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ANTARCTICA
THE BBNJ AGREEMENT AND THE ANTARCTIC TREATY SYSTEM

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The thorny issue of applying the BBNJ Agreement to the Southern Ocean

Since it was signed in 2023, the question has arisen as to whether or not the Agreement on the Conservation and Sustainable Use of Marine Biodiversity of Areas Beyond National Jurisdiction applies to the Southern Ocean.

On 19 June 2023, the United Nations General Assembly adopted by consensus the agreement '*relating to the United Nations Convention on the Law of the Sea and concerning the Conservation and Sustainable Use of the Marine Biological diversity of Areas Beyond National Jurisdiction'*. This tediously-named treaty is better known by its acronym 'BBNJ', which stands for '*Biodiversity Beyond National* Jurisdiction'. Although widely used, the shorthand term '*agreement on the protection of the high seas*' is incorrect, as it applies not only to the high seas, i.e. the water column beyond the 'Exclusive Economic Zone', but also to the 'Area', the marine soil and subsoil beyond the limits of national jurisdiction of coastal States (Fig. 3).

Marine areas beyond national jurisdiction (light green) and Exclusive Economic Zones (white) in the World Ocean. *Source: NOAA Ocean Exploration.*

'International waters, or the high seas, account for more than 60% of the world's ocean surface and nearly half the surface area of our planet'.

The question arises in the same terms as it did in 1982 when the United Nations Convention on the Law of the Sea (UNCLOS for short) was adopted: what will happen to the application of the BBNJ Agreement to the ocean that surrounds the Antarctic continent, namely the Southern Ocean[1]? And how will this agreement adapt to the unique and specific legal regime of the Antarctic, based on the principle of the absence of national sovereignty and jurisdiction in the Treaty area, but also to the exceptions constituted by the territorial claims of seven claimant States, including France?

The Antarctic Treaty system developed from the Washington Antarctic Treaty, which was signed on 1 December 1959 and came into force in 1961. The Treaty applies to land and sea territories south of 60 degrees south latitude. The Washington Treaty was negotiated at the end of the first International Geophysical Year 1957-1958. During this period, twelve nations organised numerous scientific expeditions to Antarctica. The results and promise of this cooperation led scientists to call for a structure to be put in place to create a regulatory framework for the use of the region that would protect scientific activities. So it was that, at the invitation of the President of the United States of America, the twelve 'founding' States negotiated and concluded the Treaty (Fig. 1).

An important point is that the Antarctic Treaty '*shall be open for accession by any State which is a Member of the United Nations*' (Art. XIII). However, the system divides the Parties into those known as 'Consultative' and the others (Fig.1). The Consultative Parties, initially the 12 original signatories, are the States Parties that carry out scientific activities in Antarctica that are recognised by the other members. Only the Consultative Parties play a practical role in the governance of the continent by taking decisions at annual meetings, the Meetings of the Consultative Parties to the Antarctic Treaty.

The content of the Treaty and the obligations imposed on States betray the ulterior motives that led several States to negotiate such a text. Only peaceful activities are authorised in Antarctica. All military and non-peaceful activities are prohibited. The Treaty establishes a framework for the exchange of information on the activities carried out by the signatories on the continent. This is undoubtedly a reflection of the climate of mistrust and suspicion that prevailed during the Cold War, with the major powers concerned seeking through this mechanism to protect Antarctica from any military use against them.

[1] As defined by the International Hydrographic Organisation, the Southern Ocean extends between the 60th parallel south and the Antarctic continent (Publication S4, October 2018 edition).

In 1972, the Convention for the Protection of Antarctic Seals was signed in London and came into force in 1978. Combined with protection measures taken in 1994 under the Commission for the Conservation of Antarctic Marine Living Resources (CCAMLR), the London Convention is now effective.

Fig. 1: The two-speed status of the Parties to the Antarctic Treaty. Since 1959, when the Antarctic Treaty was signed by twelve founding countries, 46 other countries have acceded to the Treaty. According to Art. IX.2, they are entitled to participate in the Consultative Meetings during such times as they demonstrate their interest in Antarctica by *"conducting substantial research activity there"*. Seventeen of the acceding countries have had their activities in Antarctica recognized according to this provision, and consequently there are now twenty-nine Consultative Parties in all. The other 29 Non-Consultative Parties are invited to attend the Consultative Meetings but do not participate in the decision-making. *Credit : lecerclepolaire. Source :* www.ats.aq

The CAMLR Convention was signed in Canberra in 1980 and came into force in 1982. It has 26 member States, plus the European Union and 10 'acceding States' that have signed the Convention but do not participate in the decision-making process. It remains a highly original agreement, as it is both a text protecting the Antarctic marine environment and a regional fisheries management organisation (RFMO).

