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A Report of the CSIS Europe Program

# History Lessons for the Arctic

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What International Maritime Disputes  
Tell Us about a New Ocean

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# Acknowledgments

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The Arctic captures our imagination as it did centuries ago when brave explorers tested the limits of human endurance to begin to understand this vast and unforgiving region. In the twenty-first century, a rapidly thawing Arctic Ocean frightens us as we attempt to understand the global implications of such significant climate change; at the same time, the region heightens our collective curiosity to visit and explore its great economic potential.

This research effort drew lessons from three unique geographies and histories: the 1920 Svalbard Treaty, the 1936 Montreux Convention, and the 1961 Antarctic Treaty. Three contributing authors, Alan D. Hemmings, Kristine Offerdal, and Nilufer Oral, shared their extraordinary knowledge of these international regimes and were given an intellectual challenge of their own: What does their knowledge about these regimes and their historic evolution tell us about the Arctic? Needless to say, we learned together. CSIS thanks the authors for their willingness to explore this challenge with us.

With a compass at the intersection of history and geography, this is the intellectual adventure that the Brzezinski Institute has encouraged us to take. This is an unusual comparative analysis, and criticism could be warranted that three disparate historical regimes hold no particular relevance for the Arctic. And therein lies the challenge and the opportunity. We identified six lessons for the Arctic. Can you identify more?

# Executive Summary

*History Lessons for the Arctic: What International Maritime Disputes Tell Us about a New Ocean* examines three historical maritime disputes to draw lessons and insights for the future of maritime governance in a rapidly transforming Arctic. The historical case studies—the 1920 Svalbard Treaty and the implementation of the fisheries protection zone in the Svalbard Archipelago; the 1936 Montreux Convention and the challenge of adapting this instrument to modern maritime requirements amid increased regional tensions in the Black and Eastern Mediterranean Seas; and the 1961 Antarctic Treaty and the efforts leading to the establishment of a marine protected area (MPA) in the Ross Sea—are highly instructive cases for a region that also must balance a confluence of international economic development, environmental protection, and security concerns along strategic and ecologically sensitive maritime spaces.

While historically unique, six important lessons for the Arctic and its future governing needs were gleaned that address challenging geography, the assertion of national sovereignty, and the pursuit of shared environmental goals. It is hoped that these lessons can inform the development of future Arctic governance structures and mechanisms.

## LESSON 1: ACCEPTING LIMITATIONS ON SOVEREIGNTY

Countries with the closest geographic proximity or declared claim to the disputed area accepted some limitations on their sovereign control of maritime or, in the case of the Antarctic, maritime and terrestrial space. This is a particularly relevant lesson for the Arctic.

## LESSON 2: THE IMPLICATIONS OF MILITARIZATION IN ECOLOGICALLY SENSITIVE MARITIME AREAS

Each historic case study addressed the issue of military presence in different contexts, but the goal in each case was to demilitarize, regulate military passage, or prevent any militarization. This is a

slightly less relevant lesson as there is already a significant military presence in the Arctic that will be difficult to restrict owing to territorial defense purposes.

### **LESSON 3: REGULATORY STEWARDSHIP—LIKE SCIENCE—IS AN ASSERTION OF SOVEREIGNTY**

Economic development and the challenge of environmental and ecological sensitivity was addressed in each case, typically through regulatory processes. This reality, along with the physical presence of scientific research stations, equates to projections of sovereignty. And while a consensus-based approach to process and governance promotes cooperation on issues like public safety and environmental protection, individual states solidify their sovereignty through caveats or restrictions. This lesson holds true for the Arctic.

### **LESSON 4: MODERNIZING GOVERNANCE REGIMES IS A DIFFICULT AND POTENTIALLY FRAUGHT TASK, BUT IT CAN EVENTUALLY LEAD TO POSITIVE RESULTS**

In each case study, the dispute resolution mechanisms struggled to successfully modernize in light of changing geopolitical dynamics. A consensus-based approach to governance and economic development can preserve sensitive ecosystems like the Arctic, but when consensus cannot be achieved, institutional development is effectively arrested. This is a cautionary lesson for the consensus-based Arctic Council.

### **LESSON 5: THE DECEPTIVE NATURE OF EXCEPTIONALISM**

All three treaties serve as exceptions to international maritime governance enshrined in the UN Law of the Sea Treaty (UNCLOS) as recognized under Article 35(c) and illustrate that their exceptionalism stunts governance development largely because of geopolitical considerations. Encouragingly, UNCLOS is the Arctic's principal governance framework.

### **LESSON 6: THE CONSTANT OF GREAT POWER POLITICS**

The specter of geopolitics was consistently present in all three case studies no matter how much effort was put into shielding these disputes. While great power politics can be successfully suppressed and limited to ensure stability, it never completely dissipates. Officials should be more circumspect when describing the Arctic as an exception to great power tensions.

## A FINAL ARCTIC LESSON

If policymakers can find an adaptive equilibrium between sovereignty and national interests, on the one hand, and broader international interests of stability, security, and environmental protection, on the other, a promising future for governing the Arctic can be secured.



# Lessons for the Arctic: Developing an International Normative Framework for a New Ocean

Heather A. Conley

## INTRODUCTION

Warming twice as rapidly as anywhere on the planet, the Arctic is quickly transforming into a new, “blue-water” ocean. This new ocean is also fast becoming a critical testing ground, where established international maritime norms and values confront profound climate impacts, increased economic activity, and a heightened geopolitical profile. To date, governance of the Arctic has greatly benefited from the 1982 UNCLOS; the intergovernmental forum Arctic Council of eight Arctic states created in 1996; and a web of subregional, regional, state, and international fora designed to enhance marine environmental and fisheries protection, foster greater scientific cooperation, and strengthen maritime safety along strategic sea routes. Yet despite these promising governance trends, state-based assertions of power and jurisdiction in the Arctic maritime domain are returning to the region. The escalation of geopolitical tensions between the West and Russia; as well as the increased engagement of non-Arctic states and nonstate actors who seek to assert influence demand new policy approaches and an urgent requirement to identify innovative policy and governance solutions for the Arctic region.

When confronting new policy challenges, it is valuable to reflect on historical lessons that have similar geographic and functional attributes. In the case of the Arctic, what lessons can be learned from a desire to protect fragile marine environments, pursue economic development, and address overlapping sovereign claims? Are there common elements that have either encouraged or deterred progress in resolving maritime disputes? What international instruments and organizations were most helpful in resolving these challenges? What issues were unable to be overcome? What knowledge gaps exist, and what must be better understood in a modern context?

Three authors, Dr. Kristine Offerdal, an associate professor at the Institute for Defense Studies in Norway, Dr. Nilufer Oral of the faculty of law at Istanbul Bilgi University in Turkey, and Dr. Alan D. Hemmings, adjunct associate professor at the University of Canterbury's Gateway Antarctica Centre for Antarctic Studies and Research in New Zealand (based in Perth, Western Australia), have helped us draw on their knowledge of three international maritime disputes historic case studies that literally span the globe: from the "top" of the Arctic Circle to the critical international passage that links Eurasia to Europe and finally to the "bottom" of the world in the Southern Ocean in Antarctica. The three case studies equally span a broad time horizon and evolution of international law, stretching from World War I to the interwar period to the depths of the Cold War. Each historic case study is an instructive lesson in the development of mechanisms that sought to simultaneously address challenging geography, assert national sovereignty, and pursue shared environmental goals.

By examining how the confluence of international economic development, environmental protection, and security concerns along strategic and ecologically sensitive maritime spaces were historically addressed, we can glean six important lessons for the Arctic and its future governing needs.

## HISTORY LESSONS

### Lesson 1: 1920 Svalbard Treaty

The development of the 1920 Svalbard Treaty sought to preempt competing territorial claims over the Svalbard archipelago in the Barents Sea. The Svalbard Treaty (formerly known as the Spitsbergen Treaty) granted signatory states nonexclusive economic rights to the Svalbard archipelago and its surrounding waters, while reserving sovereignty over the archipelago for Norway. The 14 original "High Contracting Parties" included the United States, Denmark, France, Italy, Japan, the Netherlands, Norway, Sweden, and the United Kingdom. By 1925 Germany, China, and the Soviet Union had signed the treaty. Today, there are more than 40 signatories, including most European states, as well as such geographically diverse countries as Afghanistan, North Korea, and South Africa. Several parties to the treaty have had a long-term presence on Svalbard in the form of scientific research centers. While the treaty was designed to resolve the issue of sovereignty along with economic rights and access to resources, there have been long-standing disputes between Norway and the other signatories, particularly between Russia, Iceland, and the European Union, including Portugal and Spain, over economic development of the region, specifically fishing rights, which have yet to be resolved.

### Lesson 2: 1936 Montreux Convention

Signed in 1936, the Montreux Convention Regarding the Regime of the Straits delineates the extent of Turkish control over the Turkish Straits (Strait of Istanbul and the Strait of Çanakkale). While the convention grants Turkey sovereignty over of the Straits, it imposes several limitations. For example, the convention guarantees the free passage of civilian vessels in peacetime, including cargo, and regulates the transit of naval warships through the Straits. In times of peace, there is no express limitation on arms shipments outside the rules regulating the passage of military weapons

and Turkey's right of self-defense. The safety of vessels passing through the Istanbul Strait has been of particular concern in recent years as the volume of traffic, particularly oil and gas shipments, has increased significantly and maritime accidents in the Straits pose an increasing risk to public safety. To address these issues and the limitations of the convention, in 1994 Turkey adopted the Maritime Traffic Regulations for the Turkish Straits and the Marmara Region, which introduced a new regulatory regime to ensure the safety of navigation, life, and property, and to protect the environment in the region without violating the Montreux principle of free passage. However, several states, including Russia, Greece, and Cyprus, objected to the new regulations, arguing that it would limit the rights of ships using the Straits. Turkey revised the regulations in 1998 and the IMO approved traffic safety measures for the Straits that included a traffic separation scheme and a vessel-traffic system that was installed in 2004. Governments approved the measures based on recorded safety improvements in the Straits.

### Lesson 3: 1959 Antarctic Treaty and Subsequent Antarctic Treaty System (ATS)

The Antarctic Treaty, and the wider set of instruments addressing sealing, fishing, and environmental protection with which it forms the ATS, involving 59 states, sets aside Antarctica—a frozen landmass surrounded by water—as a scientific preserve, establishes freedom of scientific investigation, bans measures of a military nature, seeks to safeguard the Antarctic environment, manages the existing resource activities of marine harvesting and tourism, and prohibits mineral resource activities. The Antarctic Treaty in effect “freezes” the positions on territorial sovereignty of the seven claimants and other states that do not recognize these claims. A major recent focus in Antarctica has been on improved management of the marine environment, where fishing pressures and climate change have encouraged some states to propose large marine protected areas (MPAs), consistent with the 1982 Conservation of Antarctic Marine Living Resources (CCAMLR). While a first MPA was designated in 2009, subsequent proposals for MPAs in the Ross Sea (New Zealand and the United States) and off East Antarctica (Australia, the European Union, and France) were not successful, largely as a result of opposition by Russia and China. However, in an October 2016 meeting of the CCAMLR commission chaired by Russia, a negotiation breakthrough occurred, and an agreement was reached to designate the Ross Sea as a MPA. While details have yet to be finalized, the Ross Sea MPA will come into effect on December 1, 2017. Hailed as a success by all parties, the agreement was reached despite increased geopolitical tensions with Russia over Syria and the crisis over Ukraine.

## LESSONS FOR THE ARCTIC

### Lesson 1: Accepting Limitations on Sovereignty

In each of the historic case studies, countries with the closest geographic proximity or declared claim to the disputed area accepted some limitations on their sovereign control over a specific maritime domain or, in the case of the Antarctic, both the maritime and terrestrial domains. This is significant because the concept of the nation-state in the historical context of the 1920s, 1930s, and 1960s was firmly rooted, despite the collapse of the Ottoman and Russian Empires and the two world wars of the twentieth century. By contrast, in the late twentieth- and twenty-first-century context, accepting some form of limitation on sovereignty is not considered particularly

significant (the creation of the European Union, for example, is one of the greatest experiments in the transfer of national sovereignty by 28 countries to a supranational body). These cases occurred during a time when the modern concepts of cross-border environmental cooperation, transnational threats, and the global commons,<sup>1</sup> which require a collective response and limitations to national pursuits, had not yet come into fashion.

In the case of the Svalbard Treaty, the kingdom of Norway accepted limitations on its sovereignty over the Svalbard archipelago a mere 15 years after becoming an independent nation in 1905. These limitations included granting signatories to the Svalbard Treaty the same rights of access to Svalbard as Norway under the principle of nondiscrimination (meaning that Norway cannot introduce preferential treatment based on nationality). For example, signatories would be granted access to the exploitation of natural resources. But in return for agreeing to such limitations, Norwegian authorities were granted the right to regulate all activity on and around the Svalbard archipelago. The time period during which the negotiations took place was also conducive to the acceptance of these limitations as well as the construct of the deal itself. Political positioning began prior to the outbreak of World War I but was suspended during the war. Formal negotiations only began after the war ended. With the collapse of the Russian Empire in 1917, the Soviet Union was not yet recognized and was absent during the 1920 negotiations. Norway suffered commercial losses during the First World War and was compensated for its losses thus leading to results of the initial signing of the Svalbard Treaty.

The Montreux Convention was also adopted against the backdrop of conflict. In 1923, following the collapse of the Ottoman Empire and its war of independence, the Republic of Turkey was founded. Thirteen years later the Montreux Convention was signed. But unlike the more geographically isolated Arctic region, the Turkish Straits had been a geostrategically significant region for centuries. This very young republic understood the role and impact of brutal great power conquest and control over the Turkish Straits specifically during World War I. The conclusion of World War I and the signing of the Lausanne Peace Treaty paved the way for the demilitarization of the Turkish Straits. As great power dynamics darkened again prior to the outbreak of World War II, in 1935 Turkey requested that the parties to the Lausanne Treaty convene on the question of the remilitarization of the Straits. Turkey was given full control over the Straits, which under the Lausanne Treaty on the Straits had been given to an International Straits Commission. However, Turkey's sovereignty remained limited to the extent of recognizing the "freedom of passage and navigation" of merchant vessels that was also part of the Lausanne treaty. Turkey was, however, granted the ability to impose a charge (general fees rather than service related fees that are accepted under international law) on *all* ships in nonstopover (without calling at a port in the Straits) passage through the Straits. Vessels could also be stopped for sanitary inspection, something that is not allowed under current international law. Foreign states were also required to give prior notice to the Turkish authorities for the passage of war vessels through the Straits. The Montreux Convention also imposes vessel size and quantity limitations, as well as restrictions on the type of war vessels allowed passage, which is also not practiced under current international law.

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1. *Global commons*, according to the United Nations Environment Program, refers to domains or areas that lie outside the political reach of any one nation-state.

The Antarctic was the historic latecomer as the continent, although massive in size, only became geopolitically relevant following the end of World War II. As Cold War tensions grew, it was feared that Antarctica would become a new contested space between the Soviet Union and the United States. To prevent competing sovereign territorial claims, the Antarctic Treaty was designed to suspend any sovereign's ability to make territorial claims while the treaty was in force. It states,

No acts or activities taking place while the present Treaty is in force shall constitute a basis for asserting, supporting or denying a claim to territorial sovereignty in Antarctica or create any rights of sovereignty in Antarctica. No new claim, or enlargement of an existing claim, to territorial sovereignty in Antarctica shall be asserted while the present Treaty is in force.<sup>2</sup>

Hence, all sovereigns accepted limitations on their ability to operationalize their claims. Sovereignty issues, however, were appropriately channeled into jurisdictional control over a nation's citizens, specifically when and where they were physically located in the Antarctic. Because the presence and activities of a nation's citizens revolved around scientific research, science is increasingly viewed as an equivalent to national presence and a project of sovereignty in Antarctica.

In all three cases, there was a willingness to accept some form of sovereign limitation or a perpetual suspension of sovereignty. Regulatory limitations were accepted by the two newly independent and recently formed countries, Norway and Turkey, as these young nations needed to carefully balance their position vis-à-vis a much larger neighbor (Russia) amid geopolitical headwinds. The suspension of sovereignty in Antarctica was also due to great power rivalry between the United States and Soviet Union over an unpopulated space.

Thankfully for the Arctic, there is only a small part of the Central Arctic Ocean around the North Pole where the question of sovereignty is still undecided. And although expressions of sovereignty are in abundance for the five Arctic coastal states—Canada, Denmark (via Greenland), Russia, Norway, and the United States—they assert these claims through the Law of the Sea Treaty in the form of the submission of scientific claims to extend their outer continental shelf in the Arctic (with the exception of the United States, which has not yet ratified UNCLOS).

It is interesting to contemplate the role that science and national scientific presence plays in the assertion of sovereignty. While this is not true for the Montreux Convention, physical presence and science are elements of both the ATS and the Svalbard Treaty, where signatories can have a physical presence in the region. With regard to Svalbard, 10 countries have a physical and institutional presence in the research town of Ny-Ålesund in the form of scientific research centers. In the Antarctic, increasing one's scientific presence similarly enhances and equates to a nation's sovereign presence. For example, in recent years China has substantially increased its scientific presence in both Antarctica and in the Arctic. In the Arctic, China, as a permanent observer to the Arctic Council since 2013, has a new scientific research center in northern Iceland and Greenland, and has requested permission to place a scientific research station in northern Canada, in addition to its scientific presence on Svalbard. In the Antarctic, China has steadily upgraded its presence, increasing its level of engagement, including building a new icebreaker, building new bases in the

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2. The Antarctic Treaty, Article IV (2), December 1, 1959, [http://www.ats.aq/documents/ats/treaty\\_original.pdf](http://www.ats.aq/documents/ats/treaty_original.pdf).

