The Interaction between the Antarctic Treaty System and the Other Relevant Conventions Applicable to the Antarctic Area

A Practical Approach versus Theoretical Doctrines

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I. Introduction

1.The Development of the Antarctic Treaty System

Faced with the increasing complexities of international life, states seem to be responding by entering into an ever-larger number of international negotiations and treaties. A consequence of this is the increasing possibility of overlap and conflict between the various treaty provisions potentially applicable to the same subject-matter. This is particularly so with regard to certain multilateral conventions and the Antarctic Treaty System (ATS).

This system is a complex of legal instruments that have their origin in the Antarctic Treaty.[1] Although not formally recognized as such, the ATS is referred to in two norms. The first is article 2 para. 1 of the Convention on the Regulation of Antarctic Mineral Resource Activities (CRAMRA)[2] which states that the ATS comprises "... the Antarctic Treaty, the measures in effect under that Treaty, and its associated separate legal instruments...". The second norm is article 1 lit.(e) of the Protocol on Environmental Protection to the Antarctic Treaty (Madrid Protocol)[3] which affirms that the "Antarctic Treaty (S)ystem means the Antarctic Treaty, the measures in effect under that Treaty, its associated separate international instruments in force and the measures in effect under those instruments; ...". As appears evident from the latter norm, Antarctic Treaty parties have tried to limit the extent of the ATS in the recent years by excluding, from the ATS, national legislation concerning Antarctica and international instruments which are not yet in force such as CRAMRA.[4]

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1 Washington, 1 December 1959, UNTS Vol. 402 No. 5778.

2 Wellington, 2 June 1988, *ILM* 27 (1988), 868 et seq.

3 Madrid, 4 October 1991, *ILM* 30 (1991), 1455 et seq.

4 The entry into force of CRAMRA also seems to be unlikely in the future. Nevertheless, for present purposes, CRAMRA norms will be taken into account because they contain certain fundamental principles which can be

Among the components of the ATS, primary importance must be acknowledged in favour of the Madrid Protocol. In fact, article 4 para. 1 of the Protocol affirms that this instrument supplements the Antarctic Treaty.

Moreover, there is no doubt that the expression "measures in effect under that Treaty" (see above) includes the Recommendations carried out under the procedure provided for in article IX of the Antarctic Treaty. Among such instruments, Recommendation III-VIII of 1964[5] is particularly significant. The legal nature of Antarctic Recommendations has been clarified by Decision 1 of the XIX Antarctic Treaty Consultative Meeting (ATCM)[6] in which Antarctic instruments have been classified in Measures (legal acts which are binding under article IX para. 4 of the Antarctic Treaty), Decisions (operative acts), and Resolutions (programmatic acts).

Furthermore, the expression "associated separate international instruments", included in article 1 of the Madrid Protocol, seems to recall the Convention for the Conservation of Antarctic Seals of 1972[7] since article 1 para. 1 of this Convention acknowledges the legal status of Antarctica as established by article IV of the Antarctic Treaty. A particular role is also accorded to the International Convention for the Regulation of Whaling.[8] This convention does not formally belong to the ATS, but it is, in any case, closely linked to the regime. For example, the declaration of a sanctuary area in the Antarctic seas, which is one of the most important decisions of the Whaling Commission (established by article 3 of the Whaling Convention) has acknowledged the legal and political status of the Antarctic area as it is under the Antarctic Treaty.[9]

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useful for the development of future Antarctic norms. See for further information concerning this regime, see Chapter III. For an overview of the Convention see F. Francioni, "La Convenzione di Wellington sulle risorse minerarie antartiche", *Riv. Dir. Int.* 72 (1989), 34 et seq. and E. Sciso, *Le risorse dell'Antartide e il diritto internazionale*, 1990.

5 Also known as Agreed Measures, in: U.S. Department of State (ed.), *Handbook of the Antarctic Treaty System*, 1994, 2403.

6 See the Final Report of the XIX ATCM held in Seoul from 8 to 19 May 1995.

7 London, 11 February 1972, *ILM* 11 (1972), 251 et seq.

8 Washington, 2 December 1946, UNTS Vol. 161 No. 2124.

9 In the Antarctic sanctuary area, any form of whaling, including that carried out for scientific purposes, is prohibited. See the Whaling Commission Meeting held in Puerto Vallarta in 1994. The Whaling Commission, in par-

The intent of the Whaling Commission to recognize the authority of the ATS and to act in accordance with it is, therefore, apparent.

Another important question concerning the definition of the components of the ATS is whether or not the Convention on the Conservation of Antarctic Marine Living Resources (CCAMLR)[10] should be included in the ATS. Such question has received a variety of answers. On the one hand, great significance has been accorded to the fact that ATS and CCAMLR norms protect the environment and the resources appertaining almost to the same geographic area and acknowledge their reciprocal competencies.[11] On the other hand, one author has inferred that the CCAMLR aims to establish a distinct legal regime from the fact that the Convention has created autonomous governmental organs.[12] Regardless of the relative strength of these conflicting arguments, CCAMLR cannot be ignored by the present article because of its considerable importance to the protection of living resources.

After having identified the actual components of the ATS, it is important to describe the fundamental principles on which this system is based and which make the system "unique" among other international regimes. The ATS infers its fundamental rules from the Antarctic Treaty.

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ticular, affirmed that the declaration of an Antarctic Sanctuary "is (not) intended to prejudice the special legal and political status of Antarctica". For an overview of this declaration see M.C. Maffei, "The protection of whales in Antarctica", in: F. Francioni/T. Scovazzi (eds), *International Law for Antarctica*, 2nd edition, 1996, 171 et seq., (182).

10 Done in Canberra on 20 May 1980, *ILM* 19 (1980), 837 et seq. For an overview see R. Frank, "The Convention on the Conservation of Antarctic Marine Living Resources", *ODILA* 13 (1983), 291 et seq. and R. Lagoni, "Convention on the Conservation of Marine Living Resources: A Model for the Use of a Common Good?", in: R.Wolfrum (ed.), *Antarctic Challenge*, 1984, 101 et seq.

11 See arts 3 and 4 para. 1 of CCAMLR which affirm that States parties must respect arts I and V and arts IV and VI of the Antarctic Treaty, respectively. Similarly, Antarctic Treaty parties have acknowledged the exclusive competence of CCAMLR with respect to the regulation of fishing in the Antarctic seas as it has been stated when the Madrid Protocol was made. In favour of the inclusion of CCAMLR in the ATS see, D. Rothwell, "A Maritime Analysis of Conflicting International Law Regimes in Antarctica and the Southern Ocean", *Austr. Yb. Int'l L.* 16 (1995), 155 et seq., (168). This author highlights the common interests protected both by the ATS and CCAMLR.

12 In this sense see A. Watts, *International Law and the Antarctic Treaty System*, 1992, 216.

In particular, article IV of the Treaty establishes the atypical legal status of the Antarctic area by "freezing" claims of sovereignty[13] of some contracting parties.[14] Such a solution has allowed the peaceful cooperation between the Consultative Parties since the entry into force of the Antarctic Treaty and has favoured the development of the so-called "bifocal approach". "Bifocal approach" means that Antarctic parties must create norms which, although establishing the same duties and rights for all States parties, can be differently construed by Claimant and non-Claimant States on the basis of their acknowledgement or denial of sovereign rights in Antarctica. For example, one can mention the comprehensive approach adopted by article 2 of the Madrid Protocol which is aimed at preserving "... Antarctica as a natural reserve ...". So far, the evolution of the ATS has lead to an increasing internationalization of the system as the large number of states which are parties to the Treaty demonstrates.[15] Recently, the system has also moved toward a most significant institutionalization by creating permanent organs such as the Committee for Environmental Protection (established by article

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13 Article IV of the Antarctic Treaty states: "(n)othing contained in the present Treaty shall be interpreted as: a) a renunciation ... of previously asserted rights of or claims to territorial sovereignty ... c) prejudicing the position of any Contracting Party as regards its recognition or non-recognition of any other State's right of or claim or basis of claim to territorial sovereignty...".

14 States parties to the Antarctic Treaty are divided into consultative and non-Consultative Parties. The status of a Consultative Party (ATCP) is determined by the fact that a contracting state has carried out "substantial scientific activity" in Antarctica as article IX para. 2 of the Antarctic Treaty affirms. The Consultative Parties participate in the Antarctic Treaty consultative meetings and have decision-making power. Among the Consultative Parties there are seven Claimant States. They are Argentina, Australia, Chile, France, New Zealand, Norway and the United Kingdom. These states have claimed sovereign rights over certain Antarctic areas for many years on the basis of different reasons: discovery, geographic proximity, and the theory of "sectors". For an overview see G. Battaglini, *La condizione dell'Antartide nel diritto internazionale*, 1971 and J. Jessup, "Sovereignty in Antarctica", *AJIL* 41 (1947), 117 et seq.

15 At the present, there are 42 contracting parties to the Antarctic Treaty. Among them, there are 27 Consultative Parties. Although the number of States parties seems exiguous, nevertheless, such states represent over 70 per cent of the world population and the most powerful countries with respect to their economic and political importance.

11 of the Madrid Protocol). Such institutionalization will become still more evident if an Antarctic Secretariat is created.

Thus, although the ATS cannot be considered as a completely institutionalized regime, it shows some characteristics which make it different from an ordinary international treaty.[16] For this reason, it is important to analyze the interaction between the ATS and other international instruments regulating similar subjects. The areas in which such interaction is most frequently found are the law of the sea, the conservation of resources and the protection of the environment. Moreover, the existence of several international legal instruments can also cause some procedural overlap and conflicts of competence between the organs and institutions established by such instruments. This is particularly notable with regard to the questions of liability and dispute settlement.

2. Legal Theories on the Solution of Treaty Conflicts

Thus far, the problem of the application of successive international conventions relating to the same subject-matter has been resolved by reference to legal theories aimed at establishing, *a priori*, whether and how certain treaties can prevail over others.

Firstly, the relationship between international conventions has been guided principally by reference to compatibility clauses included in the conventions themselves. These clauses are particularly relevant in order to ascertain the intent of States parties to a treaty. Indeed, under article 31 para. 4 of the Vienna Convention on the Law of Treaties, subjective interpretation (which considers the intent of States parties to a treaty the best means to determine the extent of a treaty norm) is merely an

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[16] In this sense see F. Francioni, "A Decade of Development, in Antarctic International Law", in: Francioni/Scovazzi, see note 9, 1 et seq., (10–12). For an overview see D. Vidas/W. Ostreng, "The Legitimacy of the ATS regimes: introduction", in: O. Stokke/D. Vidas (eds), *Governing the Antarctic*, 1996, 227 et seq., R. Wolfrum, "Possible Challenges And The Future Development of The Antarctic Treaty System", in: A. Jackson (ed.), *Proceedings of an International Symposium on the Future of the Antarctic Treaty System*, 1995, 85 et seq., and N. Ronzitti, *La normativa internazionale sull'Antartide e i suoi futuri sviluppi*, 1991. See also G. Guillaume, "Le Statut de l'Antarctique. Réflexions sur quelques problèmes récents", in: *Mélanges offert à René-Jean Dupuy*, 1991, 171 et seq.

exception to the general rule of objective interpretation.[17] By contrast, this article's aim is to stress the importance of subjective interpretation for the resolution of conflicts between treaty norms.

The effectiveness of compatibility clauses is not beyond dispute. The content of compatibility clauses is usually general. This makes it necessary to interpret the scope of such clauses in order to determine the actual intent of States parties to a treaty.[18] Apart from that, compatibility clauses usually do not establish a clear hierarchy between international rules but, rather, simply recall international instruments other than those to which such clauses belong.[19] Thus, attempts to resolve conflicts

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17 Article 31 para. 4 of the Vienna Convention tempers the purpose of article 31 para. 1 which seems to disregard the importance of States parties' intent for the interpretation of a treaty. Paragraph 1 of this norm, in fact, affirms that "(a) treaty shall be interpreted ... in accordance with the ordinary meaning to be given to the terms of the treaty ...".

18 In this regard, one may mention article 311 of the 1982 UN Convention on the Law of the Sea (UNCLOS). Paras 2 and 3 of this article affirm that other international agreements can be applied instead of UNCLOS only when such agreements are "compatible with the Convention" and do "not affect the application of the basic principles embodied herein". Such expressions clearly need to be interpreted in order to establish the extent of their content. Similarly, the scope of article VI of the Antarctic Treaty does not seem to be self-evident when it states that it will not "prejudice ... the rights ..., of any State under international law with regard to the high seas ...".

19 For example, article 5 para. 3 of CRAMRA recalls the concept of the continental shelf as intended by the international law of the sea. However, CRAMRA does not provide a similar regime to that established by UNCLOS for such an area. As far as the priority between treaty systems is concerned, another example of the insufficient clarity of compatibility clauses is provided by article 14 para. 4 of the Convention on International Trade in Endangered Species (CITES) (Washington, 3 March 1973, *ILM* 12 (1973), 1085 et seq.). On the one hand, this article establishes that if signatory states are already parties to another treaty providing for the regulation of species protection, the latter treaty prevails. On the other hand, article 14 para. 4 limits such priority to those species which do not require special protection. By contrast, as far as endangered species are concerned, CITES asserts its superiority over any other international agreement. For a general comment on CITES see M. Peters, "The Convention on International Trade in Endangered Species: An Answer to the Call of the Wild?", *Conn. J. Int'l L.* 10 (1994), 169 et seq.

ate for the resolution of serious conflicts where the complexity of the relationship between treaties requires a deeper and more precise analysis than one based merely upon the application of a temporal criterion.[24]

Thirdly, in order to establish the relevance of certain international conventions, various theoretical approaches have attempted to verify the opposability of such conventions to third states. (For present purposes, third states *vis à vis* a treaty means not only states that are not parties to any international convention, but, obviously, also those states which although they are not parties to the treaty concerned, are parties to some other conventions which may deal with a similar subject-matter). Indeed, it could be argued that if a convention is applicable even to states which are not parties to it (for reasons that may be related to the customary character of the norms, to the existence of an objective regime or some other reason), such a convention should be considered as an instrument of particular relevance and, thus, should prevail over other international treaties. Views differ on this point. On the one hand, most writers deny the effectiveness of international agreements *vis à vis* third states on the basis of the general principle of *pacta tertiis nec nocent nec prosunt.*[25] However, the automatic application of the *pacta ter-*

Law of Treaties. As a limitation upon the general rule established by article 30, article 60 para. 2 lit.(c) provides the possibility for States parties to a multilateral convention to suspend compliance with the convention against those States parties which have consecutively concluded a bilateral treaty breaching the provisions of the convention. For an thorough analysis of article 30 see E. Vierdag, "The Time of the "Conclusion" of a Multilateral Treaty: Art. 30 of the Vienna Convention on the Law of Treaties and related provisions", *BYIL* 65 (1988), 110 et seq.

24 For the view that the *lex prior* and the *lex posterior* principles offer a too simplistic solution to the problem of treaty conflicts see C. Jenks, "The conflict of the law-making treaties", *BYIL* 30 (1953), 401 et seq., (446).

25 The *pacta tertiis* principle has been also incorporated in the Vienna Convention on the Law of Treaties at arts 34–38. It is the expression of the doctrine of consent which affirms that since all states are equal before international law, they can be bound only by norms which they have manifestly accepted. Such a principle has also been endorsed by the PCIJ decisions in the Chorzow Factory and Free zones Cases, PCIJ Series A, No. 8, 1 et seq., and No. 22, 5 et seq., respectively. Among the numerous authors who recognize the legitimacy of the *pacta tertiis* principle see G. Schwarzenberger, *The Frontiers of International Law*, 1962, 21 et seq. and Ch. Rozakis, "Treaties and Third States: a Study in the Reinforcement of the Consensual Standards in International Law", *ZaöRV* 35 (1975), 1 et seq., (3). For an overview see C. Chinkin, *Third Parties in International Law*, 1993,

tiis principle runs the risk of allowing third states to act in an unrestrained manner at least where there are no other international norms which constrain them.[26] On the other hand, other writers contend that some treaties, by reason of the importance of their content[27] and the

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Ph. Cahier, "Le problème des effets des traités à l'égard des Etats tiers", *RDC* 143 (1974), 589 et seq.

