

## The Ross Dependency – An Undeclared Condominium

by

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### I. INTRODUCTION

A New Zealander, urging Antarctic exploration on his fellow countrymen ninety years ago gave a stirring account of that continent's future:<sup>1</sup>

. . . when we begin to contemplate the vast impetus which might be given to the commerce of New Zealand, the imagination is apt to wander into boundless regions of wealth.

Then it was still *terra australis recenter inventa sed nondum plene cognita*. Despite large-scale scientific investigations over the past twenty years, no economically exploitable minerals, using present techniques, have yet been found. An ice-sheet covers ninety-eight per cent of the continent to a maximum depth of 14,000 feet. Winds of over 100 miles per hour are frequent on the coast south of Australia. The world's lowest temperature of  $-126.9^{\circ}\text{F}$ . has been recorded at the Soviet station, Vostok. Annual rainfall is less than in Arizona. From March to October ships cannot penetrate the pack-ice surrounding the continent, and it is only recently that winter flights to Antarctica have been made. The only large-scale economic activity anywhere near this 5,000,000 square mile continent is the declining whaling industry. In other words, the continent is a desert.

The Ross Dependency, 2,000 miles from New Zealand, has an area of approximately 300,000 square miles, two and a half times as large as New Zealand. Nearly half of this area comprises the Ross Barrier, a huge ice-shelf floating on the sea. It is attached to the continental ice-sheet but has the permanency of land, save for its seaward edge, from which icebergs up to twenty-five miles long break off. The American population of the Dependency in winter is 220, the New Zealand population a tenth of that number. All are engaged in scientific research and support.

<sup>1</sup> Purnell, C. W., "On Antarctic Exploration" (1878) xi Trans. N.Z. Inst. 31, 36.

## II. ACQUISITION OF TERRITORY IN POLAR REGIONS

It is scarcely surprising that an early Antarctic explorer, Dumont d'Urville, echoed Dante "abandon hope all ye who enter here". Despite its inhospitality, there are many claimants to Antarctica, and their resourcefulness in presenting claims is impressive.<sup>2</sup> The multiplicity of grounds is in part due to the lack of clarity in the rules for acquisition of territory in polar regions.

The generally formulated rule is:<sup>3</sup>

. . . the discovery of lands unknown to civilization, even when coupled with a formal taking of possession, does not support a valid claim of sovereignty unless the discovery is followed by an actual settlement.

The additional requisite of notification, although a moot point,<sup>4</sup> is of minor importance in Antarctica. Claimants have made a point of complying with it. In Africa, signatories to the Final Act of the Conference of Berlin, 1884, agreed, by Article 35, to ensure the establishment of authority sufficient to protect existing rights, and freedom of trade and transit.<sup>5</sup> Although this rule only became fixed in the nineteenth century, it may be traced to Gryphiander's *Tractatus de Insulis* (1623) and Queen Elizabeth's reply to the Spanish Ambassador, Mendoza, complaining of Drake's incursions:<sup>6</sup>

. . . she would not persuade herself that [the Indies] are the rightful property of Spanish donation . . . only on the ground that the Spaniards have touched here and there, have erected shelters . . . since without possession prescription is of no avail.

Consideration of the generally cited cases gives little help in defining the rule more precisely. In the *Clipperton Island Case*<sup>7</sup> Victor Emmanuel III arbitrated between France and Mexico. In 1858 a French officer, on Government orders, drew up a formal act of possession whilst aboard ship off the island. The Hawaiian Government was notified and the declaration published in a local paper. In 1897 three men were found on the island collecting guano. They hoisted the American flag, but were disowned by their Government. Later that year a Mexican ship landed, hoisted the national flag and persuaded two of the same three men to leave the island. The arbitrator held the island to have been *res nullius* in 1858, and the French act to have passed the test of actual taking of possession. Article 35 of the Act of Berlin was held irrelevant because, *inter alia*, it only applied to Africa, and presupposed occupation. It was emphasised that in 1858

<sup>2</sup> Hill, N., *Claims to Territory in International Law* (1945) 111.

<sup>3</sup> Hackworth, *Digest of International Law* (1940) i 399.

<sup>4</sup> Munch, I. V., "Völkerrechtsfragen der Antarktis" (1958) Archiv des Völkerrechts 7: 225, 242.

<sup>5</sup> 76 B.F.S.P. 19.

<sup>6</sup> Camden, *Annales Rerum Anglicae et Hiberniae* (1717) ii 359–360, quoted in Goebel J. Jr., *The Struggle for the Falkland Islands* (1927) 63.

<sup>7</sup> (1932) 26 A.J.I.L. 390.

the island was uninhabited and so at the complete disposal of France. It has been argued that the case does not contradict the "fundamental principle" of effective occupation, merely dispensing with actual occupation for uninhabited islands.<sup>8</sup> Had the United States intervened the outcome might have been different. As in the *Eastern Greenland* case<sup>9</sup> it appears that both claims were weak, but the arbitrator was bound by the terms of the compromise. Far from supporting the generally accepted rule that effective occupation is required this case tends to the view that, at least in the case of uninhabited islands, symbolic annexation alone gives good title.<sup>10</sup>

In the *Island of Palmas* case<sup>11</sup> Huber as arbitrator had to decide whether that island belonged to the United States (as successor to Spain) or to the Netherlands. The arbitrator stressed actual display of sovereignty and, as a corollary, the duty to protect the rights of other states. Sovereignty cannot be exercised at every moment in every part of the territory. Neither discovery alone nor contiguity give title. Title, once acquired, must be maintained by the rules of contemporary international law. Again a small island, this time inhabited. Again two claims, one of which can only be described as less weak than the other.

The *Legal Status of Eastern Greenland* case has several distinguishing features. Notice was sent to all states interested.<sup>12</sup> From 1380 to 1931 there had been no rival to Denmark.<sup>13</sup> Several Danish treaties, including the Treaty of Kiel, specifically mentioned Greenland. The Ihlen declaration constituted Norwegian recognition of Danish sovereignty. Despite these apparently conclusive factors in Denmark's favour, the court had regard to unexercised concessions, legislation as an exercise of sovereign power, private hunting expeditions and scientific parties, coastal inspection by one vessel, and the issue of permits to visitors.