Being responsible for the conservation of Antarctic marine ecosystems, CCAMLR has adopted an ecosystem-based management approach, which does not exclude 'rational use' (Art. 2, para. 2), provided that this is carried out in a sustainable manner and takes into

account the effects of fishing on the balance of ecosystems. Each year, fishing quotas are set for each zone. The maritime zone covered by CCAMLR is slightly wider than that of the Antarctic Treaty, as it is set according to a geographical and scientific criterion: '*this Convention applies to the Antarctic marine living resources of 60° South latitude and to the Antarctic living marine resources of the area between that latitude and the Antarctic Convergence which form part of the Antarctic marine ecosystem*' (Art. I-1).

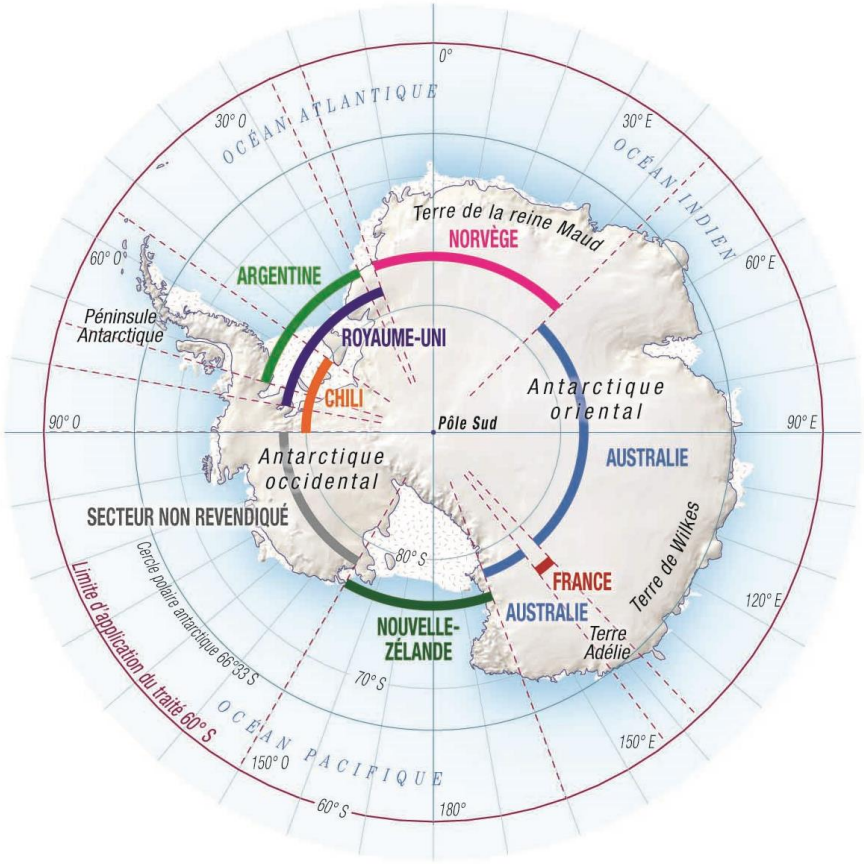

Fig. 2: Territorial claims over Antarctica by the 7 claimant States (Argentina, Australia, Chile, France, New Zealand, Norway and the United Kingdom), some of which overlap. *Credit: Institut Polaire Français.*

This convention has proved its worth in limiting overfishing in the region and combating illegal, unreported and unregulated fishing (or 'IUU fishing'), particularly for a species with high added value, the toothfish. But the challenges are constantly changing, and CCAMLR frequently finds itself in difficulty as the number of fishing nations among its members increases. For example, the creation of three marine protected areas (MPAs) has been blocked for over thirteen years by China and Russia, despite the efforts of the other contracting Parties to demonstrate, on a scientific basis, the need for their creation. And at the last annual meeting in October 2024, the Member States failed to agree to renew an important measure to prevent krill overfishing in a particularly sensitive area off the Antarctic Peninsula.

The Protocol on Environmental Protection to the Antarctic Treaty was signed in Madrid in 1991 and came into force in 1998. It designates Antarctica as a '*natural reserve devoted to peace and science*' (Art. 2). Article 7 prohibits all activities relating to Antarctic mineral resources other than scientific research. 42 States have signed it.

