

New Zealand and the Convention on the Regulation of Antarctic Mineral Resource Activities (CRAMRA): An unhappy divorce?

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In this article, the authors discuss New Zealand's role in the negotiation, conclusion and abandonment of the Convention on the Regulation of Antarctic Mineral Resource Activities (CRAMRA). In particular, they examine whether New Zealand was under an obligation in international law to support CRAMRA during the interim period between signature and ratification, rather than abandoning it such a short time after it had been concluded.

During much of the 1980s the parties to the Antarctic Treaty¹ devoted considerable attention to the negotiation of a minerals regime. The 1959 Antarctic Treaty had not dealt with the issue of exploration and exploitation of mineral resources and, while there had been various efforts to ensure that uncontrolled mining did not occur in Antarctica, the matter was by no means adequately regulated by the provisions of the Antarctic Treaty or accompanying recommendations. At the 11th Antarctic Treaty Consultative Meeting (ATCM) held in Buenos Aires during 1981, it was decided that a Special Consultative Meeting (SATCM) should be convened to discuss the minerals issue.²

The first session of the SATCM was convened in Wellington, New Zealand during 1982 and the negotiations were concluded in Wellington in June 1988, after 12 sessions at various locations around the world. New Zealand played a very significant role in the negotiation of the convention which emerged from these negotiations. Much of the discussions at these sessions centred around various draft negotiating texts which had been prepared by Mr Chris Beeby, a senior New Zealand diplomat of the Ministry of External Relations and Trade.³ New Zealand gave the negotiations a high profile and

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1 The treaty was concluded at Washington on 1 December 1959 and entered into force on 23 June 1961: 402 UNTS 71. There are currently 39 parties to the Treaty, 26 of which hold Consultative Party status.

2 Recommendation XI-1 in WM Bush *Antarctica and International Law* (Oceana, London, 1982) vol 1, 442.

3 See C Beeby "The Antarctic Treaty System as a Resource Management Mechanism - Nonliving Resources" in *Antarctic Treaty System: An Assessment* (National Academy Press, Washington, 1986); C Beeby "The Convention on the Regulation of Antarctic

eventually became the depository for the 1988 Convention on the Regulation of Antarctic Mineral Resource Activities (CRAMRA).⁴

Since the signing of the final Act of CRAMRA in Wellington on 2 June 1988 and its opening for signature on 25 November 1988, there has been a substantial shift in support away from CRAMRA. Australia and France, both Antarctic Treaty Consultative Parties (ATCPs), announced in 1989 that they would not sign CRAMRA but instead would campaign for the development of a comprehensive Antarctic environmental protection regime. At the time of this announcement there was speculation as to whether CRAMRA would ever enter into force, because of the intricate formula requiring participation by certain states. Debate continued on this issue throughout 1989. New Zealand, however, maintained that it would continue to support CRAMRA and seek its implementation.⁵

The New Zealand position on CRAMRA radically changed in February 1990 when the then Prime Minister, Geoffrey Palmer, announced that New Zealand would "set aside consideration of the ratification of CRAMRA".⁶ Instead, the Prime Minister declared that New Zealand would now engage in "further detailed discussions with the Treaty partners to explore creative solutions to protect the Antarctic. We will also continue to vigorously promote our innovative measures for the enhancement of the Antarctic Environment ...".⁷ At a press conference following this announcement the Prime Minister carefully avoided the issue of whether New Zealand had abandoned the convention.⁸ New Zealand further distanced itself from CRAMRA in August 1990 when Prime Minister Palmer announced that New Zealand would support the Australian-France proposal for Antarctica at the November 1990 SATCM in Chile.⁹

The debate about CRAMRA was especially important as the convention was seen as pivotal in implementing an environmentally sensitive minerals regime at a time when there were no effective controls upon mining activities in Antarctica.¹⁰ Despite having

Mineral Resource Activities" (Unpublished paper presented to the International Bar Association, Auckland, 13 October 1988).

4 Article 61, CRAMRA, done in Wellington on 2 June 1988: see (1988) 27 ILM 868-900.

5 D Mussared "NZ Agrees to Disagree over Antarctica" *The Australian*, Australia, 5 July 1989, 8; J Whealan "New Leader Gains Surge of Support in Opinion Polls" *The Sydney Morning Herald*, Australia, 10 August 1989, 9.

6 G Palmer, Press Statement (Parliament Buildings, Wellington, 26 February 1990) 1.

7 Above n 6, 2.

8 G Palmer, Post-Cabinet Press Conference (Parliament Buildings, Wellington, 26 February 1990); "Antarctica Update" (1990) 2:40 NZ Ex Rel Rev 19.

9 J Whealan "Kiwis Back Antarctic Mining Ban" *The Sydney Morning Herald*, Australia, 25 August 1990, 21.

10 For examples of that debate, see J Burgess "Comprehensive Environmental Protection of the Antarctic: New Approaches for New Times" in G Cook (ed) *The Future of Antarctica* (Manchester UP, Manchester, 1990); WM Bush "The Antarctic Treaty System: Toward a Comprehensive Environmental Regime" in RA Herr (ed)

substantial support when it was concluded in 1988, following the Australian/French announcement that support has gradually been eroded. Recommendation XV-1 of ATCM XV in Paris during 1989 called for the convening of a SATCM to give special consideration to developing a comprehensive environmental protection regime for Antarctica. After a series of meetings in Vina del Mar, Chile and Madrid, Spain, the ATCPs effectively precluded the implementation of CRAMRA by agreeing at Madrid in October 1991 on a protocol to the Antarctic Treaty. Article 7 of that protocol prohibits "any activity relating to mineral resources" from taking place in Antarctica for a period of at least 50 years.¹¹ As a consequence of this action, CRAMRA has now become an abandoned convention.

This article will focus on the role that New Zealand took in the Antarctic minerals debate, the negotiation of CRAMRA and the events that took place after the convention was opened for signature. As one of the major sponsoring states of CRAMRA, was there any obligation upon New Zealand to support the convention during the interim period between signature and ratification, and not to abandon CRAMRA such a short time after it had been concluded? Do those states which participated in the negotiation of CRAMRA and eventually signed the convention in 1988-1989 have any legitimate complaint against New Zealand, given the action that it took? What obligations, if any, does a "principal" or sponsoring state have under the law of treaties? To address these issues, general principles of treaty law will be discussed, as will the obligations imposed upon signatory states by the 1969 Vienna Convention on the Law of Treaties (VCLT).¹²

I THE ANTARCTIC TREATY SYSTEM, MINERALS AND NEW ZEALAND

A *The Antarctic Treaty*

When the Antarctic Treaty was negotiated in 1959, the participating states were well aware of the possibility that there were minerals in the Antarctic.¹³ However, the Treaty does not contain any separate provisions for commercial mining. This was a deliberate decision of the 1959 Washington Conference.¹⁴ Antarctic mining seemed to be a remote possibility and it was difficult enough to cope with the crucial Cold War issues: demilitarisation and international cooperation, freedom of scientific

Antarctica's Future: Continuity or Change? (Australian Institute of International Affairs, Hobart, 1990).

11 Protocol on Environmental Protection to the Antarctic Treaty, XI ATSCM/2, done at Madrid on 4 October 1991.

12 Vienna Convention on the Law of Treaties, concluded at Vienna on 22 May 1969 and entered into force on 27 January 1980, UN Doc A/CONF 39/27: 1155 UNTS 331. There were 54 parties to the convention as at 31 December 1989.

13 See the statement by Wight, Commonwealth of Australia Parliamentary Debates (HR), 23rd Parl, 2nd Sess, 29 (18 October 1960), p 2110.

14 See FO Vicuna *Antarctic Mineral Exploitation* (Cambridge UP, Cambridge, 1988) 39, referring to the restricted official document of the Washington Conference, COM II/SR/6 (final), 7 November 1959.

investigation, the sovereignty problem, and environmental protection.¹⁵ In addition, any international regulation of commercial mining would have been unacceptable to claimant states, as it would have been interpreted as a challenge to their sovereignty claims. Therefore, if the issue had been officially introduced at the conference, it could have prejudiced the whole negotiations.¹⁶

B *The Initial Debate on Antarctic Minerals*

In the late 1960s and early 1970s the ATCPs began to feel that the absence of any regulation of mineral activities constituted a gap in the Antarctic Treaty. Some had received enquiries from marine geophysical prospecting companies about the possibility of commercial prospecting and exploration in the Southern Ocean.¹⁷ At the same time the question of Antarctic resources was introduced at United Nations fora.¹⁸ The ATCPs had to react if they did not want to lose their self-established competence in Antarctic affairs. One of the primary concerns was the preservation of the Antarctic Treaty, which had proved to be a stabilizing factor for the whole region.¹⁹ At ATCM VI in Tokyo during 1970, New Zealand took the initiative and informally raised the question of Antarctic minerals with other delegations.²⁰ It was agreed that the problems deriving from possible mineral finds in Antarctica should be faced.²¹

At that time it was considered that there were 2 possible options which could fill the gap in the Antarctic Treaty. The first option was the simple prohibition of any commercial mineral activities. The second was to create a set of rules facilitating the control of mining. Unregulated mining was not an option that the ATCPs were prepared to tolerate.