The test formulated was<sup>14</sup>

... the intention and will to exercise such sovereignty and the manifestation of State activity.

Of particular interest are statements that King Haakon Haakonsen's pretensions in the thirteenth century gave sovereign rights, without any contact with Greenland, because they were unopposed. Little is needed in the way of actual exercise of rights over uninhabited areas, if they are not questioned. The reduction of occupation to an "ill-

<sup>8</sup> Svarlien, O., *The Eastern Greenland Case in Historical Perspective* (1964) 57.

<sup>9</sup> (1933) P.C.I.J. Ser. A/B No. 53. The case is discussed in detail below.

<sup>10</sup> Von der Heydte, "Discovery, Symbolic Annexation and Virtual Effectiveness in International Law" (1935) 29 A.J.I.L. 448, 462.

<sup>11</sup> (1932) H.L.B. 82.

<sup>12</sup> Hackworth, *supra* n. 3, 480.

<sup>13</sup> *Eastern Greenland* case, *supra* n. 9, 46.

<sup>14</sup> *Ibid.*, 63.

defined minimum" has led to an emphasis on state activity rather than actual occupation,<sup>15</sup> and assertions of authority unsupported by actual administrative control.<sup>16</sup> This case appears to be the explanation for many of the battles of etiquette in which protest notes were exchanged like cards in a game of snap and which created<sup>17</sup>

. . . postmasters with no mail to handle. Royal Magistrates with no cases to try, brass plaques that look over windswept mountains where men have visited but once.

The view that Polar regions, being uninhabitable, are not subject to appropriation<sup>18</sup> may be rejected. The uninhabitability of a claim is only significant in regard to the effectiveness of occupation.<sup>19</sup> Also, technological advances now permit the establishment of permanent bases, and it has been suggested that "more normal standards" should in future be applied to the acquisition of Polar territory.<sup>20</sup> The *Minquiers and Ecrehos* case,<sup>21</sup> concerning rocks and islets in the English Channel, is strictly speaking not a case of acquisition of *res nullius*, but of ancient title. However, the emphasis on exercise of state functions is relevant, as is the cumulative process of acquiring territorial sovereignty. The critical date concept used in *Palmas* and *Eastern Greenland* is ignored, but reliance is placed on the "slow evolution of the process whereby sovereignty is established".<sup>22</sup> In the same opinion there is a discussion of the geographical criteria of proximity, without specifically relying on them, and a dismissal of "paper protests".

The *Continental Shelf* case<sup>23</sup> dealt with the definition of boundaries, but was based on the assumption that the shelf, even apart from the Convention, is capable of national appropriation without "occupation, effective or notional, or . . . any express proclamation".<sup>24</sup> The coastal state's title is based on the assumption that "the submarine areas concerned may be deemed to be actually part of the territory . . . a prolongation or continuation". Argentine publicists have long held the Antarctic Peninsula to be "the prolongation of the South American Andes",<sup>25</sup> invoking the Argentine continental shelf decree.<sup>26</sup> Peron

<sup>15</sup> Svarlien, *supra* n. 8, 73.

<sup>16</sup> Hyde, C. C., "The Case concerning the Legal Status of Eastern Greenland" (1933) 27 A.J.I.L. 732, 738.

<sup>17</sup> Herbert, W., *A World of Men* (1968) 30.

<sup>18</sup> Sullivan, W., *Quest for a Continent* (1957) 356.

<sup>19</sup> Hall, *A Treatise on International Law* (8th ed. 1924), 125n.

<sup>20</sup> Munch, *supra* n.4, 235.

<sup>21</sup> Hayton, R. D., "The Nations and Antarctica", (1960) 10 Osterr Zeitschr. f. offentl. Recht. 368, 393.

<sup>22</sup> (1953) I.C.J. 47.

<sup>23</sup> *Ibid.*, 103.

<sup>24</sup> (1969) 8 Int. Leg. Mat. 340.

<sup>25</sup> Convention on the Continental Shelf, A/Can F. 13/38 Art. 2(3), 142.

<sup>26</sup> "Antardita Argentina, Isolas Oceanicos, Mar Argentina" (1949) Primavera Acuna de Mones Ruiz 45.

<sup>27</sup> "The Antarctic and Inter-American Relations" (1947) American Perspective 1: 97, 100.

termed the Peninsula a natural geological prolongation of Argentine territory.<sup>28</sup> This concept may serve to resolve the Chile-Argentina conflict in Antarctica by the *divortium aquarum* rule utilised by them in South America. Dicta in the *Continental Shelf* case will doubtless be utilised to support the Chilean and Argentine arguments based on continuity.

Summing up the cases, it may be stated that the effective occupations test remains in name. However, in practice very little is demanded of claimants to polar regions.

### III. SECTORS

According to a theory advanced by Senator Poirier in the Canadian Parliament in 1907,<sup>29</sup>

In future partition of northern lands, a country whose possession today goes up to the Arctic regions, will have a right, or should have a right, or has a right to all lands that are to be found in the waters between a line extending from its eastern extremity north, and another line extending from its western extremity north. All islands between the two lines up to the North Pole should belong and do belong to the country whose territory abuts up there.

This principle, based on contiguity, has no standing in the law of nations as a means of territorial acquisition.<sup>30</sup> In the two cases in which it has been supposedly applied, by the Union of Soviet Socialist Republics and Canada in the Arctic,<sup>31</sup> there are additional grounds for the claims. Ellesmere in the Canadian Arctic (area 77,000 square miles) became, in 1922, the only island in the world inhabited solely by policemen.<sup>32</sup> Russia has long maintained wireless and meteorological stations on Novaya Zemlya and Franz Joseph Land,<sup>33</sup> and has now many scientific stations on other Arctic islands and floating icebergs.<sup>34</sup> If the principle were applied, part of Spitsbergen would be in the Soviet sector, part of Greenland in the Canadian sector, and the other part, together with Jan Mayen Island, unaccounted for.

