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Thawing the ice: a contemporary solution to Antarctic sovereignty

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ABSTRACT. The Antarctic Treaty System (ATS) has provided a peaceful framework for governing the continent over many decades, in spite of seven extant territorial claims. However, its method of freezing these claims has been criticised for being short-sighted and ineffective in providing a long-term solution. This paper argues to the contrary. It undertakes a brisk analysis of different categories of alternatives: global commons, absolute sovereignty, restricted sovereignty and shared sovereignty. After dismissing each category for various reasons, it promotes the reform of the existing ATS, in which a long-term vision and modified chairmanship structure provide stronger leadership and more effective implementation. Essentially, it holds that the primary reason there is criticism of the system is because it is not functioning as well as it might be. The paper not only contends that a developed ATS is an achievable aim, but that it could eventually develop into a restricted, shared sovereignty governance framework. That form of governance, which would emerge over time, could be a more durable solution that resolves the competing territorial claims. In this way, the paper charts a potential pathway for the future of Antarctic governance. This path begins, however, with a reformed ATS.

Introduction

In the context of territorial sovereignty, Antarctica is a continent frozen in time. The Antarctic Treaty prevents national territorial claims, of which there are seven (Saul & Stephens, 2015a, p. lvii), from being asserted while the instrument remains in force, but does not dispel or prevent future claims. In the meantime, the Antarctic Treaty System (ATS) provides the governance framework for the continent. This has been criticised as a temporary solution that leaves sovereignty disputes dormant for the future (Dodds, 2011; Hemmings, 2008; 2009; Hemmings, Chaturvedi, Leane, Liggett & Salazar, 2015; Jabour, 2012, pp. 711–712; Kennicutt et al., 2015, pp. 13–14; Rothwell, 2010; Welch, 1992, pp. 654–655). Although this anxiety is justified, this paper will contend that the current system is the best solution in the present political and diplomatic climate (Jabour & Weber, 2008). All the ATS needs is a stronger common vision, as mentioned by Jabour (2012, p. 719), with more effective implementation and communication. A more mature ATS could evolve over time into a stronger international organisation modelled on restricted, shared sovereignty. However, such a change could only occur with a reformed ATS.

This paper undertakes a wide analysis of alternative solutions to Antarctic sovereignty, which is defined here as the ability of a state to exercise its supreme authority over territory. It creates broad categories to cover more specific proposals which cannot be examined in detail. Therefore, this analysis is not comprehensive and readers are encouraged to delve deeper. Rothwell (1986), for example, offers an excellent, if slightly dated, analysis of the relevant issues (see also Lefeber, 1990). At its heart, this paper advocates a stronger ATS as the best solution to competing claims for Antarctica. This idea has been coined variously by Hemmings (2008, pp. 89–90; 2009, pp. 71–72) as 'Antarctic institutional development' or viewing Antarctica through the prism of 'conventional international relations' with a degree of 'Antarctic exceptionalism'. Creating a true global commons over the continent is not an attainable goal in the present political climate; if anything, national interests in the region are growing. Simultaneously, states recognise that the unique environmental, scientific and anthropological considerations of the Antarctic require a high degree of international cooperation. National policy documents, particularly of claimant states, swing between asserting national interests and strengthening international cooperation in science and environmental protection, a concept known as bifocalism (Bray, 2016; Commonwealth of Australia, 2016; Det Kongelige Utenriksdepartement, 2015; Haward & Cooper, 2014; Her Majesty's Government, 2014; McGee & Smith, 2017; New Zealand Government, 2010; see also Dodds, 2017).

The tension between national and international interests is central to Antarctic sovereignty. This paper will focus on the long-term, international, cooperative aspect of this tension, as opposed to the steps that individual states could take to alleviate tension (Bray, 2016; Dodds, 2011). It thus examines different 'shades' or 'models' of shared sovereignty. It will conclude that absolute sovereignty to a small group of claimant states is unrealistic and not conducive to international cooperation. A form of restricted sovereignty, following something akin to the Svalbard Treaty in the Arctic, would also be unworkable as it suffers from the problems of both absolute sovereignty and global commons. Finally, there is mention of shared sovereignty or condominium, where the claimants share in the governance of the continent. While this last idea has some merit in appealing to claimant states, it is not likely to appease the non-claimant community.

The ATS is currently the most pragmatic international solution to territorial claims in the Antarctic. By freezing

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claims, it has defused the issue. This directs attention to international cooperation and practical national operations, and away from legal quarrels. In other words, it accommodates both international and national interests (Bray, 2016, p. 257; McGee & Smith, 2017, pp. 33–34). However, ineffective implementation, communication and resources hamper the work of the ATS, which keeps alive criticism of the system as a true solution. Above all, the ATS lacks a central, well-publicised vision for Antarctica. In this way, it resembles the early years of its northern cousin, the Arctic Council, a soft law multilateral institution to which this paper will occasionally refer because of the interrelatedness of the polar regions (Kennicutt et al., 2015, p. 15; Rothwell, 1996, pp. 42–47; see also Marsden, 2016, pp. 57–58). Now is the time for the ATS to fashion a clearer, ministerial-level vision (Hemmings, 2009, pp. 71–72), which remains dynamic through a rotating chairmanship, is effectively implemented by signatory states and is communicated to the world.

As the ATS strengthens as the pre-eminent organisation responsible for the continent's future, the conflict over Antarctic territory will probably fade. There would be little logic in opposing the ATS when it is effectively working in the furtherance of common Antarctic goals. Indeed, the stronger the ATS becomes, the weaker the Antarctic sovereignty issue will become, a point at which Rothwell already hinted in 1996 (p. 425; see also Rothwell, 2013, pp. 250–251). In its place, a form of restricted, shared sovereignty could emerge, combining the last two sovereignty models above. A restricted condominium, as opposed to a pure condominium (Bulkeley, 2010), could cure many of the problems that other sovereignty models face by sharing sovereignty among active ATS members and restricting this sovereignty with an international law overlay. Exactly how such a model could be reached and operated is for another article to explain. Its mention here is to demonstrate the longer term potential of this paper's proposals. The immediate argument is for the ATS to reform its internal processes to better formulate and implement a common vision that could commence the thawing of Antarctica's frozen sovereignty.

