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MARITIME CLAIMS IN ANTARCTICA

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ABSTRACT

Current issues relating to resources in Antarctica, particularly the exploitation of marine resources, have focused attention on the issue of maritime jurisdiction in Antarctica. This object of this paper is to consider how the regime of maritime zones established by the United Nations Convention on the Law of the Sea 1982 can be applied to Antarctica, and to assess the legal basis upon which those zones might be asserted by claimants to territorial sovereignty in Antarctica. The actions of Australia and New Zealand regarding maritime claims are discussed and compared.

The paper considers the relationship between the maritime zones of UNCLOS and the prohibition contained in the Antarctic Treaty against the extension of existing claims or the assertion of new claims. The paper concludes that the Antarctic Treaty is reasonably able to be interpreted to support both the view that claims to maritime zones are prohibited and the view that they are permitted, although the latter argument seems to be more strongly supported by international convention and customary law.

This dual interpretation of the provisions in the Antarctic Treaty and the other legal instruments of the Antarctic Treaty System, is the means by which the interests of both claimants and non-claimants to territory in Antarctica are accommodated. The paper concludes that the interpretation chosen by a particular State Party to the Antarctic Treaty will be determined by political objectives relating to sovereignty, rather than legal considerations.

The text of this paper (excluding contents page, footnotes, bibliography and annexures) comprises approximately 12000 words)

INTRODUCTION **TABLE OF CONTENTS**

I	INTRODUCTION	1
II	THE ANTARCTIC TREATY SYSTEM.....	4
III	THE LAW OF THE SEA IN ANTARCTICA.....	8
A	THE UNITED NATIONS CONVENTION ON THE LAW OF THE SEA	8
B	THE RELATIONSHIP BETWEEN UNCLOS AND ANTARCTICA	9
	1 <i>Maritime zones established by UNCLOS</i>	9
	2 <i>The Antarctic Treaty System: A surrogate coastal state?</i>	10
IV	THE ESTABLISHMENT OF MARITIME ZONES IN ANTARCTICA.....	12
A	THE SEARCH FOR A COASTAL STATE.....	13
B	THE SCOPE OF ARTICLE IV	13
C	THE EFFECT OF ARTICLE IV	17
	1 <i>The Territorial Sea</i>	17
	2 <i>The Continental Shelf</i>	19
	3 <i>The Exclusive Economic Zone</i>	20
V	STATE PRACTICE IN ESTABLISHING MARITIME ZONES IN ANTARCTICA	22
A	AUSTRALIAN MARITIME CLAIMS IN ANTARCTICA.....	24
	1 <i>The Territorial Sea</i>	26
	2 <i>The Continental Shelf</i>	26
	3 <i>The Exclusive Economic Zone</i>	27
B	THE NEW ZEALAND CLAIM.....	31
	1 <i>New Zealand's claim to the Ross Dependency</i>	32
	2 <i>The exercise of sovereignty in the territorial sea</i>	33
	3 <i>Legislating for maritime areas in the Ross Dependency</i>	36
	4 <i>Implementation of other Antarctic Treaties</i>	42
C	COMPARISON OF NEW ZEALAND AND AUSTRALIAN PRACTICE	42
VI	CONCLUSION	44
	BIBLIOGRAPHY	45

ANNEXES

I INTRODUCTION

In May of this year New Zealand hosted the XXIst Antarctic Treaty Consultative Meeting, whereby the Parties to the Antarctic Treaty meet annually to discuss Antarctic matters. Media coverage of the Meeting focused on two particular aspects of the Meeting. The first was the failure of the Meeting to address the issue of illegal fishing for *Dissostichus eleginoides* or Patagonian Toothfish in Antarctic waters. The stocks of this highly lucrative species are rapidly being depleted despite the existence of a regulatory regime in respect of Antarctic fishing.

The second focus was on the inability of the Meeting to resolve the issue of the location of a proposed Secretariat of the Antarctic Treaty System, an issue which has plagued treaty parties for a substantial number of years.

Underlying both these failings is the issue of sovereignty over Antarctica.

Antarctica is the only continent without a recognised sovereign state. It is true that seven territorial claims have been made to the continent, but these are not recognised by any government in the international community save for the claimants themselves, and three of the claimants do not recognise the lawfulness of each other's claim.¹

It is therefore hardly surprising that the dispute over sovereignty between claimants and non-claimants is the defining feature of the Antarctic Treaty System. The System has survived by creating a legal regime able to be interpreted by both claimants and non-claimants consistently with their respective views of the sovereignty issue. The dichotomous nature of the legal regime of the Antarctic Treaty System, while enabling its survival and the maintenance of peace and co-operation in Antarctica for almost forty years, also has also had the effect of creating uncertainty as to the application of other

¹ Christopher C Joyner *Antarctica and the Law of the Sea* (Martinus Nijhoff Publishers, Dordrecht, The Netherlands, 1992), p 75.

international legal instruments, and particularly the United Nations Convention on the Law of the Sea 1982 (UNCLOS).

While the issue of location of the Treaty Secretariat is entwined in issues of overlapping claims to sovereignty, the issue of illegal fishing has exposed the difficulty in enforcing a regulatory regime in the absence of jurisdiction over the waters to which it applies.

The basis for the exercise of national jurisdiction over marine areas is set out in UNCLOS. This Convention determines the maritime zones over which coastal states can exercise jurisdiction and the extent to which they can do so. However, the dichotomous nature of the Antarctic Treaty System and the 'agreement to disagree' over claims also inevitably extends to disagreement over the existence of 'coastal states' in Antarctica.

Consideration of the legal basis for establishing the UNCLOS maritime zones in Antarctica is therefore defined firstly by the disputes as to sovereignty, and secondly, by the ambiguity and double meaning of the law of the Antarctic Treaty System which flows from those disputes. It is inherently a political issue and it is therefore to be expected that the acts of states in this regard will demonstrate a subordination of legal considerations to political realities.

In 1972 Auburn wrote that 'It is true that it will only be when economic resources are discovered (in Antarctica) that the real test of the present international harmony will come'.² It would seem that this prediction has been borne out by the recent discovery of Patagonian Toothfish resources in the Southern Ocean. It may be that claimant states will be prompted to consider establishing maritime zones as a way of protecting Antarctic resources. However, to do so threatens to push the 'agreement to disagree' over sovereignty beyond the limits of the tolerance of non-claimants.

² FM Auburn *The Ross Dependency* (Martin Nijhoff, The Hague, 1972), p 43.

This paper examines the applicability of the UNCLOS framework of maritime zones to Antarctica and concludes that persuasive legal arguments can be made for the application of this framework to Antarctica and the establishment of maritime zones in accordance with UNCLOS. However, it concludes that whether or not claimant States will take such a step is likely to be determined by political considerations rather than legal ones.

The first part of the paper introduces the territorial claims to Antarctica and the dichotomous nature of the Antarctic Treaty System.

The second part of the paper examines the provisions of UNCLOS relating to maritime zones and identifies the difficulties in applying them to Antarctica. The opposing views of claimants and non-claimants are discussed.

The third section of the paper considers more closely the legal arguments made in support of each view, and concludes that the absence of a recognised coastal state does not of itself preclude claimants from establishing maritime zones in accordance with UNCLOS. In this respect, the argument that the establishment of those zones is contrary to Article IV of the Antarctic Treaty is examined and found to be simplistic. The legal position is complex and different considerations are relevant to the different zones which are able to be claimed at international law.

The fourth part of the paper looks at State practice with regard to establishing maritime claims in Antarctica, and concludes that every claimant has claimed some form of maritime zone adjacent to their claim to the continent itself. The conclusion is reached that State practice is varied and does not point to any consistent application of the law of maritime zones to Antarctica.

The final parts of the paper consider the practice of Australia specifically and, in more detail, New Zealand, in relation to maritime claims in Antarctica. There are significant

differences between the actions of each State toward maritime areas and the possible reasons for these differences are discussed. Australia has taken a much more assertive approach to the declaration of claims, and it is concluded that while the legal arguments made in support of Australian actions apply equally to New Zealand, there are political and practical reasons why New Zealand may not follow Australia's example.

II THE ANTARCTIC TREATY SYSTEM

This part of the paper gives a brief summary of claims to territory in Antarctica and an introduction to the nature of the Antarctic Treaty System. It is not intended to assess the legitimacy of the claims to sovereignty at international law which is unnecessary for the purposes of this paper and which is an area of substantial jurisprudence and legal analysis in its own right³.

The United Kingdom (1908), New Zealand (1923), France (1924), Australia (1933), Norway (1939), Chile (1940) and Argentina (1942) have claimed territory in Antarctica⁴. These claims are 'sectoral': a certain point in a land area is occupied and claims to sovereignty made sectorally to the South Pole and north to 60° Sth.⁵

These sometimes conflicting claims to sovereignty⁶ and the non-recognition of these claims by other States active in Antarctica⁷ prompted a need for some kind of *modus vivendi* between claimants and non-claimants to be established. The catalyst for action came in the International Geophysical Year (1957-8) which emphasised the need for cooperation and freedom in the scientific investigation of Antarctica. The Antarctic

³ See for example Emilio J Sahurie *The International Law of Antarctica* (Martinus Nijhoff Publishers, Dordrecht, 1992); Christopher C Joyner, see n 1 above; Sudhir K Chopra and Christopher C Joyner (Eds) *The Antarctic Legal Regime* (Martinus Nijhoff Publishers, Dordrecht, 1988); Sir Arthur Watts, *International Law and the Antarctic Treaty System* (Grotius Publications Ltd, Cambridge, 1992).

⁴ See map of Antarctica showing sectors claimed at Appendix A.

⁵ Bo Johnson Theutenberg *The Evolution of the Law of the Sea* (Tycooly International Publishing Ltd, Dublin 1984), p62.

⁶ Particularly between the United Kingdom, Chile and Argentina in respect of the Antarctic Peninsular

⁷ Specifically, the United States and Russia

Treaty of 1959 was the result.⁸ The Treaty established a legal regime to ensure cooperation and freedom of scientific investigation could continue by demilitarising the continent and ameliorating the problems of uncertain sovereignty.

Although the Treaty did not create an international organisation as part of the regime it established, it did create a mechanism by which Parties would convene for consultations on 'matters of common interest pertaining to Antarctica' and to develop measures in furtherance of the principles and objectives of the Treaty⁹. This mechanism has become the Antarctic Treaty Consultative Meeting whereby the Consultative Parties¹⁰ have developed 'the competence to commence a process of continuous formulation of Antarctic law and politics'¹¹ which has become known as The Antarctic Treaty System (ATS).¹² The ATS is comprised of

the Antarctic Treaty, the measures in effect under that Treaty, its associated separated international instruments in force and the measures in effect under those instruments.¹³

These include the Agreed Measures for the Conservation of Flora and Fauna 1964 (the Agreed Measures)¹⁴, the Convention on Antarctic Seals 1972¹⁵, the Convention for the Conservation of Marine Living Resources 1980 (the CCAMLR Convention)¹⁶ and the

⁸ The Treaty was negotiated in Washington between Argentina, Australia, Belgium, Chile, France, Japan, New Zealand, Norway, South Africa, the USSR, the United Kingdom and the United States of America. It entered into force in June 1961, when ratified by all those countries who had been at Washington.

⁹ Article IX.

¹⁰ These are currently the original 12 plus Brazil, China, Ecuador, Finland, Germany, India, Italy, the Republic of Korea, the Netherlands, Peru, Poland, Spain, Sweden and Uruguay.

¹¹ Davor Vidas in Olav Schram Stokke and Davor Vidas *Governing the Antarctic, The Effectiveness and Legitimacy of the Antarctic Treaty System* (Cambridge University Press, Cambridge 1996), p 37.

