

# The Hollowing of Antarctic Governance

Alan D. Hemmings

**Abstract** The paper examines the apparent disabling of some substantive functions of the Antarctic Treaty System (its ‘hollowing’) since the adoption of the Madrid Protocol in 1991. It provides some examples of such hollowing by reference to regulatory gaps, the Antarctic continental shelf, and changes in the operation of Antarctic Treaty Consultative Meetings, before exploring the drivers of the hollowing and future options to reinvigorate Antarctic governance.

**Keywords** Antarctic Treaty • Antarctic Treaty System • International relations

## 1 Introduction

The system of Antarctic governance is now long established and, seemingly, well grounded. The foundational instrument, the Antarctic Treaty<sup>1</sup> was adopted in 1959; it is given effect through now annual diplomatic meetings—the Antarctic Treaty Consultative Meeting—rotating through Consultative Party states; and from this platform a wider Antarctic Treaty System<sup>2</sup> (ATS) has been developed, addressing

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<sup>1</sup>The Antarctic Treaty. Adopted Washington DC 1 December 1959, entered into force 23 June 1961. 402 UNTS 71.

<sup>2</sup>The Antarctic Treaty System is defined in Article 1 of the Madrid Protocol (below) as “the Antarctic Treaty, the measures in effect under that Treaty, its associated separate international instruments in force and the measures in effect under those instruments”.

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A.D. Hemmings (✉)  
Perth, WA, Australia  
e-mail: ahe30184@bigpond.net.au

A.D. Hemmings  
Gateway Antarctica Centre for Antarctic Studies and Research, University of Canterbury,  
Christchurch, New Zealand

in turn issues round sealing,<sup>3</sup> marine harvesting,<sup>4</sup> mineral resources<sup>5</sup> and environmental protection.<sup>6</sup> Membership of the Antarctic Treaty has increased from the 12 original signatories of 1959 to 29 Consultative (i.e. decision-making) and 24 Non-Consultative Parties in March 2017. The Commission for the Conservation of Antarctic Marine Living Resources comprises 24 states plus the European Union as Members (decision-making), plus 11 Acceding States. Overall, 59 states are Parties to one or more instruments of the ATS, 31 of them decision-making Parties. The top-tier members of the ATS include the major states of both the Developed World and the Global South (Brazil, China, India, and South Africa) and, inter alia, the Five Permanent Members of the UN Security Council. Antarctica is no longer an item of high profile contention at the UN (Hemmings 2014). Whilst international environmental NGOs are calling for Antarctic marine protected areas, this is not activism at the levels of the earlier “World Park” advocacy; the worst excesses of IUU fishing have been reined in (Österblom et al. 2015); and Antarctica remains the only place on the planet generally free of crime and violence.

So, on the face of it, Antarctica is in good shape, its governance well embedded, robust, and adequate to the needs. This is indeed invariably the formal view from within the system itself. The 2009 *Washington Ministerial Declaration on the Fiftieth Anniversary of the Antarctic Treaty* unsurprisingly adopts a positive tone, reaffirms the historic verities of the ATS and betrays not an iota of concern about any deficiencies or strategic challenges before that system.<sup>7</sup> In a world of endless troubles locally, regionally and globally, and more immediately pressing concerns for governments, the Antarctic plainly appears a refreshingly benign geopolitical and institutional arena. Where else might one point to a system of international governance still ticking over so nicely 58 years after it was set in motion?

In this paper I want to challenge this happy picture of a benign and unproblematic contemporary Antarctic scene. In doing so the paper neither claims nor requires that Antarctica presents in a state of chaos or mayhem comparable to other areas of legitimate and necessary concern on our planet. It does not intend to suggest that the problems it identifies in our current Antarctic governance arrangements are of the same order as those in other places and around other issues. Its purpose is to seek to identify problems in an early stage of development, at a point where they are (if we are persuaded) far more amenable to resolution than they likely will be if left until they cross critical thresholds. The paper takes it as

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<sup>3</sup>[CCAS] Convention on the Conservation of Antarctic Seals. Adopted London, 1 June 1972, entered into force 11 March 1978. 1080 UNTS 175.

<sup>4</sup>[CCAMLR] Convention on the Conservation of Antarctic Marine Living Resources. Adopted Canberra 20 May 1980, entered into force 7 April 1982. 1329 UNTS 47.