Ross Sea region—which now totals five<sup>3</sup>—and commissioning its own Antarctic air squadron to resupply research expeditions and conduct scientific research.<sup>4</sup> While no one doubts the cooperative and collaborative nature of international scientific research and understanding, science can be exploited for nationalistic purposes in a way that it was not intended. It will be interesting to observe if the October 2016 designation of the Ross Sea MPA—which allows research and monitoring of this pristine area—will prompt nations to increase their scientific presence in the region.

## Lesson 2: The Implications of Militarization in Ecologically Sensitive Maritime Areas

Unsurprisingly, each historic case study addressed the issue of military presence but in different contexts. In the case of Svalbard, Norway may not “create nor allow the establishment of any naval base . . . and not . . . construct any fortification . . . [and not use Svalbard] for warlike purposes.”<sup>5</sup> However, the Svalbard Treaty has been subject to differing interpretations between Norway and Russia on this topic that have led Russia to argue that Svalbard should be a demilitarized zone. In the case of the Montreux Convention and although Turkey may not inhibit passage of military vessels, foreign states are required to give Turkish authorities prior notice before a warship traverses the Straits. There are additional restrictions placed on the transit of military vessels through the Turkish Straits based on vessel size and quantity limitations, as well as restrictions on the type of war vessels that are allowed passage. The Montreux Convention further includes a unique provision that allows Turkey to prohibit the passage of all military vessels if Turkey is itself threatened. Finally, the Antarctic Treaty prohibits “measures of a military nature” and elevates the use of Antarctica for only “peaceful purposes.”<sup>6</sup> To emphasize this point, scientific stations and equipment (as well as ships and aircraft at points of discharging or embarking materials or personnel) are subject to inspection by designated observers. Aerial inspection is also unrestricted, and discussion over the use of drones for inspection purposes are ongoing.<sup>7</sup> The Antarctic Treaty also prohibits nuclear testing and disposal of radioactive wastes (the latter provides for review should there be a permissive international regime but this has not occurred).<sup>8</sup> Nuclear components including the reactor “Nukey Poo” at the U.S. McMurdo Station and various other remote weather stations deployed by the United States and the Soviets have gradually been phased out.

The military dimensions to these international dispute settlements are designed to either end military engagement or to ensure it does not begin. The case of Antarctica is an example of the latter. The military dimension had not presented itself as a significant issue; therefore, it was more readily agreed to prohibit militarization before it began. Restrictions on the nuclear dimension were also a contemporary reflection following the use of two nuclear bombs in the previous

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3. Anne-Marie Brady, “Evaluating China as an Antarctic State,” Woodrow Wilson International Center for Scholars, May 13, 2014, <https://www.wilsoncenter.org/event/china-and-antarctica>.

4. Shannon Tiezzi, “China to Establish Antarctic Air Squadron in 2016,” *Diplomat*, February 17, 2016, <http://thediplomat.com/2016/02/china-to-establish-antarctic-air-squadron-in-2016/>.

5. Treaty between Norway, the United States of America, Denmark, France, Italy, Japan, the Netherlands, Great Britain, Ireland, the British overseas dominions, and Sweden concerning Spitsbergen signed in Paris, February 9, 1920, Article 9.

6. Antarctic Treaty, Article I.

7. *Ibid.*, Article VII.

8. *Ibid.*, Article V.

decade and the increased international concern about the potential outbreak of nuclear war. The Turkish Straits, in contrast, had been plagued by military intervention for centuries. The Montreux Convention therefore reflected the reality that regional military use would continue, and uniquely attempted to regulate military activity—so uniquely, in fact, that the Montreux Convention contravenes the 1982 Law of the Sea Treaty.

The Svalbard case is a blend of these two examples. While the archipelago itself was not a militarized zone, the Arctic grew over time in its strategic significance to the region's great powers, resulting in significant military buildup as well as the placement of nuclear weapons. Thus, an implication of the Svalbard Treaty was that Svalbard could not be used for war purposes despite significant military activity in the Arctic region during World War II and the Cold War. Since World War II, the Arctic region has maintained fairly robust military infrastructure as it is home to the U.S.-based missile defense system and Russian Federation's strategic nuclear forces. After a post-Cold War decline in military forces in the Arctic, there has been an increase in military activities and exercises in the Arctic, particularly as the Russian government seeks to reinvigorate its military and civilian presence in the Russian Arctic. Thus, it appears unlikely that the United States, Russia, or the other three Arctic coastal (and NATO member) states would accept limitations on its military deployments and presence in the Arctic.

### Lesson 3: Regulatory Stewardship—like Science—Is an Assertion of Sovereignty

Each historic case addressed economic development and the challenge of environmental and ecological sensitivity primarily through a regulatory lens. Economic development, in the case of the ATS, was frozen in the same way that the parties' sovereign claims had been suspended. Thus, any steps toward economic development—whether it was hunting seals, harvesting Antarctic krill, tourism, or mining—could occur *only* through consensus and collective action by the parties to the treaty. And if consensus was reached, the economic activity was regulated. For example, tourism was permitted but no more than 500 passenger vessels were allowed in the waters around Antarctica. As consensus became harder to reach, the default mechanism was to prevent all activity, such as mining.

Some have suggested that the ATS's consensus-based and building-block approach to economic development should be replicated in the Arctic. But this approach comes with several caveats. First, the ATS has successfully contained problems but it has not resolved them. When consensus cannot be reached, further action is prevented new challenges as a multitude of economic activities and preservation activities (like the numerous attempts since 2011 to designate a Ross Sea MPA, which was only finally agreed to in October 2016) cannot be resolved. Moreover, there was very little economic activity in and around Antarctica prior to the ATS, and the ATS prevents countries from claiming territorial rights. Both of these conditions are absent in the Arctic. It is also important to note that institutional development in the Antarctic has been effectively arrested since the 1991 Madrid Protocol, which prohibits mineral resource activity if consensus among the parties cannot be reached.

Economic development and regulatory prerogatives are most clearly outlined in the Svalbard Treaty. A signatory to the treaty is able to participate in nondiscriminatory economic development

of Svalbard under the auspices of Norwegian regulatory stewardship. To date, economic engagement in Svalbard has principally focused on Norwegian and Russian economic interaction in the fisheries and the mining sectors, with more varied national participation in the commercial fisheries sector. With the exception of fisheries for Norway, economic development on Svalbard today equates to maintaining its sovereignty over the archipelago. Likewise for Russia, its motivations historically included economic gain but are today more focused on an assertion of its national presence and rights. In an effort to gain concessions when feasible, Russia occasionally reminds the Norwegian authorities that a political and military imbalance exists in Russia's favor. Considering this dynamic as well as the Arctic's increasing economic value, Norway's role as an economic steward is being challenged, particularly in its management of fisheries. Although Norwegian authorities allow all interested states to fish in the Fisheries Protection Zone, Norwegian regulators have set specific limits on the size of mesh, the amount of fry, and have introduced cod quotas for third parties, which countries like Spain strongly oppose.

Greater regulatory processes to promote public safety and environmental protection became a prominent feature of the Montreux Convention as it evolved over time. Owing to the treacherous journey through the narrow Turkish Straits and following several significant accidents that caused loss of life and environmental damage, there was an urgent need to improve safety. This led to a proposed vessel-traffic management scheme and the development of regulations that were subsequently adopted as the 1994 Maritime Regulations for the Turkish Straits.<sup>9</sup> The 1994 regulations included, among other things, defining large vessels as those 150 meters or more in length and deep draft vessels as being 10 meters or more; introducing a mandatory ship reporting system; restricting two-way passage of two or more large vessels carrying dangerous, hazardous, noxious, or nuclear cargo; vessels between 150 and 200 meters in length were not allowed to cross narrow areas of the Strait at the same time; closure of shipping traffic in the Straits depending on weather conditions, deep draft vessels, nuclear-powered vessels, vessels carrying dangerous, hazardous, or noxious cargo; and the imposition of mandatory tugboat escorts for vessels having a draft of 54–58 meters. These regulations were viewed with concern as limiting factors unilaterally imposed by the Turkish authorities. As the only meaningful change to the Montreux Convention since 1936, it was seized on as an opportunity to reopen or question the unique characteristics of the Convention itself by the parties to the Convention, particularly Russia.

If Lesson 1 suggests that states agree to accept some limitations on their sovereignty, then Lesson 3 holds that sovereigns seek to regain some of their loss of sovereignty through equivalent means, such as regulatory demands and an enhanced physical presence expressed through science or economic activity.

#### Lesson 4: Modernizing Governance Regimes Is a Difficult, Long and Potentially Fraught Task . . . but Can Produce Positive Results in the End

In each case study, the frameworks struggled to successfully modernize in light of changing geopolitical dynamics. The single best example of the difficulties in adapting modern regimes is the Montreux Convention. It was well understood that the Turkish Straits needed enhanced safety

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9. *Ibid.*, at 344. The regulations went into effect July 1, 1994.

measures that culminated in a 1990 study that eventually became the 1994 Maritime Regulations for the Turkish Straits. In 1993 the Turkish government decided to submit a proposal to the IMO to consult the body on the establishment of a vessel traffic separation scheme in the Straits in line with one of the proposed elements of the new maritime regulations, which would serve to replace an existing rule of navigation under the Montreux Convention.<sup>10</sup> While it was not Turkey's intention, the government accidentally, and for the first time since 1936, reopened the regime regulating use of the Turkish Straits in a multilateral forum. Heated debate and controversy ensued which lasted until 1999 with Russia at the diplomatic forefront to reopen the Montreux Convention in its entirety. Turkey's principal aim had been to simply *consult* the IMO on the establishment of the new traffic separation scheme and draw attention to the growing dangers of shipping accidents in the Straits. An additional complicating factor was the emergence of Caspian energy and significant pipeline projects that heightened the geopolitical stakes in the region, as these reserves were now accessible to Western development after the dissolution of the Soviet Union. Geopolitically, the pipeline would be a significant development in breaking the Russian monopoly of pipeline infrastructure to Europe. It would also provide a by-pass route for the navigationally risky and environmentally sensitive Istanbul Strait. This long, protracted fight largely centered upon mandatory or "strongly advised" actions that sought to expand Turkey's sovereignty over the Straits to include prior notification of vessel size, whether in ballast or not, and whether vessels were carrying hazardous and noxious cargo. Turkey strongly objected to any discussion of its national legislation in the IMO as being a political infringement on the otherwise technical mandate of the IMO as well as touching on Turkish sovereignty.<sup>11</sup> Despite a challenging five-year negotiating period, regional cooperation was ultimately strengthened, and navigation of the Straits was modernized.

To a lesser extent, the ATS also struggled with attempts to modernize. Its institutional development was effectively stymied from 1991 to late 2016 as signatories were at loggerheads over the development of MPAs in the Ross Sea. Because only consensus can achieve progress, decisionmaking stagnation can be perpetrated indefinitely. Russia had been at the forefront of this strategy by preventing the development of an MPA with a number of states expressing concern about protecting their marine harvesting activities in Antarctica. At long last, the October 2016 agreement designating a Ross Sea MPA is a welcome breakthrough. Time will tell if the agreement will bolster political will and provide the impetus for further cooperation and institutional development.

In contrast, there have not been any recent attempts to modernize or adapt the Svalbard Treaty. Current dynamism within the treaty relates to challenging Norway's regulatory authority by asserting alternative forms of sovereignty through economic and scientific research means. Because of its close regional proximity and great power interests near the Svalbard archipelago, Russia is at the forefront of these challenges.

The Arctic region thus far has pursued an informal adaptive governing framework to modernize as Arctic states have shied away from embracing formal treaties and structures. It has successfully

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10. Turkey initiated the process by submitting an information paper to the 62nd Maritime Safety Committee meeting of the IMO on March 26, 1993 (IMO Doc. MSC 62/INF.10); Nihan Ünlü, *The Legal Regime of the Turkish Straits* (The Hague: Martinus Nijhoff, 2002).

11. IMO Doc. 67/WP.10/ADD.3, statement by Turkey, December 3, 1996.

negotiated international search and rescue, as well as international oil spill response agreements to address new circumstances, yet its informality has led to inconsistent and ad hoc structures that produce political complications and organizational complexities of their own.<sup>12</sup>

## Lesson 5: The Deceptive Nature of Exceptionalism

All three cases studies share the attribute of exceptionalism. Although all three treaties were negotiated prior to UNCLOS in 1982, they continue to serve as exceptions to international maritime governance enshrined in the UN Law of the Sea Treaty as recognized under Article 35(c). An attempt to align the Montreux Convention to international maritime legal standards through the IMO entailed a lengthy process, geopolitical intrigue, and a crossing of so-called red lines of Turkish sovereignty, which reaffirmed the historic exception to the international normative rules. The fact that the ATS prohibits sovereign terrestrial or maritime claims means UNCLOS is also not applicable, although the creation of this unique treaty system had the initial advantage of creating a governance boundary that eliminated the overlap or intrusion by other regional or global instruments. Yet as development in Antarctic governance had largely been arrested since the early 1990s, recent global instruments and regional fishery management organizations present relationship and responsibility challenges to the ATS.<sup>13</sup> The Svalbard Treaty has not made a meaningful effort to evolve.

The lesson for the Arctic is that creating an exceptional regime has its downsides. There is a growing amount of literature and supportive official governmental discourse that argues the Arctic region will remain exempt from a return of tensions between Russia and the West. All three case studies illustrate that their exceptionalism in reality stunts governance development largely owing to geopolitical considerations. But here the Arctic region is truly unexceptional to the case studies: UNCLOS is the Arctic's principal governance framework.

There is also a view that a consensual governance model protects or immunizes a particular dispute from a return to instability and potential conflict. Both the ATS and the Arctic Council share the requirement for consensus. But consensus comes with a note of caution. Despite the recent Ross Sea MPA breakthrough, the ATS demonstrates that if governance progress can only be achieved through consensus, governance evolution can stagnate or be outright halted. This in turn makes the governance regime less responsive to best environmental and governance practices, exposing the region to great power politics, and ultimately leading to instability. Although the Arctic Council has evolved by increasing the number of observers and creating new instruments

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12. Heather A. Conley and Matthew Melino, *An Arctic Redesign: Recommendations to Rejuvenate the Arctic Council* (Washington, DC: CSIS, 2016), [https://csis-prod.s3.amazonaws.com/s3fs-public/legacy\\_files/files/publication/160302\\_Conley\\_ArcticRedesign\\_Web.pdf](https://csis-prod.s3.amazonaws.com/s3fs-public/legacy_files/files/publication/160302_Conley_ArcticRedesign_Web.pdf).

13. Inter alia, the Law of the Sea Convention, and the Convention on Biological Diversity, adopted in Rio de Janeiro, June 5, 1992, entered into force December 29, 1993, 1760 UNTS 79; Convention for the Conservation of Southern Blue Fin Tuna, adopted May 10, 1993, entered into force May 20, 1994, 1819 UNTS 360; Convention on the Conservation and Management of Fishery Resources in the South East Atlantic Ocean, adopted April 20, 2001, entered into force April 13, 2003, 41(2) ILM 257; Southern Indian Ocean Fisheries Agreement, adopted December 29, 2006, entered into force June 21, 2012, [2012] UNTS 273; Convention on the Conservation and Management of High Seas Fishery Resources in the South Pacific Ocean, adopted November 14, 2009, entered into force August 24, 2012, [2013] UNTS 173.

such as the Arctic Economic Council and the Arctic Coast Guard Forum, these new developments have initially complicated and confused the effectiveness of what once was a small, regionally focused intergovernmental forum. Critically, this also leads to questions over future focus and effectiveness of the forum.<sup>14</sup>

## Lesson 6: The Constant of Great Power Politics

The specter of geopolitics was consistently present in all three case studies. In the case of the Montreux Convention, centuries of geopolitical intrigue over and fighting for maritime access to the warm waters of the Mediterranean and Black Seas necessitated an international regime to ensure regulated access to the Turkish Straits and prevent future conflict. Russia played a dominant role in the outcome of the regime prior to the Lausanne Peace Treaty and at its inception in 1936, as well as in the mid-1950s as Turkey attempted to modernize the regime. The United States, however, was not a party to the Montreux Convention, although it was certainly very interested in maintaining peace and stability in the region as well as preserving freedom of navigation and commerce for American vessels through the Turkish Straits. The United States would later take a more active role in the region in the aftermath of World War II and would seek to protect the Montreux Convention from change by outside powers, particularly the Soviet Union. Concurrently, the United States took a more active security and containment role in the region, first with the articulation of the 1947 Truman Doctrine and, second, when Turkey became a member of NATO in 1951.

The ATS was defined and designed to prevent Antarctica from becoming a victim of great power politics. Its efforts in this regard have been successful because of the imposition on the limits of jurisdictional sovereignty and the requirement of consensus by the parties to initiate development. However, even these dramatic steps have not completely eliminated great power politics. Until very recently, Russia blocked consensus and prevented the creation of a marine protected area in the Ross Sea. Moreover, great power politics have simply been channeled into different means. The United States, Russia, and China have all used science and the physical number of research stations on Antarctica as a proxy for the projection of sovereignty. The United States has engaged diplomatically through its science presence and its role in CCAMLR.

The Svalbard archipelago has experienced historic cycles of great power politics as well as periods of reduced tensions and international collaboration. Like the ATS, the United States, Russia, and China are all signatories to the Svalbard Treaty. The region has experienced periods of greater international collaboration when the Soviet Union and later Russia was unable to be an active player in the region. During periods of heightened Russian physical presence and engagement in the region, the Svalbard Treaty was probed and tested. The United States also has a unique security relationship to Norway as a member of NATO, which creates certain great power tensions in the region. A future test for the region will be the greater presence of China in the Arctic region through its growing scientific and economic agenda. As noted in Lesson 1, science has been used as a proxy for the projection of sovereignty on Svalbard with 10 countries maintaining scientific research centers in Ny-Ålesund. China has substantially increased its scientific presence in both Antarctica and in the Arctic. The United States has largely used international scientific collaboration

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14. Conley and Melino, *Arctic Redesign*.

and environmental protection through the Arctic Council and other multilateral fora as a means to mitigate sovereignty instincts, but its role in the Antarctic is similar to one of science as a sovereign presence.

