# 《联合国海洋法公约》对南极海域争端的影响与启示

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**内容摘要：**《联合国海洋法公约》（以下简称为“《公约》”）创设的海域制度引发了南极海域各类争端，这些争端产生的根本原因在于《公约》与南极条约体系之间的冲突。即使各国依据《公约》纷纷在南极主张领海、专属经济区和大陆架，但这并不足以撼动南极条约体系，不可能对现有南极海域秩序产生根本性影响。同时，《公约》中关于强制管辖程序的规定和海底区域制度，也为完善现有南极争端解决机制提供了值得借鉴的启示。

**关键词：**联合国海洋法公约　南极海域争端　解决机制

## 一、引　言

南极[1]蕴含着丰富的生物资源和油气资源，在《南极条约》（The Antarctic Treaty）签订之前就已是各国争相宣告领土主权的地域。1959 年签订的《南极条约》使其成为了具有特殊法律地位的大陆，该条约冻结了所有针对南极地区提出的领土主张，使南极局势维持着相对的稳定。以《南极条约》为基础，南极条约协商国签订了一系列的条约，从而产生了一整套区域性制度，即“南极条约体系”。1982 年通过的《联合国海洋法公约》（以下简称“《公约》”）是现行海洋法的“宪章”，可在所有海域适用。然而《公约》并未明确其与南极条约体系之间的关系，其内容又与南极条约体系存在明显冲突，《公约》在南极海域与南极条约体系的重叠适用必定会影响到后者所建立的秩序。虽然南极领土主权冻结之现状无法被撼动，但各利益攸关国还是会利用《公约》来争取南极海洋权益。

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1 本文所指南极是指南纬 60 度以南的区域，既包含南极陆地（含冰架），同时也包括南纬 60 度以南海域。

总的来说，南极争端主要分为海域争端和领土争端两类，《公约》在南极海域的适用必然会对海域争端产生一定影响，同时，该公约争端解决机制的完备也对现存南极争端解决机制也带来了启示。

## 二、南极海域争端类型

各国在南极领土归属及相关海域权利归属的问题上存在法律和事实上的分歧，且存有法律利益上的冲突，引发了南极地区存在的海域争端和领土争端。

《南极条约》第 4 条实际上冻结了南极的领土主权主张。[2] 第 1 款规定任何行为不得作为放弃或承认原来所主张的南极领土主权或主权权利的依据，从而确立了“无偏见条款”；第 2 款将“无偏见条款”适用范围扩大到条约缔结之后的各国行为。《南极条约》第四条对领土主张冻结的模糊性规定使得南极领土现有主张国、潜在主张国和非主张国之间的利益冲突得以缓解和搁置。《南极条约》始终是缔约各方为了维持南极地区长期和平的权宜之计，是相互妥协后的产物，这样一来，领土主权之争便被暂时掩盖和搁置。[3] 然而，《南极条约》缔结过程完全忽略了潜在海域争端的存在，这为之后的海域争端埋下了伏笔。

主权原则是一项重要的国际法原则，领土主权之争在《公约》签订之前是南极地区的主要争端类型。而随着《公约》谈判的进行，海域权利之争在南极海域展开。有的学者认为，国际法中并没有要求沿海国在主张海洋权利之前必须正式确立其领土主张，所以南极领土主张国可以自由地主张他们的海洋权利。[4] 据此，即使南极领土主张因《南极条约》的生效而被冻结，也不影响主张国在南极海域主张其《公约》项下的海洋权利。但由于陆地决定海洋，海洋权利主张可被视作是对领土主张的重申，各国纷纷主张相关的南极海洋区域，实际上是希望借此巩固自己在南极的领土主张。

《公约》对沿岸国海域权利的扩张使得南极领土主张国再一次嗅到了资源和权利的味道，南极海域的争夺战也随即展开。

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2 《南极条约》第 4 条第 1 款：“本条约的任何规定不得解释为：（a）缔约任何一方放弃在南极原来所主张的领土主权权利或领土主权；（b）缔约任何一方全部或部分放弃由于它在南极的活动或由于它的国民在南极的活动或其他原因；（c）损害缔约任何一方关于它承认或否认任何其他国家在南极的领土主权、主权权利的主张或这些主张的基础。”《南极条约》第 4 条第 2 款：“在本条约有效期间所发生的一切行为或活动，不得构成主张、支持或否定对南极的领土主权的要求的基础，也不得创立在南极的任何主权权利。在本条约有效期间，对在南极的领土主权不得提出新的要求或扩大现有的要求。”

3 吴宁铂：《南极外大陆架划界法律问题研究》，复旦大学 2012 年硕士学位论文，第 17 页。

4 Federica Mucci & Fiammetta Borgia, *The Legal Regime of the Antarctic*, The IMLI Manual on International Maritime Law, Volume I: The Law of the Sea, Oxford University Press, 2014, p. 499.

## （一）领海和专属经济区

南极海域主张的对立首先体现在各主张国能否根据《公约》扩大其在南极海域的主权权利。《南极条约》第 6 条也允许各国根据国际法在南极公海海域行使权利，[5] 但由于“公海”和“权利”措辞的模糊性，其具体含义并不明确。这是否意味着南极海域不由《南极条约》规范而由公海制度管理呢？南极条约体系的发展给出了否定的答案：其不仅涵盖了南极海域的生物资源养护，还涉及到海域矿物资源的开发利用和南极海洋环境保护等事项。[6] 毫无疑问，各国在依据《公约》主张权利时，必须顾及到南极条约体系下特殊的南极海域制度。在这方面，主张国基于其“南极领土”主张《公约》项下的领海和专属经济区，必然会遭遇非主张国的反对，引起海域争端。

《公约》和《南极条约》通过以前，1958 年《日内瓦四公约》实际上已初步明确了相关的海域制度。但是，尽管国际上普遍以 3 海里为领海宽度，四公约之一的《领海及毗连区公约》并未就领海的宽度进行规定。《公约》的通过使得领海宽度得以扩张，沿海国据此可主张 12 海里的领海。以澳大利亚为例，其在 1990 年便发表声明将其南极领土的领海宽度扩大至 12 海里。但这又是一份缺乏国际法效力的声明，因为澳大利亚仅将 12 海里领海的法律效果限制在本国国民。[7] 这表明在涉及主权的领海问题上，主张国倾向于谨慎行事，不敢在主权问题上与《南极条约》中的冻结条款抵触。

与领海相异，《南极条约》签订之时并无专属经济区制度。倘若各国能依据其南极领土合法主张 200 海里专属经济区，便能在南极海域享有勘探和开发该海域内自然资源的专属权利。迄今，已有四个主张国声明了南极专属经济区。由于《南极条约》第四条规定各国不得在南极创立任何主权权利，南极专属经济区主张也因有违反该条款之嫌，而被非主张国反对。除了以南极大陆为基础主张专属经济区，阿根廷还以其南纬 60 度以北的桑德维奇群岛主张跨越到南极海域的 200 海里专属经济区。[8]

以上，南极领海和专属经济区的主张都存有主张国和非主张国之间的争端，除此以外，即便承认这些主张合法存在，各个海域之间还存在着重叠主张而待划界的争端。

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5 《南极条约》第 6 条：“本条约的规定应适用于南纬 60° 以南的地区，包括一切冰架；但本条约的规定不应损害或在任何方面影响任何一个国家在该地区内根据国际法所享有的对公海的权利或行使这些权利。”

6 陈力：《论南极海域的法律地位》，载《复旦学报（社会科学版）》2014 年第 5 期，第 159 页。

7 阮振宇：《南极条约体系与国际海洋法：冲突与协调》，载《复旦学报（社会科学版）》2001 年第 1 期，第 133 页。

8 英国和阿根廷均对该群岛主张主权，英国称其为南桑德维奇群岛。

## （二）外大陆架

与《大陆架公约》相比，《公约》除了重申自然延伸的标准，还引入了距离标准以确定大陆架的外部界限，其实质上扩大了一国可主张的大陆架范围。[9] 值得注意的是，沿海国对其大陆架享有基于主权的固有权利，不需要任何宣示，但当其主张超过 200 海里的大陆架外部界限时，则需要向大陆架界限委员会（以下简称“委员会”）提交划界申请案以其审核并提出建议。[10] 这为各主张国借助《公约》项下的机构重申对南极的领土主权提供了机会。

目前，澳大利亚、英国、挪威和阿根廷均已向委员会提交了正式的涉及南极海域的大陆架划界案。这些划界案可分为如下两类：

第一类，主张国以南极大陆为基础主张 200 海里外大陆架。除英国外，其它三国均以其“南极领土”为基础，向委员会提交了划界案。但是，澳大利亚和挪威在划界案中均主动要求委员会不审议附属于南极领土的大陆架部分。[11] 阿根廷尽管未如此要求，但由于多国向联合国秘书长寄出照会，提请委员会不予审议涉南极大陆的大陆架部分，[12] 委员会也决定不予审议附属于南极的大陆架外部界限申请。

第二类，主张国以南纬 60 度以北岛屿（以下简称“亚南极岛屿”）为基础向委员会提交的跨越南极海域的外大陆架划界案。澳大利亚、阿根廷、英国都有如此主张，其中，阿根廷和英国均主张乔治亚群岛和桑德维奇群岛延伸至南极海域的大陆架。据英国 [13] 和阿根廷 [14] 于 2009 年分别提交的划界案显示，两国划定的乔治亚