<sup>5</sup>[CRAMRA] Convention on the Regulation of Antarctic Mineral Resource Activities. Adopted Wellington 2 June 1988. 30 ILM 1455. Has not entered into force, being superseded by the Protocol on Environmental Protection to the Antarctic Treaty.

<sup>6</sup>[Madrid Protocol] Protocol on Environmental Protection to the Antarctic Treaty. Adopted Madrid 4 October 1991, entered into force 14 January 1998. 30 ILM 1461.

<sup>7</sup>ATS (2009, 161–162).

axiomatic that Antarctic governance should continue to manage emergent issues so that they do not become contentious,<sup>8</sup> and not await the arrival of crisis before addressing issues.<sup>9</sup> Finally, the approach adopted in this paper reflects the “new” and “deliberative” Antarctic exceptionalism that I believe is essential if we are to successfully preserve Antarctica and the common interests of humankind there into the future.<sup>10</sup>

## 2 ‘Hollowing Out’ as a Concept

The concept of ‘hollowing out’ has been widely applied over the past decades in domestic political contexts—in relation to substantive changes in administration and public services (Rhodes 1994), and more recently in relation to the state of democracy in modern states (Mair 2013; Anheier 2015). The usage, naturally, varies in the detail, but the commonality is an attempt to capture a sense of the loss of the substantive capacity within a formally unchanging architecture and/or rhetoric. The authors deploying the ‘hollowing out’ rubric point to the gap between the formal and the actual state of affairs.

I have previously argued, in the context of the 50th anniversary of the Antarctic Treaty, that ‘hollowing out’ captures nicely at least some of the difficulties and challenges now faced by the ATS as a regional governance regime (Hemmings 2010) and the present paper offers a further development of this thesis. However, in important ways as discussed below the ATS has always been a hollow system, and it is therefore important to discriminate between foundational and structural hollowness and the more recent hollowing argued here. And by ‘recent’, I am largely talking about the period since the adoption of the Madrid Protocol in 1991.

The peculiarities of the Antarctic situation—variously attaching to the place as a geographical location; as a consequence of historically contingent issues around the onset and nature of Antarctic activity; the states that were in a position to conduct that activity; the assertions of claims by some states; and global framing such as the Cold War—had consequences. It meant that the formal edifice of the international institution elaborated to provide international governance of this contested space would necessarily be a structure both lightly built and somewhat isolated—*sui generis* in important ways. The sensitivities around territorial sovereignty, which were complicated by the alignment of the claimants with the Western bloc led by the United States, made this almost inevitable. Antarctica was only internationalized up to a point. A very high level of national autonomy was required, not only by

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<sup>8</sup>The approach historically taken in relation to sealing, marine harvesting and minerals resource activities in the ATS.

<sup>9</sup>The first recital of the Preamble to the Antarctic Treaty refers to the “interest of all mankind” that Antarctica “not become the scene or object of international discord”.

<sup>10</sup>On the challenges to the historic Antarctic exceptionalism, see Hemmings (2007, 2009). The argument for a new deliberative exceptionalism is presented in Hemmings (2009, 71).

the claimants but by the rival superpowers of the United States and Soviet Union, in order for the Antarctic Treaty (and subsequently added instruments) to be acceptable. This was achieved by first establishing consensus as the basis for decision-making—thereby enabling a *de facto* ‘veto’ by any Consultative Party—and thereafter through a clear but informal understanding that certain sorts of issues (most notably territorial and jurisdictional issues) would not be further litigated—within the Antarctic fora.

In a place so remote from metropolitan territories, without resident populations in the conventional sense being present in Antarctica, with its highest forum an annual meeting of officials as distinct from a meeting of Ministers who could address the essentially political issues that arose (and, as the ATS evolved, issues transcending the separate ATS instruments), there was from inception a ‘democratic deficit’ of a quite profound sort.