[26] The *pacta tertiis* principle seems to have been assumed by the Antarctic Treaty Consultative Parties (ATCPs) in the Final Report of the VII Antarctic Treaty Consultative Meeting (ATCM) which reads: "... it would be advisable ... to ... invite as appropriate ... States concerned to accede to the Treaty ...". Nevertheless, article X of the Antarctic Treaty seems to require the imposition of obligations on non-parties, somehow, and, in the XII ATCM Final Report, the ATCPs expressed "their concern that any attempts to modify or replace the Treaty would be likely to introduce contention and instability into a region of ... unparalleled peace and international cooperation".

[27] Among the writers that support the superiority of some treaties in relation to their subject-matter see T. Meron, "On a hierarchy of international human rights", *AJIL* 80 (1986), 1 et seq., (22). Constitutive and dispositive treaties provide further examples of agreements considered to prevail over others. These categories of treaties are particularly relevant with regard to the subject-matter of this article since the Antarctic Treaty has on occasion been considered a constitutive treaty. Constitutive treaties are those conventions which establish a specific regime for a specific geographic area or which create a new entity such as a state or an international organization. In this sense, see P. Reuter, *Introduction au droit des traités*, 1995, 101. Dispositive treaties are those international agreements which deal with the management of a territory or the inherent rights within a territory. One example of a dispositive act is the mandate which conferred upon South Africa the power to govern the territory of Namibia. See Reuter, above, 111. For the view in favour of the superiority of constitutive and dispositive treaties over other international conventions see A. Mc Nair, *Law of Treaties*, 1961, 224 who affirms that dispositive treaties limit other conventions derogating from their norms, and I. Brownlie, *Principles of Public International Law*, 1990, 12. As far as the particular importance of constitutive treaties is concerned, see the Wimbledon Case, PCIJ Series A, No. 1, 1 et seq., (30) and the ICJ Advisory Opinion on South-West Africa, ICJ Reports, 1950, 128 et seq., (134). For an overview see R. Jennings, "Treaties as "Legislation"", in: *Jus et Societas. Essays in Tribute to Wolfgang Friedmann*, 1979, 159 et seq.

extent of their applicability,[28] establish rules that are enforceable upon all states, including third states.

Special attention must be given to the doctrine that supports the theory of objective regimes.[29] Such a theory has also been applied to the ATS[30] but it has fallen short of achieving general consensus in literature and in practice.[31]

All these approaches have in common the use of a formal criterion. However none of them appear to be entirely satisfactory in resolving

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28 See the Waldock Report to the ILC, in: Doc. A/CN.4/144, 13. The Special Rapporteur seemed to affirm the superiority of multilateral treaties over other international conventions. Nevertheless, Waldock specified that he intended to consider as multilateral treaties only those conventions which "either purport to lay down general norms ... or deal with ... matters of general concern ...". In fact, as Waldock affirmed, "a purely numerical test would scarcely be feasible ...", in: Doc. A/CN.4/144, 24. For the contrasting view that all treaties must be respected by third states because they create legal situations whose functioning cannot be hindered by any state, see the Fitzmaurice Report to the ILC, in: *ILCYB* 1960, Vol. II, 75.

29 An attempt to introduce the objective regime concept in the Vienna Convention on the Law of Treaties was made by Waldock, in: *ILCYB* 1964, Vol. II, 5 and 26. However, he encountered the resistance of those writers who supported the doctrine of consent such as Tunkin, ibid., Session 740, para. 15.

30 One author has suggested that article X of the Antarctic Treaty which stipulates that "... no one engages in any activity in Antarctica contrary to the principles ... of the ... Treaty" is intended to bind also third states. Moreover, this author has stated that "... a group of States that have acted over various decades in a totally inhospitable region ... have the right to see the situation is maintained", R. Guyer, "The Antarctic Regime", *RDC* 139 (1973), 148 et seq., (224–225). Against this affirmation, another author has highlighted that the mere silence of third states is not sufficient to establish the acquiescence of such states to the ATS. In this sense see B. Simma, "Le Traité Antarctique: crée-t-il un régime objectif ou non", in: F. Francioni/T. Scovazzi (eds), *International Law for Antarctica*, 1987, 137 et seq., (146).

31 Some authors have proposed the application of a new concept of objective regime to the ATS rather than that formulated by the traditional theory. Such a concept should be based on the actual effectiveness and opposability of the Antarctic Treaty System. In this sense, see A. Wyrozumska, "*Erga tertios* effect of the Antarctic Treaty", in: *Antarctic and Southern Ocean Law and Policy*, Occasional Papers, No. 6, 1993, 28. The author builds upon the objective regime doctrine proposed by E. Klein, *Statusverträge im Völkerrecht*, 1980.

the question of the interaction between international conventions. This is due, first of all, to the fact that it is not feasible to resolve all treaty conflicts with reference to a single criterion. Moreover, some conflicts between international agreements cannot be foreseen *a priori* but are visible only once they actually occur. For these reasons, it is the view of the present writer that a policy-oriented approach, based on the actual object and purpose of the relevant international instruments and aimed at evaluating the concrete effects of their application, would be preferable to the use of abstract principles which attempt to resolve *a priori* all kinds of conflicts between treaty norms.

II. The ATS and the Law of the Sea

1. Preliminary Remarks

Among the numerous international legal regimes that could interact with the ATS, the law of the sea is particularly important. In this field there are many international conventions aimed at creating an independent legal system. For this reason, article VI of the Antarctic Treaty establishes that the Treaty shall not "prejudice or in (any) way affect the rights ... of any State under international law with regard to the high seas within (the) area ...". In order to evaluate the scope of this norm, one must ascertain, first of all, whether or not the expression "international law" includes both customary and conventional law of the sea. The affirmative response seems to be the most appropriate given that the current law of the sea includes all the rules which can be applied to the maritime area irrespective of their origin. In this regard, the overlap between the ATS and the UN Convention on the Law of the Sea (UNCLOS)[32] appears to be unavoidable.

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[32] Montego Bay, 10 December 1982, *ILM* 21 (1982), 1261 et seq. For an overview see E. Brown, *The International Law of the Sea*, 1994 and T. Treves, *La Convenzione delle Nazioni Unite sul diritto del mare del 10 dicembre 1982*, 1983. For a comparative analysis of the ATS and UNCLOS see A. van der Essen, "The Application of the law of the sea to the Antarctic continent", in: F. Orrego Vicuña (ed.), *Antarctic Resources Policy. Scientific, Legal and Political Issues*, 1983, 231 et seq. and S. Müller, "The Impact of UNCLOS III on the Antarctic Regime", in: Wolfrum, see note 10, 169 et seq.

Secondly, it is by no means clear whether article VI can be interpreted as implying that the Antarctic Treaty acknowledges the priority of the law of the sea over its norms concerning the management of marine areas and resources.[33] Indeed, as will be observed below, the existence of numerous Antarctic rules concerning the management of marine areas demonstrates the intention of the Consultative Parties to create a separate legal regime with respect to the law of the sea. Thus, article VI does not seem to resolve, *a priori*, the issue of the compatibility between the ATS and treaties concerning the law of the sea. This becomes most apparent when one considers certain major issues whose regulation can be influenced by the relationship between the ATS and other legal instruments. Such issues include the applicability to Antarctica of some concepts found within the law of the sea, such as the common heritage of mankind, and the protection of living resources and the marine environment.

2. The Legal Regimes for Antarctic Seas

a. Antarctic Seas and the Delimitation of Maritime Zones

One of the crucial problems concerning the applicability of the law of the sea to the Antarctic marine area involves the compatibility between such law and the peculiar legal status of Antarctic waters. This is particularly so with regard to the issue of the delimitation of maritime zones. Indeed, the definition of maritime zones implies the presence of Coastal States whose very existence in Antarctica is controversial.[34]

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33 It is indisputable that the main interest of legal regimes in regulating activities in the Antarctic sea can be inferred from the fact that natural resources, especially living resources, are more numerous in the marine area than on the continent. In this sense see J. Parker/R. Angino, "Environmental Impacts of Exploiting Mineral Resources and Effects of Tourism in Antarctica", *Mineral Resources Potential of the Antarctica. Antarctic Research Series*, Vol. 52, 1990, 237 et seq., (242–243).

34 Under the ATS, the legal status of the area is determined by article IV para. 2 of the Antarctic Treaty under which existing state claims are frozen and "... No new claim, or enlargement of an existing claim, to territorial sovereignty in Antarctica shall be asserted ...". In order to avoid the delimitation of maritime zones in Antarctica some authors affirm that all Antarctic waters must be considered as high seas. In this sense see P. Birnie, "Effect of Art. VI of the Antarctic Treaty on Scientific Research", in: R. Wolfrum

The problem of the delimitation of maritime zones requires, firstly, a determination as to whether the expression "law of the sea", as implied by article VI of the Antarctic Treaty, includes the complex of rules in force at the time of the conclusion of the Treaty or, instead, the current law of the sea. Such a problem is particularly pressing as far as the declaration of the exclusive economic zone (EEZ) is concerned. Unlike the territorial sea and the continental shelf (regarding which sovereign rights of Coastal States were recognized before the entry into force of the Antarctic Treaty),[35] the right to claim an EEZ has only recently been considered as a part of customary law.[36] But, the expression "law of the sea" implied by article VI of the Antarctic Treaty cannot be interpreted as including only those norms applicable at the time of the entry into force of the Treaty itself.[37] Such a construction would render the ATS an outdated regime which could not be easily coordinated with current international law. An additional problem to the applicability in the Antarctic waters of all norms concerning the delimitation of maritime areas is the fact that article IV para. 2 of the Antarctic Treaty prohibits any new claim of sovereignty in Antarctica. Thus, the requirement set forth

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(ed.), *Antarctic Challenge*, Vol. III, 1988, 105 et seq., (112) and L. Caflish, "L'Antarctique: nouvelle frontière sans frontières?", in: *Le droit international au service de la paix, de la justice et du développement: mélanges à Michel Virally*, 1990, 157 et seq., (169). Such an opinion is not, however, unequivocally expressed in the legal literature, particularly with respect to Claimant States which attribute to themselves not only sovereign rights within some parts of the Antarctic continent, but also within maritime areas corresponding to these territories. For the view that if a claim of sovereignty was limited to territory, such claim would be "a paper one only", see D. Rothwell/S. Kaye, "Law of the Sea and Polar Regions. Reconsidering traditional norms", *Marine Policy* 18 (1994), 41 et seq., (46-47).

35 The rights which coastal states have regarding the territorial sea and the continental shelf resources are sovereign rights, as article 2 and article 76 of UNCLOS affirm. This means that states have a "*ipso iure*" title in respect of such areas. In this sense, see the North Sea Continental Shelf Case, ICJ Reports 1969, 3 et seq., (23). For a similar view see also Rothwell, see note 11, 158.

36 For a thorough analysis of this problem see Ch. Joyner, "The exclusive economic zone and Antarctica. The dilemmas of non-sovereign jurisdiction", *ODILA* 19 (1988), 469 et seq., F. Orrego Vicuña, "The application of the law of the sea and the exclusive economic zone to the Antarctic continent", in: Orrego Vicuña, see note 32, 243 et seq.

37 For a view in favour of this interpretation of article VI of the Treaty see Rothwell/Kaye, see note 34, 49.

in UNCLOS that an express declaration must be made by the Coastal State in order to create an EEZ could be considered as a new claim under article IV of the Antarctic Treaty.[38] Similarly, the evolution of the issue concerning the delimitation of maritime areas in the Antarctic seas could also involve new forms of state claims over international waters which are closest to coasts. Such problems have been recently raised by some national legislation. It could become relevant, at international level, if the legitimacy of such claims was recognized by some international conventions. An example of these new forms of claims is provided by the Chilean declaration of the so-called "presential sea".[39]

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[38] The requirement of an express declaration of an EEZ can be inferred from article 75 para. 2 of UNCLOS which imposes to Coastal States the duty to "give due publicity to ... geographical co-ordinates ..." of their EEZ. In this sense, see R. Churchill and V. Lowe, *The Law of the Sea*, 1988, 144–145. In order to support the legitimacy of the delimitation of an EEZ in Antarctica, some authors have emphasized that states do not have sovereign rights within the EEZ, but only an exclusive right to exploit resources. In this sense, see G. Triggs, "The Antarctic Treaty System: some jurisdictional problems", in: G. Triggs (ed.), *The Antarctic Treaty Regime. Law, Environment and Resources*, 1987, 88 et seq., (91). Indeed, the problem of declaring an EEZ in Antarctica does not depend on the nature of rights enjoyed by states over the EEZ, but refers instead to the fact that such a zone can exist only if there is a corresponding coastal state which may claim exclusive rights over this area. As has been affirmed above with regard to the territorial sea and continental shelf, the presence of such states on the Antarctic continent is not generally recognized. In addition, under Antarctic norms, there are no exclusive rights in favour of the Consultative Parties, but rather, all states enjoy the same rights and are subject to the same duties.

[39] Decree No. 430 of 28 September 1991, in *Diario Oficial*, 21 January 1992. Under the "presential sea" doctrine, Chile claims the right to control and participate in any activity carried out by other states in the area of the high sea that is closest to the Chilean coast. The existence of such a right is justified in terms of the Chilean interest in protecting the marine environment and resources which are closest to its coast. For an overview see F. Orrego Vicuña, "The "Presential sea": defining coastal states' special interests in high seas fisheries and other activities", *GYIL* 35 (1992), 264 et seq. The existence of such maritime area could, first of all, provoke conflicts between contiguous states whose exercise of power over their "presential seas" could overlap. Secondly, it can be observed that the declaration of a similar area is patently in contrast with certain rules of international law. This is particularly so with regard to the norms establishing freedom of fishing in the high sea with respect to all states. In this sense see C. Joy-

Secondly, the delimitation of maritime zones requires the presence of particular geological and geographical characteristics which do not always exist in Antarctica. In the first instance, there exist certain problems in determining the internal limit of such zones. Under article 5 of UNCLOS, this limit corresponds to the baseline of the coast. In those exceptional cases where the coast is particularly irregular, article 7 of the Convention applies the rule of straight baselines. Both articles, nevertheless, appear to be ineffective with regard to the delimitation of the Antarctic coastline due to the fact that such a line is not stable, but instead, changes with the different seasons.[40] Some authors have proposed

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ner/P. De Cola, "Chile's Presential sea Proposal: Implication for Straddling Fish Stocks and International Law Fisheries", *ODILA* 24 (1993), 99 et seq., (113) and R. Stevenson/B.Oxman, "The Future of the UN Convention on the Law of the Sea", *AJIL* 88 (1994), 488 et seq., (498). See also F. Francioni, "La conservation et la gestion des ressources de l'Antarctique", *RDC* 260 (1996), 249 et seq., (313) and T. Clingan, "*Mar presencial* (The presential sea): *Déjà vu* All over Again? – A Response to Francisco Orrego Vicuña", in: *ODILA* 24 (1993), 94 et seq. Thirdly, the possibility of declaring a "presential sea" in Antarctic waters does not seem to be tenable under current law of the sea. In fact, in Antarctica, there are no states whose claims to sovereignty are not contested and, thus, which can declare a "presential sea". In this sense see Joyner/De Cola, above, 113.
Finally, the very purpose of the declaration of a "presential sea" does not appear to be compatible with the ATS's fundamental principles. Whereas the main purpose of the Antarctic system is to preserve Antarctica as a reserve devoted to research, the intent of Coastal States which declare a "presential sea" is instead to pursue their private interests in controlling marine areas closest to its coast and to restrict other states' freedom of action in such areas. As an example, living resources cannot be exploited except by reason of a rational use as article 2 para. 2 of the Convention on the Conservation of Antarctic Marine Living Resources states. In addition, mineral resource exploitation is absolutely prohibited by article 7 of the Madrid Protocol.
Therefore, the declaration of a "presential sea" in the Antarctic waters appears to be far more inappropriate than the delimitation of the other maritime areas already recognized by international law.