Background

The 1959 Antarctic Treaty came at a time when there was great fear of a conflict over the frozen continent. There was particular anxiety over a conflict between the USA and the Soviet Union because of the Cold War, which was well underway at the time. Even today, the possibility of a dispute over the continent exists, although it is extremely unlikely (Jabour, 2012, pp. 720–721). However, Antarctica has been prone to conflict ever since humans first sighted it. As exploration of lands in the far south quickened pace through the eighteenth, nineteenth and early twentieth centuries, states were quick to claim territories and assert sovereignty over them (Rothwell, 1996, pp. 51–58; Saul & Stephens, 2015a, pp. xxvii–xxxvii). The seven current claimants to the continent, Argentina, Australia, Chile, France, New Zealand, Norway and the UK, have not had their claims recognised widely outside of the circle of claimants. Nonetheless, these claims continue to subsist, in main part because of the Antarctic Treaty, but also because no international court has ever considered the question of Antarctic sovereignty (Saul & Stephens, 2015a, pp. lxii–lxiii).

It is useful to discuss the treaty's mechanism for defusing the sovereignty issue found in article IV. The provision is divided into two parts. First, it prevents ratification of the treaty from being interpreted as a renunciation or diminution of claims or rights to Antarctica, or as prejudicing the position of a state vis-à-vis another state's claim. This simultaneously reassures claimant states of their territorial claims and reassures non-claimants of their probable negative position against claimants. Second, article IV prevents all acts taken while the treaty is in force from having any effect on territorial sovereignty and requires states to refrain from acts concerning sovereignty. This is the 'freezing' part; it preserves the status quo and has creatively defused sovereignty conflict for more than half a century (Saul & Stephens, 2015a, pp. lxxi–lxxii; see also Scott, 2011). Haward (2017, p. 21) importantly notes that the claims themselves are not frozen, only the disputes and assertions over them. While the treaty is relatively successful today, it was a controversial and difficult instrument to negotiate (Dodds, 2010). The declarations at the conclusion of the drafting conference, particularly on the related issue of civil and criminal jurisdiction, provide an insight into some of the challenges (Saul & Stephens, 2015a, pp. 45–46).

The Antarctic Treaty is the foundation for the other treaties that comprise the ATS. These are the Convention for the Conservation of Antarctic Seals, the Convention on the Conservation of Antarctic Marine Living Resources, the Convention on the Regulation of Antarctic Mineral Resource Activities (not in force) and the Protocol on Environmental Protection to the Antarctic Treaty (the 'Madrid Protocol'). The system centres on the Antarctic Treaty Consultative Meeting (ATCM) established by article IX, which meets annually in different cities around the world following the list of member states in English alphabetical order. While historically the ATCM would be preceded by preparatory meetings, the transition from biennial to annual meetings has removed this need (Saul & Stephens, 2015a, p. lxi). Nonetheless, separate meetings do occur on subject-specific matters, particular in the scientific sphere. The ATCM covers a wide range of issues, including governance, peaceful uses, science, the environment and tourism. Often when speaking on the environment, the meeting strictly acts as the Committee for Environmental Protection stemming from articles 11 and 12 of the Madrid Protocol. Meetings produce internal regulations known as 'decisions', declarations and guidelines known as 'resolutions' and legally binding instruments known as 'measures'. All decision-making is by consensus (Jabour, 2012, pp. 710–711), reflecting the

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proceedings of the Arctic Council in the north as well as many other multilateral organisations (Saul & Stephens, 2015b, p. 62). While the framework is sophisticated, it has attracted some criticism in implementation (Rothwell, 1996, pp. 120–121; Saul & Stephens, 2015b, pp. 63–65), which will be addressed in later in this paper.

The Antarctic Treaty provides for several categories of participant. The first category of 'consultative party' refers to the original signatories of the instrument, as well as those members who have acceded to the treaty who conduct 'substantial scientific research activity' in Antarctica per article IX(2). Just over half of all signatories to the treaty have consultative status. The rest are known as 'non-consultative parties' who do not have voting rights when the ATCM makes decisions, resolutions or measures. Additionally, observer organisations and invited experts attend the ATCM and contribute their expertise without voting. This brief exposition demonstrates that, at least at the institutional design level, the ATS is refined and flexible.

Nonetheless, a well-designed international framework does not necessarily guarantee its effectiveness. The history of human intervention in Antarctica is drenched in nationalism and this has proved to be a thorn in the side of international cooperation (Hemmings et al., 2015; Howkins, 2008). For example, questions remain of whether claimants are able to use their frozen territorial claims to evidence a maritime claim in the Southern Ocean (Saul & Stephens, 2015a, pp. lxiii–lxvi). Above all, the clash between international and national interests is the primary reason for the Antarctic Treaty's existence. It was seen as the solution in 1959, albeit a precarious one. Many decades of successful cooperation have not dampened calls for a stronger solution that provides finality to the question of Antarctic sovereignty. This paper explores the contrary: the development of a stronger ATS which maintains its existing advantages of consensus-based decision-making and flexibility, but which has a far stronger dynamic vision for its future. One thing is for certain:

> [That the] continent has become a symbol of our time. The test of man's willingness to pull back from the destruction of the Antarctic wilderness is the test also of his willingness to avert destruction globally. If we cannot succeed in Antarctica we have little chance of success elsewhere (Mickleburgh, 1988, p. 42).

Antarctica as a true global commons

Surveying the extensive scholarly literature on the concept of global commons reveals a widespread understanding that the term includes Antarctica (Boczek, 1983, p. 388; Freeman, 2016; Joyner, 1998, pp. 24, 27, 44, 52–53; Rothwell, 1986, pp. 140–150; Schrijver, 2016). This is true if one takes the definition of global commons to be areas beyond the exclusive jurisdiction of any state, or one of the more sophisticated definitions in the scholarly literature (for example, Joyner, 1998, p. 45). However, this paper will take a much narrower view, namely that Antarctica would only be a true global commons if it were administered directly by an international organisation, such as the United Nations, for the universal benefit of humanity (Saul & Stephens, 2015a, p. lxxii). It aligns with calls for a 'world park' (Davis, 1992, p. 40–41; Tenebaum, 1990), 'United Nations trusteeship' and the *lex ferenda* of common heritage of humanity (Joyner, 1998, pp. 32–35; see also Larschan & Brennan, 1983; Scott, 2013, pp. 28–30). The narrow definition will produce a clearer contrast between Antarctica without any sovereignty and with degrees of sovereignty, which will be considered in the next section. As the focus will be on highlighting this contrast and its interplay with a reformed ATS, the analysis of key concepts will be fairly brief.