## A FINAL LESSON

Three disparate international maritime dispute settlements—the Svalbard Treaty, the Montreux Convention, and the ATS—offer some interesting lessons, cautionary notes, and valuable insights regarding expressions of sovereignty with the need to balance shared access to fragile maritime environments where safety, economic development, and environmental protection intersect. All three case studies demonstrate that great power politics can be suppressed and channeled to promote stability but these forces never entirely dissipate. There seems to be no exemption or exception—no matter the durability of the international dispute settlement regime—from these dynamics.

But perhaps the final lesson for the Arctic is that if policymakers can find an adaptive equilibrium between sovereignty and national interests, on the one hand, and broader international interests of stability, security, and environmental protection, on the other, a form of Arctic exceptionalism could be achieved.

# The 1920 Svalbard Treaty

Kristine Offerdal

## Map 2.1. Svalbard



Source: Wikimedia Commons, [https://commons.wikimedia.org/wiki/File:Barents\\_Sea\\_map.png](https://commons.wikimedia.org/wiki/File:Barents_Sea_map.png).

## INTRODUCTION

Located in the Arctic Ocean approximately 650 miles from the North Pole, Svalbard archipelago is a group of islands north of continental Norway. In 1920 the Svalbard Treaty was signed, and it stands as a unique example both of how states were able to reach a shared resolution on an Arctic terrestrial dispute and of a state, Norway, agreeing to subject its sovereignty to stipulations. Despite the success of the Svalbard Treaty however, ongoing treaty implementation challenges remain, particularly those related to the principle of nondiscrimination and the geographical scope of the treaty, which has raised concerns related to the tax regime and resource management on the shelf and in the waters around the Svalbard archipelago, and to the question of military presence (Article 9 of the Svalbard Treaty). There are also differences in how to interpret restrictions on Norwegian sovereignty. Can the 1920 Svalbard Treaty be a future template for addressing Arctic maritime disputes and improving governance practices?

## THE SVALBARD TREATY

Prior to 1920 Svalbard was considered *terra nullius* and open for all states and stakeholders who wanted to take advantage of the area's rich resources. The most active states on Svalbard during these early years were Norway, Sweden, and Russia. Economic activities included hunting and coal extraction. Polar explorers also used the archipelago for expeditions into the unknown Arctic. After its independence from Sweden in 1905, Norway set out to establish international rules for the use of Svalbard while simultaneously seeking to include Svalbard in the kingdom of Norway. The famous polar expeditions and research activities of Fridtjof Nansen and Roald Amundsen, which included Svalbard, served as nation-building elements for the newly independent country.

Various solutions for Svalbard were discussed internationally, including a condominium with Norway, Sweden, and Russia as lead states. Norway sought a solution based on a broad international regime administered by Norway, but negotiations were halted with the outbreak of World War I. After the war, a third solution was discussed, namely, giving Norway sovereignty subject to stipulations. This ultimately became the outcome of the Paris negotiations of 1920. This solution was partly a token of appreciation of Norway's commercial fleet engagement and loss during the war as well as Norway's young, relatively weak, and small state status. Because of the 1917 Russian Revolution and its ensuing political turmoil, Russia was not part of the negotiations.<sup>1</sup>

The Svalbard Treaty granted Norway sovereignty over the archipelago, yet the treaty contains certain conditions that restrict the enactment of Norwegian sovereignty. First, stakeholders from signatory states enjoy the same rights of access to Svalbard as does Norway, for example, when it comes to exploitation of natural resources.<sup>2</sup> Norwegian authorities regulate all activity on Svalbard, but the principle of nondiscrimination in the treaty implies that Norway cannot introduce

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1. Rolf Tamnes, *Svalbard og stormaktene. Fra ingenmannsland til kald krig, 1970–1953*, Forsvarsstudier #7 (Oslo: Institutt for forsvarsstudier, 1991).

2. The original signatory states were Norway, the United States, Denmark, France, Italy, Japan, the Netherlands, Great Britain, Ireland, the British overseas dominions, and Sweden.

preferential treatment based on nationality. A number of signatory states have highlighted this point and criticized Norway for implementing preferential treatment, particularly related to Norwegian management of fisheries resources in the Fisheries Protection Zone around the archipelago.

Second, taxation of activity on Svalbard may not be used to increase the state revenues of Norway, but are restricted to the amounts needed for the administration of Svalbard. This point is of particular relevance to the (for now hypothetical) question of what management regime potential oil and gas development on the continental shelf around Svalbard should be subject to. Norway argues that the continental shelf around Svalbard is Norwegian and not subject to the Svalbard Treaty, while others do not necessarily share this view, implying that Norway cannot tax future petroleum extraction according to the model used elsewhere on the Norwegian continental shelf.

Third, according to Article 9 of the treaty, Norway may not “create nor allow the establishment of any naval base . . . and not . . . construct any fortification . . . [and not use Svalbard] for warlike purposes.”<sup>3</sup> This article of the treaty has been subject to differing interpretations among Norway and Russia, with Russia at times arguing that Svalbard should be a demilitarized zone.

The constraints in the treaty on Norwegian sovereignty have not posed significant challenges to Norway in the management of activity on the archipelago. However, Norwegian authorities naturally need to take the stipulations into account when developing their policies on Svalbard, which in essence internationalizes Norwegian policy toward Svalbard. Moreover, the constraints on Norwegian sovereignty and variations in the interpretations of the scope of the treaty have been used by Russian authorities in particular to challenge Norwegian policy. It has been relatively easy for Russia to “make a case” of Svalbard, although the practical implications of this have not been significant.

## THE 1920S AND 1930S

Western powers lost interest in the archipelago during the early years after the signing of the treaty. Matters pertaining to Svalbard were increasingly between Norway and the newly formed Soviet Union, particularly as the Soviet Union became more interested in and present in the Arctic during this period. Much of Norway’s Svalbard policy focused on ensuring that the Soviet Union committed itself to following the Svalbard regime.

In the early 1920s, the USSR linked the question of Soviet recognition of Norwegian sovereignty on Svalbard to that of Norway’s de jure recognition of the Soviet Union. Norway hesitated to be the only “Western” nation to de jure accept the USSR, and it was not until Great Britain’s first Labour government in 1924 recognized the Soviet Union that Norway did the same. Following this decision, the Soviet Union recognized Norway’s full sovereignty over Spitsbergen, including Bjørnøya in 1924.<sup>4</sup> Norway formally achieved sovereignty over Svalbard when the Svalbard Treaty

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3. Treaty between Norway, the United States of America, Denmark, France, Italy, Japan, the Netherlands, Great Britain, Ireland, the British overseas dominions, and Sweden, concerning Spitsbergen, signed in Paris, February 9, 1920, Article 9.

4. Sven G. Holtsmark, ed., *Naboer i frykt og forventning. Norge og Russland 1917–2014* (Oslo: Pax Forlag A/S, 2015), 48.

came into force in August 1925, although it was not until after the United States recognized the Soviet Union in 1933 that the USSR formally joined the Svalbard Treaty in 1935.

Norwegian sovereignty was secured through the Svalbard Treaty, but in the years that followed Norwegian authorities did little to manage activity on the archipelago. Coal companies, for instance, remained their own administrative units. Some commentators have suggested this was purposeful “nonpolicy”<sup>5</sup> or a “laissez-faire”<sup>6</sup> policy. Certainly Norwegian policy at the time reacted to developments. Today the Norwegian authorities take a more proactive approach to policy developments on the Svalbard archipelago.

The Soviet Union did not have an active policy toward Svalbard in the immediate aftermath of signing the Svalbard Treaty. Some observers assume that Svalbard has always been of strategic importance to Russia, but as Holtsmark finds, strategic considerations in relation to the archipelago were hardly present during these years.<sup>7</sup> However, the country gradually developed a more focused policy, which at first appeared to be motivated by the aim of securing coal supplies for the Kola Peninsula. In 1931 the USSR decided to implement a major expansion of the country’s coal development on Svalbard to support ongoing industrialization and the Russian Arctic’s development.<sup>8</sup>

Until the outbreak of World War II, Soviet Svalbard policy continued to be founded on economic considerations. Military strategic considerations were not part of the picture, and although the strategic value of the Russian Arctic increased throughout the period, overall attention to Svalbard was relatively low in Moscow. Perhaps as a result of both countries’ lack of focus on and attention to Svalbard, and the fact that the Soviet Union had committed to the Svalbard Treaty, there was little friction and relatively little contact between Norwegian and Soviet authorities about the archipelago during the first two decades following the signing of the Svalbard Treaty.<sup>9</sup>

## WORLD WAR II

With the outbreak of World War II in 1939, the German occupation of Norway in 1940, and the German attack on the Soviet Union in 1941, Svalbard held greater strategic military value to the great powers. To Moscow, Svalbard had a central location in supply lines between the USSR and the west and the Soviet Union’s access to the Atlantic Ocean from its bases in the northwest. Svalbard was included in the military operations of the Western powers after the German attack on the USSR, as northern Norway and adjacent ocean areas became more important in their strategies.

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5. Tamnes, *Svalbard og stormaktene*, 37.

6. Willy Østreng, *Det politiske Svalbard* (Oslo: Gyldendal norsk forlag, 1975).

7. Holtsmark, *Naboer i frykt og forventning*, 48–49.

8. *Ibid.*, 112–113. Trust Arktikugol was founded to manage the coal development from a headquarters in Barentsburg. Coal production was initiated from coal mines in Grumant, close to Barentsburg, in 1931 and in Barentsburg in 1932. In 1939 the Pyramid was also in production.

9. *Ibid.*, 113–121.

Because Norwegian authorities were concerned about Soviet military presence on the archipelago, they invited the United States and Great Britain to engage. Several solutions were discussed by the parties, including the USSR. A British suggestion to evacuate the archipelago and destroy the coal mines was eventually agreed and implemented in 1941 in agreement with Soviet authorities. It is important to note that Article 9 of the Svalbard Treaty did not prevent the signatory states from implementing military operations on the archipelago during World War II. It is also important to note that Norway did not have much influence on decisions pertaining to Svalbard. They were subject to great power politics.

With Svalbard's military strategic significance raised, in 1944 the Soviet foreign minister Viatcheslav M. Molotov communicated a Soviet demand to abolish the Svalbard Treaty of 1920. The Svalbard Treaty had been negotiated without the inclusion of the USSR and was considered an insult to Moscow, even though they had formally joined the treaty in 1935. The demand included the introduction of a joint Soviet-Norwegian administration of the archipelago, and also full sovereignty over Bjørnøya to the Soviet Union. The Norwegian government was deeply worried, but it decided to respond positively to avoid further Soviet demands and to keep good relations with the USSR. A draft joint Soviet-Norwegian declaration on Svalbard was developed by the Norwegian government. The main message was that the defense of Svalbard was to be a common concern between Norway and the Soviet Union. The Soviet Union did not respond until 1946 for two likely reasons. First, the Soviet government probably felt comfortable with Norway's draft declaration, and felt that Norway had already committed to the new arrangement. Second, and arguably more important, the government in Moscow did not want to add an additional challenge to escalating tensions between the great powers concerning Europe's post-world war order.<sup>10</sup> By the time the Soviet Union eventually responded in 1946, Norway had reconsidered. The declaration was never put into effect.

## THE COLD WAR

The Cold War led to another significant change in Soviet Svalbard policy. After Norway signed the North Atlantic Treaty in 1949, the Soviet Union never again raised interest in a new bilateral arrangement related to Svalbard. With Svalbard situated on Russia's opening to the Atlantic Ocean, the possibilities that Moscow could assert pressure on Norway had been reduced when Norway joined NATO.<sup>11</sup> Soviet policy toward Norway in general and Svalbard in particular became both defensive and reactive, with the main aim of slowing down Norway's political and military integration with NATO and to prevent a significant NATO presence in Norway. Following the Norwegian decision of January 1951 to include Svalbard in the area of responsibility of NATO's Atlantic Command (ACLANT), the Soviet Union issued two diplomatic notes communicating that Norway did not abide by its declaration on military bases from 1949, and that placing Svalbard under Supreme Allied Commander Atlantic (SACLANT) was in direct violation of the Svalbard Treaty of 1920.

The Soviet response worried the Norwegian government, but in reality the policy of the Soviet Union was defensive and aimed at securing status quo on the archipelago. The sharp notes should

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10. *Ibid.*, 299.

11. *Ibid.*, 317–318.

also be understood as a reaction to Norway's steadily closer relationship with Western allies, not least as a result of the Korean War.<sup>12</sup> Accordingly, not only Norwegian Svalbard policy but interstate relations on Svalbard were subject to changes in accordance with overall developments in East-West relations, which continues to be the situation today.

As Cold War tensions grew, UNCLOS was being negotiated and eventually would come into force in 1994. In accordance with UNCLOS and as an Arctic coastal state, Norway would be granted a 200-mile exclusive economic zone (EEZ) from its coast with exclusive rights to manage and develop natural resources on the continental shelf and in the ocean areas. During the UNCLOS negotiating process and, after careful consideration and deliberation, Norway established a 200-mile Fisheries Protection Zone around Svalbard in 1977. The zone was deliberately not named an economic zone because of uncertainties in Oslo with regard to how the parties to the Svalbard Treaty would respond. Norway's interpretation was clear: since Norway had sovereignty over Svalbard, the archipelago generated an economic zone in line with the economic zone around continental Norway. Furthermore, Norway also asserted that, as sovereign, it would take responsibility for sustainable management of the fisheries resources in an attempt to dissuade other parties from invoking their economic interests under the Svalbard Treaty.

At this time Norway's more assertive policy related to Svalbard was met by resistance by the Soviet authorities. When Norway established the Fisheries Protection Zone around the Svalbard archipelago, the zone would be managed by the Norwegian coast guard, which organizationally belongs to the Norwegian armed forces. Moscow translated Norway's fisheries approach as a step toward militarization of the archipelago. Under Article 9 of the Svalbard Treaty, the establishment of military bases and permanent installations on Svalbard for warlike purpose is prohibited. The Soviet authorities used this opportunity to call for the archipelago to become a demilitarized zone.

Svalbard is not a demilitarized zone, but Norway developed its policy with Soviet concerns and sensitivities in mind. For example, in practice Norway did not allow its military airplanes to land on Svalbard, and the number of visits by the Norwegian coast guard were kept at a minimum, although their presence naturally increased with the establishment of the Fisheries Protection Zone. In many ways the introduction of the Fisheries Protection Zone represented a test of Norway's sovereignty of the waters around Svalbard. At the same time, Oslo invested heavily in civilian infrastructure in Longyearbyen, which in turn also contributed to assertion of Norwegian sovereignty.<sup>13</sup> However, the Norwegian government worked toward a balanced policy to minimize friction with the Soviet Union.

As the Soviet Union became more fixed on its internal dynamics in the late 1980s, Moscow seemed less focused on Norway's Svalbard policy. Sensing this, Norwegian authorities gradually softened their previous restrictions on arrivals of military vessels in Longyearbyen. In addition, Norwegian military airplanes were allowed to land in Longyearbyen in connection with routine activity.<sup>14</sup>

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12. Ibid., 318, 342.

13. The society in Longyearbyen was to become a symbol of Norwegian presence in the north and of the country's sovereignty over Svalbard.

14. Jacob Borresen, Gullow Gjeseth, and Rolf Tamnes, *Allianseforsvar i endring, Norsk forsvarshistorie 1970–2000* (Bergen: Eide Forlag, 2004), 5:272.

Norwegian Svalbard policy has been historically attuned to overall geopolitical tensions with the Soviet Union and to the specific level of attention that Moscow devotes to Svalbard. When both conditions are relaxed, Norway tests new policy. When both conditions have heightened scrutiny, a balanced and more cautious policy approach is applied.

Norway's altruistic argument that the country implemented responsible management in the interest of all countries for the common good did not prevent other states from asserting their national interests as a response to Norway's measures. Following the principle of nondiscrimination, Norwegian authorities allowed all interested states to fish in the Fisheries Protection Zone, and no fishing quotas were set. However, Norwegian regulators did insist on specific mesh sizes for the fishing nets and amount of juvenile fish. In 1986 Norwegian authorities introduced cod quotas for third parties based on historic catches, although Norway typically enforced its regulations by issuing warnings to vessels for violations.

Russia protested against the Fisheries Protection Zone, but in practice Russia encouraged its fishermen to abide by Norwegian regulations.<sup>15</sup> But Russia was not the only state that had concerns related to Norway's sovereign assertion over Svalbard's fisheries management.<sup>16</sup> Spain was the most persistent and vocal opponent of Norway's Fisheries Protection Zone. In June 1986 Norway and Spain were on the brink of a "cod war." After the quota for third countries was filled, Spanish trawlers refused to leave the Fisheries Protection Zone. Norway sent three coast guard vessels and an Orion plane; it applied diplomatic pressure on Madrid until the Spanish trawlers left the zone.<sup>17</sup>

The United States and United Kingdom reserved their views on Norway's interpretation of the Svalbard question. This pause by two of Norway's closest allies led Norway to strengthen its diplomatic dialogue and bilateral discussions on issues related to the Arctic and Svalbard, and new discussion avenues were introduced in the mid-1970s to keep Norway's allies updated on the overall situation and avoid tensions or "episodes" with the Soviet Union.

In 1978 the United States, the United Kingdom, West Germany, and France came to a consensus on their Svalbard policies. They supported Norway's sovereignty assertion but underscored that Norwegian policy should be in line with the Svalbard Treaty. They warned against a Norwegian-Soviet condominium on the archipelago and aimed to balance Soviet presence in the region by increasing their own engagement in and around the archipelago. Norway responded negatively to this idea, arguing that it would be much wiser to allow Norway to address these issues to avoid unnecessary confrontation between NATO and the Soviet Union.