All Antarctic continental claims, apart from that of Norway, are apparently in sector form. Yet no state has mainland territory in the Antarctic—so from what latitude should the sectors be drawn? Why should there not be a Mexican sector?<sup>35</sup> What are the boundaries of the claimant state for this purpose? New Zealand's claim is based on

<sup>28</sup> da Costa, J. F., "A teoria dos setores polares" *Bol. Soc. Bras. Dir. Int.* No. 13–14. 87, 103.

<sup>29</sup> Svarlien, O., "The Sector Principle in Law and Practise" 10 *Polar Record* 248, 250.

<sup>30</sup> Svarlien, *supra* n.8, 61.

<sup>31</sup> da Costa, J. F., *Souverainete sur l'Antarctique* (1948) 11.

<sup>32</sup> Craig, J. D., *Canada's Arctic Islands* (1927) 9.

<sup>33</sup> Lakhtine, W., "Rights over the Arctic" (1930) 24 *A.J.L.* 703, 707.

<sup>34</sup> Petrov, V. N., "Soviet Participation in the International Geophysical Year" (1957) *Bull. Inst. Study U.S.S.R.* 9:3, 4.

<sup>35</sup> (1953) 28 *S. Calif. L.R.* 386, 397.

meridians far beyond its boundaries, to include desirable Antarctic areas. If only the nearest states may claim (as Argentina and Chile argue against England) much of Antarctica would be unclaimed. Should outlying islands be taken into account for fixing the territorial base? Chile's claim is bounded by the 90° longitude meridian, west of Juan Fernandez, but well east of Rapa Nui (Easter Island), perhaps with the intention of leaving the "United States" sector untouched. However it is not clear whether these islands were considered by Chile in formulating the decree. Arctic sectors may be based on mainland territorial base-lines; the French and English Antarctic claims cannot. France administered Terre Adélie from Madagascar, 5,000 miles away<sup>36</sup> but transferred control to Paris before the Malagasy Republic attained independence. English detachment of the British Antarctic Territory from the Falkland Islands Dependency in 1962 had perhaps a similar purpose. The sector principle is not recognised in the Antarctic by two major powers—the United States<sup>37</sup> and Russia.<sup>38</sup> Despite disclaimers, Antarctic sectors in practice encroach upon the High Seas.<sup>39</sup> Put forward to forestall Norwegian and United States claims in the Arctic, the theory found its first application in the Antarctic. There is much force in Smedal's observation:<sup>40</sup>

If a territory cannot be taken effective possession of, it must remain without a master. . . . No stipulations exist to the effect that every land shall be submitted to sovereignty, and neither is there any need for such stipulations.

Even as a suggested method for dividing Antarctica among various claimants in the future, relied on for its clarity,<sup>41</sup> the sector principle is of little use, depending on "the worst of all possible expedients—the straight line" drawn by "absentee boundary makers".<sup>42</sup> The eastern boundary of the Ross Dependency "cut[s] right through mountain ranges without any thought of including or excluding them"<sup>43</sup> but effectively cutting off the unclaimed Marie Byrd Land, from the most convenient access, via the Ross Ice Shelf. Understandably, the United States did not wish to claim Marie Byrd Land with such boundaries, and decided to build its main base in the Ross Dependency. Sectors might be plausible in the Arctic—an ocean containing islands, surrounded by land masses; but not in the Antarctic—a continent surrounded by oceans, and isolated from other con-

<sup>36</sup> Smedal, G., *Acquisition of Sovereignty over Polar Areas* (1931) 36.

<sup>37</sup> Smedal, *supra* n.36, 67.

<sup>38</sup> Mouchan, A. P., "The Legal Status of Antarctica" (1959) Sov.Y.B. Int. Law 2:342, 357.

<sup>39</sup> Hayton, *supra* n.21, 398.

<sup>40</sup> Smedal, *supra* n.36, 37, 61.

<sup>41</sup> Munch, *supra* n.4, 239.

<sup>42</sup> van der Veur, "Search for New Guinea's Boundaries" (1966). 4 125.

<sup>43</sup> Helm, A. S., Miller J. H., *Antarctica* (1962) 26.

tinents.<sup>44</sup> The theory, lacking any support in law, derives little from logic.

#### IV. ANALOGIES

The Arctic analogy is misleading. The Arctic is an ice-covered sea, navigable by atomic submarines. In August 1960, the U.S.S. *Seadragon* stopped at the North Pole for a baseball game.<sup>45</sup> The Antarctic is a medium-sized continent covered by a huge ice-sheet. The Arctic has a not insignificant population, major military installations such as Camp Century in Eastern Greenland and the D.E.W. line, and known oil reserves, comparable to those of Kuwait at Prudhoe Bay, Alaska. Today the Antarctic has only marginal economic activities and dubious strategic value.

Spitsbergen Archipelago (Svalbard), having important coal and iron resources, was regarded as *terra nullius* until 1920<sup>46</sup> although known for centuries. A conference between Russia, Sweden and Norway in 1912 prepared an elaborate protocol setting up a governing Commission, legal system and registration of occupation rights, but was never put into force. By the Treaty of Paris, 1920,<sup>47</sup> Norwegian sovereignty was recognised, all parties given free access to ports, fishing and hunting rights and rights of commerce and industry. Mineral duty was fixed. Use of the territory for warlike purposes was forbidden, and Russian nationals given equal rights until the signatories recognised the U.S.S.R., which later accepted the Treaty's terms.<sup>48</sup> Of interest are the recognition of Norwegian sovereignty coupled with the grant of wide rights to signatories in a Polar area with workable economic resources.<sup>49</sup>

Space has great economic and strategic importance. By 1980 annual United States savings from satellites may reach 3,800,000,000 dollars in long-range weather forecasts and oil and mineral prospecting,<sup>50</sup> not to mention military satellites, and prestige, the hard currency of modern politics.<sup>51</sup> The comment that "the authors [of the Outer Space Treaty] thought that as long as the instrument looked reasonably like a treaty, the main purpose was served"<sup>52</sup> has some truth. Like the Antarctic Treaty,<sup>53</sup> it has no sanctions, no authoritative interpre-

<sup>44</sup> da Costa, *supra* n.28, 105.

