CAMBRIDGE

Cambridge University Press
978-0-521-56182-2 - The Polar Regions and the Development of International Law
Donald R. Rothwell
Excerpt
More information

Part I

Introduction to the polar regions

© Cambridge University Press www.cambridge.org

CAMBRIDGE

Cambridge University Press
978-0-521-56182-2 - The Polar Regions and the Development of International Law
Donald R. Rothwell
Excerpt
More information

1 Introduction

The polar regions and the development of international law

The polar regions have occupied a distinctive place in international law for much of the twentieth century. A number of factors have contributed to this situation. States have encountered difficulty in effectively asserting polar territorial claims. Traditional modes of acquisition of territory, occupation and administration, proved difficult to apply in remote regions suffering from a harsh polar environment. The abundance of natural resources in polar waters raised issues concerning the sovereign rights of coastal states, freedoms of the high seas and resource management. International interest in the need to protect the environment, especially fragile ecosystems such as those in the polar regions, also contributed to increased attention being given to the polar regions. In response both unilateral and multilateral legal initiatives have been relied upon in the polar regions to deal with these questions. There has also been an emphasis upon the adoption of regional management mechanisms and a rejection of state sovereignty or global management approaches. In all these issues, international law has had a role to play.

This study will focus on the polar regions and how, through distinctive responses to unique polar problems, a contribution has been made to the development of international law. The study is based on the premise that the Antarctic and Arctic are separate but similar regions, which, through a combination of geography, environment and political factors, have certain common elements which make them distinctive from other regions and which require specific responses to international legal issues. The polar regions are, however, not identical and there are some very significant differences. Antarctica is a continent surrounded by ocean while the Arctic is an ocean

© Cambridge University Press www.cambridge.org

CAMBRIDGE

Cambridge University Press
978-0-521-56182-2 - The Polar Regions and the Development of International Law
Donald R. Rothwell
Excerpt
More information

surrounded by continents. The Arctic also has its own indigenous peoples who are seeking greater self-determination within their existing states or as separate states. The Arctic has also been subject in parts to substantial industrial development. Antarctica has a distinctive regional legal regime based on international law developed by states with Antarctic interests. The legal regime of the Arctic, on the other hand, is substantially based on either global international law conventions and norms, or the individual legal systems of the Arctic states. Despite these important distinctions, the polar regions have made important contributions to the development of international law. They represent examples of areas in which international law has been actively applied and adapted to meet special conditions. Given the difficulties which are sometimes encountered in effectively implementing international law at either the global or regional level, the polar regions then represent important case studies for an understanding of the development and application of international law.

This chapter essentially seeks to provide a framework for understanding the important legal issues that will be considered in later chapters. However, it is impossible to understand the legal developments that have occurred in the polar regions without also considering the impact of international relations. Accordingly, a brief review will be undertaken of international relations theory in order to provide a framework for a more detailed consideration of the interaction of international law and international relations in chapter 10.

The international law framework

During early expeditions to the Arctic and Antarctic various territorial claims were made. These raised questions as to how traditional principles of territorial sovereignty could be applied in areas remote from the metropolitan power and where there was no immediate intent to colonise as distinct from acquire.[1] In the Arctic, some states asserted claims on the basis of 'polar sectors' which ran to the North Pole. While sector claims were asserted for administrative convenience, they were also symbolic and allowed for a comparatively

[1] See James Brown Scott, 'Arctic Exploration and International Law' (1909) 3 AJIL 928–41; A. R. Clute, 'The Ownership of the North Pole' (1927) 5 CanBR 19–26; Gustav Smedal, *Acquisition of Sovereignty over Polar Areas* (Oslo, 1931); T. E. M. McKitterick, 'The Validity of Territorial and Other Claims in Polar Regions' (1939) 21 (I & IV) (3rd Ser.) *Journal of Comparative Legislation and International Law* 89–97.

© Cambridge University Press www.cambridge.org

CAMBRIDGE

Cambridge University Press
978-0-521-56182-2 - The Polar Regions and the Development of International Law
Donald R. Rothwell
Excerpt
More information

uncontested territorial division of parts of the Arctic.[2] Sector claims based partly on discovery were also made in Antarctica. However, some of the claims overlapped and all of the seven territorial claimants encountered difficulties in effectively exercising sovereignty. As if to acknowledge the difficulty of this problem, the 1959 Antarctic Treaty[3] sought to 'freeze' territorial sovereignty for the Treaty's duration.