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9 《国际公法学》编写组：《国际公法学》（第 2 版），高等教育出版社 2018 年版，第 257 页。

10 《联合国海洋法公约》第 76 条第 9 款，第 77 条第 3 款。

11 参见澳大利亚联邦，《澳大利亚大陆架划界案执行摘要》，载联合国网站，https://www.un.org/Depts/los/clcs_new/submissions_files/aus04/Documents/aus_2004_c.pdf，（待作者确认访问日期）；以及挪威于 2009 年 5 月 4 日向联合国大陆架界限委员会提交的大陆架划界案执行摘要，参见 Norway, Continental Shelf Submission of Norway in respect of Bouvetøya and Dronning Maud Land Executive Summary, UN website (待作者确认访问日期), https://www.un.org/Depts/los/clcs_new/submissions_files/nor30_09/nor2009_executivesummary.pdf。

12 参见英国、美国、俄罗斯、印度、荷兰以及日本针对阿根廷的 200 海里外大陆架划界案向联合国秘书长提交的照会，Communications received with regard to the submission made by Argentina to the Commission on the Limits of the Continental Shelf, UN website (待作者确认访问日期), https://www.un.org/Depts/los/clcs_new/submissions_files/submission_arg_25_2009.htm。

13 United Kingdom of Great Britain and Northern Ireland, Submission in respect of the Falkland Islands, and of South Georgia and the South Sandwich Islands, Executive Summary, UN website (May. 5, 2020), https://www.un.org/Depts/los/clcs_new/submissions_files/gbr45_09/gbr2009fgs_executive%20summary.pdf.

14 Argentina, Outer Limit of the Continental Shelf, Argentina Submission, Executive Summary, UN website (May. 5, 2020), https://www.un.org/Depts/los/clcs_new/submissions_files/arg25_09/arg2009e_summary_eng.pdf.

群岛和桑德维奇群岛的外大陆架外部边缘几乎完全重合（如图 1，图中上半部分是英国的主张，下半部分是阿根廷的主张，框中是涉及乔治亚群岛和桑德维奇群岛的部分）。由于两国的划界案涉及未解决的领土争端，委员会根据其议事规则决定暂不审议该处大陆架划界申请。与英阿的划界案情形不同，澳大利亚以领土主权无争议的三座亚南极岛屿为基础主张越南极海域大陆架。[15] 2004 年，澳大利亚向委员会提交了外大陆架划界案申请。[16] 该申请中，既存在一处以“南极领土”为起点的大陆架外部界限，也包含两处以亚南极岛屿为起点而作的外大陆架界限。[17] 根据委员会给出的建议，即使大陆架外部界限跨越到了南极海域，以亚南极岛屿主张的涉南极外部界限基本得到了委员会的认可。然而，尽管在程序上已被委员会认可，但其法律效力如何，是否与《南极条约》中不得在南极创设任何主权权利相违背，都是值得探讨的问题。

可见，尽管南极的领土争端虽因南极条约体系的建立而被搁置，但由于该体系并未明确其与《公约》之间的适用关系，各主张国为了谋取未来在南极的权益，都在尽力扩大自身的南极海洋主权权利。南极领土主张国基于本国的“南极领土”主张而提出的海域主张均受到了非领土主张国的反对，这是因为南极领土的主权主张已被冻结，基于主权而新创立的衍生权利自然也不能得到承认。[18] 但是，沿海国根据《公约》，基于亚南极岛屿主张的涉南极海域外大陆架和专属经济区如何与南极条约体系相协调，也亟待探讨和解决。

南极海域争端解决的主要路径或在于从根本上厘清《公约》和南极体系之间的关系。但现有的南极争端解决机制如何？其是否能在一定程度上缓解现存各国在南极的争端？因此，了解南极条约体系现有的争端解决机制就显得十分必要。

## 三、现有南极争端解决机制

以和平手段解决争端不仅是《联合国宪章》的规定，也是国际法基本原则的要求。和平解决南极争端的要求同时也包含在南极条约体系之中。南极条约体系之下涉及南极争端解决的文件主要包括《南极条约》、《南极海洋生物资源养护公约》（Convention for the Conservation of Antarctic Marine Living Resources，以下简称“《养护公约》”）、《关于环境保护的南极条约议定书》（Protocol to the Antarctic

15 三座岛屿分别为赫德岛、麦克唐纳群岛和麦夸里岛。

16 参见澳大利亚联邦，《澳大利亚大陆架划界案执行摘要》，载联合国网站 https://www.un.org/Depts/los/clcs_new/submissions_files/aus04/Documents/aus_2004_c.pdf，（待作者确认访问日期）。

17 两处涉南极海域的大陆架主张区分别为凯尔朗深海高原地区和麦夸里海岭地区。

18 朱瑛、薛桂芳、李金蓉：《南极地区大陆架划界引发的法律制度碰撞》，载《极地研究》2011 年第 4 期，第 320 页。

Treaty on Environmental Protection，以下简称“《议定书》”）及其附件六。[19]

《南极条约》第 11 条对条约的解释和适用引起的争端设置了两种解决机制。第一种是争端方之间相互协商，以期通过谈判、调查等和平方式化解争端。如果争端未能通过第一种机制得到解决，经争端各方的同意，应提交国际法院解决，但当争端各方未能就提交国际法院达成一致，他们应该继续寻求第一种机制解决争端。[20]

《养护公约》第 25 条中有与《南极条约》第 11 条相似的争端解决机制，但针对的争端是与前者相关的“解释和适用”的争端。[21] 不能通过谈判等和平方法解决的争端，经过各方的同意，应当提交给国际法院或仲裁，同样的，不能就提交国际法院或仲裁达成一致的，争端各方应回归和平的解决方法。[22]

《议定书》中包含两种争端解决机制：一般机制与特殊机制。前者与《南极条约》第 11 条的规定类似。但与《南极条约》不同的是，《议定书》要求争端方应首先履行一个程序性义务，即就争端的解决进行磋商。特殊机制专门针对《议定书》第 7、8、15 条和《议定书》附件项下的争端，以及涉及《议定书》第 13 条（在该条与上述几条相关的情况下）的争端，各国在成为《议定书》缔约国时，或之后的任何时候，可选择通过国际法院或仲裁法庭来解决上述争端。如果各争端方选择了同一种解决方式，则该方式优先，除非各方另外达成协议。[23] 如果各方未选择同一种解决机制或双方都接受了两种机制，则该争端只能提交给仲裁法庭，除非各方另有协议。如未作出选择或作出的选择已经失效，则该国被视为已经接受仲裁法庭的管辖。[24] 由此可见，对于特定争端，仲裁可成为一种强制解决机制。但在这些特定争端被提交强制解决机制之前，有 12 个月的时间让争端各方根据第 18 条的规定解决争端，且《议定书》专门规定其未授予国际法院与仲裁庭解决《南极条约》第 4 条范围内的争端，即南极主权争端。[25]

南极条约体系中关于争端解决的条款，有时候被评价为“较为简单，甚至是过于简单”。[26]《南极条约》和《养护公约》均未说明在争端方未能和平解决争端，且未就将争端提交国际法院或仲裁法庭达成合意的情况下应如何解决争端，可见南极争端解决机制仍有改进的空间。正因为南极条约体系之下争端解决机制的不完善，部分南极条约体系协商国在遇有争端时更愿意寻求非南极条约体系的争端解

19 郭红岩：《论南极条约体系关于南极争端的解决机制》，载《中国海洋大学学报（社会科学版）》2018 年第 3 期，第 8 页。
20 《南极条约》第 11 条。
21 《南极海洋生物资源保护公约》第 25 条第 1 款。
22 《南极海洋生物资源保护公约》第 25 条第 2 款。
23 《关于环境保护的南极条约议定书》第 19 条第 1、4 款。
24 《关于环境保护的南极条约议定书》第 19 条第 3、5 款。
25 《关于环境保护的南极条约议定书》第 20 条第 2 款。
26 Arthur Watts, *International Law and the Antarctic Treaty System,* Cambridge University Press, Vol. 11, 1992, p. 90.