¹² For a full analysis of the nature of the Antarctic Treaty System see *ibid*, Ch 2.

¹³ Article 1(e) of the Protocol to the Antarctic Treaty for Environmental Protection 1992.

¹⁴ Reproduced in the Second Schedule to the Antarctica Act 1960.

¹⁵ 1080 UNTS 175. New Zealand has not ratified this Convention.

¹⁶ New Zealand ratified this Convention on 22 December 1994. It is reproduced in the schedule to the Antarctic (Environmental Protection) Act 1994, which implements it in New Zealand domestic law.

Protocol on Environmental Protection to the Antarctic Treaty 1991 (Madrid Protocol)¹⁷. A further treaty which has not entered into force, and is not expected to, is the Convention for the Regulation of Antarctic Mineral Resources 1988 (the CRAMRA Convention).¹⁸

The challenge for the negotiators of the Antarctic Treaty was to devise a means of accommodating the interests of claimants and non-claimants in Antarctica. Failure to meet this challenge would have rendered impossible achievement of the objectives of preserving Antarctica for only peaceful purposes and for co-operation in scientific investigation of the continent. The answer was Article IV. The whole of the ATS relies on the preservation of the 'agreement to disagree' embodied in Article IV of the Antarctic Treaty and reiterated in the subsequent instruments it has spawned. It has successfully kept the peace in Antarctica for nearly forty years, and earned the right to be dubbed the 'flexi-glue' of the ATS¹⁹.

Article IV provides that:

- (1) Nothing contained in the present Treaty shall be interpreted as:
 - (a) A renunciation by any Contracting Party of previously asserted rights or of claims to territorial sovereignty in Antarctica;
 - (b) A renunciation or diminution by any Contracting Party of any basis of claim to territorial sovereignty in Antarctica which it may have whether as a result of its activities or those of its nationals in Antarctica, or otherwise;

¹⁷ The Protocol has yet to enter into force. All the Consultative Parties must ratify the Protocol for it to enter into force (Article 23), and Japan has yet to do so, although it is expected that it will ratify before the end of this year. The Protocol is implemented by New Zealand in the Antarctic (Environmental Protection) Act 1994. The provisions of the Act not yet in force will do so on entry into force of the Protocol at international law.

¹⁸ CRAMRA has not been ratified by any of the signatories to the Convention, and has been superseded by the Madrid Protocol which creates a total ban on mining in Antarctica.

¹⁹ Above n 1, p 46. Article IV has been variously described as 'an example of legal acrobatics which poorly conceal an internal contradiction' (Van der Essen, in Francisco Orrego Vicuna, *Antarctic Resources Policy: Scientific, legal and political issues* (Cambridge University Press, Cambridge, 1983), p 232 and as having 'frozen' claims into a condition where parties have agreed to disagree (Joyner, see n 1 above).

(c) Prejudicing the position of any Contracting Party as regards its recognition or non-recognition of any other State's right of or claim or basis of claim to territorial sovereignty in Antarctica.

(2) No acts or activities taking place while the present Treaty is in force shall constitute a basis for asserting, supporting or denying a claim to territorial sovereignty in Antarctica or create any rights of sovereignty in Antarctica. No new claim, or enlargement of an existing claim, to territorial sovereignty in Antarctica shall be asserted while the present Treaty is in force.

The effect of Article IV is to protect the interests of both claimants and non-claimants and preserve their position with regard to territorial claims. The second part of the Article provides that the Treaty provisions will operate without prejudice to the position of claimants and that the Treaty cannot be interpreted as affecting their claims or right to claim or as recognition of any claims. It provides that actions of parties for the duration of the Treaty will have no legal effect *vis-a-vis* claims, and creates a prohibition against new claims or the enlargement of existing claims to territorial sovereignty.

Triggs best summarises its effect.²⁰

The purpose of Article IV was to preserve the apparently irreconcilable interests of claimants, potential claimants and non-claimants. As a result, this ambiguous Article states what it doesn't mean and doesn't state 'what it does mean'. It is deliberately obscure, leaving each State free to interpret the Article consistently with its particular interests. While Article IV creates a 'purgatory of ambiguity', more positively it enabled the parties to move forward to establish the Treaty regime.

For claimant states, such as New Zealand²¹

the Antarctic treaty does not, as is sometimes suggested, "freeze" or "set aside" sovereignty. To the contrary Article IV specifically preserves and protects the legal position of all parties.

²⁰ G Triggs, cited in Crawford, James and Rothwell, Donald R "Legal Issues Confronting Australia's Antarctica" AYBIL Vol 13 (1992), 53.

²¹ 'Antarctica and New Zealand' Ministry of Foreign Affairs Information Bulletin No 8, August 1984, p 14.

III THE LAW OF THE SEA IN ANTARCTICA

A *The United Nations Convention on the Law of the Sea*

UNCLOS was signed at Montego Bay, Jamaica on 10 December 1982, after 14 years of negotiations in which more than 150 countries were involved. The Convention entered into force on 16 November 1994. New Zealand ratified UNCLOS on 19 July 1996 and it entered into force for New Zealand one month later. New Zealand has implemented the Convention via the United Nations Convention on the Law of the Sea Act 1996 and through amendments to the Territorial Sea, Contiguous Zone, and Exclusive Economic Zone Act 1977, which already incorporated into New Zealand domestic law some of the customary international law concepts codified by UNCLOS in relation to maritime zones.

This part of the paper examines the framework established by UNCLOS for superimposing a hierarchy of zones over the world's oceans and attaching to each zone particular rights and obligations. The nature of the ATS is examined and the conclusion reached that the determination of whether or not claimant states can establish maritime zones in Antarctica requires consideration of both the ATS and the law of the sea regime.

This paper does not consider in any detail the practical difficulties relating to Antarctica's geography which any State attempting to delimit such zones would face; rather, it focuses on the threshold question of whether there is any basis to do so at international law. The paper also considers only the law of the sea relating to establishment of maritime zones and not the other ways which it may impact on

Antarctica, for example, the concept of the common heritage of mankind²² established by UNCLOS or obligations to conserve marine resources in the high seas.²³

B The Relationship between UNCLOS and Antarctica

1 Maritime Zones established by UNCLOS

UNCLOS creates a regime of the rights and obligations of coastal states in relation to the waters adjacent to their territory. Specifically it establishes for coastal states,

- sovereignty over a belt of sea (12 nautical miles (nms)) adjacent to its land territory, called the territorial sea (Article 2)
- particular rights in a zone contiguous to that territorial sea called the contiguous zone (Article 33)
- certain rights, jurisdiction and duties over an area (188nms) beyond and adjacent to the territorial sea called the EEZ (Article 55)
- certain rights over the sea-bed and subsoil of the submarine areas that extend beyond the territorial sea, called the continental shelf (Article 77)

Antarctica was not formally discussed in the UNCLOS negotiations.²⁴ Although UNCLOS and the Antarctic Treaty negotiations took place at the same time,

Virtually no one, not even those hoping that Antarctic affairs would be regulated through the United Nations, made systematic connections between the oceans regime then being modified and the Antarctic regime being created.²⁵

While UNCLOS makes no specific reference to Antarctica, the fact that Antarctica is not specifically excluded by the terms of it would support the conclusion that UNCLOS

²² UNCLOS, Part XI.

²³ UNCLOS, Part VII.

²⁴ Auburn, *FM Antarctic Law and Politics* (C Hurst & Company, London 1982), p 126.

²⁵ Peterson, MJ "Antarctic Implications of the New Law of the Sea" *Ocean Dev and Int'l Law*, Vol 16, Number 2, 137, p 138.

should be taken to apply there. Furthermore, the basic concepts of maritime zones embodied in UNCLOS can now be considered to constitute norms of customary international law.²⁶ The more difficult question is how the Convention should be applied to Antarctica. As one commentator has observed²⁷

the Antarctic maritime legal regime demonstrates some of the difficulties of applying global regimes in regions which not only have a distinctive legal regime of their own, but also have peculiar environmental and geographical features which combine to negate the effect of the global regime.

2 *The Antarctic Treaty System: A surrogate coastal state?*

It is clear that Antarctica does pose unique legal and geographical problems in the application of the law of the sea. UNCLOS relies on the concept of the 'coastal state'. Other concepts in the law of the sea are defined by reference to the coastal state. Both the 'coastal' and 'state' elements of this concept are problematic in Antarctica. The geographical difficulties in identifying 'coastal' baselines and the legal difficulty in identifying a 'state', and diverging state views relating to both aspects, makes the application of the law of the sea problematic. It is an area where, yet again, the dichotomy of claimants and non-claimants is at the heart of the application of international law to Antarctica.

From the perspective of a claimant state, inherent in their right to territorial sovereignty are corresponding rights and jurisdiction over the maritime areas appurtenant to their claimed territory, as determined by international customary law and UNCLOS, and as specifically preserved by Article IV(1) of the Antarctic Treaty. The practice of claimants reflects this view of the law of the sea.²⁸

²⁶ The Antarctic Treaty itself preserves the rights of States in the High Seas under international law (Article VI).

²⁷ Rothwell, Donald R "A Maritime Analysis of Conflicting International Law Regimes in Antarctica and the Southern Ocean" 15 AYBIL 155, 180.

²⁸ See Part V for a summary of maritime zones asserted by claimants in Antarctica.

From the perspective of a non-claimant state, the absence of sovereign states in Antarctica means that no state may exercise territorial jurisdiction over adjacent maritime areas, and the assertion of any such jurisdiction would be a breach of Article IV(2) of the Antarctic Treaty. The surrounding waters, therefore, are high seas right up to the coastline of Antarctica in accordance with Article 86²⁹ of UNCLOS.

In 1959, the relatively narrow bands of coastal state jurisdiction accepted by most states, and the paucity of activity in the Southern Ocean, meant these differences could be ignored.³⁰

As changes in the economics of fishing and hydrocarbon exploitation focused attention on control of those resources, and, consequentially, the UNCLOS negotiations moved towards coastal state jurisdiction over a 200 nm zone, the separation between issues relating to the oceans and issues relating to Antarctica began to break down.³¹

At a time when the compromise on sovereignty at the heart of the Antarctic Treaty looked in danger of collapsing under these pressures, the Parties illustrated their adaptability by developing a collective regime to fill the gap left by the absence of a recognised coastal state. Beginning with the Agreed Measures, followed by CCAMLR and most recently by the Madrid Protocol, the ATS regulates activities in Antarctica and the surrounding waters for the purpose of conserving living resources and protecting the environment of Antarctica, very much in the same manner as a coastal state might, with the very important difference being that the measures devised by the ATS are enforceable only as against each other and not against non-members of the ATS. Joyner argues that³²

²⁹ Article 86 provides that 'all parts of the sea that are not included in the exclusive economic zone, in the territorial sea or in the internal waters of a State, or in the archipelagic State' shall be High Seas.

³⁰ See n 25 above, p 141.

³¹ *Ibid*, p 138.

³² See n 1 above, p 96.

while no traditional coastal state or sovereign exists in Antarctica, a political authority embodied in a multinational treaty institution does in fact operate throughout the region.

Hence, Vidas states that the proper approach to jurisdiction over the waters surrounding Antarctica³³

lies not in the direct application of the general law of the sea to the Antarctic maritime area, but in the concurrence of the two existing systems of legal norms, that is, the law of the sea (mainly as codified in the 1982 LOS Convention) and the ATS.

IV THE ESTABLISHMENT OF MARITIME ZONES IN ANTARCTICA

At the heart of the interface between the law of the sea and the Antarctic Treaty is the question of maritime claims in Antarctica. This part of the paper considers the arguments made in support of claimant states not being able to exercise their rights as coastal states in Antarctica. It concludes that in fact the establishment of such zones is not prohibited by the Antarctic Treaty. However, while there may arguably be a legal case to be made for the establishment of maritime zones, whether or not states will do so will depend on political rather than legal factors.