These problems regarding the effective assertion of territorial sovereignty at both the North and South Pole have intrigued scholars since the beginning of the twentieth century.[4] In Antarctica this has been fuelled by neither the United States nor Russia (the former USSR) asserting any territorial claims despite their long standing interest in and presence on the continent.[5] The issue is further complicated by the fact that the claims of Argentina, Chile and the UK partially overlap. In addition, there is one sector in Antarctica which remains unclaimed. Apart from the deep sea bed, this is the only area on earth not yet the subject of state sovereignty claims. In the Arctic, territorial claims to most Arctic lands have now been settled. Nevertheless, because of the significance of the Arctic Ocean to the region and its near permanent ice cover, questions have been raised as to whether the Arctic Ocean is subject to claim in much the same way land is.

More recently, international law in the polar regions has been tested by concerns over resource management and environmental protection. In Antarctica, a debate existed over whether mining should be allowed. Throughout the 1980s much effort was expended as interested states negotiated a convention to regulate Antarctic mineral resource activities. This process was finally concluded in 1988 when agreement was reached on the final terms of the Convention on the Regulation of Antarctic Mineral Resource Activities (CRAMRA).[6] However, CRAMRA remained controversial because its fundamental

[2] See Smedal, *Acquisition of Sovereignty* at 54–76. Arctic sector claims are still important for some maritime claims in the region; for a general review see Susan J. Rolston and Ted L. McDorman, 'Maritime Boundary Making in the Arctic Regions' in Douglas M. Johnston and Phillip M. Saunders (eds.), *Ocean Boundary Making: Regional Issues and Developments* (London, 1988) 16–73.

[3] 402 UNTS 71, Art. IV.

[4] See the discussion and references thereat in Sir Robert Jennings and Sir Arthur Watts, *Oppenheim's International Law* (9th, vol. I: Pts 2–4) (Harlow, 1992) 692–3.

[5] This is not to suggest that neither the United States nor Russia (especially their nationals) have not from time to time sought to assert territorial claims in Antarctica. See F. M. Auburn, *Antarctic Law and Politics* (London, 1982) 61–81.

[6] (1988) 27 ILM 859.

© Cambridge University Press www.cambridge.org

CAMBRIDGE

Cambridge University Press
978-0-521-56182-2 - The Polar Regions and the Development of International Law
Donald R. Rothwell
Excerpt
More information

premise was that Antarctica was a region where mining could occur despite being particularly sensitive to environmental impact. In the Arctic, unilateral resource exploitation had taken place in conformity with the right of Arctic states to exploit their own natural resources. This resulted in scarce resources being overexploited. In the case of living resources, some species were threatened, impacting upon the subsistence culture of Arctic indigenous peoples.[7] By the conclusion of the 1980s the polar regions were increasingly considered by a variety of groups as being ripe for stronger measures dealing with environmental protection at both the national and international level. This culminated in 1991 with the negotiation of two important instruments.

In the case of Antarctica, a Protocol on Environmental Protection to the Antarctic Treaty (Protocol) was adopted.[8] The purpose of the Protocol is to implement measures designed to achieve the comprehensive protection of the Antarctic environment. The Protocol overrode CRAMRA as it prohibited mining activities from taking place in Antarctica.[9] It adds to the growing elaboration of the Antarctic Treaty System (ATS) which includes two further international Conventions and over 200 Recommendations made at Antarctic Treaty Meetings. In the case of the Arctic, a very different process was chosen. Following discussions which began in 1989, the Arctic states adopted in 1991 at Rovaniemi, Finland, the 'Arctic Environmental Protection Strategy' (AEPS).[10] The AEPS contains a series of multilateral obligations and seeks to enhance cooperation amongst Arctic states in order to more effectively protect the environment. As there exists no formal multilateral legal framework in the Arctic, the AEPS does not have an existing legal regime to ensure its implementation. However, the AEPS demonstrates the growing concern amongst Arctic nations for the need to implement measures to protect the Arctic environment. It represents further evidence of the gradual move towards the development of a more comprehensive Arctic legal regime.