决机制。例如，在澳大利亚诉日本捕鲸一案中，澳大利亚便寻求国际法院解决其与日本在南极海域的捕鲸争端，此外，诉求建立在日本违反《国际捕鲸管制公约》之上。[27] 现有南极争端解决机制的不完善会导致各缔约国不愿意在南极条约体系之下解决争端，这样不仅不利于争端解决机制的发展，也可能因为个案援引的法律文件不同而导致适用标准的差异，从而造成同质案件裁判结果碎片化的不利后果。同时，援引南极条约体系之外的国际法律文件来解决南极地区的争端，可能会因南极地区的特殊法律地位而引发适用冲突。随着科技的发展和人类南极活动的日益频繁，在南极条约体系之内建立更完整的争端解决机制不仅能为将来可能发生的争端提供适用南极地区、标准统一的解决方法，还能避免引发更多的适用冲突。

综上所述，目前南极条约体系之下的争端解决机制是以和平解决为原则，一般解决机制均与《联合国宪章》的要求相符。在谈判、调查等方式无法解决争端的时候，经过争端各方的同意可以将争端提交给国际法院或仲裁法庭，只有针对特定争端，如矿物资源活动禁止、环境影响评价和应急预案相关的争端，才有强制仲裁程序。

## 四、《公约》对南极海域争端的影响及启示

《南极条约》第 6 条明确了该条约的适用范围，并明确该条约不应妨碍任何一国根据国际法规定享有的公海权利。[28] 根据《维也纳条约法公约》规定的条约解释方法，此处的“公海”应是指 1958 年《日内瓦公海公约》中所规定的“不属领海或一国内水域之海洋所有各部分”。第 6 条所指“国际法”应包含国际海洋法，但对于“国际海洋法”是指签订《南极条约》时期的国际海洋法还是指随着时间推移一直演进的国际海洋法，本文认为采取后面一种解释更为恰当，因为国际法中各国在公海的权利是不断变化的，采用更为灵活的解释能让《南极条约》更贴近当今现实，延长其生命力。而《公约》是现行国际海洋法中不可或缺的部分，因此《南极条约》和《公约》在南极地区的重叠使用是必然趋势，而《公约》对南极争端造成影响的同时也会为其解决机制带来一定启示。

### （一）对南极领海与专属经济区争端的影响

《南极条约》只提及了公海及其国际法规制，并没有规范领土毗邻海域的法

27 Whaling in the Antarctic (Australia *v.* Japan: New Zealand intervening), Judgment, I.C.J. Reports 2014, p. 226

28 《南极条约》第 6 条。

律地位，因此当《南极条约》和《公约》在南极地区同时适用，就会产生争议，即南极领土主张国依据《公约》主张相应的海洋权利是否违反《南极条约》第 4 条第 2 款的规定。

在国际法中，领海被视为是一国领土的构成。[29] 由于南极条约第 4 条冻结了各国对南极领土的主权主张，领海主张自然也应被冻结。由于在《南极条约》生效时，当时国际法规定的领海宽度为 3 海里，但随着《公约》的签订，领海宽度由 3 海里变成了最远可至 12 海里，如果将南极领海由 3 海里扩大至 12 海里，这是不是与《南极条约》第 4 条第 2 款相违背？笔者认为，尽管《公约》是国际海洋法发展的结果，但发展后的领海制度并不能适用于被冻结的南极领土主张（包括领海主张）。因此，倘若南极领土主张国依据《公约》主张 12 海里领海，则违反了《南极条约》不得扩大现有领土主权之禁止。澳大利亚所作的限制性的领海声明便是其不敢公然违反冻结条款的体现。

专属经济区方面，澳大利亚认为专属经济区是附属于领土主权的权利，所以不构成对原有主权主张的扩大，因此正式提出了南极专属经济区主张，但其他主权主张国并不认同这种主张的法律基础。专属经济区制度是《公约》首创的制度，沿岸国在专属经济区享有专属性的主权权利。即使认为专属经济区主张不属于扩大或提出新的主权主张，但沿岸国的确依靠这一主张在南极创立了新的主权权利，因此违背了《南极条约》。同时，倘若承认主张国在南极专属经济区的权利，可能会引起与《南极条约》体系中规定相矛盾的资源利用开发行为，[30] 这些矛盾将有待进一步调和。

## （二）对南极大陆架争端的影响

《公约》对领海和专属经济区方面的规定并未引起实质性的争端，只是引发了各海域主张国和非主张国之间的对立。而在大陆架争端方面，由于南极油气资源的吸引和大陆架界限委员会的介入，《公约》对大陆架（尤其是外大陆架）的规定对南极条约体系造成了较大的冲击，或在南极海域形成《公约》与南极体系之间不可调和的矛盾。《公约》不仅规定各沿岸国可主张 200 海里大陆架海域，还赋予沿岸国在特定情况下主张 200 海里外大陆架的权利。对于后者，沿岸国需要向大陆架界限委员会提交外大陆架划界案，且凡是被委员会审议通过的划界案则会被赋予一定的法律约束力，成为“最终的和具有法律拘束力的”。《公约》规定的这一程序为各国主张涉南极海域大陆架提供了法律基础。目前，七个南极领土主张

29 《国际公法学》编写组：《国际公法学》（第 2 版），高等教育出版社 2018 年版，第 249 页。

30 例如，《关于环境保护的南极条约议定书》第 7 条规定：“任何有关矿产资源的活动都应予以禁止，但与科学研究有关的活动不在此限。”

国均提交了涉南极 200 海里外大陆架划界案（其中，智利提交了初步信息）。由此看来，《公约》极大地加剧了南极大陆架主张争端。

一方面，国际社会对于能否基于南极大陆主张大陆架基本保持一致的态度，《公约》对此并不会改变南极条约体系项下的海域现状。尽管七个主张国均提交了涉南极大陆架划界案，但他们并不会因为向委员会提交了以南极大陆为基础的外大陆架申请，便要求委员会对该部分予以审议。相反，相关各国在划界案申请中均请委员会注意南极洲所具有的特别法律和政治地位，要求其不审议相关部分的申请，以保持《公约》和《南极条约》的协调一致。同时，这些大陆架主张引起了其他非领土主张国的反对，它们认为南极不存在任何领土主权，因此也就不存在所谓的沿岸国，领土主张国主张的大陆架海洋权利也就不能成立。

另一方面，以亚南极岛屿为基础主张跨越到南极海域的外大陆架的申请却极大地挑战了《南极条约》体系。委员会于 2008 年基本同意澳大利亚基于其亚南极岛屿延伸至南极海域的大陆架外部界限主张。值得一提的是，尽管德国、俄罗斯、荷兰、美国、日本和印度针对澳大利亚以南极大陆为基础提出的大陆架外部界限申请部分纷纷发表声明表达反对态度，但六国均未对亚南极岛屿所涉南极大陆架部分提出任何反对意见。[31] 这些国家似乎承认亚南极各国可以以《公约》为基础主张外大陆架，即使相关区域已进入南极海域。有的学者还认为澳大利亚此举为《公约》和《南极条约》所兼容，即利用亚南极岛屿主张涉及到南极海域大陆架并未被冻结条款禁止。[32] 笔者认为这一观点过于信赖委员会建议的法律效力，忽略了《南极条约》禁止在南极创设任何主权权利的规定，也无视了南极条约体系的现有发展。

首先，委员会给出审核意见只具有建议性质，有学者就认为这样一个建议性质的意见不足以约束各国按照建议划定外部界限，[33] 还有学者认为由于委员会是全部由地质、地球物理、水文方面的专家组成的机构，其建议对各国没有法律拘束力。[34] 因此，即使大陆架界限委员会认可了澳大利亚在南极海域所主张的大陆架外部界限，其他各国仍然可以对此提出反对。

其次，即使依据《公约》，澳大利亚有权以亚南极岛屿主张越南极海域的大陆架，但由于《南极条约》禁止在南极创设任何主权权利，澳大利亚所主张的南纬 60

31 参见德国、俄罗斯、荷兰、美国、日本和印度针对澳大利亚划界案向联合国秘书长提交的照会，Reaction of States to the submission made by Australia to the Commission on the Limits of the Continental Shelf, UN website ( 待作者确认访问日期 ), https://www.un.org/Depts/los/clcs_new/submissions_files/submission_aus.htm。

32 吴宁铂：《澳大利亚南极外大陆架划界案评析》，载《太平洋学报》2015 年第 7 期，第 9 - 16 页。

33 Suzette V. Suarez, *The Outer Limits of the Continental Shelf: Legal Aspects of their Establishment*, Springer-Verlag Berlin Heidelberg, 2008, p. 84.

34 范云鹏：《论大陆架界限委员会的法律地位》，载《中国海洋法学评论》2007 年第 1 期，第 156 页。

度以南大陆架因违反《南极条约》而无效。毫无疑问，一旦承认澳大利亚对南极海域大陆架的主权权利，即认可澳大利亚享有该地区专属的矿产资源等的专属勘探开发和科学研究等主权权利，而这与《南极条约》所规定的南极地区应为了全人类利益而永远专为和平目的而使用的宗旨相违背。即使澳大利亚承诺其不会开采南极海域大陆架上的矿产资源，其对大陆架享有的其他主权性权利和管辖权的行使也会在一定程度上威胁南极的和平与安全。从这个角度来说，阿根廷以其亚南极岛屿主张的跨域至南极海域的专属经济区也会因违背《南极条约》而无效。

最后，现有南极条约体系中的南极海域矿物禁止开采之规定与大陆架制度不可兼容。90 年代初，《议定书》的签订使南极所有海域矿物资源的开发利用完全被禁止，有学者认为这从根本上禁止了各主张国在南极海域享有的大陆架权利。[35] 大陆架制度创设的根本目的在于使沿海国在其领土的自然延伸上享有矿物资源勘探和开发等专属性主权权利，在现有南极条约体系下，此种专属性权利并无存在之可能。

可以说，《公约》的生效引发了一系列的南极海域争端。由于南极大陆领土主权的冻结，《公约》中的领海、专属经济区制度并不会对《南极条约》体系项下的南极海域制度造成冲击。但各国依据《公约》以其亚南极岛屿主张延伸至南极海域的大陆架的行为，极有可能冲击到南极条约体系项下的南极海域制度。大陆架界限委员会审议通过澳大利亚亚南极岛屿的大陆架外部界限划界案这一事实或使得相关国家有了合法依据将国家主权权利扩展到南极海域，这从根本上与南极条约体系相冲突。而这一问题的解决追根溯源还是要从《南极条约》和《公约》本身的关系入手。