The original governance structure also did not cover the entire field of Antarctic activities. To take just one facet of this, consider the situation in relation to what has become a dominant theme within the ATS—environmental protection. The Antarctic Treaty left high seas freedoms in the region intact, and whaling to regulation by a global instrument, the International Convention for the Regulation of Whaling,<sup>11</sup> and its International Whaling Commission (IWC). Subsequently the ATS has adopted a practice of complete subsidiarity to the IWC,<sup>12</sup> beyond that necessarily required under the letter of the various ATS instruments (Rothwell et al. 2009). Furthermore, as the ATS developed, its *modus operandi* was to assign responsibility for managing particular issues to successive instruments, without prejudice to existing instruments. Whilst there were sound practical and geopolitical rationales for this approach, in conjunction with the extra-ATS placement of responsibility for whales, it has posed some interesting issues around how the protection of the Antarctic environment as a whole (central to the purposes of both CCAMLR and the Madrid Protocol), and the particular responsibilities of Antarctic Treaty Consultative Parties in relation to this protection, can be achieved in practice, with the resulting fractionated institutional responsibility (Hemmings 2013).

Resolving the deep structural hollowness of the ATS would require a willingness to conduct a major reassessment of the purposes and modalities of national Antarctic engagement and international governance of the region. This would necessarily require reconsideration of positions around the question of territorial sovereignty in Antarctica. There is no current prospect of such reconsideration, the original structural hollowness of the ATS will therefore not be addressed any time soon, and this paper does not hereafter consider this further.

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<sup>11</sup>International Convention for the Regulation of Whaling. Adopted Washington 2 December 1946, entered into force 10 November 1948. 161 UNTS 74.

<sup>12</sup>See e.g. the consideration of environmental impact assessment duties in Antarctica in Hemmings et al. (2007).

### 3 Contemporary Hollowing of the Antarctic Treaty System

Institutionally, the ATS developed through decadal accretion of new topic-specific instruments addressing issues (essentially resource issues) as they arose: sealing through CCAS in 1972, fishing through CCAMLR in 1980, mining through CRAMRA in 1988, and generic environmental protection as well as the closing of the mining option, once CRAMRA was abandoned, by the Madrid Protocol in 1991. The approach of the ATS was to assume an exclusive responsibility for each emergent issue in the area 60 degrees South, or south of the Antarctic Convergence in the case of marine harvesting under CCAMLR. With the exception of the Antarctic manifestation of global whaling, noted previously, the ATS sought to own and regulate any substantive in-area activities. This approach reflected the historic Antarctic exceptionalism with which both the system and the stances of participating states brought to the region (Hemmings 2007, 2009).

A conjunction of events including the ending of the Cold War, improved operational capacity through technological advances and their wider dissemination, the rise of globalism and transformation of some states into quasi ‘market states’ (Bobbitt 2002), the dramatic expansion of human activities not just in Antarctica but surrounding it, and the growth in the number of global instruments that also apply in Antarctica, has now undermined this *modus operandum*. Emergent Antarctic issues are now, seemingly, construed by Consultative Parties as either inherently less problematical (and thus do not require new dedicated instruments for their regulation), or merely regional manifestations of a global activity (and thus best left to either global regulation, or the alleged sufficiency of market forces and/or self regulation).

The pattern of past ATS development may also have had influence. Because each successive additional instrument in the ATS was without prejudice to pre-existing instruments, as the system built the ATS acquired internal inconsistencies and complexity. The difficulties naturally increase with the number of instruments, and possibly the growth-by-accretion model has anyway reached its natural limits. For a community anxious about the risks of the alternative—a general system re-jigging, wherein a Pandora’s Box of uncertainties might be opened up—this may now also be a disincentive to further ATS development. But the substantive change is in the global context, where the historic Antarctic regional approach is now orphaned. The ATS as a body has yet to formally determine whether it is content to allow this to continue, or whether (and if so, how) it might establish a new basis for the regional management of Antarctica.

But, the ATS has adopted no new substantive instrument since the Madrid Protocol in 1991. The now over a quarter century without substantive addition to the ATS is its longest period without any instrument being under development. One might ask whether, quite aside from the specific ‘gaps’ in regime coverage this has allowed (below), the absence of a process of negotiation has also denied the ATS a critical structural ‘glue’. The process of negotiating something necessarily involves

states interacting in a dynamic context. It brings in new players (new states that are interested in this regulatory instrument; new communities in established Antarctic states who see themselves as stakeholders) and it generally alters and reinvigorates bureaucratic engagement within existing ATS states. On this last point, put cruelly, significant new diplomatic negotiation often clears out the ‘dead-wood’ and brings more senior and capable people into national delegations.

