LEGAL ISSUES CONFRONTING AUSTRALIA'S ANTARCTICA

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INTRODUCTION

Australia has a considerable history in Antarctica. From the early twentieth century era of explorers such as Sir Douglas Mawson to the flights of aviator/adventurer Dick Smith, Australians have had a continuing interest in the continent. During the past few years this interest has grown, most recently manifesting itself in the debate over the alternatives of a minerals regime which would allow commercial mining to take place, or a new environmental protection regime which would prohibit mining for the foreseeable future. Australia has played a key role in this debate, advocating internationally and domestically a permanent prohibition on mining activities and a new regime of strict environmental protection measures, and enacting its own unilateral mining ban in advance of international agreement on the issue.[1] The debate was resolved in late 1991 with the conclusion of the Madrid Protocol to the Antarctic Treaty.[2] The effect of the Protocol is to prohibit all minerals activities in Antarctica for at least 55 years and to implement a regime designed comprehensively to protect the "Antarctic environment and dependent and associated ecosystems".

The minerals debate has placed renewed emphasis on the Antarctic Treaty and on the legal regime which has grown up around the Treaty, known as the Antarctic Treaty system.[3] The Treaty provides (Article XII(2)) that a Conference may be requested by any party 30 years after the date of its coming into force "to review the operation of the Treaty". Although such a Conference has no special power to amend the Treaty by majority decision, there are special withdrawal rights if a proposed amendment proves unacceptable to any party. Thus an unsuccessful Conference under Article XII could lead, in the worst case, to the demise of the Treaty. The thirty years expired in 1991 without any request for a

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1 Antarctic Mining Prohibition Act 1991 (Cth) (in force 27 March 1991).

2 The Antarctic Treaty was concluded at Washington on 1 December 1959, and entered into force on 23 June 1961: 402 UNTS 71. The Madrid Protocol was concluded on 3 October 1991 (XI ATSCM/2/3/2), reprinted in (1991) 30 ILM 1460–1486.

3 The "Antarctic Treaty system" is defined by the Madrid Protocol, Art 1(f) as "the Antarctic Treaty, the measures in effect under that Treaty, its associate separate international instruments in force and the measures in effect under those instruments".

Review Conference, and given the agreement on the Madrid Protocol this no longer seems likely. In other words the Antarctic Treaty system has survived its first 30 years, and a strident controversy over issues of economic development. That is an achievement, the more so since, as we will see, the Treaty is based not on the *consensus ad idem* of the parties but on their agreement to disagree.[4]

Not only does Australia have a strong historical interest in Antarctica, but it also lays claim to approximately 42 per cent of the continent. The Australian Antarctic Territory, officially proclaimed in 1933, is the largest of the seven sovereignty claims made to Antarctica. It is divided into two portions, separated by the French claim to Adelie Land. Other territorial claims in Antarctica have been made by Argentina, Chile, New Zealand, Norway and the United Kingdom. But a number of these claims overlap, some drastically, and the claims are not generally recognized as valid by non-claimant States. In particular two States with extensive and continuing activities in the Antarctic, the United States and the Soviet Union, do not recognize any claims to sovereignty there, although they reserve the right, by way of so-called "bases of claim", to make their own claims in the future.[5] The Treaty is an agreement between claimant and non-claimant States, and it seeks not to resolve but to displace the various claims, counter-claims and rejections of claims. In particular Article IV of the Treaty provides that the implementation of the Treaty is without prejudice to the legal position of the various parties, and that acts done during the currency of the Treaty neither strengthen nor weaken existing claims. With Article IV in place, the parties have been able to pursue scientific research and the exploitation of some marine living resources without the sovereign rights that some of them claim being technically infringed.

In addition to the non-recognition by some parties of the claims of others, the Treaty involves a further level of claim and non-recognition, since the parties collectively assert the right to regulate activities in Antarctica as against the rest of the world. A number of developing countries, led by Malaysia, have challenged this further claim in the United Nations, relying on the principle that Antarctica is the "common heritage of mankind". That issue too remains unresolved, but the Treaty parties have been able to persuade other States wishing to participate in activities in Antarctica to accede to the Treaty, rather than to challenge their hegemony by individual or collective activities carried on outside its scope. Since the States that have acceded in this way include major third world States such as Brazil, China and India, and other major powers such as Germany, the "common heritage" argument has been to a considerable extent diffused – though by no means negated. Moreover by maintaining a distinction between Consultative Parties and other parties, but being flexible in the level of influence extended to the latter, the original parties (all of them Consultative

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4 For an assessment see Rothwell, "The Antarctic Treaty: 1961–1991 and Beyond", (1992) 14 Sydney LR 62.

5 See Bush WM, *Antarctica and International Law* (1988), vol 3, pp 205–14 (USSR), pp 420–537 (USA) for background on their respective positions.

Parties) have retained effective control. This highlights the flexibility of the Antarctic Treaty system, which has continued to develop to meet changing ideas about the management needs of the continent.

The application of an international legal regime to a whole continent, and the interrelationship of that regime and Australian law in Antarctica, create interesting legal problems – problems which are faced in few other areas of the world. This is compounded by the unique position that Antarctica occupies in international affairs. Almost the last pristine wilderness remaining on earth, it may hold extensive mineral resources, resources which developing countries claim should be shared equally by all. This paper will discuss some of these issues, from the perspective of Australian and international law as they apply in Antarctica. As will be seen, despite the international legal framework created by the Antarctic Treaty system, within which claimant States must operate, Australia has applied a regime of its own laws to the Australian Antarctic Territory. These laws have the potential to provoke jurisdictional conflict, if not outright conflict with Treaty provisions. But the relationship between those laws and the Antarctic Treaty system is not straightforwardly either one of coordination or conflict. On the one hand the Treaty explicitly does not recognize 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.

AUSTRALIA'S ANTARCTIC TERRITORY

Unlike the other continents, Antarctica is the only continent in which there is a substantial sector of unclaimed territory, where three territorial claims overlap, and where the existing territorial claims are not recognised by non-claimant States representing the great majority of the international community. It is thus easy to understand why sovereignty remains a major issue in Antarctica. Indeed it is surprising that the uncertain status of Antarctic sovereignty is not given a higher profile. Possible reasons include the historical basis for the seven claims, the continuing emphasis each claimant places on protecting its claim, the absence of any rival claimant to sovereignty over most of the claims, and the discreet protection the Antarctic Treaty affords to each claimant.

In looking at the issues, we begin by reviewing the status of the Australian claim and its validity in international law, before turning to the impact of the Treaty.

1. The Historic Basis of the Australian Claim

The United Kingdom has the longest-standing claim in the Antarctic. It rests upon the disputed ownership of the Falkland Islands, Cook's proclamation of

sovereignty over the island of South Georgia, and various acts of discovery.[6] The initial British proclamation of sovereignty came in 1908 and was followed by others in 1917 and 1948. But it was not until 1962 that the British Antarctic Territory was formally created.[7] Encouraged by the desire of Britain to ensure that British claims to Antarctica were respected, Australia also began to take steps towards making a claim to part of the continent. The explorer Douglas Mawson, who commanded the first Australian Antarctic Expedition in 1911–1914, was particularly responsible for making Australian claims in Antarctica. These claims were based upon acts of discovery and the sighting and charting of large tracts of the Antarctic coastline and inland areas.

Following the decision by Britain to hand over to New Zealand control of the "Ross Dependency",[8] concern was expressed as to the uncertain legal status of any potential Australian claims. The matter was considered in some detail at the 1926 Imperial Conference, when a report by the "Committee on British Policy in the Antarctic" was presented.[9] The report highlighted the need to ensure the effective assertion of sovereignty over areas of "British domination" in Antarctica. Thereafter Australia began to take an even more active interest in establishing a claim. Mawson was requested to return to Antarctica to lead the "British, Australian and New Zealand Antarctic Expedition" (BANZARE) of 1929–31. He was instructed to take every opportunity to "plant the British flag" and to read the appropriate proclamation of annexation of territory.[10] Extensive claims were made by Mawson during this expedition.

It will be recalled that Australia's separate international status at this time was by no means clear. The notion of the indivisibility of the Crown within the Empire and the "*inter se*" doctrine were current, and Australia had been – by comparison with Canada and South Africa – backward in asserting its separate international independence. It had not, for example, yet applied the Statute of Westminster 1931 (UK) to itself, and had accepted that such an application would not affect the Australian States.[11] Thus it is significant that the first effort to assert full legal title over the Australian Antarctic Territory took the form of a British Order in Council of 7 February 1933, asserting British sovereign rights

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6 For some background on the UK claim see Waldock, "Disputed Sovereignty in the Falkland Islands Dependencies", (1948) 25 BYIL 311.

7 See "British Antarctic Territory Order, 1962", reprinted in Bush, note 5 above, vol 3, pp 370–5; also Prescott, "Boundaries in Antarctica" in Harris S (ed), *Australia's Antarctic Policy Options* (1984), pp 85–6.

8 See Auburn FM, *The Ross Dependency* (1972).

9 "Report of the Committee Appointed by the Imperial Conference 1926 to consider British Policy in the Antarctic", reprinted in Bush (1982), vol 2, pp 100–4.

10 Triggs GD, *International Law and Australian Sovereignty in Antarctica* (1986), pp 107–8.

11 Castles, "International Law and Australia's Overseas Territories" in O'Connell DP (ed), *International Law in Australia* (1965), p 292 at 298–304.

over the Australian Antarctic Territory.[12] The same Order in Council placed the Territory under the administration of the Commonwealth of Australia. This was followed by the Australian Antarctic Territory Acceptance Act 1933 (Cth) which came into operation on 24 August 1936. Section 2 of the Act provided:

> That part of the territory in the Antarctic seas which comprises all the islands and territories 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, is hereby declared to be accepted by the Commonwealth as a Territory under the authority of the Commonwealth, by the name of the Australian Antarctic Territory.

The Australian Antarctic Territory has since been administered as an external territory of Australia.[13]

2. The Acquisition of Territory in International Law

In order to make an assessment of the validity of the Australian claim to the Australian Antarctic Territory, it is helpful to understand the basic principles which have been applied in international law regarding the acquisition of sovereignty over lands. There are five traditional methods of acquiring sovereignty over territory: occupation, annexation, accretion, prescription and cession.[14] In the case of Antarctica, all of the claims which have been made are based originally on discovery, followed by assertions of sovereignty which are claimed to satisfy the criteria for occupation. This is on the basis that "occupation" does not require actual physical presence over the whole of the territory claimed. In the *Eastern Greenland* case, the Permanent Court of International Justice held that if a claim of occupation was to be effective, it was necessary to show an intention or will to act as sovereign and the adequate exercise or display of sovereignty, but that, in the case of remote or uninhabited regions, very little in the way of actual administration was necessary.[15] It is therefore argued that a metropolitan power can demonstrate that it has effectively exercised sovereignty over distant territories on the basis of largely formal acts, such as the enactment of laws and the assertion of jurisdiction.

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12 Australia, SR & O (rev) 1948, II, 1034; Bush (1982), vol 2, p 142. The Order in Council referred to the Territory as "territory over which His Majesty has Sovereign rights", and placed the Territory "under the authority of the Commonwealth of Australia". This is curiously reticent language. But in a British note to the French Government of 14 February 1933, reprinted in Bush (1982), vol 2, p 144, the Order in Council is described as one "relating to the sovereignty of His Majesty" over the Territory.

13 For a detailed review of the process of acquisition see Triggs, note 10 above, pp 102–11. See also Castles, "The International Status of the Australian Antarctic Territory" in O'Connell, note 11 above, p 341; Prescott, note 7 above, p 87.

