AUSTRALIAN SOVEREIGNTY IN ANTARCTICA
Part II

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[*Part I of this article examined the principles of international law which relate to the acquisition of territorial sovereignty. In Part II, Ms Triggs applies these principles in assessing the legal status of Australia's claims to sovereignty in the Antarctica. The facts supporting the maintenance of this claim since 1961 are examined in the light of evolving customary international law. She concludes that while Australia has not established a consolidated title in Antarctica, international law will recognise an inchoate title, or prior right to establish sovereignty as against any other State.*]

6. BRITISH AND AUSTRALIAN ACTIVITY IN THE REGION OF THE PRESENT AUSTRALIAN ANTARCTIC TERRITORY UP TO 1961[1]

(i) *1820s-1933*

The early history of Australia is closely linked with the South polar regions. Its discovery and exploration was initially stimulated by the sealing and whaling industries. From the 1800s onwards, the search for animal oils, so essential for the colony's existence, had led ship captains further and further south to the sub-Antarctic and Antarctic seas and to the rich whaling and sealing grounds to be found there. The historian Swan makes the observation that early Australian trade rested on the products of the sea rather than the land.[2] Australia, it seems, was carried on the whale's back rather than a sheep's.[3] While many whaling vessels reported islands in the Southern Ocean during the 1820s, the fact that they could not consequently be located suggests they were giant icepacks. The first definite sightings of the Antarctic mainland which was ultimately to become the Australian Antarctic Territory were made by Captain J. Biscoe. He was employed by Enderby, a firm which combined its commercial activities with geographical surveys and exploration, to become the founder of the southern whaling industry. While on a voyage from the Falkland Islands to Hobart in 1830-1832, Captain Biscoe discovered and named Cape Ann and Enderby Land, now part of the Australian Antarctic Territory.

The next discovery in the region was made in 1833 by whaling master Captain Peter Kemp, who landed at lat. 66°S., naming it Kemp Land. A

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[1] Reliance has been placed for historical information upon Swan R. A., *Australia in the Antarctic; Interest, Activity and Endeavour* (1961).

[2] *Ibid.* 17.

[3] Dunbabin (1925) 11 *J. Proc. Roy Aust. Hist. Soc.* 1.

few years later in 1839 Captain J. Balleny sailed south to 69°S. long. 172° 11′E. He landed at lat. 64° 58′S., long. 121°E., naming it Sabrina Land after a cutter that had sailed with him but was subsequently lost in a storm with all crew.

These and other relatively *ad hoc* discoveries by commercial enterprises stimulated the interest of European governments and scientific and geographical societies. The Belleny, Kemp and Biscoe sightings, coupled with the discoveries south of the Indian Ocean and Cape Horn, gave a vague outline of the continent within the Antarctic Circle. The discoveries suggested that there was a need for study of the meteorological and earth magnetic fields in the southern ocean, partly to improve navigation and safety in the area. Official expeditions of research and exploration were organized, including two in the Australian region. One was French, led by Dumont D'Urville, and the other American, under the command of Charles Wilkes.[4] The success of these rival expeditions, and particularly the discovery in 1840 by D'Urville of Adélie Land, prompted Captain J.C. Ross, to sail south from Hobart. He had been commissioned by the British Government to locate the South Magnetic Pole and to establish magnetic stations from Ceylon to Cape Horn.[5] As senior commander of the H.M.S. Erchus, Captain Ross, with Captain S.R.M. Crozier, commanding the H.M.S. Tercos, circumnavigated the Antarctic continent, being the first to find a way through the pack ice of the Ross Sea.[6] He discovered and annexed for the British Crown, Victoria Land and roughly charted 300 miles of its coastline. He also discovered and annexed the James Ross Island group and sighted the Prince Albert mountains, now the eastern limits of the Australian Antarctic Territory.[7]

Captain Ross' report of large numbers of black, sperm and hump back whales gave added impetus to the lucrative deep-sea whaling industry located in Hobart. However, from the late 1850s the whaling industry declined with the exhaustion of accessible fields and the availability of petroleum by-products. The remaining years of the century saw a 'period of averted interest'[8] in the Antarctic as Australian development turned from the resources of the sea to those of the land. Scientific and geographical societies nonetheless maintained their interest in the area and helped to stimulate that of the Australian people. From 1868 onwards the Royal Society sponsored several oceanographical research expeditions including that of the H.M.S. Challenger which explored Antarctic waters and the islands of the South Indian ocean over a four year period.[9] The expedition

[4] See *Documents Relating to Antarctica* prepared in the Office of the Legal Advisor to the Department of Foreign Affairs, 1976 (hereinafter cited as *Documents*), Chronological List, XV.3.17. (These are available only through the Department.)
[5] Swan, *op. cit.* 29.
[6] See *Documents*, Chronological List, XV.3.18.
[7] *Ibid.*
[8] Swan, *op. cit.* 32.
[9] *Documents*, Chronological List, 1872-76, XV.3.32.

established that a vast land mass existed around the South Pole and led to a revival of interest in the Antarctic that culminated in the major expeditions during the first decades of the 20th century. Scientific interest in the Antarctic was further stimulated by the work undertaken in the first International Polar Year of 1882-83 which collected data from fifteen circumpolar stations.[10]

In a speech to the first meeting of the Victorian branch of the Geographical Society of Australia in April 1884, Baron F. Von Mueller, the botanist, foresaw grand results for geographical science and Antarctic exploration. He stressed Australia's special interests in the area and the significance of an expanded whale fishing industry. With commendable perspicacity he pointed out that '[t]o detect coal on any approachable portion of the Antarctic would be an immeasurable gain. . . . To no other people can research connected with the Antarctic regions be of that value which it must ever have for the Australian colonies'.[11]

In a speech to the Royal Society of Tasmania in 1886, the Deputy Surveyor-General, C. V. Sprent, articulated a foreign policy which, at least subconsciously, has motivated Australian activities in the Antarctic ever since. He argued that '[w]e aspire to be the leading power in these Southern Seas. We are gradually setting up a Monroe Doctrine of our own . . .'.[12]

It was not until Captain Scott's first expedition in 1901-4[13] that extensive land exploration of Antarctica was made. A sledge party reached to the lat. 77°99'S., 100 miles within the present Australian Antarctic boundary. The expedition examined the wastes of Victoria Land, and the Ross ice front, and discovered King Edward VII Land, earlier sighted by Captain Ross. These discoveries were consolidated and extended by a subsequent British Antarctic Expedition under E.H. Shackleton in 1907-9.[14] It sledged to within 97 miles of the South Pole. Shackleton took formal possession for the Crown of King Edward VII Plateau on 9th January 1909. Another sledge party, led by Professor Edgeworth Davis, reached the South Magnetic Pole within 100 miles of the Australian Antarctic Territory, taking possession of Victoria Land both at the Magnetic Pole on 10th January 1909, and again at Bernald on 17th October 1908. The following is typical of the kind of formal proclamation read by the expedition leader, in this instance Professor David.

> Mackay and I fixed up the flagpole. We then bared our heads and hoisted the Union Jack at 3.30 p.m. with the words uttered by myself in conformity with Lieutenant Shackleton's instructions. 'I hereby take possession of this area now containing the Magnetic Pole for the British Empire.' At the same time I fired the trigger of the camera by pulling the string. . . . We then gave three cheers for His Majesty the King.[15]

[10] Trans. Roy. Geogr. Soc. of A/A (Vic. Br.) 1st Session (1883-84) 125-33.
[11] *Ibid.*
[12] Proc. Roy, Soc. Tas. (1866) 141-55.
[13] *Documents*, Chronological list, XV.3.40.
[14] *Ibid.*
[15] *Documents* IV.1.; Shackleton E. H., *The Heart of the Antarctic* (1909) ii, 181.

A second Scott expedition in the race to the South Pole in 1911-13 ended tragically for its members. Extensive exploration and scientific work along the coast of Victoria Land on the Ross Ice Shelf was nonetheless achieved, including the discovery by Lieutenant Penell of Oates Land.[16]

The first Australian Antarctic Expedition took place between 1911-14 under the command of Sir Douglas Mawson. Mawson was well aware of the significance to Australia of the Antarctic continent, warning the Australasian Association for the Advancement of Science in 1911:

> If ever in the history of Australia an expedition is to set out under favourable circumstances, it must be immediate. No time is to be lost. So surely as it lapses a moment foreign nations will step in and secure this most valuable portion of the Antarctic continent for themselves, and for ever from the control of Australia.[17]

He was referring to the area due south of Australia from Cape Adare in the East to Gaussberg in the West as the region of particular Australian interest and likely influence. Swan points out[18] that it was the work and discoveries of this expedition which formed the geographical foundation for Australia's subsequent claim to territorial sovereignty in Antarctica. The expedition charted over 700 miles of coastline and 250 miles of previously sighted coast was re-examined.[19] The Expedition discovered and explored King George V Land and Queen Mary Land, both of which were claimed for the British Crown on March 1912 and December 1912 respectively. In all, Sir Douglas raised the Union Jack and took possession for the Crown at seven localities.[20] Shore parties wintered at Cape Denison and on the Shackleton Ice Shelf, exploring Terra Adélie and sledging to the South Magnetic Pole. A separate party under G. P. Ainsworth lived for 23 months on Macquarie Island, mapping the island and conducting scientific investigations.

