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**THE ANTARCTIC
A MODEL FOR THE
GOVERNANCE OF
INTERNATIONAL SPACES?**

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REVISED BY: Lesley Jessop (USA).

GRAPHIC DESIGN AND LAYOUT: Stéphane Hergueta, Alix Guillemin Lemoigne

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The Antarctic Treaty System, a Model for the Governance of the Moon or the Deep Seabed?

Built on the principles of non-appropriation, freedom of scientific research and environmental protection, could the Antarctic Treaty System serve as a model for other Areas Beyond National Jurisdiction?

The international order has historically been structured around the gradual division of the world into territories under the sovereignty of states. Certain areas—the high seas, the deep seabed, the Antarctic, outer space, the Moon and other celestial bodies—do not, however, fit into this framework. Referred to as “Areas Beyond National Jurisdiction” (in abbreviated form, “ABNJ”), these international spaces are now the focus of growing challenges related to resources, environmental protection, and national security. Faced with these challenges, there is a strong inclination to seek a governance model that can be applied to all of these areas. The Antarctic Treaty System (ATS) is thus presented as an available and successful example of international governance.

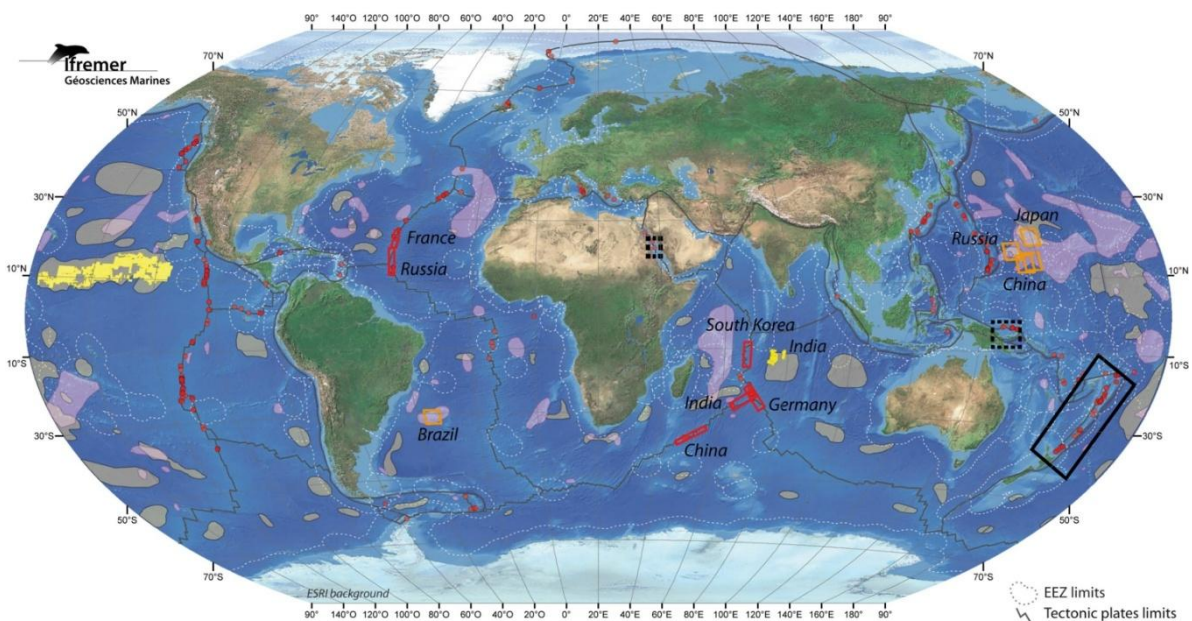


Figure 1: Location of deep-sea mineral resources and areas where these resources are being explored.
Source: Ifremer, based on ISA, 2023.