14 Starke JG, *Introduction to International Law*, 10th ed (1989), p 159; Brownlie I, *Principles of Public International Law*, 4th ed (1990), p 131.

15 (1933), PCIJ Ser A/B, No 53, pp 45–6.

On the other hand, *something* by way of the effective and continuous display of authority is required, especially if there are competing claims. Hence, in the *Island of Palmas* arbitration, the Netherlands was able to demonstrate a better title to the island in dispute because of its continuing assertion of sovereignty over time, despite claims made by the United States based on discovery.[16] This decision illustrates that discovery as a basis of claim gives rise to nothing better than an inchoate title, which must be perfected by later acts demonstrating in some way the actual exercise of sovereignty over the discovered lands. Moreover the taking of possession by way of a proclamation is insufficient to prove sovereign title over discovered territories: there must be an actual and continuing intent to exercise sovereignty over a period of time, and *some* activity which evidences and gives effect to that intent.[17]

The cases relied on to support claims of sovereignty based on formal claims and symbolic acts can be distinguished for the purposes of establishing the validity of Antarctic claims. In the *Eastern Greenland* case, the question was not whether Danish sovereignty existed but how far the claim extended over the island. In both the *Island of Palmas* and *Clipperton Island* cases there was no doubt that one of the parties in each arbitration had sovereignty – the only question was which. By contrast Antarctica is a huge continent, lacking a permanent population and habitable only with massive external logistic support. A considerable number of States engage in scientific and cognate activities there, with little or no legal regulation other than from the sending State, that is, the State of nationality. The sovereignty dispute is not merely bilateral, since influential participants in Antarctic activities reject any and all sovereignty claims. [18]

Even if one accepts the framework of "traditional notions of sovereignty",[19] there are special difficulties with the application of these notions to polar lands in general and Antarctica in particular. Six of the seven Antarctic claims[20] are based upon an Antarctic "sector" which commences from the coastline and converges in straight lines upon the geographical South Pole, thereby dividing the continent like pieces of a pie. Sector claims have some precedent in the Arctic, and are said to be based on other asserted legal principles such as the "hinterland" doctrine or contiguity.[21] However, while sector claims do have

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16 (1928), 2 Reps of Int'l Arbitral Awards 829.

17 See the *Clipperton Island Arbitration*, (1931) 2 Reps of Int'l Arbitral Awards 1105; and generally on these issues, note 14 above, Brownlie, pp 140–5; Starke, pp 160–2.

18 See Greig, "Territorial Sovereignty and the Status of Antarctica", (1975) 32 Australian Outlook 117 at 126; Suter K, *Antarctica: Private Property or Public Heritage?* (1991), p 16.

19 Greig, ibid at 126.

20 The exception is Norway, whose Antarctic claim extends inland from the coastline to an indeterminate point.

21 Smedal G, *Acquisition of Sovereignty over Polar Areas* (1931), pp 54–76.

some administrative convenience, few commentators accept their validity.[22] Even if this form of claim is accepted on the basis of Arctic practice (and that is controversial), it is difficult to see how any of the Antarctic claimants apart from Argentina or Chile could rely upon such a basis of claim.

3. The Validity of the Australian Claim

Ever since the making of its claim to the Australian Antarctic Territory, Australia has engaged in activities designed to solidify and advance the claim. Even the conclusion of the Antarctic Treaty, with its "freezing" of claims to sovereignty, could be said in some way to advance the status of the claim, if only because Australia was granted implicit recognition as a claimant under the Treaty. But Article IV of the Treaty has not prevented Australia from continuing to assert its sovereignty over the Australian Antarctic Territory. The Australian view has been put in the following terms:

> Australia's title in international law rests on acts of discovery and formal claims of title by British and Australian explorers, the formal transfer of the territory from Britain to Australia and Australian acceptance by legislation, and subsequent acts showing an intention by Australia to exercise sovereignty over the Territory. This intention is demonstrated, inter alia, by the application by Australia of legislation to the Territory, the negotiation and conclusion of Treaties affecting the Territory and by engagement in a degree of administrative activity there. Having regard to the particular conditions experienced in Antarctica, a principal form of Australian administrative activity is related to the presence of Australian scientific research bases and a program of exploration and scientific work in the Australian Antarctic Territory.[23]

But while the official position is one of confidence with respect to the status of the Australian Antarctic Territory claim, closer scrutiny suggests that there may be cause for concern. Budgetary constraints have imposed substantial limitations upon Australia's ability to maintain an effective presence on the continent. At present, Australia has three permanent scientific bases in Antarctica, and there are some summer stations which are not permanently occupied.[24] There are also several Russian (formerly Soviet) scientific stations

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22 Brownlie, note 14 above, p 151; Pharand, "Canada's Arctic Jurisdiction in International Law", (1983) 7 Dalhousie LJ 315 at 324. Concerning Antarctica see Auburn FM, *Antarctic Law and Politics* (1982), pp 17–31; Triggs, note 10 above, pp 89–96.

23 Mr A Peacock, Minister for Foreign Affairs, HR Deb 1979, Vol 116, 3502, reprinted in 8 Aust YBIL 306.

24 The three permanent Australian bases are Mawson, Casey and Davis, with another located on the sub-Antarctic Macquarie Island (Australian sovereignty over which is not in dispute).

located within the Australian Antarctic Territory.[25] While there is no disagreement over the existence of these stations in Australian territory, they potentially detract from any Australian claim based on effective – that is to say, exclusive – occupation. Gillian Triggs argues that Australia has a valid claim to the area surrounding its three permanent bases,[26] but that the remainder of the claim is problematic. She asserts that:

> ...there is little evidence to support Australian sovereignty over the vast hinterland of its claimed sector beyond exploratory expeditions and the extension of legislation. It is thus doubtful whether Australia can support its claim to sovereignty over such territory.[27]

If Australia is to protect its claim, the continuing presence on the continent of Australian scientists and expeditioners is vital.[28]

In any consideration of the status of the Australian claim to the Australian Antarctic Territory, it is relevant whether there is a serious rival claimant who would have a better claim in international law. Like possession in the common law, once a certain minimum level of possession or control can be shown, the question is not whether title is unimpeachable but whether there is any better claimant. Given that there are no non-Treaty parties with any permanent presence in Antarctica, any potential alternate claimant to all or a portion of the Australian Antarctic Territory could only be another party to the Antarctic Treaty, which under the terms of Article IV, prohibits the assertion of claims throughout the duration of the Treaty. This offers some protection for the Australian claim, at least while the Treaty remains in force, and it may be that the existence of an Australian presence, and its assertion of jurisdiction by way of legislation, would be sufficient to defeat a subsequent challenge by another claimant which was or had been an Antarctic Treaty party.[29] While the Australia claim to the Australian Antarctic Territory may not have been perfected, it is

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25 Russia claims to continue the legal personality of the Soviet Union in respect of international treaties, pursuant to the Agreement between the Soviet Republics signed at Alma Ata on 21 December 1991: see the Statement of the Russian General Consul of 16 January 1992, made to the Extraordinary Meeting of the Council of Europe Committee of Legal Advisers on Public International Law (CAHDI (92) 2, Appendix 1). That claim has been recognized by Australia: Senator G Evans, Minister for Foreign Affairs and Trade, Press Release, 26 December 1991.

26 Triggs, "Australian Sovereignty in Antarctica – Part II", (1982) 13 MULR 302 at 332.

27 Triggs, note 10 above, p 323.

28 This concern has been repeatedly expressed by Australian parliamentary committees. For example the Joint Committee on Foreign Affairs and Defence in 1978 said:

> "To give the claim for sovereignty over the area of the Australian Antarctic Territory greater international validity, Australia must obviously demonstrate a greater interest in the Territory."

Australia, Antarctica and the Law of the Sea (Parliamentary Paper No 198/1978) 74.

29 See Triggs, note 10 above, pp 312–15.

probably a better claim than that which could currently be asserted by a rival claimant.

But the real problem (given that Australia does not face overlapping claims in the way that the United Kingdom does) is that to assume a mere bilateral rivalry begs the question. The real problem is the challenge from States, Antarctic Treaty parties or not, which reject the validity of claims to any exclusive title there. The forum before which Antarctic claims may have to be vindicated in future is unlikely to be that of a bilateral arbitration in which the parties are agreed that someone has sovereignty, and that it can only be one of them. It is much more likely to be a multilateral diplomatic forum, in which the arguments will focus on legitimacy more than legality. Unless Australia and the other claimant States can convincingly argue that the maintenance of their claims is consistent with the broader interests of the international community, the legitimacy of their position is likely to be denied. And that brings us back to the Treaty, and the Antarctic Treaty system as a whole.

THE ANTARCTIC TREATY SYSTEM

Until the extensive debates which took place in the United Nations during the 1980s, for much of this century Antarctica has been ignored by international bodies such as the League of Nations and the United Nations. Whatever the validity of the individual claims, Antarctica tended to be treated just like other discovered and settled lands. Occasional concerns were expressed about the potential for the claimant States to become involved in disputes over their claims, or for major powers like the United States to seek to assert a conflicting claim themselves. However apart from an unsuccessful attempt by the United Kingdom to contest the claims of Argentina and Chile in the International Court of Justice,[30] nothing came of these concerns. Antarctica's legal regime was essentially developed on the basis of international "understandings" amongst the claimant States which purported to apply their domestic laws to the continent.

Nonetheless, one result of the Cold War was that Antarctica became a focus of US/Soviet tensions. The United States had a long history in the Antarctic, and American explorers and sealers were frequent visitors during the 19th century. It never actively asserted a sovereignty claim, and indeed did not contest the claims made by others. But it did initiate a very active scientific programme in the Antarctic from the 1930s onwards, and during the 1950s numerous American scientific bases were established on the continent. Since 1945, when the United States had the technological and financial capacity to conduct substantial Antarctic activities, it was a dominant force in Antarctica.[31] The Soviet Union has also had a long historical interest there: Thaddeus Bellingshausen has been

30 ICJ Pleadings, *Antarctica Cases (UK v Argentina, UK v Chile)* 1956. The attempt failed for jurisdictional, not substantive reasons, since Argentina and Chile declined to accept the Court's jurisdiction on the basis of a unilateral application by the UK.

31 For an assessment of the US position in Antarctica during the 1950s see Jones, "Developing the US Antarctic Research Program", in Lewis RS and Smith PM (eds), *Frozen Future: A Prophetic Report from Antarctica* (1973).

credited with being the first person to sight the Antarctic continent in 1821. The Soviets established a number of scientific bases in Antarctica in the 1950s, many of them located within the Australian Antarctic Territory.[32] There was an understandable concern on the part of Australia that its sovereignty claim could come under threat.[33]

If concerns over the potential impact of the Cold War were one factor which led to the Antarctic Treaty, the other was science. Ever since the 19th century Antarctic science has been the key activity on the continent, and it remains so. The 1957–58 International Geophysical Year (IGY) highlighted the importance of Antarctic science and the virtue of international co-operation between Antarctic scientists and the countries operating on the continent.[34] During the planning for the IGY both scientists and diplomats saw that it might open the way to negotiating an Antarctic Treaty, which would reflect many of the goals of scientific inquiry but would also deal with the underlying political concerns of the claimant States. Acting on these perceptions, the United States invited participants to a Conference in Washington in October 1959. The Conference concluded with the signing of the Antarctic Treaty on 1 December 1959.