40 During summer water volumes increase due to the melting of ice. This instability can be resolved in two different ways. The first solution requires a choice of coastline as between the winter line and the summer line in order to ensure legal certainty. However, one must take into account that, under article 7 para. 3 of UNCLOS, the excessive modification of the geographical configuration of a coast by the drawing of straight baselines is not permitted. This norm affirms, in fact, that "The drawing of straight baselines

a compromise solution in order to reconcile international rules with the special circumstances created by peculiar geological characteristics.[41] However, the harmonization of current rules of international law with Antarctic geographical features does not appear to be straightforward.[42]

It appears evident from the above that it is not easy to apply the UNCLOS norms concerning the delimitation of maritime zones in Antarctica particularly because of the special legal status of this area, but also because of its peculiar geographical characteristics. Faced with this, one must ask whether it is useful to delimit maritime zones in Antarctica at all. Indeed, such delimitation serves no purpose. Firstly, the controversial issue of the presence of Coastal States in Antarctica ap-

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must not depart to any appreciable extent from the general direction of the coast, and the sea areas ... must be sufficiently closely linked to the land ...". The same reasoning was followed by the ICJ in the Anglo-Norwegian Fisheries Case, ICJ Reports 1951, 116 et seq., (133). Against the application of the traditional theory of coastal baselines to Antarctica see Rothwell/Kaye, see note 34, 41–42. The second solution which is aimed at respecting the actual configuration of the Antarctic coastline, implies a situation in which there are different baselines for every season. Such a solution does not seem to offer a level of stability sufficient to enable this to be recognized as an international norm. For the view that special circumstances should be taken into account only as supplementary means for determining the continental shelf, see the decision in the Jan Mayen Case, ICJ Reports 1993, 38 et seq., (58–60).

41 In this sense see J. Charney, "Progress in International Maritime Boundary Delimitation Law", *AJIL* 88 (1994), 227 et seq., (234). The author highlights the necessity "to find the optimal balance between the inherent individuality of every case and the consistent application of generally relevant procedural and substantive law".

42 Certain problems can be found when determining the outer limit of maritime zones in Antarctica. For instance, with regard to the territorial sea, the area of 12 miles starting from the coast of the continent is made up of ice rather than water. One author has affirmed that, in these circumstances, ice cannot be considered as a continuation of the continent. In this sense see J. Machowski, *The Status of Antarctica in the light of International Law*, 1977, 97. Moreover, criteria established by article 76 of UNCLOS to determine the outer limit of the continental shelf do not fit with the geophysical characteristics of the Antarctic sea-bed, such as the extreme depth and the presence of ice. See C. Joyner, *Antarctica and the Law of the Sea*, 1992, 109. Finally, in front of the Antarctic coastline there are icebergs and pack-ice which cannot be easily assimilated to the "fringe of islands" mentioned in article 7 para. 1 of UNCLOS. In this regard see Watts, see note 12, 146.

pears to be a critical impediment to the delimitation of maritime zones. Secondly, it does not seem to be appropriate to attribute to the Consultative Parties different rights by reason of their status as Claimant States. Thirdly, it would be unreasonable and very problematic, under the Antarctic Treaty, to have different delimitation systems in the Antarctic maritime areas starting from the coast of "claimed" territories and in the sea fronting the coast of the unclaimed portion of Antarctica.[43] As the ATS has demonstrated, a legal regime that acknowledges the same rights and duties for all states seems to be the most effective one. Finally, even if in the view of some authors[44] the attribution of sovereign rights in Antarctica to some states could favour the application of international law (and consequently, the protection of Antarctica), it cannot be assured that such a solution would prevent abuse by these states. In any event, it seems to be unquestionable that sovereign rights concerning Antarctica are not generally recognized.

Therefore, UNCLOS norms on the delimitation of maritime areas appear to be not only incapable of defining correctly the legal status of Antarctic seas but also are not the most appropriate means of protecting the area. In the light of this, the incompatibility between these provisions and the Antarctic norms relative to the status and delimitation of Antarctic seas must lead to the conclusion that the latter ought to prevail over the former.

b. Antarctica and the Common Heritage of Mankind

The problem of the legal status of Antarctic seas becomes most apparent with respect to recent developments of the law of the sea regarding the regime of the high seas and the corresponding sea-bed.

UNCLOS has definitively declared the deep sea-bed to be a part of the common heritage of mankind.[45] In consideration of the fact that the

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[43] Unclaimed Antarctic territories go from 90° West Meridian to 150° West Meridian. Although sovereign rights on such territories are not claimed by any state, the unclaimed area is not considered as *res nullius* and, thus, cannot be subject to state occupation.

[44] See Rothwell/Kaye, see note 34, 55.

[45] See article 136 of UNCLOS and para. 2 of the Preamble to the Agreement relating to the implementation of Part XI of UNCLOS, A/RES/48/263 of 28 July 1994, *ILM* 23 (1994), 1311 et seq. For an overview see R. Wolfrum, "The Principle of the Common Heritage of Mankind", *ZaöRV* 43 (1983), 313 et seq.

common heritage principle is usually aimed at protecting areas of common interest and at the equitable sharing of resources, some authors have advanced the idea of extending the application of this principle to Antarctica.[46] This view is also supported by some states which are not parties to the Antarctic Treaty and which consider the ATS to be an inappropriate regime for the management of Antarctica and, in particular, of its resources.[47] This article intends to demonstrate that there are certain fundamental elements of the common heritage concept which cannot mesh with the legal status of Antarctica. First of all, the common heritage principle excludes any possibility of sovereignty over common goods. On the contrary, under the ATS, state claims are frozen by article IV of the Antarctic Treaty.[48] Moreover, effective participation within

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46 In this sense see the Amerasinghe declaration made during the UN General Assembly Mtg. of 1984 in: Report of the Secretary-General to the 39th Sess. of the General Assembly in: Doc. A/39/583(Part.I), 17–20. For a more nuanced analysis of the possibility of applying the common heritage principle to Antarctica see F. Francioni, "Antarctica and the Common Heritage of Mankind", in: Francioni/Scovazzi, see note 30, 109–117. This author proposes a decentralized application of the principle by its introduction into and its management by the ATS. See also B. Conforti, "Territorial Claims in Antarctica: A Modern Way to Deal with an Old Problem". Symposium "The International Legal Regime for Antarctica", *Cornell Int'l L .J.* 19 (1986), 249 et seq.

47 In this sense see the declaration of Malaysia at the UN General Assembly Mtg. of 1982, in: Doc. A/37/PV.10. More recently, Malaysia, Antigua and Barbuda, and Guinea reaffirmed that Antarctica is the common heritage of mankind at the 38th Mtg. of the First Committee during the 46th Sess. of the UN General Assembly, in: Doc. A/C.1/46/PV38.

48 Although since the entry into force of the Antarctic Treaty the ATS has evolved towards a form of management of Antarctica increasingly aimed at taking into account the interests of all mankind, the Consultative Parties seem to have never accepted the idea of considering the Antarctic area as a part of the common heritage of mankind. The ATS, in fact, allows the Consultative Parties to act in Antarctica in pursuit of their own private interests, although this right is strongly limited in its scope. For example, notwithstanding the general obligation of cooperation established by the ATS, the Consultative Parties can carry out scientific research in Antarctica for their own interests and not exclusively for the interest of all mankind. In opposition to the extension of the common heritage principle to Antarctica one must consider the declaration included in the Final Report of the XII ATCM, which, with respect to the proposal of the UN General Assembly of considering Antarctica to be a part of the common heritage, stated that the application of new norms to Antarctica would cause instability in the

the Antarctic Treaty is reserved only to those states which have demonstrated their interest "... in Antarctica by conducting substantial scientific research ... such as the establishment of a scientific station ...", as article IX para. 2 of the 1959 Treaty states. The selective character of the ATS does not seem compatible with the concept of common heritage under which all states have the same rights and importance.

The other fundamental criterion of the common heritage principle (the equitable sharing of resources) is not even included in any instrument of the ATS.[49] Thus, in order to apply to Antarctica UNCLOS

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area, in: *Antarctic Handbook*, see note 5, 150. Further, some authors have highlighted that, at this stage, the application of the concept of common heritage to Antarctica is useless due to the consolidation of the ATS. See J. Crawford/D. Rothwell, "Legal Issues Confronting Australia's Antarctica", *Austr. Yb. Int'l L.* 13 (1992), 53 et seq., (86). In these authors' view, interests protected by ATS instruments correspond to the "present range of material interests in Antarctica" since States parties to the Treaty of Washington coincide with all the states actually interested in the Antarctic area. Thus, no other states should be entitled to take part in governing Antarctica. Moreover, Crawford and Rothwell affirm that the object and purpose of ATS measures express the same values as the common heritage principle does; for example, the protection of the environment. Therefore, the enforcement of ATS norms attain identical results as those achieved through the application of the concept of common heritage. For a partially different view affirming that the Madrid Protocol enhances the character of the common interest of mankind with respect to the need to preserve the Antarctic environment see Francioni, see note 16, 9.

49 In this sense see Triggs, see note 38, 99 and R. McDonald, "The Common Heritage of Mankind", in: *Recht zwischen Umbruch und Bewahrung, Völkerrecht, Europarecht, Staatsrecht: Festschrift für Rudolf Bernhardt*, 1995, 154 et seq. In particular, the latter writer points out that no Antarctic norm provides, as the principle of equitable sharing does, that states which do not have the technical and financial means to carry out the exploitation of resources, can enjoy the benefit deriving from the outcome of the exploitation of other states. For a different view see Francioni, see note 39, 331–334. This author highlights that some norms of the Convention on the Regulation of Antarctic Mineral Resource Activities seem to be more sensitive to the interests of developing states. However, Francioni acknowledges that, notwithstanding the preferential treatment reserved to developing states under article 41 para. 1 lit.(d) and article 25 para. 6 of CRAMRA- (which promote those exploitation projects comprised of a larger participation of states), such provisions do not completely embrace the principle of equitable sharing which is a fundamental element of the concept of common heritage.

norms which establish that the deep sea-bed is a part of the common heritage of mankind, this concept needs to be adapted to the peculiar legal characteristics of the area.[50] This, again, leads to the conclusion that Antarctic provisions must be construed as prevailing over those of the UN Law of the Sea Convention, at least with respect to states which are parties to both treaties.[51]

A new variant on the common heritage principle, which appears to be more suitable for the *sui generis* legal status of Antarctica, is the concept of the "common concern of humankind" which is included in some recent international agreements (such as the Convention on Biological Diversity[52]), and which is referred to in a recent resolution of the UN General Assembly.[53] Although it seems to be correct to consider the preservation of the Antarctic environment as an interest of all mankind, the "common concern" principle nevertheless avoids the attribution to Antarctica of the status of *res communis omnium*. There are two main characteristics that render this principle one of the most relevant contemporary rules of international law in relation to Antarctica. On the one hand, the "common concern" principle can be used to resolve the potentially endless conflict between the concept of "common heritage of mankind" and the content of article IV of the Antarctic Treaty which, although precluding new claims of sovereignty on Antarctic territory, does not definitively negate the legitimacy of preexisting claims.[54] In fact, the "common concern" principle is not incompatible with the concept of sovereignty.[55] This characteristic of the "common

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50 In this regard see E. Suy, "Antarctica: Common Heritage of Mankind?", in: J. Verhoeven/Ph. Sand/M. Bruce (eds), *The Antarctic Environment and International Law*, 1992, 96

51 For an analysis of the problem of mineral exploitation see under Chapter III.

52 See para. 3 of the Preamble to the Convention on Biological Diversity. Rio de Janeiro, 5 June 1992, *ILM* 31 (1992), 822 et seq.

53 A/RES/49/80 of 15 December 1994. For a more detailed analysis see J. Charney, "The Antarctic Treaty System and Customary International Law", in: Francioni/Scovazzi, see note 9, 79.

54 In particular, one writer has highlighted how new agreements on environmental protection seem to have abandoned the concept of the common heritage of mankind. In this sense, see A.Ch. Kiss, "La Conférence des Nations Unies sur l'environnement et le développement", *A.F.D.I.* 38 (1992), 823 et seq., (837et seq.).

55 The Biodiversity Convention combines both the "common concern" concept and sovereign rights on resources.

concern" principle seems to be highly significant since, nowadays, the coexistence of the need to preserve the environment and the perceived need to promote the economic growth of states is inevitable.[56]

The "common concern" rule is also important for its content. "Common concern" means the interest, at the global level, in preserving certain aspects of the environment. Such an interest requires states to behave consistently so as to preserve areas of common interest such as the ozone layer, the climate and biodiversity.[57] Thus, the "common concern" principle fits perfectly with new trends of international law with regard to the protection of the environment.

Nevertheless, the opinion has been expressed that this principle is not applicable to Antarctica due to the fact that no Antarctic legal instrument affirms it.[58] However, this skepticism seems to stem mainly from the fact that the application of the "common concern" concept to Antarctica could open such an area to the activities of third states to the Antarctic Treaty. In this case, if third states are not bound by other international treaty norms which specifically deal with the issue of the protection of the environment, they could freely operate in Antarctica in so far as their activities are not in conflict with general principles of

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56 This is why the "common concern" principle is often associated with the concepts of sustainable development and of interests of future generations. For a detailed analysis of the interaction between the protection of the environment and new trends of trade liberalization see F. Francioni, "La tutela dell'ambiente e la disciplina del commercio internazionale", in: *Diritto e organizzazione del commercio internazionale dopo la creazione dell'Organizzazione Mondiale del Commercio*, 2nd Conference of the Italian Society of International Law, 1998, 147 et seq.

57 This kind of goods are called global commons. By "global commons" all those areas are meant whose preservation can be guaranteed only by the universal compliance with fundamental obligations. Damage to these areas often cannot be rectified and, thus, there is a risk that the global commons may be irreparably injured. In this sense see T. Scovazzi, "Considerazioni sulle norme internazionali in materia di ambiente", *Riv. Dir. Int.* 75 (1992), 699 et seq., (702). See also A. Ch. Kiss, "The Protection of Environmental Interests of the World Community Through International Environmental Law", in: R. Wolfrum (ed.), *Enforcing Environmental Standards: Economic Mechanisms as Viable Means?*, 1996, 1 et seq.

58 In this sense see the paper presented by the British government to the XX ATCM held in Utrecht in 1996 entitled "The relationship between the Protocol on Environmental Protection to the Antarctic Treaty and other international agreements of a global or regional scope", XX ATCM/WP10, 4.

international law such as the "common concern" principle. Since the ATS has developed a great variety of procedural and substantial rules particularly for the protection of the environment, it, thus, seems appropriate to uphold these more specific rules on environmental protection in order to limit the otherwise larger state freedom which could, in turn, cause damage to the Antarctic area. Therefore, the application of the "common concern" principle, as well as the "common heritage" concept, needs to be adapted to the peculiar characteristics of Antarctica.

In conclusion, with regard to the issue of the legal status of Antarctic seas, the norms on the law of the sea have revealed their inappropriateness for regulating such status due to the geographic and legal peculiarity of the area. The UNCLOS regime is, in fact, based on the concept of state sovereignty that is not embraced by the ATS at all.

Moreover, as far as the applicability of the principle of the common heritage of mankind to Antarctica is concerned, this article's analysis has reached the conclusion that such a principle cannot be applied to the Antarctic area as it is established in the Law of the Sea Convention, but it needs, at least, to be adapted to the specific legal status of Antarctica.

Therefore, a construction of article VI of the Antarctic Treaty, based merely on the analysis of the text of this norm (which appears to make the law of the sea applicable to Antarctica, at least, within the high seas) does not appear to be satisfactory. A practical interpretative approach, which attempts to ascertain the object and purpose of article VI and which construes this article in accordance with other Antarctic provisions, has highlighted that specific Antarctic norms concerning maritime issues are more suitable for regulating the status of Antarctic waters than other international provisions. Thus, it can be affirmed that even if there are no norms which definitively prohibit the application of the law of the sea to Antarctica, it seems to be most appropriate to deal with the management of Antarctic seas and, in particular, of some specific zones therein, on the basis of rules which are more in keeping with the *sui generis* nature of this area.

3. The Conservation of Marine Living Resources

The analysis of the relationship between the ATS instruments and other international conventions concerning the protection of marine living resources appears to be particularly difficult for several reasons.

First of all, there are a large number of species in the Antarctic area which can fall within the scope of the protection offered by several international instruments. For example, the various species of seals and whales can be mentioned, the protection of which is provided either by specific treaties or by general conventions.