The First World War prevented further Australian activity in Antarctica. However, the British decision to hand the Ross Dependency to New Zealand for administration in 1923, and a formal claim by the French to Adélie Land[21] stimulated demand that the Australian claim be formally established. The United States of America had by this time issued two policy statements concerning claims to sovereignty in Antarctica. The first on 2nd April 1924 by C. E. Hughes, Secretary of State, warned that in the polar regions where settlement was an impossibility mere discovery coupled with the formal taking of possession 'would afford frail support for a reasonable claim to sovereignty'.[22] Again, on 13th May 1924, Hughes stated that the United States would not annex Wilkes Land in the Australian

[16] *Documents*, Chronological List, XV.3.44.
[17] A.A.A.S. Report 13 (1911) 398-400.
[18] *Op. cit.* 340.
[19] *Documents*, Chronological List, XV.3.45.
[20] *Ibid.*
[21] 27 March 1924; *Documents* VI.1.
[22] *Ibid.* XV.1.3. and 4; Exchange of Notes between Hughes and the Norwegian minister.

quadrant on the ground that actual settlement was necessary to establish sovereignty.[23] This was, and remains, the official U.S. policy in relation to Antarctic claims.

In 1927 Argentina asserted sovereignty over the South Orkneys through continuous and effective occupation, basing its claim on the operation of a radio station on Laurie Island.[24] This was a clear challenge to the United Kingdom claim to sovereignty over these islands.[25]

Australia's perception of the need for legal protection of her interests in Antarctica was further stimulated by the activities of Norwegian whalers in the seas off the Australian quadrant. They fished in reliance upon legal opinion that the Antarctic seas were high seas and hence that any attempt to license or police activities in the area would be futile.[26]

These and other activities and claims in Antarctica were discussed as a matter of British policy at the Imperial Conference in London in 1926. It was concluded that United Kingdom sovereignty had been established by discovery, over the outlying parts of Oates Land, that is, the portion not comprised within the Falkland Islands Dependencies, and Enderby, Kemp, Queen Mary, Wilkes, King George V and Oates Lands.[27] Each of these areas, with the exception of Oates Land, had been included in the letters patent and Orders in Council relating to claims made by the United Kingdom, Australia and New Zealand. As D. H. Miller predicted, these claims were intended to include the sector to the South Pole, based on the hinterland concept.[28]

The Imperial Conference prompted the formation of an Antarctic Committee by the Australian National Research Council.[29] On the basis of research and recommendations by this Committee the Commonwealth government established the British, Australian and New Zealand Antarctic Expedition 1929-31 (BANZARE), under the command of Sir Douglas Mawson. The Royal Commission required Mawson to take possession of all the territories discovered in the course of the expedition and the territories 'not under the sovereignty of any other state which have been discovered in the past by [British] subjects'.[30] The Australian Prime Minister, S. M. Bruce, instructed Mawson to 'plant the British flag wherever you find it practicable to do so, and in doing so you will read the proclamation of annexation'.[31] BANZARE consolidated the work of the Australian Antarctic

[23] *Ibid.* XV.1.3, 9-10 and 19; Correspondence between Hughes and Prescott.
[24] *Ibid.* III.3; Director of Argentina Posts and Telegraphs to the Director of the Universal Postal Mission.
[25] The British government protested on 17 December 1927; see *Documents* III.3.
[26] (1929) 2 *J. Comp. Legis. Int. Law* (3rd Ser.) 226-32.
[27] *Documents* XIII.5; summary of proceedings of the Imperial Conference 19 October-23 November 1926.
[28] Swan, *op. cit.* 344.
[29] *Ibid.*
[30] *Documents* IV.3.
[31] 12 September 1929, *Documents* IV.4.

Expedition of 1911-14 and made further discoveries of MacRobertson Land, the BANZARE Coast and Princess Elizabeth Land. The coastline from 45°E.-75°E. was now roughly chartered, and formal proclamations annexing the Australian Antarctic Territory were read on five occasions from 13th January 1930 to 18th February 1931.[32] The total area claimed was from lat. 65° to the South Pole and defined a sector 160°E. to 45°E., excluding the French claim to Adélie Land.

In December 1931, following the work of the BANZARE expedition, the British Government Dominion Office sought the advise of the Law Offices of the Crown as to the most appropriate means of transferring administration of the Australian Antarctic Continent to the Commonwealth.[33] The request for an opinion posed the following questions:

(1) Is formal annexation over the Australian Antarctic Territory necessary to assert British title to the area?

(2) Should the territory be properly defined by the use of sectors?

(3) Should the instrument of transfer specify the precise grounds on which sovereignty was based?

The request discussed each of these issues in detail. It cited a Law Office's Opinion of 1923 which stated international law as requiring that 'discovery offered only an inchoate title which was perfected by occupation or by acts of ownership exercised over a long period and acquiesced in by other powers'.[34] The 1923 Opinion had concluded that as British sovereignty existed at that time there was no need to annex the territory. The Dominion request pointed out that since 1923, British sovereignty had been confirmed by the Imperial Conferences of 1926 and 1930, no protests had been received from any foreign government and further work on proclamations had subsequently been undertaken by BANZARE expeditions. Hence, it was argued and ultimately accepted by the responding Law Office's Opinion,[35] that action so far taken to assert British title could 'not unreasonably be regarded as sufficient'.[36]

The Law Officers further advised that no basis of title need be asserted. All that was required was an "unequivocal assertion of sovereignty'.[37] While no reason is given, it may be assumed that the Dominion Office view was adopted with the idea that to do more would be to invite criticism from foreign powers which would otherwise not be offered.

As to the problem of delineating the claim by using sectors, the request noted that the hinterland of the Australian Antarctic Territory was wholly

[32] *Documents*, Chronological List, XV.3.52.
[33] *Documents* IV.7.1.
[34] *Ibid.*
[35] *Ibid.* IV.8.
[36] *Ibid.* IV.7.2.
[37] *Ibid.* IV.8.

unexplored.[38] While this was also the situation in the Falkland Island Dependencies, the interior of the Ross Dependency had been penetrated to some extent. The request concludes that the sector principle as a basis for title was inappropriate for Antarctica, partly because 'contiguity' was a fiction, but more importantly because the principle, as it had been applied in the Arctic, would have the effect of reducing considerably the size of the Australian claim in favour of Argentina and Chile. Yet another reason lay in the need to avoid Norwegian objections to the proposed sector. Norway had resisted strongly the notion of sectors in the Antarctica and, in relation to her own claims in the Antarctica, relied upon other grounds to title. The Law Officers enigmatically advised nevertheless that the Falkland Islands and the Ross Dependency precedents should be followed and recommended a claim through the proclaimed longitudes to the South Pole.

On 7th February 1933 the British government issued an Order in Council affirming British sovereign rights over the Australian Antarctic Territory, placing it under the administration of the Commonwealth. The territory was defined as follows:

> all the islands and territories other than Adélie Land situated south of the 60° of the South Latitude lying between the 160° of East Longitude and the 45° of East Longitude.[39]

This was followed in June 1933 by the Australian Antarctic Territory Acceptance Act under section 122 of the Australian Constitution.[40] This came into operation on 24th August 1936.[41] In a statement on the second reading of the bill, Mr. Latham, the Attorney-General, argued that,

> the area had been so thoroughly visited and British sovereignty so completely established, that it was considered that there was no longer need for delay in providing for the administration of the territory and for taking it over on behalf of the Commonwealth.[42]

A number of reasons were advanced in favour of the legislation. The Hon. J. Latham, Minister for External Affairs, stressed the 'actual and potential economic importance'[43] and the need to establish an administrative authority over the whaling industry and protection for Antarctic seals and birds. The Hon. R. G. Casey spoke of the 'continuous and concerted effort on the part of Australians to consolidate their interests in the Antarctic'.[44] He listed the territorial and possible strategic value of the area, its economic potential, and finally, the significance of meteorological research for the Australian pastoral and agricultural industries as reasons for the Australian decision to accept sovereignty over the area.

[38] *Ibid.* IV.7.5.
[39] Statutory Rules and Orders (rev. 1948) ii, 1034.
[40] Commonwealth Acts 1901-1950, Vol. I, 227.
[41] Norway protested at this promulgation on the ground that it included areas claimed by Norway. See further Swan, *op. cit.* 222.
[42] Commonwealth, *Parliamentary Papers* cxxxix, 1952.
[43] Commonwealth, *Parliamentary Debates* House of Representatives, 1933, 1949-56.
[44] Swan, *op. cit.* 208.