Recommendation VII-6 from ATCM VII in Wellington during 1972 made reference to the possibility of future Antarctic minerals exploitation, and called for further discussion and study of its effects.²² While a moratorium for mining was discussed

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- 15 These issues were dealt with in arts I, III; II; IV; V and IX(1)(f) of the Antarctic Treaty.
- 16 See the statement by Osborne, the Minister for Air, Commonwealth of Australia Parliamentary Debates (HR), 23rd Parl, 2nd Sess, 29 (18 October 1960), p 2115.
- 17 J Heap (ed) *Handbook of the Antarctic Treaty System* (7 ed, 1990) 4301. Corresponding enquiries were received by the governments of France, Great Britain, New Zealand and the USA: see FM Auburn "Offshore Oil and Gas in Antarctica" (1977) 20 Ger YIL 139, 140.
- 18 See the Committee on Natural Resources, Information on Natural Resources in Antarctica (25 January 1971), UN Doc E/C 7/5, ECOSOC. The Committee decided later not to consider information on natural resources in Antarctica: see its Report on the First Session (1971), UN Doc E/C 7/13 ECOSOC, p 25.
- 19 F Sollie "The Legitimacy of Concluding an Antarctic Minerals Resources Regime among the Antarctic Treaty Parties" in R Wolfrum (ed) *Antarctic Challenge III* (Duncker & Humboldt, Berlin, 1987) 302.
- 20 "The Antarctic Treaty" (1972) 6:22 NZFAR 19-35.
- 21 BE Talboys "New Zealand and the Antarctic Treaty" (1978) 3/4:28 NZFAR 29, 32.
- 22 This resulted in a series of reports that were released during the 1970s and early 1980s on the topic of Antarctic minerals. See the "Report of the Working Group of Experts

during the meeting, no consensus could be achieved on this issue.²³ In 1973 OPEC raised oil prices by 200 per cent, revealing the dependence of the industrialized nations on imported supplies of oil. In the same year the US drillship *Glomar Challenger* demonstrated that mineral exploration of Antarctic offshore areas was technically possible, when drilling of the Ross Sea sea-bed took place. The finding of traces of hydrocarbons, such as methane and ethane, caused speculation about vast deposits of oil and gas in the Antarctic.²⁴ Antarctica was increasingly being seen as a future site for the exploitation of minerals.

Given the growing worldwide interest in scarce petroleum resources, and particularly the mineral potential of the Antarctic, the formal proposal by New Zealand in 1975 at ATCM VIII in Oslo to declare Antarctica a "world park", free of commercial mining, was unexpected.²⁵ The proposal had been influenced by the Second World Conference on National Parks, which in September 1972 had passed a resolution that Antarctica and the surrounding seas be declared a world park administered by the United Nations.²⁶ The New Zealand proposal was different in an important respect: it adopted the term "world park", but did not suggest the internationalisation of the continent; the management of Antarctica under the Antarctic Treaty was to remain untouched.²⁷ The initiative failed because it was inconsistent with the position of some claimant states on sovereignty, while other ATCPs did not want to foreclose for ever the use of Antarctica's mineral resources.²⁸ The oil crisis did not promote such an idea at that time. Instead, the ATCPs agreed on a policy of voluntary self-restraint regarding Antarctic mineral resources. The Final Report of ATCM VIII urged states and individuals not to engage in commercial exploration and exploitation in Antarctica, while, as ATCPs, they

on Exploration and Exploitation for Antarctic Minerals" (the "Holgate Report"), Annex 5 to the 9th ATCM (London, 1977); "Oil and Minerals in the Antarctic" (the "Bellagio Report"); "Report of the Group of Experts of Ecological, Technological and other related Experts on Mineral Exploration and Exploitation in Antarctica", Annex 6 to the Report of the 10th ATCM (Washington, 1979); "Reports of the SCAR Group of Specialists on Antarctic Environmental Implications of Possible Mineral Exploration and Extraction" (AEIMEE), AEIMEE Report No 1 (1981) and AEIMEE Report No 2 (1983) in RH Rutford (ed) *Reports of the SCAR Group of Specialists on Antarctic Environmental Implications of Possible Mineral Exploration and Extraction (AEIMEE)* (Scientific Committee on Antarctic Research, Cambridge, 1986).

23 The diverse positions were: unlimited moratorium (Chile), limited moratorium from 10-15 years (Argentina, France, USSR), short-term moratorium for 2 years (Australia, United Kingdom, New Zealand, Norway), and no formal moratorium at all (USA). See FM Auburn *Antarctic Law and Politics* (C Hurst, London, 1982) 261.

24 Auburn, above n 17, 142.

25 "White Paper on Antarctic Environment", NZ Parliamentary Paper (August 1989) 5. The claim that this was "formally proposed" is questioned by AD Hemmings, Antarctic Policy Group, Environmental Science, University of Auckland (Unpublished critique of the White Paper for Greenpeace Australia, 18 August 1989) 4.

26 Auburn, above n 23, 259.

27 Talboys, above n 21, 33.

28 White Paper, above n 25, 5.

continued to seek "timely agreed solutions" to the minerals issue.²⁹ With the rejection of its world park proposal, New Zealand ceased to espouse the concept.³⁰ Instead, New Zealand proposed in 1976 that an assessment regime governing mineral activities within the existing Antarctic Treaty system, which would allow mining under certain environmental safeguards and under the control of a Regulatory Committee, be implemented.³¹

With the minerals issue now firmly on the agenda at Treaty meetings, a special preparatory meeting was convened in 1976 to study the subject "Antarctic Mineral Resources" in relation to the Antarctic Treaty.³² Held in Paris during June and July, this meeting elaborated 4 important principles, which were later incorporated by ATCM IX in London during 1977 as recommendation IX-1:

- (i) the Consultative Parties will continue to play an active and responsible role in dealing with the question of the mineral resources of Antarctica;
- (ii) the Antarctic Treaty must be maintained in its entirety;
- (iii) protection of the unique Antarctic environment and of its dependent ecosystem should be a basic consideration;
- (iv) the Consultative Parties, in dealing with the question of mineral resources, should not prejudice the interests of all humankind in Antarctica.

Recommendation IX-1 mentioned for the first time a "future regime" based on those principles, whereas the previous meetings had only referred to "timely agreed solutions".

Between 1977 and 1979 the ATCPs again considered whether there was a need to negotiate a minerals regime at a time when mining in Antarctica seemed to be a remote possibility.³³ Since the occurrence of mineral deposits of economic value could not be ruled out, they were afraid of even greater difficulties in negotiating a minerals regime if it was left until exploitable deposits were found and the necessary technology was available.³⁴ They consequently decided to create a framework regime which would cover all stages of prospecting, exploration and development. At ATCM XI in Buenos Aires during 1981, the ATCPs declared formally as a common general purpose "to negotiate ... an appropriate set of rules for the exploration and exploitation of Antarctic mineral resources."³⁵ The negotiation of a regime on Antarctic mineral resources was now

29 Final Report of the 8th ATCM, para 15 in Bush, above n 2, 296.

30 White Paper, above n 25, 5.

31 WE Westermeyer *The Politics of Mineral Resource Development in Antarctica, Alternative Regimes for the Future* (Westview Press, Boulder, 1984) 79.

32 Recommendation VIII-14 in Bush, above n 2, 328-329.

33 ATCM X in Washington during 1979 confirmed the impetus building within the ATCPs towards the negotiation of a minerals regime by rec X-1, although the general purpose of such a regime remained undecided.

34 Heap, above n 17, 4301.

35 Recommendation XI-1 in Bush, above n 2, 441-443.

considered "a matter of urgency."³⁶ Recommendation XI-1 therefore laid the basis for the second, more concrete part of the work towards a minerals regime. Consequently, a 4th SATCM was convened to elaborate a regime based on the agreed principles and previous recommendations. New Zealand invited the ATCPs to hold the first session of the SATCM in Wellington - an invitation which reflected the priority New Zealand accorded to the success of the negotiations.³⁷

C *The Minerals Negotiations: 1982-1988*

The task of the 4th SATCM looked, according to one observer, "like the quadrature of the circle".³⁸ A regime preserving the leading role of the ATCPs under the Antarctic Treaty which was acceptable to claimants and non-claimants, protected the fragile Antarctic environment, and at the same time served the interest of all humankind, had to meet high expectations. The entry into force in 1982 of a regime for the living resources of the Southern Ocean, the Convention on the Conservation on Antarctic Marine Living Resources (CCAMLR),³⁹ demonstrated the ability of the ATCPs to create common legal solutions for the economic use of the Antarctic.⁴⁰ In addition, CCAMLR provided a useful model for an institutional structure of a minerals regime.⁴¹

But the negotiation of a minerals regime was much more complex and meant a challenge to the region's unique political status. The first 2 sessions were held in Wellington in June 1982 and in January 1983. The first session ended with the adoption of a "Schema for an Instrument on Antarctic Mineral Resources" which listed all the crucial issues to be implemented in the future regime.⁴² The mineral negotiations eventually took 6 years, during which 12 formal sessions and several informal meetings were held. Nearly every session was held at a different location, giving them the title

36 Recommendation XI-1(2) in Bush, above n 2, 444. For a review of the debate over a minerals regime up to this point in time, see R Rich "A Minerals Regime for Antarctica" (1982) 31 ICLQ 709-725.

37 J Hill "New Zealand and Antarctica: A Discussion Paper" (New Zealand Ministry of Foreign Affairs and New Zealand Commission for the Environment, Wellington, 1983) 62.

38 R Wolfrum *Die Internationalisierung staatsfreier Räume. Die Entwicklung einer internationalen Verwaltung für Antarktis, Weltraum, Hohe See und Meeresboden* (1984) 90.