The hollowing of Antarctic governance is reflected in several ‘paths-not-taken’ since the adoption of the Madrid Protocol. Three will be examined here. These are (a) in relation to *regulatory gaps*—where new (or more intense) human activities, organized around actual or incipient industries, have not been regulated by the ATS in the traditional manner, (b) in relation to high profile—one might say ‘strategic’ policy—issues concerning territorial sovereignty, tied up in the question of the *Antarctic continental shelf* and (c) in relation to the operation of one of two main diplomatic fora of the ATS i.e., the annual Antarctic Treaty Consultative Meeting.

### 3.1 *Regulatory Gaps*

In terms of ‘gaps’, two obvious candidates present. Antarctic tourism and bio-prospecting are the two industries which have largely developed in the period since the adoption of the Madrid Protocol.<sup>13</sup> Whilst subject to the generic obligations of the Antarctic Treaty and (particularly) the Madrid Protocol (and in relation to bioprospecting also CCAMLR), neither has been subject to the sort of response that earlier emergent or potential activities/industries (sealing, fishing, mining) or even long established whaling (outside the ATS) elicited. We have not seen the development of a ‘Convention for the Regulation of Antarctic Tourism’ or a ‘Convention for the Regulation of Antarctic Biological Prospecting’. Neither have we seen substantive regulation of these activities through second-order instruments (legally binding Measures under the Antarctic Treaty/Madrid Protocol; Conservation Measures under CCAMLR). Thus, although Measures in relation to tourism were adopted in 2004 and 2009<sup>14</sup> neither has yet entered into force. In a recent major review of the Antarctic Treaty Consultative Meeting’s (ATCM) consideration of Antarctic tourism, India (2015) has identified the substantial discussion of tourism that has occurred between the Consultative Parties, noting that some

Issue-areas related to the regulation of Antarctic tourism have stayed on the ATCM agenda and in some cases repeatedly discussed and highlighted over several decades... [and] that it is not so much a question of whether but when the ATPs would turn to a more focused discussion of how best to formalize, institutionalize and operationalize the insights, resolutions, recommendations (including those mentioned in Annexes A, B and C to this Information Paper and measures that have accumulated over the decades at various ATCMs.

<sup>13</sup>On tourism see; Liggett et al. (2011) on bioprospecting see Leary (2014).

<sup>14</sup>Measure 4 (2004) Tourism and Non-Governmental Activities; Measure 15 (2009) Landing of Persons from Passenger Vessels.

The problem is not just confined to tourism. The last time an ATCM adopted any Measures on anything apart from those associated with Protected Area management plans was in 2009, when in addition to Measure 15 on tourism, Measure 16 on the amendment of Annex II to the Protocol was adopted (the latter has not entered into force either). To put this in context, the seven ATCMs since Baltimore (i.e. 2010–2016) have adopted 103 Measures. In short, over recent years, the ATCM has ceased to adopt legally binding Measures on anything apart from Protected Area Management Plans.<sup>15</sup> Whilst hortatory Resolutions undoubtedly have their place, the absence of an evolving body of legally binding obligations leaves the Antarctic Treaty and Madrid Protocol with increasingly dated and limited tools across its broader field of competence. Under CCAMLR, the analogous Conservation Measures have continued to be annually adopted across a range of operational management tasks. The problem-area in relation to CCAMLR in recent years has been particularly around the failure to reach consensus on the designation of marine protected areas. Whilst this circumstance poses significant challenges, it is not so clearly evidence of ‘hollowing’ per se.<sup>16</sup> Whatever the arguments for or against ‘Convention’ equivalent instruments for these later commercial activities, their absence means that increasing parts of current Antarctic activity is not substantively regulated by the ATS. There are some informal mechanisms, but most of these devolve to relationships between industry and particular states.

### 3.2 *Antarctic Continental Shelf*

Coastal states are entitled under Article 76 of the UN Convention on the Law of the Sea (UNCLOS)<sup>17</sup> to certain rights over the continental shelf beyond 200 nautical miles if they can demonstrate its extent through data submitted to the Commission on the Limits of the Continental Shelf (CLCS). The seven territorial claimants in Antarctica see themselves as coastal states sensu UNCLOS, and have variously sought to reserve their rights as such in relation to the continental shelf appurtenant to their Antarctic claims. The details of the particular decisions taken by claimant states in relation to the extended continental shelf (ECS) in the Antarctic Treaty area have been well worked in the literature.<sup>18</sup> The issue here is that over the past seventeen years<sup>19</sup> despite the continental shelf having been a major Antarctic

<sup>15</sup>Discussed in the annual review of The Antarctic Treaty System in New Zealand Yearbook of International Affairs since 2011. See, e.g. Hemmings (2017a).