1. The Antarctic Treaty 1959

The Treaty was signed and eventually ratified by all twelve States which participated at the Washington Conference – Argentina, Australia, Belgium, Chile, France, Japan, New Zealand, Norway, South Africa, the Soviet Union, the United Kingdom and the United States. Poland became the first State to accede to the Treaty, so that upon its entry into force on 23 June 1961 there were 13 parties. The Treaty is a rather simple document: its flexibility has allowed for additional measures to be implemented, leading to the growth of a Treaty system based on, but much more extensive than, the 14 Articles of the Treaty itself. It is necessary first to review those Articles.

The Preamble asserts that Antarctica is to "continue forever to be used for peaceful purposes and not become the scene or object of international discord", and this is reinforced in the main body of the Treaty. For example, Article I provides that Antarctica is to be used for peaceful purposes only. No military bases are to be established, or military manoeuvres conducted. Military personnel located there can be used for scientific research. Article V furthers the effort to demilitarize the continent by prohibiting nuclear explosions and the disposal of nuclear waste. These two provisions have been effective: not even the

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32 Hanessian, "Antarctica: Current National Interests and Legal Realities", (1959) 53 Proc of American Soc of Int'l Law 145 at 157–8. For a review of the Soviet Union's interest in Antarctica see Boczek, "The Soviet Union and the Antarctic Regime", (1984) 78 AJIL 834.

33 Hayton, "The Antarctic Settlement of 1959", (1960) 54 AJIL 349 at 353.

34 Sullivan, "The International Geophysical Year", (1959) 521 Int'l Conciliation 259.

1982 Falklands War between Argentina and the United Kingdom resulted in any breach.

Science was the other key factor behind the Treaty, and Article II aims to promote the continuation of the "freedom of scientific investigation" which occurred during the IGY. Article III provides for the exchange of information about scientific programs and personnel and for the results of scientific research to be made freely available. By and large these provisions have also been effective, with scientific research continuing in Antarctica unhindered by excessive Treaty restrictions, or by the assertion of jurisdiction by territorial claimants.[35]

Article IV has been described as the "linchpin" of the Treaty: there is no doubt that without it the Treaty could not have been concluded.[36] It seeks to take into account the positions of each of the various parties which had an interest in Antarctica at the time of the Treaty's negotiation. Article IV provides as follows:

> 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.

The implications of Article IV for the application of Australian law and the Australian Antarctic Territory will be discussed in more detail later. For present purposes, it is sufficient to note that Article IV has three basic provisions. By entering into the Treaty no claimant State can be considered to have prejudiced its position, while other potential claimant States such as the United States also do not prejudice their position. In addition no activities which take place while

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35 See Roots EF, "The Role of Science in the Antarctic Treaty" in *Antarctic Treaty System: An Assessment* (1986).

36 Trolle-Anderson, "The Antarctic Scene: Legal and Political Facts" in Triggs GD (ed), *The Antarctic Legal Regime: Law, Environment and Resources* (1987), p 59.

the Treaty is in force are to constitute a basis for "asserting, supporting, or denying" a claim to territorial sovereignty, and no new claim and no enlargement of an existing claim is to be asserted while the Treaty is in force.

While politically Article IV has meant that, for the duration of the Treaty, sovereignty claims are in abeyance, legally it can have a variety of meanings. According to Triggs:

> 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.[37]

Although Article IV may be effective, at least as between the parties to the Antarctic Treaty, during the currency of the Treaty, difficult issues could still arise. For example, a State party could withdraw from the Treaty and then assert a sovereignty claim on the basis of its long-standing "occupation" of a certain sector, an occupation which has taken the form of a substantial scientific base or bases. Undoubtedly, a key aspect of the defence to such a claim would be Article IV. But in such a case the "legal fiction" created by the Treaty may be exposed. How could the International Court of Justice ignore the substantial presence of the United States at their McMurdo Sound base within New Zealand's Ross Dependency and at their Scott-Amundsen Base at the South Pole? Would it be argued that the Treaty's impact is to ignore the "occupation" by the United States of certain Antarctic lands as from 1961? If post-termination facts are relevant in support of claims, as has been argued, they must be relevant also when they are adverse to claims.[38] Article IV cannot be legally dispositive, in the sense of creating a status binding *erga omnes*. It is unlikely that a provision which merely reflects and papers over a disagreement about status would be held to create its own form of status. Thus while the Treaty has been successful in ensuring that by

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37 Triggs, note 10 above, p 137, citing, among others, Marcoux, "Natural Resource Jurisdiction on the Antarctic Continental Margin", (1971) 11 Virginia JIL 374 at 379.

38 On this view, although Art IV would deprive acts done while it was in force of probative effect in relation to any of the claims, it would not prevent reliance on situations (eg the occupation of bases or the enactment of laws) created during that time and in existence after termination. See Bernhardt, "Sovereignty in Antarctica", (1975) 5 Calif WILJ 297 at 312–16. This interpretation is far from inevitable, having regard to the words "create any rights of sovereignty" and the placement of the words "while the present Treaty is in force" in the first (as compared with the second) sentence of Art IV(2). The conclusion might also depend on the way in which, and the grounds on which, the Treaty or a State's participation in it came to an end. For other comments on Art IV see Auburn, note 22 above, pp 104–10; Triggs, note 10 above, pp 138–150; Fox H, "The Relevance of Antarctica to the Lawyer" in Triggs, note 36 above, p 77 at 81–3; Triggs, "The Antarctic Treaty System: Some Jurisdictional Problems" in Triggs, ibid, p 88 at 89–94.

and large sovereignty has not been an issue since 1959, the effectiveness of Article IV after the termination of the Treaty remains in doubt.

The area of application of the Treaty is defined in Article VI, which provides that the Treaty extends south from 60°S latitude to the South Pole. It specifically includes ice shelves, no doubt in recognition of the uncertain status of these formations in international law.[39] Article VI also states that:

> 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.

There has been some debate as to the effect of this exclusion. Initially it was thought that the Treaty did not apply to the high seas within the zone of application, but subsequent practice within the Antarctic Treaty system has demonstrated that this is not the case. The better interpretation is that the Treaty does not affect existing rights of high seas navigation which non-parties enjoy in the Southern Ocean but that subject to this proviso, it does apply there.[40]

As with any international legal regime, implementation of the Antarctic Treaty represented a problem, especially as there was no attempt made to establish a Secretariat. The approach adopted was a system of self-policing in which under Article VII the parties could designate observers to carry out inspections. Initially, the purpose of the inspections was to ensure that the provisions of the Treaty were being adhered to, but as the Antarctic Treaty system developed it grew to encompass the various Recommendations agreed to at Antarctic Treaty Meetings (ATMs). All areas of Antarctica are open to inspection, with the consequence that all scientific research, and especially activities conducted at scientific stations, are subject to periodic scrutiny by designated observers. In a further effort to ensure that scientific activities and the development of stations do not go unmonitored, Article VII(5) provides that each party to the Treaty is required to give notice of all expeditions to Antarctica, listings of stations occupied by its personnel, and any intention to use military personnel or equipment for scientific research. In order to resolve any potential jurisdictional problem regarding observers, Article VIII makes provision for exclusive jurisdiction by the party of which they are nationals.

If the core of the Antarctic Treaty is Article IV, it is Article IX which has provided the foundation for the development of the Antarctic Treaty system under the Treaty. Article IX establishes the mechanism under which ATMs are held on a regular basis. At these meetings, recommendations can be made by the participants to their governments on measures including, under Article IX(1):

(a) the use of Antarctica for peaceful purposes only;
(b) facilitation of scientific research in Antarctica;

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39 On this question see Mangone, "The Legal Status of Ice in International Law" in Wolfrum R (ed), *Antarctic Challenge III*, (1988).

40 See Recommendation V-3 dealing with the Southern Ocean.

(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.

Measures adopted at an ATM are termed Recommendations, and are arrived at by consensus. Up until the 1991 ATM in Bonn, there have been 198 Recommendations. None of these, it may be noted, have covered the subject of Article IX(1)(e), "questions relating to the exercise of jurisdiction in Antarctica".

There has been some debate as to the binding nature of the Recommendations, and in particular as to whether they impose legal rights and duties upon the parties. Article IX(4) provides that the Recommendations only become effective when approved by all those parties to the Treaty eligible to participate at ATMs. Consequently, there is something approaching a requirement for each individual Consultative Party to ratify a Recommendation before it enters into force. In practice, however, once a Recommendation is adopted at an ATM it is considered to be effective. In addition, new Consultative Parties are encouraged to adopt existing Recommendations (see Recommendation III–VII), and a list of the status of each Recommendation is maintained by the United States in its role as Treaty depository.[41] Despite this desire, there is evidence that Consultative Parties are slow to finally adopt Recommendations with the consequence that the immediate effectiveness of the measures agreed to at ATMs is diminished. [42]

Article IX also creates two different categories of parties to the Treaty. First, there are the States which are eligible to attend ATMs. These include the 12 original parties and others which have subsequently been able to demonstrate "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". So far 14 additional States have been able to meet this standard, and so there are 26 State parties to the Treaty which are eligible to attend and participate in ATMs.[43] These are known as Antarctic Treaty Consultative Parties. There has been some criticism of the procedure for recognizing additional States as Consultative Parties. In the case of Poland, it took 16 years before it was admitted,[44] but in recent years some parties have gained admission

41 For a discussion of the practices relating to Recommendations, see Auburn, note 22 above, pp 165–70.

42 See Bush (1982), vol I, pp 93–98; also "Report and Recommendations of the Seventh Antarctic Treaty Consultative Meeting, Wellington", reprinted in Bush, ibid, pp 262–72, para 10 in which concern was noted over the 8 year delay in adopting the 1964 Agreed Measures for the Conservation of Fauna and Flora.

43 Both the Federal Republic of Germany and the German Democratic Republic obtained ATCP status prior to their reunification, with the result that there are now 26 and not 27 States with ATCP status.

44 See Auburn, "Consultative Status under the Antarctic Treaty", (1979) 28 ICLQ 514.

very quickly. There is no provision for a State to lose its status as a Consultative Party: Belgium for example no longer individually conducts scientific research in Antarctica yet remains a Consultative Party because it was one of the original parties in 1959.

There is a second category of States parties, commonly known as "Non-Consultative Parties". They are parties which have acceded to the Treaty but have yet to demonstrate the necessary degree of scientific interest to become a Consultative Party. There are currently 14 parties in this position. Under the terms of the Treaty no provision is made for the participation of these States in ATMs, and there is little benefit that such a State gains from the Treaty according to its terms.[45] During debates on Antarctica at the United Nations in the early 1980s, the Antarctic Treaty system was criticised for the division between Consultative Parties and Non-Consultative Parties. It was argued that because Non-Consultative Parties were ineligible to attend ATMs there was little attraction for States who did not wish to mount a substantial Antarctic scientific effort to accede to the Treaty. Following these criticisms Non-Consultative Parties were invited to attend as observers at ATM XII and ATM XIII. Subsequently Recommendation XIII-15 was adopted: it provides that Non-Consultative Parties will be invited to attend all future ATMs.

The important provisions dealing with amendment of the Treaty are found in Article XII. This creates two procedures. One applies if there is to be an amendment during the course of the Treaty's operation; the other provides for a Review Conference to be called after 30 years from the Treaty's entry into force. Both provisions reinforce the important position of the Consultative Parties within the Treaty, and the need for consensus on any amendment or modification to the Treaty. A regular modification or amendment of the Treaty only enters into force after it has been ratified by all Consultative Parties. This was the procedure adopted with respect to the 1991 Madrid Protocol.