Secondly, the possibility of conflicts between international norms has arisen due to the existence of numerous international instruments concerning the same subject-matter. For instance, the conservation of marine living resources is promoted both by CCAMLR and UNCLOS.

Thirdly, although some international conventions can be considered as *leges speciales vis à vis* other conventions, it is exceedingly difficult to identify the precise element that establishes the special character of a treaty since such character can depend on different factors. For example, the Convention on International Trade in Endangered Species (CITES),[59] CCAMLR and the Whaling Convention[60] all have the character of *leges speciales* for various reasons: CITES is aimed at controlling trade in species; CCAMLR is applicable only to Antarctic resources and the Whaling Convention protects only a particular species of living resources.

Finally, the vast number of instruments relative to the protection of living resources can create conflicts not only between different regimes but also between instruments appertaining to the same legal system. For example, within the ATS instruments, there is, strangely, a lack of coordination between the Agreed Measures[61] and the Convention on Antarctic Seals with regard to the level of protection accorded to this species.[62]

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59 See note 19.

60 See note 10 and 8.

61 See note 5.

62 The Agreed Measures provide, in some respects, greater protection than the Seals Convention. In fact, article 1 para. 2 of the Seals Convention (providing only for the protection of marine seals) seems to exclude from its application seals which live on ice and the continent. In this sense see Francioni, see note 39, 279 and W. Bush, "The Antarctic Treaty System: a framework for evolution. The concept of a system", in: R. Herr/A. Hall/J. Haward (eds), *Antarctica's future: continuity or change*, 1990, 119 et seq., (131). However, the Seals Convention appears to have a larger sphere of application since it does not exclude from its jurisdiction those animals which are in the high seas. On the contrary, the extent of application of the Agreed Measures is limited to Antarctic areas other than the high seas. In

One can identify certain types of conflicts which occur most particularly between international treaties concerning the protection of living resources.

Firstly, some international conventions which allow the exploitation of marine living resources only by bodies holding special permits,[63] sometimes establish a level of protection for particular species which does not correspond to the safeguards accorded to the same species by other treaties.[64] At the same time, restrictions upon the granting of permits can be based on different objectives within different instruments.[65]

Another source of conflict between international treaties concerning the conservation of marine species are the different approaches which these treaties adopt. For example, the safeguarding of species by requiring exploitation permits contrasts with those regimes which attempt to protect living resources in a comprehensive manner. The ecosystem approach adopted by CCAMLR can be mentioned in this regard.[66] Under the ecosystem approach, species are not singularly protected, but rather the environment to which they belong is safeguarded so as to ensure that such species do not lack the natural elements necessary to survive.

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this regard see J. Heap, "Has CCAMLR worked? Management Politics and Ecological Needs", in: A. Jorgensen-Dahl/W. Ostreng, *The Antarctic Treaty System in World Politics*, 1991, 46.

63 The Agreed Measures allow the exploitation of living resources with permits only in order to secure food and for scientific purposes. Article 8 of the Whaling Convention allows the granting of permission to hunt specific species. Article 4 of the Seals Convention permits exploitation only to acquire food and scientific information.

64 The Seals Convention only protects particular species of seals. It seems to imply that for other species even commercial exploitation is allowed. In this sense, see Bush, see note 62, 132.

65 Under article 3 of Annex II to the Madrid Protocol, permits must be granted only for scientific purposes. In the end, Antarctic parties agreed to abolish exploitation for securing food which had allowed many abuses in the past. See G. Cook, *The Future of Antarctica. Exploitation versus Preservation*, 1990 and P. Beck, "The Resource Conventions Implemented: Consequences for the Sovereignty Issue", in: *International Challenge* (1990), 56 et seq.

66 In this sense see Watts, see note 12, 217.

Moreover, the creation of protected areas can cause conflicts between different conventions.[67] This type of conservation appears to be particularly effective since it allows the protection of species *in situ* by applying the ecosystem approach. Nevertheless, treaties establishing protected areas can be difficult to coordinate with international conventions concerning the protection of migratory species which, by their very nature, do not live in a fixed area. For example, one can mention the New York Agreement of 1995 for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea relating to the conservation and management of straddling fish stocks and highly migratory fish stocks.[68] This Agreement establishes the competence of Flag, Port and Coastal States in protecting migratory species which are in the EEZ and in the high seas. This role of Coastal States cannot be easily identified in Antarctica where the sovereignty criterion does not accord with the legal characteristics of the area. Moreover, on the basis of the preferential rights recognized for Coastal States regarding living resources in their EEZ, some countries have also claimed broader powers within those areas of the high seas which are closest to their coasts.[69] Although these powers have not yet been recognized by

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67 Article 9 of CCAMLR provides an example of this approach. In the ATS, Annex V to the Madrid Protocol regulates the question of protected areas. The possibility of creating such zones is also foreseen in article 8 of the Biodiversity Convention. Finally, with regard to the declaration of a sanctuary area in Antarctica made by the Whaling Commission see note 9 above.

68 *ILM* 34 (1995), 1547 et seq. For a general comment see D. Balton, "Strengthening the Law of the Sea: The New Agreement on Straddling Fish Stocks and Highly Migratory Fish Stocks", *ODILA* 27 (1996), 125 et seq.

69 In this regard, one can mention the case of Chile which has invoked broader powers in the "presential sea" on the basis of article 116 of UNCLOS which affirms that fishing in the high seas must be carried out in accordance with rights recognized for Coastal States in their EEZ. See Orrego Vicuña, see note 39, 283. Similarly, other Claimant States have declared broader maritime areas where they enjoy exclusive rights. In this sense see the British declaration of an EEZ around South Georgia and South Sandwich Islands which fall under the area of application of CCAMLR and the Argentine specification of an EEZ in the 200 miles maritime area where Argentina already claimed preferential rights (UN Law of the Sea Bulletin, No. 24, 1993, 47 and 20, 1992, 20 respectively). For an analysis of the Australian Maritime Legislation Amendment Act of 1994 in which Australia proclaimed its EEZ with respect to External Territories, see T. Scovazzi, "The Antarctic Treaty System and the New Law of the Sea: selected ques-

any international instrument or body, it is feasible that states which claim such powers will seek to uphold them against international obligations. Therefore, the creation of protected areas may be considered by some states to be an impediment to exercising powers either granted to them by other conventions or claimed by them on the basis of new legal doctrines.

Further, some obstacles to the application of international treaties concerning the protection of marine living resources in the Antarctic area are due to the incompatibility between certain definitions contained in these treaties and the legal status of Antarctica. For example, arts 3, 4 and 5 of CITES recall certain criteria which inadequately fit the characteristics of the Antarctic area.[70] For instance, these norms define trade as "export" and "introduction from the sea".[71] Since there is no generally recognized sovereign state in Antarctica, however, it seems improbable to define the transfer of species from Antarctica, to any state as "export".[72] Additionally, in accordance with article IV of the Antarctic Treaty, Claimant States can affirm that transfers of species which take place from claimed Antarctic territories to the territories over which such states have indisputable sovereignty shall not be considered as a form of "introduction from the sea".

Finally, a possible source of conflict between treaties concerning the protection of living resources derives from the presence, within such legal regimes, of governing organs. CCAMLR and the Biodiversity Convention provide examples of these kinds of treaties.[73] Moreover, several

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tions", in: Francioni/Scovazzi, see note 9, 381; Rothwell, see note 11, 164 and F. Orrego Vicuña, "The Law of the Sea and the Antarctic Treaty System: New Approaches to Offshore Jurisdiction", in: Ch. Joyner/S.Chopra, *The Antarctic Legal Regime*, 1988, 97 et seq.

70 Indeed, since article 7 of CITES establishes that this regime is not applicable to non-commercial exchanges such as those which take place between scientists, CITES seems incompatible with some ATS norms such as article 3 of Annex II of the Madrid Protocol which does not allow exploitation but for scientific purposes.

71 "Introduction from the sea" means the seizure of species within an area which is not under the jurisdiction of any state.

72 With regard to the inapplicability of CITES to Antarctica for this reason see S. Hajost, "International Agreements applicable to Antarctica: a survey", in: Wolfrum, see note 34, 85–86.

73 The Commission of CCAMLR is probably the most important organ empowered to deal with the problem of the protection of marine living resources. Nevertheless, one cannot ignore the existence of organs belonging

conventions, such as UNCLOS and CITES, attribute specific competencies to States parties. A conflict of competence between states and international organs is, thus, always possible. For this reason, some conventions have established certain forms of coordination between such organs. For example, article 23 of CCAMLR obliges the Commission and the Scientific Committee to cooperate with the International Whaling Commission. Moreover, both the Conference of CITES and the Whaling Commission have made reciprocal declarations acknowledging their respective competencies.[74] In short, cooperation between States parties to different conventions seems to be the best solution to treaty conflicts concerning overlapping competencies.

Indeed, cooperation is probably one of the most effective means for resolving all types of incompatibility between international norms. Treaties concerning the protection of living resources also provide for several forms of cooperation.

A form of cooperation between states in the process of concluding treaties concerning a subject-matter that is already regulated by other conventions is the adoption of compatibility clauses. With regard to the issue of the conservation of living resources, one can mention article 14 para. 4 of CITES which states:

"A State party to the present Convention, which is also a party to any other treaty, convention or international agreement, which is in force at the time of the coming into force of the present Convention and under the provisions of which protection is afforded to marine species included in Appendix II, shall be relieved of the obligations imposed on it under the provisions of the present Convention with respect to trade in specimens of species included in Appendix II that are taken by ships registered in the State and in accordance with the provisions of such other treaty, convention or international agreement" and article 22 para. 2 of the Biodiversity Convention which reads: "Contracting Parties shall implement this Convention with respect to the marine environment consistently with the rights and obligations of States under the law of the sea". These norms seem to affirm the priority of application of treaties concerning the protection of marine species. They are patently aimed at favouring the application of the Law of the Sea conven-

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to different legal regimes such as the Secretariat established by article 24 Biodiversity Convention.

74 In this regard see Maffei, see note 9, 196.

tions as *lex specialis ratione materiae.*[75] Likewise, since CCAMLR is a treaty aimed at protecting specific marine resources, it is feasible to affirm the priority of this treaty over CITES as well. However, as has already been observed,[76] compatibility clauses do not often provide a definitive solution to treaty conflicts.

Another useful means of achieving cooperation is the exchange of information.[77] The exchange of information can assist in avoiding duplication of experiments and, thus, needless exploitation of Antarctic resources.[78] For instance, article 14 para. 3 of the 1995 New York Agreement mandates scientific research as a form of cooperation to preserve living resources. Occasionally, states are expressly required to cooperate in order to preserve resources. For example, article 5 of the Biodiversity Convention demands that states "cooperate ... in respect of areas beyond national jurisdiction ... for the conservation and sustainable use of biological diversity".

The presence of international norms establishing the duty of cooperation in several legal systems leads to the conclusion that cooperation is considered probably the most effective instrument for the prevention and resolution of conflicts between treaty norms, including treaties concerning the protection of living resources. Moreover, the cooperation principle is also a rule of customary international law.[79] Thus, all states must cooperate in order to find the best solution for preserving living resources. It could be argued even that if certain treaty norms ap-

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75 In this sense, see the working paper presented by the Chilean Government during the XIX ATCM in Seoul and entitled "Relationship between the Protocol on Environmental Protection to the Antarctic Treaty and Other International agreements of a Global Scope", XIX ATCM/WP20, 8.

76 See above Chapter I. 2.

77 Some examples of norms establishing the duty of information exchange are article 4 of the Whaling Convention and article 12 of the Agreed Measures.

78 The Final Report of the Meeting on the Revision of the Seals Convention, held in London from 12 to 16 September 1988, affirms that it is necessary to ensure "the fullest possible exchange of information" among scientists in order "to minimise wasteful duplication" of experiments, in: Antarctic Handbook, see note 5, 163 and 166.

79 The cooperation principle has been fixed in Principle 7 of the Rio Declaration on Environment and Development. Rio de Janeiro, 14 June 1992, *ILM* 31 (1992), 874 et seq. See also L. Elliot, "Continuity and Change in cooperative International Regimes: the Politics of the Recent Environment Debate in Antarctica", in: *Working Papers of the Research School of Pacific Studies, The Australian National University*, No. 3, 1991, 1 et seq.

pear to be the best instrument for the enforcement of the duty of cooperation, the measures established by such norms should be applied also by third states since compliance with the cooperation principle is an obligation of customary law.[80]

In conclusion, with regard to conflicts between international instruments concerning the protection of marine living resources, it seems appropriate to seek a solution that allows the simultaneous application of as many treaties as possible while sacrificing only those norms which seem to be inessential to the regulation of a specific subject-matter.

Therefore, in cases where different regimes appear to offer the same level of protection and to cause no harm to living resources, it seems that states must simply apply those treaties to which they are parties. This solution also seems to avoid the problem of establishing the applicability of these conventions to third states. After all, many treaties use, in any case, the same means to prevent the exploitation of living resources.

In this regard, global agreements (such as the Biodiversity Convention) can be used as framework-treaties which establish general principles on the protection of living resources. Since these principles seem to reflect, to a large extent, norms of customary law, it appears appropriate to interpret other treaties in conformity with such principles irrespective of whether or not states are parties to the agreements in which these rules are contained. Additionally, global treaty norms can be applied to fill lacunae which are not dealt with by any other international instruments.

But, the enforcement of general norms requires, usually, specific instruments. Such instruments are the norms appertaining to conventions which regulate the protection of living resources in a more specific manner. These conventions, normally, cannot be considered as customary law. Nevertheless, their applicability to third states can still occur if the norms of these conventions are demonstrably the most specific rules for the regulation of a particular geographic area or situation and if third states are not bound by any other specific provision relating to the same area or situation. The specificity of these norms seems to be best ascertained through a policy-oriented approach which takes into account the object and purpose of the relevant provisions rather than through the automatic application of some general rule of international law such as

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80 In this sense see Charney, see note 53, 72.

the *lex specialis* principle.[81] With regard to the issue of the conservation of living resources, the main value on which the policy-oriented approach seems to be based is the protection of resources rather than their exploitation.[82]

However, the concept of "specificity" is, in itself, an insufficiently clear notion to allow the automatic application of a treaty norm to third states. In fact, the criteria on which such a concept is based are various. In some cases, the territorial criterion prevails in determining the special character of a norm. In other cases, other criteria are preferred. One can mention the peculiarity of some species such as whales or the characteristic of certain types of activities which exploit living resources such as commercial trade. Therefore, the best method of asserting the "specificity" of treaty norms in an unequivocal manner seems to be through the coordination between States parties and states non parties to the various conventions. In fact, if such states cooperate in order to identify certain common interests whose protection is an essential aim of all such conventions, it will be easier to accept the applicability of a treaty which appears to be particularly suitable for the protection of such interests even for those states which are not parties to that treaty.

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81 The *lex specialis* principle states that if there is an instrument which deals with a subject in a more specific and more appropriate manner, this instrument must be considered as preferable to others for the regulation of such subject. However, in the present writer's view, the specialty of all treaty norms must be evaluated in relation to the actual object and purpose of such norms rather than on the basis of certain abstract criteria. For a similar view see Ch. Rousseau, *Droit international public*, 1987, 1 et seq., (55).

82 The specificity of treaty norms concerning the conservation of Antarctic living resources must be ascertained by taking into consideration both the territorial extent of application of such norms and the peculiar characteristics of the resources protected by them. The protection accorded by CCAMLR to Antarctic marine living resources demonstrates the expertise of people who have been working under this treaty for several years. Simultaneously, the Whaling Convention seems to be the most appropriate instrument to regulate the protection of whales since the International Whaling Commission has demonstrated its serious interest in protecting these animals.

4. The Protection of the Antarctic Marine Environment

a. Antarctica and the UNCLOS Provisions Concerning the Protection of the Marine Environment

Another of the major areas in which the possibility of treaty conflicts is most likely to occur is the protection of the marine environment. This subject-matter is regulated by several conventions. Some of these have a general content which expresses fundamental principles of international law. Other instruments contain specific norms which provide detailed procedures designed to implement these general rules.