39 CCAMLR was concluded at Canberra on 20 May 1980 and entered into force on 7 April 1982: see (1980) 19 ILM 841-859.

40 JN Barnes "The Emerging Convention on the Conservation of Antarctic Marine Living Resources: An Attempt to Meet the New Realities of Resource Exploitation in the Southern Ocean" in JI Charney (ed) *The New Nationalism and the Use of Common Spaces* (Allanheld Osmun, Totawa, 1982) 239; B Mitchell and L Kimball "Conflict over the Cold Continent" (1979) 35 For Pol 124, 138.

41 CC Joyner "The Antarctic Minerals Negotiating Process" (1987) 81 AJIL 904. CCAMLR has been described as a "trial horse" for the minerals regime: see M Howard "The Convention on the Conservation of Antarctic Marine Living Resources: A Five Year Review" (1989) 38 ICLQ 104, 105.

42 See Annex B - AMR/SCM/21/Rev 1/Corr 1, First Sess, 4th SATCM, Wellington in Bush, above n 2, 450.

"nomadic negotiations".⁴³ The fact that the meetings were held at different locations is a characteristic of the Antarctic Treaty because it exists without a permanent secretariat.⁴⁴ Three important informal meetings of the Heads of Delegations were held in Whangaroa, New Zealand, where only key problems were discussed.⁴⁵

These meetings were held behind closed doors and no public record is available. The negotiations were made more complex by the diverse interests of the ATCPs: they were either claimants, non-claimants, potential miners, or developing countries.⁴⁶ A central role during the negotiations was taken by the chairman, the New Zealand Head of Delegation, Mr Chris Beeby. In contrast to the procedure at ATCMs, Beeby was elected as chairman for the duration of all the negotiating sessions. His proposals for a draft minerals regime, known as "the chairman's offerings" or as "Beeby Drafts", became the focus of the negotiations.⁴⁷ The drafts were revised several times but the basic structure remained for the eventual adoption of the convention on 2 June 1988 in Wellington.⁴⁸ Beeby contributed significantly to the drafting of the substantive provisions of the evolving Antarctic minerals convention by his private, informal diplomacy. He described the negotiations as "delicate, difficult and time-consuming."⁴⁹ CRAMRA designated the Government of New Zealand as its depositary.⁵⁰ New Zealand was also mentioned as a location for any permanent headquarters established by the Convention.⁵¹

*D The 1988 Convention on the Regulation of Antarctic Mineral Resource Activities*⁵²

Although CRAMRA was designed to govern commercial mining in Antarctica, it did not provide a comprehensive mining code for Antarctica. Rather, it was a framework

43 A Watts "Lessons to Be Learned from the Mineral Resources Negotiations" in Wolfrum, above n 19, 320. The SATCMs were held in Wellington (June 1982, January 1983); Bonn (July 1983); Washington (January 1984); Tokyo (May 1984); Rio de Janeiro (February-March 1985); Paris (October 1985); Hobart (April 1986); Tokyo (October-November 1986); Montevideo (May 1987); and Wellington (January 1988, May-June 1988).

44 Above n 43, 320.

45 See Joyner, above n 41, 900.

46 C Beeby "The Convention on the Regulation of Antarctic Mineral Resource Activities and its Future" in Herr, above n 10, 48.

47 See F Francioni "Legal Aspects of Mineral Exploitation in Antarctica" (1986) 19 Cornell ILJ 163, 178.

48 See the drafts of April 1984 (MR 17 Rev I; "Beeby II"); 19 September 1986 (MR 17 Rev II; "Beeby III"); and 2 April 1987 (MR 17 Rev III; "Beeby IV"); see Watts, above n 43, 325 n 4. For an examination of "Beeby IV", see Joyner, above n 41, 892.

49 Beeby, above n 46, 49.

50 Article 61(3).

51 Article 20(5).

52 For a detailed examination of CRAMRA, see PJ Beck "Convention on the Regulation of Antarctic Mineral Resource Activities: A Major Addition to the Antarctic Treaty System" (1989) 25 (152) Polar Rec 19-32; "The Antarctic Minerals Agreement" (1989) Proc 83rd Ann Meet Amer Soc IL 204-224; A Watts "The Convention on the Regulation of Antarctic Mineral Resource Activities 1988" (1990) 39 ICLQ 169-182.

convention linked to the Antarctic Treaty, with the framework to be filled out by the institutions created by the convention. Four main administrative bodies were to be created,⁵³ which had responsibility for issuing permits for mineral exploration and exploitation, the monitoring of such activities, and the overall implementation and administration of the convention. Article 4 of CRAMRA listed certain principles upon which Antarctic mineral resource activities were to be judged. Under these principles, mineral activities were prohibited until it was judged, based upon assessment of possible impacts, that the activity in question would not cause significant adverse effects on, amongst other things, the Antarctic environment and associated ecosystems, the global or the regional climate. No mining activity could take place until adequate safeguards for using mining technology, the capacity to monitor key environmental parameters, and the ability to respond effectively to accidents were judged to exist. CRAMRA did not impose a prohibition on commercial mining in Antarctica. Commercial prospecting could proceed without a special permit, subject to monitoring. Only the decision to identify a certain area for possible exploration and development required the consensus of the ATCPs.⁵⁴

Article 62, governing the entry into force of CRAMRA, required representation from certain groups of states. At least 16 of the 20 ATCPs which participated as such in the final session of the 4th SATCM had to ratify CRAMRA,⁵⁵ including at least 11 developed and 5 developing countries. The terms "developing" and "developed countries" were not defined in CRAMRA, but it was generally accepted that, of the 20 ATCPs participating at the 4th SATCM, the 6 developing states were Argentina, Brazil, Chile, China, India and Uruguay. The remaining 14 were considered developed.⁵⁶ The ratifying states also had to include those states necessary to establish all the institutions created by the convention in respect of every area of Antarctica. Claimant states had a guaranteed seat in each Regulatory Committee responsible for the area they claimed.⁵⁷ The USA and USSR, as countries which "assert a basis of claim in Antarctica," were granted the same right for any established Regulatory Committee, irrespective of the area concerned.⁵⁸ Thus the ratification of CRAMRA by all 7 claimants and by the USA and USSR was essential for the entry into force of the convention. This meant that one claimant alone could veto the implementation of the convention.⁵⁹

53 The Antarctic Mineral Resources Commission (art 18(1)); the Scientific, Technical and Environmental Advisory Committee (art 23); the Antarctic Mineral Resources Regulatory Committee (art 29); and the Special Meeting of Parties (art 28).

54 Article 41(2).

55 Twenty Consultative Parties participated in that capacity at the final session in Wellington. Spain and Sweden became Consultative Parties in September 1988 after the conclusion of the final Act.

56 SKN Blay and BM Tsamenyi "The Convention on the Regulation of Antarctic Mineral Resource Activities (CRAMRA), Can a Claimant Veto it?" (1989) 1 ASOLP Occ Pap 6.

57 Article 29(2)(a).

58 Article 29(2)(b).

59 See the final Act of the 4th SATCM, above n 4; Beeby, above n 46, 57; DR Rothwell "A World Park for Antarctica? Foundations, Developments and the Future" (1990) 3 ASOLP Occ Pap 4. Compare Blay and Tsamenyi, above n 56, 12.

In early 1989 there was considerable debate both in Australia and France over whether CRAMRA should be signed. This debate was partly a result of the high profile given to Antarctica by various non-governmental organisations, which, as a consequence of their concern about a possible minerals regime, were strongly advocating that Antarctica be declared a "world park".⁶⁰ On 22 May 1989 Prime Minister Bob Hawke announced that the Australian Government was opposed to mining in Antarctica and would not sign CRAMRA. Instead, it would be working towards the development of a comprehensive environmental protection convention for the Antarctic.⁶¹ During the visit by French Prime Minister Michel Rocard to Australia in August 1989 the initiative became a joint one. Prime Ministers Hawke and Rocard indicated that they saw mining in Antarctica as incompatible with the protection of the fragile Antarctic environment, and that the Australian and French Governments wanted to work together towards a convention covering every aspect of the protection of the environment in the Antarctic and its dependent and associated ecosystems.⁶² CRAMRA was no longer considered an environmentally safe regime for Antarctica by the Australian and French Governments.⁶³ After an eventful 12 months, when CRAMRA eventually closed for signature on 26 November 1989 only 19 states had signed the Convention.⁶⁴

E ATCM XV - Paris 1989

Australian and French support for the "world park" option came after both countries had taken an active role during the negotiation of CRAMRA. A trigger for the "new politics" was undoubtedly the increasing international public concern about the environment, especially after the *EXXON Valdez* oil spill in Alaska in 1989 and the *Bahia Paraiso* spill in the Antarctic itself in 1989, both of which demonstrated the consequences of oil pollution in polar areas. At the same time, scientific discoveries showed links between Antarctica and the global environment, and the scientific value of the continent as a laboratory for detecting the greenhouse effect and depletion of the ozone layer around the poles.⁶⁵

60 Rothwell, above n 59, 7-11. Also see G Mosley "World Park for Antarctica" (1989) 5:17 *HABITAT Australia* 4-7.

61 M Seccombe "Antarctica Stand Puts Aust out on Limb" *The Sydney Morning Herald*, Australia, 23 May 1989, 1; "Cabinet Kills Antarctic Mine Treaty" *The Australian*, Australia, 23 May 1989, 3.