Norway adjusted its policy once again in the 1980s by increasingly inviting other states and actors to the region, specifically international oil companies in the Barents Sea, but purposefully avoided discussion of the exploitation of potential energy resources on the shelf around Svalbard. There was also increased scientific interest in the Arctic and in Svalbard as a laboratory for Arctic research. But it appears too much international attention was too much of a good thing. As the Cold

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15. Ibid., 5:266.

16. Opposition came from, among others, Spain and Portugal.

17. Borresen, Gjeseth, and Tamnes, *Allianseforsvar i endring*, 5:272.

War ended and international collaboration in the Arctic flourished, foreign trawlers were attracted to the rich fisheries fields in the Barents Sea, and Norway entered a challenging period in terms of management of fisheries resources, not least in the Svalbard area.

## THE 1990S

With the fall of the Soviet Union, conditions were favorable for Norway on Svalbard. The Russian Federation was unable to uphold its presence on the archipelago because of diminishing coal reserves as well as the lack of resources and attention to Svalbard in general. At the outset of the 1990s, Russia had about 2,500 inhabitants on Svalbard, primarily its mining settlements at Barentsburg and Pyramiden. During the next decade this number was more than halved, and by 2010 again reduced by half.<sup>18</sup>

The Fisheries Protection Zone and, partly the continental shelf around the archipelago, would pose the most significant challenges. In the geopolitically favorable post–Cold War environment, Norway became more assertive in its management of fisheries in the Fisheries Protection Zone. NATO ally Iceland became an important challenger to the Norwegian regime. In August 1994 the Icelandic trawler *Hagangur II* refused to leave the Fisheries Protection Zone as ordered by the Norwegian coast guard. When the coast guard attempted to cut the trawl, the Icelandic ship fired against it. The Norwegian coast guard responded by firing non-explosive shells toward the trawler before the ship was seized and taken to the Norwegian city of Tromsø.

However, in the late 1990s, Russia reasserted itself as the main challenger to Norway’s management in the Fisheries Protection Zone. The zone has remained contested, but in practice fishing vessels have accepted Norwegian regulations and management, although periodic episodes—most frequently occurring in the late 1990s, when Norway began to enforce its regulations more strictly—highlight the arrangement’s fragility. Prior to this, Russian vessels not reporting catches to Norwegian authorities had been met with warnings only. During the summer of 1998, owing to overfishing of cod below the minimum size, Norway closed the southwestern portions of the Fisheries Protection Zone. Approximately 50 Russian vessels continued fishing in the area after it had been closed, and Norway responded by sending four coast guard vessels to end the fishing. Norwegian authorities seized the Russian vessel *Novokubyshevsk*. The situation was resolved when the Norwegian authorities released the Russian vessel in exchange for an end to Russian fishing in the area.

In subsequent years and in response to Norwegian actions, Russian authorities have begun to conduct their own inspections of Russian vessels in the Fisheries Protection Zone, which is permitted according to international law. In 2001 the Russian vessel *Chernigov* was seized by the Norwegian coast guard after having violated regulations. Russia protested strenuously, and, in an official diplomatic note to Norwegian authorities, demanded the Russian trawler be set free immediately. In 2002, some argue as a response to the *Chernigov* incident, Russia sent a military vessel, the

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18. “Population of Svalbard, 1 July 2013,” Statistics Norway, September 24, 2013, <https://www.ssb.no/en/befolkning/statistikker/befsvabard/halvaar/2013-09-24>.

535-foot destroyer *Severomorsk*, to the Fisheries Protection Zone. In 2005 Norwegian authorities arrested the Russian fishing trawler *Elektron*. The captain of the vessel refused to be arrested and directed the vessel, with two Norwegian inspectors on board and with the Norwegian coast guard on its tail, toward the Russian EEZ in the Barents Sea. The trawler succeeded in reaching the Russian zone, but Norway and Russia cooperated throughout the incident, which ended in the prosecution of the captain in Russia. More seizures and arrests of Russian vessels and crews in the Fisheries Protection Zone have followed, but without as firm protests from Russia as in the case of *Chernigov*.

## THE 2000S—THE RETURN OF GEOPOLITICS?

Norway has traditionally been wary of dragging Svalbard into great power politics, although a certain amount of allied attention to these issues is desired by Norwegian policymakers. Deterioration of relations between Russia and the West and heightened geopolitical tensions will reinforce Norway's stance of pragmatism and caution related to Svalbard, particularly in relation to Russia. With less trust, less contact, and less information, events such as seizing Russian fishing trawlers will become more challenging. In addition, Russia's enhanced military presence in the Arctic will encourage Norway to expand its presence in the region, particularly ensuring continued civilian presence on Svalbard.<sup>19</sup> This will be challenging as coal mining on the archipelago has been significantly reduced. How to secure Norway's future presence is a much-debated question among foreign policymakers.

Despite concern for the future, there are encouraging signs that rising East-West tensions may not directly impact Svalbard, for example, increased Russian patrols in the Fisheries Protection Zone. During the Russian-Georgia conflict in 2008 and the more recent Ukraine crisis beginning in 2014, collaboration between the Norwegian and Russian coast guards have continued. One plausible explanation may be that the losses from ending the cooperation are greater than the political costs of continuing cooperation under less favorable political relations.<sup>20</sup> Moreover, continued "low-key" cooperation is a means of keeping channels and dialogue open to minimize misunderstandings and dangerous situations. Finally, Russia may recognize that it will not receive the support of other Svalbard Treaty signatories by challenging Norway in a less favorable geopolitical climate.

But this does not mean that Russia is not continually testing Norway on Svalbard. One recent example occurred in April 2016, when Russia provocatively used the Longyearbyen airport for the transportation of personnel and equipment in connection with a Russian military exercise near the

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19. One example of the importance of Svalbard to Norwegian authorities is the case of Austre Adventfjord, which is a privately owned land area on Svalbard. The details of the dialogue between the owners of the property and Norwegian authorities are unknown, but after two years of dialogue about a potential sale of the property to the authorities, the owners advertised the property for sale on the open market in 2016. Norwegian authorities are now in a bidding round with other stakeholders of unknown nationalities but have stated clearly that they aim to buy the property (see Eirik Linaker Berglund and Thor Harald Henriksen, "Staten vil kjøpe Svalbard-eiendommen," VG Nyheter, May 22, 2014, <http://www.vg.no/nyheter/innenriks/staten-vil-kjoepe-svalbard-eiendommen/a/10131297/>).

20. Svein Kosmo, "Kystvaktsamarbeidet Norge-Russland. En fortsettelse av politikken med andre midler?" (master's thesis, Oslo, Forsvarets Høgskole, 2010), 44–45.

North Pole. Norway responded by calling in the Russian ambassador, reminding the Russian government that all foreign military activity on Svalbard is prohibited and would violate Norwegian sovereignty. Moreover, landing at airports is subject to diplomatic clearance in advance, and Norwegian authorities reminded Russia that it follows a restrictive practice with regard to granting such clearance. This recent incident has not led to major friction, but it demonstrates that the interpretation of the Svalbard Treaty continues to be contested.

It is clear that despite the many shifts in international security dynamics since 1920, Svalbard's jurisdictional questions and differences have remained the same. There is little to suggest that Norway or any other state seeks clarification of these outstanding jurisdictional issues either because Svalbard may not be important enough geostrategically or the signatory states may be generally satisfied with the way Norway is managing activity on and around the archipelago.

## THE SVALBARD TREATY: A LEGAL REGIME FOR FUTURE ARCTIC GOVERNANCE?

Is the Svalbard Treaty a model for future Arctic governance? It does not appear so despite the fact that states continue to become signatories to the treaty, with North Korea becoming the latest signatory on January 25, 2016. The Svalbard Treaty granted Norway sovereignty over Svalbard subject to stipulations that were introduced in a specific historical context. Moreover, the Svalbard Treaty grants terrestrial sovereignty area to one country, but most of the outstanding governance issues related to the Arctic today are maritime based. In terms of maritime governance such as fisheries, the arrangements in the Svalbard Treaty do not give clear jurisdictional conclusions and are therefore not likely to provide a useful guide for resource management in the Arctic in general. Moreover, when Norway introduced its Fisheries Protection Zone regime, there were and continue to be uncertainties and difficulties with implementing quotas based on historic fishing patterns. Rapid Arctic climate change will likely cause fishing stocks to relocate, which will enhance the difficulty of implementation in other portions of the Arctic. In sum, the Svalbard Treaty is in so many ways a special case; it is hard to see how it can be considered foundational for future Arctic governance.

## THE ROAD AHEAD

Because of its strategic location, Norwegian policy on Svalbard is very much a foreign and security policy, whether it has to do with physical Norwegian presence on land or resource management in the waters around the archipelago. Norwegian diplomats have made considerable efforts to try to avoid tensions first with the Soviet Union and then with the Russian Federation on Svalbard issues, while at the same time trying to strengthen Norway's position. But it has not been easy. The status of the continental shelf and ocean areas around Svalbard is not a clear jurisdictional matter. Norwegian sovereignty is subject to stipulations, and the geographical scope of the Svalbard Treaty has never been formally settled. This somewhat unclear status, however, has not prevented Norway from managing the ocean areas in accordance with Norwegian principles and seemingly

more or less in accordance with other states' interests. Norwegian authorities also likely benefit from a lack of alternatives to its management.

Despite these positive trends, Norway has had to deal with constant pressure from the Soviet Union/Russia to bilateralize relations on Svalbard, which continues to challenge Norway today.<sup>21</sup> Norwegian authorities must also ensure a Norwegian presence on the archipelago to balance the increased international presence with dramatic decline in the economic mainstay of Longyearbyen, the coal company Store Norske Spitsbergen A/S. In addition, whether future oil and gas development on the continental shelf around Svalbard will have the Norwegian tax regime of 78 percent on income imposed on it or whether the principle of nondiscrimination in accordance with the Svalbard Treaty will be imposed remains an open question. With the current price and supply crisis in the energy sector, this issue is not pressing, but it is likely to return when energy prices increase.

One of the first tests concerning the continental shelf around Svalbard is the current westward migration of snow crab in the Barents Sea. Norway and Russia have concluded that the snow crab is a species living on the continental shelf, implying that the same regime will be valid for this species as for oil and gas developments. The snow crab is currently migrating toward the Svalbard box. It remains to be seen how Norway will decide to manage the species once it enters the Svalbard box, but the outcome may set a precedent for the future of the oil and gas regime on the shelf around the archipelago.

Future success for Norway hinges on smart diplomacy alongside solid jurisdictional argumentation. For now Norway must convince other signatory states of its interpretation of the geographical scope of the Svalbard Treaty. The fundamental question is whether the Svalbard Treaty should be interpreted with a view to international law as it was assumed in 1920 or as it is viewed in 2016.

The case of Svalbard illustrates that international maritime disputes (as well as terrestrial disputes) are developed within a specific historical and political context. Those who drafted the treaty could not have foretold the dramatic diminishment of the polar ice cap and technological advances in energy development. As international law evolves, Norwegian foreign policymakers must argue that their interpretations of the legal regime surrounding the archipelago are simultaneously in line with the 1920 treaty and apply modern and pragmatic approaches. Successful implementation of the Svalbard Treaty, however, ultimately rests on developments in East-West relations and the relative importance of the Arctic region as a whole.

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21. Rolf Tamnes, *Oljealder* (Oslo: Universitetsforlaget, 1997).

# The 1936 Montreux Convention

Nilufer Oral

**Map 3.1. Turkish Straits**



Source: Wikimedia Commons, [https://commons.wikimedia.org/wiki/File:Black\\_Sea\\_map.png](https://commons.wikimedia.org/wiki/File:Black_Sea_map.png).

## INTRODUCTION

The prospects for year-round navigation through the Arctic, the promises of greater economic development, and the potential for greater militarization are an opportunity to deepen our understanding of the rights of passage and obligations to protect a fragile and unique marine environment in a region of diverse and conflicting state interests. Many viewed Russia's provocative planting of its national flag on the seabed in the North Pole in 2007 as signaling uncertainty related to future international claims. Relatively new organizations, such as the increasingly important Arctic Council, an intergovernmental forum of eight permanent member states, is attracting applications for permanent observer membership from diverse countries such as Turkey, Mongolia, Greece, and Switzerland after the number of observers increased in 2013 to include China, India, South Korea, and Japan, among others. As the polar cap continues to melt, as one author observed, "the region's remarkable untapped resource wealth and unrealized potential to become a fast lane between the Atlantic and Pacific Oceans makes it a key emerging pressure point in international affairs."<sup>1</sup> Some have even alluded to it as the emerging "Great Game" of the north.<sup>2</sup>

The Northwest Passage and the Northern Sea Route are the two primary passageways—in addition to the Transpolar Route—that promise savings of thousands of navigational miles and billions of dollars for shipping. However, unresolved legal questions remain regarding the rights of passage: Are the Northwest Passage and Northern Sea Route internal waterways (as Canada and Russia argue, respectively), which means these countries can exercise complete sovereignty over it as an internal waterway,<sup>3</sup> or are they international passages (which a majority of countries contend) that can be used in international navigation and subject to the rights of passage under international law? Since becoming parties to the 1982 UNCLOS, both Canada and Russia claim coastal state rights under Article 234 of the Convention, which recognizes the right of coastal states in ice-covered areas to unilaterally adopt and enforce nondiscriminatory pollution laws.

As the reality for circumpolar navigation quickly approaches, the potential for conflict over passage rights of international shipping and coastal state interest for protection of the marine environment likewise increases.

The history and context of the warm waters of the Turkish Straits, a geographic distance of some 6,819 kilometers from the Arctic, may seem at first glance far removed from the northern ice-bound Arctic waterways. Few waterways can compare with the critical influence the Turkish Straits have had on the international stage of high politics over the centuries. Despite fundamental differences between the Arctic and the Turkish Straits, both share common concerns of balancing competing international interests against the legitimate concerns of protection of a sensitive marine environment. The experience of the Turkish Straits, governed by the nearly 80-year-old

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1. Scott Borgerson, "Arctic Meltdown: The Economic and Security Implications of Global Warming," *Foreign Affairs* (March/April 2008): 73.

2. James Kraska, "International Security and International Law in the Northwest Passage," *Vanderbilt Journal of Transnational Law* 42, no. 1109 (2009): 1112.

3. James Kraska, "The Law of the Sea Convention and the Northwest Passage," *International Journal of Marine and Coastal Law* 22, no. 2 (2007): 257.

Montreux Convention on the Regime of the Straits, during the 1990s may offer lessons as to the importance of international cooperation for protection of the marine environment, as well as the challenges of an increased military presence in the region.

## GEOPOLITICAL HISTORY OF THE TURKISH STRAITS

The physical and political hazards of navigation through the narrow, sinewy stretch of water that links the Black Sea to the Mediterranean have been immortalized in myth and history since Jason and the Argonauts embarked on their perilous journey in search of the Golden Fleece and Ulysses survived his epic journey back home after the Trojan War. The far-sighted Roman emperor Constantine shrewdly selected the site of his eponymous city, Constantinople (Istanbul), the capital of eastern Rome on the promontory overlooking this strategic waterway, which continues to play an influential role in world politics and provide a key route for international commerce. The Byzantine Empire's control over the Straits would end in 1453, when the Ottoman sultan Fatih Sultan Mehmet conquered Constantinople and assumed complete control over the strategic Strait of Istanbul (Bosporus), the sole connection between the Black Sea and the Mediterranean Sea.<sup>4</sup> For centuries the Ottomans exercised absolute control over the Straits, refusing access to foreign vessels through the Strait of Istanbul.

Rivalry for access and control of the Straits, a matter that would eventually dominate European politics, began with Peter the Great, czar of Russia. But it was Catherine the Great who defeated the Ottomans in the famous Battle of Çeşme and whose victory was consummated with the 1774 Treaty of Küçük Kaynarca between the Russian and the Ottoman governments,<sup>5</sup> which for the first time allowed foreign flagged merchant vessels free and unhindered navigational rights in the Black Sea and Straits, as well as free access to Ottoman ports.<sup>6</sup> The Treaty of Küçük Kaynarca also marked the beginning of the slow decline of the Ottoman Empire, which would increasingly be used as a buffer by the European powers, British and Austro-Hungarian, against the growing threat of Russian expansionism. A key factor in this game of power chess, also known as the "Eastern question," would be control over the strategic Turkish Straits.

Until the disastrous Gallipoli campaign, launched by the British in 1915, support of the Ottoman Empire and recognition of the "ancient rule of the Ottoman Empire," the exclusive discretion exercised by the Ottoman sultan in granting passage rights to foreign warships through the Strait of Istanbul, had been a pillar of British foreign policy in its efforts to contain Russian expansionism.<sup>7</sup> The outbreak of World War I in 1914 had profound and permanent consequences on

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4. John Julius Norwich, *Byzantium the Early Centuries* (New York: Knopf, 1990); John Julius Norwich, *Byzantium the Decline and Fall* (New York: Knopf, 1996).

5. The Treaty of Küçük Kaynarca, July 10, 1774, reprinted in Clive Parry, *The Consolidated Treaty Series* (New York: Oxford University Press, 1969), 45:349.

6. *Ibid.*, 45:391.

7. The Convention of London, dated July 15, 1840, between the British and the Ottoman Empires expressly recognized and essentially codified the "ancient rule of the Ottoman Empire." The full title is the Convention for the Pacification of the Levant, July 15, 1840.

nineteenth-century alliances and on the question of control over the Straits. The Ottoman-German alliance against Great Britain and Russia closed the Straits to the passage of all enemy merchant and war vessels. British prime minister Lloyd George blamed the Turkish closure of the Straits as the main event that precipitated the 1917 Bolshevik Revolution, as Russian imports and export were significantly hampered.<sup>8</sup> American president Woodrow Wilson, in his famous Fourteen Points, which provided a vision of a post-World War I European peace, sought to keep the Çanakkale Strait (Dardanelles) open at all times. Significantly, it was the only waterway specifically mentioned.