This review of some of the legal issues confronting the polar regions demonstrates the difficulty in applying some fundamental concepts of international law to them. Recognising territorial sovereignty is difficult where states find it impossible to demonstrate effective administrative control due to the vastness of the region, harsh

[7] In regard to Arctic resource conflicts see generally Oran R. Young, *Arctic Politics* (Dartmouth, NH, 1992) 104–25. [8] (1991) 30 ILM 1,455 (hereafter Protocol).
[9] Protocol, Art. 7. [10] (1991) 30 ILM 1,624 (hereafter AEPS).

© Cambridge University Press www.cambridge.org

CAMBRIDGE

Cambridge University Press
978-0-521-56182-2 - The Polar Regions and the Development of International Law
Donald R. Rothwell
Excerpt
More information

environmental conditions and absence of settled populations. The adoption of the frozen sovereignty approach to deal with Antarctic territorial claims is a particular response to this problem. Likewise, sector claims, which, while highly doubtful, are nevertheless tolerated. The management mechanisms which have been adopted in the polar regions have also been unique. A genuine attempt has been made to adopt an ecosystem approach towards environmental management while dealing with emerging environmental problems prior to a crisis being reached. By adopting these and other approaches to polar problems, the polar states have demonstrated the inadequacies of general international law principles and more specialised areas such as the law of the sea when applied to the polar regions. This is not to suggest that the polar regions are in some way immune or exempt from general developments in international law. As will be demonstrated in later chapters, the polar regions have been impacted upon by a number of significant international instruments and customary international law.[11]

The polar regions, through the practice of states in the Arctic and Antarctic, have also made a contribution to the development of international law in that they demonstrate the effectiveness of regional management of international problems. The Antarctic Treaty is the prime example of this approach. The Treaty sought to deal with questions of sovereignty, scientific research and the militarisation of the continent. With these issues seemingly resolved for the Treaty's duration, the Treaty parties sought to build upon the initial Treaty framework through additional measures dealing with existing and emerging issues. The result has been the ATS, which remains the only international legal regime that has managed the affairs of a whole continent and its region. In the Arctic, unilateral state action was initially favoured by Arctic states to deal with Arctic regional problems. There were exceptions to this though, such as the 1911 Convention for the Preservation and Protection of Fur Seals[12] and the 1920 Treaty concerning the Archipelago of Spitsbergen (Svalbard).[13] After World War II the region was at the frontline of the Cold War and military and national security issues impacted upon the ability of Arctic states to engage in Arctic-wide cooperative efforts. This began to change in the 1970s with the development of a number of bilateral

[11] See generally Jonathan I. Charney, 'The Antarctic System and Customary International Law' in Francesco Francioni and Tullio Scovazzi (eds.), *International Law for Antarctica* (Milan, 1987) 55–99. [12] (1911) 214 ConTS 80. [13] 2 LNTS 8.

© Cambridge University Press www.cambridge.org

CAMBRIDGE

Cambridge University Press
978-0-521-56182-2 - The Polar Regions and the Development of International Law
Donald R. Rothwell
Excerpt
More information

and multilateral initiatives between Arctic states, primarily in areas of resource management and environmental protection. The development of new principles regarding the law of the sea also forced Arctic states to consider sovereignty questions once again as it became necessary to declare new maritime claims and delimit maritime boundaries. New technology also opened up the Arctic to the prospect of greater mineral resource development and international navigation through ice-clogged waters. All of these changes raised international issues which required cooperative responses. By the conclusion of the 1980s the Arctic states were beginning to adopt similar approaches to those taken in Antarctica. The AEPS was concluded in 1991 and there has also recently been discussion over the need for an 'Arctic Council'.[14]

In response to the unique characteristics of the polar regions, states have adopted distinctive international law responses. Many of these responses have important implications for an understanding of broader international law principles. As Sir Arthur Watts has noted with respect to Antarctica:

> Many propositions of international law stand exposed with particular clarity in the context of Antarctica, many views can be tested (perhaps to destruction) by reference to its special characteristics, the meaning of many rules of international law can be clarified by having to be applied there in unusual circumstances, and many emerging trends in the development of international law can be illustrated, and perhaps reinforced, by what has been happening there.[15]

While the international law issues in the Arctic are not identical to those in Antarctica, this comment is still valid for the Arctic.

The polar regions also present interesting contrasts to other traditional management mechanisms within the international system. Adopting a regional approach to the polar regions may not seem any different from the situation in other regions of the world where special legal regimes have been adopted to deal with marine pollution, trade and transportation. Discrete areas in need of international regulation have also been subject to international legal regimes. What is different in the polar regions is their size compared to other regions, the unique problems they face, the interest of the whole international community in their management and resource potential, and the

[14] See the discussion in chapter 6.
[15] Sir Arthur Watts, *International Law and the Antarctic Treaty System* (Cambridge, 1992) 2.