<sup>45</sup> Partridge, B., "The White Shelf: A Study of Arctic Ice Jurisdiction" (1961) 87 U.S.N. Inst. Proc., 51, 53.

<sup>46</sup> Jessup, P. C., Taubenfeld, H. J., *Controls for Outer Space* (1959) 35.

<sup>47</sup> (1924) 18 A.J.I.L. 199.

<sup>48</sup> Lakhtine, *supra* n.33, 706.

<sup>49</sup> Sollie, F., "Arctic and Antarctic, Current Problems in Polar Regions" at p. 27 of the pre-print release (to appear in *Conflict and Co-operation*, No. 2) (1969).

<sup>50</sup> Sheldon, C. S., *Outer Space* (1968) 61.

<sup>51</sup> Bloomfield, *supra* n.50.

<sup>52</sup> Fawcett, J. E. S., *International Law and the Uses of Outer Space* (1968) 15.

<sup>53</sup> (1960) 54 A.J.I.L. 476.

tation machinery, no provision for economic exploitation, and provides little opportunity for the possible application of municipal law by claimants. However the comment ignored the successful parallel of the Antarctic Treaty, despite its legal failings. Differences between the treaties are that in Antarctica there is a complete and highly successful inspection system, whereas the space inspection provision does not cover stations in orbit and demands prior notice. In Antarctica, all measures of a military nature are forbidden, in space the prohibition is more circumscribed. It is arguable that military bases may be built on the moon. Notification of space launchings is not compulsory, and in practice has often been omitted. No such problem has arisen in Antarctica. However the sweeping denial of national appropriation of the moon and other celestial bodies compares favourably with the freezing of Antarctic claims. Like the Antarctic Treaty, the Outer Space Treaty may provide a framework from which international institutions, such as the Scientific Committee on Antarctic Research (S.C.A.R.) may operate, or develop.

“Inner Space”<sup>54</sup>—the deep sea bed, is under discussion by a United Nations Ad Hoc Committee whose Draft Statement of Agreed Principles<sup>55</sup> would recognise the existence of a sea-bed area not subject to national appropriation. Apart from altering the present rule permitting appropriation,<sup>56</sup> and ending the controversy as to the meaning of Article I of the Continental Shelf Convention, this proposal would negate international practice. Norway is exploiting a North Sea gas field separated from its continental shelf by the 200–1,000 metre deep Norwegian Trench.<sup>57</sup> Like Antarctica, the deep sea-bed would be reserved for peaceful purposes. An innovation is the proposed international regime for exploitation in the interests of all mankind, with special regard to developing nations. This regime, suggested by Malta in the United Nations, would within five years have an estimated income of 6,000,000,000 dollars per annum.<sup>58</sup> It may be doubted whether this principle will be adopted in view of the United Nations annual expenditure (Government only) on oceanological research of 516,000,000 dollars<sup>59</sup> and perhaps more by Russia. Were the principles adopted huge resources would be placed under an international regime—there are several thousand million tons of

<sup>54</sup> Brown, E. D., “Deep-Sea mining, the legal regime of ‘Inner Space’” (1968) Y.B.W.A. 165.

<sup>55</sup> (1969), 63 A.J.I.L. 131, 133.

<sup>56</sup> Lindley, M. F., *The Acquisition and Government of Backward Territory in International Law* (1926) 68, 70.

<sup>57</sup> Young, R., “Offshore claims and Problems in the North Sea” (1965) 59 A.J.I.L. 505, 511.

<sup>58</sup> Behram, D., “The New World of Oceans” (June 1969) Courier 4, 6.

<sup>59</sup> Gimlin, H., “Oceans and Man” (1968) Ed. Res. Rep., No. 17, 323, 339, 340.

manganese on the bed of the Pacific alone,<sup>60</sup> and enormous quantities of other metals. The recovery of hydrogen bombs off the Spanish coast by "Alvin" in 1966 revealed the strategic possibilities of under-water craft. Current sea-bed disarmament negotiations appear to have reached an impasse on the verification issue, and the question whether to ban only weapons of mass destruction or all military weapons. Antarctic Treaty inspection provisions, with their practical success, might be relevant here.

## V. THE ANTARCTIC TREATY

After the Second World War, in 1946, the United States Navy sent a force of 4,700 men to Antarctica to test equipment in Polar conditions.<sup>61</sup> In the same year the Union of Soviet Socialist Republics sent the Slava whaling fleet to the Antarctic. England came into conflict with Argentina and Chile in the Antarctic Peninsula—each country building several small bases, refuge huts and other installations. In 1948, two Argentine cruisers and six destroyers were sent for exercises near Deception Island and narrowly missed meeting an English cruiser. Despite an agreement in 1949, renewed annually, not to send warships to the area, apart from routine supply missions, exchanges of protests continued, culminating in the Argentine expulsion of an English party from Hope Bay in 1952, when shots were fired. With the growing activity of Chile and Argentina, in co-operation despite their mutually conflicting claims, England's position deteriorated from year to year because of its inability to remove its rivals' bases.<sup>62</sup> An application to the International Court of Justice by England in 1955 failed because the other parties refused to accept the Court's jurisdiction. The situation was further complicated by American expeditions to the Antarctic Peninsula, as a prospective claimant, and Argentina and Chile's invocation of the Inter-American Treaty of Reciprocal Assistance 1947<sup>63</sup> and the Monroe Doctrine.<sup>64</sup> In 1948 the United States State Department invited interested states to discuss internationalisation. The proposal was rejected, but led to a Soviet note, in 1950, to those states, that no decision taken without its participation would have legal effect.

In the same year three prominent scientists, Van Allen, Berkner and Chapman proposed a world-wide co-ordinated scientific programme, to coincide with a period of maximum solar activity in

<sup>60</sup> Brown, *supra* n.54, 174.

<sup>61</sup> Sullivan, *supra* n.18, 173.

<sup>62</sup> Hunte Christie, E. W., *The Antarctic Problem* (1951) 290.

<sup>63</sup> Wilson, R. E., "National Interests and Claims in the Antarctic" (1964) 17 (1) Arctic, 15, 24.