World War I brought down several empires, including the Ottoman Empire. In 1923, following the successful war of independence led by General Mustafa Kemal (Atatürk) against invading foreign powers, the Turkish Republic was declared and the 1923 Lausanne Peace Treaty was concluded between the European Great Powers and the new Republic of Turkey.<sup>9</sup> The Lausanne Peace Treaty also included a separate “Convention Relating to the Regime of the Straits and Turkey,” which would bring significant changes to the “ancient rule of the Ottoman Empire,” such as the creation of an international straits commission responsible for administration of the Straits and the demilitarization of the Straits. The Lausanne regime continued until the outbreak of World War II.

In 1935, as Hitler and Mussolini threatened Europe, Turkey, in a rare application of the international law principle of *rebus sic stantibus* and citing provisions of the Lausanne Convention, requested that the contracting powers meet to renegotiate these provisions. In 1936 the Lausanne regime on the Straits was replaced with the 1936 “Convention Regarding the Regime of the Straits Signed at Montreux on 20 July 1936” (Montreux Convention), which continues to be in effect today.<sup>10</sup>

## THE 1936 MONTREUX CONVENTION

The regime of passage established under the Montreux Convention has been shaped by international politics and local interests.<sup>11</sup> Article 1 grants all ships the right of “freedom of transit and navigation.”<sup>12</sup> This regime reflects the international norm of innocent passage—that is, passage that is not prejudicial to the peace, good order, or security of the coastal state—with some local nuances. More important, it is not the transit passage regime created by the 1982 UNCLOS regime or nonsuspendable innocent passage but the unique legal status of the Turkish Straits.<sup>13</sup> This is recognized by Article 35(c) of UNCLOS, which expressly excludes application of the rules of passage (for example, nonsuspendable innocent passage and transit passage) provided in Part III of

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8. David Fromkin, *A Peace to End All Peace: The Fall of the Ottoman Empire and the Creation of the Modern Middle East* (New York: H. Holt, 1989), 239.

9. Treaty of Peace with Turkey, and Other Instruments: Signed at Lausanne on July 24, 1923, *Great Britain Treaty Series* 16 (1923), Cmd. 1929, 109, <http://treaties.fco.gov.uk/docs/pdf/1923/ts0016-1.pdf>.

10. Convention Regarding the Regime of the Straits Signed at Montreux on 20 July 1936, 173 LNTS, *Great Britain Treaty Series* 30 (1937).

11. Reprinted in *American Journal of International Law* 31, no. 1 (1937).

12. Or “*liberté de passage et navigation*.” The authentic French text does not employ the term *transit*.

13. See Glen Plant, “The Turkish Straits and Tanker Traffic: An Update,” *Marine Policy* 24 (2000): 193–214.

the convention to those straits that are “governed in whole or in part by long-standing international conventions.”

The special legal regime of passage created by the Montreux Convention can be seen in a number of its provisions relating to the passage of merchant ships and warships. For example, Turkey is able to impose a charge on *all* ships in nonstopover passage (without calling at a port in the Straits) through the Straits. These are general fees imposed and not based on specific services rendered, the latter being the only fees allowed to be imposed by a coastal state under existing rules of international law.<sup>14</sup> Article 3 of the convention also requires that *all* vessels stop for sanitary inspection, which also is not allowed under international law. Another example of the Montreux Convention’s unique character lies in the provisions applicable to the passage of war vessels that require foreign states to give prior notice to the Turkish authorities for passage through the Straits. It also imposes vessel size and quantity limitations, as well as restrictions on the type of war vessels allowed passage. Under existing norms of international law, warships enjoy transit passage rights or, in some straits, nonsuspendable innocent passage rights where such restrictions cannot be imposed; however, controversy exists regarding any notice or permission requirements in some cases. In brief, passage of merchant vessels and military vessels are subject to a *lex specialis* created by the Montreux Convention.

For centuries the passage of warships through the Straits had been the central issue. However, in the post–Cold War world, environmental concerns increasingly gained importance. By the mid-1990s the challenge Turkey faced was to institute the necessary regulations and measures to prevent the alarming increase in shipping accidents and protect the marine environment. In 1994 Turkey adopted a new set of regulations, which ignited an international debate on the 1936 Montreux Convention in the International Maritime Organization (IMO) and put the durability of the convention in a new era of shipping and environmental concerns to the test.

## PROTECTION OF SAFETY OF NAVIGATION AND THE ENVIRONMENT IN THE TURKISH STRAITS

The Turkish Straits consist of the Strait of Istanbul (31 kilometers), the Strait of Çanakkale (70 kilometers), and parts of the Sea of Marmara. The Strait of Istanbul bisects Istanbul, a historical city divided between the European and Asian continents and home to some 17 million residents. The narrowest point of the Straits is located in the Bebek-Kandilli Channel, a mere 300 yards (700 meters) in width. An average of 45,000–50,000 vessels pass through the Turkish Straits each year, including tankers transporting dangerous or hazardous cargoes. Navigation through the Istanbul Strait is particularly risky for a number of reasons, including its intense local and cross traffic and dozens of small fishing boats, commuter boats, and leisure crafts crowding the sea lanes, where large ships, including those tankers, navigate. There are 12 course alterations that ships must navigate that include four 45-degree course alterations and one 80-degree. Adding to these risks

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14. Article 43 of UNCLOS.

are the strong and unpredictable currents and crosscurrents, up to six to eight knots, and sudden weather changes that can dangerously reduce visibility.

The Turkish Straits provide a vital transport corridor for international shipping. However, in addition to its importance to international commerce, the Straits are also ecologically important. Scientists have observed that biological, physiographical, meteorological, and hydrological characteristics in the Mediterranean and Black Seas combine to form a peculiar ecosystem in the Turkish Straits, which also provide a critical biological corridor or transitional zone for marine living resources.<sup>15</sup> Many stocks of fish that once thrived in the Turkish Straits have disappeared, and the days of bountiful catches have diminished greatly as a result of human activity. Accidental and operational pollution from shipping also has had a deleterious impact on this unique ecosystem and biological corridor.

## THE 1994 TURKISH STRAITS REGULATIONS AND THE IMO

There have been numerous accidents in the Turkish Straits. The 1979 collision between the M/T *Independenta*, transporting 94,600 tons of crude oil, and the M/V *Evriali* resulted in a fiery explosion, killing 45 crew members, spilling thousands of tons of oil, and causing property damage onshore. Sixteen years later an almost identical collision between the M/T *Nassia* and M/V *Shipbroker* once more ended in tragic loss of life and an environmentally disastrous oil spill. The prospect of an accident in the Straits, especially the narrow and heavily congested Strait of Istanbul, is a daily reality. As recently as February 22, 2015, a large tanker suffered engine failure in the narrow Bebek-Kandilli area, narrowly avoiding a potentially disastrous shoreline collision.<sup>16</sup>

The recognized need to improve safety of navigation in the Straits dates back to a 1968 report published by the Turkish Merchant Marine Academy Association.<sup>17</sup> In 1987 a proposal to establish a traffic separation scheme in the Straits was prepared, which was followed by the creation of a commission in 1990 to study the matter in detail. The commission drafted the regulations that were subsequently adopted as the 1994 Maritime Regulations for the Turkish Straits.<sup>18</sup>

However, in 1993 the Turkish government made an unintended—and some could argue fateful—decision to submit a proposal to the IMO to establish a traffic separation scheme in the Straits in accordance with Rule 10 of the 1972 International Regulations for Preventing Collisions at Sea

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15. Bayram Öztürk and Ayaka Amaha Öztürk, "On the Biology of the Turkish Straits System," *Bulletin de l'Institut océanographique, Monaco* 17, no. 2 (1996): 205, [http://ciesm.org/online/monographs/CSS-2/CSS\\_2\\_205\\_221.pdf](http://ciesm.org/online/monographs/CSS-2/CSS_2_205_221.pdf).

16. The 182-meter M/T *King Edward*, a double-hulled tanker constructed in 2004, lost engine power. See "King Edward Powerless in Bosphorus," *World Maritime News*, February 24, 2015, <http://worldmaritimeneeds.com/archives/153047/king-edward-powerless-in-bosporus/>.

17. Nilufer Oral, "Oil and Water: Caspian Oil and Transportation Challenges Facing the Turkish Straits," in *Current Marine Environmental Issues and the International Tribunal for the Law of the Sea*, ed. Myron H. Nordquist and John Norton Moore (The Hague: Martinus Nijhoff, 2001), 329–364.

18. *Ibid.*, 344. The regulations went into effect July 1, 1994.

(COLREG), replacing the use of Rule 9.<sup>19</sup> While not Turkey's intention at all, for the first time since 1936 the regime of passage in the Turkish Straits would be taken up in a multilateral forum.

The new regulations, while never formally introduced to the IMO by Turkey, stirred up heated debate and controversy both within and outside the IMO. Turkey's intention had been only to seek approval of a traffic separation scheme. The controversy was ignited when Turkey presented the rules of navigations for the traffic separation scheme, as requested, which were directly taken from the 1994 regulations.<sup>20</sup> Suddenly the 1994 regulations and, despite objections from Turkey and admonishments by the IMO, the 1936 Montreux Convention became the focus of a protracted and heated debate in the IMO that lasted from 1994 until 1999. Complicating matters was the emergence of Caspian energy and significant pipeline projects that heightened the geopolitical stakes in the region as these reserves were now accessible to Western development after the dissolution of the Soviet Union. With promises of a new energy boom, the critical question was how this new oil wealth would be transported from the shores of the Caspian to Western markets—by sea via the Black Sea and Turkish Straits or by pipeline? The idea of a pipeline from Baku (Azerbaijan) via Tbilisi (Georgia) to Ceyhan (Turkey) (the Baku-Tbilisi-Ceyhan or BTC pipeline) had been proposed. The pipeline, geopolitically, would be a significant development in breaking the monopoly of Russian-owned pipeline infrastructure to Europe. It would also provide a bypass route for the navigationally and environmentally risky Istanbul Strait. Turkey's quest for improved safety of navigation and protection of the environment by imposing new rules for passage under the 1994 maritime regulations converged with the threat of a significant increase in tanker traffic from the Caspian exacerbating existing tensions in the IMO.

Controversial aspects of the 1994 regulations included the definition of large vessels as those 150 meters or more in length and deep draft vessels as being 10 meters or more. The regulations also introduced a mandatory ship reporting system known as TUBRAP (Turkish Straits Ship Reporting) with different requirements depending on the size of the vessel and cargo carried. The regulations also restricted the two-way passage of two or more large vessels carrying dangerous, hazardous, noxious, or nuclear cargo; vessels of a length between 150 and 200 meters were not to be allowed to cross narrow areas of the Strait at the same time. The regulations additionally imposed certain restrictions on the passage of vessels greater than 200 meters in length, requiring administrative review before transit would be permitted, as well as closure of shipping traffic in the Straits either one way or two way, depending on weather conditions. Particularly questionable was the daytime restriction for the passage of such vessels with mandatory tugboat escort and pilotage. Closure of one-way or two-way traffic was also required for the passage of large vessels (150 meters or greater); deep draft vessels; nuclear-powered vessels; and vessels carrying dangerous, hazardous, or noxious cargo. It was also required as a result of weather conditions. In addition, the 1994 regulations imposed mandatory tugboat escorts for vessels having a draft of 54–58 meters.

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19. Turkey initiated the process by submitting an information paper to the 62nd Maritime Safety Committee meeting of the IMO on March 26, 1993 (IMO Doc. MSC 62/INF.10); see Nihan Ünlü, *The Legal Regime of the Turkish Straits* (The Hague: Martinus Nijhoff, 2002).

20. IMO Doc. MSC 63/7/2.

In response, in 1994 the Maritime Safety Committee (MSC) of the IMO adopted a set of draft rules and recommendations for adoption by the IMO for the Turkish Straits. In 1995 at the 19th Assembly the General Assembly of the IMO adopted Resolution A.827 (19) on “Ships’ Routing,” which included associated “Rules and Recommendations on Navigation through the Strait of Istanbul, the Strait of Çanakkale, and the Marmara Sea.” However, paragraph 5 of Resolution A.827 (19) requested the MSC to review the operation of the rules and recommendations and the conditions in the Turkish Straits, and, as appropriate, to make recommendations in the rules and recommendations. As a result of this paragraph, the Turkish Straits remained on the IMO agenda for the next five years.

According to a number of governments, the 1994 regulations contradicted the IMO rules and recommendations. Specific points of inconsistencies noted between the IMO rules and recommendations and the 1994 regulations related to the nature of the duty for vessels to report. The IMO rules and recommendations “strongly recommended” all vessels participate in the TUBRAP report system and “strongly advised” vessels to give prior notification as to size, whether in ballast or not, and whether carrying any hazardous and noxious cargo. The TUBRAP system *mandated* use of TUBRAP for all vessels, with different requirements depending on vessel size and cargo being transported. On the question of pilotage, the IMO rules and recommendations “strongly recommended” use of pilots when navigating through the Straits, whereas the 1994 regulations had *imposed* escort and pilotage requirements for vessels greater than 200 meters in length. However, one point of overlap was that both allowed for temporary suspension of one-way or two-way traffic for vessels unable to comply with the traffic separation scheme.

As a result of these perceived inconsistencies, several governments called on Turkey to modify its national legislation to bring it into conformity with the IMO rules and recommendations. Of greater concern for Turkey was the challenge raised by a number of governments that the 1994 regulations were in violation of the 1936 Montreux Convention.

It is not surprising that Russia spearheaded the opposition to the 1994 regulations. Russia argued that the new regulations were a unilateral modification of the Montreux Convention by Turkey. Russia vociferously pressed its claim that the 1994 Turkish regulations were in violation of the 1936 Montreux Convention, international law, and the 1982 UNCLOS.<sup>21</sup> In particular Russia opposed the prior-notice requirement for vessels 150 meters or greater, the requirement for prior permission for the passage of nuclear-powered vessels or vessels carrying nuclear cargo or waste, and the restrictions for the passage of vessels carrying dangerous cargo. Russia took particular issue with certain passage authorization provisions of the regulations and Turkey’s authority to suspend traffic one or both ways.

Russian concerns, undoubtedly, were also colored by the prospect of a new Western-controlled oil pipeline, which presented a direct political threat against its economic and political dominance of the region and could be best undermined by ensuring cheaper passage through the Turkish Straits. The calculations were simple: the fewer restrictions on passage through the Straits

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21. IMO Doc. MSC 63/7/15: “Uncomformity [*sic*] of the Turkish Regulations for Traffic Order in the Area of the Straits and Sea of Marmara to the Rules and Recommendations Adopted by the Maritime Safety Committee.” The IMO legal committee prepared a paper that found the 1994 regulations not to be in compliance with international law.

decreased the cost of oil transport by sea. Greater restrictions on the tanker passage through the Straits brought greater costs, thereby making the construction of the BTC pipeline more competitive.<sup>22</sup> Russia also did not wish to constrict its movement in and out of the Black Sea or inhibit its access to the eastern Mediterranean.

Russia pushed to have the IMO legal committee prepare an opinion on the legality of the 1994 Turkish Straits regulations in light of the IMO-adopted draft rules and recommendations.<sup>23</sup> Joining the Russian view were Bulgaria, Romania, Ukraine, and Greece.<sup>24</sup> Romania and Ukraine even suggested a review of the 1994 regulations by the parties to the Montreux Convention, a competence that is not part of the treaty, and a report back to the IMO. For Turkey, on the other hand, formally dragging the Montreux Convention into the IMO was politically and legally a red line. On a more technical level, objections were raised against application of Rule 10 of COLREG in the narrow strait, as large vessels were unable to safely navigate within the traffic lanes, requiring suspension of one-way or two-way traffic. Under the 1982 Istanbul Port regulations, Rule 9 of COLREG applied in the Straits, which allowed for vessels to navigate close to shore. However, a number of governments and representatives of the oil and shipping industry were against Rule 10 on the grounds that large ships could not comply with it and wanted to return to Rule 9.

Turkey's principal aim had been to simply consult the IMO on the establishment of the new traffic separation scheme in accordance with COLREG Rule 10 and draw attention to the growing dangers of shipping accidents in the Straits. Turkey strongly objected to any discussion of its national legislation in the IMO as being a political infringement of the otherwise technical mandate of the IMO, as well as touching on Turkish sovereignty.<sup>25</sup> According to Turkey, the IMO rules and recommendations were complementary to and not inconsistent with the 1994 regulations and could not replace its national legislation. Matters came to a head when Turkey walked out of a meeting of the Maritime Safety Committee in protest.

Despite heated polemics and debates that lasted for nearly five years, eventually resolution was found as Turkey took heed of the criticisms and made revisions to the 1994 regulations with the Turkish Straits Maritime Traffic Scheme Regulations, adopted on November 6, 1998.<sup>26</sup> Likewise, governments recognized and acknowledged Turkey's legitimate interest in taking measures to increase safety of navigation and protection of the marine environment in the Straits. The breakthrough came with the creation of a technical working group composed of experts, including Turkey, who prepared a report assessing the pros and cons of proposals submitted concerning Rules 9 and 10, "taking into account the level of safety and protection of the marine environment, which has been achieved under the existing IMO-adopted system and the implications of applying

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22. Dagobert L. Brito, *Congestion of the Turkish Straits: A Market Alternative* (Houston: Rice University Press, 1999), <http://www.ruf.rice.edu/~econ/papers/1999papers/08Brito.pdf>.

23. IMO Doc. MSC/6/7/8.

24. Other governments who voiced concerns over the 1994 Turkish Straits Maritime Regulations included Oman, Malta, the United States, France, Mexico, Poland, the United Kingdom, and Italy.

25. IMO Doc. 67/WP.10/ADD.3, Statement by Turkey, December 3, 1996.

26. Official Gazette no. 23515. Gunduz Aybay and Nilufer Oral, trans., *Turkish Straits Maritime Traffic Scheme Regulations* (Istanbul: Aybay Publications, 1998).