由于《南极条约》并未对大陆邻近海域的权利归属作出明确规定，各国可以借诸如大陆架的“突破口”来强化自己的“领土主权”，这可能会引发新的领土主权争端，但由于《南极条约》“冻结”的主权是整个南极条约体系的基础，对它的撼动可能造成整个体系的崩溃，加之《公约》并不能适用于南极大陆地区，所以《公约》并未对南极平静的领土主权现状造成实质性冲击。

## （三）《公约》对完善南极争端解决机制的启示

首先，南极争端的解决需要建立更广泛的强制争端解决程序。南极条约体系中现存的争端解决机制是以和平解决为原则，以国家之间自行采用和平手段解决为主。若要将争端提交国际法庭或仲裁庭，则需以国家同意为前提，而只有《议定书》中的特殊情况才能适用强制仲裁程序。随着人类南极活动日益频繁，各种类

35 阮振宇：《南极条约体系与国际海洋法：冲突与协调》，载《复旦学报（社会科学版）》2001 年第 1 期，第 136 页。

型的争端会逐渐凸显，仅仅依靠《议定书》中与环境相关的强制仲裁程序远远不够。以旅游船只的管辖为例，相当一部分南极旅游船只并不注册在南极条约协商国的国籍下，这样便不能要求这些船只遵守南极条约体系的规定。由于各主张国的领土主张已被冻结，其海域主张也不能作为对这些船只行使管辖权的基础。而一旦这些船只引起的环境污染或是责任事故便可引起国际争端，当争端方无法自行采用和平手段解决争端，且未就将争端提交国际法庭或仲裁庭达成一致时，这些争端大概率会出现悬而不决的状态，不利于人类南极活动的开展和南极地区的国际合作。

《公约》第 15 部分，除了第 298 条规定的特定事项外，所有缔约国必须选择接受某一法庭或仲裁庭的管辖，这为相关争端的解决创制了“保底机制”，《南极条约》体系可以也参照《公约》的规定。即使不要求所有南极条约协商国必须接受某一法庭或仲裁庭的[36]管辖，也应针对南极现状，结合目前人类南极活动状况，制订覆盖面更广的强制争端解决程序，这样能在出现尖锐的且各方不能自行解决的南极争端之前，为其提供较为完整的解决机制。

其次，可参照《公约》中的海底管理局，适用人类共同遗产原则在南极建立一个“综合事务管理局”。《公约》第 136 条将“区域”内的矿产资源归为人类共同遗产，尽管人类共同遗产原则并不适用于南极海域，因为《公约》第 11 部分的“区域”制度旨在管理“区域”内矿产资源的开发，而对于南极资源，国际社会普遍持保护和养护的态度，但南极大陆与“区域”也存在相似之处：传统主权和属地管辖难以在其范围内适用，且它们均用于和平目的并出于人类共同利益而加以管理。两者的不同之处在于“区域”制度建立在人类共同遗产原则之上，而南极地区由南极条约体系这一独特的法律制度进行管理，该体系并未正式接受人类共同遗产原则。[37]但《南极条约》体系建立在冻结的主权之上，该方案归根究底仅是一个为避免尖锐矛盾的过渡性方案，实际的领土主权争端并没有解决，因此，在南极地区建立脱离传统主权和属地管辖，为全人类利益服务的领土和资源管理制度也不失为一种发展性的尝试。

笔者认为，为解决南极各类争端、管理南极事务，可在南极适用人类共同遗产原则。尽管领土主张国根据历史上的发现、先占、管理行为主张南极领土，但这并不能排除国际社会在南极地区享有的利益。《南极条约》在序言中强调南极不属于任何国家，确认了各国均在南极享有利益的事实，因此，可以认为南极是整个国际社会的共同遗产，人类共同遗产原则具有适用的前提。为此，可考虑在南极设立一个综合管理局，其宗旨是为全人类利益管理南极地区，如可由该管理局代表全

36 《联合国海洋法公约》第 136 条。

37 对南极适用何种理论，除人类共同遗产理论外，各国还提出了全球共有理论和世界公园理论；参见梁咏：《对南极地区的国际法展望与中国立场：人类共同遗产的视角》，载《法学评论》2011 年第 5 期，第 87 页。

人类就个主张国之间海域划界与主张问题进行讨论，并与当事国协商，还可以由其监管南极海域的矿物资源开采禁止规定的实施和监管船只活动等事项。这样可以一定程度上缓解前文提到的南极海域争端。但该制度可能面临的最大问题是机构权力来源的问题，领土主张国很难将其权力让渡给机构，且南极地区涉及无人主张的地域，这可能需要整个国际社会的同意。

## 五、结　语

《南极条约》自 1959 年以来维持的地区稳定态势正逐渐被挑战，尽管领土争端由于南极领土主权的“冻结”不会在短时间内爆发，但《公约》生效后引发的海域之争，其实质仍是南极领土主权争夺战的延续。

目前南极条约体系与《公约》在南极海域的重叠适用，对南极条约造成了一定程度的冲击，如引发了各类海域争端。而只要《南极条约》第四条中冻结条款保持生效，《公约》中创立的专属经济区制度和外大陆架制度就不会对南极海域制度产生根本性的影响。

彻底解决现存南极争端的方案在短时间内出现的可能性较低，各国可以借鉴《公约》的相关规定，通过签订或修订国际条约的方式，扩大强制争端解决程序的覆盖范围，建立更为完备的南极争端解决机制或设立综合事务管理局以缓解现有南极争端。总的来说，《公约》虽然给南极争端带来了新的问题和挑战，但同时也为南极争端的解决机制带来了启示。

# UNCLOS' Impact on and Implications for Antarctic Maritime Disputes

LIU Weizhe*

**Abstract:** The maritime regime created by the United Nations Convention on the Law of the Sea (UNCLOS) contributes to multiple categories of Antarctic maritime disputes, which are rooted in the conflicts between UNCLOS and the Antarctic Treaty System. Though States at stake are claiming their territorial sea, exclusive economic zone (EEZ), and continental shelf in the Antarctic area, it is not adequate for this very fact to shake the stability of the Antarctic Treaty System, let alone fundamentally affecting the Antarctic maritime order. UNCLOS provisions on compulsory procedures and the international seabed area (the Area) have brought valuable enlightenment for improving existing Antarctic dispute settlement mechanisms.

**Key Words:** UNCLOS; Antarctic maritime disputes; Settlement mechanism

## I. Introduction

Endowed with rich biological resources and oil and gas resources, Antarctica[1] has been the territory over which States are competing to claim their territorial sovereignty even before the signing of the Antarctic Treaty. It became a continent with special legal status subject to the Antarctic Treaty signed in 1959, which froze all territorial claims over the Antarctic region and maintained the relative stability

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1 The Antarctic referred to in this paper means the area south of 60º South Latitude, covering the Antarctica land (including ice shelves), and also the sea area south of 60º South Latitude.

of the situation in Antarctica. The Antarctic Treaty Consultative Parties signed a series of treaties based on the Antarctic Treaty, resulting in a set of regional systems, known as the Antarctic Treaty System. The United Nations Convention on the Law of the Sea (UNCLOS), adopted in 1982, serves as the "Constitution" for the prevailing laws of the sea, applicable to all sea areas. However, it is not made clear in UNCLOS its relationship with the Antarctic Treaty System, and its content is obviously in conflict with the Antarctic Treaty System. The overlapping application of UNCLOS and the Antarctic Treaty System in the Antarctic sea area will inevitably affect the order established by the latter. Even though the status quo of the frozen territorial sovereignty over the Antarctic cannot be shaken, interest-involved States will still make use of UNCLOS to vie for Antarctic maritime rights and interests.

As a general rule, Antarctic disputes are mainly divided into two categories: maritime disputes and territorial disputes. The application of UNCLOS in the Antarctic sea will inevitably have a certain impact on maritime disputes. In the meantime, the complete dispute settlement mechanism of UNCLOS has also brought valuable enlightenment to the existing Antarctic dispute settlement mechanisms.

## II. Categories of Antarctic Maritime Disputes

There are legal and *de facto* differences among States on the ownership of Antarctic territory and related maritime rights, as well as conflicts of legal interests, leading to maritime and territorial disputes in the Antarctic.