The Review Conference mechanism has often been subject to misinterpretation. Article XII(2)(a) provides that after 30 years a conference may be called to review the operation of the Treaty. It does not provide for the expiration, as distinct from review, of the Treaty at the end of the 30 year period. If amendments agreed to at a Review Conference do not subsequently enter into force, then a procedure exists whereby any party to the Treaty may withdraw.[46]

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45 For the view of a non-Consultative Party see Bruckner P, "The Antarctic Treaty system from the Perspective of a Non-Consultative Party to the Antarctic Treaty" in *Antarctic Treaty System: An Assessment* (1986).

46 For a discussion of these provisions see Blay, Piotrowicz, and Tsamenyi, "Antarctica after 1991: The Legal and Policy Options", (1989) Antarctic and Southern Oceans Law and Policy Occasional Paper 2, 1-5.

2. The Antarctic Treaty System and the Environment

Reading it thirty years later, one is struck by how little reference the Treaty makes to the environment. The only express provision is Article IX(1)(f), which permits Recommendations on "preservation and conservation of living resources in Antarctica". But as interest in the Antarctic environment has grown, and starting from the perspective of Antarctica as a scientific resource and then as an exploitable commercial resource (minerals or marine resources), ATMs have increasingly been dominated by matters related to the environment. The response of the Consultative Parties has been to implement Recommendations and to negotiate new Conventions to deal with these issues. In particular the Madrid Protocol of 1991 was specifically negotiated to deal with the protection of the Antarctic environment. Each of the environmental regimes which now go to make up the Antarctic Treaty system will be briefly referred to.

(a) The 1964 Agreed Measures

The first significant attempt to expand the coverage of the Antarctic Treaty into areas not originally dealt with came at ATM III in Brussels during 1964. At that ATM, Recommendation III–VIII adopted the "Agreed Measures for the Conservation of Antarctic Fauna and Flora".[47] The Agreed Measures declared the Antarctic Treaty area to be a "Special Conservation Area" and sought not only to bind the Antarctic Treaty parties but also to impact upon third parties.[48] The purpose of the Agreed Measures at the time was to protect Antarctic flora and fauna from the impact of activity on the Antarctic continent, but since then their scope has been widened. Specifically the Agreed Measures prohibit the "killing, wounding, capturing or molesting of any native animal or native bird" except in accordance with a permit or in certain other limited cases.[49] Specific acts of harmful interference with the normal living conditions of any native mammal or bird are also prohibited.[50] In regard to the protection of native flora, the Agreed Measures provide for the creation of Specially Protected Areas (SPAs) ie areas of outstanding scientific interest which are accorded special protection so as to preserve their unique ecology.[51] The scope of the Agreed Measures has been widened over time so as to encompass the designation of Sites of Special Scientific Interest (SSSI),[52] Sites of Historic Interest (SHI),[53] Specially Reserved Areas (SRAs) and Multiple-Use Planning Areas (MPAs).[54]

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47 Reprinted in Bush (1982), vol 1, pp 146–60; adopted and given effect within the Australian Antarctic Territory by the Antarctic Territory (Environment Protection) Act 1980.

48 Article IV.

49 Article VI(1).

50 Article VII.

51 Article VIII.

52 Recommendation VII–3.

(b) The 1972 Convention for the Conservation of Antarctic Seals

Following concerns expressed by the Consultative Parties over sealing, a Conference was convened in 1972 to deal with Antarctic Seals. From this meeting came the Convention for the Conservation of Antarctic Seals (CCAS) which entered into force in 1978.[55] The Convention seeks to protect six seal species, with complete protection granted to the Ross, southern elephant and fur seals, and catch limits set for the crabeater, leopard and Weddell seals.[56] The Convention has so far been rather successful in combating sealing, though this may be partly due to the declining interest in commercial sealing.[57]

(c) Convention for the Conservation of Antarctic Marine Living Resources 1980

After a series of Recommendations made at ATMs during the 1970s, a special Conference was convened in Canberra in 1980 to consider a regime for Antarctic marine living resources. The result was the 1980 Convention for the Conservation of Marine Living Resources (CCAMLR).[58] The Convention has several new features. First, its zone of application is the area south of 60°S latitude, but it also applies in an area to the north which takes in "the Antarctic marine living resources of the area between that latitude and the Antarctic Convergence which form part of the Antarctic marine ecosystem".[59] Hence some of the islands which are adjacent to but not within the Antarctic Treaty area (including Australia's Heard and McDonald Islands) fall within the scope of CCAMLR.[60] Secondly CCAMLR provides for the conservation of resources by

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53 Recommendation VII–9.

54 Recommendations XV–10, XV–11; for a discussion of the operation of the Agreed Measures see Keage, "Antarctic Protected Areas: Future Options", (1986) Univ of Tas Envir Stud Occasional Paper 19.

55 London, 11 February 1972; entered into force 11 March 1978: (1972) 11 ILM 251. There are currently 13 parties to CCAS; despite signing the Convention in 1972 Australia did not ratify until 1 July 1987 – the Convention having been adopted by Australian law through a 1985 amendment to the Antarctic Treaty (Environment Protection) Act 1980 (Cth).

56 Article 1(2) & Annex 1.

57 A Review Conference was held in 1988 to consider the operation of the Convention: see Marchal, "Convention for the Conservation of Antarctic Seals: 1988 Review of Operations", (1989) 153:25 Polar Record 142.

58 Canberra, 20 May 1980, entered into force 7 April 1982: (1980) 19 ILM 841. The parties to CCAMLR are Argentina, Australia, Belgium, Brazil, Canada, Chile, Finland, France, Germany, Greece, India, Italy, Japan, Republic of Korea, Netherlands, New Zealand, Norway, Peru, Poland, South Africa, Spain, Sweden, Uruguay, USSR, UK and USA; the European Community is also a party under Article 29(2); CCAMLR was adopted in Australia by the Antarctic Marine Living Resources Conservation Act 1981 (Cth).

59 Article 1(1).

60 All the islands within the extended scope of CCAMLR belong to Treaty parties who have unchallenged sovereignty over the islands; on the application of CCAMLR to

way of rational use.[61] It does not prohibit the harvesting of available marine resources, but allows it to take place under a formula which involves a compromise between rational use and certain stated principles of conservation.[62] Third, the Convention establishes a Commission for the Conservation of Antarctic Marine Living Resources, which is intended to give effect to CCAMLR's objectives.[63] The Commission, which has its headquarters in Hobart, is empowered to implement conservation measures dealing with marine living resources which become binding upon parties to the Convention.[64]

The Convention has been in operation for nearly 10 years and has received mixed reviews. It was initially heralded as a milestone for the Antarctic Treaty system and a model conservation regime, but some commentators are now uncertain whether it will be able to achieve its goals.[65] One identified problem is the inability to enforce catch quotas on third parties, due to uncertainty over Antarctic off-shore jurisdiction and the non-membership of CCAMLR by the principal fishing States.[66] But the most significant criticism has been the continuing inability of the Commission at its annual meetings to agree upon effective conservation measures for krill, the small crustaceans found in abundant numbers in the Southern Ocean and which are pivotal in the food chain.[67] This problem has partly been a result of the consensus-based decision making procedures adopted at Commission meetings. At the 1991 meeting in Hobart, however, agreement was finally reached on Conservation Measures specifically dealing with this problem. It now remains to be seen how effective these measures will be. [68]

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these islands, see "Statement by the Chairman - Final Act of the Conference on the Conservation of Antarctic Marine Living Resources", (1980) 19 ILM 838-9, para 5.

61 Article 2(2).

62 Article 2(3).

63 Articles 7 and 11.

64 Article 7(2) and 9(6). It is the only international organization with its headquarters in Australia.

65 See Shusterich, "The Antarctic Treaty system: History, Substance and Speculation", (1984) 39 International Journal 800 at 811-12; Sherman and Ryan, "Antarctic Marine Living Resources", (1988) 2:31 Oceanus 59.

66 See generally on these issues Howard, "The Convention on the Conservation of Antarctic Marine Living Resources: A Five Year Review", (1989) 38 ICLQ 104.

67 Heyward, "An Australian Perspective on CCAMLR IX", (1990) 64 ANARE News 4.

68 Conservation Measure 32/X, "Precautionary Catch Limitations on *Euphausia superba* in Statistical Area 48": CCAMLR, Report of the 10th Meeting of the Commission, Hobart, Australia, 21 October-1 November 1991, p 29; for a summary of the debate see pp 16-17; for a review of the 'failure' of CCAMLR to address the krill problem earlier see Croxall, Everson, Miller, "Management of the Antarctic krill fishery", (1992) 164:28 Polar Record 64-66; Nicol, "Management of the krill fishery: was CCAMLR slow to act ?", (1992) 165:28 Polar Record 155-157.

(d) The Madrid Protocol on Environmental Protection 1991

An important issue throughout the 1980s was whether to implement a minerals regime in Antarctica. Concerns had been raised as early as the mid-1970s about the lack of a regime to cope with Antarctic minerals activity. The prospect of commercial mining was distant, but it was thought to be easier to establish an acceptable regime at an early stage, without the additional pressure of particular mining proposals and proponents. From 1982 to 1988 the Consultative Parties met at several sessions of a Special ATM for the sole purpose of negotiating an Antarctic Minerals regime. The result was the 1988 Convention on the Regulation of Antarctic Mineral Resource Activities (CRAMRA), which allowed for eventual minerals exploitation under stringent conditions.[69] But the conclusion and opening for signature of CRAMRA was the catalyst for an intense debate within the Antarctic Treaty system over whether Antarctic mineral activities should be allowed to take place at all, and whether the proper course of action was rather a comprehensive environmental protection regime.[70] The debate was resolved in 1991 when the Consultative Parties reached agreement upon the Madrid Protocol on Environmental Protection, a Protocol to the Antarctic Treaty itself.[71]

The central provision of the Protocol is Article 7, which simply provides that: "Any activity relating to mineral resources, other than scientific research, shall be prohibited". Under the special provisions in the Protocol dealing with modification or amendment, the prohibition on mining in Antarctica will remain in place for at least 55 years.[72] Thus the major immediate impact of the Protocol

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69 Wellington, 2 June 1988, reprinted in (1988) 27 ILM 868. The UK and the US passed legislation to implement the Wellington Convention: Antarctic Minerals Act 1989 (UK) (applicable to British nationals and corporations anywhere in Antarctica); Minerals Ordinance (British Antarctic Territory Ordinance 1989 No 2) (applicable to all mining in British Antarctic Territory); Antarctic Protection Act 1990 (USA, PL 101-594) (applicable to US nationals and corporations anywhere in Antarctica). On the British legislation (which is not yet in force) see Hendry, "The Antarctic Minerals Act 1989", (1990) 39 ICLQ 183.

70 For some of the literature on this debate, see Bergin, "The Politics of Antarctic Minerals: The Greening of White Australia", (1991) 26 Aust J Pol Sci 216; Blay and Tsamenyi, "Australia and the Convention for the Regulation of Antarctic Mineral Resource Activities (CRAMRA)", (1990) 158:26 Polar Record 195; Heap, "The political case for the Minerals Convention", and Burgess, "Comprehensive environmental protection of the Antarctic: new approaches for new times", in Cook G (ed), *The future of Antarctica* (1990); Podehl and Rothwell, "New Zealand and the Convention on the Regulation of Antarctic Mineral Resource Activities (CRAMRA): An unhappy divorce ?", (1992) 22 Vic Univ of Wellington LR 23.