Rule 9 and/or Rule 10” of COLREG.<sup>27</sup> With the principal focus on a technical assessment of safety of navigation and protection of the marine environment, the opinion of the working group was that the “existing routing system and the associated rules and recommendations, as adopted by IMO in 1994, had *contributed significantly to an increase in safety and a reduction of the risk of collision.*”<sup>28</sup> The majority of the working group, with the exception of Greece, recommended ending further discussion on the Turkish Straits and noted that “the efforts of interested parties should be concentrated on promoting the full and effective use of the reporting system (TUBRAP) and the pilotage services of the Strait of Istanbul, Strait of Çanakkale and the Marmara Sea, and on the implementation, as soon as possible, of a modern Vessel Traffic Service.”<sup>29</sup> Turkey did establish a state-of-the-art vessel-traffic system in 2004.

## THE TURKISH STRAITS IN 2016

More than 20 years have passed since Turkey adopted the 1994 maritime traffic regulations. During this time period the 1,768-kilometer BTC pipeline was constructed. It became operational in 2006.<sup>30</sup> The rich energy reserves of the Caspian created more pipeline development opportunities with implications for the Turkish Straits. The number of tankers carrying dangerous cargoes through the Strait of Istanbul increased significantly from 5,000 to 6,000 vessels annually in 1998 to more than 10,000 tankers in 2007 and some 9,250 in 2012. More recently this number declined to fewer than 8,745 tankers in 2014.<sup>31</sup>

By contrast, the number of shipping accidents has dropped significantly since reaching a high of 49 in 1991,<sup>32</sup> although the risks remain. Groundings, engine failures, and other technical problems continue to pose safety and environmental risks, including numerous potentially disastrous near-miss incidents underlying the need for Turkey and all interested parties to remain vigilant in protecting the safety of navigation and the marine environment in the Turkish Straits. In this regard, cooperation between Turkey and other countries since the IMO experience has proven effective. The vessel-traffic scheme has also contributed greatly to improving navigational safety in the Straits.

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27. IMO doc. MSC71/WP.5. Preparation of a new report covering all aspects of safety and environmental protection, including review of the IMO rules and recommendations on navigation through the Strait of Istanbul, Strait of Çanakkale, and the Sea of Marmara, May 25, 1999.

28. *Ibid.*, para. 4.2. Emphasis added.

29. Barbara Kwiatkowska, ed., *International Organizations and the Law of the Sea* (The Hague: Martinus Nijhoff, 1999), 36–37.

30. “Baku-Tbilisi-Ceyhan Pipeline,” BP Azerbaijan, [http://www.bp.com/en\\_az/caspian/operationsprojects/pipelines/BTC.html](http://www.bp.com/en_az/caspian/operationsprojects/pipelines/BTC.html) (accessed April 2016).

31. “Boğazlardan geçen gemi sayısı azaldı,” *Deniz Haber Ajansı*, February 14, 2015, <http://www.denizhaber.com.tr/bogazlardan-gecen-gemi-sayisi-azaldi-haber-60404.htm>.

32. Maritime and Oceans Law Research Center, *Turkish Straits* (Istanbul: Bilgi University Press, 2001), 15.

## PASSAGE OF MILITARY VESSELS

The Montreux Convention includes special provisions for the passage of military vessels, distinguishing between Black Sea powers and non-Black Sea powers. It provides for a unique regime that, with some exceptions, restricts the number and type of military vessels that can transit through the Straits, further distinguishing between times of peace, war, and neutrality for Turkey. Moreover, the Montreux Convention required that both Black Sea and non-Black Sea powers provide prior notification to Turkey (8 days for Black Sea powers and 15 days for non-Black Sea powers) to transit through the Straits. Moreover, non-Black Sea powers can stay for only 21 days in the Black Sea. In addition, passage of submarines through the Straits is prohibited, except for boats from Black Sea states that are on the way to rejoin their base or for repair, but passage must be on the surface during daytime and in single file. Following the Russian-Georgia crisis, the Russian-Crimea crisis, the Ukraine crisis, and more recently the Syrian crisis, there have been a number of military transits through the Straits.

In 2014, preceding the Crimean referendum by Russia, the United States deployed the USS *Truxtun*, a guided missile destroyer, through the Turkish Straits into the Black Sea. The United States reported that the ship was on a routine and preplanned operation.<sup>33</sup> Two days earlier, Turkey had also granted the USS *Taylor* passage into the Black Sea. Tensions in the Black Sea spread to the skies above it as Turkey sent up F-16 fighter jets after a Russian surveillance jet flew close to Turkish airspace in the Black Sea.<sup>34</sup> The second U.S. warship, the USS *Donald Cook*, entered the Black Sea on April 10, 2014, and was closely observed by a Russian fighter jet.<sup>35</sup>

Russia lodged a protest with Turkey, claiming it had violated the Montreux Convention by allowing the USS *Taylor* to stay 11 days over the 21-day limit on the grounds of a mechanical breakdown.<sup>36</sup> In July 2014 Russian news agencies reported a record number of nine NATO vessels in the Black Sea.<sup>37</sup> That same month, standing NATO Mine Counter-Measures Group TWO, one of four standing NATO maritime forces, composed of four ships from Italy, the United States, Turkey, and the United Kingdom, entered the Black Sea in a “regularly scheduled deployment to enhance NATO’s solidarity and readiness in the region.”<sup>38</sup> In response, the Russian Black Sea Fleet conducted 20 military vessel drills in the Black Sea.

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33. Steven Beardsley, “Destroyer USS Truxtun Heads for Black Sea amid Heightened Tensions over Crimea,” *Stars and Stripes*, March 6, 2014, <http://www.stripes.com/news/destroyer-uss-truxtun-heads-for-black-sea-amid-heightened-tensions-over-crimea-1.271401>.

34. “Turkish Fighters Scramble against Russian Aircraft,” *Global Times*, March 4, 2014, <http://www.globaltimes.cn/content/846222.shtml>.

35. “Russian Fighter Jet Made Repeated Passes Close to U.S. Warship in Black Sea,” *Guardian*, April 14, 2014, <http://www.theguardian.com/world/2014/apr/14/russian-fighter-jet-repeated-passes-us-warship-black-sea>.

36. “Turkey Urges Russia to Drop Montreux off the Agenda,” *Hurriyet Daily News*, April 13, 2014, <http://www.hurriyetdailynews.com/turkey-urges-russia-to-drop-montreux-off-the-agenda.aspx?pageID=238&nid=64988>.

37. “NATO Sets Record by Sending Nine Ships into Black Sea,” *Sputnik News*, July 8, 2014, <https://sputniknews.com/world/20140708190842033-NATO-Sets-Record-By-Sending-Nine-Ships-Into-Black-Sea/#ixzz3QbV8geyW>.

38. “Nato Ships Enter Black Sea,” NATO, July 3, 2014, [http://www.nato.int/cps/en/natohq/news\\_111570.htm?selectedLocale=fr](http://www.nato.int/cps/en/natohq/news_111570.htm?selectedLocale=fr).

The following month Azerbaijan, Georgia, and Turkey made a tripartite agreement for conducting joint military exercises and for education and cooperation for protection of energy pipelines.<sup>39</sup> Between September 8 and September 10, 2014, a multinational naval exercise in the Black Sea took place with the participation of Ukraine, Georgia, Romania, the United States, Turkey, and three NATO warships (Canadian frigate HMCS *Toronto*, Spanish frigate ESPS *Almirante Juan de Borbon*, and Romanian frigate ROS *Regele Ferdinand*).

The Syrian crisis has also reverberated in the Straits as Turkish-Russian policy in Syria were at odds, most dramatically expressed when Turkey downed a Russian jet over the Turkish-Syrian border on November 24, 2015. Russia provocatively responded by sending a warship to the Mediterranean through the Straits with a highly visible soldier holding a ground-to-air missile on his shoulder. This could have triggered the provision in the Montreux Convention that allows Turkey to close the Straits should it feel threatened.

Recently Turkey and Russia have reconciled. Nonetheless, these past few years have demonstrated the vital strategic place of the Straits for security of the region and the central role Turkey plays.

## LESSONS FOR THE ARCTIC

The Arctic, once protected largely against human activity by its once-impenetrable ice sheets and glaciers, is now vulnerable to increased circumpolar navigation and energy exploitation. At what cost to its unique and fragile natural environment?

Concerns for protection of the Arctic environment date back to the 1969 journey of the SS *Manhattan*, escorted by the U.S. icebreaker *Northwind*, transporting Alaskan oil through the Northwest Passage without seeking prior authorization from Canada. In response, one year later Canada enacted the Arctic Waters Pollution Prevention Act for the Northwest Passage.<sup>40</sup> It was admitted by Canada to be in violation of international law at the time, and the United States challenged Canada's view of the Northwest Passage as an internal waterway, raising questions over coastal state and shipping legal rights and obligations.<sup>41</sup> Some compromise was reached in 1988 with the Arctic Cooperation Agreement, signed by the United States and Canada, which states that the two governments recognize the desirability "to cooperate in order to advance their shared interests in Arctic development and security" and further recognize the need to protect the unique environment of the region and the well-being of its inhabitants. The operative parts of the agreement

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39. Joshua Kuchera, "Georgia, Azerbaijan, Turkey Agree on Joint Military Exercises," *EURASIANET*, August 21, 2014, <http://www.eurasianet.org/node/69646>.

40. Arctic Waters Pollution Prevention Act, R.S.C. ch. 2 (1970), amended by S.C. ch. 41 (1977–1978) (Can.).

41. Michael Byers and Suzanne Lalonde, "Who Controls the Northwest Passage?," *Vanderbilt Journal of Transnational Law* 42 (2009): 1150. The authors point out that the "illegal" status of the Arctic Waters Pollution Prevention Act was remedied with the adoption of Article 234 of the 1982 United Nations Convention on the Law of the Sea permitting coastal states to adopt pollution laws 200 nautical miles from the coast, where year-round ice creates hazards for safety of navigation (*ibid.*, 1151). See also Kraska, "International Security and International Law in the Northwest Passage," 1125. Kraska describes Canada's internal water claims to constitute the most excessive maritime claims of any Arctic nation (*ibid.*, 1118).

provide that the parties will facilitate the navigation of their icebreakers in their respective Arctic waters and develop and share research results. Importantly, the United States agrees to obtain the consent of Canada for navigation of U.S. icebreakers in those waters Canada claims to be internal water. The agreement continues today. However, differing interpretations by the United States and Canada in relation to rights of passage remain unresolved.

As commercial shipping and tourism increases in the Arctic, many other countries and shipping interests will be added to what has traditionally been a bilateral controversy. The number of new vessel applications to transit the Northern Sea Route have increased over the past several years, although the actual number of transits has declined because of low energy and commodity prices, weaker economic demand, and Western-imposed sanctions against Russia. However, economic activity will likely increase in future years as other nations, such as China, become more economically active in the Arctic.

Similar to the Turkish Straits, if not significantly more pronounced, the Arctic presents critical challenges for protection of a unique marine environment from the inevitable risks of operational and accidental vessel source pollution if shipping activities increase. At present, unlike the Antarctic, there is no multilateral treaty for the Arctic region. In 2009 the eight permanent members of the Arctic Council signed the Tromsø Declaration, which included provisions on protection of the environment.<sup>42</sup> More recently, in 2013 the Arctic Council released an extensive Arctic Biodiversity Assessment that included the marine environment.<sup>43</sup> At the international level, the IMO has been actively engaged in studying circumpolar navigation, and in November 2014 it adopted the Polar Code (International Code for Ships Operating in Polar Waters) as a mandatory instrument beginning on January 1, 2017, with amendments to the International Convention for the Safety of Life at Sea (SOLAS) and MARPOL to be completed soon.<sup>44</sup>

What lessons, then, can be garnered from the Turkish Straits? While some have criticized the 1936 Montreux Convention as outdated, especially in regard to protection of the marine environment, the IMO experience proved the convention was not a hindrance to Turkey taking measures such as the TUBRAP reporting system, the establishment of a traffic separation scheme under Rule 10 of COLREG, and the temporary suspension of traffic where necessary. In fairness to criticism made at the same, some of the measures Turkey adopted, such as mandatory tug escort for large vessels, were not consistent with the Montreux Convention. However, other measures were warranted, as was eventually demonstrated by the sharp decline in accidents, especially collisions. Ultimately, the overriding importance of safety of navigation and protection of the marine environment prevailed over political discord and a five-year imbroglio over the Turkish Straits in the IMO. Simplistic as it may seem, open communications and good-faith cooperation at all levels, combined with

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42. Signed on April 29, 2009, by Canada, the United States, Finland, Denmark, Russian Federation, Sweden, Iceland, and Norway.

43. Arctic Biodiversity Assessment available at <http://www.arcticbiodiversity.is/the-report> (accessed April 2016).

44. Adopted during the 94th session of IMO's MSC. The scope of the new Polar Code is broad, applying to both polar areas, including ship design, construction, equipment, operational, training, search and rescue, and protection of the environment. The code is expected to go into force by January 1, 2017, and apply to new ships constructed after that date; ships constructed before this date will be required to meet the mandatory requirements after January 1, 2018, or the first intermediate or renewal survey, whichever comes first.

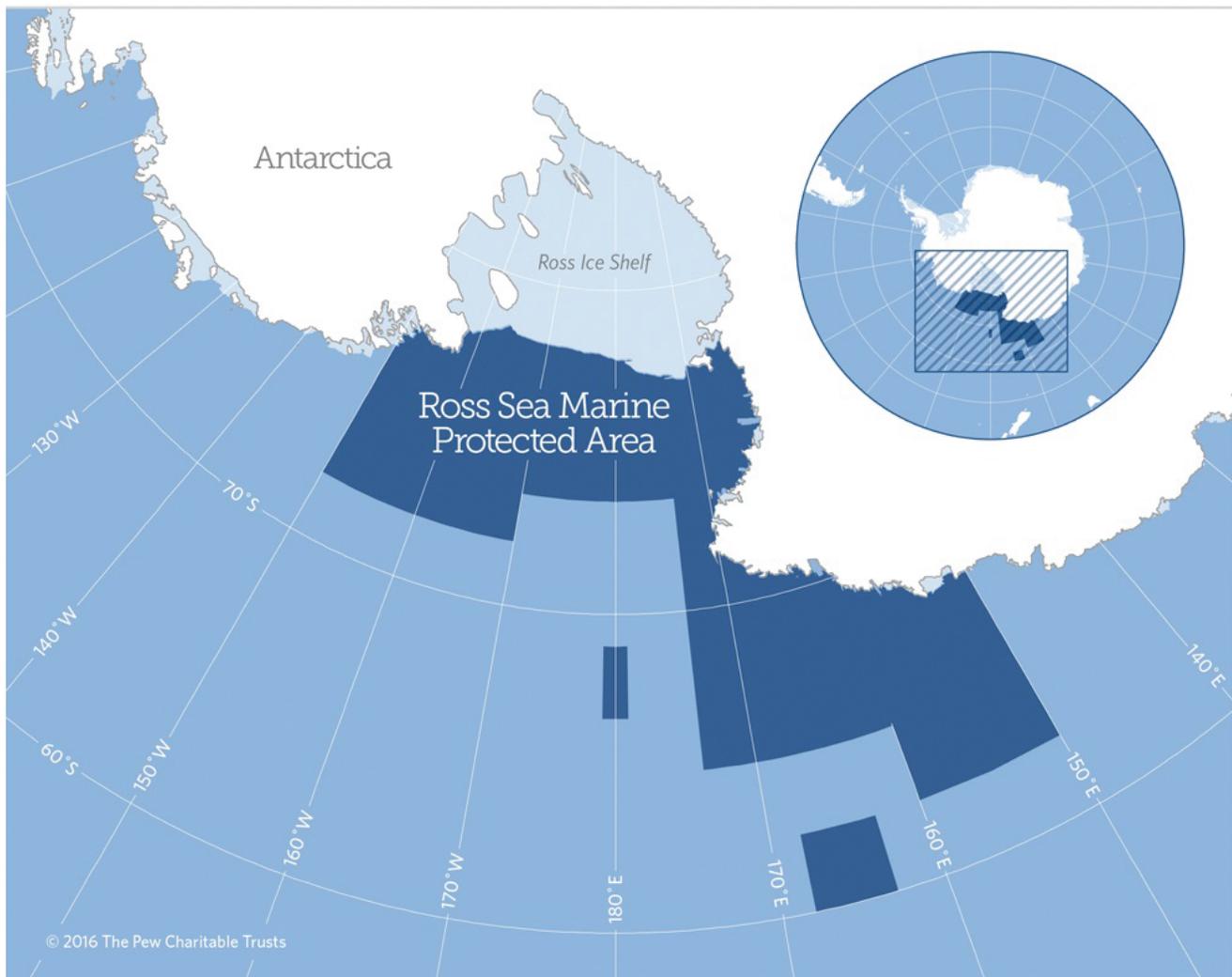
technical know-how and a full appreciation of the common interest in ensuring safe navigation and protection of the marine environment, should guide all states in the Arctic.

Unlike the Turkish Straits, which has a long-standing treaty in place regulating the passage of all ships, the waterways of the Arctic are subject to UNCLOS. Increasingly, however, there has been greater emphasis on bilateral understandings and unilateral measures. Nonetheless, given all its complexities and different interests, the Turkish Straits succeeded in establishing a complementary regulatory framework, consistent with international law and supplemented with state-of-the-art technology to preserve safe passage and protection of the environment. The Arctic Council and the IMO together can provide the technical and political fora for all interested states to cooperate and adopt such technical measures, legal instruments, or political accords necessary to protect the last frontier of pristine nature.