For the Norwegians not the least important reason prompting Australian administration over the area was the revenue which might be gathered from the issue of whaling licences.[45] The Norwegians also protested at the proclamation of the Act on the ground that the Australian claim included areas which had been claimed by Norway, being King Leopold, Queen Astrid and Ingrid Christensen and Queen Maud Lands.[46]

(ii) *1933-1961*

The history of Australian activity in Antarctica between 1933 and the Antarctic Treaty of 1961 is one of attempts to strengthen and consolidate effective control over her claim. This was stimulated by a number of factors. In 1933 the International Court of Justice gave its decision in the *Eastern Greenland* case, on 1st April 1938, France formally annexed Adélie Land;[47] in 1939 Germany made a conflicting sovereignty claim in the Norwegian sector:[48] and throughout this period, the United States undertook extensive exploratory expeditions in Antarctica.

In 1935 the Convention for the Regulation of Whaling[49] was ratified by 19 States including Australia. The Commonwealth then passed the Whaling Act 1935-1948 which applied the Convention to

> Australian waters beyond territorial limits to the Territories of the Commonwealth, to ships registered in Australia, whether or not such ships are in Australian waters of a Territory of the Commonwealth, and to all ships over which the Commonwealth has jurisdiction.[50]

Japan objected to the promulgation of the Whaling Regulations under this Whaling Act, although there was little likelihood of them being enforced within the Antarctic area.[51] The Norwegians also questioned the validity of the New Zealand, British and Australian seaward limit of their Antarctic claims at the lat. 60°S., arguing that the ice limit was the true continental edge.[52] The purpose of this delimitation was to ensure that any islands subsequently to be discovered within the sector would be embraced within Australian sovereignty. In practice, however, Australia did very little in the following years to participate in the Antarctic pelagic whaling industry, despite the huge areas of whale rich seas within its sector.

In 1939 a direct challenge to Australian sovereignty was made by Ellsworth, an American, on an aerial reconnaissance flight over the hinterland of the Australian sector. On 11th January he flew over the interior of

[45] Christensen L., *Such is the Antarctic* (1935) ch. 4.
[46] Swan, *op. cit.* 222.
[47] *Documents* VI.4.
[48] For Norway's Proclamation of Sovereignty in Antarctica January 14 1939, see *Documents* X.4.1.
[49] This Convention has now been superceded by the Convention of 1946 and Protocol of 1956. The Australian domestic legislation is the Whaling Act 1960, and the Whale Protection Act 1980 (Cth) (yet to be proclaimed).
[50] S. 4(1).
[51] Swan, *op. cit.* 222.
[52] See *infra* n. 94.

Princess Elizabeth Land and claimed 77,000 square miles for the United States. Quite apart from constituting a conflicting claim, this raised the question of whether a valid title could be based on aerial operations alone. Swan suggests Ellsworth had some sort of authority to act for the United States in claiming new territory though this was denied by Ellsworth.[53] Accompanying Ellsworth was Sir Hubert Wilkins, an Australian, who, on touching down on parts of the mainland within the Australian sector, raised Australian flags and left a record of his visit affirming Australian sovereignty.[54] It is an indication of the international tension and confusion surrounding the sovereignty claims that on this expedition its leader and second in command should make claims for their respective States within an area already subject to exclusive Australian jurisdiction. The Australian authorities[55] refused to consider the Ellsworth claim, and the United States has chosen to refrain from any sovereignty claims on its own behalf.[56]

Australian plans for Antarctic exploration and research were halted by the outbreak of World War II, though the activities of the British and German warships in the South Atlantic during the war demonstrated for Australia the need for continued activity in the seas between it and the Antarctic.[57] After the war Australian occupation and scientific research in Antarctica, as distinct from activities of discovery and exploration, began in earnest. In January 1947 the Commonwealth government set up an executive committee of departmental representatives to consider future action in the Australian Antarctic.[58] This was followed by the establishment of an executive planning committee to investigate further exploration and scientific development of the Australian Antarctic Territory. In March 1947 the R.A.A.F. carried out long-range flights from Australia out to the Southern Ocean to photograph Macquarie Island and to gain information with regard to weather and water conditions.[59] In August 1947 an expedition was announced and named the Australian National Antarctic Research Expedition (ANARE). This was to be the first of many such expeditions which were intended to consolidate Australia's sovereignty claims in her sector. Federal cabinet also approved recommendations that scientific and meteorological stations should be established and maintained for the next five years on Heard and Macquarie Islands.[60] The Minister for External Affairs, the Rt. Hon. R. G. Casey explained the Australian government's policy in Antarctica as follows:

[53] Swan, *op. cit.* 226.
[54] *Documents* IV.15.1.
[55] Swan, *op. cit.* 227.
[56] See *Documents* XV.2.9-10 for U.S. instructions to the American Consul re advice to be given to Ellsworth with regard to these claims.
[57] See *e.g.* the destruction by Britain of the German battleship the 'Graf Spee', cited in Swan, *op. cit.* 235.
[58] Law P. G. and Bechervaise J., *ANARE* (1957) xxii.
[59] (1947) *5 Polar Record* 79.
[60] Swan, *op. cit.* 242.

> The Australian Antarctic sector is of vital importance to Australia. For strategic reasons it is important that this area, being as it is so close to Australia's back door, shall remain under Australian control. . . .[61]

Hence he added defence and security concerns to Australia's resource and scientific interests.

The first island to be formally occupied by Australia was Heard with a team of fourteen men under the leadership of meteorologist, A. V. Gotley.[62] On 26th December 1947, Australian occupation was formalized by a flag-raising ceremony and the reading of a declaration. This was supplemented by press releases of the event and radio broadcasts and documentary films, to give the maximum publicity in order to further consolidate Australian title.[63]

A second ANARE cruise in February 1948 established a research station at Buckles Bay on Macquarie Island in March.[64] Comprehensive long-term scientific programs were instituted at both stations. Livestock experiments were conducted with sheep and goats, and meteorological data was transmitted daily to Australia.

The Federal government's growing concern with Antarctica was demonstrated by the establishment of a permanent Antarctic Division in the Department of External Affairs on 4th May 1948. Further, a grant of £500 was authorized to the Scott Polar Research Institute in England. In February 1948 another ANARE expedition on H.M.A.S. Wyatt Earp sailed to find a site for a permanent station.[65] This otherwise unsuccessful expedition managed to survey the Balleny Islands, land on Borradaile Island and call at Macquarie Island. ANARE relief teams were shipped in early 1949 to both the Heard and Macquarie Islands and during the winter of 1949 topographical surveys of Heard Island were completed. Similar ANARE relief teams replaced the previous year's team in 1950, 1951, 1952 and 1953. In March 1953 an Act for the administration of the Heard and McDonald Islands was passed.[66] In the same year the government announced that an expedition would be sent to the continent itself to establish a scientific research station on the Australian Antarctic Territory. In February 1954, after relieving the two island stations, a new mainland coastal station was established and named Mawson in MacRobertson Land.[67] During the winter of 1954, sledge and tractor journeys were made from Mawson to Scullin Monolith, King Edward VIII Gulf and to within sight of Prince Charles Mountains. The scientific work at Mawson was expanded, and it

[61] (1953) *Current Notes* 172.
[62] *Documents*, Chronological List, XV.3.64.
[63] Swan, *op. cit.* 249.
[64] *Documents*, Chronological List, XV.3.64.
[65] *Ibid.*
[66] Heard and McDonald Islands Act 1953 (Cth), see Millard D. J., 'Heard and McDonald Islands Act' (1953-55) *Sydney Law Review* 374; O'Connell D. P. (ed.), *International Law in Australia* (1965) 310.
[67] *Documents*, Chronological List, XV.3.77.

was decided to close Heard station but to maintain observations at Macquarie station.[68]

In 1954 the Commonwealth passed the Australian Antarctic Territory Act 1954-1973. This legislation applied the laws of the Australian Capital Territory to the AAT and gave the Governor-General of Australia the power to make ordinances for the peace, order and good government of the region.

In 1954-55 another ANARE relief expedition went to both Macquarie and Heard Islands and the latter base was closed.[69] During the winter of 1955 the scientific program at Mawson was expanded and automatic meteorological stations were established. Further sledge and tractor journeys were made from Mawson to Scullin Monolith, Prince of Wales Mountains and the David, Mawson and Casey ranges. 1955 saw further Australian government commitments to its Antarctic program. The government promoted Australian participation in the proposed International Geophysical Year (I.G.Y.) with a grant of £67,000 to allow universities and other bodies to take part.[70] The government also issued an invitation to other States to enter the Australian Antarctic Territory during the I.G.Y.[71] In August 1955 Mr Casey announced that a second mainland station would be established in the Vestfold Hills area, 400 miles east of Mawson as a meteorological station.[72] Finally the government agreed to contribute £25,000 to the British Commonwealth Trans-Antarctic Expedition in 1957-58 to the hinterland of the continental section of the Falkland Islands Dependencies.[73]

In December 1955 another ANARE relief expedition went to Macquarie.[74] A second cruise in December 1955 — March 1956 sent air and sea exploration parties to the Wilkes Land coast, and a landing was made in Davis Bay, Balacena Island, the Windmill Islands and the North West coast. Photographic surveys were made by air and tractor journeys from Mawson were made for geological and survey work. It should be noticed at this point that the ships used for this relief work were not Australian owned but were chartered annually from a Danish owner.[75] Further relief operations to Macquarie and Mawson took place in 1956-57. Using the ship the 'Kista Dan' as a base, air reconnaissance flights were made to find a site for a second station. This was ultimately located and named Davis on 13th January 1957 and hut building commenced.[76]

[68] *Ibid.*
[69] *Ibid.*
[70] (1955) *Current Notes* 495; (1955) *Facts and Figures* 55-6.
[71] *Ibid.* Swan, *op. cit.* 280.
[72] (1955) *Current Notes* 579-80; (1955) *Facts and Figures* 45.
[73] (1955) *Facts and Figures* 56.
[74] *Documents*, Chronological List, XV.3.82.
[75] For a comparison with other States see Senator the Hon. Webster J. J., 'Antarctica: an information paper' November 1977 (unpublished).
[76] See Swan, *op. cit* ch. 28 for a description of the establishment of Davis.