<sup>16</sup>Although the underlying differences around the interpretation of purposes of the convention may be. See Cordonnery et al. (2015).

<sup>17</sup>United Nations Convention on the Law of the Sea. Adopted Montego Bay 10 December 1982, entered into force 16 November 1994. 21 ILM 1261.

<sup>18</sup>Succinct coverage provided in Saul and Stephens (2015), lxiii–lxvi.

<sup>19</sup>The period may reasonably be said to begin in 1999 with an Australian Media Release: Robert Hill, Minister for the Environment and Heritage and Alexander Downer, Minister for Foreign

geopolitical issue, raising legal questions relating to territorial positions (Kaye 2001) and stimulating six non-claimant ATCPs to lodge notes with the CLCS reiterating non-recognition of territorial claims and the provisions of Article IV of the Antarctic Treaty,<sup>20</sup> absolutely no consideration of it has occurred in the fora of the ATS.<sup>21</sup> There is no reference to the issue in the Final Reports of any ATCM. To an objective observer, the absence of formal consideration of such a significant issue in the very system established to manage Antarctic interests is surprising. It is ironic that one of the core issues behind the negotiation of the Antarctic Treaty, and seemingly contained by it through the celebrated Article IV, is now so sensitive that it cannot any longer be placed on an ATCM agenda and discussed. The related question of jurisdiction in Antarctica has also proven too sensitive to consider.

### 3.3 *Antarctic Treaty Consultative Meeting*

Article IX (1) of the Antarctic Treaty itemizes “measures in furtherance of the principles and objectives of the Treaty” which the Representatives of Parties may wish to consider at subsequent meetings (the meetings that we refer to as ATCMs). Amongst these are “(e) questions relating to the exercise of jurisdiction in Antarctica”. Whereas the other measures itemized have, to varying extents, indeed provided the basis for subsequent ATCM discussion and specific outcomes, the question of jurisdiction was left alone, until the 1992 ATCM, when Uruguay tabled a Working Paper under the title: “Issues relating to the exercise of jurisdiction in Antarctica” (Uruguay 1992).

This paper was stimulated by a January 1992 incident involving a Uruguayan and the death of a Russian at the Russian station on King George Island. Summarizing the juridical complexities around this incident (which the Uruguayan paper itself did not explicate): we had a citizen from a non-claimant ATCP (Uruguay,) involved in the death of a citizen of a state (Russia) which rejects territorial claims but asserts that it has a basis to claims itself, at a Russian station, in a part of the Antarctic subject to mutually exclusive territorial claims by three states (Argentina, Chile, United Kingdom)—none of which claims Uruguay has publicly recognised.

Although an agenda item was established for the ATCM: “Item 18. Question Related to the Exercise of Jurisdiction in Antarctica”, it was not substantively

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(Footnote 19 continued)

Affairs. “Move to Claim Extended Antarctic Continental Shelf”—Joint Media Release, 2 December 1999.

<sup>20</sup>Germany, India, Japan, Netherlands, Russian Federation, United States. Data from [http://www.un.org/depts/los/clcs\\_new/commission\\_submissions.htm](http://www.un.org/depts/los/clcs_new/commission_submissions.htm).

<sup>21</sup>See the statement by a senior Swedish diplomat that although the claimants, Russia and the US had held consultations, “no formal or informal consultations with the rest of the Parties were held” (Jacobsson 2007).



discussed and the ATCM decided that it would be considered at the next ATCM, which was not held until 1994. At that meeting, held in Seoul, in the space of two days, two revisions of the paper were issued, excising reference to the death incident and softening the analysis. Following a brief discussion the ATCM Final Report (Republic of Korea 1995) noted:

(122) A working paper (XVIII ATCM/WP 32) on this item was tabled and introduced by Uruguay. The Meeting recognized the importance of this question, the solution of which was left deliberately open in Article IX (1) of the Antarctic Treaty. But it was also understood that the question raises some delicate and sensitive problems which need more, and careful, deliberations.