© Cambridge University Press www.cambridge.org

CAMBRIDGE

Cambridge University Press
978-0-521-56182-2 - The Polar Regions and the Development of International Law
Donald R. Rothwell
Excerpt
More information

means that have been adopted to deal with these problems. As such the polar regions are important prototypes for regional management in a world which is increasingly becoming concerned about the effectiveness of global management regimes at all levels.

Finally, it should be noted that the global community has increasingly expressed a concern over how the polar regions are managed. This has partly been due to increased interest in wilderness areas and the need to protect ecosystems, but also because of the important scientific work carried out in the polar regions. There is also a greater appreciation that with their position at the extremities of the earth and their fragile ecosystems the polar regions are important indicators of the impacts of global climate change.[16] The development of management options such as the 'common heritage' concept for areas of global commons has also increased international interest in the polar regions.[17] At the conclusion of the twentieth century it could be argued that the polar regions have a greater international significance than at any other time in history.[18]

The international relations framework

During the past twenty years studies concerning regimes dominated international relations literature.[19] The main interest amongst political scientists was how regime theory could be used to explain

[16] See Scientific Committee on Antarctic Research, *The Role of Antarctica in Global Climate Change* (Cambridge, 1989).

[17] This has especially been the case in regard to whether Antarctica should be considered part of the 'common heritage of mankind' and if the United Nations rather than the ATS is the more suitable body to administer the region: see Zou Keyuan, 'The Common Heritage of Mankind and the Antarctic Treaty System' (1991) 38 *Netherlands International Law Review* 173–98.

[18] This point has often been made by Oran Young, who argued throughout much of the 1980s that the world had entered the 'Age of the Arctic': see Oran R. Young, 'The Age of the Arctic' (1985–86) 61 *Foreign Policy* 160–79; Oran R. Young, *The Arctic in World Affairs* (Seattle, 1989). Similar bi-polar arguments have been made by Peter Beck: see P. J. Beck, 'Entering the Age of Polar Regions: The Arctic and Antarctic are No Longer Poles Apart' (1989) 18(1) AMBIO 92–4.

[19] The main forum for debate has been the journal *International Organization*: see F. Kratochwil and J. G. Ruggie, 'International Organization: A State of the Art on an Art of the State' (1986) 40 IntOrg 753 at 759–63 where the rise in regime literature during the 1970s is discussed. A good example of the literature is also to be found in Stephen D. Krasner (ed.), *International Regimes* (Ithaca, NY, 1983). For an international law perspective on the developments in international relations theory, see Kenneth W. Abbott, 'Modern International Relations Theory: A Prospectus for International Lawyers' (1989) 14 *Yale Journal of International Law* 335–411.

© Cambridge University Press www.cambridge.org

CAMBRIDGE

Cambridge University Press
978-0-521-56182-2 - The Polar Regions and the Development of International Law
Donald R. Rothwell
Excerpt
More information

international cooperative behaviour.[20] After a growth in the number of international organisations in the post-war United Nations era, the 1970s presented an opportunity to reflect upon these developments and to gain a greater understanding as to how these organisations were created, and how they operated and responded to changing conditions. It was at this time that some political scientists began to turn to regime theory as a means to explain these developments and answer some of these questions.[21] A theory dealing with international regimes also allowed for a greater understanding of new initiatives in international cooperation.[22] This early work was expanded on to such a degree that regime theory became a major area of study within international relations theory.[23]

Political scientists have already considered the application of regime theory in the polar regions.[24] This contrasts with the work of international lawyers, who, while having considered the legal regime of the polar regions,[25] have given little attention to regime theory.

[20] See Jan Q. Th. Rood, 'The Functioning of Regimes in an Interdependent World' in James N. Rosenau and Hylke Tromp (eds.), *Interdependence and Conflict in World Politics* (Aldershot, UK, 1989) 61–82.

[21] See J. C. Ruggie, 'International Responses to Technology: Concepts and Trends' (1975) 29 IntOrg 557–83; E. B. Haas, 'On Systems and International Regimes' (1974–1975) 27 *World Politics* 147–74.