It is entirely logical that Antarctica be proclaimed a true global commons, being the last great wilderness on Earth. The importance of the untouched nature of a wilderness is twofold. First, in the environmental context, it incites an urge to protect the wilderness from human intervention and exploitation. This has been a core reason for the ATS and is exemplified by the Madrid Protocol in articles 2 and 3, and in the preamble. Second, and more importantly from a legal perspective, is the simple fact that it is relatively untouched. There is no broad recognition for territorial claims in the Antarctic. Instead, the continent is beyond the exclusive national influence of any single country, and there is no evidence of any state being able to exert its absolute jurisdiction over claimed territory. Science and tourism dominate the field of human activity. The lack of national influence bears powerful resemblance to article 136 of the United Nations Convention on the Law of the Sea, which applies the principle of the common heritage of humanity – an aspect of global commons – to the area defined in article 1 of that treaty as 'the seabed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction' (Scott, 2013, pp. 28–30). At least on these facts, the case for a form of international management on the basis of the common heritage of humanity or true global commons is convincing.

However, that would be disregarding the political situation which reigns. As a distinguished polar scholar once wrote,

> … it is necessary to understand that some of the basic rules in international politics will have an impact on how the Antarctic 'problem' is resolved. If the seven territorial claimants and the United States and Soviet Union are unwilling to consider any future proposals for the administration of the Antarctic, any campaign … [to establish a governance regime] will fail (Rothwell, 1986, p. 204).

The interests of the claimant and potential claimant states are critical to any future governance regime because these are the states that would need to approve it. This is the reason why a recent article on environmental governance in the Third Pole region in the Himalayan-Hindu Kush Mountains and Tibetan Plateau considered the interests of the key states China and India as 'crucial to developing [regional] governance' (Marsden, 2016, pp. 73–74).

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Making Antarctica a true global commons would end territorial claims for good. This is highly unlikely to be a pathway that any of the claimant states would pursue. As aforementioned, national interests in the Antarctic are growing and states cannot be expected to suddenly put aside their efforts for an international regime that may not operate in their favour. Claimant states especially would undergo reputation loss after decades and centuries of attempts to claim sections of the continent. They would also suffer actual damage to their national interest, resulting from years of following the tune of bifocalism (Bray, 2016; Haward & Cooper, 2014; McGee & Smith, 2017; Scott, 2013, p. 33). Importantly, the consultative parties to the ATS would lose their overriding influence in the Antarctic because a true global commons would be managed with the interests of all states in mind, and perhaps even all of humanity under the 'common heritage' notion.

A solution putting Antarctica under some form of international trusteeship would probably require the consent of the United Nations General Assembly. One could argue that non-members of the ATS could outmanoeuvre the ATS states on the world stage, but that would be ignoring the status of ATS members; all permanent members of the United Nations Security Council are also consultative parties in the ATS. Two of these, the UK and France, are also claimant states, while two more, Russia and the USA, have reserved the right to make a claim. Any venture to take away the rights of these influential states, even if they are currently frozen, would appear doomed from the beginning. The question of an Antarctic 'world park' under international stewardship is not new to the General Assembly, having been mentioned in five resolutions on 15 December 1989, 12 December 1990, 6 December 1991, 6 December 1992 and 16 December 1993. Since then, such calls have disappeared from General Assembly resolutions on Antarctica (Saul & Stephens, 2015a, pp. 723–731). Reading the suite of documents reveals a shift in the relationship between the ATS and the General Assembly, from a level of frosty indifference on the part of the ATS to a more conciliatory effort to communicate their work to the world. That is, the stronger and more open the ATS has become, the weaker the case for a true Antarctic global commons. The entry into force of the Madrid Protocol in 1998 appears to have ended any remaining political will to fight for a world park, while the 'Question of Antarctica' has become increasingly less of a concern for the General Assembly (Becks, 2006).

Antarctica becoming a true global commons is a very unlikely venture. International politics entwined with history means it would lack support from the most influential states of our time. This would be so even in the face of widespread public support to the contrary, as even the weight of successive General Assembly resolutions has not fazed the ATS. Perhaps in a far-flung future with changed global priorities and a different spread of global powers, the idea of a world park or an international trusteeship could crystallise. Until then, national sovereignty must play a role, however small, in the governance of Antarctica.

Antarctica with shades of sovereignty

Absolute sovereignty

The polar opposite of an Antarctic global commons is a continent divided among claimant states exercising absolute sovereignty over their territory. While many would deride this idea as utter nonsense, exclaiming that the Antarctic Treaty was meant to put a stop to territorial disputes, that would not constitute a fair analysis. There is some merit in according a small group of states sovereignty over Antarctic territory. For one, if the United Nations managed it diplomatically, it could provide a conclusive answer to the question of Antarctic sovereignty because it would end the disputes. It could also provide a greater incentive for the claimants to fund research, environmental protection and monitoring over their territories. The controversial issue of jurisdiction, both over land and sea, would be resolved. Nevertheless, for all its advantages, political reality will strike down this solution as nigh on impossible to achieve.

Accepting territorial claims would finally settle Antarctic sovereignty and this paper would not need to exist. It would need to be conceived, planned and debated with utmost tact to satisfy the interests and reputations of all states concerned. Therefore, there would need to be a good deal of 'give and take;' that is, claimants would need to accept increased responsibility for the territory they acquire. Absolute sovereignty does not necessarily imply a lack of international law. Rather, claimants would be fully responsible for implementing whatever international obligations the world may see fit to impose over the Antarctic in exchange for giving up the idea of a global commons, within reason. These could be treaties on protecting the environment, bans on mineral exploitation, securing Antarctic sea and air borders to prevent illegal entry and activities, and requirements to share scientific knowledge. Effectively, the ATS could continue to exist but be implemented exclusively by the claimants. Being a sovereign in the harsh Antarctic environment is expensive, and this would ensure that the states who assume the mantle of sovereignty also assume the financial and operational responsibilities that come with it.