In broad terms, there are two main arguments which are usually made against claimant states being legally entitled to establish maritime zones, and exercise the rights which inhere in a coastal state in respect of such zones, in Antarctica. The first is that in the absence of a recognised sovereign state in Antarctica maritime zones cannot be established (Part A of this Part). The second is that the establishment of such zones is prohibited by the Antarctic Treaty. This part of the paper considers these two arguments. Part B consider whether Article IV applies to maritime areas and claims and concludes that it does. Part C considers how Article IV applies and whether its affect is to prohibit the establishment of such zones. The different considerations relevant to

³³ See n 11 above, p 70.

each zone are identified. The conclusion is reached that the establishment by claimants of a territorial sea, continental shelf, and EEZ is consistent with the Antarctic Treaty.

A *The Search for a Coastal State*

It has been argued that, in the absence of a recognised sovereign state, there is no legal capacity to designate lawfully recognised zones of offshore jurisdiction.³⁴ However, some commentators do not view uncertainty as to territorial sovereignty to be a barrier to the exercise of rights accorded to 'coastal states' by UNCLOS. Kaye argues that non-recognition of land claims does not alter the fact that a claimant state is entitled to assert its rights offshore from the Antarctic territories while it maintains an existing claim to those territories.³⁵

It would seem logical that a claim to territorial sovereignty is also a claim to all the rights which flow from that claim at international law. The practice of claimants has been to establish varying maritime zones as an incident of their claim to territorial sovereignty which would seem to support this view. Therefore the lack of international recognition of a claim to territorial sovereignty does not, of itself, preclude claims to maritime zones which international law has determined to be a consequence of that claim to territorial sovereignty.

The question is therefore to what extent the assertion of national jurisdiction over maritime areas in accordance with UNCLOS is prohibited by the Antarctic Treaty.

B *Scope of Article IV*

³⁴ See n 1 above, p 264.

³⁵ Kaye, Stuart *Australia's Maritime Boundaries* (Wollongong Papers on Maritime Policy No 4, Wollongong, 1995), p 193.

The argument that claimant states are prevented by the Antarctic Treaty from establishing jurisdiction in off-shore areas as permitted by UNCLOS is that to do so would be breach the second part of Article IV(2), which states that no new claim, or enlargement of an existing claim, to territorial sovereignty in Antarctica can be asserted while the Treaty is in force.

Against this view, attempts have been made to assert that the prohibition in Article IV does not apply to maritime areas, but only to the Antarctic continent and iceshelves. If this argument were correct, claimant states would be entitled to both extend existing maritime zones and claim new ones.

One such argument is based on an interpretation of Article VI of the Antarctic Treaty, which, by referring only to ice-shelves, should be taken to implicitly exclude maritime areas from the Treaty's application.

However, 'this very simple formulation certainly does not accurately reflect the position today'³⁶ as the ATS has extended its scope to encompass the marine areas surrounding Antarctica.

Further, it would seem that the Parties intended that the Treaty would apply to the surrounding waters of the Antarctic continent. The application of the Treaty to High Seas south of 60° was one of the main issues of the 1959 diplomatic Conference in Washington which produced the Antarctic Treaty. Some states participating in the negotiations opposed the application of the Treaty to High Seas areas, particularly in relation to the demilitarisation provisions. It should be recalled that the Treaty was negotiated in a Cold War environment with both the United States and the Soviet Union in attendance. However, most of the participants felt that, in order to effectively

³⁶ Kaye, Stuart and Rothwell, Donald R "Australia's Antarctic Maritime Claims and Boundaries" *Ocean Development and International Law*, Volume 26, 195, p 199.

demilitarise the continent, the seas surrounding the continent had to be included, particularly to cover ice shelves which could be used as a site for a military base.³⁷

Accordingly a compromise was reached whereby in effect the high seas would be excluded from the zone of application 'from the point of view of demilitarisation and inspection, with the exception of ice shelves, which would be treated as if they were land'.³⁸ The intention would therefore seem to have been that where the provisions of the treaty conflicted with the rights of states in high seas areas, the latter would prevail. However, it would still seem to have been the intention of the drafters that the Convention apply to the waters south of 60°.

This is clear from a number of interpretations which were agreed upon at the time of adoption of the text by the Conference, including an understanding that the position of territorial waters would be governed by the provisions of Article IV. The interpretation of the New Zealand delegation of those understandings was that 'in other words, parties were free to assert or deny that there were areas of territorial waters around particular sectors of Antarctica'.³⁹ Therefore it is clear that Article IV was intended, quite clearly, to deal with maritime as well as continental claims.

The alternative argument that Article VI should be interpreted as meaning that all the maritime areas south of 60 are high seas and are to remain so also seems contrary to the expressed intention of the Parties, as well as being an uncomfortable interpretation of the Article. A better interpretation of Article VI is that it preserves the rights of all parties on the high seas, wherever those high seas exist in the Treaty area. It offers no guidance as to which areas are high seas, consistent with the other articles of the Treaty, it leaves it open to the Parties to determine, when necessary, the particular status of marine areas depending upon their positions as a claimant or non-claimant.

³⁷ Report of the New Zealand Delegation, MFAT File PM 208/5/4/5 Part 1, p 33.

³⁸ Ibid, p 34.

³⁹ Ibid, p 34.

A further possible argument to exclude maritime zones from the operation of Article IV is that 'territorial sovereignty in Antarctica' refers only to land and ice claims.⁴⁰ However, it has also been said that⁴¹

Territorial sovereignty extends principally over land territory, the territorial sea appurtenant to the land, and the seabed and subsoil of the territorial sea.

The concept of territorial sovereignty would not, therefore, necessarily seem to be limited to *terra firma* and ice. This interpretation of the nature of territorial sovereignty would seem to be supported by Article 1 of the 1958 Convention and by the intentions of the Parties, discussed above, that Article IV would deal with both maritime and land claims discussed above. This question of what is a claim to 'territorial sovereignty' is more relevant to the nature of the maritime claim being asserted, rather than as to the application of Article IV

It has also been argued that 'claim' refers to land and possibly ice, but not to adjacent maritime areas, because the inclusion of a specific provision in CCAMLR preserving the rights of claimants to exercise coastal state jurisdiction under international law implies that such rights are not dealt with in the Antarctic Treaty.⁴² Article IV(2)(b) of CCAMLR provides that nothing in the Convention shall be interpreted as

a renunciation or diminution by any Contracting Party of, or as prejudicing, any right or claim or basis of claim to exercise coastal state jurisdiction under international law within the area to which this Convention applies.

⁴⁰ See for example Watts, see above n 3, p 20, who argues that Article IV applies to 'territorial sovereignty in Antarctica' which only refers to the Antarctic continent. He further argues that the negotiators of the Antarctic Treaty would have been mindful of the distinction drawn in the Geneva Convention on the Continental Shelf between sovereign rights in respect of the continental shelf and full blown 'sovereignty'. He therefore argues that 'sovereignty' was used in its strict sense, and that the intention was therefore to exclude from the prohibition merely 'sovereign rights' for certain limited purposes. However, it is clear from Article 1 of the 1958 Convention that 'the sovereignty of a State extends beyond its land territory'.

⁴¹ Ian Brownlie, *Principles of Public International Law* (Clarendon Press, Oxford, 1990), p 107.

⁴² See above n 35, p 198.

However, the CCAMLR Convention deals with a wider area than the Antarctic Treaty⁴³ and encompasses some sub-Antarctic islands outside the scope of the Antarctic Treaty over which sovereignty is not in dispute. Accordingly, it would seem that the inclusion of this no-prejudice provision in the CCAMLR Convention was directed at the rights of coastal states to exercise jurisdiction in the water surrounding those islands.⁴⁴ The provision does not state this specifically, because, in keeping with the dichotomous approach of the ATS to sovereignty issues, by being ambiguous it meets the needs of both claimants and non-claimants. It is open to claimants to interpret the provision as protecting their rights as coastal states south of 60° Sth.

It is these provisions that give rise to the 'bifocal' approach, an approach which allows claimants and non-claimants to interpret the same language differently.⁴⁵

Therefore, it is clear that the prohibition in Article IV is directly relevant to the question of maritime claims being established in accordance with UNCLOS.

C The Effect of Article IV

Contravention of this provision essentially contains three elements:

- 1) a new claim is made or an existing claim enlarged;
- 2) the claim is to 'territorial sovereignty';
- 3) the claim must be 'asserted' while the Treaty is in force.

1 The Territorial Sea

⁴³ It applies to the whole area of the Antarctic Convergence which extends in places beyond 60° Sth (Article 1).

⁴⁴ A statement by the Chairman of the Canberra Conference was made to this effect and recorded in the final act of the Conference (19 ILM 837).

⁴⁵ Frank, Ronald F "Convention on Antarctic Living Resources" 13 Ocean Development and International Law 291, p 307.

A 'new claim' can be interpreted as being a claim which had not been made at the time that the Antarctic Treaty was concluded. Prior to 1959, the right of coastal states to a territorial sea and continental shelf adjacent to their territory was recognised at international law. All claimant states had asserted jurisdiction over a three-mile territorial sea adjacent to the claimed Antarctic territory. Chile and Australia had also asserted rights to a continental shelf adjacent to that territory.

The Hague Codification Conference of 1956 had stated that⁴⁶

It is now accepted that the rights of the coastal State over the territorial sea do not differ in nature from the rights of sovereignty which the State exercises over other parts of its territory.

The Convention on the Territorial Sea and the Contiguous Zone 1958 was subsequently adopted in Geneva.⁴⁷ Article 1 of the Convention provided that

The sovereignty of a State extends, beyond its land territory and its internal waters, to a belt of sea adjacent to its coast, described as the territorial sea.

State practice as to the breadth of the territorial sea at that time was not uniform, and the 1958 Convention was silent on the subject, although it was widely held that the territorial sea could not extend beyond 12 nms.⁴⁸

The right of coastal states to establish territorial seas therefore clearly pre-dated the Antarctic Treaty and cannot be considered to be a 'new' claim. Further, even if claimants had not already asserted such a right, it was automatically conferred upon them by international law.

⁴⁶ The Hague Codification Conference of 1920 YBILC (1956), 265.

⁴⁷ 516 UNTS, 205. New Zealand signed but did not ratify this Convention (see 516 UNTS, 266).

⁴⁸ Center for Oceans Law and Policy, University of Virginia *United Nations Convention on the Law of the Sea 1982: A Commentary* (Martinus Nijhoff Publishers, Dordrecht, 1993), p 79.

The right to a territorial sea can be said to be inherent in a state's sovereignty over adjacent territory. In this regard the dissenting opinion of Judge McNair in the *Anglo-Norwegian Fisheries*⁴⁹ case is often cited.

To every State whose land territory is at any place washed by the sea, international law attaches a corresponding portion of maritime territory... International law does not say to a State: "You are entitled to claim territorial waters if you want them". No maritime State can refuse them. ... The possession of this territory is not optional, nor dependent upon the will of the State, but compulsory.

Present international law permits coastal states to establish territorial seas of 12nms. If it is accepted that the territorial sea is an inherent right of coastal states, then it follows that⁵⁰

when international law recognises that the limits of the territorial sea have been enlarged from 3-12 miles, it remains the inherent right of a sovereign state to extend its territorial sea claim in conformity with international law as recognised at that time.

It is therefore concluded that by claiming sovereignty in Antarctica, states necessarily also claim the rights to a territorial sea adjacent to that claimed territory. On this basis, any assertion of rights to the territorial sea would be consistent with both UNCLOS and the Antarctic Treaty.