‘Rather than succumbing to the temptation to copy a model, recent history invites us to take up the challenge of constructively articulating existing legal regimes’

For example, the apparent simplicity of a ban based on the principle that “any activity relating to mineral resources, other than scientific research, is prohibited” in Antarctica (Protocol on Environmental Protection to the Antarctic Treaty, Art. 7) might appeal to advocates of strict protection for these vulnerable environments. The ATS¹ could thus serve as inspiration for the rules applicable to other international spaces², starting with the deep seabed. The complexity and twists and turns of the ongoing negotiations within the International Seabed Authority (ISA), which is responsible for organizing and regulating activities in the deep seabed, tend to support the idea that the ATS could be used as a model to guide this work; especially, at a time when debates are intensifying regarding the advisability of a precautionary pause on deep-sea mining. While the simplicity of the message addressed to decision-makers may be appealing, we must not lose sight of the fact that the law of the ABNJ is characterized by its complexity and that it is not always appropriate to equate simplicity of objectives with simplification of the associated rules. The view advocated here is that, while the experience of the ATS can inform the discussion, the diversity of the environments involved makes any uniform transposition illusory: for many of these international spaces (Antarctica, deep seabed, high seas), the challenge lies less in exporting a model than in articulating existing legal regimes. To understand this, it is necessary to revisit the historical dynamics of the territorialization of the world.

Long before the emergence of ABNJ, the dynamics of power and conquest determined the distribution of our world’s geographical dependencies. Toward the end of the 15th century, power was largely identified, and territories resembled personal possessions more than stable political entities. The year 1492 marked a radical upheaval of this (European) world order. Christopher Columbus’s expedition to the Americas ushered in a phase of maritime expansion and rivalry among European powers. To prevent a conflict between Spain and Portugal, the papal bull *Inter Cætera* (1493), followed by the Treaty of Tordesillas, organized the division of newly discovered lands between the two powers. This dynamic of expansion continued over the following centuries. It contributed to the gradual emergence of a territorial conception of

¹ “The *Antarctic Treaty system* 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” (Protocol on Environmental Protection to The Antarctic Treaty, Art. 1-e)

² Under Article IV of the Antarctic Treaty, the Treaty neither invalidates nor recognizes territorial claims made prior to the Treaty’s signing in 1959. Thus, for the so-called “claimant states” (Argentina, Australia, Chile, France, New Zealand, Norway, United Kingdom) that lay claim to a sector of the 6th continent, this area cannot be equated to an ABNJ. However, given the success of the “freezing” of the territorial claims, the Antarctic may, to some extent, be equated with such an area.

sovereignty and the consolidation of the exclusive authority of states within their borders. This historical dynamic was subsequently accompanied by a multiplication of sovereign territories, particularly with the decolonization of the 20th century, and remains visible today, in the fortification of many borders.

In the early 17th century, the attention of European powers gradually shifted toward maritime spaces. A doctrinal debate then arose between advocates of a freedom of the sea and those who supported the possibility of extensive appropriation of maritime zones. Drawing on the idea that the sea is a space of impermanence, and thus beyond any logic of occupation, Hugo Grotius asserted in his work that has since become famous that “the sea, like the air, is common” and that “it must [therefore] be free, for by nature it is open to all” (*Mare Liberum*, 1609). History for Europeans, thus recorded the triumph of an open and free conception of the seas and oceans, establishing the existence of the high seas as a conduit for trade and communication. This space was then identified as the maritime area lying beyond strictly delimited territorial waters. From this sequence, a key observation also emerges: Humanity was still far from Antarctica when the first space considered to be international emerged in international law.