Additionally, sovereign states could exercise unchallenged jurisdiction over their territory. Currently, there is controversy over the system of states exercising jurisdiction over their own nationals in Antarctica. This is restricted to official observers, scientists and their assistants per article VIII(1). For example, French scientists operating in Dronning Maud Land (Norwegian Antarctic territory) are subject to French law if they commit crimes. France, Chile and Argentina made negative declarations after the adoption of the Antarctic Treaty (Saul & Stephens, 2015a, pp. 45–46), arguing for the right of a state to exercise jurisdiction over any nationals in its territory. This is clearly a claimant-based position; if a state claims

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territory, it should be able to apply its laws to anyone within it, whether or not they are nationals of the governing state. However, other claimants, Norway and the UK, firmly supported a system of jurisdiction over one's own nationals, to be applied to all situations and enshrined as a principle of the treaty (Saul & Stephens, 2015a, pp. 45–46). This could apply to states who are not party to the Antarctic Treaty. The resultant article VIII(1) appears to be a compromise between these two positions, as it adopts the Anglo-Norwegian view but limits it to a subset of participants in Antarctic affairs, albeit a rather significant subset. Unfortunately, a detailed examination of this issue lies beyond the scope of this paper. The crux of the matter is that if absolute sovereignty were adopted today, the French-Chilean-Argentinian view would become reality and each claimant would exercise jurisdiction over all persons on their territory.

There are, however, a great many disadvantages to the solution of absolute sovereignty. Chief among them is the fact that existing claims are not widely recognised outside of the circle of claimants. Even if they were recognised as a bargain for, *inter alia*, accepting responsibility to implementing international law in the Antarctic, the British, Argentinian and Chilean claims overlap. Some have suggested that the overlapping 'claims be mutually recognised among the claimants' (Rothwell, 1986, p. 167; see also Jessup & Taubenfeld, 1959, pp. 176–177). This would probably lead to an international arbitration or court case, with no certainty that all the parties would respect the outcome. Furthermore, there is the thorny issue of the last piece of unclaimed land in Antarctica, also the last unclaimed land on Earth. Who would be entitled to it? Who has the right to decide the question? There are no easy answers that avoid a major dispute between the USA and the Russian Federation, who both retain rights to make Antarctic claims, as well as other states who may wish to make a claim.

Additionally, there would probably be strong, global opposition to the validity of claims, which could lead to a diplomatic and legal battle. The sudden change from an organisation that values open international cooperation, even though it currently favours the consultative parties, to a system of absolute sovereignty for claimants would cause outrage. For example, a perceived lack of openness in the Agreement on Enhancing International Arctic Scientific Cooperation drew sharp criticism before it was even finalised (Shibata & Raita, 2016). In a dispute between the claimants and the rest of the international community, as mentioned by Hinkley (1990, p. 47; see also pp. 45–52), an international court would probably require 'a continued display of authority' stemming from the *Legal status of eastern Greenland* case, amongst others. Essentially the requirement is for effective occupation or control (for more, see Rothwell, 1996, pp. 59–63). There, Danish troops patrol the wilderness through the Sirius Sled Patrol, while small communities are dotted along the coast. It is possible that Antarctic claimants could satisfy the test, although their argument would be hampered by the fact that no substantial, non-scientific communities live on the continent and no military activity is apparent other than in support capacities. As noted in Rothwell (1996, p. 61), although a lower standard probably applies to Antarctica, there is still a need for a 'system of laws in the territory claimed and activities demonstrating a clear intention to keep the territory under administrative control'. Further, Triggs (1986) notes that the analysis of sovereignty would need to take place using a snapshot of activities prior to the entry into force of the Antarctic Treaty, as no activity after its entry into force has any bearing on sovereignty per article IV. For present purposes, the above mix of problems is viewed as irremediable. Absolute sovereignty would only incite conflict and disputes in the short term, and may or may not solve them in the long term (Rothwell, 1986, pp. 168–169). The parties to the Antarctic Treaty were already wary of a system of dispute resolution relying on an international court (Rothwell, 1996, pp. 100–101) and the pathway to absolute sovereignty would be filled with such disputes. This makes it an unsatisfactory solution.

Restricted sovereignty

Territorial sovereignty, combined with an international legal regime, is a potential solution that lies between the global commons and absolute sovereignty. An example of this model is Svalbard, a Norwegian territory in the Arctic which is subject to a multilateral treaty limiting Norwegian authority. While Svalbard is considered part of Norway, any national of a signatory to the Svalbard Treaty has visa-free access to the archipelago (Ulfstein, 1995, pp. 177–182, 268–271). Moreover, they are entitled to perform a wide range of activities while they are there, with the only limitation that they comply with Norwegian regulations and limited aspects of Norwegian law (Ulfstein, 1995, pp. 183–218). Mining, tourism and science have featured prominently in Svalbard's economy, which is important enough to the Norwegian Government that they produce regular 'white papers' on the archipelago; the latest is simply entitled 'Svalbard' (Det Kongelige Justis-og Beredskapsdepartement, 2016). The successful arrangement has led some to call for a similar regime in the Antarctic (Rothwell, 1986, pp. 172–176). However, history and politics will once again dictate the options available to policy makers. With overlapping claims, unclaimed land and no clear 'steward' state, Antarctica is not suited to an arrangement that accords even restricted sovereignty to a single or small group of states (see also Koivurova & Holiencin, 2017).