62 RJ Hawke and M Rocard "Agreement with France on Antarctic" (1989) 60 *Aust FA Trade* 445.

63 In 1989 varying degrees of support for the Australian-French initiative were received from Belgium, Italy, Spain and the Federal Republic of Germany.

64 To that date Argentina, Brazil, Chile, China, Czechoslovakia, Denmark, Finland, the German Democratic Republic, Japan, New Zealand, Norway, Poland, the Republic of Korea, Sweden, South Africa, Uruguay, United Kingdom, the USSR and the USA had signed; however, no state has yet ratified CRAMRA. The Federal Republic of Germany regards itself as not bound by the signature of CRAMRA by the former German Democratic Republic: Letter from the Embassy of the Federal Republic of Germany, Canberra, 15 November 1990.

65 MJ Molina "The Antarctic Ozone Hole" (1988) 31 *Oceanus* 47-52.

ATCM XV in Paris during October 1989 saw the "Antarctic Club" divided into 2 camps. On the one hand, there were states in favour of CRAMRA, especially the USA and United Kingdom; on the other hand, the new coalition against mining in Antarctica, under the leadership of Australia and France, advocated a comprehensive environmental convention for the continent. Principal elements of the Australian-French proposal were: the prohibition of mining in and around Antarctica; the rejection of CRAMRA as an inadequate assessment regime; and the establishment of a comprehensive environmental conservation regime for Antarctica, including the declaration of Antarctica as a "Nature Reserve - Land of science".⁶⁶ Faced with a deadlock, the ATCPs endorsed a proposal for a SATCM on the Antarctic environment to be held in Chile during 1990 where discussion could be continued.⁶⁷

F *The New Zealand Policy Reversal*

New Zealand has always been very interested in Antarctic affairs. The geographic proximity of New Zealand to Antarctica explains this interest. Any changes in the Antarctic of an environmental or political nature could easily affect New Zealand. On the one hand, New Zealand's security is involved, which is why it desires the demilitarised and stable zone at present provided by the Antarctic Treaty.⁶⁸ On the other hand, New Zealand's Antarctic claim is a potential resource asset, particularly given its dependence on Middle East oil. It has been noted that "in energy terms, the Antarctic is regarded as a possible future bank in which New Zealand could have some day a substantial interest",⁶⁹ and that is why it did not want to foreclose the option of future mineral exploitation in Antarctica. As already seen from the examination of the history concerning the negotiation of CRAMRA, New Zealand played a very active role during the elaboration of that regime. It introduced the minerals issue to Antarctic Treaty meetings. During the minerals negotiations 4 of the 12 formal sessions including the final sessions were hosted by New Zealand, and New Zealand's leading diplomat for Antarctic affairs, Chris Beeby, became "CRAMRA's chief architect."⁷⁰

In 1984 a Labour Government under Prime Minister David Lange came to office in New Zealand and undertook a review of New Zealand's policy on Antarctic minerals. It re-ordered the priorities for its delegation and restored environmental protection as being of primary importance in the minerals negotiations.⁷¹ However, this did not include a ban on Antarctic mining. After the conclusion of CRAMRA, New Zealand became one of the strongest proponents of the convention, notwithstanding growing public opinion

66 "Franco-Australian Draft Working Paper on Possible Components for a Comprehensive Convention for the Preservation and Protection of Antarctica" (XV ATCM/WP/3) in *Final Report of the Fifteenth Antarctic Treaty Consultative Meeting* (Paris, 1990) 209.

67 Recommendations XV-1(2) and XV-2 (1989), above n 66, 39-43.

68 Hill, above n 37, 70; White Paper, above 25, 5.

69 Hill, above n 37, 59.

70 Hemmings, above n 25, 4.

71 White Paper, above n 25, 5.

in New Zealand in favour of a no-mining option and growing Australian and French opposition to CRAMRA.

In August 1989 the New Zealand Government released a "White Paper on Antarctic Environment", a document which sought to explain New Zealand's present position on Antarctic affairs but succeeded only in showing clearly the contradictory nature of the position it was forced to adopt. The White Paper recognized that most New Zealanders would like a ban on Antarctic mining, but appeared to accept mineral activities as one of the "acceptable uses of Antarctica". This, despite its statement that it was "opposed to mining in Antarctica and always has been opposed to mining in Antarctica."⁷² The government disguised this ambiguous position even more with a call for an Antarctic park concept, which it described as an "integrated series of measures" creating a comprehensive and binding environmental protection regime for Antarctica. This was later taken as a proposal to ATCM XV.⁷³ At the same time it was supporting CRAMRA it acknowledged that the "constraints imposed, legal, environmental and procedural, are formidable."⁷⁴ The government seemed to be keeping its options open, but the proposal of an Antarctic park, where mining could be allowed under CRAMRA, did not sway public opinion in New Zealand, or halt the growing opposition to CRAMRA.

On 26 February 1990 Prime Minister Palmer announced that New Zealand would "set aside" consideration of the ratification of CRAMRA. The deadlock among the Treaty parties over the ratification of CRAMRA was noted as being one which required a "creative solution" similar to the Antarctic park concept put forward by New Zealand at the 15th ATCM. The Prime Minister stated that "CRAMRA was obviously far from perfect" but avoided abandoning it absolutely.⁷⁵ On 24 August 1990 the divorce between New Zealand and CRAMRA was final. Prime Minister Palmer said that New Zealand would call for Antarctica to be made a world park at the SATCM to be held in Chile during November and December 1990, and that it would support the Australian push for a total mining ban in the region.⁷⁶

II THE LAW OF TREATIES

Against the background of the relationship between New Zealand and CRAMRA, it is now appropriate to consider the law of treaties in an attempt to understand whether there are any special obligations placed upon signatory states, and in particular those states which have "sponsored" and agreed to act as a depository to a treaty. General

72 White Paper, above n 25, 10; G Palmer "Antarctica: A Statement by the PM" (1989) 4:39 NZ Ex Rel Rev 18-19.

73 White Paper, above n 25, 7, 9; also see the "Working Paper on the Protection of the Antarctic Environment submitted by New Zealand" (XV ATCM/WP/4) in the *Final Report*, above n 66, 214-226.

74 White Paper, above n 25, 10.

75 For the Australian reaction, see RJ Hawke, Press Release (Canberra, 26 February 1990).

76 Whealan, above n 9, 21.

principles of treaty law will be analysed first, with emphasis on the work of the International Law Commission (ILC).⁷⁷

A *Obligations upon Signatory States*

When the law of treaties initially developed it was often the case that heads of state signed a treaty on behalf of their state. It was therefore considered that, unless an express exception had been made, a treaty was binding from the date of signature. The development of constitutional democracies, and the loss of powers previously accorded a head of state saw a gradual change in this practice. It became rare for heads of state actually to sign treaties. Rather this was left to plenipotentiaries who acted as the delegates or agents of the state. This resulted in concern over potential ultra vires acts by plenipotentiaries, with the consequence that the act of signing a treaty lost its previous status as a binding commitment by a state to a treaty, and ratification increasingly became required before a state was considered to have finally committed itself to a treaty.⁷⁸ In some cases the constitutional procedures of the state required a formal ratification process, the ratification of a treaty by the United States Senate being an example.⁷⁹ However, treaty-making practice began to change in this area when more sophisticated procedures were implemented to verify the actions taken by plenipotentiaries on behalf of a state, and modern communications allowed a government to keep in closer contact with its agents throughout the treaty negotiation process.⁸⁰

Treaty making practices began to be reconsidered during the early part of the 20th century. It was accepted that mere signature was not sufficient to indicate intention to be bound by a treaty if the treaty formally required ratification.⁸¹ State practice reflected this situation with ratification being the primary method for a state to indicate full acceptance of a treaty, even though other methods of acceptance existed.⁸² However, despite the continuing importance attached to ratification, it was argued that states

77 The discussion which follows will give some weight to the work of the ILC due to its impact on the development of the law of treaties. The 4 Special Rapporteurs who prepared reports on this subject were Prof JH Brierly (1950-1952), Sir Hersch Lauterpacht (1953-1954), Sir Gerald Fitzmaurice (1956-1960), and Sir Humphrey Waldock (1962-1966).

78 For a review of this aspect of treaty law, see FO Wilcox *The Ratification of International Conventions* (Allen & Unwin, London, 1935) 21-41; H Blix *Treaty-Making Power* (Stevens, London, 1960) 3-104.

79 The United States Constitution (art II, § 2) requires the Senate to confirm ratification of a treaty by a two-thirds majority. For a review of the role of the Senate, see MJ Glennon "The Senate Role in Treaty Ratifications" (1983) 77 AJIL 257-280.

80 See the following relevant provisions in VCLT: art 7 (full powers), art 8 (subsequent confirmation of act performed without authorisation).

81 GG Fitzmaurice "Do Treaties Need Ratification?" (1934) 15 BYIL 113, 118.

82 See H Blix "The Requirement of Ratification" (1953) 30 BYIL 352, 357-363 where actual figures for the methods chosen to express consent to League of Nations and United Nations treaties are given; also see JM Jones *Full Powers and Ratification* (Cambridge UP, Cambridge, 1949) 89.

which had signed a treaty were subject to 2 possible obligations. First, that states should actually proceed to ratify treaties they had signed, or at the very least commence the relevant constitutional procedures for ensuring ratification. Second, that during the period between signature and ratification the state should do no acts which would jeopardize the eventual effective entry into force of the treaty. Both of these issues were eventually considered by the ILC.