Among international conventions which deal with the question of the protection of the marine environment in a general manner, UNCLOS appears to be the most relevant. Section 1 of Part XII of the Law of the Sea Convention establishes general principles of international environmental law. Although such principles are universally recognized as rules of customary international law,[83] some norms of Part XII of UNCLOS can contrast with ATS provisions. In particular, article 206 of UNCLOS which deals with the problem of impact assessment appears to offer less protection of the marine environment than Antarctic norms. It could be observed that article 206 takes into account only those environmental impact phenomena which cause "substantial pollution" and "significant ... changes" to the environment. By contrast, article 1 para. 2 of Annex I to the Madrid Protocol obliges the carrying out of impact assessments with respect to all activities which cause more than a "minor or transitory impact" on the environment.[84]

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83 In this sense see T. Treves, "Oceans", in: T. Scovazzi/T. Treves (eds), *World Treaties for the protection of the Environment*, 1992, 149 et seq., (151) and A. Boyle, "Marine Pollution under the Law of the Sea Convention", *AJIL* 79 (1985), 347 et seq. Moreover, the affirmation included in the English paper presented during the XXth ATCM appears to be particularly interesting as it states that the Montego Bay Convention is "a framework for international environmental law regarding oceans in that it provides a basis for a series of treaties (both global and regional) on each ... topic", XX ATCM/WP 10, see note 58, 5. Recently, the Agreement on straddling and highly migratory fish stocks has embodied some of the most recent principles of environmental law. For example, one can mention subparas (c) and (e) of article 5 which respectively recognize the precautionary principle and the ecosystem approach.

84 Article 3 para. 2 lit.(e) of Annex I of the Protocol considers as relevant also the "possible indirect or second order impacts" of human activities on the

Another relevant norm contained in UNCLOS which can interfere with ATS provisions is article 234 concerning the protection of the environment in ice-covered areas. This norm attributes to Coastal States the power to protect the marine environment in their EEZs. For present purposes, article 234 appears to be relevant as providing possible evidence of the intent of States parties to UNCLOS in dealing with the management of iced zones including Antarctica. Although the legitimacy of the delimitation of the EEZ in the Antarctic seas is controversial, the general content of article 234 could be interpreted to suggest the applicability of this norm also to the Antarctic area.[85]

Hence, even if general principles concerning the protection of the marine environment established in UNCLOS seem to be compatible with the provisions of the ATS,[86] one cannot exclude certain conflicts between the norms contained in these two legal regimes due to the different criteria on which such regimes are based. Similarly, Antarctic provisions cannot be automatically considered as *lex specialis* with respect to UNCLOS general provisions concerning the protection of the

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Antarctic environment. The Annex summarizes rules already established in previous Antarctic instruments concerning the problem of impact assessment. Among these instruments, Rec. VIII-11 is worth mentioning, in: Antarctic Handbook, see note 5, 2031. Moreover, the impact assessment procedure is one of the fundamental means in CRAMRA for the prevention of the harmful effects of mineral activities on the environment, as article 2 of the Convention affirms. One of the most peculiar characteristics of the system of environmental impact assessment established by the Madrid Protocol is the fact that article 8 para. 2 extends this kind of control also to research activities. A specific contribution to the recognition of the noxious effect of scientific research on the environment is provided by CRAMRA. In this sense see L. Kimball, "CRAMRA and other environmental regimes in the ATS: how well does it fit", in: Jorgensen-Dahl/Ostreng, see note 62, 139 and P. De Cesari, "Scientific Research in Antarctica: new developments", in Francioni/Scovazzi, see note 9, 413 et seq., (454).

85 In particular, and although during the IIIrd Conference on the Law of the Sea the applicability of article 234 was excluded with regard to the Antarctic area, the definitive text of the article is silent in this respect. In this sense see F. Auburn, *Antarctic Law and Politics*, 1982, 126.

86 In this sense see Rec. XV-4, in: Antarctic Handbook, see note 5, 2073. This recommendation affirms that Part XII of UNCLOS expresses general principles on the protection of the marine environment and, thus, it must be respected.

marine environment and, thus, as taking precedence over them.[87] In fact, the specialty of treaty norms must be ascertained on the basis of the actual object and purpose of such norms and not in accordance with an abstract rule such as the *lex specialis* principle. Instead, it is possible to affirm that the Consultative Parties intended to apply UNCLOS principles insofar as they are compatible with the unique geographical and legal nature of Antarctica.

However, the main reason why the possibility of a conflict between the ATS and UNCLOS norms is ever-present depends on the fact that such regimes attribute powers and obligations to different bodies concerning the protection of the marine environment. Whereas UNCLOS in Section 6 of Part XII recognizes a decentralized system of attribution of implementing powers to different states by reason of their proximity and connection to the marine environment to be protected,[88] the ATS establishes a unified regime of rights and duties for all States parties. In this sense, the kind of supervisory regime provided by Antarctic norms seems to be more general than that established by UNCLOS. The general character of the ATS is becoming increasingly evident due to the institutionalization of this legal regime. In fact, the creation of international organs such as the CCAMLR Commission and the Committee on Environmental Protection demonstrates the intent of the Consultative Parties to impose uniform rules upon all states subject to the ATS

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87 The opinion that Antarctic norms are *lex specialis* with respect to UNCLOS rules is expressed by Rothwell, see note 11, 180. For a general comment on the peculiar character of the ATS norms concerning the protection of the environment see S. Pannatier, *L'Antarctique et la protection internationale de l'environnement*, 1994; F. Orrego Vicuña, "The Protocol on Environmental Protection to the Antarctic Treaty: Question of Effectiveness", *Geo. Int'l Envtl L. R.* 7 (1994), 6 et seq.; S. Blay, "New Trend in the protection of the Antarctic Environment: the 1991 Protocol", *AJIL* 86 (1992), 377 et seq. and J. Puissochet, "Le Protocole au Traité sur l'Antarctique, relatif à la protection de l'environnement", A.F.D.I. 37 (1991), 755 et seq.

88 Article 220 of UNCLOS attributes to Coastal States the power to control ships which cross into in their territorial seas and EEZs. Moreover, article 218 recognizes for Port States the power to carry out inspections on ships which berth in their harbours. Finally, under article 217, Flag States have all residual powers on their national ships in order to protect the marine environment. For a more specific analysis of this matter see Churchill and Lowe, see note 38, 257-258.

and, possibly also upon third states.[89] However, the extremely specific content of Antarctic norms concerning the protection of the marine environment does not allow a consideration of such norms as being rules of customary international law. Moreover, it appears to be particularly difficult to assert that these ATS norms bind third states.

In short, the only rules regarding the protection of the marine environment which seem to be applicable to all states are general principles of international law concerning this matter.

First of all, general principles of international environmental law are framework norms in accordance with which treaty regimes can autonomously establish specific rules concerning a particular subject-matter. Such principles do not conflict with ATS provisions, but the way in which they are implemented can differ within the ATS and other international regimes. In these circumstances, general principles can be useful as interpretative instruments to ascertain the actual scope of those rules which have a specific content and to coordinate international provisions appertaining to different regimes which regulate similar subjects. Moreover, general principles can provide a minimum protection of certain fundamental interests in relation to those states which are not bound by any specific international instrument.

b. The Prevention of Marine Pollution in Antarctic Seas

Besides general principles concerning the protection of the marine environment, there are some international conventions which deal with this problem in a specific manner and that can interfere with the application of ATS norms. Of particular interest are treaties concerning the prevention of marine pollution. With regard to this matter, the Consultative Parties themselves have decided to apply the rules established in these treaties rather than to adopt specific Antarctic instruments. In particular, States parties to the ATS have referred to the MARPOL regime[90] in

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89 In this regard see Ph. Gautier, "Institutional Developments in the Antarctic Treaty System", in: Francioni/Scovazzi, see note 9, 34.

90 Such a regime is constituted by the Convention for the Prevention of Pollution from Ships and its accompanying Protocol, London, 2 November 1973, *ILM* 12 (1973), 1319 et seq. and on 16 February 1978, *ILM* 17 (1978), 546 et seq. For a thorough analysis see A. Boyle/D. Freestone/K. Kummer/D. Ong, "Marine Environment and Marine Pollution", in: Ph. Sand (ed.), *The Effectiveness of International Environmental Agreements*, 1992, 149 et seq.

several instruments[91] and have definitively incorporated the provisions of this regime into Annex IV of the Madrid Protocol.[92] Notwithstanding the intention of State parties to the ATS to respect MARPOL provisions, as article 14 of Annex IV to the Madrid Protocol attests,[93] these two regimes present several aspects of divergence or even incompatibility. Firstly, in some cases MARPOL obligations are stricter than the obligations laid down in the Madrid Protocol.[94] In this case, States parties to both MARPOL and to the ATS should respect the stricter obligations as compared to those states which are bound only by the Madrid Protocol.

Secondly, certain loopholes are revealed in the MARPOL regime with respect to its treatment of the question of marine pollution. As an example, three of the five Annexes to the Convention which provide for the management of certain particular polluting substances are not yet in force. In this case, it should be questioned whether the declaration of the Madrid Protocol stating the conformity of the Protocol with MARPOL provisions can render the norms included in the Annexes to

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91 Rec. XV-4 invites States parties to adopt measures "to ensure compliance ... with the relevant provisions" of MARPOL, in: Antarctic Handbook, see note 5, 2073. Moreover, the Final Report of the XVth Antarctic Treaty Consultative Meeting "calls upon [States parties] to become parties to" the MARPOL regime, ibid., 2075.

92 See Bush, see note 62, 129. This author considers that the Madrid Protocol is "at most a rudimentary repeat of MARPOL obligations and in some respects a woefully inadequate reflection of them".

93 Indeed article 14 affirms that "(w)ith respect to those Parties which are also Parties to MARPOL 73/78, nothing ... shall derogate from the specific rights and obligations thereunder". Therefore, the Consultative Parties that are not parties to MARPOL can derogate from the provisions of this convention. For a comparison between the Madrid Protocol and MARPOL see L. Pineschi, "The Prevention of Marine Pollution from Ships According to Annex IV to the Protocol on Environmental Protection to the Antarctic Treaty", *Marine Pollution Bulletin* 24 (1992), 228 et seq.

94 For instance, whereas under Annex II to MARPOL the discharge of liquid substances in Antarctica is forbidden, article 4 of Annex IV to the Madrid Protocol merely affirms that such discharge must not be "harmful to the marine environment". This difference is highlighted by the British paper presented to the XXth ATCM, XX ATCM/WP 10, see note 58, 13.

MARPOL applicable to the Antarctic area even if they are not in force in other marine zones worldwide.[95]

Thirdly, there are some situations in which MARPOL norms are incompatible with the legal status of Antarctica and, thus, their application in the area appears to be ineffective.[96] For instance, even if the MARPOL regime has accorded to Antarctica particular protection as a "special area" under Annex I, II, and V,[97] it must be observed that such an area includes the zone below 60° South Latitude and does not embrace the wider area of the so-called Antarctic Convergence established by CCAMLR.[98]

In conclusion, as far as the relationship between the MARPOL regime and the ATS is concerned, some conflict appears to be unavoidable. In fact, unlike UNCLOS norms, MARPOL provisions have a

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95 This problem is particularly relevant with regard to inspections. Under article 14 of Annex IV to the Madrid Protocol, MARPOL provisions, including those appertaining to the Annexes which are not yet in force, must be applied. Nevertheless, the inspections performed by Gateway Port States on ships transporting substances regulated by MARPOL Annexes not yet in force could be carried out only if such Port States are parties to the Madrid Protocol. On the contrary, states which are only bound by MARPOL could not carry out inspections related to these substances. In this sense see the paper presented by the Dutch government during the XXth ATCM and entitled "Inspections of ships in Gateways Ports to Antarctica on the basis of MARPOL 73/78 and in Antarctic Ports under the Environmental Protocol (Annex IV) to the Antarctic Treaty", XX ATCM/WP 9, 2-3. For an overview of the problem of inspections in Antarctica see P. Giuliani, "Inspections under the Antarctic Treaty", in: Francioni/Scovazzi, see note 9, 469–470.

96 The prohibition against the discharge of noxious substances, provided in Annex II to MARPOL, in the territorial sea is not adaptable to Antarctica where the existence of such a marine area is uncertain. In this sense, see Hajost, see note 72, 87.

97 Antarctica has been considered as a special area under Annexes I and V to MARPOL in 1990, Resolution MEPC 42(30), in: MEPC 30 (24), Annex V, 1–2. The amendment of Annex II to MARPOL was made in 1992, Resolution MEPC 57(33), in: MEPC 33/20/Add.1, Annex 8, 8.

98 For a view in favour of the extension of the area of application of MARPOL, see the Report presented by Working Group I to the XIXth ATCM, XIX ATCM/WP 33, 4. Antarctic Convergence is the maritime zone "where cold Antarctic waters which are moving northwards dip beneath the warmer southward-moving sub-tropical waters". For this definition see Watts, see note 12, 151.

very specific content and sphere of application. Therefore, when a conflict between such provisions and certain Antarctic norms occurs, it seems to be appropriate to identify the most effective norms for the preservation of a particular area rather than to consider all norms as applicable by reason of the fact that all of them have the objective of preventing marine pollution. The traditional concept of effectiveness has been used to ascertain the extent of the powers of an entity such as a state or an individual. However, effectiveness can also be valuable to estimate the extent of application of a treaty regime, in particular, with respect to third states.[99] In the present writer's view, effectiveness of treaty norms should also mean the proven capacity of these norms of dealing with a specific subject. Such capacity should be objectively inferred from the positive results arisen from the application of treaty norms. A solution favouring the application of the most effective norms seems to be also accepted by the Consultative Parties which, as far as marine pollution is concerned, have adopted rules which derive from MARPOL.

Nevertheless, under a rigid legal point of view, it still appears to be improbable to impose obligations contained in certain treaties upon states which are not parties to them. However, in some specific fields such as the prevention of marine pollution, and although these norms do not form a part of customary international law, they seem to be the most appropriate means of controlling the harmful effects of pollution on Antarctic seas. The appropriateness of these norms is not determined on the basis of some theoretical concept such as the category of objective regimes. Rather, from the analysis of the actual object and purpose of provisions, as a policy-oriented approach demands, it can be inferred that such provisions are the most appropriate instrument for dealing with this matter. In fact, they demonstrate a particular competence which renders them opposable even against third states. In the present writer's view, the opposability of treaty norms such as some specific Antarctic provisions concerning marine pollution or MARPOL norms is based upon the capacity of these norms to be universally applied due to the fact that both States parties to the treaty to which such norms belong and third states consider them as the most appropriate means of dealing with a specific problem. In order to ascertain the opposability of treaty norms against third states the acquiescence of such states is a decisive factor. Nevertheless, acquiescence does not appear to be a suffi-

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[99] For an overview of the concept of effectiveness applied to treaty regimes see J. Touscoz, *Le principe d'effectivité dans l'ordre international*, 1964, 91.

cient condition for the establishment of the customary law character of such norms. Therefore, although appropriateness renders certain treaty norms opposable against third states, these norms cannot be considered as rules of customary law.[100] Appropriateness must not be confused with the concept of specificity, which is a characteristic that has been acknowledged in favour of the norms concerning the conservation of living resources in this article.[101] The opposability of specific treaty norms against third states is possible only when such states are not bound by other international conventions which deal with a similar subject-matter in an equivalent manner. By contrast, the appropriateness of treaty norms which makes these provisions the best instrument for regulating a specific problem and which must also be inferred from the acquiescence of third states to such provisions excludes the application of other international norms. Both the ATS and MARPOL seem to have a proven capacity to deal with the subject-matter of marine pollution. By reason of such capacity, states which are not parties to these treaties should apply the solution proposed by the ATS and MARPOL rather than to seek for alternative procedures to enforce the general principle of environmental law which imposes upon all states the duty to prevent marine pollution. In fact, the measures adopted by the ATS and MARPOL have been demonstrated to be both protective and environmentally beneficial. By contrast, the adoption of different procedures for the control of marine pollution by other treaties could affect the environment in a harmful manner.

c. Treaty Regimes on Waste Disposal

Another important issue concerning the protection of the Antarctic marine environment is the problem of waste disposal. Although this problem has always been one of the most serious causes of environmental devastation,[102] the Consultative Parties gave scant regard to this matter for a considerable time.[103] They have acknowledged only recently the

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[100] For the importance of third states' acquiescence for evaluating the effectiveness of international law see Brownlie, see note 27, 160.