The proposal appears simple: grant claimants sovereignty over Antarctic territory but limit the traditional implications of absolute sovereignty. First, nationals of all other signatory states should be treated equally with nationals of the sovereign state. That is, they would have equal, unimpeded access to the territory to perform any activity in a manner authorised by the sovereign state. This is the principle of non-discrimination, which can become a very complex area of discussion (see Ulfstein,

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1995, pp. 231–267) raising similar issues to the internal European Union prohibition on quantitative restrictions for imports and exports (see articles 34–36 of the Treaty on the Functioning of the European Union and the 1974 case of Procureur du Roi v Benoit and Gustav Dassonville). Both lie beyond the scope of this paper. The second aspect would be the international law overlay, which dictates which activities are permitted in Antarctica. This could be decided for the long term in a treaty or be managed by an institution at which all the Antarctic States would be members. Whatever the specifications, the picture is of a sovereign state that regulates activities within its borders, treats foreign nationals as equally as its own and does not permit activities that are not sanctioned by an international law overlay.

It is plain that restricted sovereignty suffers from a combination of issues, stemming from its attempt to satisfy two sides. It attempts to satisfy those who support the global commons concept, as it would allow a degree of international oversight into the activities that are permitted in the Antarctic. Simultaneously, it tries to satisfy the claimants by confirming their disputed sovereignty. However, in the Antarctic context, trying to please both sides of the debate will only attract the failures of both ideas. The primary problem is political. The consultative parties of the ATS as a whole are not agreed on a solution which places Antarctica under the stewardship of an international regime. Nor would they agree to a regime that confirms claimant sovereignty because of the huge uncertainty over who would actually be the legitimate claimants and over what territory. Restricted sovereignty does not solve any of these issues; by contrast, it brings them all to the fore. Fundamentally, Svalbard had a state ready to take up the reins of sovereignty, Norway, with little substantive opposition from other states to this position (Ulfstein, 1995, pp. 33–52; see also Koivurova & Holiencin, 2017). Antarctica is a continent with opposition to territorial claims both within and outside of the ATS, whose basic premise is to take sovereignty off the table (Triggs, 1986, p. 220). Consequently, the restricted sovereignty model of the Arctic is not a good match for the Antarctic.

Shared sovereignty

A third possible design for sovereignty to discuss briefly is that of a condominium (Rothwell, 1986, pp. 169–172). The basic idea is an agreement among the claimant states, perhaps including the rest of the consultative parties, that all of them govern Antarctica. This potentially overcomes concerns over how to divide Antarctica because the claimants are more likely to accept shared sovereignty over the whole continent versus loss of sovereignty altogether. Indeed, one could say that the current system is already a form of condominium, albeit a very weak one, in which active Antarctic States undertake operations in the continent together, sharing facilities with other nationals to foster scientific cooperation.

The reality, however, is that the ATS is neither a pure situation of shared sovereignty, nor is such an aim desirable. Shared sovereignty among the claimants and consultative parties would not address the wishes of the non-claimant, non-consultative party community. This community would lose the influence it currently has over Antarctic affairs through the ATCM. Essentially, a condominium creates an 'Antarctic club' exercising absolute power over the continent and suffers from similar criticisms to those levelled at proponents of absolute sovereignty, namely that the rest of the world would not be able to participate. A unilateral declaration of shared sovereignty would damage international relations between the claimants and the rest of the world.

Restricted and shared sovereignty

A combination of restricted and shared sovereignty could result in an agreeable solution. It could include, for illustration, rights of third party nations to participate and vote in meetings of the condominium, allowing the international community to set basic regulations for the members of the condominium to follow. In this way, models of restricted and shared sovereignty would exist simultaneously, creating a system *sui generis*, which is typical of polar law solutions (Rothwell, 1996, pp. 448–450). While a model of shared sovereignty holds some merit, it cannot succeed politically unless it is restricted by a degree of influence from the international community. A system of restricted, shared sovereignty is thus a serious candidate for a future Antarctic governance system.

Such a system deserves a wholly separate article. However, it is useful to this paper's vision to provide a glimpse of how it would operate. The basic concept of the system should be a continuation of the more mature ATS. However, the Antarctic Treaty would probably be insufficient in its present form to provide the legal basis. Instead, there would need to be a new treaty that establishes the existence of a condominium, restricted by an overlay of international law and outlining the balance of authority between the two. A more mature ATS would lay the groundwork for such a treaty, because the ATS already resembles a condominium of the more active parties in Antarctica, restricted by the influence of less active parties who participate in the ATCMs. The restrictions in the form of treaties, measures and resolutions do not match those of the Svalbard Treaty, but are nonetheless indications of potentially more substantial restrictions in the future. Therefore, it is posited that a combination of restricted and shared sovereignty is the most natural successor to the ATS. Even so, it is not an immediate possibility as there is unlikely to be enough support for a large change to the status quo. To create such a system would require a stronger ATS that can begin to thaw the frozen sovereignty laid down by the Antarctic Treaty.

Antarctica as a frozen continent

The ATS has been a relatively successful framework. By defusing territorial claims, it has taken sovereignty out of the picture for practical purposes. Open disagreement over

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sovereignty is an extremely remote possibility and, as seen in the previous section, any attempts to create a completely different framework may be more harmful than helpful, or may simply be unfeasible. In spite of its success, the ATS could benefit from improvement. This section will discuss tweaks to the system to give it more credibility in the eyes of the international community, which could encourage more signatories to the treaties, more policy discussion and less debate on sovereignty. The paper advances the idea that a more purposeful ATS that focuses member states' efforts on implementing a common vision will thaw frozen sovereignty. It argues that the reason sovereignty continues to appear in scholarly literature, media and national rhetoric is because of the lack of substantial, purposeful activity emanating out of the ATCMs. More activity, including more innovative cooperation, could be achieved by a stronger dynamic vision that is effectively implemented and communicated to the world.