(123) The Meeting therefore agreed to leave the item out of the Agenda of the XIXth ATCM and put it again on the Agenda of the XXth ATCM in order to give all Parties sufficient time to elaborate ways and means how to approach the question again in order to find an agreeable solution.

Accordingly, the issue was put onto the agenda of the XX ATCM held in The Netherlands in 1996. There was no substantive discussion and the Final Report included two short paragraphs (Netherlands 1996), the first reiterating the sentiments of paragraph 123 of 1994, and the second reading:

(74) The Meeting agreed that the Delegations had not yet had sufficient time to duly consider the issue, and decided to omit the item from the Agenda of the following Consultative Meetings until a request was made by a Consultative Party to re-include it.

So, a paper raising issues around jurisdiction (seemingly recognized at the adoption of the Antarctic Treaty in 1959 as an issue that needed attention), triggered by a serious incident in the Antarctic, was reluctantly passed through three ATCMs over a period of four years before being put out to pasture. The item has never been revisited, and the general problem of jurisdiction in such circumstances remains unresolved, beyond the hortatory 2012 injunction that “the Parties cooperate to institute discussion on issues related to the exercise of jurisdiction in the Antarctic Treaty area”,<sup>22</sup> which rather begs the question. One might argue that, notwithstanding the text of Article IX, this is an example of the foundational structural hollowness of the Antarctic Treaty. But this seems a weak position. Great care surrounded the drafting of the Treaty, and it seems implausible that Parties then deliberately identified an issue for subsequent attention which they had no intention of considering. The alternative reading that the unwillingness to consider the matter in the mid 1990s is in some sense a product of a latter hollowing of the ATS seems, on the face of it, more probable.

The other facet of the ATCM that I want to address here is the decision to contract the length of the annual meeting from ten to eight working days. The decision to do this was made at the 33rd ATCM in 2010 (ATS 2010) although this is documented only in the Final Report at paragraph 537, and not codified as a Decision (the class of decision-making ordinarily used in relations to matters of an

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<sup>22</sup>Resolution 2 (2012).

administrative nature),<sup>23</sup> and scheduled to commence at the next-but-one ATCM, i.e. the 35th ATCM in 2012 in Hobart. Plainly, there had been prior discussion between at least some Consultative Parties on this matter. Formally, the rationale for this contraction in the duration of the meeting was “efficiency” in the context of the development of a “Multi-Year Strategic Work Plan” for the ATCM (ATS 2010 paragraphs 519–527), the lead on which was Norway, which “introduced a proposal”. Norway had not tabled any paper containing such a proposal—and nor had any other State or participant (Observer or Expert). For a substantive proposal, one might ordinarily have expected a Working Paper. The decision to hold an eight day meeting in 2012 was formally without prejudice to subsequent meetings: “as far as subsequent ATCMs are concerned, the Meeting further agreed that the appropriate length of ATCMs would be kept under review” (ibid, paragraph 538). But, at the following 34th ATCM, Norway (2011) tabled a Working Paper specifically proposing the shortening of ATCMs, and at the first of the shorter ATCMs (the 35th in Hobart) Belgium announced the dates for the 36th ATCM showing that it planned to continue the eight day meeting format (ATS 2012, paragraph 308). The following year, the next ATCM (host, Brazil) also confirmed an eight day meeting (ATS 2013). This pattern has continued with the 2015 and 2016 ATCMs.

Plainly, the eight day ATCM is established as the new norm. Aside the question whether a degree of stealth was involved at the inception of this process—and of how many Consultative Parties were privy to the move—the substantive question I want to pose is, does this materially strengthen or weaken the ATCM’s capacity to conduct its business and deliver on the obligations of the two international legal instruments (the Antarctic Treaty and the Madrid Protocol) that it purports to manage?

All the indications are that the environmental management obligations of the Madrid Protocol (to say nothing of the wider obligations that arise under the Antarctic Treaty) are expanding, rather than contracting over the years. This is the unremarkable product of increasing human activity in Antarctica, more participant States within the ATS, a global trend of more sophisticated environmental management, and the learning curve and capacities in relation to Antarctic activities in particular. Whatever the ‘efficiencies’ achieved through the entirely reasonable process of implementing work-plans for the ATCM and its advisory Committee for Environmental Protection, it seems inherently unlikely that cutting the yearly meeting by 20% is going to be without effect on its capacity to not only get through the agenda, but give the issues the substantive consideration they may often require. Might the disappearance of the legally binding Measure from the output of recent ATCMs (except in the case of Protected Area management plans) be coupled with this? Of course these may be two separate symptoms of a more general shift of focus. In either case, this is a facet of the hollowing of Antarctic governance that we have under review here. Which takes us to the key question: What has caused this post-Madrid Protocol hollowing of Antarctic governance?