[22] Regime analysis is still being applied to developing areas of institutional cooperation: see Peter H. Sand, 'International Cooperation: The Environmental Experience' in Jessica Tuchman Matthews (ed.), *Preserving the Global Environment* (New York, 1991) 236–79.

[23] An example would be the work of Keohane: see Robert O. Keohane, *After Hegemony* (Princeton, NJ, 1984) 49–132. See also, Ernst B. Haas, 'Words Can Hurt You; or, Who Said What to Whom About Regimes' in Stephen D. Krasner (ed.), *International Regimes* (Ithaca, NY, 1983) 23 at 24 who noted that since the early 1970s regime theory has developed into:

> a way of understanding the interactions of homo politicus with nature and with culture. It rests on the supposition that our collective understanding of our political choices increasingly depends on how we think about nature and culture. The study of regimes illustrates the range of past and future choices about international collaboration in the context of changing self-understanding.

[24] In the case of the Arctic, see Elizabeth Young, 'The Arctic: Prospects for an International Regime' in R. B. Byers and Michael Slack (eds.), *Strategy and the Arctic* (Toronto, 1986) 105–16; Gail Osherenko and Oran R. Young, *The Age of the Arctic* (Cambridge, 1989) 240–68; Oran R. Young and Gail Osherenko (eds.), *Polar Politics* (Ithaca, NY, 1993). In the case of Antarctica, see M. J. Peterson, *Managing the Frozen South* (Berkeley, CA, 1988); J. S. Dryzek, M. L. Clark and G. McKenzie, 'Subject and System in International Interaction' (1989) 43 IntOrg 475–503 for an application of 'Q methodology' to the Antarctic Treaty System.

[25] In relation to the Antarctic, see for example the following: Gillian D. Triggs (ed.), *The*

© Cambridge University Press www.cambridge.org

However, despite the widely differing approaches, there has recently been an increased interchange between international relations theory and international law. Sufficient respect has been gained for international relations theory that 'many international lawyers have concluded that regime theory can contribute to international law as well as international relations'.[26] Regime theory does indeed have something to offer international lawyers and this is especially the case with the polar regions. To gain an overall understanding of regime theory it is first necessary to consider a number of theoretical issues – what constitutes a regime, what factors are required for regime formation, the impact that the formative process can have on regime structure, the conditions that are necessary for a regime to be effective and how regimes respond to change. Only after a consideration of these various questions is it possible to gain an understanding of regime dynamics.[27]

Regime definition[28]

In approaching the study of regimes, it is first necessary to understand what a regime actually is. When regime studies emerged in the early 1970s, this was a major area of debate. Two of the early contributors were Ruggie and Haas. Ruggie described a regime as 'a set of mutual expectations, rules and regulations, plans and organizational energies and financial commitments, which have been accepted by a group of states'.[29] Haas noted that regimes were 'collective arrangements among nations designed to create or more effectively use scientific or

Antarctic Treaty Regime (Cambridge, 1987); Christopher C. Joyner and Sudhir K. Chopra (eds.), *The Antarctic Legal Regime* (Dordrecht, 1988). In the case of the Arctic, see Barnaby J. Feder, 'A Legal Regime for the Arctic' (1976–8) *Ecology Law Quarterly* 785–829; J. Enno Harders, 'In Quest of an Arctic Legal Regime' (1987) 11 *Marine Policy* 285–98; 'Legal Regimes of the Arctic' (1988) 82 ProcAmSocIL 315–34.

[26] Anne-Marie Slaughter, 'Book Review: *Regime Theory and International Relations*' (1995) 89 AJIL 454–6 at 454. On the potential for greater interchange between the disciplines of international law and international relations theory see the papers and discussion which took place at the 1992 meeting of the American Society of International Law: 'International Law and International Relations Theory: Building Bridges' (1992) 86 ProcAmSocIL 167–87.

[27] Peterson, *Managing the Frozen South* at 9.

[28] Despite nearly twenty years of accumulated literature on regime theory there is still debate as to what regimes are: see Stephan Haggard and Beth A. Simmons, 'Theories of International Regimes' (1987) 41 IntOrg 491–517; Mark W. Zacher 'Toward a Theory of International Regimes' (1990) 44 *Journal of International Affairs* 139–57.

[29] Ruggie, 'International Responses' at 570. For a later assessment of some of the problems associated with regime definition see Kratochwil and Ruggie, 'International Organization'.

© Cambridge University Press www.cambridge.org