It is important to recognise that the success of the ATS could be a result of its less interventionist and less authoritative nature. That is, by reforming the ATS in the direction of a more substantial international organisation, one could be increasing the prospect of disagreement over procedure and substantive policy. This is a legitimate concern to which this paper cannot provide a comprehensive response. Suffice to say that this paper offers one example of Antarctic governance reform; there could be many others. The sovereignty issue is unlikely to go away while the status quo remains (Scott, 2011; 2013, p. 34). Reform offers the chance to begin resolving the issue by providing an alternative: a stronger organisation. The model here is based heavily on the Arctic Council, which operates in a similar context. Both entities are instances of multilateral cooperation in a harsh and relatively sparsely populated region with a strong focus on scientific cooperation and environmental protection, and an agreement to disagree on a key issue: military in the Arctic; sovereignty in the Antarctic (Scott, 2013, pp. 22–24). It draws primarily on the procedural aspects of the Arctic Council. This avoids concerns about drawing on a forum to design an organisation; at least procedurally, there is little difference. Yet procedural change should not be underestimated. Properly designed and implemented, procedure has the capacity to drive the entity to new heights. It has done so in the Arctic and it could well do so in the similar context of the Antarctic.

Thawing the ice through vision

A stronger common vision would be the foundation of a reformed ATS. It would require a ministerial-level meeting on a regular basis, which sketches out high-level goals to achieve over the short, medium and long term. The ATCM already produces a multi-year strategic work plan but it lacks the publicity and authority of a ministerial declaration, especially when it is buried deep within a much larger report. In the 2016 Final Report of the ATCM, the strategic work plan is at pp. 307–312. In fact, ATCMs reiterate that the plan is only complementary to the ATCM agenda, rather than central, as expounded in paragraph 3 of Decision 6 of the 2016 ATCM. There is no obvious reason why the strategic work plan is not given greater primacy.

This paper argues for a stronger system akin to that of the Arctic Council, where ministers issue declarations biennially. While these are at a relatively high level of abstraction, they are specific enough for the goals to be achieved. For instance, the 2009 Tromsø Declaration by the Arctic Council under Norwegian leadership set up a task force to investigate the utility of deepened search and rescue cooperation, which ultimately resulted in the Agreement on Cooperation on International Aeronautical and Maritime Search and Rescue two years later. Improved search and rescue had been a Russian idea (Vasiliev, 2013, p. 55), who had been the preceding chair, and the Norwegian chairmanship had continued along this theme of providing safety in maritime transport, amongst other issues. Another example is the 2017 Agreement on Enhancing International Arctic Scientific Cooperation. Borne out of a task force established at the 2013 ministerial meeting in Kiruna, the treaty is the third treaty signed under the auspices of the Arctic Council since 2009 (Bloom, 2016); a remarkable achievement in comparison with the ATS, which has not signed a treaty since the Madrid Protocol in 1991. It goes without saying that mere numbers of international agreements do not represent success; indeed, the 2017 treaty has already received some criticism (Shibata & Raita, 2016). However, signing such instruments is accorded greater attention by international observers and the general public. The Arctic Council is evidence that this attention can provide the impetus for further political ambition.

The ATS needs similar ambition and political motivation in order to mature as an international organisation. That is not to say that existing Antarctic meetings are useless; rather that there appears to be a lack of leadership and long-term vision for Antarctica's future (Jabour, 2012, pp. 718–719). There is no legal impediment to implementing a long-term vision through a ministerial meeting as ministers would still represent their governments under article IX(1) of the Antarctic Treaty. To illustrate with an example, there has been movement in the ATS towards closer cooperation among research programmes to avoid 'doubling-up' of infrastructure. The idea is that less human interference in Antarctica will help it remain a pristine wilderness. However, relevant resolutions of the ATCM – which are not binding – have to date been extremely broad (Bastmeijer & Tin, 2015, pp. 588–589). This has led scholars to call for the ATCM to go further to establish basic principles on scientific activities (Bastmeijer & Tin, 2015, pp. 589–592). It remains to be seen whether these will eventuate to complement the 2009 principles for tourist activities and associated measures such as those on passenger vessel landings. However, this is but one issue on the ATS' wide agenda. In order for more of these issues to be elevated to the legally binding status of measures or for the resolutions

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to become more prescriptive, the ATCM should become a ministerial-level meeting. Such a meeting would involve ministers representing governments, as opposed to simply government officials. There would therefore be an overt ability to make policy rather than shape it. It is stressed that the ATCM can already make policy in the form of measures and resolutions; however, a minister inevitably brings a higher level of decision-making power compared to an official acting on government policy.

It is noted that ministerial involvement does not necessarily result in better progress. Ministers can be bound by domestic considerations and, in some instances, be completely overborne by these considerations. State officials still play an important part, therefore, in negotiations before, during and after ministerial meetings. For example, direct discussions on military issues are prohibited by a footnote in the Ottawa Declaration that established the Arctic Council. Almost all of the Arctic States have significant military assets above the Arctic Circle. For some, such as Russia, naval bases in the Arctic are justified as the Arctic Ocean represents their primary access to the sea. For others, the Arctic represents a substantial proportion of their population or territory; Greenland is significantly larger than Denmark in the Kingdom of Denmark. Norway even places its joint military headquarters above the Arctic Circle, in the city of Bodø. The prohibition of interference in military issues from the Arctic Council would have been an absolute non-negotiable term from a political perspective. However, officials would have played a part in ensuring that such prohibition did not derail the overall intent of creating the intergovernmental forum that is the Arctic Council. Additionally, the Arctic Council continues to reiterate its commitment to peace and security in the Arctic, notwithstanding the prohibition on discussion of military issues. In this vein, officials can be seen as having a moderating effect on ministers.

Ultimately, though, ministerial involvement generally creates greater progress through greater decision-making power, even if that progress is negative or represents a temporary impasse. Given that the focus of ATCMs is primarily on scientific cooperation and environmental protection, it is unlikely that ministerial involvement would necessitate a 'spill-over' of geopolitical disputes from elsewhere in the world (Saul & Stephens, 2015b, p. 80). The Arctic Council has succeeded in doing the same even though its discussions touch on a broader range of issues, including sustainable development and economic cooperation. Temporary impasses in the Antarctic context have included disagreement over the designation of marine protected areas. However, the 2016 agreement on a Ross Sea Marine Protected Area, the largest in the world at the time of writing, is evidence that these temporary hurdles in Antarctic politics can be overcome.