By 1957 Mawson was a settlement of 30 buildings and Macquarie a settlement of 48 buildings.[77] These stations could cover research into eight branches of geophysics for the Australian I.G.Y. commitment. These were meteorology, geo-magnetism, the aurora, ionispheric physics, cosmic rays, glaceology, seismology, and gravity. One purpose of this work was to map the land lying under the continental ice cap and to establish the 'real' coastline.

During the I.G.Y.,[78] from June 1957 to December 1958, comprehensive scientific programs were inaugurated at all three Australian stations. This included biological studies into the bird and animal populations of Macquarie Island, and a geological survey of the north-eastern part of the Vestfold Hills which took place from the five member Davis station. During this year research activities at Mawson were expanded and several far-ranging trips were made into the interior including a 400 mile expedition. In May 1958 the United States announced its intention to hand over Wilkes station, which had been established within the Australian sector on the Budd Coast, to the Australian government on the condition that United States and other scientists could continue to work there while Australia provided the administrative and logistical services.[79]

The considerable scientific success of the I.G.Y. and the heightened international interest in Antarctica prompted the International Council of Scientific Unions to set up a special committee on Antarctic research (SCAR) to further the 'co-ordination of scientific activity in Antarctica with a view to framing a scientific program of circum-polar scope and significance'.[80] SCAR was composed of the twelve States which had been most actively engaged in Antarctic work, and the vice-president was Professor K. E. Bullen of the University of Sydney. At a SCAR meeting in August 1958 it was announced that all nations then working in Antarctica intended to continue with their research for another year.

After the close of the I.G.Y. yet another ANARE relief expedition set out for Macquarie and later, the Davis and Mawson stations. Under the leadership of Phillip Law, Australia also took over the Wilkes station from United States' control.[81] After the usual flag-raising ceremonies the expedition sailed for Oates Land where aerial reconnaissance flights were conducted into the hinterland and along the coastline. Law could now state that 'no

[77] Swan, *op. cit.* 292.

[78] Sixty-six States participated in the I.G.Y. as members of the International Council of Scientific Unions. Forty-eight Research bases were established by eleven States in different parts of Antarctica: Argentina 8, Australia 2, Belgium 1, Chile 4, France 2, Great Britain 14, Japan 1, New Zealand 1, Norway 1, Soviet Union 6, United States 8. Grattan C. H., *The South West Pacific Since 1900* (1963) 697. About 5,000 persons were in Antarctica over the I.G.Y. See McDougal, Lasswell and Vlasic, *Law and Public Order in Space* (1963) 800.

[79] (1958) *Current Notes* 234.

[80] Swan, *op. cit* .309.

[81] *Documents*, Chronological List, XV.3.87.

important rock feature now remains undiscovered on the Oates Land coast or on any part of the coast of the Australian Antarctic Territory'.[82]

In 1958 the decision was taken by SCAR to establish an 'International Antarctic Analysis Centre' in Melbourne where the Commonwealth Bureau of Meteorology could analyze the synoptic charts of the Southern Hemisphere south of lat. 30°S.[83]

At a SCAR meeting in Canberra in March 1959, the Australian government announced that the ANARE stations would be continued for 1960 with a greater amount of field work.[84] In the meantime the government announced its intention to take part in a conference in Washington to be held in October 1959 with the governments of the twelve States engaged in research in Antarctica to discuss a proposal that a treaty be negotiated for the future use of the region. Australia's objectives were stated by Casey as follows:

> [It] was hoped that the possibility of political dispute would be removed from this region of the world which would be 'sealed off' as a permanently peaceful area: and that the foundations would be laid for fruitful cooperation between all interested countries in scientific research there for the benefit of all.[85]

On 1st December 1959 the Antarctic Treaty was signed by the twelve States including Australia. Swan, writing in 1961, asked with considerable foresight whether States might co-operate in scientific work there only so long as 'the apparent returns of such work are such as not to arouse the acquisitive instinct of man'.[86] In January 1960 and in 1961 further ANARE relief expeditions took place to Wilkes, Davis, Mawson and Macquarie stations.

7. STATUS OF AUSTRALIA'S ANTARCTIC CLAIM, 1961

Returning to the problem of the validity of Australia's Antarctic claim the task remains to assess the factual description of exploration, settlement and scientific research in light of the legal requirements for the acquisition of territory as they existed in 1961. When the Antarctic Treaty came into force, State practice and judicial and academic authorities had adopted the requirement of effective occupation as the sole means of acquiring *terra nullius*. Effective occupation could be established by showing the intent of the State to act as sovereign, coupled with the actual, continuous and peaceful manifestations of the functions of State in the territory. International tribunals modified this requirement in relation to remote and inhospitable areas. For reasons which have been explained, however, these decisions constitute meagre authority for the solution of Antarctic claims. The views

[82] Swan, *op. cit.* 318.
[83] See statement of the Minister for the Interior, the Hon. G. Freeth (1959) 9 *Polar Record* 360-72, 475-87; (1960) 10 *Polar Record* 86-9.
[84] (1959) 9 *Polar Record* 589-608.
[85] (1959) *Current Notes* 675-6.
[86] Swan, *op. cit.* 327.

of Scott[87] and Balch[88] that polar regions were not subject to national claims of sovereignty as they were uninhabitale could no longer be supported after the success of the International Geophysical Year. Technological developments and the practice of States demonstrated that it was now possible to winter in polar regions. Further, difficulties in habitation had not in practice prevented sovereignty claims in equally inhospitable areas such as high mountains or desert regions.

The early British and Australian discoveries and subsequent exploration and annexations in Antarctica did not of themselves create title. Hence the conclusion of the Imperial Conference in 1926 that sovereignty by discovery had been established in parts of Antarctica was incorrect. However from the time of the BANZARE expeditions the intention of Britain, Australia and New Zealand to assert sovereignty over the discovered areas was clear. It is nonetheless extremely doubtful that the requirement of effective occupation had been met by the time administration of the Australian Antarctic Territory was transferred to the Commonwealth of Australia. While the decision in the *Island of Palmas* case was not discussed by the Crown Law Officer's Opinion in 1933 it would be reasonable to assume that it was seen as a highly authoritative precedent favouring the establishment of British sovereignty by that time. The minimal and fleeting exploratory expeditions up to 1933 could not satisfy the demands of effective occupation. Even on the basis of the Huber dicta[89] that the maintenance of a right may differ according to whether the territory is inhabited or uninhabited, in no sense was the Antarctic occupied, effectively or otherwise, by 1933. The activities could, however, support a claim to an inchoate title, and hence a preferential right to perfect title as against any other State.

After Australia accepted control of the AAT in 1933 its policy was to strengthen and consolidate its claim by effective control. The question is whether Australia succeeded in doing so by 1961.

Australia's claim of effective occupation, as distinct from exploration and discovery, in Antarctica up to 1961 rests upon scientific activities conducted at the two island stations, Heard and Macquarie, and the continental bases, Mawson, Davis and finally Wilkes. The ANARE teams, relieved annually by a fresh team, would spend a year conducting scientific programs. These included sledge and tractor journeys to the hinterland, seismology and upper wind measurements, topographical surveys, geophysical research and routine meteorological, magnetic and solar observations and biological and geological work.

[87] Scott J. B., 'Arctic Exploration and International Law' (1909) 3 *American Journal Law* 928.

[88] Balch T. W., 'The Arctic and Antarctic Regions and the Law of Nations' (1910) 4 *American Journal of International Law* 265.

[89] Triggs, 'Australian Sovereignty in Antarctica' (Part One) (1981) 13 *M.U.L.R.* 123, 130.

In 1948 the Australian Government established a permanent Antarctic Division in the Department of External Affairs, and the laws of the Australian Capital Territory were extended to Antarctica by the Australian Antarctic Territory Act of 1954. The government's commitment was promoted by Australian participation in the International Geophysical Year and the establishment of a second continental land base at Davis. The respect accorded the Australian scentific work in Antarctica by other States engaged in research there is demonstrated by the decision to hold the first Antarctica Treaty Consultative meeting in Canberra in 1961.