<sup>64</sup> Gould, L. M., *The Polar Regions in their Relations to Human Affairs* (1958) 19.

1957–1958.<sup>65</sup> Before and during this International Geophysical Year (I.G.Y.) numerous bases were established on and in the vicinity of the continent.<sup>66</sup> Observers were exchanged and mutual help rendered —such as the extrication of the Japanese ship *Soya* by the Soviet ice-breaker *Ob* in 1957. The success of I.G.Y. led to secret negotiations<sup>67</sup> culminating in the signature of the Treaty.

Although New Zealand supported internationalisation as did other Commonwealth countries<sup>68</sup> and presumably the United States and Russia, neither Chile nor Argentina could agree to forgo their national claims.<sup>69</sup> Ambassador Scilingo of Argentina stated:

This Conference . . . has not been convened to institute regimes or to create structures. It is not its mission to change or alter anything.

Several provisions of the Treaty which invite criticism from a legal point of view reveal the nature of the Treaty as a toughly negotiated compromise between divergent views and blocs.<sup>70</sup> There are no real sanctions and no effective machinery for resolving disputes. Is the area underneath the ice-shelves mentioned in Article 6 part of the High Seas or not?<sup>71</sup> Non-active original signatories have a veto.<sup>72</sup> Why ban nuclear tests in Antarctica when they are still permitted elsewhere? The continent has no population and tests would be safer there than in the Pacific.<sup>73</sup> Nuclear wastes from the McMurdo Base reactor must be shipped to the United States for disposal under Article 5. Might not disposal in Antarctica be safer than in the United States? The continent has no law<sup>74</sup> and no police force. The separation of peaceful from military activities is difficult to define. Success in implementation so far, may be, in good part, due to the lack of exploitable resources. Under Article 10 parties undertake to enforce the Treaty against nationals of third parties, but *pacta tertiis nec nocent nec prosunt*. Might such enforcement be an international delict? The settlement is not final. In fact “settlement”<sup>75</sup> is a misleading term. As Ambassador Silingo pointed out, the Treaty aims to preserve the

<sup>65</sup> Baldwin, G. B., “The Dependence of Science on Law and Government—the International Geophysical Year—A Case Study” (1964) *Wis. L. R.* 78, 87.

<sup>66</sup> “United States Policy and International Co-operation in Antarctica”, Presidents message to Congress (1964) 88th. Long. 2d. Sess. Doc. 358, 5.

<sup>67</sup> “The Conference on Antarctica” (1960) *Department of State Bull.* 7060, 25.

<sup>68</sup> da Costa, J. F., “Antártida; o problema político” (Sept. 1961), *Ref. Bras. Pol. Int.* No. 15, 85, 87.

<sup>69</sup> Christie, *supra* n.62, 276.

<sup>70</sup> Conference, *supra* n.67, 31.

<sup>71</sup> da Costa, *supra* n.68, 90 n.

<sup>72</sup> Hanessian, J., “The Antarctic Treaty”, (1960) 9 *I.C.L.Q.* 436.

<sup>73</sup> da Costa, *supra* n.68, 99.

<sup>74</sup> “The Antarctic Treaty”, hearings before the Senate Foreign Relations Committee (1960) Ex. B. 86th. Cong. 2d. Sess., Statement of Hon. Clair Engle, Senator from Calif. 6.

<sup>75</sup> Taubenfeld, “A Treaty for Antarctica”, (Jan. 1961) *Int. Conc.* No. 531, 245, 288.

<sup>76</sup> Hayton, R. D., “The Antarctic Settlement of 1959” (1960) 54 *A.J.I.L.* 349, 370.

status quo, chaotic as it may be in juristic theory. The Treaty has no administrative machinery. The consultative meetings mentioned in Article 9 are only held annually to formulate policy recommendations to Governments. The real burden of administration is borne by S.C.A.R., a body not mentioned in the Treaty. The United Nations has no significant role in the Treaty. There is much force in the comment by Senator Gruening on Article 4:<sup>77</sup>

The treaty states that it does not mean that contracting parties are renouncing claims to territorial sovereignty in Antarctica. It states that it does not mean the contracting parties agree to renunciation or diminution of claims to territorial sovereignty. It states it does not prejudice the position of any parties with respect to their recognition or non-recognition of the right or claim of any other state. It does not state, however, what it does mean.

Article 5 prohibits nuclear explosions in "Antarctica", which is defined, in Article 6 as the area south of 60° S. latitude, including ice-shelves, but without prejudice to any State's rights over the high seas. Does this permit nuclear explosions in the sea beneath the ice-shelves? As several countries do not recognise any Antarctic claims, they would also not recognise any territorial sea, thus theoretically permitting explosions directly off-shore. The very definition of "Antarctica" as including land, ice and sea is a further derogation from the freedom of the high seas, despite the saving in Article 6, because the Treaty, by defining "Antarctica" in this way extends its obligations, such as non-militarisation, non-disposal of nuclear wastes, inspection, conservation of living resources, to the high seas sixty degrees south of the equator.

The Treaty apparently does not envisage any activity other than scientific research. Contracting parties are only entitled to participate in consultative meetings if they conduct "substantial scientific research activity there" (Article 9). Tracking penguins by satellite<sup>78</sup> may be of great scientific interest, but there are strong indications that the United States Congress will soon demand returns from the 28 million dollars spent annually in Antarctica.<sup>79</sup> Should economic activities, such as the projected tourist trips of Air New Zealand, and "*M.V. Lindblad Explorer*" to McMurdo Sound, furnish a basis for representation at meetings? This is a point of particular interest to small countries which would no doubt prefer economic activities to scientific research, and especially to the smallest Antarctic claimant—New Zealand.

These objections, and others may be cited, must be weighed against the political success of the Treaty which has been scrupulously

<sup>77</sup> Hearings, *supra* n.74, 13.

<sup>78</sup> Lindsay, R., "Similarity to space beckons Scientists" (5 Dec. 1966) Technology Week 34, 35.