The move towards more decision-making could challenge the existing consensus system. Currently, all consultative parties have to agree unanimously on measures, resolutions and decisions. In fact, the reason that there are so few substantial ATCM measures could be that the parties struggle to reach a consensus on anything more difficult; that is, they regularly strike impasses. That may be the case, but it may also be attributable to the lack of decision-making authority accorded to Antarctic officials. As above, ministerial meetings could bring the necessary impetus to achieve consensus in areas currently seen to be too difficult. Strong consensus, particularly from political leaders, could also assist in convincing dissenters to join the consensus. Over time, the consensus system may become unwieldy with large numbers of consultative members (Tenebaum, 1990, pp. 125–126). If that were the case, a new system of majority voting might be needed. However, a change to majority voting may also cause issues with cultures that prefer a consensus-mode of decision-making (Saul & Stephens, 2015b, pp. 78–80). Note though that non-binding resolutions are always available if unanimity cannot be achieved for binding measures. For now, there is no indication that the consensus system is failing or that it would fail under a future Antarctic ministerial meeting.

Therefore, a strengthened vision is well within reach. It is something upon which the Antarctic States have already been able to agree in the form of the multi-year strategic work plan. This is no surprise because the content of these strategies does not challenge the basic premises of the ATS, especially that of frozen sovereignty. Instead, work progresses on the core areas of international scientific cooperation and environmental protection. A stronger vision would create more concrete policies in these fields and lay down the tools for implementation, compliance and possibly even enforcement. It is not perfect, and could result in negative progress, but the moderating effect of officials would still ensure that the system remains balanced.

Thawing the ice through dynamism

In order for the common vision to be useful, however, it must remain dynamic. To an extent, this already exists. The ATCMs are hosted by member states on an annual rotating basis. The hosts set the agenda in consultation with other states and the ATS secretariat. As mentioned earlier, the agenda is the central structure of the ATCM and long-term strategy is only a small part of that. However, this weakens the effectiveness of the meeting; the long-term vision should be the centre of discussions. In order to better facilitate this, the ATCM should develop a modified rotating chairmanship with a time frame of at least two years, combined with the existing tiered membership levels. The tiers would provide for varying degrees of participation in Antarctica, while the longer rotating chairmanship would strengthen the development of a strategic vision.

The current annual rotating chairmanship is inadequate because it is too short a period of time to develop and implement any long-term plans. This is because the size and breadth of ATS membership, which reaches all inhabited continents, makes consultation with all

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stakeholders challenging. A two-year rotating chairmanship could be a way to deal with this. By giving the chair more time to formulate and implement a strategy, the system could actually encourage the development of such strategies. That is, a two-year rotating chairmanship would elevate the importance of the chair's position, as opposed to their current primary responsibility of hosting the ATCM. It imparts a sense of leadership on the chair, which could indirectly stimulate more imagination and coordination in the long-term vision. The clearest example of this is in the Arctic Council chairmanships, which produce considered policy statements and plans before their commencement and follow through with regular updates and reports.

The tiered membership of the ATS is also a useful tool for keeping the system dynamic. Members are divided into consultative and non-consultative parties, with some provision for observers. The definition of consultative party relies on an activity test, which importantly activates only while the party is 'conducting substantial scientific research activity' per article IX(2) of the Antarctic Treaty. Note that this test does not apply to the original twelve signatories. While it is unlikely for diplomatic reasons that a party would be stripped of their consultative status for not satisfying the test at any point in time, a party might unilaterally decide to change status. This could be for financial, operational or strategic reasons. The main difference between the two categories is the level of involvement in Antarctica, and subsequently, the right to vote on decisions affecting the continent. As the ATS matures, greater commitment from the consultative members will be sought. Tiered membership provides the framework for states to choose their desired level of commitment to the Antarctic and the resources they are willing to expend. It is a flexible system that can endure over time.

Thawing the ice through effective implementation and communication

A dynamic, long-term vision needs to be implemented effectively and communicated to the world. Implementation speaks to compliance with Antarctic measures and resolutions and enforcement in the event of non-compliance. Saul & Stephens (2015b, pp. 63–65) identify both as a weakness of the current ATS law-making framework. Enforcement is a perpetual challenge for international law and Antarctica would probably not be able to offer any new solutions (Doomen, 2011, pp. 61–67; see also Bradford & Ben-Shahar, 2012). Compliance, however, and enforcement vis-à-vis non-state actors, is a real possibility. Long-term visions which achieve consensus and are managed by a more authoritative ATCM will probably inspire greater cooperation among ATS members. Stronger cooperation can lead to more innovative ways to encourage compliance, particularly vis-à-vis external actors in Antarctica and the Southern Ocean. By then effectively communicating these measures and their reasoning to the outside world, the ATS can encourage new member states to get involved in the treaty framework. This will legitimise the ATS as the sole international organisation responsible for Antarctica's future and begin the process of truly chipping away at national Antarctic territorial sovereignty.

The clear, periodic vision produced by a rotating ATS chairmanship has the potential to motivate all ATS members to work more closely for a common goal. Closer cooperation among ATS members is likely to solidify the 'Antarctic club'. Such a club already exists in the Arctic in the form of the Arctic Council, but is not so clear in present day Antarctica. While some scholars may lament the development of a club because it pushes the continent further away from a true global commons, this paper considers it a necessary step in the evolution of Antarctica's governance framework. An Antarctic club would be distinguished from that of the Arctic because the Antarctic Treaty has open membership. The recent 2015 accessions of Mongolia, Iceland and Kazakhstan indicate the continuing breadth of countries interested in participating in Antarctica. The accession of Malaysia, a long-time critic of the ATS, in 2011 and its 2016 adoption of the Madrid Protocol, is not only recognition of how far the ATS has come but also how attitudes of opponents can change if deficiencies in the system are addressed (Ahmad, 2010; Becks, 2006, pp. 220–221; Ismail et al., 2012, p. 43; Jabour, 2012, pp. 721–722).