2 Continental Shelf

The arguments made above in respect of the territorial sea also apply to the continental shelf. The concept of a continental shelf also pre-dated the Antarctic Treaty. Customary law relating to the continental shelf was codified in the Convention on the Continental Shelf 1958.⁵¹ The underlying concept has not changed with the conclusion

⁴⁹ ICJ Rep (1951), 160.

⁵⁰ See above n 36, p 206.

⁵¹ NZTS 1965, No 2. New Zealand ratified this Convention on 18 January 1965.

of UNCLOS. Article 2(3) of that Convention, and Article 77(3) of UNCLOS specify that

The rights of the coastal State over the continental shelf do not depend on occupation, effective or notional, or on any express proclamation.

Therefore, the rights of claimant states over the continental shelf which extends outwards from its territorial claim are inherent in that claim. Like the territorial sea, assertion of rights over the continental shelf is not a 'new' claim, nor an enlargement of an existing claim, as the those rights existed at customary international law prior to the conclusion of the Antarctic Treaty.

Crawford and Rothwell go even further and argue that even if the continental shelf doctrine had been a post-Antarctic Treaty innovation, claimants would not be prevented by the Treaty from asserting rights over the continental shelf because international law would have 'done the deed' without the claimant state having had to do anything.⁵²

3 *The Exclusive Economic Zone*

There would seem to be crucial differences between the nature of the Exclusive Economic Zone (EEZ) and the territorial sea, which, although resulting in the same conclusion as to the arguable consistency of establishing an EEZ with Article IV, reach that conclusion by a different route.

Firstly, the concept of an EEZ did not pre-date the Antarctic Treaty. Accordingly, it must be either a new claim or an enlargement of an existing claim. However, it is not clear whether a claim to an EEZ can be equated to a claim to 'territorial sovereignty'. In the EEZ the coastal state has sovereign rights over exploring and exploiting, conserving

⁵² See above n 36, p 81.

and managing the natural resources of the zone.⁵³ In addition, and in contrast to the territorial sea and continental shelf, an EEZ must be asserted by a State wanting to exercise the rights accorded to it in respect of the zone by UNCLOS.

The rights of a state in the EEZ are arguably more limited than what is meant by the concept of territorial sovereignty. Brownlie draws a distinction between rights which are 'owned' and 'territorial sovereignty'.⁵⁴ He concludes that the EEZ constitutes a special jurisdictional zone rather than an extension of sovereignty.⁵⁵ A similar distinction is described by Rothwell⁵⁶ between sovereign rights over the whole area of the EEZ and sovereign rights over resources within the area, with only the former being able to be equated to 'territorial sovereignty'. These arguments conclude therefore that establishment of an EEZ, while being a new claim, is not a claim to territorial sovereignty.

However, there is a further argument that the claim to an EEZ is not 'new'. Rather, the assertion of an EEZ is not an enlargement of an existing claim but rather a recognition of a latent but inherent right to territorial sovereignty.⁵⁷ In this regard Kaye argues that the claim to an EEZ is not a new claim, merely an entitlement attaching to a previously claimed area of land. It is ancillary to a land claim, not a new claim in itself.⁵⁸

A related argument⁵⁹ is that the Treaty should be interpreted in light of the developments of international law since the Treaty was concluded. This argument is based on the theory of inter-temporal law established by Judge Huber in the *Island of*

⁵³ Article 56, Section 1(a).

⁵⁴ See above n 41, p 110.

⁵⁵ *Ibid.*, p 183.

⁵⁶ See above n 27, p 163.

⁵⁷ See above n 45, p 307.

⁵⁸ See above n 35, p 203.

⁵⁹ This argument is made by both van Der Essen and Vicuna, (see n 19 above, p 245 and p 98-99 respectively) and Kaye, see n 36 above.

Palmas case⁶⁰, that the available maritime zones should be those created by international law in the course of its evolution. Vicuna argues that⁶¹

The exclusive Economic Zone is also covered by inter-temporal law, being a right which derives from coastal statehood status and which manifests itself in such a way as to be determined by how the law of the sea evolves to affect the rights of coastal States.

It seems clear that a treaty should be interpreted in light of the rules of international law in force at the time of its conclusion, except where concepts in a treaty may be 'not static but evolutionary'. It would seem that in preserving the rights of states on the high seas under international law in Article VI the parties would not have intended to freeze those rights as they were on entry into force of the Convention in 1961. Rather, they would have intended Article VI to also protect any subsequent rights on the high seas. Therefore, it would seem arguable that claims made by states prior to entry into force of the Convention would, in the future, include any rights which international law may have subsequently attached to those claims.

Therefore, it can be concluded that there are persuasive legal arguments available to claimant states that the establishment of UNCLOS maritime zones is not prohibited by Article IV. In respect of the 12nm territorial sea and continental shelf, the argument can be made that these are neither 'new', nor claims which are 'asserted'. In respect of the EEZ, the argument can be made that a claim to such a zone is inherent in a claim to territorial sovereignty and therefore is not an 'assertion' of the claim or 'new', as claims to territory should be seen in the context of the evolution of international law with regard to the rights which attach to such a claim. The further argument can be made that such a claim is not a claim to 'territorial sovereignty'.

V STATE PRACTICE AND MARITIME ZONES IN ANTARCTICA

⁶⁰ Cited by Vicuna, in Joyner and Chopra (Eds) see n 3 above, p 100.

⁶¹ *Ibid.*

New Zealand, Australia, Chile, the United Kingdom, France, Norway and Argentina claim maritime zones in Antarctica. All claimant states have at one time or another asserted the right to a territorial sea. However, only Australia has proclaimed an EEZ pursuant to UNCLOS. The nature of the maritime claims vary. In 1927 Argentina advised the International Bureau of the Universal Postal Union to⁶²

'be informed that Argentine territorial jurisdiction extends de jure and de facto over the continental surface, **territorial sea** and islands situated off the maritime coast, to South Georgia, South Orkneys and polar territory not delimited.⁶³ (emphasis added)

In 1939 Norway proclaimed

That part of the mainland coast in the Antarctic extending from the limits of the Falkland Islands Dependencies in the west (the boundary of Coats Land) to the limits of the Australian Antarctic Dependency in the east (45°E. Long) with the land lying within this coast **and the enviroing sea**, shall be brought under Norwegian sovereignty. (emphasis added)

In 1940 Chile declared that⁶⁴

All lands, islands, islets, reefs of rocks, glaciers (pack ice) already known, or to be discovered, **and their respective territorial waters**, in the sector between longitudes 50 and 90 west, constitute the Chilean Antarctic or Chilean Antarctic Territory. (emphasis added)

By Presidential declaration of 23 June 1947 Chile also proclaimed sovereignty over its continental shelf and in 1952 proclaimed a maritime zone for all of its territory of 200nms.⁶⁵

⁶² Reproduced in WM Bush *Antarctica and International Law, A Collection of Inter-State and National Documents* (Oceana Publications Inc. London, 1982) Vol I, 584-5.

⁶³ Argentina and Chile have also asserted sovereignty over an area enclosed with the territory of both countries, their Antarctic territories and the South Orkneys, South Shetland and South Sandwich Islands, known as 'The Argentine Sea' or 'The Chilean Lake'. This claim is based on a concept of geological, political and geographical unity. See above n 1, p 93.

⁶⁴ Decree No 1,747, reproduced in Bush see n 62 above, Vol II, p 311.

⁶⁵ *ibid*, p 448-449.

France established a territorial sea of 12 miles in respect of the French Southern and Antarctic Territories by Order No 5 of 13 January 1972.⁶⁶ It had previously restricted the fishing rights of foreigners within a 12 mile band by Decree 71-711 of 25 August 1971 extended to Antarctic territories on 1 September. Its declaration of an EEZ applied only to the Southern territories and not Adelie land.⁶⁷

Fishing Zones and EEZs have been established in the waters surrounding the sub-Antarctic Islands which are north of 60° south latitude and therefore not covered by the Antarctic Treaty. These islands are Heard and McDonald (Australia), Kerguelen and Crozet (France), Bouvetoya (Norway), Prince Edward and Marion (South Africa).

It can therefore be concluded that the practice of claimants in asserting maritime zones is only consistent in respect of territorial seas (although not always in respect of breadth). There would seem to be no consistent approach taken by claimants to asserting continental shelves or EEZs adjacent to their continental claims.

This inconsistency would seem to be a function of both the ambiguity of Article IV and the political environment of the ATS.

A Australian Maritime Claims In Antarctica

In 1992 Joyner stated that⁶⁸

If offshore maritime zones were proclaimed by one claimant state independent of the Antarctic Treaty arrangement, the legal status of that proclamation would become largely a matter of political conjecture and debate, lacking substantial legal credibility with the international community.

⁶⁶ Vicuna in Chopra and Joyner eds see n 3 above, p 104.

⁶⁷ Ibid, p 108.

⁶⁸ See above n 1, p 92.

However, in 1994 Australia did exactly that by proclaiming an EEZ which operated for all its external territories, including the Australian Antarctic Territory (AAT).

The AAT comprises

... all islands and territory, other than Adelie Land, situated south of the 60th degree south latitude and lying between the 160th degree east longitude and the 45th degree east longitude.⁶⁹

The Territory was placed under the authority of the Commonwealth of Australia by an Order in Council of the British Government, the British Government having previously asserted sovereignty over the area.⁷⁰ This part of the paper considers Australian policy in respect of asserting its sovereign jurisdiction over maritime zones adjacent to the AAT. Australian practice in this regard makes a useful case study, and is particularly appropriate for comparison with New Zealand, for several reasons.

Firstly, the circumstances under which both Australia and New Zealand came to assert sovereignty over Antarctic territory (by way of an inheritance from the United Kingdom), and therefore the legal basis of their claims, are very similar.⁷¹

Secondly, in establishing an EEZ on the basis of the rights conferred upon Australia as a coastal state under UNCLOS, Australia has gone where no claimant had gone before, and where to date, no other claimant has followed.

Thirdly, Australia is New Zealand's most important bilateral partner and has tended to share common interests with New Zealand on Antarctic matters. Both countries are 'Antarctic Gateway' countries by virtue of their proximity to the continent. Further, their territorial claims abut at 160° East Longitude, which will presumably necessitate, at some future point, a delimitation exercise in respect of their common boundary. Such

⁶⁹ Australian Antarctic Territory Acceptance Act 1933, Section 2.

⁷⁰ "Australian Law in Antarctica" House of Representatives Standing Committee on Legal and Constitutional Affairs, November 1992. Australian Government Publishing Service, Canberra, p 2.

⁷¹ Both recognise the validity of the other's claims, as well as those of the UK and Norway who reciprocate that recognition.

an exercise may be further complicated if New Zealand were to seek to delimit the continental shelf around the Balleny Islands which lie between 160° and 170° East Longitude.

The EEZ established in 1992 was not the first maritime zone asserted by Australia with respect to the AAT. In fact, Australia had previously asserted rights to a territorial sea, continental shelf and fisheries zone.

1 The Territorial Sea

Australia, like New Zealand, had previously asserted the right to a territorial sea adjacent to its Antarctic territories. However, it was not until the enactment of the Seas and Submerged Lands Act 1973 that Australia formally proclaimed a three nautical mile territorial sea around continental and external territories. In 1990 it extended the Australian territorial sea from 3 to 12 miles by way of a proclamation issued under that Act.⁷²

2 The Continental Shelf

In 1953 Australia proclaimed a continental shelf around its coastline which implicitly included the AAT.⁷³ The Continental Shelf and Living Resources Act 1968 was subsequently applied to the AAT. An amendment in 1994 to the Seas and Submerged Lands Act adopted the more expansive UNCLOS definition of the Continental Shelf. While Australia has purported to legislate for the continental shelf adjacent to the AAT, these laws have never been applied in practice,⁷⁴ with the exception of the Antarctic Mining Prohibition Act 1991 which extends to the continental shelf of the AAT and is applied not only to Australian nationals but also nationals of other Contracting Parties.