71 Madrid, 4 October 1991 (XI ATSCM/2/3/2); for discussion on the negotiation process see Rothwell, "The Madrid Solution to Antarctica: The End of the Antarctic Minerals Debate?", (1991) 2:68 CAB 27; for a review of the Madrid Protocol see Redgwell," Note", (1991) 40 ICLQ 976; Blay, "New Trends in the Protection of the Antarctic Environment: The 1991 Madrid Protocol", (1992) 86 AJIL 377.

72 Article 25. Article 25(5)(a) goes even further, providing that:

is to ensure that CRAMRA will not, for the foreseeable future or perhaps ever, enter into force.[73]

By adopting the Protocol the Consultative Parties agreed to reject mining activities in Antarctica, and instead to emphasise the protection of the Antarctic environment. The Protocol does this by seeking to implement various degrees of protection for "the Antarctic environment and dependent and associated ecosystems".[74] Article 3 contains a list of environmental principles by which all activities within the Antarctic Treaty area are to be judged. All continuing and new activities in Antarctica will have to undergo an Environmental Impact Assessment, to ascertain what impact they will have upon the Antarctic environment, and whether sufficient planning has been carried out on the basis of the stated environmental principles.[75] The Protocol also has a series of Annexes designed to deal with specific environmental issues, thereby creating mini-regimes within the overall Protocol framework. The original Annexes deal with conservation of fauna and flora (Annex II),[76] waste disposal and waste management (Annex III), and prevention of marine pollution (Annex IV). Additional Annexes may be agreed upon as the need arises. Indeed this has already occurred: Annex V, adopted at ATM XVI, deals with "Area Protection and Management". It is anticipated that a Recommendation will be put forward at ATM XVII proposing an Annex dealing with tourism.

The actual and potential impact of the Protocol therefore is considerable. It has the potential to override many Recommendations previously made on the management of scientific bases, disposal of waste, and conduct of scientific research activities. It will impact not only on commercial mining (a remote prospect anyway), but upon all Antarctic activities that have the potential to affect the Antarctic environment. In Antarctica this means virtually all human activity.

> "the prohibition on Antarctic mineral resource activities [in article 7] shall continue unless there is in force a binding legal regime on Antarctic mineral resource activities that includes an agreed means for determining whether, and, if so, under what conditions, any such activities would be acceptable. This regime shall fully safeguard the interests of all States referred to in Article IV of the Antarctic Treaty and apply the principles thereof. Therefore, if a modification or amendment to article 7 is proposed at a Review Conference... it shall include such a binding legal regime."

See also Arts 13, 19, 20(2), which create a system of enforcement and dispute settlement without exposing Article IV itself to independent scrutiny.

73 It must be stressed that no exploitable mineral resources have been discovered in Antarctica, and that suggestions that there are substantial resources are a form of geological speculation. See Laws, "Scientific Opportunities in the Antarctic" in Triggs (ed) note 36 above, p 28; and Larminie, "Mineral Resources: Commercial Prospects for Antarctic Minerals" ibid, p 176.

74 Article 3(1).

75 See Article 8 and Annex 1.

76 The effect of this Annex, when adopted, will be to replace the 1964 Agreed Measures for the Conservation of Antarctic Flora and Fauna.

THE APPLICATION OF AUSTRALIAN LAW TO THE AUSTRALIAN ANTARCTIC TERRITORY

So far we have focussed on the international aspects of Australia's involvement in Antarctica. The key to that involvement is that Australia is a State claiming sovereignty over the AAT, and it is appropriate to say something about the exercise of that sovereignty, in particular through the application of laws to the Territory.

1. The Australian Antarctic Territory as an "External Territory"

As we have seen, Australian "authority" over the AAT was accepted by the Australian Antarctic Territory Acceptance Act 1933. As a matter of Australian constitutional law, the AAT thereby became a territory of the Commonwealth, subject to section 122 of the Constitution. The 1933 Act gave the Governor-General power to make Ordinances "having the force of law in and in relation to the Territory", but in addition the Parliament has general legislative power over the Australian Antarctic Territory. Under section 122 that power is substantially free of the limitations imposed on the Commonwealth on the exercise of section 51 powers. Thus the High Court has held that trial by jury does not apply,[77] nor does the guarantee of just terms for the acquisition of property.[78] That plenary authority is not reduced or limited, in Australian constitutional law, by the absence of general recognition of Australian sovereignty over the Australian Antarctic Territory.[79]

Limitations that may apply to the exercise of Australian authority in the Australian Antarctic Territory under international law, including the Antarctic Treaty, are not as such enforceable in Australian law. It was settled in the 1930s that the constitutional basis for Australian authority in mandated (later trust) territories was section 122 and not section 51(xxix).[80] The consequence was that limitations on that authority imposed by the mandate or trusteeship agreement did not produce corresponding limitations on the constitutional power of the Commonwealth – something that would have occurred, under the *Tasmanian Dams* principle,[81] if the source of power had been an international agreement. A further consequence is that limitations on legislative power imposed by an international agreement applicable to the Territory are not enforceable in an

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77 *R v Bernasconi* (1915) 19 CLR 629.

78 *Tau v Commonwealth* (1969) 119 CLR 564.

79 In other words, the courts will treat a claim by the Crown to sovereignty over particular territory as conclusive under the act of state doctrine: *Coe v Commonwealth* (1979) 24 ALR 118 (HC), and cf *AG for British Honduras v Bristowe* (1880) 6 AC 143; *Secretary of State for India v Surdar Rhustam Khan* [1941] AC 356.

80 *Porter v R* (1926) 37 CLR 432; *Jolley v Mainka* (1933) 49 CLR 242; *Ffrost v Stevenson* (1937) 58 CLR 528.

81 *Tasmania v Commonwealth* (1983) 158 CLR 1.

Australian court, unless those limitations have been implemented by legislation.[82]

The position in the Australian Antarctic Territory is even clearer, since the limitations imposed by the Antarctic Treaty, and by the Antarctic Treaty system in general, are not – as with a Mandate or Trusteeship Agreement – the source of Australian authority. The Antarctic Treaty system, from Australia's point of view, is an international arrangement which does not derogate from the existence of an authority previously acquired.

On the other hand, the exercise of that authority is another matter. The AAT is an "external territory" under the Acts Interpretation Act 1901, and in consequence federal legislation only applies to it if it is expressed to do so, or if it is obvious from the legislation in question that it was intended to do so.[83] Whether there are any other implications of the AAT being classified as an external territory is doubtful. In *Berwick v Gray*, the High Court used the phrase "part of the Commonwealth" in relation to Norfolk Island, which is also classified as an external territory by the Acts Interpretation Act.[84] In reaching that conclusion, Mason J referred to the political history of Norfolk Island, which was an original part of the colony of New South Wales. He also said that:

> Special considerations affected those Territories which were held under mandate from the League of Nations or under trusteeship from the United Nations but, with this qualification, it is my opinion... that external territories form part of the Commonwealth...[85]

Since he did not elaborate on the nature of those "special circumstances", it is not clear whether the AAT is subject to a similar qualification. It has certainly never been governed as part of the territory of a State, as was the case with each of the "internal territories" and Norfolk Island. But whatever the true position, it is doubtful that any consequence attaches to it as a matter of Australian law, having regard to the plenary power the Commonwealth Parliament has over all its section 122 territories, however they may have been acquired.[86]

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82 *Fishwick v Cleland* (1960) 106 CLR 186; cf s 4(1) Antarctic Treaty Act 1960 (Cth) which provides, in conformity with Article VIII(1) of the Antarctic Treaty, that non-Australian citizens are not subject to the laws in force in the Australian Antarctic Territory in respect of acts or omissions occurring in Antarctica while in the course of their functions.

83 See Acts Interpretation Act 1901 (Cth) s 17(pd), (pe).

84 (1976) 133 CLR 603, 608–9 (Mason J) (with whom Murphy J agreed); to the same effect ibid, 605 (Barwick CJ).

85 Ibid, 608, citing *Spratt v Hermes* (1965) 114 CLR 226.

86 Cf ibid, 611 (Jacobs J).

2. The Applicable Law of the Australian Antarctic Territory[87]

The effect of the Acts Interpretation Act, with its presumption against the application of federal legislation to external territories, is powerfully reinforced by the Australian Antarctic Territory Act 1954 (Cth). That Act was passed – not before time – to provide in more detail for the government of the AAT, and it went considerably further than the previous bare conferral of Ordinance-making power under the 1933 Act. But the 1954 Act was still sparing in applying federal laws to the Territory. Section 8(1) provides:

> An Act or a provision of an Act (whether passed before or after the commencement of this Act) is not, except as otherwise provided by that Act or by another Act, in force as such in the Territory, unless expressed to extend to the Territory.

In fact very few federal laws have been so expressed, other than laws giving effect to aspects of the Antarctic Treaty system.[88] It should be noted that as a matter of constitutional theory it is not possible for an Act to exclude its own implied repeal by later legislation. A later Act which by the clearest implication applied to the AAT, but which was not in so many words "expressed to extend to the Territory", would presumably still do so, and would to that extent impliedly repeal (or at any rate prevail over) section 8(1) of the 1954 Act itself. But in the light of section 8(1), there would be a strong presumption against this.[89]

In addition to federal laws expressly applying to the AAT under section 8(1), section 11 empowers the Governor-General to make Ordinances for the peace, order and good government of the Territory, re-enacting the earlier provision to this effect in the 1933 Act. In fact, the power has been very little exercised.[90]

In the absence of applicable federal law or of ordinances made under section 11, section 6(1) applies. It provides, in familiar terms, that:

> Subject to this Act, the laws in force from time to time in the Australian Capital Territory (including the principles and rules of common law and equity so in force) are, by virtue of this section, so far as they are applicable to the Territory and are not inconsistent with

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87 See generally Triggs, note 10 above, ch 7; Australia, Attorney-General's Department, Submission, 30 August 1990, in House of Representatives, Standing Committee on Constitutional and Legal Affairs, Reference: The Legal Regimes of Australia's External Territories and the Jervis Bay Territory, Phase II – The Australian Antarctic Territory and the Territory of Heard Island and McDonald Islands, *Submissions authorized for Publication* (1991) vol 1, S43 (hereafter HR Submissions); C Lidgerwood on behalf of the Centre for Comparative Constitutional Studies, University of Melbourne, Submission, 21 December 1990, 28–85, in HR Submissions, vol 2, S144 (hereafter CCCS Submission).

88 But see Australia, Department of the Arts, Sport, the Environment, Tourism and Territories, Submission, September 1990, in HR Submissions, vol 1, S69, 45–9 (hereafter DASETT Submission).

89 Triggs, note 10 above, pp 250–1.

90 But see CCCS Submission, p 33.

> an Ordinance, in force in the Territory as if the Territory formed part of the Australian Capital Territory.

The consequence was that prior to 1991, ACT law applied generally, but federal law only very selectively. Thus income tax law does not apply to the Territory as such, although Australian residents who earn income there may be liable to tax on the same basis as they would in respect of income earned abroad.[91] The major qualification to the general application of ACT law was the phrase "so far as they are applicable to the Territory".