A stronger ATS is an important step towards effective multinational compliance efforts. Compliance with scientific and tourism regulations is already relatively widespread, thanks to almost universal agreement that the Antarctic environment must be preserved. Active observers at the ATS, such as the International Association of Antarctica Tour Operators, help to implement these measures at the non-governmental level. However, compliance out in the Southern Ocean, even within the boundaries of the Antarctic Treaty Area, is difficult. Among other issues, illegal, unreported and unregulated fishing (IUU) remains a problem in these waters (Gurney, 2016, pp. 4–5; McGee & Smith, 2017, pp. 31–33). Currently, under standard law of the sea, 'flag states' (the state where a vessel is registered or whose flag the vessel flies) have jurisdiction over their vessels on the high seas and the responsibility to ensure compliance with applicable laws (McCreath, 2015, pp. 32–33). This is often ineffective because of a lack of resources, amongst other things (Boczek, 1983, pp. 379–380; McCreath, 2015, pp. 33–34).

Better cooperation among ATS members by using a multinational compliance mechanism could help solve this. For example, a measure could give all ATS consultative party vessels the authority and responsibility to maintain compliance with ATS measures and regulations. Non-consultative parties could sign up to this by notifying the Antarctic Treaty secretariat in Buenos Aires. Other cooperative measures relating to 'expedition' jurisdiction, port state jurisdiction and expanding existing inspection regimes could also be explored (McCreath, 2015, pp. 35–52). Indeed, under the Agreement on Port State Measures

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to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing that entered into force in 2016, most ATS members are bound to deny entry to their ports vessels that have engaged in IUU fishing (article 9), among other measures. The Convention for the Conservation of Antarctic Marine Living Resources, one of the treaties that comprise the ATS, also provides for a system of observation and inspection in article XXIV, albeit one that relies on the flag state to take action. Rothwell (2013, p. 238) describes the convention as:

> [A] pioneer in regional mechanisms for marine living resource management, adopting an ecosystem approach in its boundaries, and applying the precautionary principle towards marine living resources in a more holistic fashion than equivalent regional fisheries mechanisms had adopted at that time.

However, there is always room for improvement. A multinational compliance mechanism, which McCreath (2015, pp. 52–54) describes as a 'collective exercise of coastal state jurisdiction' under the law of the sea, would have a greater impact when it comes to resources. It treats the consultative parties, and any non-consultative parties that elect to participate, as the joint sovereign states of Antarctica. A similar form of cooperation already exists in the sub-Antarctic region, for example, in the 2007 Agreement on Cooperative Enforcement of Fisheries Laws in the Maritime Areas Adjacent to the French Southern and Antarctic Territories, Heard Island and the McDonald Islands between Australia and France to combat IUU fishing around the Kerguelen, Heard and McDonald islands (Gullett & Schofield, 2007). There are also weaker examples such as the Niue Treaty on Cooperation in Fisheries Surveillance and Law Enforcement in the South Pacific Region, where parties are left to agree the terms of cooperative surveillance and enforcement in subsequent instruments (Kawaley, 1999, pp. 355–364). This demonstrates the wide scope for Antarctic regimes to be moulded to the political circumstances of the relevant time; although of course, stronger cooperation would be preferable to strengthen compliance and enforcement. Additionally, per Lindley & Techera (2017, p. 73) in another context, more cooperative mechanisms may 'assist states lacking political will or unwilling to ratify international laws due to implementation obligations given that goals tackled collectively are more achievable'.

The increased effectiveness of ATS measures and resolutions will, if communicated well to the world-at-large, establish the system as the pre-eminent authority in the Antarctic Treaty Area. As discussed earlier, the open nature of ATS membership means that if the system is functioning well and producing desirable results, external states will want to join in. The ATS needs to develop a higher profile in order to gain more recognition on the busy world stage, but that will be a likely incidence of a regular ministerial-level meeting of the ATS members. A larger number of Antarctic States will make consensus more difficult to achieve, but will ensure more effective compliance when agreed measures are implemented. The pre-eminence of the ATS could signal a shift towards an international condominium over the continent. The potential for territorial disputes would fade, as would the right of individual claimants to exercise effective sole sovereignty over Antarctic land and sea. There would simply be no reason to do so in face of a very successful international system which is thawing the ice in the Antarctic Treaty.

Conclusion

Human engagement in Antarctica has come a long way from the age of explorers. It has weathered competing claims to the land and seas, remained aloof in the midst of two world wars and developed a complex system of international and national law. With the present and historical political situation in mind, the ATS emerges as the best pathway to the future governance of Antarctica. Other sovereignty solutions fail to address important and competing national and international interests. A true global commons, in the form of a world park or international trusteeship, would not satisfy the claimants. In direct contrast, absolute sovereignty does not address the concerns of the rest of the world, as well as uncertainty over how to divide territory. Restricted sovereignty fails for broadly the same reasons, and shared sovereignty suffers from a lack of international participation. A system of restricted, shared sovereignty might resolve these issues. In this last framework, the consultative parties responsible for the bulk of operational activities in and around the continent would become the common sovereign, sharing their benefits and responsibilities. However, their sovereignty would be held in check by a wider group that includes the existing non-consultative parties, who would be able to make certain decisions to restrict the overuse of sovereignty against the interests of the world-at-large. The balance of power between these states would need to be carefully determined and be open to change over time. This paper posits that shared, restricted sovereignty is the most natural evolution of the existing ATS. For now, however, the frozen sovereignty framework of the ATS is the best model to work with.

However, it needs tweaking. The ATS needs a stronger vision developed by a longer term, rotating chairmanship which brings ministerial involvement to the ATCM. This will improve the decision-making ability of the ATCM and allow it to take more creative measures in the pursuit of cooperation. This paper has raised maritime security and joint exercise of coastal state jurisdiction as examples; there are likely to be many others (Jabour, 2012, pp. 711–718). Above all, a stronger ATS will pave the way for the development of a stronger entity that could represent a longer term solution to the sovereignty issue. The greater and more intense the cooperation in the ATS, the more likely it is that sovereignty will simply fade away. Strong and effective cooperation is likely to sit uneasily with the pursuit of purely national interests. In short, bifocalism has its limits. This paper promotes neither a global nor a

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national solution. It puts forward a contemporary update to the solution to Antarctic sovereignty that began with the Antarctic Treaty. This solution places the future of Antarctica in the collective hands of the states who are playing a role, whatever it be, in the cooperative governance of the frozen continent.

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