<sup>79</sup> Stuiblinger, E., "Antarctic Research, A Prelude to Space Research" (Jan-Feb 1969) Antarctic Journal, In.

observed.<sup>80</sup> Prohibition of nuclear explosions has ended fears of secret Soviet tests and rumours of French tests.<sup>81</sup> The detailed provisions for inspection have been carried out, including overflight. Exchange of scientists is an informal but highly effective guarantee, taking into account the population wintering over (not more than 200 at any base). Comprehensive animal conservation has proved successful.<sup>82</sup> One agreed measure is that indigenous animals shall not be killed, except on a strictly controlled basis for meat.<sup>83</sup> Adrian Hayter, leader at Scott Base in 1964, has vividly described the care taken to shoot seals within a quota, and only if they are beyond their prime, or diseased.<sup>84</sup> "It is also a pleasure in this international country not to have to contend with customs or official formalities of any kind".<sup>85</sup> The Treaty was the first of a series banning nuclear weapons, but to date it is the most sweeping, and the only one with a completely effective inspection system. It may be argued that there is nothing in Antarctica worth fighting about, but history is replete with wars fought over "deserts and marshes".<sup>86 87</sup>

When, for instance, power was the predominant consideration in regard to Antarctica, the majority of participants considered the resources as non-sharable. Yet when, through I.G.Y., enlightenment became the predominant consideration, claimants to areas of exclusive control opened their sectors to the scientists of other nations.

Despite its many formal defects the Treaty may represent a practical diplomatic compromise.

## VI. INTERNATIONAL ORGANIZATION

National activities in Antarctica exemplify the trend towards organised multinational action in the common interest in international affairs.<sup>88</sup> The suggestion for a third international polar year (later named I.G.Y.) comprehending a world-wide study of the geophysical sciences, was raised in a committee of the International Council of Scientific Unions (I.C.S.U.), a non-governmental organisation of scientific bodies. I.C.S.U. entrusted the organisation of I.G.Y. to its

<sup>80</sup> Amaro, A., "Symbol of Good Will: The Antarctic Treaty" (1967) 19, *Américas*, No. 2, 1, 3.

<sup>81</sup> C. F. Terres Australes et Antarctiques Francaises (Jan.-March 1959) 62.

<sup>82</sup> Anderson, D., "The Conservation of Wild Life under the Antarctic Treaty" 14 *Polar Record* No. 88, 25.

<sup>83</sup> Presidents note, *supra* n.66, 34.

<sup>84</sup> Hayter, A., *The Year of the Quiet Sun* (1961) 141.

<sup>85</sup> Moorehead, A., "A Reporter at Large: Borrowed Light" (June 27, 1964) *New Yorker* 39, 40.

<sup>86</sup> Woolsey, L. H., "The Settlement of the Chaco Dispute" (1939) 33 *A.J.I.L.* 126, 128.

<sup>87</sup> McDougal, M. S., Lasswell, H. D., Ulasic, I. A., *Law and Public Order in Space* (1963) 775.

<sup>88</sup> Jessup and Taubenfield, *supra* n.46, 282.

Comité Spéciale de l'Année Géophysique Internationale (C.S.A.G.I.). In 1957 I.C.S.U. created S.C.A.R. to co-operate post-I.G.Y. research.

Parallel to S.C.A.R. are the consultative meetings held under Article 9 of the Treaty. An example of the inter-relation between the two bodies is the adoption of conservation measures to protect wildlife. General rules were recommended by S.C.A.R. in 1960 and adopted by the first consultative meeting at Canberra in 1961. The "Agreed Measures for the Conservation of Antarctic Fauna and Flora" adopted at the third consultative meeting at Brussels in 1964 were an elaboration of the S.C.A.R. proposals.<sup>89</sup> At the first meeting representatives agreed that S.C.A.R. activities came within Article 3 of the Treaty (regarding the promotion of international co-operation in scientific investigation) and their continuance should be encouraged.<sup>90</sup> It is remarkable that the sole human activity in Antarctica, scientific research, is co-ordinated by an international organisation not mentioned in the Treaty. Like Article 4 (claims) this is an example of successful diplomatic pragmatism. Another interesting international aspect is the exchange of scientists—in 1968 a Soviet geologist wintered at the American McMurdo Station and a United States Geophysicist at the Russian station of Molodezhnaya.<sup>91</sup>

The success of the Treaty may be compared to the failure of the International Whaling Commission established under the Convention for the Regulation of Whaling 1946,<sup>92</sup> which acts "only in an advisory capacity on behalf of member nations, and meanwhile the nations squabble".<sup>93</sup> Despite frequent scientists' warnings, it is probable that whaling will soon end, due to low prices for whale oil, the high cost of expeditions, and excessive catches of females.

Apart from government activity in Antarctica, there is much private research by institutions, such as the Victoria University geological surveys and Canterbury University zoological studies.<sup>94</sup> Non-governmental expeditions have continued, with Government support. The Trans-Antarctic Expedition, 1955–1958 (T.A.E.) of Hillary and Fuchs was carried out by private companies formed for the purpose. The private nature of the venture is illuminated by the ingenious methods of fund-raising in New Zealand.<sup>95</sup> The entire French Antarctic programme was initiated by a private organisation—"Expéditions Polaires Françaises-Missions Paul-Émile Victor" supported by a Government budget and regarded, in France, as a "private laboratory

<sup>89</sup> "The Antarctic", (March 1966) British Information Office 17.

<sup>90</sup> Presidents Message, *supra* n.66, 32.

<sup>91</sup> Antarctic Journal, (September-October 1968), 216.

<sup>92</sup> 161 U.N.T.S. 72.

<sup>93</sup> McLaughlin, *Call to the South* (1962) 30.

<sup>94</sup> Foubister, R., *The New Zealand Antarctic Research Programme for 1968–1969*, (September 1968), 13.