Article  of the Antarctic Treaty has in fact frozen the territorial sovereignty claims over the Antarctic.[2] Art. 4(1) establishes the "unbiased clause" by

2 Art.4(1) of the Antarctic Treaty:"Nothing contained in the present Treaty shall be interpreted as:(a) a renunciation by any Contracting Party of previously asserted rights of or claims to territorial sovereignty in Antarctica;(b) a renunciation or diminution by any Contracting Party of any basis of claim to territorial sovereignty in Antarctica which it may have whether as a result of its activities or those of its nationals in Antarctica, or otherwise;(c) prejudicing the position of any Contracting Party as regards its recognition or non-recognition of any other State's right of or claim or basis of claim to territorial sovereignty in Antarctica."Art. 4(2) of the Antarctic Treaty:"No acts or activities taking place while the present Treaty is in force shall constitute a basis for asserting, supporting or denying a claim to territorial sovereignty in Antarctica or create any rights of sovereignty in Antarctica. No new claim, or enlargement of an existing claim, to territorial sovereignty in Antarctica shall be asserted while the present Treaty is in force."

providing that no acts shall constitute a basis for renunciation or recognition of the territorial sovereignty or sovereign rights in Antarctica originally claimed; Art. 4(2) extends the application scope of the "unbiased clause" to the acts of States after the conclusion of the treaty. The ambiguous provisions on freezing territorial claims under Article 4 of the Antarctic Treaty alleviate and shelve the conflicts of interest among existing and potential claimants and non-claimants in the Antarctic Territory. The Antarctic Treaty has always been an expedient measure and a product of mutual compromise among the Contracting States to maintain long-term peace in the Antarctic. As a result, the disputes over territorial sovereignty has been temporarily covered up and put aside.[3] However, the conclusion of the Antarctic Treaty completely ignored the existence of potential maritime disputes, which set the stage for subsequent maritime disputes.

The principle of sovereignty is a pivotal principle of International Law, and the dispute over territorial sovereignty was the main type of dispute in Antarctica before the signing of UNCLOS. The dispute over Antarctic maritime rights appeared with the negotiation of UNCLOS. Some scholars have argued that there is no requirement in the International Law for coastal States to formally establish their territorial claims before claiming maritime rights, so Antarctic territorial claimants are free to assert their maritime rights.[4] Accordingly, even if the Antarctic territorial claim is frozen as a result of the entry into force of the Antarctic Treaty, it will not affect the States' claims to their maritime rights under UNCLOS in the Antarctic sea area. However, given the principle that "the land dominates the sea", maritime claims can be regarded as a reaffirmation of territorial claims. The States' relevant maritime claims in the Antarctic are actually in the hope to consolidate their territorial claims in the Antarctic.

UNCLOS's expansion in the maritime rights of coastal States has renewed the taste of the claimant States of Antarctic territory for resources and rights, and the battle for the Antarctic sea area has ensued.

### *A. The Territorial Sea and the Exclusive Economic Zone (EEZ)*

3 WU Ningbo, *A Study on the Legal Issues of the Delimitation of the Antarctic Outer Continental Shelf,* Master's thesis of Fudan University, 2012, p. 17. (in Chinese)

4 Federica Mucci & Fiammetta Borgia, *The Legal Regime of the Antarctic*, The IMLI Manual on International Maritime Law, Volume I: The Law of the Sea, Oxford University Press, 2014, p. 499.

The opposition of the Antarctic maritime claims is manifested first and foremost in the ability of claimant States to expand their sovereign rights in the Antarctic sea area following UNCLOS. Article 6of the Antarctic Treaty also allows States to exercise their rights in the Antarctic high seas following International Law,[5] but the specific meaning is unclear due to the ambiguity of the terms "high seas" and "rights". Does this mean that the Antarctic sea area is not governed by the Antarctic Treaty but by the high seas' regime? The development of the Antarctic Treaty System has given a negative answer: it covers not only the conservation of biological resources in the Antarctic sea area, but also such matters as development and utilization of marine mineral resources and protection of the Antarctic marine environment.[6] There is no doubt that States must take into account the special Antarctic maritime regime under the Antarctic Treaty System when claiming rights under UNCLOS. In this regard, claims to the territorial sea and the EEZ under UNCLOS by claimant States based on their "Antarctic territory" are bound to encounter opposition from non-claimant States, leading to maritime disputes.

Prior to the adoption of UNCLOS and the Antarctic Treaty, the relevant maritime regime had been in fact initially defined in the 1958 Geneva Conventions. However, the Convention on the Territorial Sea and the Contiguous Zone, one of the four Geneva Conventions, does not provide for the breadth of the territorial sea, despite the generally-accepted breadth of the territorial sea of 3 nautical miles. The adoption of UNCLOS has allowed for an expansion of such breadth, whereby coastal States can claim a territorial sea of 12 nautical miles. Australia, for example, stated in 1990 to extend the breadth of its Antarctic territorial sea to 12 nautical miles. But this is yet another statement that lacks the effect of International Law, as Australia limits the legal effect of the 12-nautical-mileterritorial sea area only to its nationals.[7] This shows a tendency on the part of the claimant States to act cautiously and dare not conflict with the freezing provisions of the Antarctic Treaty in issues of sovereignty over the territorial sea.

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5 Art. 4 of the Antarctic Treaty: "The provisions of the present Treaty shall apply to the area south of 60º South Latitude, including all ice shelves, but nothing in the present Treaty shall prejudice or in any way affect the rights, or the exercise of the rights, of any State under International Law with regard to the high seas within that area."

6 CHEN Li, *Study on the Legal Status of Antarctic Ocean*, Fudan Journal (Social Sciences Edition), Vol. 51: 5, p. 159 (2014). (in Chinese)

7 RUAN Zhenyu, *Antarctic Treaty System and International Law of the Sea: Conflict and Coordination,* Fudan Journal (Social Sciences Edition), Vol. 38: 1, p. 133 (2001). (in Chinese)

Unlike the territorial sea, there was no EEZ regime at the time of signing the Antarctic Treaty. States would enjoy the exclusive rights to explore and exploit the natural resources in the Antarctic sea area, provided that they legally claim an EEZ of 200 nautical miles based on their Antarctic territory. So far, four claimant States have declared the Antarctic EEZ. Since it is provided for in Article IV of the Antarctic Treaty that States may not create any sovereign rights in Antarctica, the claim to the Antarctic EEZ is also opposed by non-claimant States on the grounds that it is suspected of violating this Article. In addition to basing its EEZ claim on the Antarctic continent, Argentina also claims a 200-nautical-mile EEZ that extends into the Antarctic sea area from its Sandwich Islands north of 60º South Latitude.[8]

From the foregoing, there are disputes between the claimant States and the non-claimant States in the claims to the Antarctic territorial sea and the EEZ. Moreover, even if these claims are recognized as legal, there still exist disputes of overlapping claims to be delimited in each sea area.

### *B. The Outer Continental Shelf*

Compared with the Convention on the Continental Shelf, UNCLOS not only reaffirms the standard of natural extension, but also introduces the distance criterion to determine the outer limits of the continental shelf, which essentially expands the scope of the continental shelf that a country can claim.[9] It is worth noting that the inherent sovereignty-based rights of coastal States over their continental shelf do not require any declaration. However, when they claim the outer limits of the continental shelf beyond 200 nautical miles, it is necessary to apply to delimitation to the Commission on the Limits of the Continental Shelf (hereinafter "CLCS") for approval and recommendation.[10] This provides an opportunity for the claimant States to reaffirm their territorial sovereignty over Antarctica through the institutions under UNCLOS.

At present, Australia, the United Kingdom, Norway and Argentina have all made formal submissions to CLCS on the delimitation of the continental shelf involving the Antarctic sea area. These submissions fall into the following two categories:

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8 Both the United Kingdom and Argentina claim the islands, which Britain calls the South Sandwich Islands.

9 Public International Law (2nd Edition), Higher Education Press, 2018, p. 257. (in Chinese)

10 Art. 77(3), Art. 76(9) of the United Nations Convention on the Law of the Sea.

For the first category, the claimant States claimed a continental shelf beyond 200 nautical miles based on the Antarctic continent. Except for the United Kingdom, the other three States have made submissions to CLCS based on their "Antarctic territory". Among them, both Australia and Norway took the initiative to request CLCS not to deliberate the part of the continental shelf attached to the Antarctic territory.[11] Although Argentina did not request so,[12] CLCS also decided not to deliberate the application for the outer limits of the continental shelf attached to Antarctica as a result of the diplomatic notes addressed to the Secretary-General of the United Nations requesting doing so from several States.

In the second category, the claimant States presented to CLCS the submissions on the outer continental shelf across the Antarctic sea area based on the islands north of 60º South Latitude (hereinafter "sub-Antarctic islands"). Australia, Argentina and the United Kingdom all made such claims, among which Argentina and the United Kingdom both claimed a continental shelf that extends to the Antarctic sea area from the Georgia Islands and Sandwich Islands. According to the respective submissions made by the United Kingdom[13] and Argentina[14] in 2009, the outer edges of the outer continental shelves of the Georgia Islands and Sandwich Islands delineated by the two States almost coincided (as shown in Figure 1, the upper part of the figure is the claim of the United Kingdom, the lower part is the claim of Argentina, and the box shows the part that involved the Georgia Islands and Sandwich Islands). As the submissions of the two States involved an

11 See Commonwealth of Australia, E*xecutive Summary of the Australian Continental Shelf Submission*, UN webisite (Date TBC), https://www.un.org/Depts/los/clcs_new/submissions_files/aus04/Documents/aus_2004_c.pdf; For the executive summary of Norway's continental shelf submission to the United Nations Commission on the limits of the continental shelf on 4 May 2009, see Norway, continental shelf submission of Norway in respect of Bouvetøya and droning Maud Land executive summary, UN website (Date TBC), https://www.un.org/Depts/los/clcs_new/submissions_files/nor30_09/nor2009_executivesummary.pdf.