Next came the era of major international treaties, when the reconstruction of a new world order following the two world wars gave rise to the idea that international law—condemning the use of force and promoting cooperation among states—would spare “untold sorrow to mankind” (United Nations Charter, Preamble). In the post-World War II context, the reconstruction of the international order was accompanied by an effort to legally codify the rules governing activities within what was considered by a large number of powers as international spaces. Between 1958 and 1967, several treaties would recognize the existence of areas not subject to national appropriation and establish a legal foundation for regulating activities associated with them. Two of the four Geneva Conventions, concluded in 1958, would thus be dedicated to the high seas. The Antarctic Treaty, signed in 1959, established the legal regime applicable to the 6th continent. Finally, the Outer Space Treaty of 1967 codified the principles governing “the activities of states in the exploration and use of outer space, including the Moon and other celestial bodies.” Despite their differences, these two legal regimes are based on common principles: overcoming tensions stemming from national appropriation dynamics, restrictions on military use, and freedom of scientific research. Replication of emerging legal regimes was the result, and the Outer Space Treaty drew upon the Antarctic Treaty negotiated a few years earlier. Nevertheless, the conclusion of the Antarctic Treaty, in this context, reflects both the geopolitical dynamics of its time and the specific

characteristics of the region in question. Beyond the common principles, it must indeed be noted that the Antarctic Treaty exhibits a certain legal distinctiveness: negotiation *outside the UN framework* by a limited number of States particularly concerned with the legal fate of this 14-million-square-kilometer continent enclosed by a vast ocean; authorization of activities in the Antarctic provided that they are *exclusively peaceful*; *freedom of scientific research* in a spirit of *strong interstate cooperation*; *an original governance system* based on the meeting of the Consultative Parties and the production of secondary legislation; and finally, a relatively well-developed *monitoring and oversight mechanism*, with the possibility of appointing observers and conducting inspections. The history of ABNJ within which the Antarctic Treaty is a significant achievement, could have ended there. However, the emergence and subsequent growing importance of certain issues during the second half of the 20th century would inevitably challenge the established order and lead to the adaptation of the legal regimes derived from the aforementioned framework treaties.

ABNJ	Antarctica	Outer space	The Moon and other Celestial Bodies	The High Sea	International Seabed Area
Founding treaties	Antarctic Treaty (1959). Negotiated and adopted outside the UN framework.	Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and other Celestial Bodies (1967). UN Agreement.	Outer Space Treaty (1967) + Agreement governing the Activities of States on the Moon and Other Celestial Bodies (1979). UN Agreements.	Convention of the United Nations on the Law of the Sea (1982), Part VII. UN Agreement.	Convention of the United Nations on the Law of the Sea (1982), Part XI. + Agreement relating to the implementation of Part XI (1994). UN Agreements.

Figure 2: Founding Treaties related to International Spaces (ABNJ). Article IV of the Antarctic Treaty does not resolve the territorial dispute between claimant and non-claimant states, thereby maintaining an ambivalent territorial status quo known as the “freezing of territorial claims”.

The exploration and exploitation of the oceans’ biological and non-biological resources, including the seabed and subsoil, were the primary drivers behind the negotiation of a new law of the sea in the 1970s. This process culminated in the adoption, on December 10, 1982, of the United Nations Convention on the Law of the Sea (UNCLOS). This “Constitution of the Oceans” establishes a new area falling under the category of ABNJ: the deep seabed—which legal experts refer to as *the Area*—whose legal regime differs from that applicable to the overlying water column. Part XI of UNCLOS establishes the legal framework applicable to the Area. While it incorporates certain principles already present in earlier regimes, it primarily marks a break with the regime of freedom characterizing the high seas. The Area and its mineral resources are described therein as the *common heritage of mankind* (UNCLOS, Art. 136), establishing a regime based on a system of authorization conditional upon compliance with secondary legislation adopted

under the auspices of the ISA, an international organization established by the Convention.