[101] See above Chapter II. 3.

[102] One writer highlights the potentially dangerous effects that waste could have on Antarctica if its introduction was allowed into the area. In this sense, see E. Sahurie, *The International Law of Antarctica*, 1992, 363.

[103] There are only a few Antarctic instruments which concern this subject. Rec. VIII-11 affirms that waste disposal consists of discharging such sub-

necessity of identifying particular instruments aimed at regulating waste disposal, both by creating autonomous instruments such as Annex III to the Madrid Protocol and by adopting rules established by other treaties such as the London Convention on the Prevention of Marine Pollution by Dumping of Wastes and other Matters[104] and the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal.[105] The Consultative Parties seem to have accepted the principles included in both these conventions.[106] Nevertheless, some inconsistencies between the Antarctic regime and the other conventions are apparent.

Firstly, both the London and Basel conventions base their systems of waste management on the principle of state sovereignty. In fact, the majority of their norms attribute to Flag States, Port States or Coastal States the power to exercise control over ships which carry out the dumping of waste or which transport noxious substances.[107] Moreover, the Basel Convention expressly mentions the concepts of import and export which imply the existence of transboundary movement. This kind of movement could not take place when ships destined for Ant-

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stances into the sea, in: Antarctic Handbook, see note 5, 2061. More detailed rules are provided by Rec. XV-3 where waste disposal is divided into several phases, ibid. 2064. For a specific analysis of this issue see J. Barnes/P. Lippermann/K. Rigg, "Waste Management in Antarctica", in: Wolfrum, see note 34, 491 et seq.

104 London, 13 November 1972, *ILM* 11 (1972), 1291 et seq.

105 Basel, 22 March 1989, *ILM* 28 (1989), 657 et seq. For a thorough analysis of this problem see K. Kummer, *International Management of Hazardous Wastes*, 1995.

106 Paragraph 85 of the Final Report of the XVth ATCM states that "(i)n the elaboration of a waste classification system, ... care should be taken to avoid inconsistencies with classifications employed in ... the 1972 international convention for dumping ... and the Basel Convention ...", in: Antarctic Handbook, see note 5, 2068.

107 See article 7 para. 1 subparas (a) and (c) of the London Convention on dumping which attributes control to Flag States and to states under whose jurisdiction ships are found. Similarly, article 4 of the Basel Convention confers such a power upon export and import states. For an overview of this problem see W. Lang, "The International Waste Regime", in: W. Lang/H. Neuhold/K. Zemanek (eds), *Environmental Protection and International Law*, 1991, 147 et seq., (158).

arctica do not cross any state border.[108] Indeed, article 4 para. 6 of the Basel Convention attempts to reconcile the approach adopted by the Convention which is based on the state sovereignty criterion with the particular legal status of Antarctica. This article prohibits "the export of hazardous wastes or other wastes for disposal within the area south of 60° South Latitude, whether or not such wastes are subject to transboundary movements". However, the wording of article 4 para. 6 does not seem to clarify whether or not the state sovereignty criterion must be applied with respect to the Antarctic area. On the one hand, the adoption of the term "export" rather than the use of the expression "transfer" suggests that a movement of wastes from one country to another must occur. On the other hand, the final part of article 4 para. 6 seems to be more protective of Antarctic environment than the former since it disregards the issue whether or not such transfers involve transboundary movements. Therefore, one can assume that states which can reach Antarctica without transboundary movements will support the less protective construction of article 4 para. 6.

A further reason why the norms of the London and Basel conventions are unsuitable for application to the Antarctic area without any specific adaptation, is due to the fact that the criterion of state sovereignty adopted by these conventions would favour Claimant States. In fact, they would have wider powers than other Consultative Parties.[109] This is patently in contrast with the approach adopted by Antarctic instruments concerning waste disposal which establish the same rights and duties for all States parties. Indeed, the Consultative Parties seem to have accepted that Antarctica has a peculiar legal status, as article IV of the Antarctic Treaty clearly indicates. Therefore, it appears improbable that such states could deny this fundamental rule of the ATS in order to apply other international norms.

Secondly, the provisions of the London and Basel conventions do not take into consideration all the criteria established by the Antarctic Treaty and its associated instruments. For instance, although article 4 para. 6 of the Basel Convention prohibits the export of hazardous wastes into the Antarctic area, it does not take into account the concept

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108 This hypothesis could be feasible if one takes into account transport from some Claimant States such as Argentina or Chile to their claimed Antarctic territories.

109 In this sense see M.T. Infante, "The Applicability of Maritime Conventions to Antarctica", in: F. Francioni (ed.), *International Environmental Law for Antarctica*, 1992, 135 et seq., (146).

of the Antarctic Convergence established by CCAMLR.[110] This means that even if States parties to the Basel Convention appear to be concerned to protect the Antarctic environment, the norms of the Convention cover a narrower area than that which the Consultative Parties seek to protect.

Thirdly, there are some substantial differences between the norms of the ATS and the other conventions. Whereas article 4 para. 6 of the Basel Convention prohibits the introduction into the Antarctic area of all hazardous substances, article 7 of Annex III to the Madrid Protocol only prevents the introduction of some specific waste.[111] Similarly, Annex I to the Anti-dumping Convention prohibits the discharge of radioactive substances into the sea. By contrast, Annex III to the Madrid Protocol does not take into account this problem at all.[112]

In conclusion, the regulation of waste management in Antarctica is mainly carried out with reference to instruments which do not pertain to the ATS. Nevertheless, the Consultative Parties seem to prefer to create autonomous norms when possible. In any case, these norms do not appear to be opposable by third states. For example, the Madrid Protocol provisions concerning waste are neither norms of customary law nor rules which should prevail over others by reason of their particular appropriateness in dealing with this subject-matter as it appears within Antarctic provisions concerning marine pollution.[113] In fact, neither the Consultative Parties nor third states seem to acknowledge special effectiveness in favour of Annex III of the Madrid Protocol or with regard to

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110 For the concept of the Antarctic Convergence, see note 98.

111 This difference between the two legal norms is highlighted by the Chilean paper presented to the XIXth ATCM, XIX ATCM/WP20, see note 75, 10. For a critical view regarding the approach adopted by Annex III see L. Pineschi, *La protezione dell'ambiente in Antartide*, 1992, 320.

112 In reality, there are some Antarctic instruments which invite the Consultative Parties to cooperate in order to establish rules concerning the movement of radioactive substances. See Rec. 2 done in 1995 during XIXth ATCM, in Final Report of the XIXth ATCM, 97. Probably, the Consultative Parties have considered that the banning of such substances by article V of the Antarctic Treaty constituted a sufficiently effective rule. Nevertheless, such a norm does not seem to prohibit, in the Antarctic seas, the passage of ships which carry radioactive substances. Moreover, the very existence of an instrument such as the above-mentioned recommendation demonstrates the need to improve the regulation of transport of radioactive substances in Antarctica.

113 See above, 518, 519.

the Basel and London conventions.[114] Therefore, the general principle of international law which affirms the duty to protect the environment can be considered as the only limitation upon unlawful waste disposal carried out by those states which are not bound by any international convention. With regard to treaty norms concerning waste disposal which impose precise obligations, they appear to be equally suitable for dealing with a particular problem and, thus, all of them can be considered applicable.

In sum, norms concerning the protection of the environment have provided an important example of the interaction between treaty norms and have also illustrated a possible solution to the conflicts affecting the interaction of such norms. A pragmatic and policy-oriented approach which takes into consideration the specific aims of the relevant norms (such as the purpose of assuring the best protection of the environment) appears to be a more effective instrument than the application of the legal theories which disregard the actual object and effectiveness[115] of treaty norms in favour of solutions based on the application of abstract criteria.

III. The Management of Antarctic Mineral Resources

The question of the exploitation of Antarctic mineral resources involves many interests which are often in conflict. On the one hand, such exploitation is able to satisfy states' economic needs. On the other hand, mineral activities can violate the general interest in protecting the Antarctic environment. In order to respect these different interests, states have advanced the applicability of international treaties other than Antarctic norms. In fact, the ATS regime which is currently in force does not permit many possibilities for the exploitation of mineral resources since the most relevant Antarctic norm concerning this subject, article 7 of the Madrid Protocol, states that "(any) activity relating to mineral resources other than scientific research, shall be prohibited". Indeed, in 1988, the Consultative Parties created a specific regime concerning the

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114 Notwithstanding the fact that article 4 para. 5 and article 7 of the Basel Convention establish the applicability of this treaty to exports to, and imports from, third states, it appears evident that such obligations can be imposed only upon states parties to the Convention when they undertake certain exchanges which involve third states.

115 For the concept of effectiveness, see above, 517, 518.

management of mineral resources, the already mentioned CRAMRA. This treaty, however, has not yet entered into force and, indeed, has been set aside by the adoption of the Madrid Protocol.[116] It is nevertheless important to compare the CRAMRA regime to UNCLOS norms concerning the exploitation of mineral resources in order to demonstrate, once more, the difference between the approaches adopted by the ATS and UNCLOS respectively.

Firstly, CRAMRA provisions concerning the exploitation of those resources found in the continental shelf do not embrace the criterion of territorial sovereignty as UNCLOS does. CRAMRA does not determine preferential rights of exploitation in favour of Claimant States, but rather, it establishes a procedure that all states must respect in carrying out mineral activities in the area. Moreover, there is a further point of conflict between CRAMRA and UNCLOS. Both these regimes have created organs which are responsible for authorizing and controlling mineral activities. In this regard, conflicts of competence among organs belonging to different regimes seem to be unavoidable.[117] Although the

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116 Considering the new rule sanctioned by article 7 of the Madrid Protocol, CRAMRA does not have any chance to enter into force at least before the expiry of 50 years as established by article 25 para. 2 of the Protocol. Article 25 para. 2 affirms that "... after the expiration of 50 years from the date of the entry into force of this Protocol, any of the Antarctic Treaty Consultative Parties so requests ..., a conference shall be held ... to review the operation of this Protocol".

117 Conflicts of competence can involve, in particular, the relationship between the Antarctic Mineral Resources Commission established by article 18 of CRAMRA and the Commission on the Limits of the Continental Shelf provided for in Annex II of UNCLOS. As article 3 of the Annex states, the UNCLOS Commission gives advice to states which wish to fix the outer limit of their continental shelf beyond 200 nautical miles. The Commission's advice seems to be determinative for this type of delimitation of the continental shelf since states which do not agree with the Commission's decision must submit a further request to this organ, as article 8 of Annex II establishes. This function of the UNCLOS Commission could open the possibility of conflict between this organ and the CRAMRA Commission with regard to which of these two organs should be competent to delimit the Antarctic continental shelf. In fact, under article 5 of CRAMRA, the outer limit of the continental shelf corresponds to the geographical extent of application of UNCLOS. For the view that a conflict between the two Commissions is possible, see Watts, see note 12, 158.
However, the most powerful organ of UNCLOS is the International Sea-Bed Authority whose functions of supervision of mining in the deep sea-

entry into force of CRAMRA appears to be unlikely, if it occurred, conflicts between such a treaty and the norms of UNCLOS would be inevitable. The solution to such a conflict must be found in the specific character of the regime of CRAMRA. Article 3 of the Convention affirms the exclusive competence of CRAMRA in regulating mineral activities in Antarctica although it is territorially limited to the Antarctic continent and continental shelf.[118] Therefore, if this treaty enters into force in the future, States parties to it would be bound to respect this exclusiveness in the area concerned. Simultaneously, third states no longer seem to be entitled to claim sovereign rights over Antarctica, due to their prolonged acquiescence within the existing situation.[119] Consequently, no state can seek to apply the norms of UNCLOS concerning the continental shelf.

With regard to the regime of the Madrid Protocol, the strict prohibition of mineral exploitation established by article 7 seems to conflict with the norms of UNCLOS which permit the exploitation of mineral resources appertaining to the continental shelf[120] and to the deep seabed.[121]

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bed are established in Section 4 of Part XI. Although article 5 of CRAMRA excludes the applicability of the Convention to "the sea-bed and the subsoil beyond the geographic extent of the continental shelf", this does not mean that all conflicts among the International Authority and the organs of CRAMRA can be eliminated. In fact, if mineral activities carried out in the deep sea-bed under the UNCLOS regime can cause damage to the area which is under the jurisdiction of CRAMRA, the Antarctic Mineral Resources Commission could feel entitled to impede the Authority's decisions.

118 For a view in favour of the attribution of the character of a special regime to CRAMRA with respect to UNCLOS, see Watts, see note 12, 230. For the view that CRAMRA is a compromise between the UNCLOS regime and the Antarctic Treaty System see R. Wolfrum, *The Convention on the Regulation of Antarctic Mineral Resource Activities: an attempt to break new ground*, 1991, 33.

119 In this sense see Guyer, see note 30, 225.

120 Article 77 para. 1 of UNCLOS affirms that "(t)he Coastal State exercises over the continental shelf sovereign rights for the purpose of exploring it and exploiting its natural resources".

121 The exploitation of mineral resources located in the deep sea-bed is carried out in the interest of all mankind as it results from the norms contained in Part XI of UNCLOS. In particular, article 150 states that "Activities in the Area shall ... be carried out in such a manner as to foster healthy develop-

First of all, one must ascertain what is the geographic extent of the prohibition of mining established by article 7 of the Madrid Protocol since no geographic limit is established by this norm. Article 1 lit.(b) of the Protocol affirms that the "-Antarctic Treaty area- means the area to which the provisions of the Antarctic Treaty apply in accordance with Article VI of that Treaty". Article VI establishes that the Treaty norms "shall apply to the area south of 60° South Latitude ... but nothing in the present Treaty shall prejudice or ... affect the rights ... of any State under international law with regard to the high seas within that area".

It does not seem necessary to determine the extent of application of the Madrid Protocol in order to ascertain whether or not the exploitation of the resources located in the Antarctic continental shelf is possible. In fact, the right of states to exploit such resources is not protected by article VI of the Antarctic Treaty whose only concern is that Antarctic norms do not affect the rights of states within the high seas. Therefore, the prohibition established by article 7 of the Protocol is in patent contrast with article 77 of UNCLOS which recognizes the right of any Coastal State to exploit mineral resources within the continental shelf. However, this conflict of norms does not seem to be incapable of resolution. In fact, only Claimant States would be entitled to claim the right to exploit such resources.[122] However, since these states are parties to the Madrid Protocol, they must respect the prohibition established therein, by reason of the manifest special character *ratione materiae, ratione originis,* and *ratione personae* of this act with respect to UNCLOS norms.

By contrast, the delimitation of the extent of application of the Madrid Protocol appears to be decisive in resolving the problem of the exploitation of mineral resources located in the Antarctic deep sea-bed. In fact, from the apparent extent of application of the Protocol, a conflict between the ban on mineral exploitation established by article 7 of the

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ment of the world economy ...". Moreover, article 153 para. 1 affirms that "Activities in the Area shall be organized, carried out and controlled by the Authority on behalf of mankind ...". Para. 2 lit.(a) of the same article establishes that mineral activities shall be carried out by the Enterprise and para. 2 of Section 2 of the 1994 New York Agreement implementing Part XI of the UNCLOS sanctions that "(t)he Enterprise shall conduct its initial deep sea-bed mining operations through joint ventures", A/RES/48/263 of 28 July 1994.

122 As above affirmed, third states that have not claimed any rights on Antarctica for a substantial period of time, do not presently seem to be entitled to claim such rights. See note 119.