# The 1959 Antarctic Treaty and Subsequent Antarctic Treaty System

Alan D. Hemmings

**Map 4.1. Ross Sea Marine Protected Area**



Source: Map by Pew Charitable Trusts courtesy New Zealand Ministry of Foreign Affairs and Trade, [http://www.pewtrusts.org/~media/assets/2016/10/ross\\_sea\\_mpa\\_map.pdf?la=en](http://www.pewtrusts.org/~media/assets/2016/10/ross_sea_mpa_map.pdf?la=en).

## MIRROR IMAGES OR POLES APART?

Most of us live in more benign climes. The poles are geographically and conceptually remote from our shared historic experience, and they were conventionally explored and substantially mapped less than a century ago. Accordingly they retain a strangeness, a sense of being peripheral spaces, both remote, cold, snow covered, harsh, and dangerous places. One largely uninhabited (the Antarctic), the other (the Arctic) inhabited by four million people of whom approximately 10 percent are indigenous. Hence the unifying term *polar regions*, capturing both but invariably in practice privileging the pole in one's own hemisphere: the Arctic in the north, the Antarctic in the south.<sup>1</sup> They are so unlike the places where most of us live that we tend to focus on their apparent similarity to each other and assume that this reflects substantive commonalities.

In the second decade of the twenty-first century, the strategic interest in the Arctic and the Antarctic, and the presumed relationship between the two, is variously oriented around scientific understanding of climate change, environmental stewardship, appropriate regional governance arrangements, and actual and potential economic development generally through access to natural resources. While one issue is not always given precedent over the others (although historically resource access has often trumped environmental protection), there is plainly a powerful linkage among them.

This essay looks to the Antarctic, and specifically the governance arrangements effected through the Antarctic Treaty System (ATS), considers the issues that it has sought to resolve or manage, and examines whether these approaches—and the system as a whole—may be seen as having any useful application, or provides a model that may assist regional governance, in the Arctic.

## THE ANTARCTIC PROBLEM

Although the exploitation of Antarctic seals and whales followed in the wake of James Cook, and significant maritime expeditions were mounted by states in the first half of the nineteenth century, short-term residence ashore did not commence until the 1890s,<sup>2</sup> and from the turn-of-the-century "Heroic Age" expeditions through to Richard E. Byrd, visitation was transitory and intermittent. This only changed after World War II, when permanently occupied scientific stations were established. Antarctica never had an indigenous population, and even today it has no conventional residents beyond rotating staff at the 103 main Antarctic facilities.<sup>3</sup> Notwithstanding this recent

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1. The earliest volume known to me that considers both the Arctic and Antarctic under this term is Sir John Richardson, *The Polar Regions* (Edinburgh: Adam and Charles Black, 1861).

2. Notably the expeditions of Bellingshausen (Russia), d'Urville (France), Ross (United Kingdom), and Wilkes (United States). Alan D. Hemmings, "Commercial Harvest in Antarctica: Exploitation of Antarctic Marine Living Resources," in *Exploring the Last Continent: An Introduction to Antarctica*, ed. Daniela Liggett, Yvonne Cook, Bryan Storey, and Veronika Meduna (New York: Springer, 2015), 413–428; T. H. Baughman, *Before the Heroes Came: Antarctica in the 1890s* (Lincoln: University of Nebraska Press, 1994).

3. See the Main Antarctic Facilities list created by the Council of Managers of National Antarctic Programs at [https://www.comnap.aq/Information/SiteAssets/SitePages/Home/Antarctic\\_Facilities\\_List\\_13Feb2014.xls](https://www.comnap.aq/Information/SiteAssets/SitePages/Home/Antarctic_Facilities_List_13Feb2014.xls) (updated February 13, 2014).

## BOX 4.1. Text of Article IV of the 1959 Antarctic Treaty

Nothing contained in the present Treaty shall be interpreted as:

- a. a renunciation by any Contracting Party of previously asserted rights of or claims to territorial sovereignty in Antarctica;
- b. a renunciation or diminution by any Contracting Party of any basis of claim to territorial sovereignty in Antarctica which it may have whether as a result of its activities or those of its nationals in Antarctica, or otherwise;
- c. prejudicing the position of any Contracting Party as regards its recognition or nonrecognition of any other State's rights of or claim or basis of claim to territorial sovereignty in Antarctica.

No acts or activities taking place while the present Treaty is in force shall constitute a basis for asserting, supporting, or denying a claim to territorial sovereignty in Antarctica or create any rights of sovereignty in Antarctica. No new claim, or enlargement of an existing claim, to territorial sovereignty in Antarctica shall be asserted while the present Treaty is in force.

and still slight human presence, seven claims to territory were made by midcentury, although these were generally not recognized by most states, and actively rejected by at least six states.<sup>4</sup>

### Territorial Sovereignty

The core Antarctic problem to be addressed was jurisdiction. There was no agreed territorial sovereignty over a 14-million-square-kilometer continent. The Arctic, in contrast, has only a few land border disputes, such as Hans Island, claimed by both Canada and Denmark. It does, however, have maritime disputes, most notably in relation to the status of the Northwest Passage. Canada claims waters within its Arctic archipelago as internal, effectively enclosing the Northwest Passage. The United States and some European states claim that the islands are a "strait used for international navigation," granting the right of innocent passage.<sup>5</sup> As in the Antarctic (albeit complicated by the general nonrecognition of territorial claims, which undercuts pretensions to coastal state status), the Arctic has seen active seabed mapping in support of national claims to extended

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4. In chronological order of their final substantive form: United Kingdom (1908), New Zealand (1923), Australia (1933), France (1938), Norway (1939), Chile (1940), and Argentina (1943). Details in Victor Prescott and Gillian D. Triggs, *International Frontiers and Boundaries: Law, Politics and Geography* (Leiden: Martinus Nijhoff, 2008), 384–391. The Argentine, Chilean, and UK claims substantively overlap and are mutually contested. Australia, France, New Zealand, Norway, and the United Kingdom recognize one another's claims. No other states are known to do so. Germany, India, Japan, the Netherlands, Russia, and the United States have declared their nonrecognition of any of the seven Antarctic claims in the context of submissions by claimants to the Commission on the Limits of the Continental Shelf. The United States and Russia have each long rejected such claims, while reserving a basis-of-claim themselves.

5. Kathryn Isted, "Sovereignty in the Arctic: An Analysis of Territorial Disputes and Environmental Policy Considerations," *Journal of Transnational Law and Policy* 18, no. 2 (2009): 355, [http://archive.law.fsu.edu/journals/transnational/vol18\\_2/isted.pdf](http://archive.law.fsu.edu/journals/transnational/vol18_2/isted.pdf).

continental shelves and other features.<sup>6</sup> In the Antarctic it was evident by the late 1940s that resolution of territorial sovereignty disputes in relation to the continent was unlikely, but that to forestall both regional (largely Anglo-Argentine) and global (Cold War) confrontations, the territorial question had to be neutralized. This was achieved through the ingenuity of Article IV of the Antarctic Treaty,<sup>7</sup> which reserved the positions of claimants, semicclaimants (United States and Soviet Union), and nonclaimants and froze the situation so that nothing done while the treaty was in force altered the status quo ante. Jurisdiction was to be confined to one's own citizens, wherever they were in Antarctica, and all parts of the continent were thereby open to all.

Collective action was the unavoidable concomitant of being unable to resolve territorial sovereignty. Procedurally this necessitated consensus decisionmaking under the Antarctic Treaty and what became, with subsequent expansion of the regime through the adoption of further instruments, the ATS.<sup>8</sup>

Without resolution of territorial sovereignty along conventional lines in Antarctica, the construct of the coastal state, *sensu* the 1982 Law of the Sea Convention,<sup>9</sup> has not been applicable there. Consequently, management of the Antarctic marine environment also necessitated a collective approach, accomplished through the 1980 Convention on the Conservation of Antarctic Marine Living Resources (CCAMLR),<sup>10</sup> where for that part of the convention area that falls within the Antarctic Treaty area the Article IV provisions are again applicable.

## Demilitarization and the Precedent of Prohibition

A critical requirement for both the neutralization of territorial tensions in Antarctica and the prevention of Cold War antipathies was the containment of military activities—more precisely prohibiting “measures of a military nature” and exhorting “peaceful purposes.”<sup>11</sup> Stations and equipment (and ships and aircraft at points of discharging or embarking materials or personnel) were subject to inspection by designated observers, and aerial inspection was unrestricted.<sup>12</sup> The consequential prevention of the militarization of Antarctica, in conventional terms,<sup>13</sup> stands in marked contrast to long-standing and geostrategically important military bases in the Arctic (particularly in Russia and the United States). The Antarctic Treaty also prohibited both nuclear explosions and disposal of radioactive wastes (the latter pending any achievement of a permissive international regime

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6. *Ibid.*, 358.

7. The Antarctic Treaty, adopted in Washington, DC, December 1, 1959, entered into force June 23, 1961, 402 UNTS 71.

8. Addressing: seals (1972), marine living resources (1980), minerals (1988—subsequently abandoned), and environmental protection (1991).

9. UNCLOS, adopted in Montego Bay, December 10, 1982, entered into force November 16, 1994, 1833 UNTS 397.

10. Convention on the Conservation of Antarctic Marine Living Resources, adopted in Canberra, May 20, 1980, entered into force April 7, 1982, 1329 UNTS 47.

11. Antarctic Treaty, Article I.

12. *Ibid.*, Article VII.

13. Military personnel and equipment have always been legitimate in support of “peaceful purposes” in Antarctic operations and widely employed. More recently the question of joint-use technologies and equipment has posed questions about the depth of demilitarization in a contemporary military context.

allowing it, which has never eventuated).<sup>14</sup> Again, in stark contrast, significant amounts of radioactive materials are found in the Arctic, particularly off the Kola Peninsula and in the Kara and Barents Seas in the Russian Arctic. The Russian government has confirmed that by the early 1990s the Soviet Union had dumped 2 submarines, 14 reactors—5 of which contained spent nuclear fuel—19 other vessels with radioactive waste on board, and about 17,000 containers of radioactive waste.<sup>15</sup> Smaller amounts of nuclear materials were present in the Antarctic, most significantly at the “Nukey Poo” power plant at the U.S. McMurdo station—operational in 1963, closed in 1973, and decommissioned and repatriated in 1978—and in various radioisotopic thermoelectric generators (RTGs) deployed in remote weather stations by the United States and Soviet Union, which have generally also been recovered and removed from Antarctica.

Perhaps of equivalent significance to the actual prohibitions is the established precedent of collectively *prohibiting* activities as a foundational element and instrument of the Antarctic system. Although prohibition of an activity could still be problematical, these precedents may have assisted the now wider Antarctic Treaty System of the early 1990s to agree, for example, to a prohibition on mineral resource activities (apart from scientific research) in Article 7 of the Protocol on Environmental Protection to the Antarctic Treaty (Madrid Protocol),<sup>16</sup> which was negotiated to replace the Convention on the Regulation of Antarctic Mineral Resource Activities (CRAMRA).<sup>17</sup> Indeed, a moratorium on minerals activities had been agreed while CRAMRA itself was under negotiation. There are other, if less striking, prohibitions such as those in relation to various materials that may not be taken to Antarctica under the terms of the Madrid Protocol, and more recently prohibiting landings in Antarctica from tourist vessels carrying more than 500 passengers.<sup>18</sup>

## Collective Responsibility and Collective Interests

The Antarctic Treaty consultative parties took collective responsibility for Antarctic arrangements, grounding this in terms of an “interest of all mankind” in peaceful purposes and avoiding Antarctica becoming a “scene or object of international discord” and the “continuance of international harmony,” furthering the purposes and principles of the UN Charter.<sup>19</sup> Operationally, this collective responsibility enjoined a stance of Antarctic exceptionalism, whereby any and all issues arising in Antarctica were seen as necessarily falling to the responsibility of the consultative parties. As they arose, the issues of regulating a resumption of sealing, the commencement

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14. Antarctic Treaty, Article V.

15. Laura Dattaro, “The Soviet Union Dumped a Bunch of Nuclear Submarines, Reactors, and Containers into the Ocean,” *Vice News*, February 20, 2015, <https://news.vice.com/article/the-soviet-union-dumped-a-bunch-of-nuclear-submarines-reactors-and-containers-into-the-ocean>.

16. Protocol on Environmental Protection to the Antarctic Treaty, adopted in Madrid, October 4, 1991, entered into force January 14, 1998, 30 ILM 1455.

17. Convention on the Regulation of Antarctic Mineral Resource Activities, adopted in Wellington, June 2, 1988, has not entered into force, 27 ILM 868.

18. Measure 15 (2009), [http://www.ats.aq/devAS/info\\_measures\\_listitem.aspx?lang=e&id=432](http://www.ats.aq/devAS/info_measures_listitem.aspx?lang=e&id=432) (accessed September 2015), although this has still to enter into force.

19. Antarctic Treaty, Preamble.

of fishing,<sup>20</sup> the potential mining of Antarctica, and the modalities of environmental protection were issues to be addressed through new instruments developed by these parties and forming an expanding ATS.

Given the still-underlying political differences around territory, the limited knowledge about available resources and the still more imposing constraints of a difficult operating environment under the technology of the day, the foundational common interest and activity of the Antarctic Treaty was scientific research. As a generally shareable public good, with exhortation to cooperation in logistics and the conduct of the research, science became a valuable and openly celebrated glue to bind the new regional arrangements, under the “continent for science” rubric.

## THE ANTARCTIC SOLUTION

The Antarctic Treaty System has delivered, if not always final resolutions at least containment mechanisms for the historically problematical Antarctic issues. Positions around territorial sovereignty have been defanged through Article IV, demilitarization and peaceful purposes has been enshrined, free access to all parts of the Antarctic has been guaranteed, and science has been promoted as not only the sanctioned route to national presence but an inherently cooperative activity binding participants and delivering global public goods.<sup>21</sup> The ATS architecture has created a potentially expansive regulatory regime, with consensus decisionmaking. A sort of informal condominium obtains, within which the varying positions of members can be safely managed, and through which external challenges can be met—either through co-option into the system<sup>22</sup> or through a bloc solidarity where this is not possible.<sup>23</sup> This, at least, is the conventional wisdom, and there is indeed much to be said in favor of the Antarctic dispensation. It has endured for, so far, 57 years, no mean achievement in international relations terms. The Antarctic has been peaceful, with no wars fought over it and continuous peaceful engagement within its forums, even among states otherwise antagonistic to each other elsewhere.

### Constraints and Caveats

Some qualification needs to be placed on this happy situation. There is, obviously, a considerable place for historical contingency in the successes: we got to the Antarctic late, it was a hard place to do anything, there were not many states involved, and extending the active Cold War to

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20. The relevant instrument, the Convention on the Conservation of Antarctic Marine Living Resources, extended Antarctic collective governance to the area south of the Antarctic Convergence or Polar Front, with a northerly boundary varying from 60 to 45 degrees south latitude.

21. This has not, of course, meant that states have not continued to pursue their geopolitical interests in the region. See, for example, Klaus Dodds and Alan D. Hemmings, “Britain and the British Antarctic Territory in the Wider Geopolitics of the Antarctic and Southern Ocean,” *International Affairs* 89, no. 6 (November 2013): 1429–1444.

22. That is, by encouraging states to join the ATS.

23. The approach adopted in relation to the G77 challenge to the legitimacy of the ATS during the 1980s Question of Antarctica debates in the UN General Assembly. See, for example, Alan D. Hemmings, “Re-Justifying the Antarctic Treaty System for the 21st Century: Rights, Expectations, and Global Equity,” in *Polar Geopolitics? Knowledges, Resources and Legal Regimes*, ed. Richard C. Powell and Klaus Dodds (Cheltenham: Edward Elgar, 2014), 55–73.

Antarctica was never on anybody's wish list. As it became possible to do commercially valuable things in Antarctica, the existing structures provided a robust scaffolding for further systems development. Interestingly, the first challenges to the system related to the marine environment (sealing and later fishing), which meant that generic and internationally accepted high seas norms were drawn on. The most challenging debate occurred around minerals activities because this issue necessarily had implications for the region's central and intractable problem of territorial sovereignty. But despite some imaginative mechanisms to attempt to deal with mineral activities in the CRAMRA,<sup>24</sup> the problem was resolved when the convention was abandoned, replaced by the Madrid Protocol, which specifically prohibited minerals activity. So to summarize, the ATS has yet to actually regulate a very difficult issue. Moreover, the management of Antarctic marine living resources is now becoming much more difficult, as well, and it will be interesting to see if a likely resumption of interests in mineral resource activities—and the two other commercial activities of tourism and biological prospecting—will become more problematic. We have yet to reach a generally recognized crisis point in Antarctica.

So, in a sense, the jury is still out on the capacity of the ATS to manage intense commercial activity or (increasingly perhaps) a set of interacting activities. With no substantive governance or regime development since the adoption of the Madrid Protocol in 1991, and with neither tourism nor biological prospecting having yet led to institutional development of the sort earlier seen in relation to sealing, fishing, and mining, the inclination and capacity of the ATS to manage contemporary activities is quite unclear. The "building-block" approach to regime development, whereby each topic-specific instrument is seen as additive to the ATS without prejudice to earlier instruments, has its structural complications. Ensuring consistency of approach not only between instruments but across the terrestrial and marine divide, in such an institutionally fragmented Antarctic system, is very complicated and has the potential to retard progress. If one cannot—or feels one dare not—simplify the architecture of the regime because this entails reopening fraught debates around matters addressed in the existing legal instruments, then possibly the present ATS is at, or near, its level of maximum complexity and regime competency.

A second qualification is around the historically useful constructive ambiguity built into Antarctic agreements. There is some evidence that although this plainly aided the attainment of consensus enabling the adoption of instruments, it adds to the difficulties of adopting new approaches down the line. Thus, the vexed issue of designating marine protected areas (MPAs) under CCAMLR has revealed fundamental differences between the "pro" and "anti" MPA states around the capacities of the Convention.