The negotiators of Part XI undoubtedly hoped that such a framework would serve as a model for regulating human activities in other ABNJ. The provisions of the Agreement Governing the Activities of States on the Moon and Other Celestial Bodies (or Moon Agreement), adopted on December 5, 1979, while UNCLOS negotiations were still underway, bear witness to this. Article 11 designates the Moon and its natural resources as the *common heritage of mankind* and provides for the establishment of an international regime governing the exploitation of these resources when such exploitation becomes possible. The Agreement further specifies that its provisions regarding the Moon “shall also apply to other celestial bodies within the solar system” (Moon Agreement, Art. 1), thereby aspiring to extend the scope of a law of terrestrial origin far beyond the boundaries of the imaginable. The Moon Agreement thus sought to establish, following the model of the high seas/Area distinction, a separation between the legal regime applicable to Earth’s orbital space and that applicable to the Moon and other celestial bodies. This attempt, however, was short-lived: although the agreement entered into force on July 11, 1984, it was never ratified by any spacefaring power. It nevertheless illustrates the influence exerted, in UN negotiations of the period, among other factors, by Part XI of UNCLOS. The failed attempt, four years after the adoption of the Moon Agreement, to adopt the Wellington Convention on the exploration and exploitation of Antarctic mineral resources provides a second illustration of this. Although it remained at the draft stage, since the Convention never entered into force, it aimed to complete the framework of legal instruments governing activities in Antarctica. Taking “note of the possible existence of mineral resources in Antarctica” (Wellington Convention, Preamble), it drew inspiration from the model of Part XI of UNCLOS while rejecting the characterization of Antarctic space and its resources as the common heritage of mankind.

The consequences of these failures will appear diametrically opposed, yet lead to a shared conclusion: the legal regime governing the common heritage of mankind, if it were to be clarified and refined within the framework of the Area—as illustrated by the 1994 New York Agreement relating to Part XI of UNCLOS—will never become a model for the development of regimes dedicated to other ABNJs. Regarding outer space and the resources of celestial bodies, the failure of the Moon Agreement will even encourage the emergence of unilateral initiatives, particularly in the United States, where legislation consolidated by the Trump administration grants private companies rights to resources

they might extract in space. If the Moon Agreement is still mentioned today by the United States, it is only to better dismiss it. The Antarctic Community's reaction to the failure of the Wellington Convention was quite different. This failure led to the adoption, as early as 1991, of the Madrid Protocol, whose Article 7, mentioned above, prohibits "any activity relating to natural mineral resources, other than scientific research." The success of this prohibition regime can only be understood in conjunction with the emergence of a new issue: the conservation of biological resources and the protection of the environment. Although the law of the sea had incorporated the issue of the conservation of biological resources of the high seas as early as 1958, it was not until UNCLOS that states established a framework to regulate their freedom of fishing for conservation purposes (UNCLOS, Part VII, Section 2). The regulatory framework governing activities in the Area will also include a provision aimed at protecting the marine environment, entrusting the ISA with the task of adopting rules designed to "prevent, reduce, and control pollution of the marine environment" and to "protect the natural resources of the Area" (UNCLOS, Art. 145).

UNCLOS will further enshrine, beyond the division into maritime zones, a general obligation to "protect and preserve the marine environment" (UNCLOS, Art. 192). Regarding the ATS, after two decades of discussions within the Meeting of Consultative Parties on the issue of environmental protection, the decision was made in 1980 to establish a regime for the protection of biological resources, incorporating the concept of ecosystems, with the adoption of the Convention on the Conservation of Antarctic Marine Living Resources (CCAMLR). Then, in 1991, the Madrid Protocol designated the Antarctic region as a *natural reserve, devoted to peace and science*, thereby combining the prohibition set forth in Article 7 with a commitment to preserve this region from the economic and strategic interests of state powers.

Should the ATS then be viewed as a model legal framework for ABNJs, given the simplicity of its prohibition and the ambition of its protective measures? One might be tempted to agree. However, while promoting this model may be understandable in light of the objectives being pursued, and while efforts to ensure consistency across legal systems appear legitimate, a degree of caution must nevertheless guide the analysis of existing legal frameworks. Comparing Antarctica to the Moon makes sense for the lawyer or politician seeking to convince their audience of the validity of their objectives. The issues related to these various ABNJs, however, can only be understood in light of the characteristics of the environments in question, as ABNJs really have nothing in common other than the legal category that brings them together. The specific nature of the

environments under analysis also explains certain fundamental distinctions in the legal framework governing them, starting with the technique of freezing territorial sovereignty rights or sovereignty claims in the case of the Antarctic Treaty (Antarctic Treaty, Art. IV). It was because this continent had already been the subject of discoveries, and because the so-called “claimant states” rejected a strict application of the principle of non-national appropriation, that this legal approach was proposed. During the Cold War, it was necessary to remove this region of the world from the logic of confrontation—which was already widespread enough on a global scale—that the main interested states were able to bring this project for a region devoted to peace and science.