Protocol and the norms on mining in the deep sea-bed provided by Part XI of UNCLOS must be inferred.[123]

A comparison between article VI of the Antarctic Treaty and article 7 of the Madrid Protocol reveals an ambiguity regarding the area in which the Madrid Protocol should be applied. The phrase "the rights, of any State ... with regard to the high seas ...", contained in article VI of the Treaty, could be interpreted as including the rights enjoyed by states not only in international waters but also in the deep sea-bed. In this sense, the prohibition of mining, established by article 7 of the Madrid Protocol, would be inapplicable to the deep sea-bed in the area south of 60° South Latitude.[124] Under this particular interpretation of article VI of the Antarctic Treaty, there should be no legal obstacle preventing the Consultative Parties and third states from carrying out mineral activities in the Antarctic deep sea-bed as established by UNCLOS since this Antarctic norm acknowledges state freedom in the high seas and arguably the applicability of the more recent principle of the common heritage of mankind to the deep sea-bed. By contrast, a legal tenet considers that the prohibition established by article 7 must be applied to the whole area south of 60° South Latitude in order to facilitate the fulfillment of the aim of this prohibition.[125] In the present writer's view, notwithstanding the wording of article VI of the Antarctic Treaty, such treaty and the system that has evolved from it reveal the intent of the

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[123] Such a conflict appears to be unavoidable even if mineral activities under UNCLOS are stringently controlled, due to the fact that under the Law of the Sea Convention a limited exploitation is always possible. Moreover, one cannot deny that the entry into force of UNCLOS became possible due to some slight changes in the approach concerning mineral exploitation of the deep sea-bed. In fact, the Agreement of 1994, implementing Part XI of the UNCLOS, takes into account not only the interests of all mankind, but also "sound commercial principles", as article 1 lit.(a) of the sixth section of the Annex to the Agreement reads. In this sense, see D. Larson/M. Roth/T. Selig, "An Analysis of the Ratification of the UN Convention on the Law of the Sea", *ODILA* 26 (1995), 287 et seq., (294) and B. Oxman, "United States Interests in the Law of the Sea Convention", *AJIL* 88 (1994), 167 et seq., (173 et seq.).

[124] This view seems to be shared by the United Kingdom whose Antarctic Act of 5 July 1994, implementing the Madrid Protocol, does not include the deep sea-bed in the list of zones to which the Protocol is applicable.

[125] For this view, see D. Vidas, "The Antarctic Treaty System and the Law of the Sea: A New Dimension Introduced by the 1991 Madrid Protocol", *International Antarctic Regime Project Publication Series* No. 1, 1993, 18 et seq.

Consultative Parties to create special provisions for this peculiar area. Therefore, article VI must be construed in accordance with other Antarctic norms. In this regard, the purpose of the ban on mining established by article 7 of the Madrid Protocol is clearly the prevention of damage to the entire Antarctic ecosystem. Hence, it seems to be appropriate to interpret such a prohibition as including the whole area south of 60° South Latitude.

Moreover, the applicability of Part XI of UNCLOS to Antarctica meets with other legal and practical obstacles. One must distinguish between States parties both to the ATS and UNCLOS and states which are only parties to UNCLOS. In fact, one could argue that the regime established by Part XI does not reflect customary international law.[126] According to this view, article 136 UNCLOS, which considers the seabed beyond national jurisdiction as the common heritage of mankind, would be binding only for states parties to UNCLOS. Among these states, there are several Consultative Parties. However, the Consultative Parties seem to be mainly bound by the obligations deriving from Antarctic norms. These provisions, in fact, must be considered to be *lex specialis* with respect to the norms of the Law of the Sea Convention. The character of specialty recognized with respect to Antarctic norms concerning mineral exploitation does not derive from the automatic application of an abstract rule such as the *lex specialis* principle.[127] Such specialty depends on the fact that Antarctic norms (and, in particular, the ban on mining established by the Madrid Protocol) are the outcome of the Consultative Parties deliberations based on the experience acquired by scientists who have carried out research in Antarctica for years. Since the results of such research still render it impossible to foresee the extent of the noxious effects of mining on the Antarctic environment, mineral exploitation in the area does not appear to be advisable.

Moreover, states which are only parties to UNCLOS could also be prevented from applying Part XI to Antarctica. In fact, article 145 of UNCLOS has as its main concern the protection of the environment while carrying out mineral activities. In this regard, States parties to UNCLOS could accept the prohibition of mining in Antarctica in order to prevent damage to the environment. Such a solution could be an effective way to reconcile the regime of the Law of the Sea Convention and the ATS. In fact, the protection of the Antarctic environment is the

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126 With regard to the doubtful customary character of the norms included in Part XI of the UNCLOS see Churchill and Lowe, see note 38, 200.

127 See note 81.

fundamental reason why the Madrid Protocol sought to prohibit mineral exploitation in the first place.

Moreover, the ban on mining based on the need to protect the Antarctic environment could be deemed to be binding even for third states to both the Antarctic Treaty and UNCLOS. In fact, the duty to protect the environment and, to a certain extent, the precautionary principle, which considers it necessary to take measures aimed at preventing environmental damage in those cases where there are serious threats of it, are rules of customary international law.[128] In this regard, article 7 of the Madrid Protocol should be interpreted as establishing a ban on mineral activities based on the assessment of an unacceptable risk which such activities can represent for the integrity of the Antarctic environment. However, except when mineral exploitation would damage the environment, it seems impossible to oblige States parties to UNCLOS which are not parties to the ATS not to apply the Law of the Sea Convention in order to respect Antarctic provisions.

Therefore, conflicts between the ATS and UNCLOS provisions concerning the exploitation of mineral resources still remain. The most effective method for resolving such conflicts is to take into consideration general principles upon which both the ATS and the UNCLOS regime are based. For example, as has been affirmed with regard to the mineral exploitation of the deep sea-bed, the general obligation to pre-

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[128] The precautionary principle has been definitively established in Principle 15 of the Rio Declaration on Environment and Development, see note 79. Principle 15 states: "Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation". Some of the most recent global agreements have embodied the precautionary principle. As an example, one can mention article 3 para. 3 of the Framework Convention on Climate Change (Rio de Janeiro, 9 May 1992, *ILM* 31 (1992), 849 et seq.). With regard to the attribution of the character of a customary rule to the precautionary principle see T. Scovazzi, "Sul principio precauzionale nel diritto internazionale dell'ambiente", *Riv. Dir. Int.* 75 (1992), 699 et seq. and J. Cameron/J. Abouchar, "The status of the precautionary principle in international law", in: D. Freestone/E. Hey (eds), *The Precautionary Principle and International Law*, 1996, 29 et seq., (52). For a contrasting view see P. Birnie/A. Boyle, *International Law and the Environment*, 1992, 98.

serve the environment can be an effective means of coordinating conflicting norms belonging to the two regimes.[129]

With regard to the exploitation of mineral resources located in the Antarctic continental shelf under UNCLOS provisions, it could be argued that such activity is absolutely prohibited due to the inappropriateness of the criterion of sovereignty on which such provisions are based in relation to the Antarctic area.

As far as the exploitation of Antarctic deep sea-bed resources is concerned, Antarctic norms appear to be the instruments which confer the most secure protection upon the Antarctic environment and, thus, are the most suitable provisions for regulating such matters. Part XI of UNCLOS still remains applicable to all the other deep sea-bed regions except Antarctica. The applicability of this Convention to the Antarctic area will be possible only if the exploitation of mineral resources is harmless beyond doubt to the environment and the principles contained in UNCLOS are considered suitable for the particular characteristics of this continent. Such a possibility appears rather remote due to the fact that Antarctic issues are regulated in an ever-increasing manner by specific instruments which better fit the peculiarity of the area.

IV. Liability for Damage and Dispute Settlement

1. A Liability Regime for Antarctica

The presence of a liability regime within an international treaty makes such a treaty more effective. A comprehensive liability regime should indicate the subjects upon whom responsibility is to be imposed, the applicable standard or standards of liability and the categories of damages recoverable. Nevertheless, international law offers few examples of conventions which provide for regimes of this nature. One could argue that the ATS itself could be more effective if it included norms concerning liability. By contrast, article 16 of the Madrid Protocol simply

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[129] In this sense see F. Francioni, "Norme convenzionali e "principi" sullo sfruttamento di spazi comuni: il caso delle risorse minerarie dell'Antartide", in: *Il diritto internazionale al tempo della sua codificazione. Studi in onore di Roberto Ago*, Vol. II, 1987, 185 et seq., (200) et seq.

proposes the adoption of an Annex on liability.[130] The only Antarctic instrument to establish a regime on liability is CRAMRA.[131] The Madrid Protocol also includes a norm aimed at preventing and reducing environmental damage. This norm is outlined in article 15 which provides for "response action".[132] This so-called "response action" is nevertheless not a liability provision. However, the performance of this activity evidently implies compensation for the expenses incurred in undertaking such action. Therefore, article 15 itself seems to indicate the necessity of creating a regime on liability within the ATS which at least establishes who must pay compensation and the amount.[133]

So far, conflicts between the ATS norms and other regimes on liability pertaining to different treaties seem unlikely. Nevertheless, it could be useful to evaluate whether the existing regimes on this matter can be effectively applied to the Antarctic area insofar as there are no specific Antarctic norms on liability. In fact, one of the main reasons why such norms do not yet exist is the fact that the establishment of a liability regime which is suitable for the peculiar legal characteristics of Antarctica is far from straightforward.[134]

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130 For a skeptical view regarding the contribution of the Protocol to the issue of liability see C. Redgwell, "Environmental Protection in Antarctica: the 1991 Protocol", *ICLQ* 43 (1994), 599 et seq., (615).

131 Article 8 para. 2 of CRAMRA provides that "(A)n operator shall be strictly liable for: (a) damage to the Antarctic environment ... arising from its Antarctic mineral resources activities ...; (b) loss of or impairment to an established use ...; (c) loss of or damage to property of a third party ...; (d) reimbursement of reasonable costs ... relating to necessary response action ...". The only possibility for excluding liability is established by article 8 para. 4 which states that "(A)n operator shall not be liable ... if it proves that the damage (to the environment) has been caused by ... (a) an event constituting an exceptional character ...". For an overview see H. Burmester, "Liability for Damage from Antarctic Mineral Resource Activities", *Va. J. Int'l L.* 29 (1989), 621 et seq.

132 Under article 15, states must react in a "prompt and effective" way to damage caused by human activities.

133 In this sense see F. Francioni, "Liability for damage to the Antarctic environment", in: Francioni/Scovazzi, see note 9, 594.

134 In this sense see Francioni, above, at 585. This author emphasizes that it is difficult to ascertain the responsibility of states which operate in Antarctica because of the peculiar character of the activities which such states carry out. Therefore, Francioni considers it appropriate to establish several standards of liability for each kind of activity. Similarly, another author has af-

First of all, as affirmed above, even international treaties other than Antarctic instruments do not provide very specific rules concerning liability.[135]

Secondly, some international treaties establish regimes on responsibility which are effectively inapplicable to the Antarctic area. For example, article 8 of the Montreal Protocol on Substances that deplete the Ozone Layer[136] added to the Vienna Convention for the Protection of the Ozone Layer[137] provides for a system of non-compliance. Such an instrument is aimed at ascertaining the degree of respect for treaty norms by states where the noxious effects on the environment are foreseeable as these occur gradually and over time. However, this is generally not the case with regard to Antarctica where, thus far, most environmental damage has been caused by unforeseen and instantaneous accidents.[138]

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firmed that "fault liability is not enough because of the many accidents that may happen in Antarctica". In this sense, see E. Van Bennekom, "A New Regime to Protect the Antarctic Environment", *LJIL* 5 (1992), 33 et seq., (48 et seq.).

135 The London Convention (see note 104) and the Basel Convention (see note 105) only oblige States parties to adopt a liability regime, but do not specify the characteristics of this regime. See article 10 of the London Convention and article 12 of the Basel Convention. Indeed, States parties to the Basel Convention are attempting to create a responsibility system by means of a separate Protocol. The applicability of such norms to Antarctica is considered not feasible by the Chilean paper presented at the XIXth ATCM, in: XIX ATCM/WP 20, see note 75, 20. By contrast, the application of such provisions in the area, as long as the Consultative Parties do not create autonomous norms on liability, has been supported by the English paper presented at the XXth ATCM, XX ATCM/WP 10, see note 58, 18. Similarly, UNCLOS provisions on liability generally seek to apply only those rules on responsibility sanctioned by already-existing international law. For example, arts 304 and 235 of UNCLOS recall international law with regard to the problem of responsibility generally and to liability for damage to the marine environment. In particular, article 235 establishes the duty to provide prompt and adequate compensation for environmental damage.

136 Montreal, 16 September 1987, *ILM* 26 (1987), 1541 et seq.

137 Vienna, 22 March 1985, *ILM* 26 (1987), 1516 et seq.

138 In this regard the accident involving the Argentine ship "Bahia Paraiso" in 1989 is noteworthy. See J. Charney, "Third States Remedies for Environmental Damage to the World's Common Space", in: F. Francioni/T. Sco-

Thirdly, sometimes the regimes on responsibility established by other international treaties do not mesh well with the fundamental principles of the ATS. For instance, article 4 para. 6 of the Framework Convention on Climate Change affirms that in implementing the provisions of the Convention a certain flexibility must be applied with regard to developing states. This statement is strictly linked to the acknowledgment of "common but differentiated responsibilities" sanctioned in para. 1 of the same article. Such an approach does not seem to be compatible with the intention of the Consultative Parties which have always been in favour of a system where states have the same rights and duties.[139]

Finally, it must be observed that even if an Antarctic regime on liability does not yet exist, certain international norms already appear to be in conflict with the general principles of the ATS. For example, article 22 of Annex III to UNCLOS concerning responsibility for activities carried out in the Area establishes compensation for damage corresponding to the actual amount of the damage itself. Such a rule is patently in conflict with article 15 of the Madrid Protocol which establishes a factual obligation such as response action instead of the mere duty of compensation. Moreover, one can hypothesize a further source of conflict between the above-mentioned norms due to the possible development of a liability regime within the ATS. In fact, if a state intervenes in response action in order to prevent the damage provoked by another state in Antarctica, the ATS regime on liability could oblige the latter state to pay compensation for the expenses incurred following the response action carried out by the former state. In this hypothesis, the amount of compensation would be patently larger than that established by article 22 of Annex III to UNCLOS.

In addition, the future regime on liability already demonstrates some lacunae. In fact, if the Consultative Parties establish a liability regime through an Annex to the Madrid Protocol, such a regime will cover only those activities regulated by the Protocol itself. This means that some important issues (such as fishing whose exclusive competence pertains to CCAMLR) will not be subject to any regime of responsibility.

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vazzi (eds), *International Responsibility for Environmental Harm*, 1991, 149 et seq. In this sense see also Francioni, see note 133, 585.

139 Recall that article IX para. 2 of the Antarctic Treaty equates the attribution of the status of a consultative party to a state with its effective capacity to carry out research activities in the area.

Therefore, the future Antarctic regime on liability must, prior to its creation, resolve several problems which are both internal and external to the ATS. The solution of such problems can be accomplished through some useful suggestions offered by some recent international treaties. With regard to compensation, the International Convention on Liability and Compensation for Damage in connection with the Carriage of Hazardous and Noxious Substances by Sea[140] provides an interesting mechanism for the payment of damages. The Convention has created a special "International Hazardous and Noxious Substances Fund" to compensate damage which has not been caused by illicit conduct or whose amount is too exorbitant to be paid by the liable entity. A similar fund would seem to be particularly useful within the ATS since damage occurring in Antarctica has often been difficult to address because of the predominantly ecological character and of the long term measures required to address it. Consequently, there is a risk that such damage will not be rectified.

Another suggestion concerns the possibility of condemning illegal conduct in absence of any liability regime. Indeed, the lack of a liability regime in the ATS cannot, even at present, constitute a justification for imprudent behaviour in the Antarctic area nor can it condone the failure to repair environmental damage. Thus, it seems to be appropriate to find alternative norms in order to ascertain responsibility and to condemn those responsible. Article 4 of the MARPOL regime provides that all violations of its norms must be punished under the internal legislative provisions of States parties concerning reparations. Although there are no sovereign rights generally recognized on the Antarctic continent which could allow a state to apply its norms to all persons on the basis of a territorial criterion, the Consultative Parties can use their internal provisions to limit and to condemn the behaviour of Antarctic operators by reason of the criterion of nationality.[141] In this case, cooperation between all Consultative Parties in regulating their own nation-

140 Done in London on 9 May 1996, *ILM* 35 (1996), 1415 et seq.

141 This solution recalls article 217 of UNCLOS which acknowledges the power of enforcement in favour of Flag States with respect to their national ships which violate international norms concerning the protection of the marine environment in all cases where there is no jurisdiction of Coastal or Port States. However, the link between the Flag State and a national ship seems to be stricter than the link between a state and its citizens who operate in Antarctica. In fact, national vessels are considered to be a part of the Flag State territory. By contrast, states do not have territorial jurisdiction over Antarctic bases.

als uniformly could be an effective means of enforcement of Antarctic norms. Even more radically, the interest in punishing breaches of Antarctic norms could bring the Consultative Parties to apply and to let other parties apply national provisions concerning liability *vis à vis* all individuals operating in Antarctica (or at least with respect to those which are citizens of the ATS states) despite their nationality.[142] Such broad application of national norms does not seem possible, at this stage, due to the strong resistance of states against restrictions on their sovereignty. Strongest cooperation and firm cohesion between the ATCPs is required in order to fight this resistance.