Following ACT self-government, the issue arose whether the continued application of the general body of ACT law was appropriate. Curiously, the position was that ACT law itself, as it existed from time to time principally under the Seat of Government (Administration) Act 1910, continued to apply, but not the Australian Capital Territory Self-Government Act 1988 (Cth), which is now the foundation of ACT law.[92] This is because the Self-Government Act is a federal Act, and was not stated to apply to the AAT. Eventually it was decided that the Commonwealth ought to have a more direct responsibility at least for the criminal laws applicable in the AAT, and the 1954 Act was amended to provide that the criminal laws of the Jervis Bay Territory apply there.[93] This is a second stage of incorporation by reference, since the criminal laws of the ACT in force from time to time apply, subject to any Ordinance to the contrary, to the Jervis Bay Territory, and the criminal laws applicable in the Jervis Bay Territory apply, subject to any Ordinance to the contrary, to the AAT.[94]

Whatever the meaning of the "applicability" test in section 6(1) of the 1954 Act, it has been estimated that 70–80 percent of potentially applicable ACT laws are irrelevant to the Territory, and the reality is that almost no laws have been applied in any way in the AAT, other than to Australian nationals. In some cases this has been because a deliberate decision has been made to limit the scope of Australian law applicable there to Australian nationals: this is true, for example, of the Antarctic Marine Living Resources Conservation Act 1981 (Cth), giving effect to CCAMLR. That Act does not apply to foreign persons or vessels.[95] In another case, the 1979 amendment to the Fisheries Act 1952 (Cth) which created

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91 Australian Taxation Office, Submission, 31 July 1990, in HR Submissions, vol 1, S13.

92 See Australian Antarctic Territory Act 1954 (Cth) s 4, as amended by Australian Capital Territory Self-Government (Consequential Amendments) Act 1988 (Cth), Schedule 2.

93 See Australian Antarctic Territory Act 1954 (Cth) ss 4, 6, as amended by Crimes Legislation Amendment Act 1991 (Cth), Schedule 2.

94 See Jervis Bay Territory Acceptance Act 1915 (Cth) ss 4A, 4F. The general distinction between civil and criminal law may be difficult to apply. For example is the Coroners Act part of the criminal or the civil law? See also N Reaburn, Attorney-General's Department, 30 August 1990, HR Submissions, vol 1, S43, 13; P Kennedy, DASETT, 20 September 1990, HR Submissions, vol 1, S68, 26–7.

95 Sections 5(2)(b), 7(b) Antarctic Marine Living Resources Conservation Act 1981 (Cth).

a 200mm Australian Fishing Zone, the law was theoretically extended to the AAT, but then a short time later its application in that zone was restricted to Australian nationals.[96] We understand that the brief delay in gazetting the exemptions under the Act was deliberate.

In other cases, applicable Australian law is subject to an exemption to take into account the activities of other Antarctic Treaty parties, whether or not these are specifically entitled to exemption from jurisdiction under the Antarctic Treaty itself. The best example is the Antarctic Treaty (Environment Protection) Act 1980 (Cth), which implements the Agreed Measures for the Conservation of Antarctic Fauna and Flora: it does not apply to an action authorized by a permit or authority of another Antarctic Treaty party. [97]

There is a real difference between these various techniques of exemption. A general exemption for foreign nationals or vessels (as with the Australian Fisheries Zone) extends to non-Treaty nationals, and exempts conduct no matter how illicit, unauthorized or contrary to the purposes of the Antarctic Treaty system. By contrast a specific exemption for authorized conduct (as with the Antarctic Treaty (Environment Protection) Act 1980) does not exempt third State nationals (except where they are participating in the scientific program of a Treaty party, as sometimes happens). It is also a more controlled form of exemption, since it can be assumed that the "permit or authority of another Antarctic Treaty party" will not have been granted indiscriminately.

A similar technique is that of exempting conduct in Antarctica if that conduct is regulated by another State on the basis of nationality. This is what the Antarctic Mining Prohibition Act 1991 (Cth) does: section 6 prohibits any person from engaging in "mining activity" in the AAT, but section 9 provides that proceedings cannot be commenced against a person (other than an Australian national or permanent resident) under section 6:

> if the act constituting the offence would also constitute an offence against a law of the person's country of nationality for which the person would be liable to be prosecuted.

The effect of this is to exempt from prosecution[98] conduct which is regulated by another State, whether or not that State is a party to the Antarctic Treaty, and whether or not the law of the other State is enforced.

But if it is better, from the point of view of consistency with Australian claims to sovereignty, to grant specific rather than general exemptions in cases

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96 Fisheries Act 1952 (Cth); Gazette S189 (26 September 1979); Gazette S225 (2 November 1979). See also Whale Protection Act 1980 (Cth); Fisheries Management Act 1991 (Cth) ss7(1), 11.

97 Sections 7(1), 19(3) Antarctic Treaty (Environment Protection) Act 1980 (Cth).

98 But not from the application of section 6 as such: the conduct would still be formally unlawful under Australian law, although exempt from prosecution. This might affect the legality of contracts to mine in the AAT, which would (at least at common law in a forum which recognized Australian sovereignty) be unenforceable because they would be unlawful by the law of the place of performance.

not directly covered by treaty, it is problematic to assert a jurisdiction which is then not enforced. In fact there has been no attempt to apply the Antarctic Treaty (Environment Protection) Act 1980 to conduct in the AAT by foreign nationals which has not been authorized by Australian administrators. And this represents the general position with respect to the theoretically applicable law: that law has not been applied to foreign nationals or bases in the AAT.[99]

3. The Implications of the Antarctic Treaty System for the Application of Law

Before giving some examples of this tacit non-application, and of the issues it is capable of raising, it is necessary to refer to the Antarctic Treaty which makes specific provision with respect to some of the jurisdictional issues.

(a) Exemptions from Australian law under the Antarctic Treaty

Article VIII(1) of the Treaty provides that observers designated under Article VII, scientific personnel exchanged between expeditions and stations under Article III(1)(b), and accompanying staff members, "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". This exemption is implemented in Australian law by ss 3(2) and 4(1) of the Antarctic Treaty Act 1960 (Cth).

The Article VIII exemption is both broad and narrow. For the persons to whom it applies, it is broad: there is no requirement that the exempted actions should in any way relate to "the purpose of exercising their functions": it is simply their presence in Antarctica which must so relate. Thus a foreign observer who killed an Australian scientist during a private brawl on an Australian base would be exempt from jurisdiction. And because that exemption is a legislative one, it would require retrospective legislation to give effect to any waiver of jurisdictional immunity from the other State concerned – even though this may be a State, such as New Zealand, which recognizes Australian sovereignty over the AAT.[100] Moreover such a State may not apply its own criminal law to acts

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99 It remains to be seen whether the position with the Antarctic Mining Prohibition Act 1991 (Cth) will be any different. The Act was passed and came into force before the Madrid Protocol had been concluded, and in that sense it represents an outright exercise of Australia's asserted sovereignty over the AAT. On the other hand it is hard to see how issues of enforcement could arise. Mining was anyway unlikely, and even without the Madrid Protocol the imperative need for security of mining tenure would have reinforced the unlikelihood.

100 It should be noted that Article VIII refers to exclusive jurisdiction over the specified persons, whereas s 4(1) of the Australian Act exempts those persons from "the laws in force in the Territory"; jurisdiction and the application of laws are not necessarily the same thing, but in this respect also s 4(1) errs on the side of caution; see Australia, Attorney-General's Department, Submission, 16 September 1991, HR Submissions (1991) vol 3, S396–405, esp 397–99.

of its nationals outside its own territory. On the other hand the exemption is in other respects narrow: it does not apply to the scientific staff of other Antarctic Treaty parties present in the AAT for purposes other than those listed in Article VIII(1), no matter how closely related their activities may be to the scientific program of the other State or the purposes of the Treaty. Nor does it apply to tourists or government officials visiting Antarctica, overflying the AAT, etc. Thus in theory it leaves a great deal of room for the application of Australian law. Moreover as a general matter, once a legal instrument has set out a particular exemption for persons or conduct, the inference would normally be that other persons or conduct are not exempt. The Antarctic Treaty provides for jurisdictional conflicts to be resolved by consultation (Article VIII(2)), and for further measures to be adopted "relating to the exercise of jurisdiction in Antarctica" (Article IX(1)(e)). In the absence of any such measures, the only provision which might rebut the inference that could be drawn from Article VIII(1) is Article IV itself.

(b) The meaning of Article IV

So far as the application of law is concerned, the most important general provision of the Treaty is Article IV(2), which applies against the background of a denial that the Treaty involves "a renunciation by any Contracting Party of previously asserted rights of or claims to territorial sovereignty in Antarctica" (Article IV(1)(a)). There are two quite different aspects to Article IV(2). The first sentence is concerned with the legal effects, on the international plane, of "acts or activities taking place while the present Treaty is in force". The sentence does not prohibit any particular conduct, including the making and enforcement of laws. It simply qualifies or removes the international legal consequences of such conduct, to the extent that it would otherwise reinforce, consolidate or extend a claimant's sovereignty. By contrast the second sentence does require abstention, the abstention from making a "new claim", or from "enlarging" an existing claim. What are the implications of this?

So far as the ordinary exercise of legislative power goes, they are, in our view, not extensive. When a State legislates for territory it asserts sovereignty over, it does not make a "new claim" to that sovereignty: it just exercises it. Of course such legislation, especially if it is enforced according to its terms, will further consolidate that sovereignty, and may resolve doubts about its existence or extent. But issues of consolidation and evidence are dealt with in the first sentence of Article IV(2), not the second. It follows that the enactment of laws for the Territory is not prohibited by the Treaty. That view is implicitly accepted by the Crimes Legislation Amendment Act 1991 (Cth), which enacted by reference a complete code of criminal law for the Territory (although one identical in content to that previously in force). It is explicitly accepted by the Antarctic Mining Prohibition Act 1991 (Cth), which was enacted before the

conclusion of the Madrid Protocol, and was thus not merely an implementation of agreed policy under the Antarctic Treaty system.[101]

Is the position any different when it comes to the enforcement of laws? It is difficult to see why it should be. The enforcement of an existing law is no more a new claim to sovereignty than its enactment. The only hypothesis on which the exercise of a jurisdiction under a law would involve a "new claim" would be that the original right was a mere right to make laws which were not to be enforced. And that would not be a claim to territorial sovereignty.

So far we have been discussing "ordinary" legislation – for example a Crimes Act, a Drugs Act or a Coroners Act, to take three relevant cases. But legislation can also be the vehicle for the extension of a sovereign claim, for example in the context of off-shore resources. Would legislation defining and regulating the continental shelf off the AAT, or enacting a fisheries zone or an exclusive economic zone or extending the territorial sea, involve an "enlargement of an existing claim" contrary to Article IV(2)? Alternatively, would such legislation involve the "assertion" of such an enlargement? One possibility is that Article IV is addressing only territorial claims to the Antarctic continent itself, and not maritime claims at all. But in other contexts a reference to the territory of a State includes a reference to at least some of its off-shore zones, especially where what is in dispute is the extent of jurisdiction.

With the continental shelf, the position is complicated by two factors. First, the continental shelf doctrine was well established before the Antarctic Treaty came into force, and although there have been significant changes in that doctrine as a result of the negotiation of the 1982 United Nations Convention on the Law of the Sea, the underlying concept of the continental shelf has not changed.[102] If the continental shelf doctrine antedated the Antarctic Treaty, Australia would not be making a new claim, or enlarging an existing claim, in asserting rights to a continental shelf off the AAT. On that basis Article IV(2) would simply not apply.

Secondly, it is established that the continental shelf inheres in a coastal State by virtue of its sovereignty over the land territory. It does not need to be claimed, or proclaimed. Thus Article 2(3) of the 1958 Geneva Convention on the Continental Shelf provides that:

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101 See AS Blum, DASETT, 26 March 1991, HR Submissions, vol 2, S253. The Department of Foreign Affairs and Trade commented, in the context of the Act, that "the application of Australian law to foreign nationals present in the Australian Antarctic Territory may serve to strengthen the Treaty system... In the normal course of events we would expect any Australian legislation to be enacted in the context of measures recommended by the Antarctic Treaty Consultative Parties": Submission, August 1991, HR Submissions, vol 3, S373, 388.