⁷² AYBIL Vol 13 p 277.

⁷³ See above n 36, p 81.

⁷⁴ Ibid, p 207.

3 *The Exclusive Economic Zone*

In 1979, Australia amended the Fisheries Act 1952 to create a 200nm Australian Fisheries Zone (AFZ) and which operated for all of Australia, including its external territories and therefore the AAT. However, in a proclamation one month later, the waters adjacent to the AAT were designated as 'excepted waters' from the AFZ. The effect of such an action was to make the applicable fisheries legislation enforceable only against Australian nationals and vessels, but not against foreign nationals and vessels. Australian nationals and vessels are still caught because even though those waters were not part of the AFZ, they were still 'proclaimed waters' for the purposes of the Act. This legislation was subsequently replaced by the Fisheries Management Act 1991 which adopted a similar exemption to exclude the waters of the AAT from the AFZ.⁷⁵

By including the waters as part of the AFZ for even just one month, Australia signified their right to exercise jurisdiction over those waters as an incident of their claim to the AAT and as a coastal state under UNCLOS. In Australia's view, the assertion of sovereign rights over resources in the 200nm zone is wholly consistent with the Antarctic Treaty:⁷⁶

... the existence of such rights is merely an attribute of their (the claimant's) sovereignty over the adjacent land and that they enjoy such rights not through any extension of sovereignty but simply by direct operation of law.

The Australian Government further argued that claims relating to off-shore jurisdictions are not claims to 'territorial sovereignty' as prohibited by Article IV of the Antarctic Treaty.

The reason given at the time for restricting that jurisdiction to Australian vessels and nationals was the need to tread carefully with respect to its Antarctic treaty partners and

⁷⁵ See above n 36, p 209.

⁷⁶ Australian Foreign Affairs Record, Vol 51, no 2, p 10 (February 1980).

to enable negotiations for the Convention for the Conservation of Antarctic Marine Living Resources to be successfully concluded.

More recently, on 1 August 1994, Australia proclaimed an EEZ around both the mainland and external territories, including the AAT. This was consistent with a policy designed to ensure Australia claimed the range of maritime zones allowed under the new LOS and to put in place a regime that would eventually allow ratification of UNCLOS.⁷⁷ By implication therefore, the Australian Government considered the establishment of such a regime to also be consistent with the Antarctic Treaty. However, there has been no consequential alteration of the scope of the AFZ, and therefore the actual legal regime applicable to the waters adjacent to the AAT remains as it was prior to proclamation of the EEZ.

Two conclusions might be drawn from such an action. Firstly, it is possible to conclude that Australia's purpose in establishing the EEZ was not in fact to gain benefits from the exercise of the sovereign rights and jurisdiction conferred upon it in respect of the EEZ under the UNCLOS. In 1989 at the top of the list of policy objectives of the Australian Government in Antarctica, was to

preserve our sovereignty over the Australian Antarctic Territory, including our sovereign rights over the adjacent offshore areas;

The second, is that they were not confident as to how such an action would be received by other Parties to the Antarctic Treaty and the international community in general. Having concluded that there was scope to apply Australian legislation to the AAT, the Department of Foreign Affairs and Trade had advised that 'Whether to do so in any particular case becomes a matter of policy judgment.'⁷⁸ The policy reason cited at the time was 'to ensure that the operation of CCAMLR in the AAT would not be impeded

⁷⁷ See above n 36, p 209.

⁷⁸ See above n 70, p 14.

by Australian legislation'.⁷⁹ In other words, although legally entitled to establish an EEZ, a political decision was made to exercise forbearance in exercising jurisdiction over the EEZ. However, CCAMLR also applies to the EEZ around Heard and MacDonalld Islands, which is part of the AFZ and would not therefore be presumed to raise the same problems.

Rather the difference is that those islands are north of 60 degrees and therefore are outside the Antarctic Treaty area. Accordingly, the conclusion can be drawn that for political as well as legal reasons, it is the Antarctic Treaty which influenced Australian policy in this regard, rather than concerns about impeding CCAMLR. It is interesting that several years on, when CCAMLR's effectiveness is being threatened by the fishing activities of third parties, and in fact Australian assertion of jurisdiction over the AAT EEZ might provide a legal basis for Australia to enforce CCAMLR measures against illegal fishers thereby enhancing its operation, Australia has chosen to continue to not assert its EEZ rights against foreign nationals and vessels. Even prior to the establishment of the EEZ, the House of Representatives Standing Committee on Legal and Constitutional Affairs, in its 1992 inquiry into the legal regimes of Australia's External Territories and the Jervis Bay Territory, recommended that the AFZ include the waters adjacent to the AAT, and expressed the view that the non-enforcement of Australia's obligations under CCAMLR against foreign nationals and vessels was inconsistent with Australia's claims of sovereignty over the Territory.⁸⁰

At the heart of this reluctance must be Australia's concerns as to the reactions of its fellow Antarctic Treaty partners and the rest of the world. Any action against third party nationals or vessels could potentially initiate a process of wider examination of the legitimacy of Australia's claim; it is to be expected that Australian policy is designed to avoid this eventuality.

⁷⁹ See above n 36, p 16.

⁸⁰ See above n 70, p 18.

In addition to the legal and political difficulties of exercising jurisdiction in the EEZ against foreign nationals and vessels is that the sheer logistical difficulties of enforcing any such legislation made its application practically unfeasible and politically undesirable. As Kaye correctly points out⁸¹

Attempting to enforce a maritime zone that few States recognise is to call attention to a claim in a part of the world that few States have evidenced an interest in ... In addition, it would be logistically difficult to adequately enforce legislation for an AAT EEZ against foreign nationals, and to utilise such unenforceable legislation might aid the impression that the Australian claim was a 'paper' one.

Australia has not attempted to determine the outer limits of the EEZ and the baselines from which the Zone would extend are likewise yet to be specified.

The conclusion may be drawn that Australia established the EEZ for the purpose of reinforcing their claim to the AAT, or at least, to be seen to be acting consistently with their assertion of a valid claim to territorial sovereignty in Antarctica. A failure to establish the maritime zones which are the entitlement of a coastal state under UNCLOS could be interpreted as an admission of doubt as to Australia's status as a coastal state in Antarctica and to the validity of their territorial claim.

It should be recalled that, legally, the Antarctic Treaty provisions themselves explicitly deprive any such acts purported to be the exercise of sovereignty of any legal effect for the duration of the treaty. However, it is not clear what effect this Article would have in practice if in fact the Treaty were actually dissolved, or if a Party were to withdraw from it. Further, in the words of the Department of Foreign Affairs and Trade

... the stipulation that acts taking place while the Antarctic Treaty is in force do not constitute a basis for asserting or supporting a claim to territorial sovereignty does not mean that those acts are themselves prohibited by the Treaty.

⁸¹ See above n 35, p 193.

Other claimant states have not followed Australia's example. In the case of Norway, the United Kingdom, Chile and Argentina the existence of overlapping or contested claims would seem to make such an action politically unfeasible, particularly in light of the hyper-sensitivity of claimants to the Antarctic peninsular.

In fact, as Crawford and Rothwell point out, weaknesses in Australia's ability to exercise sovereign rights over Antarctic maritime areas are simultaneously a function of, and disguised by, the terms of the Antarctic Treaty.

On the one hand the Treaty explicitly does not recognise Australian sovereignty, and, at least as between the parties, it nullifies the legal effect of acts done in the purported exercise of sovereignty, in the sense of depriving them of any evidentiary value in support of the sovereignty claim. On the other hand it leaves it open for Australia to continue to assert a jurisdiction it has never had the capacity to enforce, and provides a legal alibi for that non-enforcement which may ultimately help to preserve what is, so far, very much a paper claim.⁸²

B The New Zealand Claim

Auburn states that⁸³

For most of the nationals operating in Antarctica, a major motive is to preserve national claims. For New Zealand it is submitted that this motive is, in fact, dominant.

This part of the paper considers the extent to which New Zealand has asserted a claim to, or jurisdiction over, maritime areas in Antarctica. The application of New Zealand domestic legislation to marine areas is considered, as are public statements of New Zealand policy regarding maritime claims to those areas.

⁸² See above n 36, p 55.

⁸³ See above n 2, p 5.

It is concluded that New Zealand asserts a right to a territorial sea, exclusive economic zone and continental shelf in the Ross Dependency at international law. However, legislation establishing New Zealand's maritime zones does not include those asserted in respect of the Ross Dependency and until 1977 there is little evidence of any intention to do so. Very limited legislative action has been taken asserting jurisdiction over those areas at domestic law.

1 New Zealand's Claim to the Ross Dependency

Authority over the Ross Dependency was vested in the Governor General of New Zealand by a British Order in Council of 1923. The Order appointed the Governor-General of New Zealand as the Governor of the Ross Dependency who was

‘authorised and empowered to make all such Rules and Regulations as may lawfully be made by His Majesty's authority for the peace, order and good government of the said Dependency, subject, nevertheless, to any instructions which he may from time to time receive from His Majesty or through a Secretary of State’

Conferring authority over the Ross Dependency on New Zealand was seen by the British Government as a way of reinforcing the sovereignty of the British Empire over Antarctic territory.⁸⁴ The proximity of New Zealand to the Ross Dependency logically recommended it as being best placed to exercise administrative authority over the Dependency. The Order itself did not refer to the waters surrounding the Ross Dependency, only to

.. 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 ...

⁸⁴Malcolm Templeton, *A Wise Adventure? New Zealand in Antarctica 1920-90* (Unpublished) Ch I, p 5.

However it seems clear from subsequent statements by the British authorities, and New Zealand actions, to have also implicitly conferred on New Zealand jurisdiction over the adjoining territorial sea, which was at that time generally recognised at customary international law to have a breadth of 3 nautical miles.

2 *The exercise of sovereignty in the territorial sea of the Ross Dependency*

Specifically, New Zealand promulgated the Ross Dependency Whaling Regulations 1926 which purported to regulate whaling activities in the Ross Dependency. The original whaling licence had been issued by the British Government to Larsen and Konow, proprietors of the Rosshavet Company. They were authorised to⁸⁵

occupy certain territorial waters belonging to His Majesty situated in and near the Ross Sea and The Antarctic Ocean for the purpose of Whale fishing and carrying of the Whale Industry generally within the territorial waters as aforesaid ...

In 1926 the Ross Dependency Whaling Regulations were promulgated. Their effect was to modify the application of fisheries legislation⁸⁶ relating to the licensing of whaling. The 1926 Regulations were replaced by the 1929 Ross Dependency Whaling Regulations, which are still in force. They provide that 'it shall be unlawful for any person to engage in whaling in the Ross Dependency or in any portion thereof.' In fact, both the Antarctic Marine Living Resources Act 1981⁸⁷ and the Antarctic (Environmental Protection) Act 1994⁸⁸ preserve these regulations.

In 1935 the Whaling Industry Act was passed which would appear to apply to the territorial waters of the Ross Dependency.⁸⁹ The New Zealand registered Southern

⁸⁵ See above n 84, Ch II, 16.

⁸⁶ The Fisheries Amendment Act 1912, which amended the Fisheries Act 1908.

⁸⁷ Section 16(d).

⁸⁸ Section 53.

⁸⁹ It applies to 'any territory administered by His Majesty's Government in New Zealand'.