In conclusion, the absence of a liability regime in the ATS does not exclude the possibility of the interaction and, on occasion, of conflict between Antarctic provisions and the norms on liability appertaining to other international conventions.[143]

In other cases, certain international conventions can offer useful suggestions for the future Antarctic liability regime.[144] Moreover, inter-

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142 This reasoning is not entirely new. In fact, the applicability of national legislation (in particular concerning environmental protection) to aliens in the areas which are beyond state jurisdiction has been affirmed by certain national statutes and hypothesized by some authors. For example, one can mention the case of the application of the 1972 US Marine Mammals Protection Act to Mexican fleets which were fishing tuna in the high seas. For a deep analysis of the case see F. Francioni, "Extraterritorial Application of Environmental Law", in: K. Meessen (ed.), *Extraterritorial Jurisdiction in Theory and Practice*, 1996, 126. In Francioni's view, some cases demonstrate the "need to extend environmental safeguards beyond the limits of national territoriality". The author acknowledges that the application of state environmental provisions to areas beyond national jurisdiction is not precisely a problem of extraterritoriality since extraterritoriality involves "the sphere of sovereignty of another state", ibid., 123. Further, Francioni admits the legitimacy of the exercise of extraterritorial jurisdiction (and, arguably, of the jurisdiction over areas beyond national control) "whenever it is appropriate in order to avoid serious environmental harm ...", ibid., 132. For the opposite view, see the Australian statutes concerning environmental protection which deny their applicability to aliens who operate in Antarctica. For an overview, see Crawford/Rothwell, see note 48, 82.

143 The definition of the relevant damage seems to be one of the most controversial issues concerning liability. For example, one can mention the inconsistency between article 22 of Annex III to the UNCLOS and article 15 of the Madrid Protocol. See under above, 533, 534.

144 The creation of a special fund to cover exorbitant damage such as has been established by the London Noxious Substances Convention seems to be

national treaties other than Antarctic instruments provide alternative solutions to the Consultative Parties as to how to combine the exigency of protecting the Antarctic environment with the difficulty of creating a liability regime.[145]

In the present writer's view, the legal and geographic peculiarity of Antarctica requires an appropriate regime on liability due to the atypical entities which operate in Antarctica and the atypical kind of accidents which can occur therein. However, the need to create a specific regime on liability cannot be permitted to disregard one of the main aims of the entire ATS; the preservation of the Antarctic environment. In order to achieve such an aim, it seems convenient also to refer to international provisions other than Antarctic norms, at least, while the Consultative Parties have not themselves created a specific regime on liability.

2. Dispute Settlement Concerning Antarctic Issues

The issue of liability is closely linked to the question of dispute settlement. In fact, both these instruments ensure that the legal regimes to which they belong are more effective. Until the entry into force of the Madrid Protocol, the ATS provided only for diplomatic means for dispute settlement.[146] Articles 19 and 20 of the Protocol establish the Arbitral Tribunal which is competent to deal with controversies arising under the Protocol on subject-matters such as the prohibition of mineral activities and the appropriateness of impact assessment procedures. Moreover, the Tribunal has a general competence to evaluate the level of compliance with the obligations established in the Protocol. Such general competence seems to attribute to the Tribunal the possibility of dealing with a large number of controversies concerning Antarctica. Nevertheless, article 20 para. 2 excludes from the competence of the

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particularly useful in Antarctica since the extent of environmental damage is often unpredictable.

145 See the solution proposed by article 4 of MARPOL , see above, 534. Indeed, the lack of an effective legal instrument on liability cannot allow abuses especially with respect to the performance of certain important activities such as fishing.

146 See article XI of the Antarctic Treaty and article XXV of the CCAMLR. For an overview see G. Bosco, "Settlement of Disputes under the Antarctic Treaty System", in: Francioni/Scovazzi, see note 9, 614–615.

Tribunal "any matter within the scope of Article IV of the Antarctic Treaty". This limitation appears to be justified by the intention of the Consultative Parties to resolve questions concerning the fundamental principles of the ATS within the ATCMs.[147]

Even if no overlap between judicial organs established by different treaties has yet occurred, the system of dispute settlement sanctioned by the Madrid Protocol seems capable of interfering with other similar regimes. Annex VI to UNCLOS establishes certain specific organs such as the International Tribunal for the Law of the Sea and the Sea-Bed Disputes Chamber. The International Tribunal seems to be the most important organ of UNCLOS. Its competence is general and involves any residual matter which is not or cannot be dealt with by another specific organ of the Convention.[148] The main interaction between the International Tribunal and the Tribunal established by the Madrid Protocol concerns the jurisdiction over those questions which are excluded by article 20 of the Protocol from the competence of the Antarctic organ. In fact, the UNCLOS Tribunal can deal with disputes by applying any norms of international law which are not in conflict with the Law of the Sea Convention.[149] Although the Consultative Parties are obliged to respect the limitations upon justiciability for those issues indicated by the Madrid Protocol by reason of their acceptance of the jurisdiction of the "Antarctic Tribunal", third states to the ATS could ask the

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147 In this sense see T. Treves, "Compulsory Settlement of Disputes: a new element in the Antarctic system", in: Francioni/Scovazzi, see note 9, 605. For a general analysis see F. Auburn, "Dispute Settlement under the Antarctic System", in: A. Postiglione (ed.), *Per un tribunale internazionale dell' ambiente*, 1992, 127 et seq.

148 For a view in favour of the residual character of the competence of the International Tribunal see S. Rosenne, "Establishing the International Tribunal of the Law of the Sea", *AJIL* 89 (1995), 806 et seq., (812–813) and R. Ranjeva, "Le règlement des différends", in: P.M. Dupuy/D. Vignes (eds), *Traités du nouveau droit de la mer*, 1985, 1105 et seq., (1165). See also G. Jaenicke, "Dispute Settlement under the Law of the Sea Convention", in: R. Wolfrum (ed.), *Antarctic Challenge*, Vol. II, 1986, 163 et seq.

149 In this sense see article 293 of UNCLOS. Moreover, article 22 of Annex VI affirms that "(i)f all the parties to a treaty ... already in force and concerning the subject-matter covered by this Convention so agree, any dispute concerning the interpretation or application of such treaty ... may ... be submitted to the Tribunal". Indeed, such norm does not appear to be applicable to the Antarctic Treaty since the Consultative Parties have never agreed (as article 22 requires) to accept the jurisdiction of the International Tribunal with regard to disputes concerning Antarctic issues.

UNCLOS Tribunal to deal with a controversy regarding such questions pertaining to Antarctica. Indeed, as affirmed above,[150] even third states do not seem to be entitled to apply all UNCLOS norms to the Antarctic area since some of these norms are not suitable for the peculiar geographical and legal characteristics of the Antarctic seas. For example, since the delimitation of maritime zones is based on the indisputable recognition of sovereign rights with respect to coastal states, it does not seem to be either possible or appropriate to delimit such zones within Antarctic waters. Therefore, even the settlement of disputes concerning this matter should be reserved to the competence of the organ entitled to do so by the Madrid Protocol: in this specific case, the competent organ is the ATCM since, as is established by article 20 para. 2 of the Protocol, the issue of sovereignty is not included among justiciable questions.[151]

Another possible source of conflict is provided by the interaction between the norms on dispute settlement of CCAMLR and the Convention on Biological Diversity. In fact, article 25 para. 2 of CCAMLR and Annex II of the Biodiversity Convention sanction two regimes of arbitration which deal with controversies concerning very similar subjects. In this case, the possibility of overlap is clearly visible. On the one hand, the CCAMLR arbitration system can be considered to be predominant as *lex specialis*. CCAMLR protects only marine species whereas the Biodiversity Convention is applicable to all living resources. On the other hand, the arbitration regime established by the Biodiversity Convention creates a more specific and more effective procedure than that provided by CCAMLR. Therefore, it is not free from controversy which of these dispute settlement regimes can be deemed to be the most specific and, thus, which one must prevail. However, the substantial specificity of CCAMLR seems to be predominant over the peculiarity of the dispute settlement regime established by the Biodiversity provisions. In fact, it seems to be more important to identify the most appropriate norms which deal with the substance of a problem than to apply the most detailed rules of dispute settlement.

Finally, the interaction between the Madrid Protocol and the MARPOL regime with regard to the question of the resolution of disputes is noteworthy. Although article 14 of Annex IV to the Protocol establishes the superiority of MARPOL provisions, this does not ap-

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[150] See under Chapter II. 2. b.

[151] For a view in favour of the specialty of the Antarctic system of dispute settlement see Treves, see note 147, 608.

pear to imply also norms on dispute settlement. Therefore, controversies concerning Antarctic issues cannot be automatically brought before the MARPOL judicial organs.[152] However, there are some questions which pertain to both these regimes. In this case, it is more difficult to exclude the competence of either of them to deal with such questions.

In short, although the existing systems of dispute settlement show a certain similarity in terms of their procedures, one can affirm that conflicts (or at least overlaps) are always possible. In such cases, it appears difficult to identify the regime that should prevail over others by reason of its specialty since all of them are special in some way.[153] Therefore, in order to establish which judicial organ is competent to deal with a particular controversy, it is necessary to ascertain what treaty norms are most appropriate to regulate the issue which forms the subject-matter of the dispute rather than to attribute the competence to judicial organs on the basis of some technical and abstract criteria.

V. Conclusions

In this article, the writer has tried to analyze the possible types of relationships which exist between different international treaties dealing with a similar subject-matter. One has also tried to indicate some criteria to establish how these relationships affect the legal regime of Antarctica. The conclusion which has been reached is that, rather than formal criteria, an analysis of the actual object and purpose of treaty norms is required to properly answer the question. The evaluation of the States parties purpose, conduct, and objective appears to be an effective instrument for determining to what extent states wish to be bound by an international convention. Therefore, a policy-oriented and teleological interpretation of treaties seems to be a more useful instrument than a purely textual interpretation which is the approach preferred by article 31 para. 1 of the Vienna Convention on the Law of Treaties.[154]

The conduct of both States parties and third states to a treaty is generally the clearest indication of the purposes underlying the application of treaty norms. This is particularly so with regard to the response of third states to the ATS since such a system establishes a comprehensive

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[152] In this regard see Treves, see note 147, 611.

[153] In this sense see the example of the dispute settlement regimes of CCAMLR and the Biodiversity Convention.

[154] See note 17.

regime for a specific geographic area, the correct management of which is an interest of the entire international community.

Moreover, as this article has shown, it is impossible to establish *a priori*, on the basis of certain general rules, what treaty among those applicable to the Antarctic area must prevail over others.[155]

In the present writer's view, it does not seem appropriate to fashion criteria for Antarctica to determine *a priori* the pre-eminence of one treaty as a whole over another. Instead, it is preferable to identify which norm, among all those potentially applicable in a specific case, represents the "proper" law. For this purpose, the evaluation of the actual object and purpose of a norm is the most effective means of determining such "propriety". Nevertheless, the "propriety" of treaty norms does not appear to be a legal criterion which automatically would permit establishing whether all the norms of a treaty must prevail over the provisions of another international convention. Therefore, it is necessary to analyse treaty norms singularly in order to evaluate their substantive effect.

Three different situations can be identified where, for different reasons, some ATS norms seem to prevail over others.

First of all, certain norms of the Antarctic Treaty System have become customary rules of international law over the last decades. As such, they are now applicable to all states including third states.[156] The universal applicability of these provisions is not due to the fact that they pertain to the ATS, but to the fact that they are customary rules.[157] However, few provisions contained in the ATS possess all the formal and substantial characteristics necessary to render them norms of customary international law. So, this situation remains quite exceptional.

Secondly, some other ATS norms seem to have reached a degree of effectiveness which ensures that their application is preferable to that of

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155 For example, the ATS instruments, UNCLOS and the Convention on Biodiversity cannot be classified by reason of the importance and degree of specificity of their subject-matter. For the view that it is impossible to create a hierarchy between treaties, see Rousseau, see note 81, 156, Jenks, see note 24, 442 and Reuter, see note 27, 32.

156 For example, see article I of the Antarctic Treaty establishing the prohibition of the military use of the area and article 2 of the Madrid Protocol which establishes the duty to protect the Antarctic environment.

157 For the possibility of treaty norms becoming enforceable with respect to third states once these norms become customary rules, see article 38 of the Vienna Convention on the Law of Treaties.

other treaty norms. Such effectiveness must be inferred both from the ATCPs' intent to make certain Antarctic norms generally applicable and from the acquiescence of third states to the enforcement of these rules. In fact, in some cases, third states have acknowledged the particular "appropriateness" of the ATS for regulating certain specific matters. Although the "appropriateness" of treaty norms seems to be based on the same grounds (universal application of a treaty regime and acquiescence of third states) as the theory of objective regimes, the policy-oriented approach through which such "appropriateness" must be ascertained is completely different from the doctrine of objective regimes. This approach, by taking into account the actual object and purpose of treaty norms, is aimed at determining what provisions show a particular competence for dealing with a specific matter. Instead, the formal requirements demanded by the theory of objective regimes, such as the rigid definition of the duration of time of acquiescence, are abstract criteria which do not give importance to the substantial differences between the various treaty norms. It is indisputable that the majority of ATS provisions are the most appropriate rules for the regulation of Antarctic activities.[158] Yet, norms pertaining to international treaties other than the ATS have also demonstrated their appropriateness for regulating certain specific issues.[159]

Finally, other Antarctic provisions are ordinary treaty norms and, thus, bind only states parties to the conventions to which they belong. These provisions can be considered to prevail over other international norms only in those cases where they demonstrably possess a significant degree of "specificity". Such "specificity" must be ascertained on the basis of the actual object and purpose of these norms and not be due merely to the application of an abstract and non-critical criterion of norm-selection such as the *lex specialis* principle.[160] However, the existence of a duty upon third states to apply norms pertaining to treaties to which they are not parties by reason of their "specificity" is not recognized by international law. Such "specificity" is not a sufficient requirement to render these norms customary rules of international law. Similarly, these type of norms cannot be equated to the provisions which the present writer has classified as opposable against third states

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158 See for instance the example of Antarctic norms concerning marine pollution under Chapter II.4.b.

159 See the MARPOL provisions concerning the classification of polluting substances.

160 For the concept of specificity see above 511, 512.

by reason of their particular "appropriateness".[161] In the view expressed in this paper, the application to third states of norms which demonstrate a certain degree of "specificity" could be possible only in those cases where these states are not bound by any alternative instruments which are as effective as the specific norms at issue.[162]

Nevertheless, in order to foster and to strengthen the legitimization of the universal application of treaty norms of "specific" character, the highest level of cooperation between states is required. Such cooperation should be based on the need to safeguard such general interests as the sustainable protection of resources and the conservation of the environment. In fact, with regard to the management of Antarctica, it seems preferable that all actors, private and public, including those who are subject to the jurisdiction of states which are non-parties to the Antarctic Treaty, respect those rules which are most suitable for the characteristics of this area rather than accept only those obligations deriving from treaties to which the respective countries are parties. The Consultative Parties have adopted this pragmatic approach with regard to the regulation of certain subjects such as marine pollution and, to some extent, waste management.[163] It would be desirable if states which are non-parties to the ATS decided to enforce those Antarctic norms which provide for the most appropriate level of overall protection of the Antarctic area.

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161 For example, it is impossible to see how the granting of special permits for the exploitation of certain living resources established by the Agreed Measures should be preferred to the same instrument adopted by CITES.

162 The enforcement of Antarctic provisions concerning environmental impact assessment seems to be preferable to the application of the rules established in other international conventions since the former have proved to be both effective and non-deleterious for the conservation of the Antarctic environment. On the contrary, the latter have not been yet applied in the Antarctic area. See above, 512.

163 See above, 518, 519 and 522, 523.