<sup>95</sup> Helmand Miller, *supra* n.43, 56 n.

under government contract, performing a piece of government work."<sup>96</sup>

The New Zealand Antarctic Research Programme is formulated by the Ross Dependency Research Committee composed of representatives of government departments, learned institutions and the armed services. The Antarctic Division of the Department of Scientific and Industrial Research is responsible for detailed planning and execution, and is represented in Antarctica by the leader of Scott Base,<sup>97</sup> in whom the Governor-General has purported to vest power to enforce criminal jurisdiction under the *Antarctica Act 1960*.<sup>98</sup>

## VII. THE NEW ZEALAND CLAIM

New Zealand's claim to the Ross Dependency in international law is shaky—as are all other Antarctic claims. In 1923 the Dependency was defined as "the coasts of the Ross Sea, with the islands and territories adjacent thereto, between the 160th degree of east longitude and the 150th degree of west longitude which are situated south of the 60th degree of south latitude".<sup>99</sup> One reason for drawing the line through the high seas may have been that much of the area was then unexplored. There is an interesting parallel with the Bull of Pope Alexander VI giving to Ferdinand and Isabella "all islands and lands, found and to be found, discovered and to be discovered".<sup>1</sup> Rival claimants have indeed compared the two claims—"we must . . . revert to that period to find claims as badly founded".<sup>2</sup> The immediate impetus to the promulgation of the Order in Council was the expansion of whaling into the Ross Sea by the Rosshavet Whaling Company of Sandefjord, Norway.<sup>3</sup> The intimate connection between the spread of whaling into the Antarctic and the question of sovereignty has been demonstrated by Kosack.<sup>4</sup> According to the record of the Imperial Conference 1926, it was considered that British title "exists by virtue of discovery" to Antarctic areas which "include" what is now the Australian Antarctic Territory and part of Coats Land.<sup>5</sup> Presumably it also "included" the Ross Dependency. It is interesting that this record of the Conference, which in fact tells us nothing of the proceedings, mentions discovery as a source of title. This mistake soon had its repercussions.

In an exchange of notes with the United States in 1934 the British ambassador in Washington denied that title to the Dependency was

<sup>96</sup> Leschack, L. A., "The French Polar Effort and the Expéditions Polaires Françaises" (1964) *Arctic* 17 (1), 3, 13.

<sup>97</sup> Foubister, *supra* n.94, 4.

<sup>98</sup> "Antarctic Operations Manual" (July 1965), Antarctic Div. D.S.I.R. 19. 99 (1923) N.Z. Gaz. 2211.

<sup>1</sup> de Vattel, E., *The Law of Nations* Bk. I. Ch. 17, 208.

<sup>2</sup> Smedal, *supra* n.36, 8, 9.

<sup>3</sup> Helm and Miller, *supra* n.43, 26.

<sup>4</sup> Kossack, H. P., *Antarktis* (1955) 129.

<sup>5</sup> Ollivier, M., *Colonial and Imperial Conferences* (1954) Vol. 3, Pt. 2, 161.

based solely on discovery. He alleged acts of administration and government such as the issue of whaling licences and appointment of Magistrates.<sup>6</sup> But the Ross Dependency Whaling Regulations had been ignored since 1929, were probably *ultra vires*<sup>7</sup> and their enforcement beyond the three mile limit (the base-line of which was far from clear) would have been contrary to a British undertaking at the Hague Conference on the Codification of International Law to respect the three mile limit.<sup>8</sup> The Magistrate, like the Administrator, had never exercised his functions in the Dependency.

There can be little doubt that England, and presumably New Zealand, recognised title by discovery alone, at that time. The Australian Antarctic Territory Acceptance Act 1933,<sup>9</sup> confirming the English claim on Australia's behalf, exempts Adélie Land claimed by France, without defining its boundaries.<sup>10</sup> No Frenchman visited Adélie Land from the date of its discovery in 1840 until 1950, and it was, in 1934, administered from Madagascar, 5,000 miles away. Recognition of the French claim at that time could only be on the basis of discovery. Currently the French claim is based on discovery and occupation.<sup>11</sup>

The New Zealand claim cannot be considered *in vacuo*, but must be examined in relation to possible rival claims:<sup>12</sup>

It is impossible to read the records of the decisions in cases as to territorial sovereignty without observing that in many cases the tribunal has been satisfied with very little in the way of the actual exercise of sovereign rights provided that the other State could not make out a superior claim. This is particularly true in the case of claims to sovereignty over areas in thinly populated or unsettled countries.

A Japanese claim based on the voyage of Lieutenant Shirase in the *Kainan Maru* in 1912 to Kainan and Okuma Bays in the Ross Sea, and his penetration to the Yamato Snow Field, is precluded by Article 2 (e) of the Peace Treaty with Japan by which Japan renounced all past Antarctic claims. A future claim would have to be based on occupation of Showa Base in the Norwegian sector, but such a claim is unlikely.<sup>13</sup> A possible Norwegian claim based on Amundsen's conquest of the Pole in 1911 and Norwegian whaling activities seems improbable because Norway dropped her claims in the Australian sector by a secret agreement in the Bouvet Islands negotiations,<sup>14</sup>

<sup>6</sup> Hackworth, *supra* n.3, 456.

<sup>7</sup> Charteris, A. H., "Australasian Claims in Antarctica" (1929) *Jo. Comp. Leg.* Ser. 3 No. 11, 226, 230.

<sup>8</sup> da Costa, *supra* n.28, 123, 131.

<sup>9</sup> Comm. Acts 1901–1950 iv. I 227.

<sup>10</sup> da Costa, *supra* n.31, 83.

<sup>11</sup> Parfond, "La Terre Adélie" (June 1950) 50 *La Revue Maritime*, n.s., 741, 742.

<sup>12</sup> *Eastern Greenland* case, *supra* n.9, 46.

<sup>13</sup> Tajudo, K., "Japan and the Problems of Sovereignty over the Polar Regions" (1959) 3 *Japanese Journ. Int. Law* 12, 15.

<sup>14</sup> Bogen, H., "Main Events in the History of Antarctic Exploration" (1957) *Norsk Hvalfangst Tjelende*, 295.

undertook later not to claim in British sectors<sup>15</sup> and by setting the bounds of her own claim to Dronning Maud Land in 1939 between the English and Australian claims implicitly recognised these and other Commonwealth claims.

Russia does not recognise the New Zealand claim.<sup>16</sup> Unofficial Soviet sources have suggested that Russia claims islands proximate to the Antarctic Peninsula, and to the areas where stations are situated such as Pravda,<sup>17</sup> (Knox) Coast-Mirnyy Base,<sup>18</sup> but no official claim has been made. There are no Soviet bases in the Dependency so there is no present foundation for a Soviet claim.