B Is a Signatory State Required to Ratify?

Harley was an early 20th century commentator who considered whether signatory states had an obligation to ratify. After reviewing various authorities he concluded that ratification could not be withheld.⁸³ Harley saw this as not a legal but rather a moral obligation, arguing that this obligation "increases proportionately with the scope and difficulty of the negotiation of the treaty."⁸⁴ This followed because:⁸⁵

in a negotiation where many States are represented, there is considerable difficulty in reaching agreements on many points Moreover, the physical difficulty of getting a large group of negotiators together is very great Since a reconsideration of the agreements reached would require a new gathering of the negotiators, it appears that a very high moral obligation to ratify exists, especially in case of multipartite or international treaties.

In 1935, the Harvard Research in International Law project gave extensive consideration to the law of treaties.⁸⁶ The Harvard Draft articles on the law of treaties provided that signature of a treaty on behalf of a state did not create an obligation to ratify the treaty, the commentary asserting that states had a right to exercise their discretion in these matters.⁸⁷ However, Harley's argument that a moral obligation to ratify existed was not completely dismissed:⁸⁸

Much may be said for the view that States should not arbitrarily withhold their ratifications of treaties which have been signed on their behalf, and that they should regard themselves morally bound to proceed with ratification except when really serious reasons prevent their doing so.

Yet this was a controversial area and others writing at the same time were not prepared to go as far.⁸⁹

83 JE Harley "The Obligation to Ratify Treaties" (1919) 13 AJIL 389, 404.

84 Above n 83, 405.

85 Above n 83, 405 where the opinion of the French jurist, Renault, was relied upon.

86 Research in International Law - Harvard Law School, "Law of Treaties" (1935) 29 Supp AJIL 769 (hereafter referred to as the "Harvard Draft").

87 Article 8, above n 86, 770; see also GW Hackworth *Digest of International Law* (US Gov Printing Office, Washington, 1943) vol 5, 56-57.

88 Harvard Draft, above n 86, 772.

89 Compare Wilcox, above n 78, 104-105.

When the ILC began its work on the law of treaties in 1950, Professor Brierly, the Rapporteur at the time, very much relied upon the Harvard Draft and adopted an identical provision providing that a signatory state had no obligation to ratify.⁹⁰ However, a diversity of opinion existed within the ILC over the content of draft article 8, and though it was eventually accepted, an additional article was proposed.⁹¹ This provided:⁹²

The mere fact of its signature being duly appended, especially to a multilateral treaty, places the State under an obligation to take, within a reasonable time, such steps as are required to ensure that the treaty thus signed is subjected to the constitutional procedure for ratification or rejection.

While the ILC eventually decided to delete the proposed article from its report,⁹³ the debate that took place certainly indicated that some members believed that, at the very least, "good faith" imposed a requirement upon a signatory state to proceed to a consideration of ratification.⁹⁴

It was the work of Waldock as Rapporteur which had the most impact in the years immediately preceding the 1969 VCLT. Article 9(2)(b) of Waldock's first report in 1962 placed signatory states under an obligation to "examine the question of ratification or, as the case may be, acceptance of the treaty in good faith with a view to its submission to the competent organs of the State for ratification or acceptance" and, if the treaty so provided, this obligation was mandatory.⁹⁵ Despite the inclusion of this provision it was noted in the accompanying commentary that:⁹⁶

the signatory State in these cases is under a certain, if somewhat intangible, obligation of good faith subsequently to give consideration to the ratification (or acceptance) of the treaty. The precise extent of this obligation is not clear. That there is no actual obligation to ratify under modern customary international law is certain

The obligation imposed by the first part of article 9(2)(b) resulted in considerable debate within the ILC with 2 distinct views being represented: that no such obligation

90 Article 8, Revised Articles of the Draft Convention [1951-II] YBILC 73.

91 See [1951-I] YBILC 34-39.

92 Above n 91, 39.

93 Above n 91, 157.

94 Above n 91, 37 (Yepes), 38 (Alfaro), 52 (Cordova); see also JS Camara *The Ratification of International Treaties* (Ontario Publishing, Toronto, 1949) 64. During Lauterpacht's term as Rapporteur, a draft article to similar effect was proposed in which it was argued that "signature, although not implying an obligation of ratification, implies the duty to take some action showing a deliberate acknowledgement of the principle that eventual ratification is the natural outcome and purpose of signature": see the Third Report of the Special Rapporteur on the Law of Treaties [1953-II] YBILC 110. This aspect of the Lauterpacht draft was not, however, given any later consideration by the ILC: compare art 30(1)(b) - Law of Treaties [1956-II] YBILC 122.

95 First Report on the Law of Treaties [1962-II] YBILC 46.

96 Above n 95, 47.

existed in international law, or that if, it did, it was only *lex ferenda*. Despite reference being made to the practice of encouraging subsequent ratification of treaties by both the International Labour Organisation and the World Health Organisation,⁹⁷ it was eventually decided to reject that part of the draft article dealing with the obligation of a signatory state to proceed to ratification or acceptance.⁹⁸ With this decision, the ILC dispensed with consideration of this question and it did not reappear in any future reports of the Rapporteur or in ILC debates.⁹⁹

It can therefore be said that, apart from the possibility of a moral obligation to ratify, or the requirement that states must in good faith proceed to ratification, no *legal* obligation exists in the law of treaties requiring a state which has signed a treaty to proceed to ratification, or to ensure that ratification is considered by the appropriate parliamentary authorities.

C *The Interim Obligation prior to Ratification*

The Harvard Draft also considered whether signatory states had any obligations imposed upon them prior to ratification. It was argued that prior to the entry into force of a treaty, a state should "for a reasonable time after signature, refrain from taking action which would render performance by any party of the obligations stipulated impossible or more difficult".¹⁰⁰ An unratified treaty therefore only represented an "inchoate" bargain between the signatories with no legal duty resting upon a signatory state to perform the obligations created by the treaty at that time.¹⁰¹ The only exception was the duty of good faith, under which:¹⁰²

one signatory State has a right to assume that the other will regard its signature as having been seriously given, that ordinarily it will proceed to ratification, and that in the meantime it will not adopt a policy which would render ratification useless or which would place obstacles in the way of the execution of the provisions of the treaty, once its ratification has been given.

97 [1962-I] YBILC 93 (Bartos).

98 Above n 97, 98.

99 Later reports still considered the legal consequences of signature, but not in the sense of imposing an obligation of proceeding to ratification: see the discussion on draft art 11 in the Fourth Report on the Law of Treaties [1965-II] YBILC 36; and ILC debate at [1965-I] YBILC 50-55.

100 Harvard Draft, above n 86, 778.

101 Harvard Draft, above n 86, 779, in which emphasis was placed upon the decisions of the Permanent Court of International Justice in the *Oder River Commission*, Series A, No 23 PCIJ 20; and the *Mavrommatis Case*, Series A, No 2 PCIJ 57 per Judge Moore.

102 Harvard Draft, above n 86, 780-781: this obligation though was only classified as one of good faith, which could not be classified as a legal duty. Compare *AA Megalidis v Turkey*, Decision of the Turkish-Greek Mixed Arbitral Tribunal (1927-1928) 4 Ann Dig IL Cases 395.

When the ILC began its consideration of this issue the Harvard Draft was once again relied upon. Article 7 in Brierly's 1951 report reproduced the Harvard Draft proposal¹⁰³ and this generated debate within the ILC over the doctrine of good faith and abuse of rights.¹⁰⁴ Despite the ILC deciding in 1951 to delete this provision, another draft article on the topic was included for consideration in Lauterpacht's first report in 1953.¹⁰⁵ With the retention of a similar article in Fitzmaurice's first report in 1956,¹⁰⁶ the recognition of such a principle in the law of treaties seemed to be confirmed. Despite considerable debate within the ILC over the actual application of the principle in later years there was little dissent over its substance.¹⁰⁷

When eventually debated at the Vienna Conference the wording of the ILC draft was changed so that the obligation not to "frustrate" a treaty was replaced with the obligation to not "defeat the object and purpose" of a treaty.¹⁰⁸ Commentators have interpreted the amendment as resulting from the need to ensure that while good faith be the operating principle the deletion of "tending to frustrate" removed any issue of subjective intent.¹⁰⁹ When presented to the Plenary Conference at Vienna the draft article was adopted unanimously as article 18 of the VCLT.¹¹⁰ The relevant portion of article 18 provides:¹¹¹

103 Revised Draft Articles of the Draft Convention [1951-II] YBILC 73.

104 [1951-I] YBILC 34-36, 39-42.

105 Article 5, Report of the Special Rapporteur on the Law of Treaties [1953-II] YBILC 108-112.

106 See art 30, Law of Treaties [1956-II] YBILC 104-128.

107 ME Villiger *Customary International Law and Treaties* (Kluwer, Dordrecht, 1985) 316-317. See, eg, [1965-I] YBILC 87-98, 262-263, 282-283. The complete wording of the then draft art 15 was:

"A State is obligated to refrain from acts tending to frustrate the object of a proposed treaty when:

- (a) It has agreed to enter into negotiations for the conclusion of the treaty, while these negotiations are in progress;
- (b) It has signed the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become party to the treaty;
- (c) It has expressed its consent to be bound by the treaty, pending the entry into force and provided that such entry into force is not unduly delayed."