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<sup>23</sup>Decision 1 (1995).

## 4 Drivers of the Hollowing of Antarctic Governance

The Madrid Protocol was adopted after not only a particularly difficult period for the ATS (the decade long negotiation and then abandonment of the minerals convention CRAMRA; the associated critique of the ATS by global environmental NGOs and large parts of some members' publics; the challenge to ATS hegemony constituted by the 'Question of Antarctica' in the UN General Assembly) but at a hinge point in global geopolitics, when the Soviet system collapsed and new (if uncertain) world orders were possible. Even in Antarctic fora the transformation was palpable. At my first ATCM (Paris in 1989), Consultative Parties still aligned themselves by reference to their superpower sponsor, or in the case of non-aligned states by conspicuous detachment. I recall my then head of delegation, renowned New Zealand diplomat Chris Beeby, when East Germany had supported New Zealand's then pro-CRAMRA stance, turning to me and wryly remarking that "things aren't quite going as we hoped!" By the time we got to Viña del Mar in late 1990 and the onset of the negotiations for what became the Madrid Protocol, the Soviet Union, whilst still formally an entity was a busted flush, and by the 1992 Seventeenth ATCM had been superseded by the Russian Federation. Everything had changed in Antarctic terms.

My first proposition is that when we look to explanations for the various Antarctic transformations—including the argued hollowing of its governance—we recognize the criticality of the first few years of the 1990s. Having just got through a traumatic (in relative terms of course) decade, the ATS was still intact, it had a new shiny instrument to both bring into force and learn how to operationalize (quite different things), and it had some outliers still to negotiate (a Secretariat; and some sort of arrangements around liability for environmental damage). But this was all assumed to be 'bedding-in' stuff. Antarctica was not going to be a 'hot' topic any more. So very probably we were always in for a quiet decade in Antarctic affairs. The difficulty was, that (a) hitherto the ATS had always had the proverbial 'pot on the boil', with instruments adopted each decade, and had therefore never experienced a 'quiet' period before; and (b) it was precisely during this quiet decade that the pattern of Antarctic activity changed most significantly, with the new and burgeoning industry of tourism joining the decade-old Antarctic fishing industry as Antarctica's new commercial players. It was not, in my view, that the tourism industry was necessarily a problematical development, but that for historically contingent reasons its arrival elicited none of the preparatory regulatory work (bar the encouragement that particular states gave to the establishment of IAATO) that the arrival of previous industrial interests (including fishing) had.

Second, my sense is that after the nasty surprise some states had had with the collapse of CRAMRA, there was an inclination to steer well clear of any further attempts to regulate anything. No official wanted to propose to their government that another can of worms be opened! For some states it was simply this aversion to risk. For others I think that a strategic choice was made to leave 'regulation' to informal or market mechanisms. That way one avoided formal responsibility for

particular codifications, there was nothing to be overturned by your opponents, and thus the thing (generally commercial activity) was likely to be able to proceed. Much less fuss and bother all round.

So, we faced a situation where the existing (and newly agreed) elements of the ATS were all in place, but where there was no enthusiasm for engaging in new and potentially contentious regime development. As we know, the Secretariat was eventually resolved, and a limited annex on liability (Annex VI to the Madrid Protocol) was adopted in 2005, although twelve years on its entry into force is still years away at best, and may never be achieved.

As I have argued elsewhere, it also appears that we began to come up against the limits of what we actually agreed on in relation to the Antarctic dispensation by the turn of the century. The incremental development of the ATS, and its convention of not relitigating past arrangements, meant that we had sometimes arrived at consensus around quite vague ideas of the actual obligations. As the cumulative weight of these obligations increased, and more so as we actually began to operationalize them, some of these obligations suddenly became rather inconvenient. Whilst states have been largely free to self-define Antarctic obligations, there is a limit to the viability of this in a necessarily collective enterprise. Various matters have thrown up the quite different stances Consultative Parties may take in relation to particular issues—whether it is environmental impact assessment (Hemmings and Kriwoken 2010), the designation of marine protected areas (Cordonnery et al. 2015) or environmental management overall (Hemmings 2013). Furthermore, we seem to be having some general difficulties around the vexed subject of what values we are aiming to secure in our Antarctic arrangements (Hemmings 2012). In this respect we face not only the inevitably differing positions of states, but one otherwise positive achievement of the ATS—its longevity. This has meant that we are using instruments now all decades old to address contemporary situations; and unsurprisingly the values of the past are sometimes not those of the present—or at least they are not the preferred values of some states.