A United States claim is much more plausible. The United States has not recognised any claims of any other nations in the Antarctic and has reserved all rights which it may have on the continent.<sup>19</sup> This position is based upon the opinion of Secretary Hughes previously cited.<sup>20</sup> The cases discussed above support Waldock's contention that this opinion is wrong in law.<sup>21</sup> The United States might well have departed from this view in 1940,<sup>22</sup> but preparations for making a claim were interrupted by the war. Operation Highjump in 1946 aimed at "consolidating and extending United States sovereignty over the largest practicable area of the Antarctic continent".<sup>23</sup> Until 1955 the Dependency was virtually "an American colony".<sup>24</sup> and until Soviet concern took a concrete form in 1950, the United States might well have claimed a large part of the continent.<sup>25</sup> A comparison might be made with the Norwegian claim to Dronning Maud Land made in 1939 whilst the German Neu-Schwabenland expedition was on its way to the area claimed.

Taking 1969 as the "critical date", a United States claim to the Dependency would seem far superior to that of New Zealand. New Zealand might rely on the British expeditions of Ross, Borchgrevink, Scott, Shackleton, Mawson and Hillary. But United States expeditions have been on a far larger scale—the outstanding example being Operation Highjump. The protest by the British Ambassador in Washington, in 1934, against Byrd's establishment of a Post Office,

<sup>15</sup> (1940) 34 A.J.I.L. Supp. 84.

<sup>16</sup> Movchan, *supra* n.38, 357.

<sup>17</sup> Wolk, S., "The Basis of Soviet Claims in the Antarctic" (April 1958) 5 Bull. Inst. Study U.S.S.R. No. 4, 43, 46.

<sup>18</sup> Pruck, E., "Die Sowjets in der Antarktis" (1958) Ost europa No. 8, 658, 660.

<sup>19</sup> (5 Jan. 1947) 16 Dep. State Bull. No. 392, 30.

<sup>20</sup> *Supra* n.3.

<sup>21</sup> Waldock, C. H. M., "Disputed Sovereignty in the Falkland Island Dependencies" (1948) 25 B.Y.B.I.L. 311, 352.

<sup>22</sup> Hearings, *supra* n.74, 96.

<sup>23</sup> Sullivan, *supra* n.18, 173.

<sup>24</sup> This phrase is taken from *New Zealand in its Relation to Antarctic Exploration* 2. Donnelly, thesis, Canterbury Univ. (1934) in connection with Byrd's ship "Eleanor Bolling", and was used in reference to Byrd's Antarctic base (p. 99).

<sup>25</sup> Gould, *supra* n.64, 32.

operation of a radio station and aircraft without applying for permission, was of no effect.<sup>26</sup> No protest was made against the actual presence of the expedition in the Dependency, which was surely the crux of the matter.<sup>27</sup> In contrast to this, when a Canadian ship visited the Eastern Greenland village of Godhavn in 1923 it was only after "formalities having been fulfilled and regulations complied with".<sup>28</sup> This was duly noted in the *Eastern Greenland* case. It has been suggested that the Ross Sea had become, from the time of Byrd until T.A.E. and I.G.Y., a virtual American province, and in 1955 New Zealand was given the chance to effectively occupy and map this vast and neglected province for the first time.<sup>29</sup>

United States/New Zealand Antarctic co-operation is governed by a "status of forces" type agreement<sup>30</sup> by which New Zealand grants use of air and sea ports, exemptions from duties and taxation in return for "logistic support as far as possible", in Antarctica. New Zealand Antarctic activities "could barely continue" without American transport.<sup>31</sup> Our only supply ship, H.M.N.Z.S. *Endeavour* (formerly U.S.S. *Namakagon*)<sup>32</sup> is on loan from the United States Navy until June 1972. It cannot dock near Scott Base without United States ice-breakers.<sup>33</sup> New Zealand field activities since 1960 have depended for transport on the United States Navy VX-6 Squadron.<sup>34</sup> American personnel in the Dependency outnumber New Zealand personnel ten to one. In the present context the question whether there is a New Zealand claim or a British one<sup>35</sup> may be ignored.

From a practical point of view American presence in the Dependency has many advantages to New Zealand. It keeps Russia out. The main New Zealand base, Scott, is two miles from the main United States base, McMurdo. All New Zealand air transport within Antarctica is by United States planes. Accident damage to planes, which may total in a year much more than the entire New Zealand Antarctic budget, is not borne by New Zealand. New Zealand receives foreign currency from American expenditure here in connection with the Antarctic programme far in excess of our own Antarctic budget (200,000 dollars per year). It seems unlikely that New Zealand, the smallest Antarctic

<sup>26</sup> Hackworth, *supra* n.3, 456.

<sup>27</sup> Daniel, J., "Conflict of Sovereignties in the Antarctic" (1949) 3 Y.B.W.A. 241, 245.

<sup>28</sup> Craig, *supra* n.32, 13.

<sup>29</sup> Prebble, M. M., *New Zealand's Antarctic Field Programme 1957–65*, thesis Victoria Univ. (1965) 5–6.

<sup>30</sup> (1958) N.Z.T.S. No. 2; (1961) N.Z.T.S. No. 3.

<sup>31</sup> Hayter, *supra* n.84, 22.

<sup>32</sup> (1962) N.Z.T.S. No. 7; (1968) N.Z.T.S. No. 9.

<sup>33</sup> Hayter, *supra* n.84, 80.

<sup>34</sup> Prebble, *supra* n.29, 32.

<sup>35</sup> Berriedale-Keith, A., *Responsible Government in the Dominions* (1928) ii, 1039–1040.

claimant, will be able to increase this budget, and it is certainly not prepared, today, to undertake the expenses of an independent Antarctic programme, which would require an ice-breaker, helicopters and an airfield for large planes—expenditures which are beyond the budget of the Australian Antarctic programme. For the present, in the absence of economic activity, this undeclared condominium seems the best solution for New Zealand.