The contestation over the development of MPAs in Antarctica also throws into relief the complications that arise when responsibilities are split between legal instruments. The ATS can be viewed as comprising two "cells." The first, centered on the 1959 Antarctic Treaty and the 1991 Madrid Protocol, is a coherent geopolitical regime, dedicated to preserving peace, free access (still largely through science), and (through the Madrid Protocol) environmental protection. The second "cell" is CCAMLR, which for all its novel commitment to ecosystem protection is at heart a resource access

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24. For example, through the makeup of the Article 2 Regulatory Committees for any area subject to exploration, which ensures all positions on territorial claims there are represented.

## BOX 4.2. Difficulties with MPA Designation under CCAMLR

CCAMLR's primary mechanism for enacting the consensus decisions of its commission is known as a "conservation measure," mandated under Article IX (relating to the functions of the Commission—the main decisionmaking body) of the convention.<sup>1</sup> Conservation measures are identified as including nine purposes, including "the designation of the opening and closing of areas, regions or sub-regions for purposes of scientific study or conservation, including special areas for protection and scientific study."<sup>2</sup> This has been taken as the basis for designating MPAs, otherwise there could not have been consensus on the designation (via a conservation measure) of the one MPA so far achieved in 2009, nor on a second conservation measure in 2011 on a *framework* for MPAs.<sup>3</sup>

However, in the course of subsequent discussion of proposed MPAs in the Ross Sea and off East Antarctica,<sup>4</sup> both of which proposals it has opposed,<sup>5</sup> the Russian Federation revealed in July 2013 that it now held a very different position, arguing, inter alia, the alleged:

lack of a definition for the concept of a CCAMLR marine protected area, upon which, in its opinion, the full legal foundation of the Commission's activities in relation to the establishment of such areas should be based. Neither the [Convention], nor [the] general CCAMLR Conservation Measure 91-04 . . . contains such a definition.<sup>6</sup>

The stance of the majority of Commission Members is well captured in the United States' response that:

it had no doubt that the establishment of the two MPAs would be in full accord with international law, and that the Commission has already decided this point. CM 91-04 reflects a determination by the Commission that it has legal authority to establish a representative system of Antarctic MPAs. . . . Moreover, CM 91-03 adopted in 2009, established an MPA.<sup>7</sup>

The Ukraine saw the Law of the Sea Convention as precluding the CCAMLR Commission from designating MPAs,<sup>8</sup> despite the fact (as we have seen) that it had already done so in 2009 with Ukraine's agreement.<sup>9</sup> Most Commission Members disagreed with the Ukraine's position, but with the deterioration in its domestic situation, confrontation with Russia and tighter alignment with the West, Ukraine has since disappeared as a substantive opponent of Antarctic MPAs.

The issues around the Antarctic MPA issue are complex, including substantive *Antarctic policy* differences over resource access versus ecosystem protection calculations, concerns about the geopolitical implications of MPAs, and differing assessments of the ATS; differences around the *process* of MPA designation; and *out-of-area antagonisms* (Libya, Ukraine, now Syria and broader deterioration in relationships between Russia and the West).<sup>10</sup> However, the CCAMLR Commission meeting in October 2016 finally agreed to the designation of the Ross Sea MPA.<sup>11</sup> This was achieved through Conservation Measure 91-05, adopted by consensus at the meeting. This positive development was made possible by some concessions, to Russia in particular, on the joint United States–New Zealand proposal.<sup>12</sup> Some operational details are "yet to be finalized,"<sup>13</sup> and will be considered at a workshop in New Zealand in mid-2017. The MPA will come into effect on December 1, 2017. Plainly this is a positive development, and has been widely welcomed, including by Secretary of State Kerry and New Zealand foreign minister McCully.<sup>14</sup> Despite the diplomatic efforts entailed, it is perhaps surprising that agreement was possible, given the out of area difficulties between Western

(continued)

## BOX 4.2. (Continued)

states and Russia noted above—difficulties that were joined in October by new concerns around Russian deployment of Iskander-M missiles to Kaliningrad and strengthening of its Baltic fleet.<sup>15</sup> A contributing factor, beyond the concessions, may have been that Russia was chair of the CCAMLR Commission in 2016, and looking to an evident “success.”

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1. At Paragraph 1(f).

2. At Paragraph 2(g).

3. CCAMLR, like all parts of the ATS, operates on the basis of consensus decisionmaking. CCAMLR, “Protection of the South Orkney Islands Southern Shelf,” Conservation Measure 91/03 (2009); CCAMLR, “General Framework for the Establishment of CCAMLR Marine Protected Areas,” Conservation Measure 91/04 (2011).

4. For a detailed analysis of the Antarctic MPA issue, see Laurence Cordonnery, Alan D. Hemmings, and Lorne K. Kriwoken, “Nexus and Imbroglia: CCAMLR, the Madrid Protocol and Designating Antarctic Marine Protected Areas in the Southern Ocean,” *International Journal of Marine and Coastal Law* 30 (2015): 727–764.

5. While not the only opponent—China and initially Ukraine have expressed opposition, and other states, including India, have reservations—Russia has been the lead and most vocal opponent.

6. CCAMLR, Report of the Second Special Meeting of the Commission, Bremerhaven, Germany, July 15 and 16, 2013, Paragraph 3.18

7. *Ibid.*, Paragraph 3.19.

8. *Ibid.*, Paragraph 3.26.

9. Given consensus decisionmaking, unless Ukraine had agreed in 2009 (and again in 2011), it would not have been possible to adopt the conservation measures.

10. Cordonnery, Hemmings, and Kriwoken, “Nexus and Imbroglia,” 754–761.

11. Associated Press, “Countries OK World’s Largest Marine Reserve in Antarctica,” *New York Times*, October 28, 2016, [http://www.nytimes.com/aponline/2016/10/28/world/asia/ap-as-new-zealand-antarctic-reserve.html?\\_r=0](http://www.nytimes.com/aponline/2016/10/28/world/asia/ap-as-new-zealand-antarctic-reserve.html?_r=0).

12. Including reducing the period of designation from 50 to 35 years, and allowing research fishing within the protected area. For further details, see “Ross Sea Marine Protected Area,” New Zealand Ministry of Foreign Affairs and Trade, <https://www.mfat.govt.nz/en/environment/antarctica/ross-sea-region-marine-protected-area> (accessed September 2015).

13. CCAMLR Executive Secretary Andrew Wright, in “CCAMLR to Create World’s largest Marine Protected Area,” CCAMLR Press Release, October 28, 2016, <https://www.ccamlr.org/node/92518>.

14. John Kerry, “On the New Marine Protected Area in Antarctica’s Ross Sea” (press statement, U.S. Department of State, Washington DC, October 27, 2016), <http://www.state.gov/secretary/remarks/2016/10/263763.htm>; Murray McCully, “Agreement to Protect Ross Sea Reached” (press release, Wellington, New Zealand, October 28, 2016), <https://www.beehive.govt.nz/release/agreement-protect-ross-sea-reached>.

15. Reuters, “Russia Beefs up Baltic Fleet amid NATO Tensions-Reports,” *New York Times*, October 26, 2016, <http://www.nytimes.com/reuters/2016/10/26/world/europe/26reuters-russia-defence-baltic-sweden.html>.

and management body—what elsewhere we know as a Regional Fisheries Management Organization (RFMO). While both “cells” use a common management language, the term *conservation* is explicitly qualified in CCAMLR as including “rational use.”<sup>25</sup> So, subtly different norms operate and sometimes complicate relationships between the Antarctic Treaty/Madrid Protocol and CCAMLR.

The first explicit attention to extending protected areas into the marine environment came when the Madrid Protocol expanded the long-established terrestrial protected areas system beyond its traditional terrestrial focus. Although CCAMLR also has the capacity to designate MPAs, it had not done so until the issue gained a higher profile through the Madrid Protocol. After a protracted “turf war” between the institutions of the Antarctic Treaty Consultative Meeting and CCAMLR’s Commission (largely the same states, just wearing different hats in these very different forums), CCAMLR won the turf battle and was responsible for any proposals that might have implications

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25. Article II.

for fishing. Since most proposals, in order to serve any useful purpose would have precisely this implication, suddenly a number of states that had been previously sanguine about the capacity when framed within the Madrid Protocol context found their marine harvesting interests under CCAMLR potentially challenged. Unsurprisingly, some of the key fishing states closed down the MPA process under CCAMLR, incidentally highlighting an ATS deficiency, namely, that it has no political level recourse or forum involving foreign or other ministers where transinstrument/institutional issues can be resolved.

Finally, there is the question of broader international legitimacy. While the ATS certainly includes the dominant global states from both the developed world and global South,<sup>26</sup> which represent the majority of the world's population, many states and peoples are not represented within it.<sup>27</sup> Although formally membership of ATS instruments remains open to all states, the financial and technical entry costs for physically operating in Antarctica (which is an essential prerequisite for accession to the instruments in practice) presents a significant barrier.<sup>28</sup> The annual "Question of Antarctica" debates in the UN General Assembly from 1983 to 2005 reflected the reality of these barriers and a more general challenge to the legitimacy of the ATS by the Group of 77 developing states.<sup>29</sup> Although the challenge was resisted and ultimately defeated by the ATS, legal scholar Duncan French has suggested that there is a need to embed global principles of international law within the ATS and encourage more general buy-in by the international community of the achievements of the ATS, so as to narrow the gap between the regional regime and international law.<sup>30</sup>

## LESSONS FOR THE ARCTIC

The Arctic is a very different place from the Antarctic, and one should be wary of assuming transferability of approaches, mechanisms, or institutional architecture between the two. But at a deep structural level of political legitimacy, the two regions have some commonalities. The question of

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26. Thirty states, plus the European Union, are decisionmaking parties to one or more instruments of the ATS. A further 28 states have acceded to one or more instruments. Thus, as of August 2016, a total of 58 states plus the European Union have a presence within the ATS.

27. There are presently (August 2016) 193 members of the United Nations.

28. The obtaining and funding of scientific equipment and trained personnel; the costs of transport to and from Antarctica and establishment and maintenance of infrastructure in Antarctica. The annual costs are measured in millions, even if the Antarctic program is run in collaboration with another state's program—and for autonomous programs tens of millions of dollars annually. Thus a comparison of Antarctic expenditure for 2010 showed, for example, the United States at \$295 million, Australia at \$143 million, Russia at \$67 million, China at \$44 million, and New Zealand at \$17 million. See Anne-Marie Brady, "The Emerging Economies of Asia and Antarctica: Challenges and Opportunities," in *Australia's Antarctica: Proceedings of a Symposium to Mark 75 Years of the Australian Antarctic Territory*, ed. Julia Jabour, Marcus Haward, and Anthony J. Press (Hobart: Institute for Marine and Antarctic Studies, 2012), 103–113.

29. See Hemmings, "Re-Justifying the Antarctic Treaty System," 59–62.

30. Duncan French, "Regime Integrity *qua* Antarctic Security: Embedding Global Principles and Universal Values within the Antarctic Treaty System," in *Antarctic Security in the Twenty-First Century: Legal and Policy Perspectives*, ed. Alan D. Hemmings, Donald R. Rothwell, and Karen N. Scott (Abingdon: Routledge, 2012), 51–69.

international equity is manifestly at issue in both the Arctic and the Antarctic,<sup>31</sup> but, notwithstanding the glass-ceiling reality, the Antarctic has at least a history of a continuously expanding membership of its key legal regime. The achievements and longevity of the ATS speak powerfully to the benefits of having a “tent” wherein regional interests may be discussed, and, where consensus is achievable, policy elaborated. The much more restricted participation of the Arctic Council and Arctic forums—whether Arctic-five or Arctic-eight—does not provide any sort of analogue, notwithstanding its more political level engagement and the presence of governmental and nongovernmental observers. From an Antarctic perspective, the Arctic generally lacks a specific regional legal mechanism such as the overarching Antarctic Treaty or the issue-specific marine living resources instrument CCAMLR that may offer finer resolution than just generic UNCLOS prescriptions. However, the intergovernmental Arctic Council does provide a regional-bloc mechanism built around the Arctic’s indigenous populations.

One way in which the Antarctic regime has been very innovative (at least historically; the more recent hiatus in institutional development may undercut this if not reversed) has been in its ability to sequentially elaborate theme-specific legal regimes (peace and territorial stabilization, sealing, fishing, mining, environmental protection) as stand-alone instruments, but at the same time couple these to the foundational norms of the system: the principles established in the 1959 Antarctic Treaty. There may be costs to so doing, in terms of the consistency and coherence of the overall system beyond a certain level of development, but it has (at least until recently) provided the ATS with a motive force that seems to have helped its stability and participant engagement. The Antarctic had the initial advantage that a sort of cordon sanitaire encircled it. There was little risk of overlap or intrusion by other regional or global instruments. The Arctic has not been in this situation, and involving contiguous national territory plainly did not require the early international accommodation essential in Antarctica. The Antarctic legal arrangements now rub up against not only more recent global instruments,<sup>32</sup> but a number of RFMOs whose southern boundaries abut the CCAMLR area and present relationship and responsibility issues.<sup>33</sup> The Antarctic regional context has thereby become more complicated, and it is important when considering the transferability of Antarctic approaches to assess their contemporary functioning and not just their operation in the past.

The regulation of Arctic fisheries appears, on the face of it, to be one of the more obvious areas where Antarctic approaches may offer benefits. The Arctic presently lacks an overarching RFMO.

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31. Alan D. Hemmings, “Common Challenge: International Equity in the Arctic and Antarctic,” in *The Arctic and Antarctica: Differing Currents of Change*, ed. Peter Kennedy (Wellington: New Zealand Institute of International Affairs, 2015) 66–72.

32. Inter alia, the Law of the Sea Convention, and the Convention on Biological Diversity, adopted in Rio de Janeiro, June 5, 1992, entered into force December 29, 1993, 1760 UNTS 79.

33. Convention for the Conservation of Southern Blue Fin Tuna, adopted May 10, 1993, entered into force May 20, 1994, 1819 UNTS 360; Convention on the Conservation and Management of Fishery Resources in the South East Atlantic Ocean, adopted April 20, 2001, entered into force April 13, 2003, 41(2) ILM 257; Southern Indian Ocean Fisheries Agreement, adopted December 29, 2006, entered into force June 21, 2012, [2012] UNTS 273; Convention on the Conservation and Management of High Seas Fishery Resources in the South Pacific Ocean, adopted November 14, 2009, entered into force August 24, 2012, [2013] UNTS 173.

In the Antarctic the circumpolar RFMO is provided by CCAMLR, which predates most other RFMOs and, through its focus on ecosystem management, scientific research, and a tight coupling with the Antarctic Treaty and other components of the ATS, is formally more than an RFMO. Although most of its area comprises the high seas, not all of it does. There are significant areas under coastal state jurisdiction from sub-Antarctic territories that are under undisputed national jurisdiction. In addition, while covered by the Article IV “freezing” of territorial positions, for the seven claimant states at least the waters close to the Antarctic continent and islands south of 60 degrees south latitude are contested areas, where these states like to think (and sometimes have asserted) that they have coastal state standing.<sup>34</sup> In other words, the Southern Ocean is a complex juridical space. In the Arctic, the balance between high seas and coastal state areas is the reverse of the Antarctic: a small “donut hole” of high seas beyond larger areas subject to coastal state authority. There are limited international management arrangements in relation to the donut hole of the Central Arctic Ocean,<sup>35</sup> but no clear mechanism for integrating this with the wider Arctic Ocean in the manner achieved in the south by CCAMLR although the Arctic Council is exploring the creation of a pan-Arctic Marine Protected Areas network and has established a Task Force on Arctic Marine Cooperation to explore future mechanisms.<sup>36</sup> Some such mechanism, that allowed functional integration of management across all maritime domains and provided a contact point with out-of-area operators, would surely offer benefits for Arctic Ocean management.

The changing world order will be difficult enough for the traditional Antarctic states to accommodate, but (to take just the more obvious facets of this transformation) four of the “emergent” global powers have already a long engagement in the ATS. South Africa is (albeit under its then apartheid government) an original signatory to the Antarctic Treaty: Brazil and India became Antarctic Treaty Consultative Parties (ATCP) in 1983, and China in 1985. Similarly, in relation to CCAMLR where South Africa is an original signatory, India joined in 1985 and Brazil in 1986. China did not become a commission member until 2006. Generally then, these key states have been parties to the important ATS instruments for a long time. China and India only became observer states to the Arctic Council in 2013.

The Arctic coastal states seem unlikely to concede sovereign rights to any sort of new regional structure beyond the Arctic Council in the foreseeable future, but this does not necessarily rule out any possibility of analogues to the Antarctic regime, if we can achieve this under looser juridical arrangements. In other words, might we be able to achieve the functional successes of a regional order without the hard wiring and formal architecture that has evolved in the Antarctic? Such a project inevitably presents some challenges and will at best provide only a partial solution to perceived limitations in the present international arrangements in the Arctic Ocean. The

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34. For example, in relation to submissions to the Commission on the Limits of the Continental Shelf.

35. Yereth Rosen, “5 Nations Sign Declaration to Protect Arctic ‘Donut Hole’ from Unregulated Fishing,” *Alaska Dispatch News*, July 17, 2015, <http://www.adn.com/article/20150716/5-nations-sign-declaration-protect-arctic-donut-hole-unregulated-fishing>.

36. John Kerry, “Remarks at the Presentation of the U.S. Chairmanship Program at the Arctic Council Ministerial” (remarks, Legislative Assembly of Nunavut, Iqaluit, Canada, April 24, 2015), <http://www.state.gov/secretary/remarks/2015/04/241102.htm>.

constructive ambiguity, and piecemeal development, that we have found necessary in relation to the evolving Antarctic regime—and the consequential limitations in its capacities and (perhaps) ongoing development beyond a certain point—are reality checks. But in arriving at such limitations one might hope that sufficient confidence and time has been acquired that there is at least the possibility of some subsequent optimism around the regional arrangements.

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COVER IMAGE CRUTTWELL, C., ATLAS TO CRUTTWELL'S GAZETTEER, 1799.

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