12 See the notes submitted by the United Kingdom, the United States, Russia, India, the Netherlands and Japan concerning the Argentina's submission on the 200-nautical-mile outer continental shelf to the Secretary-General of the United Nations, Communications received with regard to the submission made by Argentina to the Commission on the Limits of the Continental Shelf, UN website (Date of visit to be confirmed by author), https://www.un.org/Depts/los/clcs_new/submissions_files/submission_arg_25_2009.htm.

13 United Kingdom of Great Britain and Northern Ireland, Submission in respect of the Falkland Islands, and of South Georgia and the South Sandwich Islands, Executive Summary, UN website (May. 5, 2020), https://www.un.org/Depts/los/clcs_new/submissions_files/gbr45_09/gbr2009fgs_executive%20summary.pdf.

14 Argentina, Outer Limit of the Continental Shelf, Argentina submission (May. 5, 2020), https://www.un.org/Depts/los/clcs_new/submissions_files/arg25_09/arg2009e_summary_eng.pdf.

unresolved territorial dispute, CLCS decided, following its rules of procedure, not to deliberate the application for the delimitation of the continental shelf of that place for the time being.Different from the case of the United Kingdom and Argentina, Australia claimed the continental shelf across the Antarctic sea area based on three sub-Antarctic islands without territorial sovereignty dispute.[15] In 2004, Australia applied delimitation of the outer continental shelf to CLCS,[16] which involved one continental shelf with outer limit starting from the "Antarctic territory", and two continental shelves with outer limits starting from the sub-Antarctic islands.[17] According to the recommendations made by CLCS, even though the outer limits of the continental shelf extended to the Antarctic sea area, the claim involving Antarctic outer limits based on the sub-Antarctic islands has basically been recognized by CLCS. However, despite the fact it has been approved by CLCS in the procedure, it is worth exploring what its legal effect is and whether it is contrary to the prohibition of any creation of any sovereign right in the Antarctic under the Antarctic Treaty.

It can be seen that although the territorial dispute in the Antarctic has been put on hold due to the establishment of the Antarctic Treaty System, claimant States are making every effort to expand their Antarctic maritime sovereign rights to seek future rights and interests in the Antarctic, as the System doesn't specify the application relationship with UNCLOS. The maritime claims made by Antarctic territorial claimant States based on their "Antarctic territory" have been opposed by non-claimant States. This is because claims to Antarctic territory have been frozen and, naturally, newly created derivative rights based on sovereignty cannot be recognized.[18] On the other hand, it is also urgent to explore and solve how to coordinate the outer continental shelf and EEZ involving the Antarctic sea area claimed by coastal States based on the sub-Antarctic islands with the Antarctic Treaty System.

The main way to settle Antarctic maritime disputes may be to fundamentally

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15 The three islands are: Heard Island, MacDonald Islands and Macquarie Island.

16 See Commonwealth of Australia, E*xecutive Summary of the Australian Continental Shelf Submission*, On the UN website (Date TBC), https://www.un.org/Depts/los/clcs_new/submissions_files/aus04/Documents/aus_2004_c.pdf.

17 The two continental shelf claiming areas that involve Antarctic sea area are the Kerguelen Plateau and the Macquarie Ridge, respectively.

18 ZHU Ying,XUE Guifang, LI Jinrong: *Conflicts of Legal Systems Induced by the Delimitation of the Continental Shelf in the Antarctic Region*, Chinese Journal of Polar Research, Vol. 23: 4, p. 320 (2011). (in Chinese)

clarify the relationship between UNCLOS and the Antarctic Treaty System. But what about the existing Antarctic dispute settlement mechanism? Can it ease the existing disputes among States in the Antarctic to some extent? Given this, it is necessary to understand the existing dispute settlement mechanisms of the Antarctic Treaty System.

## III. Existing Antarctic Dispute Settlement Mechanisms

Settling disputes by peaceful means is not only a provision of the Charter of the United Nations, but also a requirement of the basic principles of International Law. The requirements for the peaceful settlement of Antarctic disputes are also included in the Antarctic Treaty System. Documents relating to the settlement of Antarctic disputes under the Antarctic Treaty System mainly include the Antarctic Treaty, the Convention for The Conservation of Antarctic Marine Living Resources (hereinafter "CCAMLR"), the Protocol on Environmental Protection to the Antarctic Treaty (hereinafter "PEPAT") and its Annex VI.[19]

Article 11 of the Antarctic Treaty provides for two mechanisms for the settlement of disputes arising from the interpretation and application of the Treaty. The first is mutual consultation between the parties to the dispute, intending to settle disputes through negotiation, investigation and other peaceful means. If the first mechanism fails, the dispute shall, with the consent of the parties concerned, be referred to the International Court of Justice for settlement. But when the parties to the dispute fail to agree on a referral to the Court, they should continue to seek a settlement through the first mechanism.[20]

Article 25 of CCAMLR provides a dispute settlement mechanism similar to that provided for in Article 11of the Antarctic Treaty, but it deals with the disputes related to the "interpretation and application" of the former.[21] Disputes that cannot be settled by such peaceful means as negotiations shall, with the consent of the parties concerned, be referred to the International Court of Justice or arbitration. Likewise, if no agreement can be reached on referral to the Court or arbitration, the

19 GUO Hongyan, *The Settlement Mechanism of the Antarctic Treaty System on the Antarctic Dispute*, Journal of Ocean University of China (Social Sciences), Vol. 31: 3, p. 8 (2018). (in Chinese)

20 Art.11 of the Antarctic Treaty.

21 Art. 25(1) of the Convention for the Conservation of Antarctic Marine Living Resources.

parties concerned shall return to a peaceful settlement.[22]

PEPAT provides for two kinds of dispute settlement mechanisms: a general mechanism and a special mechanism. The former is similar to the provisions of Article 11of the Antarctic Treaty. However, unlike the Antarctic Treaty, PEPAT requires the parties to the dispute to first fulfill a procedural obligation, that is, to consult on the settlement of the dispute. The latter is exclusively for addressing disputes under Articles 7, 8 and 15 of PEPAT and the annexes to PEPAT, as well as disputes relating to Article 13 of PEPAT (in so far as it is related to the above-mentioned articles). States may choose to settle the above-mentioned disputes through the International Court of Justice or the Court of Arbitration at any time when they become contracting parties to PEPAT or at any time thereafter. If each party to the dispute has opted for the same settlement mechanism, such a mechanism shall prevail unless otherwise agreed by the parties.[23] If the parties fail to choose the same settlement mechanism or both parties accept the two mechanisms, the dispute may only be referred to the Court of Arbitration unless otherwise agreed by the parties. If no choice is made or the choice made has lapsed, that State is deemed to have accepted the jurisdiction of the Court of Arbitration.[24] It appears that arbitration can be a compulsory settlement mechanism for particular disputes. However, before these specific disputes are referred to the compulsory settlement mechanism, there is a period of 12 months for the parties to the dispute to resolve the dispute following the provisions of Article 18, and PEPAT specifically provides that it does not authorize the International Court of Justice or the Court of Arbitration to resolve disputes within the scope of Article 4 of the Antarctic Treaty, namely the Antarctic sovereignty disputes.[25]

Provisions of the Antarctic Treaty System on the dispute settlement have been sometimes evaluated as "relatively simple, and even overly simple".[26] There is still room for improvement in the Antarctic dispute settlement mechanism, as neither the Antarctic Treaty nor CCAMLR states how the dispute should be settled if the parties concerned fail to do so peacefully and fail to agree on a referral to the International Court of Justice or the Court of Arbitration. Precisely because

22 Art. 25(2) of the Convention for the Conservation of Antarctic Marine Living Resources.
23 Arts. 19(1)(4) of the Protocol to the Antarctic Treaty on Environmental Protection.
24 Arts. 19(3)(5) of the Protocol to the Antarctic Treaty on Environmental Protection.
25 Art. 20(2) of the Protocol to the Antarctic Treaty on Environmental Protection.
26 Arthur Watts, *International Law and the Antarctic Treaty System,* Cambridge University Press, Vol. 11, 1992,p. 90.

of the imperfection of the dispute settlement mechanism under the Antarctic Treaty System, some Antarctic Treaty System Consultative Parties prefer to seek the dispute settlement mechanism of the non-Antarctic Treaty System in case of a dispute. For example, in the case of Australia v. Japan over whaling, Australia sought the International Court of Justice to resolve its whaling dispute with Japan in the Antarctic sea area based on Japan's violation of the International Convention for the Regulation of Whaling.[27] The imperfection of the existing Antarctic dispute settlement mechanisms will lead to the reluctance of the Contracting States to settle disputes under the Antarctic Treaty System, which is detrimental to the development of the dispute settlement mechanism, and may also give rise to differences in applicable standards due to different legal documents cited in individual cases, thus resulting in the adverse consequences of fragmented judgment results inhomogeneous cases. At the same time, invoking international legal documents outside the Antarctic Treaty System to resolve disputes in the Antarctic may lead to application conflicts because of the special legal status of the Antarctic. Given the development of science and technology and the increasing frequency of human activities in Antarctica, the establishment of a more complete dispute settlement mechanism within the Antarctic Treaty System can not only provide a unified solution applicable to the Antarctic for disputes that may occur in the future, but also avoid causing more application conflicts.