Whaling and Sealing Company paid an annual licence fee under this legislation.⁹⁰ This legislation was subsequently replaced by the Marine Mammals Protection Act 1978 which only applied to New Zealand and 'New Zealand Fisheries Waters' which did not include the Ross Dependency⁹¹.

Writing in 1957, Ivor Richardson stated that⁹²

While it is true that legislation is a vain pretension of sovereignty if there is no reasonable control of the territory in question, the statement is hardly applicable to the New Zealand regulation of whaling in the Ross Dependency from 1923 onwards.

He then cites the appointment from time to time of officers of the government of the Dependency, and visits of administrators to the Dependency on licensed whalers in ensure observance of the regulations, as examples of New Zealand asserting control over whaling in the territorial waters of the Ross Dependency

The conclusion that New Zealand accepted jurisdiction over the territorial waters adjacent to the Ross Dependency is supported by an opinion of the Foreign and Commonwealth Office of the United Kingdom of 15 March 1927 which stated that although the Order in Council of 1923 did not refer to seas, 'no doubt it must be construed as including the national and territorial waters appurtenant to this land'.⁹³ The opinion went on to say that the Whaling Regulations could not authorise the arrest of vessels outside the territorial sea adjacent to the Ross Dependency. In the opinion of the author W E Beckett⁹⁴

We have, I think, agreed that the Ross Sea Barrier is to be considered as land rather than water and therefore presumably the TW (territorial waters) will be measured from the edge of the barrier ...

⁹⁰ See above n 62 Vol III, p 54.

⁹¹ See n 101 below.

⁹² "New Zealand Claims in the Antarctic" NZLJ Feb 19, 1957, 38

⁹³ See above n 62, Vol III, p 56.

⁹⁴ *Ibid.*

The 1923 Order in Council therefore implicitly included the surrounding territorial waters under New Zealand's jurisdiction over the Dependency, and that New Zealand accepted they had sufficient legal basis to exercise that jurisdiction against both foreign and New Zealand whalers is evident from its promulgation of the Regulations.

Subsequent official statements by the New Zealand Government confirmed that this was their view also. In 1974 Minister Norman Kirk stated that⁹⁵

The right to explore and exploit the natural resources of the Ross Dependency and its adjacent waters is a concomitant of New Zealand's claim to sovereignty over the territory. New Zealand has maintained its right to exercise control and jurisdiction within the territory since the passage, in 1923, of an Order in Council placing the Ross Dependency under New Zealand administration.

There was one notable exception to public assertions of sovereignty over maritime areas and that was a statement by the Prime Minister (K. Holyoake) in relation to the application of the Continental Shelf Act of 1964 to the Ross Dependency. In denying that it applied there he stated that 'we have never asserted, and have never been granted, any rights with respect to control of the Ross Sea'.⁹⁶ This statement was clearly in error as New Zealand had purported to exercise jurisdiction over whaling in the territorial sea.

Therefore, at the time that the Antarctic Treaty entered into force in 1961, the only pre-existing maritime zone asserted by New Zealand was the 3nm territorial sea. As the right to a continental shelf can be considered to have automatically belonged to any coastal state at that time, it would be possible to argue that, although New Zealand had taken no step to assert such rights, they had been conferred upon New Zealand by international law. Further, New Zealand would now be entitled to a territorial sea of up to 12nms.

⁹⁵ New Zealand Foreign Affairs Review, Vol 24, no 8. P 42 (August 1974). This was in response to a Parliamentary Question on sovereignty in the Ross Dependency.

⁹⁶ NZ, General Assembly, Parliamentary Debates (House of Reprs) Vol 339, p 1,684 (28 August 1964).

3 *Legislating for maritime areas in the Ross Dependency*

The Ross Dependency has been, since 1983, part of the Realm of New Zealand,⁹⁷ although it is not within the 'limits of New Zealand'.⁹⁸ The Ross Dependency would not seem to have at any time been embraced by the term 'New Zealand', although New Zealand legislation has been applied to the Ross Dependency, and therefore by implication, to the territorial sea.⁹⁹ The enactment of the Antarctica Act 1960 which implements the Antarctic Treaty, was the first occasion that Parliament had extended New Zealand law directly to activities taking place in the Ross Dependency.¹⁰⁰

However, with the exception of whaling, neither the territorial sea or the continental shelf of the Ross Dependency have been the specific subject of New Zealand legislation or regulation. Legislation which applied specifically to the territorial sea and continental shelf of New Zealand would not seem to have applied to the territorial sea and continental shelf in the Ross Dependency.¹⁰¹ Only belatedly were legislative steps taken to provide a mechanism to incorporate those zones into the New Zealand Continental Shelf and New Zealand Territorial Sea in domestic law.

Legislative action in 1977 asserted the right to a territorial sea adjacent to the Ross Dependency, but this legislation has not sought to exercise the rights which attach to

⁹⁷ Letters Patent Constituting the Office of Governor-General of New Zealand, SR 1983/225

⁹⁸ This means the outer limits of the territorial sea of New Zealand. (Acts Interpretation Act 1924 Section 4).

⁹⁹ The 1923 Ross Dependency Regulations applied 'the laws and usages in force in the Dominion of New Zealand at this date' to the Ross Dependency, except in so far as they were inapplicable to the conditions of the Dependency. The Order also provided that all subsequent laws, as far as applicable, would also apply to the Ross Dependency, unless expressly disallowed or modified. They would extend to the Ross Dependency not as the law of New Zealand but as the law of the Dependency (van Bohemen para 1).

¹⁰⁰ Gerard van Bohemen, *The Laws of New Zealand: Antarctica* (Butterworths, Wellington, 1992), para 2

¹⁰¹ The Fisheries Act 1908, applied to the 'waters or New Zealand waters'. Later fisheries legislation applies to "New Zealand fisheries waters", which are defined to include the waters of the EEZ and Territorial Sea of New Zealand as set out by the Territorial Sea, Contiguous Zone and EEZ Act 1977.--

such a maritime zone. The territorial sea adjacent to the Ross Dependency remains excluded from the territorial sea of New Zealand at domestic law.

New Zealand's maritime zones are established at domestic law in the Territorial Sea, Contiguous Zone and Exclusive Economic Zone Act 1977 (The Act). The purpose of the Act is to

make provision with respect to the territorial sea and the contiguous zone of New Zealand; and to establish and exclusive economic zone of New Zealand adjacent to the territorial sea, and in the exercise of the sovereign rights of New Zealand to make provisions for the exploration and exploitation, and conservation and management, of the resources of the zone; and for matters connected with those purposes.

Part I of the Act dealing with the territorial sea came into force on 1 October 1977 and Part II establishing the Exclusive Economic Zone (EEZ) came into force on 1 April 1978. The Act was amended in 1996 to include Part IA which creates the Contiguous Zone of New Zealand and implements Article 33 of UNCLOS.

The territorial sea is defined as¹⁰²

those areas of the sea having, as their inner limits, the baseline described in sections 5 and 6 and 6A of this Act and, as their outer limits, a line measured seaward from that baseline, every point of which line is distant 12 nautical miles from the nearest point of the baseline.

The baseline is the low-water mark along the coast of New Zealand and all islands.¹⁰³

'New Zealand' is defined in Section 2 as including the Ross Dependency, except for the purposes of Part II and section 29. The effect of this definition is to include within the Territorial Sea of New Zealand that adjacent to the Ross Dependency. However,

¹⁰² Section 3.

¹⁰³ Section 5. Section 6 deals with how baselines should be drawn for bays, and Section 6A provides for straight baselines to be drawn where there are river-mouths, unstable coastlines, deeply indented coastal areas or a fringe of island in the immediate vicinity of the coast.

Section 1(4)(b) provides that the commencement order bringing the Act into force, may bring provisions of the Act into force on different dates in respect of specified parts of New Zealand. The Act has been brought into force in the mainland and islands, but not the Ross Dependency¹⁰⁴.

Accordingly, Part I applies to the Ross Dependency, but is not applied there. This device effectively means that although New Zealand considers that it has a territorial sea adjacent to the Ross Dependency at international law, it has not incorporated it into its domestic legislation.

By excluding the Ross Dependency from the definition of New Zealand in respect of Part II and Section 29, the EEZ of New Zealand and the power to make interim regulations for the conservation and management of fisheries do not extend to the Ross Dependency. However, Section 9(3) provides that any provisions of the Act including those determining the EEZ of New Zealand can be applied to the Ross Dependency by Order in Council.

These legislative devices are less concerned with the exercise of jurisdiction over the Antarctic territorial sea and EEZ, as they are with sending a particular message to the rest of the world, and in particular New Zealand's partners in the Antarctic Treaty. That message is that New Zealand maintains its claim to territorial sovereignty over the Ross Dependency and all the rights and obligations at international which inhere in such sovereignty.

It also operates to keep the possibility of exercising those rights open. They perhaps also seek, in some way, to make up for the inconsistency of claiming rights at international law, yet having no mechanism to exercise them domestically, which could be taken to imply uncertainty on New Zealand's part as to the validity of its entitlement to those rights.

¹⁰⁴ SR 1977/245.

At the time of the second reading of the Bill which became the Territorial Sea and Exclusive Economic Zone Act 1977, the Minister of Foreign Affairs stated that the Bill¹⁰⁵

... contains merely an enabling provision which reserves the right to take this step in the future, if desired. It is therefore fully consistent with the Antarctic Treaty, which provided that there should be no new claims and no extension of old claims. But if we had omitted any reference to the Dependency, that would have been interpreted as not maintaining that the potential for such a claim was there. If we had sought to add that territory to the zone, that would in fact have been an extension. The provision in the Bill is fully consistent with the Antarctic Treaty, but it also retains New Zealand's flexibility consistent with its sovereign claim to react to any future development in the area.

It would seem from this statement that the New Zealand Government considered that to establish an EEZ in the Ross Dependency would be a clear breach of Article IV of the Antarctic Treaty. The 'future development' referred to would therefore presumably be either New Zealand withdrawal from the Treaty, its dissolution or the conclusion of some further inter-governmental agreement which recognised New Zealand's claim. It would not seem to suggest that changes in the political environment, or state practice, regarding maritime claims in Antarctica, would be 'developments' sufficient motivation to take an action which the Government regarded as a breach of the treaty. However, the Minister went on to say that¹⁰⁶

The Government believes that it would not be desirable, in the light of these forthcoming discussions and the obvious practical problems involved, to establish an economic zone in the Ross Dependency at present.

This seems at odds with the previously expressed view that to do so would in fact be in breach of the Antarctic Treaty, rather than simply undesirable because of practical

¹⁰⁵ New Zealand General Assembly Parliamentary Debates Vol 413 pp 2,396-97.

¹⁰⁶ Ibid.

problems and the forthcoming discussions on the conservation of Antarctic marine living resources. It would seem to over simplify the Government's view to interpret this statement as meaning that it considered the establishment of an EEZ in Antarctica to be a breach of the Antarctic Treaty. It is perhaps unfortunate that the Minister's statement was in such terms.

Rather, it seems likely that the Government was attempting to fudge the question of whether or not such an act was in fact an extension of its existing claim or a new claim and therefore a breach of the Antarctic Treaty. Therefore, in the event that any other claimant established an EEZ and the Government decided to follow this precedent, New Zealand could point to the provisions of the Act as, in the first instance, permitting the declaration of an EEZ, but in the second instance, as illustrating that it had always considered that it could do so.

The 'practical problems' referred to are obviously the sheer logistical difficulty in determining the outward limits of an EEZ, and the exact scope of the territorial sea, as UNCLOS defines the EEZ by reference to its relationship to the territorial sea.