102 See the Geneva Convention on the Continental Shelf, 29 April 1958: 499 UNTS 311. Australia ratified the Convention on 14 May 1963, and it came into force on 10 June 1964, after the Antarctic Treaty.

> The rights of the coastal State over the continental shelf do not depend on occupation, effective or notional, or on any express proclamation.[103]

In fact Australia proclaimed a continental shelf around its coastline, including that of the AAT, in 1953.[104] But having regard to the terms of Article 2(3), it could be argued that, even if the continental shelf doctrine was a post-Antarctic Treaty innovation, Australia had not made a new claim or enlarged an existing one. The argument would be that international law had done the deed without Australia having to do anything! Even so, if Australia then legislated to give effect to its "sovereign rights" over the continental shelf of the AAT, the issue would be whether it had "asserted" such a claim. If so, it might be the case that under Article IV Australia would have the rights, but could not exercise them.

The position with the 200 mile fisheries zone is slightly different. Both the fisheries zone and the exclusive economic zone have developed since the Antarctic Treaty, and they are therefore "new claims" in a way that the continental shelf may not be. Moreover, unlike the continental shelf, the practice is for these zones to be expressly claimed by proclamation pursuant to legislation passed for that purpose, and this is what Australia has done with the Australian Fisheries Zone.[105] In asserting such a zone off the AAT, and subsequently exempting foreign nationals and vessels from it, Australia seems to have sought to get the best of both worlds, a reinforcement of its claim but without conflict with its Antarctic Treaty partners. It could be argued that it managed to get the worst of both worlds, a technical breach of Article IV without any of the support

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103 In the *North Sea Continental Shelf* cases ICJ Rep 1969, p 6 at 31, the International Court expressed the view that certain articles of the Convention (including Article 2) were declaratory of general international law. As to the automatic attribution of a continental shelf, see Article 77(3) of the 1982 Convention.

104 See Bush (1982), vol 2, 172. The Proclamation did not expressly refer to the AAT, but it did so by clear implication ("any part of the coasts of territories under its authority other than territories administered under the trusteeship system of the United Nations"). The Continental Shelf (Living Natural Resources) Act 1968 (Cth) formally applies to the AAT (see ss 5(1), 9), but has not been applied in practice: see Triggs, note 10 above, pp 251, 255. The Petroleum (Submerged Lands) Act 1967 (Cth) does not apply: ss 5(1), 5A, 7. On the other hand the Seas and Submerged Lands Act 1973 (Cth), which is in declaratory form and provides a legal basis for delimiting the Australian territorial sea and continental shelf, applies to all Australian territories (see s 4). See also Bush (1982), vol 2, pp 173–4.

105 Triggs, note 36 above, p 91 argues to the contrary, on the basis that the EEZ "exists as a consequence of territorial sovereignty and does not depend upon prior assertion", and that it is not "tantamount to a claim of territorial sovereignty". But although international law may prevent other States from claiming a 200 mile zone appurtenant to a coastal State, the practice is for such zones to be expressly claimed, and to be treated (at least for the purposes of use, including harvesting of natural resources) as high seas in the absence of such a claim. Whether or not a State has sovereignty over a fisheries zone or EEZ which it has claimed, its rights there depend on it having sovereignty over its coastline, so that the terms of Article IV(2) of the Treaty (if they apply at all to maritime zones) would seem to apply here. Cf Triggs, note 10 above, pp 247–9.

for Australia's position that might have flowed from the enforcement of its zone vis-a-vis third parties.[106]

(c) The problem of enforcement

But the reality is that Australia has made almost no effort to enforce the laws which formally apply in the AAT, whether by express provision or under section 6 of the 1954 Act. In particular it has made no attempt to do so as against foreign nationals, including residents of the various foreign bases within the AAT.[107] One reason for this is obviously logistic and evidentiary: laws to be enforced require personnel and enforcement capacity almost all of which is lacking. Another reason is the sensitivity of what is described as the "jurisdictional issue" within the AAT. We understand that Australia's announcement, at the time of its rejection of CRAMRA, that it would enact unilateral legislation to ban mining in the AAT was queried by some States parties as a potential claim contrary to Article IV.

But in addition there is the view that a more active policy of enforcement is simply unnecessary, since, in the words of one Departmental submission, "no serious incidents" have occurred in the AAT "for many years".[108] In fact, Antarctica – without threatening to rival the crime and accident rates of metropolitan Australia – is increasingly producing its share of wrongs, as human activity expands. Taking the continent as a whole, there have been, for example, cases of unlawful dumping of waste;[109] crashes and other aerial incidents involving aircraft which would not have passed theoretically applicable air traffic control and airworthiness standards;[110] the crash of a large civilian air-liner with the death of all on board;[111] the death of a Soviet doctor in the AAT

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106 For discussion of the analogous issue of the extension of the territorial sea from 3 to 12 miles off the AAT, see Opeskin and Rothwell, "Australia's Territorial Sea: International Law and Federal Implications of its Extension to 12 Miles", (1991) 22 Ocean Devel & Int'l Law 395 at 401-3. The extension was brought about by proclamation under the Seas and Submerged Lands Act 1973 (Cth), and applied to all external territories. Since no baselines have been proclaimed under that Act along the "coasts" of the AAT, the real effect of the proclamation for the AAT is obscure.

107 See eg CCCS Submission, 52-3 (no attempt to apply Radiocommunications Act 1983 (Cth) to AAT as a whole).

108 DASETT Submission, para 9.4.

109 This has also been an occasional problem in the Australian sub-Antarctic islands: cf Kriwoken, Hay and Keage, "Environmental Policy Implementation: Sea dumping off sub-Antarctic Heard Island, Australia", (1989) 48 Maritime Studies 11.

110 CCCS Submission, 78. See also Auburn, "Antarctic Air Safety", (1988) NZLJ 408.

111 For US litigation arising from the Mt Erebus disaster see *Beattie v United States* 756 F2d 91 (1984). There the DC Court of Appeals held that Antarctica was not a "foreign country" for the purposes of claims against the United States under the Federal Tort Claims Act 28 USCA ss 1346, 2680(k). Scalia J dissented. See also Carl, "The Need for a Private International Law Regime in Antarctica" in Joyner CC and Chopra SK (eds), *The Antarctic Legal Regime* (1988), p 65.

without any coronial inquiry;[112] and the arrest and subsequent trial in the ACT Magistrates Court of a member of an Australian scientific team charged with a drugs offence.[113] In *United States v Escamilla*,[114] one member of a US scientific team based on an ice island in the Arctic Ocean (and located within the Canadian sector claim, which the United States does not recognize) killed the leader of the team in a fight over locally brewed raisin wine. The Court of Appeals was evenly divided on the issue of jurisdiction but quashed the conviction, *inter alia* because the jury had not been allowed to consider the special circumstances applicable to life on an Arctic ice island. Such cases suggest that in remote areas such as these, if something can go wrong it will.[115]

Whatever the justifications, it is apparently government policy not to enforce its laws in the AAT. This extends, for example, to the requirements for broadcasting licenses,[116] and generally to the activities of foreign bases in the AAT. The policy has been stated as follows:

> Australian legislation has not been applied to foreign nationals who are in the AAT but are not participating in ANARE. This is primarily because the Treaty provides for freedom of scientific research and, as

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112 AS Blum, DASETT, Letter of 22 April 1991, HR Submissions, vol 3, S290. The doctor was not a "protected person" under Art VIII of the Treaty: even if he had been, query whether the application of coronial law to a dead person is a subjection to jurisdiction "in respect of all acts or omissions occurring while they are in Antarctica for the purpose of exercising their functions", within the meaning of Art VIII(1). On the jurisdictional issues raised by this incident see CCCS Submission, 78; RH Wyndham, Department of Foreign Affairs and Trade, Letter of 9 September 1991, HR Submissions, vol 3, S391 ("unprecedented for a Party claiming sovereignty in a sector of Antarctica to attempt to enforce its national legislation on the members of a national expedition of another State Party... We therefore see the non-exercise of coronial jurisdiction in this case as not prejudicial to the maintenance of Australian sovereignty"); AD Rose, Secretary, Attorney-General's Department, Letter of 16 September 1991, HR Submissions, vol 3, S396, 404 (arguing that the Deputy Coroner, on finding out about the death, should have contacted the custodians of the body and requested their cooperation in the exercise of jurisdiction under the Coroners Act; if that cooperation was refused no further action need be taken, and "no adverse implications for the domestic authority of the Australian legal system should arise. Nor should such action give rise to any jurisdictional dispute, given that no physical enforcement is envisaged").

113 See CCCS Submission, 71. Magistrate Nicholls managed to find that he had jurisdiction under s 7 Australian Antarctic Territory Act 1954 (Cth), despite the fact that s 10 only refers to the Supreme Court. That lacuna was subsequently filled (see ss 7, 10 as amended by Crimes Legislation Amendment Act 1991, Schedule 2), and the ACT laws involved also had to be amended to make them "applicable" to the circumstances of the AAT: see AAT Ordinances 1985 Nos 2–4. These were the "first examples of the laws of the ACT being amended to specifically meet the needs of the AAT": CCCS Submission, 33.

114 467 F2d 341 (CA4, 1972).

115 US and Russian scientists planned a joint base on an ice-floe adrift in the Weddell Sea between February and June 1992. It is not known whether they carried raisins.

116 See CCCS Submission, 53.

> all other nations active in the AAT are also parties to the Treaty, they are bound by its provisions. For this reason it has been considered inappropriate to apply Australian law to the Soviet and Chinese expeditions, even though in some cases they are operating only a few kilometres from Australia's Davis Station and Law Base.[117]

A similar policy underlies the decision not to apply Australian fisheries laws to foreign ships in the Australian Fisheries Zone adjacent to the AAT, although here the principal beneficiaries include non-parties to the Antarctic Treaty.[118]

(d) Possible solutions

Although it is easy to contrast the "general appropriateness" standard which under section 6 of the 1954 Act is a prerequisite to the application of Australian law to the AAT and the reality of its non-application there,[119] it is less easy to confront the alternatives. Successive Parliamentary Committees have called for a more energetic application of Australian law to the AAT,[120] but Parliamentary committees are, perhaps fortunately, not responsible for the conduct of Australia's international relations. One option would be to apply in a more rigorous and thorough-going way a distinction between treaty and non-treaty nationals.[121] But the problem is that Article IV prohibits the extension of claims *erga omnes*, and despite the legal arguments we have outlined, the sensitivity about enforcement of national legislation is not only confined to its enforcement against the nationals of other parties to the Treaty but also to any legislative acts which are seen to be positively asserting sovereignty.

Faced with these dilemmas, one official giving evidence before the House of Representatives Standing Committee on Legal and Constitutional Affairs was driven to argue that "one thing we can say is that it was a sovereign act of

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117 DASETT Submission, September 1990, para 7.4; see also id, para 4.9 ("dispute over sovereignty may be counter-productive to cooperation within, and development of, the Antarctic Treaty system"); cf Rose, note 112 above, S396 at 399–405.