108 I Sinclair *The Vienna Convention on the Law of Treaties* (2 ed, Manchester UP, Manchester, 1984) 43

109 JK Gamble and M Frankowska "The Significance of Signature to the 1982 Montego Bay Convention on the Law of the Sea" (1984) 14 ODIL 121, 124-125; see also K Holloway *Modern Trends in Treaty Law* (Stevens, London, 1967) 57.

110 Villiger, above n 107, 319.

111 Further reviews of the development of art 18 within the ILC and at the Vienna Conference can be found in W Morvay "The Obligation of a State not to Frustrate the Object of a Treaty Prior to its Entry into Force" (1967) 27 *Zeitschrift für Ausländisches öffentliches Recht und Völkerrecht* 451-462; MA Rogoff "The International Legal Obligations of Signatories to an Unratified Treaty" (1980) 32 *Maine LR* 263, 272-288; RF Turner "Legal Implications of Deferring Ratification of SALT II" (1981) *Va JIL* 747, 759-765.

A State is obliged to refrain from acts which would defeat the object and purpose of a treaty when:

- (a) it has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty

D Interpretation of Article 18 of the VCLT

The issue which now arises is what exactly is the extent of the obligation imposed by article 18?¹¹² Rogoff has come to the following conclusions regarding the effect of the obligation:

- (i) there is no affirmative duty upon a signatory to do certain acts or to carry out specific provisions of a treaty which it has signed;¹¹³
- (ii) a signatory may engage in normal activities incident to its sovereignty after signature but prior to entry into force, even though the effect of a particular activity may be to reduce the benefit of the bargain for the other signatory or signatories;¹¹⁴
- (iii) a signatory state may do those acts whose consequences would not render provisions of the treaty impossible of performance when the treaty enters into force.¹¹⁵

Rogoff does note that there has been some confusion over whether intentional action in bad faith is required before article 18 can be implemented, or if an objective standard exists. He concludes that, as actual state of mind is very difficult to prove, an objective standard should be applied.¹¹⁶

Gamble and Frankowska adopted the Rogoff criteria for article 18 in their study of how it could be applied to the 1982 United Nations Convention on the Law of the Sea (UNCLOS).¹¹⁷ In the course of their study they speculated on what actions would go to defeat the "object and purpose" of that particular treaty. Adopting the Rogoff view that

112 See DP O'Connell *International Law* (2 ed, Stevens, London, 1970) vol 1, 224. On whether art 18 is based on the principle of good faith, see S Rosenne *Developments in the Law of Treaties 1945-1986* (Cambridge UP, Cambridge, 1989) 148-149; T Hassan "Good Faith in Treaty Formation" (1981) Va JIL 443, 458-459; compare Villiger, above n 107, 321; and see also Sinclair, above n 108, 42-44.

113 Rogoff, above n 111, 297 citing the decision in the *Iloilo Claims* case, American and British Claims Arbitration (1926) 382.

114 Rogoff, above n 111, 297 citing the decision by the Permanent Court of International Justice in *German Interests in Polish Upper Silesia* (1926) PCIJ Series A, No 7.

115 Rogoff, above n 111, 297. Villiger's construction of art 18 is that "acts defeating the object and purpose of a treaty render meaningless subsequent performance of the treaty, and its rules": see above n 107, 322. See also the examples given in the Harvard Draft, above n 86, 782; and Morvay, above n 111, 453.

116 Rogoff, above n 111, 298-299. See also PV McDade "The Interim Obligation between Signature and Ratification of a Treaty" (1985) 32 Neth ILR 5, 27-28.

117 Done at Montego Bay, Jamaica, 10 December 1982; A/CONF 62/122, reprinted in (1982) 21 ILM 1261-1354.

such actions would have to render the treaty impossible of performance, they suggested that establishing a deep seabed mining regime outside of the part XI framework of UNCLOS would more than likely be considered to meet the article 18 requirement, especially given the importance attached to these provisions of the convention during its negotiation between 1971 and 1982.¹¹⁸

While it is possible to gain from the debate within the ILC and subsequent literature an understanding of how article 18 is to be interpreted, the issue of whether article 18 has been accepted as now being part of the law of treaties is another matter. Despite comments at the time of its negotiation that it was not representative of existing custom,¹¹⁹ there is evidence to suggest that states have since accepted the article as binding either as custom or under the VCLT.¹²⁰ Given the developments in state practice since the VCLT was negotiated and the acceptance of article 18 during the intervening period,¹²¹ it can be concluded that article 18, while perhaps being initially seen as *lex feranda*, has now become accepted as part of the law of treaties.

E *The Role of Good Faith in the Law of Treaties*

In recent times the doctrine of good faith has increasingly been recognised for its important role in international law. This doctrine, and the related doctrine of abuse of rights, are seen as lending support for the existence of an international morality which prevails upon states and influences their actions.¹²² Despite the support for these doctrines, their content and actual influence in international law has been the subject of great debate.¹²³ Nevertheless, there is acceptance that good faith, or the duty to act bona fide, does have an important role in ensuring the smooth functioning of international

118 Gamble and Frankowska, above n 109, 134; see also on this point McDade, above n 116, 44-47.

119 See O'Connell, above n 112, 223; Rosenne, above n 112, 149.

120 See in the cases of the United States, Canada and the UK respectively: M Frankowska "The Vienna Convention on the Law of Treaties before United States Courts" (1988) 28 Va JIL 281, 299 n 82; "Rights and Duties of States: Provisional Application of Treaty - Material Breach - Response" (1978) 16 Can YBIL 366; I Sinclair "The Vienna Convention on the Law of Treaties: The Consequences of Participation and Nonparticipation" (1985) Proc 79th Ann Meet Amer Soc IL 270, 274.

121 For other examples of state practice, see Gamble and Frankowska, above n 109, 127-128, 142-153; Turner, above n 111, 766-769; RE Dalton "The Vienna Convention on the Law of Treaties: Consequences for the United States" (1985) Proc 79th Ann Meet Amer Soc IL 276, 277-278.

122 For a discussion of morality in international law, see GI Tunkin "International Law and other Social Norms functioning within the International System" in B Cheng and ED Brown (ed) *Contemporary Problems of International Law* (Stevens, London, 1988) 296-302; T Nardin *Law, Morality and the Relations of States* (Princeton UP, Princeton, 1983).

123 See G Schwarzenberger "The Fundamental Principles of International Law" (I-1955) 87 RdC 194, 290-326; V Paul "The Abuse of Rights and Bona Fides in International Law" (1977) 28 *Osterreichische Zeitschrift für öffentliches Recht und Völkerrecht* 107-130.

relations and creating an international system based on mutual respect, trust and understanding between states.¹²⁴ As Paul has argued:¹²⁵

Without good faith being respected in international relations nowadays, without mutual problems being solved in good faith in accordance with the interests of states, life in the international community would be impossible in modern times where mutual interdependence of states is quite obvious.

The law of treaties has been influenced in many aspects by the doctrine of good faith. Article 26 of the VCLT expressly recognises good faith in the principle of *pacta sunt servanda*.¹²⁶ It has been argued that the doctrine of good faith was influential in the development of article 18 of the VCLT.¹²⁷ When the forerunner to article 18 was discussed in the Harvard Draft it was noted that the obligation imposed was based upon good faith,¹²⁸ and during the 1965 ILC debates there was some argument as to whether the term "good faith" should actually be included in the draft.¹²⁹

Good faith has also been recognised as having a strong influence in the interpretation and execution of treaties. In his Hague Academy lectures Schwarzenberger tackled this issue, emphasising the importance of the doctrine and its links to bad faith.¹³⁰ The importance of the doctrine of good faith then is central to an understanding of the law of treaties. It is "the basic premise upon which all international intercourse is based and in which law can be firmly rooted."¹³¹ Given the importance of good faith in international law, and its impact on the law of treaties, its influence must not be discounted in considering New Zealand's relationship with CRAMRA.

III NEW ZEALAND, CRAMRA, AND THE LAW OF TREATIES

A *Did New Zealand have an Obligation to Ratify?*

Following the debates which took place within the ILC and during the negotiation of the VCLT, it must be accepted that at that time there was a majority view that no obligation existed upon a state to ratify a treaty that it had signed. An example of this approach was put forward by Lord McNair, who persuasively argued against the

124 M Lachs "Some Thoughts on the Role of Good Faith in International Law" in RJ Akkerman (ed) *Declarations on Principles* (Sijthoff, Leyden, 1977) 50. See also Schwarzenberger, above n 123, 301, where good faith was seen as serving as a "measuring rod by reference to which it can be tested whether, in any individual case, subjects of international law have lived up to these standards in the relations governed by the *lex inter partes* of a consensual engagement."

125 Above n 123, 122.

126 For a comment on this aspect of the VCLT, see Sinclair, above n 108, 83-84; TO Elias *The Modern Law of Treaties* (Oceana, Dobbs Ferry, 1974) 40-45.

127 Rosenne, above n 112, 148-149; compare Villiger, above n 107, 321.

128 Harvard Draft, above n 86, 781.

129 [1965-II] YBILC 262-263, 282-283.

130 See Schwarzenberger, above n 123, 300-301.

131 Lachs, above n 124, 53.

existence of such a legal or moral obligation in international law. Emphasising the importance of allowing a state the opportunity of studying the advantages and disadvantages of a treaty without the pressures accompanying the negotiating process,¹³² McNair saw that states which refused to ratify usually only did so after a full consideration of many factors:¹³³

It is not the practice of an enlightened Government to sign a treaty unless, subject to new circumstances intervening, it means to ratify it in due course. To withhold ratification lightly and without adequate reason, or in the hope of obtaining some new concession in the same or another subject of negotiations, is a breach of courtesy and "bad business"; but Governments usually realize from their own experience that the Government of the other contracting party may meet with insurmountable political difficulties which preclude ratification.