To conclude, the current dispute settlement mechanisms under the Antarctic Treaty System is based on the principle of peaceful settlement, and the general settlement mechanism is consistent with the requirements of the Charter of the United Nations. Where a dispute cannot be settled by negotiation, investigation, etc., such dispute may be referred to the International Court of Justice or the Court of Arbitration with the consent of the parties to the dispute. Compulsory arbitration procedures are only involved for specific disputes, such as those related to the prohibition of mineral resources activities, environmental impact assessment and contingency plans.

## IV. UNCLOS' Impact and Enlightenment on Antarctic Maritime Disputes

27 Whaling in the Antarctic (Australia *v.* Japan: New Zealand intervening), I.C.J. Reports 2014, p. 226

Article 6 of the Antarctic Treaty defines the scope of its application and specifies that it shall not prejudice the rights of any State to the high seas under International Law.[28] Following the method of treaty interpretation provided for in the Vienna Convention on the Law of Treaties, the term "high seas" herein shall mean "all parts of the sea that are not included in the territorial sea or the internal waters of a State" as provided for in the 1958 Geneva Convention on the High Seas. The "International Law" referred to in Article 6should include the international law of the sea. However, as to whether the "international law of the sea" refers to the one during the signing of the Antarctic Treaty or the one that has been evolving over time, this paper holds the opinion that the latter interpretation is more appropriate, since the rights of States to the high seas under the international law are constantly changing, and the adoption of a more flexible interpretation would enable the Antarctic Treaty to be more in tune with present-day realities and prolong its service life. UNCLOS is an indispensable part of the current international law of the sea, so the overlapping use of the Antarctic Treaty and UNCLOS in the Antarctic region is an inevitable trend. UNCLOS, while having an impact on Antarctic disputes, will also shed some light on its settlement mechanism.

### *A. Impact on the Territorial Sea and EEZ Disputes*

The Antarctic Treaty only mentions the high seas and its international regulatory regime, without regulating the legal status of the sea area adjacent to the territory. Therefore, when the Antarctic Treaty and UNCLOS are applied simultaneously in the Antarctic region, there will be a dispute as to whether the corresponding maritime rights claimed by Antarctic territorial claimant States based on UNCLOS violate Article 4, Paragraph 2 of the Antarctic Treaty.

The territorial sea is regarded as the composition of the territory of a state under International Law.[29] As Article 4 of the Antarctic Treaty freezes States' sovereign claims over Antarctic territory, the territorial sea claim should naturally be frozen as well. The breadth of territorial sea stipulated by International Law was 3 nautical miles at the time of the entry into force of the Antarctic Treaty, but such breadth was changed from 3to a maximum of 12 nautical miles with the conclusion

28 Art.6 of the Antarctic Treaty.
29 Public International Law (2nd Edition), Higher Education Press, 2018, p. 249. (in Chinese)

of UNCLOS. Is it contrary to Article 4, Paragraph 2 of the Antarctic Treaty to extend the Antarctic territorial sea from 3 to 12 nautical miles? This paper holds the view that even though UNCLOS is a result of the development of the international law of the sea, the developed territorial sea regime cannot be applied to frozen Antarctic territorial claims (including territorial sea claims).Hence, if an Antarctic territorial claimant State claims a 12-nautical-mileterritorial sea area under UNCLOS, it would violate the prohibition of the Antarctic Treaty on expanding existing territorial sovereignty. Australia's restrictive territorial declaration is a manifestation of its dare not to blatantly violate freezing provisions.

With regard to EEZ, Australia has formally claimed the Antarctic EEZ, arguing that EEZ is a right attached to territorial sovereignty and therefore does not constitute an expansion of the original sovereignty claim. However, other claimant States do not agree with the legal basis of this claim. The EEZ regime is a regime pioneered by UNCLOS, and coastal States enjoy exclusive sovereign rights in the EEZ. Even if it is considered that the claim of EEZ does not belong to the expansion or the introduction of a new claim of sovereignty, the coastal States do rely on such a claim to create new sovereign rights in the Antarctic, thus contravening the Antarctic Treaty. Meanwhile, recognition of the rights of claimant States in the Antarctic EEZ may give rise to resource utilization and exploitation practices that contradict the provisions of the Antarctic Treaty System,[30] and these contradictions will remain to be further reconciled.

### *B. Impact on the Antarctic Continental Shelf Disputes*

The provisions of UNCLOS in respect of territorial sea and EEZ have not given rise to substantive disputes, but only to antagonism between claimant States and non-claimant States in each sea area. Regarding continental shelf disputes, the provisions of UNCLOS on the continental shelf (especially the outer continental shelf) have had a great impact on the Antarctic Treaty System, or formed an irreconcilable contradiction between UNCLOS and the Antarctic System in the Antarctic sea area, owing to the attraction of Antarctic oil and gas resources and the intervention of CLCS on the limits of the Continental Shelf. Aside from providing

30 For example, Article VII of the Protocol on Environmental Protection to the Antarctic Treaty provides that "Any activity relating to mineral resources, other than scientific research, shall be prohibited."

that coastal States may claim the continental shelf of 200 nautical miles, UNCLOS also grants coastal States the right to claim an outer continental shelf beyond 200 nautical miles under certain circumstances. In the latter case, coastal States need to make submissions on the delimitation of the outer continental shelf to CLCS, and any submission deliberated and adopted by CLCS will be given a certain degree of legal binding force and become "final and legally binding". This procedure under UNCLOS provides a legal basis for States to claim the continental shelf in the Antarctic sea area. At present, all the seven Antarctic territorial claimant States have made submissions on the200-nautical-mileouter continental shelf involving Antarctica (among which Chile has submitted preliminary information). It appears that UNCLOS has greatly intensified the dispute over claims on the Antarctic continental shelf.

On the one hand, the international community has basically maintained a consistent attitude as to whether or not a continental shelf can be claimed based on the Antarctic continent, and UNCLOS will not change the status quo of the sea area under the Antarctic Treaty System. Although all the seven claimant States had made submissions on the delimitation of the continental shelf involving Antarctica, they would not ask CLCS to deliberate that part just because they had submitted an application to CLCS for an outer continental shelf based on the Antarctic continent. Instead, in their submissions, the States concerned drew the attention of CLCS to the special legal and political status of Antarctica and requested it not to deliberate the applications of the relevant parts to maintain the coherence of UNCLOS and the Antarctic Treaty. In the meantime, these continental shelf claims raised opposition from other non-territorial claimant States, which argued that there was no territorial sovereignty over Antarctica and therefore no so-called coastal States, and that the continental shelf maritime rights claimed by territorial claimant States could not be established.

On the other hand, the claims to an outer continental shelf spanning into the Antarctic sea area based on sub-Antarctic islands have posed a significant challenge to the Antarctic Treaty System. In 2008, CLCS largely agreed with Australia's claim on the outer limits of the continental shelf extending to the Antarctic sea area from its sub-Antarctic islands. It is worth mentioning that although Germany, Russia, the Netherlands, the United States, Japan and India have issued statements opposing Australia's application for the outer limits of the continental shelf based on the Antarctic continent, none of them raised any objection to the part of the

Antarctic continental shelf covered by the sub-Antarctic islands.[31] These States seem to recognize that sub-Antarctic States can claim the outer continental shelf based on UNCLOS even if the area concerned has entered the Antarctic sea area. Some scholars have also argued that Australia's move is compatible with UNCLOS and the Antarctic Treaty, that is, claims to the continental shelf involving the Antarctic based on sub-Antarctic islands is not prohibited by the freeze clause.[32] As far as this paper is concerned, this view overly relies on the legal effect of the recommendations of CLCS, while ignoring the provisions of the Antarctic Treaty prohibiting the creation of any sovereign rights in the Antarctic, as well as the current development of the Antarctic Treaty System.

First of all, the audit opinion given by CLCS is only of a recommended nature, and some scholars have argued that such a recommendation is not sufficient to bind States to delineate outer limits following the recommendations.[33] Some scholars have also argued that since CLCS is a body composed entirely of experts in geology, geophysics and hydrology, its recommendations are not legally binding on States.[34] Therefore, even if CLCS endorsed the outer limits of the continental shelf claimed by Australia in the Antarctic sea area, other States could still object to it.

Secondly, even if Australia were entitled under UNCLOS to claim the continental shelf across the Antarctic sea area based on its sub-Antarctic islands, given the prohibition of the Antarctic Treaty on the creation of any sovereign rights in the Antarctic, the continental shelf south of 60º South Latitude claimed by Australia is null and void because of violations of the Antarctic Treaty. There is no doubt that the recognition of Australia's sovereign rights over the continental shelf in the Antarctic sea area would be a recognition of Australia's sovereign rights of exclusive exploration, exploitation and scientific research to the exclusive mineral resources of the region, which runs counter to the purpose stipulated in the Antarctic Treaty that the Antarctic region should always be used exclusively for peaceful purposes for the benefit of all mankind. Despite Australia's commitment

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31 See the notes submitted by Germany, Russia, the Netherlands, the United States, Japan and India concerning the submission made by Australia to the Secretary-General of the United Nations, https://www.un.org/Depts/los/clcs_new/submissions_files/submission_aus.htm.