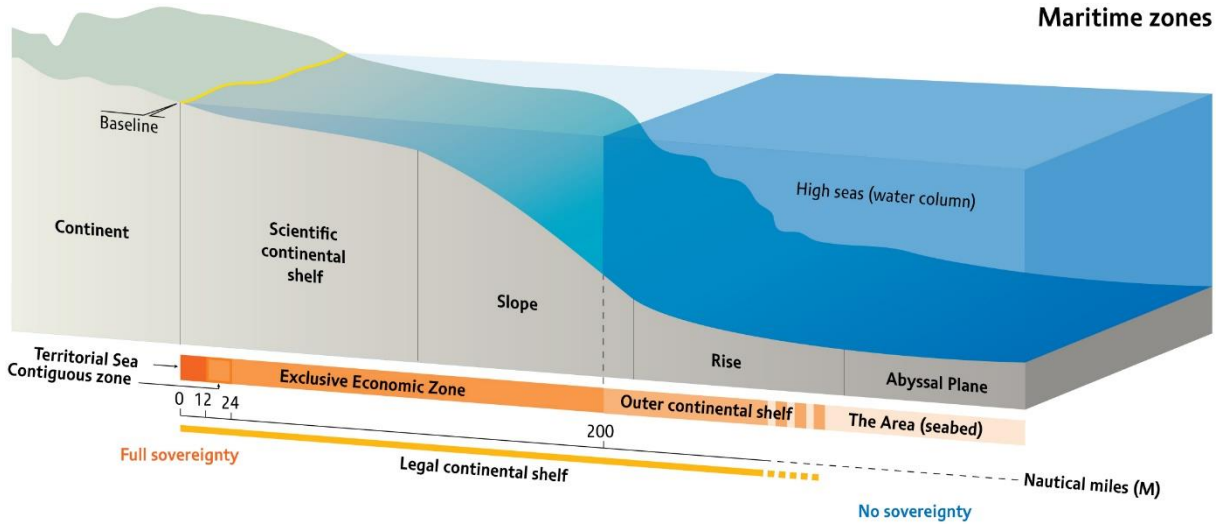

Fig. 3: The maritime areas covered by the United Nations Convention on the Law of the Sea. Coastal States enjoy sovereignty over their territorial sea, which extends up to 12 nautical miles from the coastline. Coastal States enjoy sovereign rights over natural resources and certain economic activities within an exclusive economic zone of 200 nautical miles. Coastal States have jurisdiction over the resources of their continental shelf: the underwater extension of a State's territory used to explore and exploit its natural resources. The limit of the shelf is set at 200 nautical miles from the coast, or more in some cases. On scientific grounds, coastal states can claim an extended continental shelf of up to 350 nautical miles. The water column beyond the EEZs is the high seas, and the seabed beyond the (extended) continental shelves under national jurisdiction is the Area. *Source :* https://www.un.org/fr/global-issues/oceans-and-the-law-of-the-sea

The United Nations system has developed considerably since 1945. The organs of the United Nations have created their own jurisprudence, and the number of specialised institutions has multiplied. The Antarctic Treaty System (ATS), on its own scale, has followed the same path. However, while the United Nations system is intended to be universal, the same cannot be said of the ATS, which, while open to all, sets conditions for the participation of States in the operation of treaties and agreements. Membership is open, but effective participation, with the right to vote on decisions, is limited to States that can demonstrate their interest in the Antarctic world and their willingness to carry out activities authorised by the treaties.

This distinction between the two systems could have led to tensions or even disputes between them. The United Nations might have felt that, by denying access to the role of decision-maker in Antarctica to Member States of the United Nations deemed insufficiently active in Antarctica, the treaty system ran counter to the principles of universality of the

1945 Charter of the United Nations, in particular the '*principle of the sovereign equality of all its Members*' (Chap. I, Art. 2.1). Although attempts were made by developing States to do so, the United Nations as a whole preferred to keep a low profile when the Antarctic Convention recalled the primacy of the principles of the 1945 Charter.

The United Nations could not be troubled by the fact that it had drawn up rules stating that '*Antarctica shall be used for peaceful purposes only*' (Article I of the 1959 Treaty), mentioning that '*Freedom of scientific research in Antarctica and cooperation towards that end (...) shall continue*' (Art. II) and that '*scientific observations and results from Antarctica shall be exchanged and made freely available*' (Art. III 1.c). Furthermore, the preamble to the 1959 Treaty states that '*it is in the interest of all mankind that Antarctica shall continue for ever to be used exclusively for peaceful purposes and shall not become the scene or object of international discord*' and that '*a treaty ensuring the use of Antarctica for peaceful purposes only and the continuance of international harmony in Antarctica will further the purposes and principles embodied in the Charter of the United Nations'*.