Against the undoubted scientific achievements and contributions of the ANARE parties must be set the relatively parsimonious contribution of the Commonwealth when compared with those of other States active in Antarctica. Since the nineteenth century the United States has been the most active party in the Antarctica and since the 1950s the Soviet Union has developed an Antarctic research program rivalling that of the U.S. Other non-claimant States such as South Africa, Japan and Belgium have also been involved in substantial scientific research programs in Antarctica over this period. These activities tend to weaken the notion of an exclusive territorial sovereignty in any of the claimant States. The Australian government policy of securing the defence, resource and economic benefits of sovereignty in Antarctica has not been matched by adequate budgets. The Commonwealth relies on limited charter party arrangements for a ship for Australian Antarctic activities and, unlike other States, Australia makes no serious attempt to exploit the rich whaling and other resources of the high seas within the Australian sector. Nor did Australia attempt to regulate whaling there under the International Whaling Conventions to which it is a party. Certainly Australian activities cannot justify the extension of Australian sovereignty north from the coast to the 60°S. lat., which, for other reasons, has no validity at international law.

It is significant in assessing the validity of title based upon occupation that sovereignty was claimed and maintained in the absence of protest.[90] Proof of actual consent is even more eloquent evidence of title. As Huber said in the *Island of Palmas*[91] no claim to sovereignty can be clandestine. The absence of protest constitutes evidence of acquiescence and has the same effect as recognition of title.[92] While it cannot constitute a root of title and must be used with caution, particularly in territorial disputes, it can assist in interpreting evidence of sovereignty.[93]

During the period of occupation and exploration in the AAT up to 1961 there were only two protests. The first by Norway[94] was occasioned by the

[90] See Schwarzenberger G., 'Title to Territory; Response to a Challenge' (1957) 51 *American Journal of International Law* 308, 311.
[91] (1928) 2 R.I.A.A. 831, 868.
[92] Brownlie I., *Principles of Public International Law* (2nd ed. 1973) 164.
[93] Jennings R. V., *The Acquisition of Territory in International Law* (1963) 51.
[94] Proclamation of Norwegian Sovereignty in Antarctica 14 January 1939, *Documents* X.4.1.

promulgation in 1936 of the Australian Antarctic Territory Acceptance Act 1933. Norway's objection was to the inclusion in the AAT of territories explored by Norway. This objection was impliedly withdrawn on January 14 1939 when Norway asserted her own claim in Antarctica and defined its limits as the Falkland Islands Dependencies in the west and the AAT in the east. In its proclamation of sovereignty Norway drew attention to its promise to Great Britain in 1929 not to deny claims within control of the British Empire. It stated that its primary concern was with the limits of territorial waters at the 60° parallel and the licensing in these waters of Norwegian whaling vessels. Norway would not claim exclusive rights over waters adjacent to her own territory and 'should be insured against the possibility of other nations excluding them from these waters . . .'.[95]

The second objection, by Japan,[96] was prompted by similar concerns for its whaling industry. Japan protested at the issue of Whaling Regulations applicable to Antarctic waters by the Australian Government under the Whaling Act of 1935.

The competing U.S. claim in the AAT by Ellsworth was never accepted by the U.S. government, which has consistently refused to recognize any claims in Antarctica. The U.S. has made no claims for itself but has reserved all its 'historical rights' in Antarctica though it has never stated clearly what it understands these rights to be.[97] The Soviet Union takes a similar attitude.[98] It reserves all rights based on its 'initial' discoveries and exploration to present corresponding territorial claims in Antarctica. It does not recognize any existing claims and demands the right to take part in any solution of the question of rights in Antarctica.

Australia's sovereignty over its sector is recognized by the other claimant States. Recognition is not accorded by any other member of the international community. This is a particularly salient fact when it is remembered that the international community presently consists of 155 States. Further, the United Nations organizations have so far abstained from taking any position on the question of Antarctic sovereignty.

Put most favourably to Australia, all that can be asserted on her behalf is that there are at present no formal protests specifically against Australian sovereignty. This is not surprising as no State has made a competing claim in the Australian sector. While Australia cannot argue that there has been general recognition of her title it may be claimed that there has been a general absence of formal protest. Importantly however, those States with the greatest commitment of scientific research and personnel in Antarctica,

[95] *Ibid.*
[96] Swan, *op. cit.* 222.
[97] See text of Note addressed to Foreign Minister of the 11 States participating in the I.G.Y. proposing a Conference on Antarctica, *Documents* XIV.3.1.
[98] See generally Toma, 'Soviet Attitude Towards the Acquisition of Territorial Sovereignty in the Antarctic' (1956) 50 *American Journal of International Law* 611.

the Soviet Union and the United States, have expressly refused to recognize sovereignty claims in the area.

As the legal standards for territorial acquisition in remote and inhospitable areas are so ambiguously expressed and based upon such dubious and inappropriate authority, it is difficult to make any categorical conclusion as to the validity of Australia's sovereignty claims in Antarctica by 1961. Clearly the intent to act as sovereign is present, as is 'continuous and peaceful' settlement. Such limited occupation was entirely appropriate to the circumstances of the territory. There were no duties to perform in relation to a population nor rights to be protected beyond those of the scientific personnel. Activities were exclusively of a scientific or exploratory kind. Indeed they could be of no other.

On the other hand few States have recognized Australian sovereignty and two have specifically denied it. The *sine qua non* of sovereignty is population and this is represented only by the presence of ANARE and other research teams. These constitute scientific outposts of a transient and highly specialized kind. The question is thus whether the standard of effective occupation, modified as it has been by the concept of minimal control, is satisfied by evidence of the intent to act as sovereign supported by annual research expeditions. It seems unlikely that international law will support the validity of Australian sovereignty in these circumstances. Nonetheless the doctrine of inchoate title will give Australia a prior right to perfect title as against other States. At the time of the Antarctic Treaty Australia had not satisfied the requirements of effective occupation, but could claim the right to complete her claim to sovereignty in those parts of the sector which had been explored or where bases had been established.

8. THE ANTARCTIC TREATY

The Antarctic Treaty was signed on December 1st 1959 by twelve States. These were the seven claimant States and Belgium, Japan, South Africa, the Soviet Union and the United States. The treaty entered into force on June 23, 1961 when all signatories ratified it. Twelve States have since acceded to the treaty.[99]

The primary purpose of the treaty, stimulated by the success of the International Geophysical Year, was to ensure that Antarctica would be used for peaceful purposes in the interests of all mankind. Free scientific investigation was to continue and international cooperation in the exchange of information, personnel and scientific observations and results were to be fostered. Most importantly, Article IV(2) of the treaty prevents activities

[99] Italy (1981), Brazil (1975), Czechoslovakia (1962), Denmark (1965), Federal Republic of Germany (1980), German Democratic Republic (1974), Netherlands (1967), Poland (1977), Rumania (1971) and Uruguay (1980), Peru (1981), Papua New Guinea (1981).

taking place while the treaty is in force from constituting a basis for 'asserting, supporting or denying a claim to territorial sovereignty in Antarctica' or 'creating any rights of sovereignty in Antarctica'. This concession in the interests of treaty regulation was gained only on the basis that the treaty was not to 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.[1]

Consequently territorial claims in Antarctica, valid or otherwise, remain quiescent for the time the treaty remains in force. There are three issues which arise from this. The first one is as to the legal position of sovereignty claims in the event that the treaty terminates. The second is as to the effect of the treaty upon the rest of the international community. The third is as to whether the treaty is in any respect declaratory of customary international law.

Article XII of the treaty provides that a contracting party is deemed to have withdrawn if a modification or amendment to the treaty is not ratified by it within two years of the entry into force of the amendment or modification. Withdrawal may also be made by any contracting party if modifications or amendments made by a Review Conference, which may be held at any time after 1991, have not entered into force. Article IV(2) appears intended to have legal effect after the termination of the treaty. That is, although the treaty is at an end, the parties remain bound by the obligation not to base territorial claims on activities taking place during the life of the treaty. This will override Art. 70[1] of the Vienna Convention on the Law of Treaties that the termination of a treaty 'releases the parties from any obligation further to perform the treaty'.[2]

As a consequence international law would bind the parties to the undertakings made in Art. XII in the event that the Antarctic Treaty is terminated or one or several parties withdraw. Australia may not cite her activities in Antarctica since 1961 in support of a perfected claim to sovereignty as against any other party to the treaty.

But of what significance is Art. IV to the majority of States not party to the treaty? The Permanent Court of International Justice has stated the

[1] Article IV(1.).