While both the ILC and VCLT rejected recognition of any obligation upon a signatory state to ratify, Hassan has suggested that the matter should be reconsidered following the subsequent acceptance of article 18 and the further development of the doctrine of good faith. In a reassessment of the actual significance of ratification in the modern era of treaty-making, Hassan argues that it is now virtually impossible for a State to claim that an agent has acted in excess of authority as a reason for non-ratification. Rather, states now increasingly refuse to sign a treaty which they believe they ultimately will not ratify.¹³⁴ Relying upon these changes in state practice, Hassan claims that:¹³⁵

the recent change in the importance of signature logically leads to a requirement that any refusal to ratify be based on the principle of good faith. Since practice normally emerges through the acceptance of doctrine, the growing recognition of the concept of the abuse of rights and its doctrinal application to the question of ratification eventually may lead to its application in State practice. At that time, the contemporary moral obligation to ratify will have entered the realm of law.

While Hassan did not rely upon state practice to support his argument, there is evidence which suggests that states are now beginning to acknowledge the impact that states which refuse to ratify have upon the multilateral treaty-making process. In the late 1970s the Secretary-General of the UN was asked to prepare a report on the techniques and procedures used in the elaboration of multilateral treaties.¹³⁶ In preparing the report the Secretary-General addressed the following question: "Should the United Nations consider and take action in respect of the procedures by individual States to ratify and bring into force multilateral treaties formulated under its auspices?"¹³⁷ Though many states considered that such action would potentially interfere with the

132 AD McNair *The Law of Treaties* (Clarendon Press, Oxford, 1961) 133.

133 Above n 132, 135.

134 Above n 112, 461-463.

135 See above n 112, 464; for general comments on the doctrine of good faith in the law of treaties, see Rosenne, above n 112, 135-179.

136 UNGA Res 36/112 (10 Dec 1981).

137 *Review of the Multilateral Treaty-Making Process* ST/LEG/SER B/21 (1985) 148.

internal law of a state, both the United States and the Netherlands responded favourably. Describing the problem of unratified treaties as being "considerable" the United States submitted that the:¹³⁸

entire process of drafting and adopting treaty texts becomes fruitless if the resulting treaties are not ratified, and a less effective process if ratifications do not come about with sufficient reach and rapidity that treaties come into force within a reasonable period of time after their completion.

In its response the Netherlands gave attention to whether obligations could be imposed upon states after signing a treaty to ensure that the ratification process was proceeded with. It made the following submission:¹³⁹

One might envisage for example making the obligation of good faith separate from the signing of the treaty. Such obligation would therefore have to have its starting point in the collective decision to establish the text of a treaty or in the decision to label the treaty as urgent.

It cannot be argued that New Zealand came under any legal obligation to ratify CRAMRA, given that the existence of such an obligation has continually been rejected by the ILC, during negotiation of the VCLT, and by the commentators. There is support, though, from some commentators and states for the proposition that good faith in international law requires states which have signed treaties to at least proceed towards ratification. However, these arguments cannot at present be said to amount to the existence of customary international law on this point.

B Is New Zealand in Breach of Article 18 ?

With respect to article 18 of the VCLT, New Zealand was subject to the obligation not to defeat the "object and purpose" of CRAMRA from the time of its signature in November 1988. While there has been a debate amongst commentators as to the true nature and effect of article 18, it is accepted that whatever obligation may be imposed by that article, does not continue once a state has made its intention clear not to become a party to the treaty.¹⁴⁰ Following the New Zealand decision to "set aside ratification" of CRAMRA it would seem that New Zealand made clear its intention "not to become a party to the treaty".¹⁴¹ Whether the statements by Prime Minister Palmer in either February or August 1990 were sufficient to bring to an end the application of article 18 against New Zealand is difficult to determine. New Zealand was, however, subject to the limitations of article 18 from at least November 1988 until February 1990.

138 Above n 137, 157-158.

139 Above n 137, 155; see also at 156, where it is suggested that art 18 of the VCLT may be helpful in these cases.

140 Villiger, above n 107, 322.

141 On 27 October 1990 New Zealand elected a National Party government headed by Jim Bolger. There has been no indication that the new government has a different attitude towards CRAMRA, or intends to reverse the stand previously taken by the Labour government.

As has been noted, during much of the time that CRAMRA was open for signature New Zealand very actively supported the convention despite the attitude of other ATCPs. It was only after both Australia and France made their position clear that New Zealand began to reconsider its policy towards mining and the future of Antarctica. The New Zealand "White Paper on Antarctic Environment" was released to provide a basis for community discussion in the lead up to ATCM XV in Paris. While stating that the government was now seeking the development of an "Antarctic park concept", the White Paper stated that this policy "does not mean turning our backs on the complex negotiations that led to" CRAMRA.¹⁴² The assertion in the White Paper that New Zealand "is opposed to mining and always has been opposed to mining in Antarctica",¹⁴³ and that "detailed measures of environmental protection for Antarctica within an integrated framework"¹⁴⁴ should be developed are difficult to reconcile with continued support for CRAMRA. However, the official position of the New Zealand delegation at the Paris ATCM was that New Zealand still supported CRAMRA and awaited its implementation. It was only after that meeting that New Zealand reassessed its attitude towards CRAMRA, with the first indication of a substantial change in policy being the Prime Minister's February statement. On the evidence available it is therefore difficult to argue that the actions of New Zealand during the period from November 1988 to February 1990 had the potential to defeat the "object and purpose" of CRAMRA. While government policy may have undergone a subtle change during this time, especially after the release of the White Paper, New Zealand did not, for instance, actively begin to support New Zealand companies commencing unregulated mining activities in Antarctica. On the current interpretation of article 18, it would have been necessary to find evidence of that type to argue that New Zealand had sought to defeat the "object and purpose" of CRAMRA.

A further question that should be asked regarding the potential application of article 18 to New Zealand is whether the obligation dissolves once it is certain that the treaty in question will not enter into force? This is especially pertinent in regard to CRAMRA, given the arguments that once Australia and France decided not to sign in May 1989 the convention could not enter into force. If that was the case - and certainly a reading of the final Act of the 4th SATCM would seem to confirm the interpretation that CRAMRA would only enter into force with the participation of all the claimant states - the fate of the convention was sealed from the time of the announcement by Australia and France that they would not sign CRAMRA.¹⁴⁵ New Zealand's actions would then have had no real effect on the future viability of CRAMRA, if, following Australia's announcement on 22 May 1989, CRAMRA had already effectively been abandoned.

142 Above n 25, 9-10.

143 Above n 25, 10.

144 "Working Paper on the Protection of the Antarctic Environment submitted by New Zealand" (XV ATCM/WP/4) in the *Final Report*, above n 66, 214.

145 Compare Blay and Tsamenyi, above n 56, 10-16.

Without even considering the complex question of whether the VCLT applies to CRAMRA and accordingly regulates the relationship between all 19 signatory states,¹⁴⁶ it would seem that on 3 grounds article 18 has no application against New Zealand. First, because it did nothing during the period that it supported the Convention to defeat its "object and purpose". Secondly, because as from 22 May 1989 CRAMRA could no longer possibly enter into force. Finally, because during 1990 New Zealand definitely made known its intention that, despite having signed CRAMRA, it no longer wished to become a party to the convention.

C Are there Additional Obligations to Article 18?

It may well be that, 10 years after the VCLT entered into force, it is now accepted that an international obligation exists which requires states which have signed a treaty not to defeat the object and purpose of that treaty. It is doubtful, though, whether anything approaching an article 18 obligation can be extended to impose further legal requirements upon states as a consequence of the act of signature. There is, however, evidence that states are beginning to view the act of signature more seriously. The acknowledgement that the United Kingdom deliberately withheld its signature of UNCLOS as also did other states,¹⁴⁷ is evidence that the act of signature was seen in that instance as potentially creating legal obligations.¹⁴⁸ Signature was not being viewed as mere acknowledgement that the text of the treaty was consistent with that agreed upon at the codifying conference, or that tacit approval was being given to its provisions. Indeed, it has actually been suggested that, given the length of the negotiations and importance of the ensuing convention, a decision not to sign UNCLOS should be given extra significance.¹⁴⁹

From the adoption of the Text (April 1982) until the signing ceremony (December 1982), states were afforded ample time to be certain whether they wanted to sign the Convention. This means that decisions not to sign were perceived as definite stands, not explainable on the grounds of the unavailability of proper instructions from governments.

This change in state practice may have resulted from the consequential effects of article 18 and the tremendous significance of the codificatory impact of UNCLOS.

146 New Zealand is a party to the VCLT, but not all of the other signatory states are.

147 Sinclair, above n 120, 274. Although they signed the final Act of the conference, the Federal Republic of Germany, Japan and the United States initially refused to sign UNCLOS. Japan has since done so.

148 See G Marston (ed) "United Kingdom Materials on International Law" (1984) 55 BYIL 509-510, for the statement by Rifkind, Minister of State, Foreign and Commonwealth Office, in the House of Commons that "it is not our practice in the United Kingdom to sign international treaties that we do not think we will be able to ratify. We are not in a position to undertake to ratify the United Nations law of the sea convention. Even those who favour signature would regard ratification of the present convention as against our interests."