Thus, apart from a 'two-speed' system set out in the founding texts of the Antarctic system between those States that are scientifically and economically active (fishing, maritime and land-based tourism) in Antarctica and the others, nothing has been able to create a dispute between the two systems. While the United Nations Security Council has never directly addressed an issue relating to the white continent, the same has not been true of the General Assembly (UNGA). The UNGA organised discussions on Antarctica in the 1980s at the initiative of developing countries that were challenging the monopoly of the States parties to the Washington Treaty. The most vocal of these States was Malaysia, which called on the United Nations to take action to ensure that Antarctica was managed more equitably. In Malaysia's view, the Antarctic should be considered a 'common heritage of mankind', a concept then under discussion in the negotiation of the United Nations Convention on the Law of the Sea (UNCLOS) for the soil and subsoil of the continental shelf beyond the areas under the jurisdiction of coastal states. This debate remained unresolved and, to prevent it from resuming, the Consultative Parties sought to bring Malaysia closer to the Antarctic Treaty. Malaysia joined the Treaty in 2011. Malaysia did not become a Consultative Party, but the will to lead the fight against Antarctic governance has since disappeared from the priorities of Malaysian authorities.

What about the Law of the Sea? The Antarctic Treaty contains a reference to the Law of the Sea, stating that '*nothing in the present Treaty shall prejudice or in any way affect the rights, or the exercise of the rights, of any State under international law with regard to the high seas within that area*.' (Art. VI). This is where the issue of the 'claiming States' comes in (Fig.

2). These are seven States that claim territorial sovereignty in Antarctica. They have agreed to 'freeze' their claims (Article IV of the Treaty) for as long as the Treaty remains in force. It is now accepted that the UNCLOS, to take account of the absence of sovereignty over the Antarctic coast, does not extend its maritime zones (territorial sea, EEZ and extended or non-extended continental shelf) below the Antarctic high seas. This means that as soon as you reach the coastline, you are on the high seas and Article VI of the Antarctic Treaty can be applied without difficulty. However, the question of the 'extended continental shelf' (Fig.3) arose when the time limit laid down in UNCLOS was reached, beyond which coastal states could no longer assert claims for extension. France, like other claimant States, played the game of Article IV of the Treaty by simply reserving its rights to an extension for the future, in the event that the Treaty were to lapse[2]. This attitude confirms that the two legal systems can coexist perfectly well if States make the necessary efforts.

The same applies to the Area, whose mineral resources are placed under the jurisdiction of the International Seabed Authority (ISA) by UNCLOS. The question has not yet been openly raised, but it may one day be, if a State wishes to go beyond simple prospecting in the context of scientific research and explore and then exploit the mineral resources of the Southern Ocean Area. In this case, it would be up to the ISA to receive the request, analyse it and decide in accordance with its procedural rules. Such an occurrence would result in a conflict of rights between the ISA and its jurisdiction over the Area and the provisions of the Antarctic Treaty system which prohibit any activity on mineral resources in the land and sea area covered by the Treaty.

The question could arise now that the BBNJ agreement completes the legal regime for the high seas and the Area. It was concluded by consensus of the UNGA in 2023 but is not yet in force. At the time of writing, 21 States have ratified it. France ratified it in November 2024. 60 ratifications are required for the agreement to enter into force. Since the Antarctic high seas begin at the coast, the BBNJ agreement should apply from the coast. This means that it would be possible to create coastal high seas MPAs in Antarctica. The first consequence of the deterioration in the working climate at CCAMLR was to block the creation of three marine protected areas (MPAs) in East Antarctica. Defenders of the marine environment were undoubtedly too quick to rejoice, thinking that the BBNJ

[2] In order not to disturb the agreements of the Antarctic Treaty, but to safeguard the outer limit of the continental shelf under UNCLOS, two approaches have been applied by the seven claimant: a submission was filed along with instructions that it was not to be examined by the Commission on the Limits of the Continental Shelf (CLCS) or a State reserved the right to make a submission at a later date.(*Continental Shelf - The Last Maritime Zone*, UNEP/GRID-Arendal, 2011).

Agreement would break the deadlock, since it provides that a decision to create an MPA will be taken by a qualified majority and not by consensus. This was forgetting that the BBNJ Agreement puts forward the principle of 'not undermine' (Art. 5.2) which means that its implementation must not prejudice the competences of existing organisations. This is exactly the case with the CCAMLR. Moreover, when the BBNJ agreement was signed or ratified, two States issued declarations highlighting the existence of an organised, effective Antarctic system, to which the BBNJ system should leave Antarctic maritime jurisdiction.

So far, the UN and Antarctic systems have worked fairly well, avoiding clashes and disputes over jurisdiction. The Antarctic system is fulfilling its role of protecting scientific activities and the environment. The United Nations system, with the new BBNJ mechanism, could have further facilitated the creation of tools to protect biodiversity. It is a pity that it is States like the United Kingdom and Chile that, by wanting to preserve the Antarctic Treaty system from any encroachment by the United Nations, are weakening the protection of the high seas environment in the region. It is now to be hoped that the international institutions concerned will give themselves the opportunity to achieve positive results through dialogue and collaboration.

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