[2] (1967) 61 *American Journal of International Law* 263-463, in force 27 January 1980, Australia acceded 13 June 1974 without declarations or reservations.

classical doctrine that '[a] treaty only creates law as between the States which are parties to it: in case of doubt, no right can be deduced from it in favour of third States'.[3] Unless the Antarctic Treaty is declaratory of customary international law it creates no rights or duties in relation to the 135 non-treaty members in the international community. That is, Australia could argue, as against a non-treaty member, that her activities since 1961 constitute effective occupation. Since this would assert, support or create a right to sovereignty in Antarctica contrary to Art. IV it would be inconsistent with Australia's obligation to the treaty parties. It would not violate any rights of third parties. Such a claim is unlikely during the life of the treaty but it may become necessary if the treaty terminates and no other regime is established over Antarctica. What is more likely is that third States may reject the Antarctic Treaty as a valid regime over the Antarctic continent. As they are not bound by its terms they are free to argue that international law does not recognize sovereignty claims there, or more specifically, that international law considers the area to be *res communis* and not subject to individual acts of appropriation. While this last argument will be considered later it suffices to make the point that third States are not bound as such by the Antarctic Treaty regime.

Finally, the Antarctic Treaty may state customary international law in some respects and to this extent will be binding upon treaty and non-treaty parties alike regardless of its termination. Certainly some of the treaty provisions were based upon practices which existed during the I.G.Y. These include the articles requiring that Antarctica should be used for peaceful purposes only,[4] that freedom of scientific investigation should continue,[5] and that the exchange of information, personnel and scientific information should be encouraged.[6] As these principles have been consistently applied since the middle of the 1950s with considerable international success, it may reasonably be concluded that they represent a local custom in the Antarctic continent and as such are generally binding. They do not go to the question of sovereignty, however, unless they are considered to impose a restraint upon title, perfected or inchoate.

In summary, the activities of Australia within the AAT since 1961 cannot be the basis for consolidating its inchoate title as against other treaty parties. Australian sovereignty must depend upon its validity in 1961. These activities may be claimed as against the rest of the international community in the event that the United Nations or other international organizations should attempt to apply the common heritage concept to the Antarctic. In any event, the practice of States supports the view that claims to sovereignty

[3] *Certain German Interests in Polish Upper Silesia* P.C.I.J. Ser. A. No. 7, 29 (1926).
[4] Article I.
[5] Article II.
[6] Article III.

in Antarctica are subject to the obligation to ensure that certain principles of peaceful and reasonable use are maintained there.

9. DEVELOPMENT OF CUSTOMARY INTERNATIONAL LAW SINCE 1961

Before assessing the evidence of occupation in the AAT since 1961 two interrelated matters must be considered. The first concerns intertemporal law: the second, evolving customary international law. It has been noted that rights validly acquired may be lost if they are not maintained in accordance with developing international law.[7] The relevance of acts of effective occupation to territorial sovereignty since 1961 will depend upon whether international law has remained unchanged. A number of academic writers[8] and some States[9] have argued that Antarctica is not subject to exclusive rights of territorial sovereignty. It is argued that the practice of States demonstrates a new rule of international law which declares Antarctica is subject to common rights of access, use and control, and is no longer, if it ever was, subject to claims of sovereignty. As a consequence, only an organization which represents major world interests may make decisions in relation to this common space. The argument rests upon several grounds. The first is that the territorial theories applied to claims in Antarctica are now inappropriate colonial concepts. The second is that the history of exploration in Antarctica supports the notion of common rights, and the third is that the Antarctic Treaty and subsequent State practice confirm these common rights.

As to the first ground, this article has made the point that the traditional case law is of dubious authority. But to argue that it belongs to a bygone colonial era is to beg the question as to whether customary international law has changed. As to the second, it is clear that the practice of States may create binding international rights and obligations. It is equally clear that from the earliest times of exploration and discovery in Antarctica explorers have been highly mobile in their activities, covering overlapping regions, crossing routes with each other, and relying upon foreign States for logistical

[7] See Triggs, *op. cit.* 145-55.

[8] Burton S. J., 'New Stresses in the Antarctic Treaty' (1979) 65 *Virginia Law Review* 421; Bernhardt J. P. A., 'Sovereignty in Antarctica' (1975) 5 *Californian Western International Law Journal* 297; Hayton R. D., 'Polar Problems in International Law' (1958) 52 *American Journal of International Law* 746; Daniel, 'Conflict of Sovereignties in the Antarctic' (1949) 3 *Yearbook of World Affairs* 241; Alexander F. C., 'Legal Aspects: Exploitation of Antarctic Resources' (1978-79) 33 *University of Miami Law Review* 371; Greig D. W., 'Territorial Sovereignty and the Status of Antarctica' (1978) 32 *Australian Outlook* 117; Note, 'Thaw in International Law? Rights in Antarctica under the Law of Common Spaces' (1978) 87 *Yale L.J.* 804.

[9] United States, Hyde I. C., *International Law, Chiefly as Interpreted and Applied by the United States* (1945) 352; Soviet Union, see Toma *op. cit. Cf.* Kish J., *The Law of International Spaces* (1973) 72, argues that as the greatest exploration has been by the Soviet Union and the United States this demonstrates the inadequacy of the other sovereignty claims.

support. During the I.G.Y. States established bases at points all over the Antarctic coast and continent. The U.S. maintains five stations in four different sectors, and the Soviet Union has seven stations in five sectors. Poland and Japan have stations in sectors claimed by other States.[10] Scientists have moved freely from one sector to the other for the purposes of co-operative research. These facts, coupled with the failure of States generally to recognize the validity of Antarctic claims and the comparatively major scientific commitments of the Soviet Union and the United States as non-claimant States, are said to contradict the claims of exclusivity and to affirm a pattern of common rights to use and settlement.[11] While the failure to recognize the validity of claims, and the relative levels of activity must be conceded, the historical mobility of explorers and scientists does not of itself support this view. That the United States has established a base within the Australian sector impliedly supports the argument for territorial sovereignty as a prior Australian invitation and subsequent co-operation has been necessary.[12] This is true of all other bases established in sectors claimed by other States. That foreign States are allowed to undertake scientific activities within claimed sectors is arguably an exercise of the claimant State's territorial sovereignty.

As to the Antarctic Treaty, it has been shown that claimant State participation was predicated on holding the sovereignty question in abeyance. Nothing was to be interpreted as a diminution of title. It was on this basis alone that the subsequent acts of scientific co-operation between States have taken place. It should not be possible to argue that this co-operation now demonstrates a State practice which denies validity to title, albeit inchoate. Nevertheless, the purposes of the Treaty to the extent that they articulated the practice of States during the I.G.Y. may now constitute customary international law. That is, sovereignty may be restricted by the obligation to ensure that the area be used for peaceful purposes, that scientific co-operation be continued, that jurisdictional rights over personnel be based on nationality rather than territorial location, and finally that freedom of access be ensured. The Treaty recognizes that it is in the interests of all mankind that Antarctica should not become the source or object of international discord[13] and sets up a policy-making authority with equal participation by Consultative parties, whether or not they are claimants. It should be noticed, however, that no secretariat exists nor a permanent headquarters. The Consultative meetings take place alternatively in member States and the organizational work is undertaken by that State. There has been no participation by the international community and only one acceding

[10] Note ,*op. cit.* 810 n. 24.
[11] *Ibid.* 814.
[12] See Ministerial statement inviting States to work in the Australian sector, 17 December 1956; (1956) *Current Notes* 844.
[13] Preamble.

State — Poland — has achieved Consultative party status. Proceedings of the Consultative meetings are secret, which further supports the exclusivity of the 'Antarctic Club'. It is doubtful that these facts will support the argument that the practice of States under the Antarctic Treaty can be said to demonstrate that Antarctica is subject to 'common rights'.

Of greater import for the concept of common rights in Antarctica is the development of the common heritage concept during the negotiations of the Third U.N. Conference on the Law of the Sea. The Draft Convention of August 1980, Art. 136 states that the resources of the seabed and ocean floor and subsoil thereof beyond the limits of national jurisdiction 'are the common heritage of mankind'. Attempting to define the phrase, the Maltese Ambassador has identified three characteristics:

> First of all there is the absence of property. The common heritage engenders the right to use certain property, but not to own it. It implies the management of property and the obligation of the international community to transmit the common heritage, including resources and values, in historical terms. Common heritage implies management. Management not in the narrow sense of management of resources, but management of all uses. Third, common heritage implies sharing of benefits.[14]

Within the defined Area no State may claim or exercise sovereignty and all such rights are invested in mankind on whose behalf the Authority shall act. The prospects for signature and ultimate ratification of this Draft are highly uncertain. If however, a new law of the sea treaty comes into force it is likely that the developing states will attempt to apply the common heritage concept to Antarctica. Indeed the non-aligned States meeting in Sri Lanka in 1974 failed by only one vote to do so.[15] However, the political difficulties in extending the concept to Antarctic resources were recognized early in the UNCLOS negotiations. In the interests of achieving agreement on the questions relating to the law of the sea no attempt was made to bring Antarctica within the ambit of the draft.

Despite the possible acceptance of the common heritage concept in the law of the sea negotiations it is far too early to state that it represents customary international law. The International Court of Justice in the *North Sea Continental Shelf Cases* states:

> Although the passage of only a short period of time is not necessarily, or of itself, a bar to the formation of a new rule of customary international law on the basis of what was originally a purely conventional rule, an indispensable requirement would be that within the period in question, short though it might be, State practice, including that of States whose interests are specially affected, should have been both extensive and virtually uniform in the sense of the provision invoked — and should moreover have occured in such a way as to show a general recognition that a rule of law or legal obligation is involved.[16]

[14] See Borgese (ed.), *Pacem in Maribus* (1972), Introduction to Part 3, 161.