32 WU Ningbo: *An Analysis on Australian Submission for Delimitation in Outer Limits of Continental Shelves Related to Antarctic Area*, Pacific Journal, Vol. 23: 7, pp. 9-16 (2015). (in Chinese)

33 Suzette V. Suarez, *The Outer Limits of the Continental Shelf: Legal Aspects of their Establishment*, Springer-Verlag Berlin Heidelberg, 2008, p. 84.

34 FAN Yunpeng, *A Study on the Legal Status of the Commission on the Limits of the Continental Shelf,* China Oceans Law Review, Vol. 3: 1, p. 156 (2007). (in Chinese)

that it will not exploit mineral resources on the continental shelf in the Antarctic sea area, its exercise of other sovereign rights and jurisdiction over the continental shelf will threaten the peace and security of Antarctica to some extent. From this point of view, Argentina's claim of the EEZ extending to the Antarctic sea area based on its sub-Antarctic island would also be null and void as a violation of the Antarctic Treaty.

Finally, the prohibition of mineral exploitation in the Antarctic sea area in the existing Antarctic Treaty System is incompatible with the continental shelf regime. In the early 1990s, the signing of PEPAT completely prohibited the exploitation and utilization of mineral resources in all Antarctic sea areas, which, as argued by some scholars, fundamentally prohibited the continental shelf rights enjoyed by various claimant States in the Antarctic sea area.[35] The fundamental purpose of the continental shelf regime is to enable coastal States to enjoy exclusive sovereign rights such as exploration and exploitation of mineral resources in the natural extension of their territory, which is not possible under the existing Antarctic Treaty System.

It can be said that the entry into force of UNCLOS has triggered a series of disputes in the Antarctic sea area. Due to the freezing of the territorial sovereignty of the Antarctic continent, the territorial sea and EEZ regime in UNCLOS will not have an impact on the Antarctic maritime regime under the Antarctic Treaty System. However, there is a risk that the Antarctic maritime regime under the Antarctic Treaty System is very likely to be impacted by the actions of States claiming the continental shelf extending to the Antarctic sea area based on their sub-Antarctic islands following UNCLOS. The fact that CLCS has deliberated and approved Australia's submission on the outer limits of continental shelf based on its sub-Antarctic islands may provide a legitimate basis for the relevant States to extend national sovereign rights to the Antarctic sea area, which is fundamentally in conflict with the Antarctic Treaty System. The solution to this problem should be traced back to the relationship between the Antarctic Treaty and UNCLOS.

Given the Antarctic Treaty does not clearly provide for the ownership of rights in the adjacent sea areas of the continent, the States can strengthen their "territorial sovereignty" through "breakthroughs" such as the continental shelf,

35 RUAN Zhenyu, *Antarctic Treaty System and International Law of the Sea: Conflict and Coordination*, Fudan Journal (Social Sciences Edition), Vol. 38: 1, p. 136 (2001). (in Chinese)

which may lead to new territorial sovereignty disputes. However, seeing that the frozen sovereignty of the Antarctic Treaty is the basis of the entire Antarctic Treaty System, the shaking of it may lead to the collapse of the whole system. Coupled with the fact that UNCLOS does not apply to the Antarctic continent, UNCLOS has not had a substantial impact on the peaceful status quo of territorial sovereignty in the Antarctic.

### *C. UNCLOS' Enlightenment for Improving Antarctic Dispute Settlement Mechanisms*

To begin with, there is a need to establish a broader compulsory dispute settlement procedure for the settlement of the Antarctic dispute. The existing dispute settlement mechanism in the Antarctic Treaty System is mainly settled by peaceful means between States based on the principle of a peaceful settlement. If a dispute is to be referred to the International Court of Justice or the Court of Arbitration, it must be subject to the consent of the States concerned, and the compulsory arbitration procedure can be applied in the special circumstances under PEPAT. With the increasing frequency of human activities in Antarctica, various types of disputes will flare up, and it will be far from enough to rely solely on the compulsory arbitration proceedings related to the environment under PEPAT. Taking the jurisdiction of tourist vessels as an example, a considerable number of Antarctic tourist vessels are not registered under the nationality of the Antarctic Treaty Consultative Parties, and thus cannot be required to comply with the provisions of the Antarctic Treaty System. Given that the territorial claims of the claimant States have been frozen, their maritime claims cannot be used as a basis for exercising jurisdiction over these vessels. International disputes may arise in the event of environmental pollution or liability accidents caused by these vessels. When the parties to the dispute fail to resolve the disputes by peaceful means and fail to reach an agreement on a referral to the International Court of Justice or the Court of Arbitration, there is a high probability that these disputes will be in suspense, which is to the detriment of the development of human activities in Antarctica and international cooperation in the Antarctic region.

Part 15 of UNCLOS, in which all Contracting States must choose to accept the jurisdiction of a court of justice or court of arbitration except for the specific matters provided for in Article 298, creates a "minimum guarantee mechanism" for the settlement of relevant disputes, and the Antarctic Treaty System may also refer

to the provisions of UNCLOS. Even if it is not required that all Antarctic Treaty Consultative Parties should accept the[36] jurisdiction of a court of justice or court of arbitration, a broader compulsory dispute settlement procedure should be developed in the light of the status quo of Antarctica and the current state of human activities in the Antarctic, in order to provide a more complete settlement mechanism for a cute Antarctic disputes that cannot be resolved by the parties concerned.

Secondly, the principle of the common heritage of mankind could be applied to establish an "integrated affairs authority" in Antarctica, along the lines of the International Seabed Authority in UNCLOS. Article 136 of UNCLOS classifies the mineral resources in the Area as the common heritage of mankind. Although the principle of the common heritage of mankind does not apply to the Antarctic sea area, as the Area regime of Part 11 of UNCLOS aims to manage the exploitation of mineral resources in the Area, and the international community generally holds the attitude of protection and conservation of Antarctic resources, there are similarities between the Antarctic continent and the Area: traditional sovereignty and territorial jurisdiction are difficult to apply within their scope, and they are used for peaceful purposes and managed for the common interests of mankind. They differ in that the Area regime is based on the principle of the common heritage of mankind, while the Antarctic region is governed by a unique legal regime, the Antarctic Treaty System, which does not formally accept the principle of the common heritage of mankind.[37] Yet the Antarctic Treaty System, which is based on frozen sovereignty, is in the final analysis only a transitional solution to avoid sharp contradictions, leaving the actual territorial sovereignty dispute unresolved. In this context, it is also a developmental attempt to establish a territorial and resource management system in Antarctica that is divorced from traditional sovereignty and territorial jurisdiction and serves the interests of all mankind.

This paper holds the opinion that the principle of the common heritage of mankind can be applied in the Antarctic to resolve various disputes in the Antarctic and manage Antarctic affairs. Even though territorial claimant States claim Antarctic territory based on historical discovery, pre-occupation and management,

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36 Art. 136 of the United Nations Convention on the Law of the Sea.

37 As to what theory is applicable to Antarctica, in addition to the theory of common heritage of mankind, States have also put forward the theory of global sharing and the theory of world parks. See LIANG Yong, *Prospect of International Law and China's Position on Antarctica: The Perspective of the Common Heritage of Mankind*, Law Review, Vol.22: 5, p. 87 (2011). (in Chinese)

this does not rule out the interests enjoyed by the international community in the Antarctic region. In its preamble, the Antarctic Treaty emphasizes that Antarctica is not owned by any State and confirms the fact that all States enjoy interests in Antarctica. Antarctica can therefore be considered the common heritage of the entire international community, and the principle of the common heritage of mankind has the premise of application. To this end, consideration can be given to the establishment of an integrated affairs authority in Antarctica, whose purpose is to manage the Antarctic region for the benefit of all humankind, for example, by conducting a discussion on behalf of all mankind on the delimitation and claims of maritime areas between the claimant States, and consultation with the States concerned, and also by regulating the enforcement of the prohibition on the exploitation of mineral resources in Antarctic sea area and the regulation of activities of vessels. This can alleviate the Antarctic maritime disputes mentioned above to some extent. However, the biggest problem facing the regime is the source of institutional power, which is difficult for territorial claimant States to cede to the institution, and the fact that the Antarctic region involves unclaimed territory, which may require the consent of the entire international community.

## V. Conclusion

The regional stability maintained by the Antarctic Treaty since 1959 is gradually being challenged. Although territorial disputes will not break out in a short time due to the "freeze" of Antarctic territorial sovereignty, the maritime disputes triggered by the entry into force of UNCLOS are in essence a continuation of the battle for Antarctic territorial sovereignty.

The current overlapping application of the Antarctic Treaty System and UNCLOS in the Antarctic sea area has caused an impact on the Antarctic Treaty to a certain extent, such as causing various maritime disputes. As long as the freeze clause in Article 4of the Antarctic Treaty remains in force, the EEZ regime and the outer continental shelf regime created in UNCLOS will not have a fundamental impact on the Antarctic maritime regime.

Given the low likelihood of a thorough solution to the existing Antarctic disputes in a short period, States can draw on the relevant provisions of UNCLOS, expand the coverage of compulsory dispute settlement procedures by signing or amending international treaties, and establish a more complete Antarctic dispute settlement mechanism or set up an integrated affairs authority to alleviate

existing Antarctic disputes. To sum up, despite the new problems and challenges that UNCLOS has brought to the Antarctic dispute, it has also shed light on the Antarctic dispute settlement mechanisms.

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