149 Gamble and Frankowska, above n 109, 157.

Similarities do exist between what occurred when UNCLOS was opened for signature and what occurred in the case of CRAMRA. With CRAMRA there was also a significant gap in time between the conclusion of the meeting which agreed to the final text of CRAMRA and final Act (2 June 1988) and the convention actually becoming open for signature (25 November 1988). New Zealand chose immediately to give the convention its formal support and signed on 25 November 1988. This provided an initial boost to the possible entry into force of the convention, given the importance attributed by article 62 to ratification by ATCPs and claimant states. It also demonstrated New Zealand's continuing commitment to CRAMRA, consistent with the initiatives it had taken during the negotiations to finalise a minerals regime. In Australia and France, though, there was much greater debate within government and amongst the public as to whether CRAMRA should even be signed.¹⁵⁰ This was despite the fact that under the terms of CRAMRA it was only ratification, acceptance or accession which would eventually bring the regime into force. Therefore, as was the case with UNCLOS, Australia and France chose not to sign CRAMRA because they were aware that certain legal consequences would follow which would make it difficult for them to commence their campaign for the implementation of an Antarctic regime which philosophically conflicted with CRAMRA. Other states, like the Federal Republic of Germany, chose not to sign CRAMRA because of the increasing political debate amongst the ATCPs over whether CRAMRA was the correct "option" for Antarctica. By not signing, the Federal Republic of Germany remained "unaligned" and retained the ability to conciliate between the various groups in an attempt to avoid polarization within the Antarctic Treaty system.¹⁵¹

It can therefore be argued that, following the very public stands taken by high profile states at the conclusion of both UNCLOS and CRAMRA not even to sign these conventions, states do not view the act of signature lightly. What occurred in these 2 cases may have been influenced by the political considerations surrounding these controversial conventions. It can also be argued, though, that article 18 and the legal consequences which result from signature must also have weighed heavily upon states when deciding not to sign UNCLOS and CRAMRA. Whether these refusals to sign a treaty can also be interpreted as acknowledgement of the existence of other obligations in international law consequent upon signature is yet to be determined.

D Does New Zealand have any Obligation as a "Principal State"?

It has been demonstrated above that New Zealand had a special relationship with CRAMRA. One of its leading diplomats had been chairman of the SATCM, a number of these meetings had been held in New Zealand - including that which concluded the convention and article 61 of CRAMRA recognised New Zealand as the depositary for

150 For an analysis of the Australian position, see SKN Blay and BM Tsamenyi "Australia and the Convention on the Regulation of Antarctic Mineral Resource Activities (CRAMRA)" (1990) 158:26 *Polar Rec* 195-202.

151 Letter from the Embassy of the Federal Republic of Germany, Canberra, 15 November 1990; Bericht der Bundesregierung ueber die XV Antarktiskonsultativtagung vom 9-20 Oktober 1989 in Paris (23 November 1989) 2.

the convention. There was also the suggestion that if a secretariat had been established to the Antarctic Mineral Resources Commission, a location in New Zealand would have been selected. New Zealand had committed itself to the successful negotiation of CRAMRA and certainly played the role of a "principal" or "sponsoring" state in ensuring its successful completion. Do any obligations flow from this special position held by New Zealand ?

As the named depositary to CRAMRA, New Zealand had certain obligations imposed upon it. The convention was open for signature in Wellington for a period of 12 months,¹⁵² and any instruments of ratification, acceptance, approval or accession were to be deposited with New Zealand.¹⁵³ As the depositary, New Zealand had to notify the contracting parties to the convention of all signatures and instruments adopting CRAMRA, and the date of its entry into force.¹⁵⁴ These functions imposed upon New Zealand were normal for a depositary and are in fact dealt with in part VII of the VCLT. The VCLT sought to codify international practice in this area and there was general agreement within the ILC when the functions of a depositary were first discussed in 1962.¹⁵⁵ The ILC debate on this topic is of interest, as a number of members made reference to the important role played by a depositary. Rosenne suggested that the United Nations had never accepted that a depositary was a mere "postbox": instead, the functions were more akin to that of a "trustee" of the parties to the convention.¹⁵⁶ Another member noted that the implication of "bad faith on the part of a depositary ... was extremely unlikely."¹⁵⁷ While this debate does signify the importance of the role of a depositary to a treaty, the only obligation imposed upon a depositary by the VCLT is one of impartiality in the performance of its functions.¹⁵⁸

Given the important role of the depositary in a multilateral treaty, what was the position of New Zealand as a principal state responsible for the negotiation of CRAMRA? Holloway discusses the role of "principal" states when referring to action taken by the United States towards both the League of Nations and Genocide Convention, and that of France towards the European Defence Community Treaty.¹⁵⁹ While acknowledging that the law of treaties accepts ratification as a discretionary act, Holloway argues that:¹⁶⁰

a State often signs or even ratifies a convention because it considers the signature of a particular State or States as a sufficient guarantee of its value and future effectiveness. This is particularly true, as regards the signature of major Powers, in the case of major

152 Article 60.

153 Article 61.

154 Article 66.

155 See arts 26 and 27, First Report on the Law of Treaties by Sir Humphrey Waldock [1962-I] YBILC 81-83.

156 [1962-I] YBILC p 188, para 13-14.

157 Above n 156, p 190, para 42 (Gros).

158 See art 76(2). For a discussion on the rights and duties of depositories, see Elias, above n 126, 209-216; Rosenne, above n 112, 415-424.

159 Above n 109, 48-53.

160 Above n 109, 50.

political treaties and general multilateral treaties of a quasi-legislative or institutional character.

The United States refusal to ratify the Covenant of the League of Nations is perhaps the best and most well known example of a principal state failing to support a treaty which it had sponsored. It was because of the prominent role taken by President Wilson and the United States in the conclusion of the peace treaties and conception and organisation of the League of Nations that many states signed and ratified the covenant. Yet despite there being no legal or moral obligation to ratify, Holloway contends that given the importance of the treaty to international law and the maintenance of peace, the "necessity of recognising the principle of a moral and legal obligation to ratify a regularly signed treaty acquires compelling force."¹⁶¹

This example again shows the important role which good faith can play in international law and in the law of treaties. With the explicit recognition given to good faith in the VCLT, it is now perhaps time to reconsider whether the doctrine has any further application to the law of treaties. Paul has argued that the principle of good faith imposes obligations upon a state "not to use its formal rights in interest of its own policy to the detriment of legitimate interests of other states or to the detriment of general aims of the international community."¹⁶² This growing recognition of the role of good faith in international law and the obligations it imposes upon states to act with regard to other states further strengthens the argument that principal states have certain obligations imposed upon them as a result of the role they take in the treaty negotiation process. What form these obligations take is difficult to determine exactly. However, in light of McNair's comment, it could be argued that "courtesy" and "good business" would require that such a state at least exercise more patience during the period prior to entry into force of the treaty; and that, if it does abandon the treaty, states which have become a party to the treaty are entitled to an explanation.

IV CONCLUSION

The law of treaties has recognised that a legal obligation exists for states during the interim period between signature and eventual entry into force of a treaty or the signing state's refusal to ratify. This obligation, found in article 18 of the VCLT, has its basis in good faith. Whether there is any further obligation in international law upon signatory states is at present uncertain. But it may well be that there is a developing rule of customary international law based on existing treaty law, good faith, and state practice which extends the duty of good faith to states which have been principal states during the treaty negotiation. When considering the existence of such an obligation in the case of states like New Zealand who have sponsored the negotiation of a treaty and acted as a principal state, it becomes necessary to balance competing interests. One is the recognition of the sovereignty of a state to retain its freedom of action to either ultimately accept or reject a treaty. The others are the obligations imposed upon that state as a consequence of its participation in the treaty-making process, and its relations

¹⁶¹ Above n 109, 51.

¹⁶² Paul, above n 123, 125.

with other states that participate in that process and have become parties to the treaty in good faith. Balancing these interests is a difficult task, but there is evidence that while no such obligation was positively considered to exist during the work of the ILC and negotiation of the VCLT, the subsequent acceptance of article 18 and concern about multilateral treaties being left unratified has seen both commentators and states raise the issue of whether such an obligation should in fact exist. The acceptance given to the influence of good faith in the law of treaties by the VCLT, and the need to ensure that multilateral treaties, once negotiated, do enter into force may be the catalyst for future detailed consideration being given to this issue.

In the case studied here New Zealand effectively abandoned CRAMRA despite the principal role it took in the debate over a minerals regime and negotiation of the convention. There has, of course, been a very substantial change in the politics of Antarctic mining since 1988, a defence which is legitimately open to New Zealand. However, given New Zealand's role in CRAMRA and the significance it attached to the convention, it is difficult to believe that allegations of "bad business" or even of bad faith were not considered by some signatory states following New Zealand's actions in 1990. That 18 other states had also signed CRAMRA during the 12 months that it was open for signature is further evidence that the convention did initially have considerable support. Though no ratifications were received, would New Zealand have acted as it did if its withdrawal had the effect of substantially delaying the convention's implementation, or even ensuring that it would not enter into force? Given the total abandonment of CRAMRA by all the ATCPs that occurred in 1991, the answers to some of these questions have no immediate practical significance. This study has, however, sought to demonstrate that international law may have developed, or is developing in such a way that a treaty divorce may not be so simply achieved in the future.