The Ross Dependency poses particular difficulties in this regard, due to the location in the dependency of the largest ice shelf in the world, the Ross Shelf¹⁰⁷. The role of ice-shelves in determining baselines¹⁰⁸ from which maritime zones extend outwards from the Antarctic continent is unclear.¹⁰⁹ While the view was expressed in 1927 that 'the Ross Sea Barrier is to be considered as land rather than water' and therefore the baselines from which the territorial sea extended should be taken from the edge of the

¹⁰⁷ See above n 1, p 45. The Ross Shelf is purported to have an area of at least 325,000 square kilometres and is hundreds of metres thick.

¹⁰⁸ The baseline would usually be the low-water line along the coast (UNCLOS, Article 5).

¹⁰⁹ For an analysis of the different views regarding the status of fast ice, pack ice and ice shelves see Joyner 'The EEZ and Antarctica: The Dilemmas of Non-Sovereign Jurisdiction' 19 *Ocean Dev & Int'l L* 469, 471-476, Kaye, see above n 35, p 199-202.

also Treaty.

shelf¹¹⁰, it has also been argued that the 'seaward margins of ice shelves are too unsteady and variable to serve as normal baselines under international law'.¹¹¹

A further consideration for the New Zealand government is the sheer resource implications of establishing such a zone and enforcing their rights within it. Even New Zealand southern most islands are approximately 1600 kms from the nearest point in the Ross Dependency.¹¹²

A further difficulty, which would have been at the forefront of policy makers minds at the time and subsequently, is the existence of the American McMurdo Base in the Dependency. The US are the most vociferous non-claimants in Antarctica and their 'pedigree in Antarctica is as impressive as that of many other states with territorial claims to the area'.¹¹³ They do not consider that any of the claims to territory to have any validity, and consider the waters of Antarctica to be high seas right up to the coast of the continent.

'The American Antarctic connection has been valuable to New Zealand from both a political and scientific standpoint.'¹¹⁴ The degree of New Zealand's logistical dependence on the United States Antarctic Program to support its own is considerable, and it has been said that 'New Zealand could barely continue her Antarctic activities without the United States'.¹¹⁵ Sahurie states that¹¹⁶

As the possibility of exploiting resources in the Antarctic increases, undoubtedly New Zealand will strengthen her participation in Antarctic affairs. The more delicate consequences of such a course of events will affect her relations with the United States.

¹¹⁰ Foreign Office Opinion on the Territorial Scope of the Ross Dependency Whaling Regulations, 15 March 1927, reproduced in Bush, see n 62 Vol III, 56.

¹¹¹ See above n 1, p 82.

¹¹² See above n 21, p 3.

¹¹³ See Sahurie above n 3, 32.

¹¹⁴ Prior, Stuart "Antarctica: View from a Gateway" Center for Strategic Studies Working Paper 5/97 (Victoria University of Wellington, 1997), 17.

¹¹⁵ A Hayter quoted in Sahurie, see n 3 above, p 18.

¹¹⁶ See Sahuries above n 3, p 19.

4 *Implementation of other Antarctic treaties*

The mechanism established by the Territorial Sea, Contiguous Zone and Exclusive Economic Zone Act 1977 of asserting the right to these zones in the Ross Dependency, is incorporated by reference into both the Antarctic Marine Living Resources Act 1981 (AMLR Act) and the Antarctic (Environmental Protection) Act 1994 (A(EP) Act).¹¹⁷

The AMLR Act applies to New Zealand and New Zealand fisheries waters and therefore does not apply to the marine areas of the Ross Dependency on a territorial basis. 'New Zealand fisheries waters' are defined by fisheries legislation¹¹⁸ which refers to the territorial sea and EEZ of New Zealand under the TS and EEZ Act.

The Madrid Protocol is implemented into New Zealand domestic law by the A(EP) Act which applies to any person in the Ross Dependency. The Ross Dependency is defined by the Act to include the continental shelf of the Ross Dependency. This is the sole reference to the existence of the continental shelf of the Dependency in New Zealand legislation. Section 11(a) of the Act creates a prohibition applicable to nationals of other treaty parties who undertake mineral resource activity in the Ross Dependency. Not since the Ross Dependency Whaling Regulations 1929 had New Zealand directly applied legislation enforcing a 'coastal state' right against non-New Zealanders.

C *Comparison of New Zealand and Australian Practice*

Both New Zealand and Australia assert the right to maritime zones as a coastal state in Antarctica. While there would seem to be sufficient basis in international law to establish such zones, it is submitted that both New Zealand and Australia are inhibited

¹¹⁷ The operative provisions of this Act are yet to enter into force. They will do so on entry into force of the Madrid Protocol see n 17.

¹¹⁸ It refers to the Fisheries Act 1908, which has now been repealed and replaced by the Fisheries Acts 1983 and 1996 respectively.

by the political environment relating to sovereignty in Antarctica from seeking to exercise their rights as coastal states. Hence their reluctance to assert their jurisdiction against foreign nationals and vessels.

Australia has been more assertive in respect of their maritime claims in Antarctica. Unlike New Zealand they have incorporated those maritime zones into their domestic legislation and have declared an EEZ adjacent to the AAT. New Zealand by comparison has only belatedly created a legislative basis for amalgamating maritime zones in Antarctica with those of the rest of New Zealand.

On the other hand Australia's involvement in Antarctica is not so intricately bound up with that of a non-claimant as New Zealand's so clearly is. Not only is there a high level of dependency of the New Zealand Antarctic program on the American program, but the United States has a substantial base in the Ross Dependency, and a long history of significant involvement in the area.

Whether or not New Zealand will take further action to assert jurisdiction over maritime areas is uncertain. Any decision in this regard should be based on a clear conception of the objective of doing so. As mineral resource activities are banned in Antarctica, and the exploitation of marine resources is governed by CCAMLR, the only remaining reason for taking this further step would be to reinforce New Zealand's claim to the Ross Dependency.

A failure to do establish maritime claims may be interpreted as a lack of conviction on the part of New Zealand as to the validity of its claim. On the other hand, the Antarctic Treaty can be cited as the reason for such forbearance without any inference as to the validity or otherwise of New Zealand's claim. The true genius of the Antarctic Treaty is that it can quite reasonably be interpreted as being consistent with both a decision to establish such zones or not to do so. It is submitted that, in making a decision as to

whether or not to more strongly assert New Zealand's maritime claims in the Ross Dependency, legal considerations will be subordinated to political objectives.

VI CONCLUSION

The determination of whether it is legally possible for claimant states in Antarctica to establish maritime zones adjacent to their claimed territory, requires consideration of both the Antarctic and the law of the sea regimes. UNCLOS creates a framework for maritime zones around the concept of the 'coastal state'. The identification of a 'coastal state' in Antarctica goes to the heart of the disputes over territorial sovereignty in Antarctica.

The Antarctic Treaty and related Conventions are sufficiently ambiguous on the question of maritime claims to permit reasonable legal arguments to be made in support of the position of both claimants and non-claimants. This is hardly surprising given that this was in fact the clear intention of the drafters of the Treaty. While there are stronger legal arguments for the lawful establishment of territorial seas and continental shelf than there are for EEZs, there would seem to be sufficient legal arguments available to claimant states to justify the establishment of such zones in Antarctica. However, whether or not States decide to establish such zones, and the extent to which they assert jurisdiction over them, will depend on political, rather than legal, considerations.

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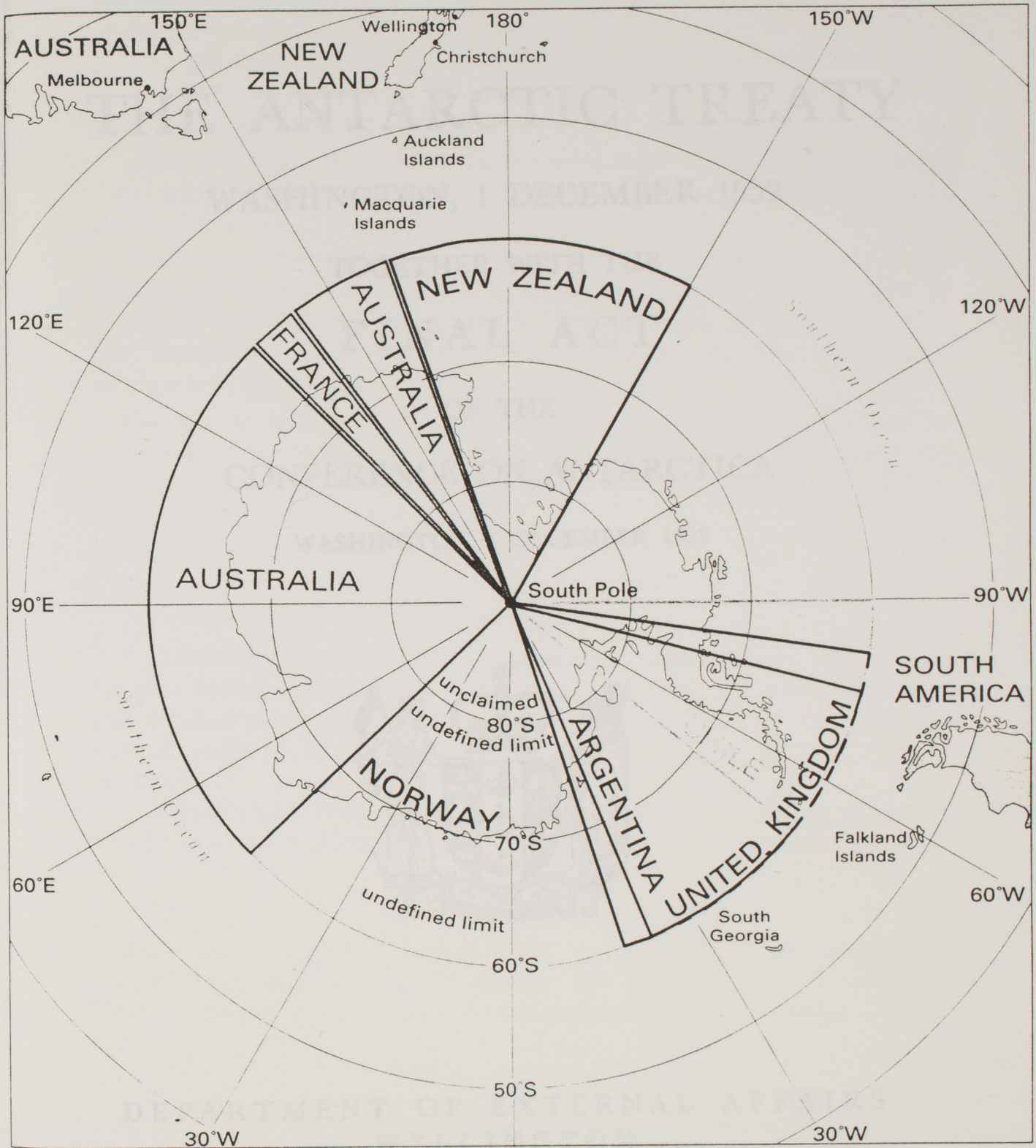
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TERRITORIAL CLAIMS IN ANTARCTICA



ANNEX B

THE ANTARCTIC TREATY

WASHINGTON, 1 DECEMBER 1959

TOGETHER WITH THE FINAL ACT

OF THE CONFERENCE ON ANTARCTICA

WASHINGTON, 1 DECEMBER 1959



DEPARTMENT OF EXTERNAL AFFAIRS
WELLINGTON

1960

THE ANTARCTIC TREATY

The Governments of Argentina, Australia, Belgium, Chile, the French Republic, Japan, New Zealand, Norway, the Union of South Africa, the Union of Soviet Socialist Republics, the United Kingdom of Great Britain and Northern Ireland, and the United States of America,

Recognizing that it is in the interest of all mankind that Antarctica shall continue forever to be used exclusively for peaceful purposes and shall not become the scene or object of international discord;

Acknowledging the substantial contributions to scientific knowledge resulting from international cooperation in scientific investigation in Antarctica;

Convinced that the establishment of a firm foundation for the continuation and development of such cooperation on the basis of freedom of scientific investigation in Antarctica as applied during the International Geophysical Year accords with the interests of science and the progress of all mankind;

Convinced also, that a treaty ensuring the use of Antarctica for peaceful purposes only and the continuance of international harmony in Antarctica will further the purposes and principles embodied in the Charter of the United Nations;

Have agreed as follows:

ARTICLE I

1. Antarctica shall be used for peaceful purposes only. There shall be prohibited, *inter alia*, any measures of a military nature, such as the establishment of military bases and fortifications, the carrying out of military maneuvers, as well as the testing of any type of weapons.