118 See DASETT Submission, September 1990, para 4.10; CCCS Submission, 47.

119 Cf AS Blum, DASETT, Letter of 28 March 1991, HR Submissions, vol 2, S247 ("Most ACT laws... are not considered appropriate and are not actively administered... [I]n the AAT it has been necessary to balance Australia's sovereignty and its international obligations and policy interests... No systematic monitoring of compliance with applied ACT laws is undertaken").

120 See eg Report of the Joint Committee on Foreign Affairs and Defence, *Australia, Antarctica and the law of the sea* (1978); House of Representatives Standing Committee on Environment, Recreation and the Arts, *Report into Tourism in Antarctica* (May 1989) para 4.31. HR Standing Committee on Legal and Constitutional Affairs, *Australian Law in Antarctica* (Nov 1992) para 3.1.

121 The nearest to that approach so far adopted is the Antarctic Treaty (Environment Protection) Act 1980 (Cth), although, as we have seen, there has been no attempt to enforce that Act against foreign nationals. The technique adopted by the Antarctic Mining Prohibition Act 1991 (Cth) is different again, and unlike the 1980 Act it makes no distinction between Treaty and non-Treaty State nationals.

Australia to not apply" its fisheries laws to the Territory.[122] This idea of sovereignty by abstention demonstrates the extent to which the protection of Australia's claims in the Antarctic currently depends on the first, rather than the second, sentence of Article IV(2).

CONCLUSION: AUSTRALIA'S ANTARCTIC POLICY AND THE DEVELOPMENT OF AN ANTARCTIC LEGAL REGIME

Australia's Antarctic policy since 1959 has sought to balance a long-standing territorial claim with the broader interests of the Antarctic Treaty system. In the post-war years, when scientific and political interest in Antarctica began to increase, Australia had only a small scientific community and lacked the resources to compete in research with countries such as the United States and the Soviet Union. In particular, Australia viewed with alarm the interest that was shown in portions of the Australian Antarctic Territory by the Soviet Union. With the Cold War at its height, there was the potential for Antarctica to become yet another battleground for the superpowers. Consequently, Australia enthusiastically supported the notion of a Treaty which preserved sovereign rights, demilitarised the continent, and allowed scientific research to continue unhindered.

Australia's commitment to the Antarctic Treaty has therefore been strong, and not only for pragmatic reasons. Because of its strong Antarctic heritage, geographical connection, and the commitment of its scientists to the continent, Australia has been well placed to play an active role in the development of the Antarctic Treaty system. As provided for in the Treaty the first ATM was held in Canberra in 1961, and a number of other Antarctic Treaty meetings have been held here since then. With the CCAMLR Commission located in Hobart, there is now an annual meeting of Antarctic scientists and government officials in Australia, discussing issues relating to the Convention. Australia has taken a leading role at the United Nations throughout the 1980s in debates concerning Antarctica. The then Australian Ambassador to the United Nations, Mr Richard Woolcott, spoke on behalf of the Consultative Parties in a series of annual debates, initiated by developing countries such as Malaysia, on whether the Antarctic Treaty system was suitable for Antarctica or whether the continent should be declared part of the "common heritage of mankind".[123] During this time the Australian Government mounted a strong campaign against United

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122 Mr R Moncur, Director, Antarctic Division, DASETT, in House of Representatives, Standing Committee on Constitutional and Legal Affairs Reference: The Legal Regime of Australia's External Territories and the Jervis Bay Territory, Phase II – The Australian Antarctic Territory and the Territory of Heard and McDonald Islands, *Hansard* (4 April 1991) 48.

123 See Hayashi, "The Antarctica Question in the United Nations", (1986) 19 Cornell ILJ 275; Beck, "The United Nations and Antarctica", (1984) 137:22 Polar Record 137; Maquieira, "The Question of Antarctica at the United Nations – The End of Consensus?" in Wolfrum R (ed), *Antarctic Challenge III* (1988).

Nations involvement in Antarctic affairs, especially as the Consultative Parties were then engaged in detailed discussions over a minerals regime.[124]

In a speech to a specially convened Conference held in Antarctica during 1985, Ambassador Woolcott refuted the criticisms that had been made against the Antarctic Treaty system and noted how the Treaty had sought to promote the principles and purposes of the United Nations Charter. Claims that the Consultative Parties were members of a closed club, which only a few privileged States could enter, were rejected. There were no prohibitions on States acceding to the Antarctic Treaty, or becoming Consultative Parties if they could demonstrate the required (in recent times reduced) degree of scientific interest. In response to arguments that Antarctica be declared a part of the common heritage of mankind, it was noted that while this concept had been applied in outer space and the deep seabed, Antarctica had been subject to sovereign claims which were, despite the Treaty, still in existence.[125] Since then the developing States initiative has continued, but has made little progress.[126]

Thus the legitimacy of the claim to govern Antarctica made by the Treaty parties, and implied by the Treaty itself, depends on two apparently contradictory elements. On the one hand there is the fact that *all* the States most directly concerned in Antarctica, including all the claimant States, are supporters of and parties to the Treaty. The Antarctic Treaty system can thus claim to embody the present range of material (including scientific) interests in Antarctica. On the other hand there is the fact that measures taken under the Antarctic Treaty system, especially in more recent years, have been predominantly concerned to protect the environment of Antarctica while facilitating the conduct of scientific research. Thus despite significant shortcomings – especially in the protection of krill – the Treaty can also claim to embody and further the values which underlie the common heritage principle in a fragile region. And these claims are reinforced by the fact that the Treaty parties have managed, through diplomatic and other means, both to co-opt newcomers with developing interests and to repel attempts to extend a more generalized "common heritage" principle to the area. That success is, for example, exemplified by the tacit understanding that the deep sea-bed regime in Part XI of the 1982 United Nations Law of the Sea Convention has no application there.[127]

But it is not only the continent that is fragile: so too is the governing regime. It is no accident that the diplomatic change of direction that led from CRAMRA and a putative minerals regime to the Madrid Protocol with its long-term

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124 See Hayden, "Keeping Tension out of the Last Continent", (1985) 56 Aust Foreign Affairs Record 25.

125 Woolcott RA, "The Interaction between the Antarctic Treaty system and the United Nations System" in *Antarctic Treaty system: An Assessment* (1986).

126 See Beck, "A Continent Surrounded by Advice: Recent Reports on Antarctica", (1988) 151:24 Polar Record 285; Beck, "Antarctica, Vina del Mar and the 1990 UN Debate", (1991) 162:27 Polar Record 211.

127 According to Triggs, note 38 above, pp 92–3.

prohibition of mining, was triggered by concerns that CRAMRA amounted to an abandonment of territorial rights.[128] Australia could not get agreement on a minerals regime which acknowledged its claims, and (in part at least for that reason) preferred an alternative which avoided mining, and meant that the compromise embodied in Article IV of the Treaty could remain substantively intact. While resource exploitation remains a distant and theoretical possibility, the interests of claimants, of non-claimants and of the common heritage could converge, as they did, in a long-term ban. Similarly it is no accident that the area in which the Antarctic Treaty system has been most deficient, the protection of marine species, has been the area where resource exploitation is a real and present possibility, and where some of the principal exploiters such as Taiwan are non-parties.

Similar stresses underlie Australia's record, or lack of it, in applying Australian law to the Antarctic Treaty system. Vis-a-vis Antarctic Treaty parties, the problem is not so much the provisions of the Antarctic Treaty itself but the fact that their coverage is incomplete. The thoroughgoing abstention, non-intervention, non-application of Australian laws and procedures within the AAT is the product of a tacit understanding, rather than the Treaty itself. (It is also in part a result of the logistic problems of applying and enforcing laws in such a place.) But at least that practice is protected by Article IV.

On the other hand, so far as third States are concerned Australia suffers, with the other claimant States, from the inherent weaknesses of treaties as law-making instruments. The Antarctic Treaty system is, if only because it rests on a disagreement about status, not an objective territorial regime.[129] The parties could not agree on the "correct" territorial regime as between themselves, and that would surely be a prerequisite to any attempt to enforce it as against the world. It therefore applies only as a treaty, ie as a contractual arrangement. This gives rise to an inequality: the new claims, or enlargements of existing claims, which are precluded by Article IV(2), are claims of any kind, including new claims as against the world. But the world of non-parties to the Treaty, though advantaged by the restraint required under Article IV, is not bound by the explanation for that restraint which Article IV contains. That explanation attaches, like an explanatory memorandum, to every act and omission of Australia vis-a-vis other States parties to the Treaty in respect of the Australian Antarctic Territory. It does not attach to similar acts and omissions vis-a-vis

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128 See text notes 68-73 above, also Seccombe M, "Keating warns against signing Antarctic treaty", *Sydney Morning Herald* (21 November 1988) p 2. Throughout the CRAMRA negotiations the protection of Australia's Antarctic interests was a live domestic issue. A Parliamentary Committee reported in 1985 on natural resources in the AAT and urged Australia to maintain its claim to sovereignty: Senate Standing Committee on National Resources, *The Natural Resources of the Australian Antarctic Territory* (1985) xiii.

129 See Simma, "The Antarctic Treaty as a Treaty providing for an Objective Regime", (1986) 19 Cornell ILJ 189, and works there cited.

third parties.[130] And yet Australia may be increasingly called on to respond to the acts of third parties in and near the Australian Antarctic Territory. Again it is no accident that the most important manifestation of this problem, in Australia's case, relates to the non-assertion of a fisheries zone or an exclusive economic zone off the Territory.

It is difficult to base a secure legal regime on an agreement to disagree. But that very agreement to disagree seems to be essential to the form of stability Antarctica currently has. No-one has suggested an alternative collective regime which could work, and it is impossible to believe that the extension of individual State sovereignty would be any more satisfactory.[131] It is easy to suspect that the present stability is the product merely of an ever-more-complex holding pattern in the form of the Antarctic Treaty system. That may be so but, for all its difficulties, it is a stability which seems the best option on offer.

Postscript

In November 1992 the House of Representatives Standing Committee on Legal and Constitutional Affairs released its report on "Australian Law in Antarctica". The report makes a number of significant recommendations regarding the application of Australian law in the Australian Antarctic Territory. The most important of these are: that Australian law be extended to those foreign nationals in the AAT who are not covered by the exemption in Article VIII(1) of the Antarctic Treaty (Recommendation 1), that a 200 nautical mile Australian Fishing Zone be proclaimed adjacent to the AAT and the Fisheries Management Act 1991 (Cth) be amended to apply to the activities of non-contracting Treaty parties within that area (Recommendation 2), that where foreign nationals are exempt from the application of Australian laws because of Article VIII(1) of the Treaty that Australia negotiate arrangements with other Contracting Parties for the transfer of jurisdiction (Reccomendation 4), and that the Australian Antarctic Territory Act 1954 (Cth) be amended to allow for the application of the laws of Tasmania, excepting criminal laws, to the AAT (Recommendation 5). The adoption of these Recommendations by Parliament will go some way to resolving some of the problems highlighted in this paper, however, whether such an active assertion of Australian law in the AAT and adjacent maritime areas will raise concerns amongst other Antarctic Treaty parties remains to be seen.

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130 Triggs, note 10 above, p 304 suggests that there is "some injustice in allowing third States to imply both a prejudice to sovereignty claims and the creation of enforceable common rights in Antarctica from activities taking place pursuant to the Antarctic Treaty... which... specifically protects parties vis-à-vis each other from such an implication". But third States do not need to rely on "enforceable common rights" there: they can rely on their own non-recognition of claims, and the absence of enforcement action by the claimants.

131 But see Heap, "Current and Future Problems arising from Activities in the Antarctic" in Triggs, note 36 above, p 201, esp at 204-5, 208-10.