[15] In 1947 the Trusteeship Council received a petition calling for international control of polar regions but no action was taken. 15 U.N. T.C.O.R. 4, U.N. Docs T/PET CENTERAL (1947) Proposals for international regimes have been made by the United States (1948), India (1956), United Kingdom (1958), Soviet Union (1958), See Hayton, *op. cit.* 755; Jessup P. and Taubenfeld H., *Controls for Outer Space and the Antarctic Analogy* (1961) 171-5.

[16] (1969) I.C.J. Reps 3, 43.

Those parts of the Draft treaty dealing with mining the resources of the seabed have been the most controversial and are likely to be the main stumbling block to final ratification of the treaty. The common heritage concept is integral to this regime. It is clear then that the two elements for the creation of a customary rule based on the common heritage, State practice and recognition of a legal obligation, do not yet exist.[17]

It is evident, however, that the late twentieth century has seen a substantially altered international community. Newly independent and typically poor and underdeveloped States are repudiating the traditional doctrines of international law and are influencing the creation of new law. This includes the right of self-determination,[18] the obligations of the New International Economic Order for equitable sharing of wealth and resources,[19] and international decision-making. There is an increased concern for environmental protection and for the rational management of the earth's resources. This political climate renders it possible, and even likely, that the resources of the seabed will become subject to the common heritage concept sometime in the future. But it is a mere hope or expectation that the concept will be analogically applied to Antarctica. The most obvious reason is that, in contrast to Antarctica, international law provides that the high seas are free to all nations. That is, they are not, and have not been since the late eighteenth century, open to occupation by States. It is not such a radical step to declare that the resources of the seabed beneath the high seas are to be managed and exploited by an international authority in the interests of the international community as a whole. By contrast the Antarctic continent has been treated notionally as a land mass,[20] and has consequently been subject to the traditional international law rules of acquisition of *terra nullius*. The fact that the area may not have been effectively occupied, at least until recently, does not justify the conclusion that it is *res communis*. The inchoate titles which have existed over parts of Antarctica since the 1930s must negate this possibility.

Even if it were accepted that the common heritage concept, as an emerging doctrine of international law, were to be applied to Antarctic resources by the United Nations or some other international organization, this does not resolve the present issue of the validity of the Antarctic claims. What is the position of States who are in the process of perfecting titles to territory by occupation where a new rule is evolving but has yet to crystallize

[17] For the creation of custom in international law see D'Amato A., *The Concept of Custom in International Law* (1971); Oppenheim L., *International Law* (7th ed. 1948) 25-6.

[18] See, Declaration on the Granting of Independence to Colonial Territories and Peoples G.A. Res. 1514, December 14 1960; 1970 Declaration on Principles of International Law, G.A. Res. 2625, October 24; *The Western Sahara Case* Advisory Opinion (1975) I.C.J. Reps, 12.

[19] See 1974 Charter of Economic Rights and Duties of States, G.A. Res. 3281, reprinted in (1975) 14 *International Legal Materials* 251.

[20] See discussion of this problem by Alexander *op. cit.* 832 ff.

into binding custom? Can claimant States persist in occupying Antarctica when it is, for the sake of argument, manifestly obvious that the vast majority of States reject the possibility of sovereignty in Antarctica and intend that the common heritage concept and ultimately internationalization should apply there? These difficulties were perceived by the International Court of Justice in the *Fisheries Jurisdiction Case* in 1974 where it said:

> There is at the moment great uncertainty as to the existing customary law on account of the conflicting and discordant practice of states . . . where practice is contradictory and lacks precision, is it possible and reasonable to discard entirely as irrelevant the evidence of what states are prepared to claim and to acquiesce in, as gathered from the positions taken by them in view of or in preparation for a conference for the codification and progressive development of the law on a subject.[21]

If the development of the common heritage concept and its possible application to Antarctica is to be taken into account, the result presents a confusing hiatus. *Ex hypothesi* while there is no clear rule of international law the claimant State will be prevented from acquiring title. For the time being Antarctica would remain *terra nullius* and no State would be entitled to exercise sovereignty there. This in itself raises little difficulty, at least as long as the Antarctic Treaty regime continues to safeguard the environment and regulate activities there. However, the governments of claimant States will be far from satisfied with a legal opinion which asserts that they cannot perfect or retain title despite the absence of any customary rule which prevents them from doing so. Intertemporal law will deny title if it is not maintained in accordance with customary international law. While it is correct to argue that Australia's inchoate or perfected title is subject to custom, it has yet to be established that the international law of territorial acquisition has changed. The necessary conclusion is that until a new rule is shown to exist, Australia is entitled to claim the benefits of the traditional rule: that is, that she has an inchoate title, or better still, a perfected title.

This conclusion does not resolve the possible ambiguities. If Australia can presently show that the requirements of effective occupation have been satisfied in the AAT, and assuming subsequent maintenance of that title, then international law will protect its sovereignty. This is unless a changed customary rule states that even consolidated titles in Antarctica must give way to the common heritage, or any other concept. The greatest difficulty with this conclusion is that if Australia has an inchoate title only, it is very likely to consolidate its title in the future with expanding technology and resource incentives. Recognition of an inchoate title in the present political climate would commit the international community to a resolution which may conflict with the political aspirations of the majority of that community.[22]

Regardless of the relative merits of the territorialist and universalist positions, a danger exists that they will assume an irreconcilable symbolic

[21] (1974) I.C.J. Reps 3, 48, *per* Forster, Bengzon, Arechaga, Singh and Ruda JJ.

[22] For a discussion of this consequence see Oxman B. H., The Antarctic Regime: An Introduction, 33 *University of Miami Law Review* 285, 289.

role in the debate between the developed and developing States. A more moderate position is suggested by Greig,[23] when he argues that the concept of inchoate title might continue to play its traditional role as a prelude to full sovereignty, but that it should no longer facilitate the creation of exclusive sovereign rights. He proposes that it is: 'possible to accept the claimants as having some lesser territorial rights than full sovereignty',[24] so that the more limited right is subject to the reasonable demands of other States. The concept of 'reasonableness' in international law has been applied by the International Court in the *Fisheries Jurisdiction Case*[25] and by an Arbitral Tribunal in the *United Kingdom/French Continental Shelf Boundaries Arbitration*.[26] It is also the basis for negotiations in the U.N. Third Law of the Sea Conference in relation to continental shelf rights and the development of the resources of the deep seabed. While it has been argued that the common heritage concept has not yet 'jelled' into a rule of customary law, a much stronger case can be made for the concept of reasonableness. It can be objected that the authorities cited by Greig all relate to maritime zones rather than a continental land mass. However, it stretches the notion of continent to describe the Antarctic as territory, as parts of the 'land' are 4000 metres beneath the ice-pack.[27] As Antarctic claims may yet remain inchoate, and as international law appears to require that jurisdiction over 'new' spaces is subject to a principle of reasonableness, it might be argued that Antarctic claims, under the doctrine of intertemporal law, are also subject to an overriding reasonableness. While this concept has had little application outside problems relating to the continental shelf, fishing and deep-sea mining rights, it is precisely in relation to these resources that the international community has its greatest interest in Antarctica.

Against this background of changing customary international law it is now appropriate to examine the facts relating to Australia's Antarctic claim since 1961.

10. THE AUSTRALIAN ANTARCTIC TERRITORY FROM 1961 TO THE PRESENT

When the Antarctic Treaty was signed in 1959 Phillip Law predicted that:

[23] *Op. cit.* 128.
[24] *Ibid.*
[25] (1974) I.C.J. Reps 3, 23. Here the court established '. . . the concept of preferential rights of fishing in adjacent waters in favour of the coastal States in a situation of special dependence on its coastal fisheries'.
[26] (1977) 18 *International Legal Materials* 397. The Tribunal applied a reasonableness approach by describing the continental delimination effect of the British Islands close to the French coast as 'a circumstance creative of inequality and calling for a method of delimitation that in some measure redresses the inequality'.
[27] See Lovering J. F. and Prescott J. R. V., *Last of Lands . . . Antarctica* (1979) 12-13.

> An interesting transition period has been reached in Antarctica. The era of territorial competition of the first 50 years of this century has given way to an era of technological competition, in which nations use the arena afforded by Antarctica to demonstrate their technical and scientific skills.[28]

The following 20 years have shown that while nations have indeed used Antarctica as a scientific laboratory, this has been prompted in part by the need to maintain sovereignty claims. This is particularly true of Australia's commitment to its Antarctic Territory over the last decade and is illustrated in the view of the Antarctic Research Policy and Advisory Committee (ARPAC) Report to the Government in November 1979.