The contemporary Antarctic situation combines both the traditional inter-state contestation of Antarctic territorial sovereignty evident in the 1950s and the new technology-enabled frictions of actual and reasonably foreseeable commercial activities. Whereas, the pre-Antarctic Treaty problem was that territorial sovereignty issues (given further edge by their situation alongside the global ideological bipolarity of the Cold War) occurred outside any institutional framework, the present problem occurs despite the operational continuation of that framework, the ATS. Further, not only is the possibility of resource/commercial activity which was all but impossible in the 1950s now a reality, but formal sanction for the activities is present (or asserted to be) in both ATS and non-ATS global instruments. Further, under the influence of globalism and neoliberalism, it has proven increasingly difficult to agree any substantive Antarctic-specific governance system for local manifestations of emergent global industries (which include both tourism and bioprospecting).

Now that Antarctica is seen to possess actually realizable commercial benefits (including, notwithstanding the current minerals resource activity prohibition, under

Article 7 of the Madrid Protocol, the ongoing interest in hydrocarbons and, perhaps further out, other mineral resources), it is even harder for claimants to let go of their supposed territorial rights than it was in the past, and all potential beneficiary states are disinclined to adopt obligations that might come back to haunt them later. This is particularly so if global regimes promise to grant valuable rights to them precisely because they are territorial/coastal states (the UNCLOS Article 76 dilemma). Absent the Cold-War glue and the general technical restraints of a difficult Antarctic environment, in an international milieu of unrestrained commercial competition, the Antarctic regime is extremely vulnerable. It cannot grow; it cannot easily update even those capacities that it has; it faces competition from global regimes (or global norms of market liberalization outside traditional institutional regulation) for jurisdiction over particular fields; and its original problem (territorial sovereignty) is reinvigorated, and one route whereby the broader global phenomenon of nationalism may gain traction in relation to Antarctica too (Hemmings et al. 2015).

In consequence, the ATS has transformed from a regional regime wherein substantive policy responses were not only adopted, but also operationally managed, to one which risks becoming merely a limited regional coordinating mechanism, with substantive responses either impossible at all, or left to other fora. What we have seen is a disabling of the substantive core of the ATS, whilst leaving its edifice intact. It has not collapsed, but it has been hollowed out.

## 5 The Future

There are no easy remedies for this hollowing. The arrangements for Antarctic governance are those that sovereign states are prepared to countenance, and counsel from the sidelines has little chance of influence unless those states come to see their present approaches to Antarctica as problematical in terms that matter to them. But it would, surely, be desirable to see some more substantive discussions of core Antarctic governance issues and options than has been evident within the ATS since (probably) the original Washington conference before the adoption of the Antarctic Treaty. A hollowed Antarctic governance may be a present convenience in the estimation of some participants (although one might wonder how many Antarctic active states actually conduct any sort of high policy discussion around Antarctic governance—in which case, is what we see actually deliberative?) but it risks the real control of Antarctic futures migrating elsewhere, and the declaratory commitments to the ATS suggest most Consultative Parties would not wish to see this.

My own view is that we need to find a new basis for confidence in a regional governance arrangement in the Antarctic, and that requires new thinking as well as a confidence that some historic Antarctic values are worth defending (Hemmings 2014). There is an obvious double project open to the ATS: to frame its principles and values (and hence the underpinning of its justification) in a way that allows these to be ‘owned’ beyond the community presently found within the ATS, and to

internalize global principles and values not hitherto reflected within the ATS so that the Antarctic finally sits more comfortably in the global context (Hemmings 2017b). If we can reinvigorate and expand the Antarctic Treaty System, so that it can continue to provide the institutional architecture to do this, I think this is our best option. But if it cannot or will not evolve, there is nothing about the Antarctic situation that will prevent the real power to determine Antarctic futures going elsewhere.

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