2. The present Treaty shall not prevent the use of military personnel or equipment for scientific research or for any other peaceful purpose.

ARTICLE II

Freedom of scientific investigation in Antarctica and cooperation toward that end, as applied during the International Geophysical Year, shall continue, subject to the provisions of the present Treaty.

ARTICLE III

1. In order to promote international cooperation in scientific investigation in Antarctica, as provided for in Article II of the present Treaty, the Contracting Parties agree that, to the greatest extent feasible and practicable:

- (a) information regarding plans for scientific programs in Antarctica shall be exchanged to permit maximum economy and efficiency of operations;

- (b) scientific personnel shall be exchanged in Antarctica between expeditions and stations;
- (c) scientific observations and results from Antarctica shall be exchanged and made freely available.

2. In implementing this Article, every encouragement shall be given to the establishment of cooperative working relations with those Specialized Agencies of the United Nations and other international organizations having a scientific or technical interest in Antarctica.

ARTICLE IV

1. Nothing contained in the present Treaty shall be interpreted as:

- (a) a renunciation by any Contracting Party of previously asserted rights of or claims to territorial sovereignty in Antarctica;
- (b) a renunciation or diminution by any Contracting Party of any basis of claim to territorial sovereignty in Antarctica which it may have whether as a result of its activities or those of its nationals in Antarctica, or otherwise;
- (c) prejudicing the position of any Contracting Party as regards its recognition or non-recognition of any other State's right of or claim or basis of claim to territorial sovereignty in Antarctica.

2. No acts or activities taking place while the present Treaty is in force shall constitute a basis for asserting, supporting or denying a claim to territorial sovereignty in Antarctica or create any rights of sovereignty in Antarctica. No new claim, or enlargement of an existing claim, to territorial sovereignty in Antarctica shall be asserted while the present Treaty is in force.

ARTICLE V

1. Any nuclear explosions in Antarctica and the disposal there of radioactive waste material shall be prohibited.

2. In the event of the conclusion of international agreements concerning the use of nuclear energy, including nuclear explosions and the disposal of radioactive waste material, to which all of the Contracting Parties whose representatives are entitled to participate in the meetings provided for under Article IX are parties, the rules established under such agreements shall apply in Antarctica.

ARTICLE VI

The provisions of the present Treaty shall apply to the area south of 60° South Latitude, including all ice shelves, but nothing in the present Treaty shall prejudice or in any way affect the rights, or the exercise of the rights, of any State under international law with regard to the high seas within that area.

ARTICLE VII

1. In order to promote the objectives and ensure the observance of the provisions of the present Treaty, each Contracting Party whose representatives are entitled to participate in the meetings referred to in Article IX of the Treaty shall have the right to designate observers to carry out any inspection provided for by the present Article. Observers shall be nationals of the Contracting Parties which designate them. The names of observers shall be communicated to every other Contracting Party having the right to designate observers, and like notice shall be given of the termination of their appointment.

2. Each observer designated in accordance with the provisions of paragraph 1 of this Article shall have complete freedom of access at any time to any or all areas of Antarctica.

3. All areas of Antarctica, including all stations, installations and equipment within those areas, and all ships and aircraft at points of discharging or embarking cargoes or personnel in Antarctica, shall be open at all times to inspection by any observers designated in accordance with paragraph 1 of this Article.

4. Aerial observation may be carried out at any time over any or all areas of Antarctica by any of the Contracting Parties having the right to designate observers.

5. Each Contracting Party shall, at the time when the present Treaty enters into force for it, inform the other Contracting Parties, and thereafter shall give them notice in advance, of

- (a) all expeditions to and within Antarctica, on the part of its ships or nationals, and all expeditions to Antarctica organized in or proceeding from its territory;
- (b) all stations in Antarctica occupied by its nationals; and
- (c) any military personnel or equipment intended to be introduced by it into Antarctica subject to the conditions prescribed in paragraph 2 of Article I of the present Treaty.

ARTICLE VIII

1. In order to facilitate the exercise of their functions under the present Treaty, and without prejudice to the respective positions of the Contracting Parties relating to jurisdiction over all other persons in Antarctica, observers designated under paragraph 1 of Article VII and scientific personnel exchanged under subparagraph 1 (b) of Article III of the Treaty, and members of the staffs accompanying any such persons, shall be subject only to the jurisdiction of the Contracting Party of which they are nationals in respect of all acts or omissions occurring while they are in Antarctica for the purpose of exercising their functions.

ARTICLE X

Each of the Contracting Parties undertakes to exert appropriate efforts, consistent with the Charter of the United Nations, to the end that no one engages in any activity in Antarctica contrary to the principles or purposes of the present Treaty.

ARTICLE XI

1. If any dispute arises between two or more of the Contracting Parties concerning the interpretation or application of the present Treaty, those Contracting Parties shall consult among themselves with a view to having the dispute resolved by negotiation, inquiry, mediation, conciliation, arbitration, judicial settlement or other peaceful means of their own choice.

2. Any dispute of this character not so resolved shall, with the consent, in each case, of all parties to the dispute, be referred to the International Court of Justice for settlement; but failure to reach agreement on reference to the International Court shall not absolve parties to the dispute from the responsibility of continuing to seek to resolve it by any of the various peaceful means referred to in paragraph 1 of this Article.

ARTICLE XII

1. (a) The present Treaty may be modified or amended at any time by unanimous agreement of the Contracting Parties whose representatives are entitled to participate in the meetings provided for under Article IX. Any such modification or amendment shall enter into force when the depositary Government has received notice from all such Contracting Parties that they have ratified it.

(b) Such modification or amendment shall thereafter enter into force as to any other Contracting Party when notice of ratification by it has been received by the depositary Government. Any such Contracting Party from which no notice of ratification is received within a period of two years from the date of entry into force of the modification or amendment in accordance with the provisions of subparagraph 1 (a) of this Article shall be deemed to have withdrawn from the present Treaty on the date of the expiration of such period.

2. (a) If after the expiration of thirty years from the date of entry into force of the present Treaty, any of the Contracting Parties whose representatives are entitled to participate in the meetings provided for under Article IX so requests by a communication addressed to the depositary Government, a Conference of all the Contracting Parties shall be held as soon as practicable to review the operation of the Treaty.

(b) Any modification or amendment to the present Treaty which is approved at such a Conference by a majority of the Contracting Parties there represented, including a majority of those whose repre-

2. Without prejudice to the provisions of paragraph 1 of this Article, and pending the adoption of measures in pursuance of subparagraph 1 (e) of Article IX, the Contracting Parties concerned in any case of dispute with regard to the exercise of jurisdiction in Antarctica shall immediately consult together with a view to reaching a mutually acceptable solution.

ARTICLE IX

1. Representatives of the Contracting Parties named in the preamble to the present Treaty shall meet at the City of Canberra within two months after the date of entry into force of the Treaty, and thereafter at suitable intervals and places, for the purpose of exchanging information, consulting together on matters of common interest pertaining to Antarctica, and formulating and considering, and recommending to their Governments, measures in furtherance of the principles and objectives of the Treaty, including measures regarding:

- (a) use of Antarctica for peaceful purposes only;
- (b) facilitation of scientific research in Antarctica;
- (c) facilitation of international scientific cooperation in Antarctica;
- (d) facilitation of the exercise of the rights of inspection provided for in Article VII of the Treaty;
- (e) questions relating to the exercise of jurisdiction in Antarctica;
- (f) preservation and conservation of living resources in Antarctica.

2. Each Contracting Party which has become a party to the present Treaty by accession under Article XIII shall be entitled to appoint representatives to participate in the meetings referred to in paragraph 1 of the present Article, during such time as that Contracting Party demonstrates its interest in Antarctica by conducting substantial scientific research activity there, such as the establishment of a scientific station or the despatch of a scientific expedition.

3. Reports from the observers referred to in Article VII of the present Treaty shall be transmitted to the representatives of the Contracting Parties participating in the meetings referred to in paragraph 1 of the present Article.

4. The measures referred to in paragraph 1 of this Article shall become effective when approved by all the Contracting Parties whose representatives were entitled to participate in the meetings held to consider those measures.

5. Any or all of the rights established in the present Treaty may be exercised as from the date of entry into force of the Treaty whether or not any measures facilitating the exercise of such rights have been proposed, considered or approved as provided in this Article.

representatives are entitled to participate in the meetings provided for under Article IX, shall be communicated by the depositary Government to all the Contracting Parties immediately after the termination of the Conference and shall enter into force in accordance with the provisions of paragraph 1 of the present Article.

(c) If any such modification or amendment has not entered into force in accordance with the provisions of subparagraph 1 (a) of this Article within a period of two years after the date of its communication to all the Contracting Parties, any Contracting Party may at any time after the expiration of that period give notice to the depositary Government of its withdrawal from the present Treaty; and such withdrawal shall take effect two years after the receipt of the notice by the depositary Government.

ARTICLE XIII

1. The present Treaty shall be subject to ratification by the signatory States. It shall be open for accession by any State which is a Member of the United Nations, or by any other State which may be invited to accede to the Treaty with the consent of all the Contracting Parties whose representatives are entitled to participate in the meetings provided for under Article IX of the Treaty.

2. Ratification of or accession to the present Treaty shall be effected by each State in accordance with its constitutional processes.

3. Instruments of ratification and instruments of accession shall be deposited with the Government of the United States of America, hereby designated as the depositary government.

4. The depositary Government shall inform all signatory and acceding States of the date of each deposit of an instrument of ratification or accession, and the date of entry into force of the Treaty and of any modification or amendment thereto.

5. Upon the deposit of instruments of ratification by all the signatory States, the present Treaty shall enter into force for those States and for States which have deposited instruments of accession. Thereafter the Treaty shall enter into force for any acceding State upon the deposit of its instrument of accession.

6. The present Treaty shall be registered by the depositary Government pursuant to Article 102 of the Charter of the United Nations.

ARTICLE XIV

The present Treaty, done in the English, French, Russian and Spanish languages, each version being equally authentic, shall be deposited in the archives of the Government of the United States of America, which shall transmit duly certified copies thereof to the Governments of the signatory and acceding States.

In witness whereof, the undersigned Plenipotentiaries, duly authorized, have signed the present Treaty.

Done at Washington this first day of December, one thousand nine hundred and fifty-nine.

For Argentina:	ADOLFO SCILINGO F. BELLO
For Australia:	HOWARD BEALE
For Belgium:	OBERT DE THIEUSIES
For Chile:	MARCIAL MORA M. E. CAJARDO V. JULIO ESCUDERO
For the French Republic:	PIERRE CHARPENTIER
For Japan:	KOICHIRO ASAKAI T. SHIMODA
For New Zealand:	G. D. L. WHITE
For Norway:	PAUL KOHT
For the Union of South Africa:	WENTZEL C. DU PLESSIS
For the Union of Soviet Socialist Republics:	V. KUZNETSOV [Romanization]
For the United Kingdom of Great Britain and Northern Ireland:	HAROLD CACCIA
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