The specific features of the legal regime associated with the prohibition in Article 7 of the Madrid Protocol, beginning with the question of its possible reform, can also be explained by the stakes surrounding the exploration and potential exploitation of mineral resources within this area. When it comes to interpreting Article 25 of the same protocol, which codifies the possibility of reviewing the protocol’s operation “upon the expiration of a 50-year period,” the divergence in conclusions further illustrates the diversity of issues related to the question of exploitation. While some view Article 25 as a series of legal constraints reinforcing the strength of the ban, I, for my part, see in it an uncertainty inherent to the challenges of exploiting mineral resources within the ABNJs, which justified the affirmation of a ban in Antarctica in 1991, while simultaneously introducing a time-related clause intended to reassure proponents of future exploitation when the time comes.

The highly topical issues surrounding security and defense can only be fully understood in light of the current or potential military use of the environments in question. It is therefore not surprising that France adopted a Space Defense Strategy in 2019 before turning its attention, in 2022, to the challenges of controlling the seabed. Conversely, there is as yet no Antarctic Defense Strategy. Some will justify this by citing the legal principle of the exclusively peaceful use of this polar region. Yet this same principle applies to the Area, which has not prevented France from publicly adopting a political-strategic response to what it perceives as the growing militarization of the seabed.

Given the diversity of the issues at stake and the difficulty of grasping them, and beyond legitimate concerns about consistency, any attempt at standardization carries the risk of settling for the lowest common denominator, or even the risk of a state that abdicates its responsibilities—a state whose unilateral initiatives undermine the legal system in question just as much as they deviate from it. Rather than succumbing to the temptation to copy existing models, recent history suggests that we should instead, where

appropriate, rise to the challenge of constructively integrating existing regimes. Such an effort to integrate these regimes—covering the high seas, the deep seabed, and Antarctica—would also help prevent the risk of excessive fragmentation of rules and a proliferation of decision-making. It is therefore worth noting that, although originally established outside the UN framework, the ATS quickly became the subject of periodic reviews within the United Nations General Assembly and analyses aimed at integrating it with the law of the sea, which was then in the process of being developed. Ensuring this integration requires sustained cooperation, supported by dedicated institutional frameworks and adequate financial resources. In light of the recent success of a new agreement complementary to UNCLOS, dedicated to the conservation and sustainable use of marine biological diversity beyond national jurisdiction (the so-called BBNJ Agreement for *Biodiversity Beyond National Jurisdiction*), shouldn't efforts focus first on consolidating the existing system by promoting the integration of the various legal regimes? Article 5 of the BBNJ Agreement, which requires an interpretation “*that does not undermine*” existing frameworks and relevant international bodies, combined with a general obligation of enhanced cooperation (BBNJ Agreement, Art. 8), could thus be interpreted as an incentive to better coordinate systems in order to ensure the coherence of collective action in the service of humanity's interests.

We must therefore give diplomacy time to work: a diplomacy that, if possible, remains shielded from the turbulence of recent events; a diplomacy that listens to the findings of science; a diplomacy that, as it works to foster cooperation within the ABNJs, can finally still give meaning to the concept of Humanity.

Thomas LECLERC³ for POLAR WATCH⁴

³ Associate Professor in Public Law, Université de Bretagne Occidentale, UMR AMURE, France.

⁴ The opinions expressed in this article are the responsibility of the author.

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