> Since Australia's presence in Antarctica is mainly demonstrated by the scientific work it does there and because most international involvement in the area focuses on scientific research, the excellence achieved in scientific programs is important. The maintenance of Australia's sovereignty over the AAT and its standing in the Antarctic Treaty will be influenced by the extent of scientific and exploration activity in which it engages and by the scope and quality of its contribution to scientific knowledge concerning Antarctica.[29]

In essence then, the scientific research programmes demonstrate Australia's tangible commitment to Antarctica and are 'only international manifestation[s] of Australia's activity in the area'.[30] While complete details of scientific research and exploration, personnel, and budget allocations are not readily available the following information when compared with that of other States gives some idea of the extent of Australia's Antarctic activities over the last 20 years.

Since 1961 the Australian National Antarctic Research Expeditions have continued annually to the four permanent stations, Mawson, Davis, Macquarie and Wilkes: the last being replaced in 1969 by nearby Casey station. The programme is presently coordinated by the Antarctic Division of the Department of Science and the Environment, which provides the logistic support and conducts the scientific research.[31] Other Government organisations have undertaken research work in Antarctica as is required by their functional responsibilities, and to a limited degree the universities have also been involved in research there. The number of staff wintering in the AAT has remained fairly stable. During 1972-73 61 wintered over, and in 1977-78 66 did so. Transport facilities have continued to be provided by the two specialised ships under charter for 120 days per year at a cost of approximately $1.5 million in 1976-77. In the 1977-78 Budget funds were appropriated for a design and feasibility study for an Australian Antarctic ship.[32] In the meantime no attempt has been made to construct an airfield on any one of the Australian bases.

[28] (1959) 21 *Australian Journal of Science* ix.
[29] ARPAC Initial Report to the Government, 1980, Australian Government Publications, 5 (hereinafter cited as *ARPAC Report*).
[30] *Ibid.* 21.
[31] Webster, *op. cit.* 16.
[32] *Ibid.* 20.

Expenditure of the Antarctic Division in 1976-77 was $6.5 million.[33] This, coupled with the contributions of other organisations to ANARE of personnel, equipment and data analysis brought the total Antarctic expenditure to $7.1 million.[34] The research component of this is relatively small. As ARPAC reported,[35] 14% of total expenditure in 1978-79 is attributable to research, 76% to logistics, and 10% for administration. As was pointed out by the Sub-committee on Territorial Boundaries in its Interim Report, annual expenditure in Antarctica 'has been miniscule, much less than the cost of one F-111 fighter bomber'.[36] Nonetheless, the rate of increase in spending over the last few years has been high. From 1966 to 1971 the annual expenditure was approximately $2.5 million.[37] This was increased to $8.7 million in 1977-78, to $12.2 million in 1978-79, to $20.9 million in 1979-80, and to an estimated expenditure of $24.5 million in 1980-81.[38]

Australian scientific programmes have had two broad purposes: to understand the Antarctic environment and the relationship between it and the globe, and to study phenomena peculiar to the geographic location. The programmes cover many disciplines including glaciology, upper atmosphere physics, biology, medical research, cosmic ray physics, and geology and geophysics.[39] Regular meteorological, seismological and magetic observations are made, and mapping and survey expeditions are carried out.

On the advice of ANCAR[40] ACAP[41] and other expert sources, ARPAC concluded in 1979 that the programmes in territorial biology, glaciology and cosmic ray and upper atmosphere physics 'contributed significantly to Australia's high standing in the Antarctic scientific community'.[42] However, it was noted that Australia contributed no significant meteorological research on Antarctic climate and weather systems, its marine biology and oceanography programmes were limited by a lack of funds, personnel and a suitable research ship, that results in medical research have been of limited success, and that mapping and geoscientific surveys have been 'reduced to a point falling short of the Government's policy of maintaining sovereignty over the AAT'.[43]

While the Antarctic marine scientific activities of other States, particularly the Soviet Union, United States, France and Japan, and non-Treaty States

[33] *Ibid.*
[34] *Ibid.*
[35] *ARPAC Report* 9-10.
[36] *Australia, Antarctica and the Law of the Sea* 73 Interim Report of the Sub-committee on Territorial Boundaries, of the Joint Committee on Foreign Affairs and Defence (hereinafter cited as *Boundaries Report*).
[37] Webster, *op. cit.* 16.
[38] Commonwealth *Parliamentary Debates* House of Representatives, 16th August 1977, 173; 21st August 1979, 234; 19th August, 1980, 260.
[39] *ARPAC Report* 7-8.
[40] Australian National Committee for Antarctic Research.
[41] Advisory Committee on Antarctic Programs.
[42] *ARPAC Report* 7.
[43] *Ibid.* 8.

such as Taiwan, have been extensive over the last two decades, Australia does not conduct any significant scientific work in the waters around Antarctica.[44] In 1977 however, the Government endorsed the principle that Australia should extend the Antarctic Division activities to off-shore areas, and two officers have been employed in 1978-79 to encourage and develop marine scientific research programs by the Government and non-Government organisations.[45]

Australia's legislative and administrative role in Antarctica has been prompted primarily by its function as a treaty party member. As a Consultative party Australia has participated in making over 118 recommendations at 10 Consultative meetings dealing with communications, safety, protection and preservation of the environment, and resource management. Australia has approved all but approximately 30 of these recommendations[46] and has ratified the Agreed Measures for the Conservation of Antarctic Flora and Fauna, adopted at the Third Consultative Meeting in Brussels, 1964.[47] Australia is also a party to the Convention for the Conservation of Antarctic Seals which came into force 11 March, 1978,[48] and is a signatory to the Antarctic Marine Living Resources Treaty,[49] a convention, the drafting of which owes much to Australian efforts. Little legislation has been enacted which relates specifically to Antarctica. Several Acts will, however, apply in Antarctica including the Environment Protection (Impact of Proposals) Act 1974 and the National Parks and Wildlife Conservation Act 1975. The Department of Environment, Housing and Community Development considered that the present domestic legislation was an adequate framework for the protection of the Antarctic environment as required under the Antarctic Treaty and the recommendations of the Consultative parties.[50] In 1980, however, the Antarctic Treaty (Environment Protection) Act came into force. This legislation implements the Agreed Measures for the Conservation of Antarctic Fauna & Flora in accordance with Article IX of the Antarctic Treaty. It gives the Governor General the power to declare specially protected areas and sites of special scientific interest. Activities within those areas are now subject to authorization, and a system of inspection, arrest and seizure has been established. Article 19(1) lists the offences relating to the Antarctic environment generally and imposes fines and imprisonment for breaches. A register of permits is to be maintained listing all permits in force. No declarations have yet been made under this legislation though its purpose is presumably to give effect to those areas already designated by the Antarctic Treaty parties at Consultative Meetings.

[44] *Ibid.* 31.
[45] Webster, *op. cit.* 21.
[46] (1980) 20 *Polar Record* 87 Annex I.
[47] (1964-65) 12 *Polar Record* 457.
[48] U.K.T.S. No. 45 (1978).
[49] (1980) 19 *International Legal Materials* 841.
[50] *Boundaries Report* 58.

Also in 1980, the Whale Protection Act was passed for the preservation, conservation and protection of whales. Its commencement has yet to be proclaimed.

This variable record should be compared with those of the other States active in Antarctica. Quantitative comparisons are difficult to make and information limited. Nonetheless, data on the number of stations occupied, logistic support and the level of scientific personnel, programs and publications gives some gauge of activities.[51] The most dramatic comparison lies with the Soviet Union and the United States. The Soviet Union's activities are continent wide. Six permanent Soviet stations are maintained, four within the AAT, and one 1400 km inland. The wintering complement in January 1976 was 329, 94 being scientists. Annual relief operations are supported by six vessels, five of which are owned by the Soviet Union, including two marine science research vessels. Extensive research programs include topographical and geological mapping and geophysical surveys.

The United States maintains four permanent stations with a summer personnel of 1,000 and 96 wintering over. These stations are supported and supplied by five ships owned by the United States, and flights from Christchurch, New Zealand. The budget for the program in 1976 was U.S.$47 million. The United States research programme is concentrated in the Western Antarctic and includes work in geophysics, glaciology and marine science.

The programmes of Argentina, Chile and the United Kingdom are most closely comparable with those of Australia. The United Kingdom maintains five permanent stations on the Antarctic mainland and four in the Antarctic Peninsula with wintering parties of approximately 80. The budget commitment was reported in 1977 to be £3.5 million and operations are supported by three United Kingdom owned ships, two planes and two helicopters. The scientific programmes are similar to Australia's though more scientific personnel are involved. Chile has three permanent stations and a wintering personnel of 65. Of three relief ships one is a marine research vessel. Argentina has six permanent stations and a wintering staff in 1976 of 190. The scientific work of both Chile and Argentina is comparable in size with Australia's but is not as comprehensive.

Poland maintains one permanent station and its scientific work emphasizes marine biology.[52] South Africa also has one permanent station with a wintering party in 1976 of 18 scientists. Research concentrates on atmospheric sciences, though marine and oceanographic surveys are carried out during relief voyages. Japan has one permanent station, 30 permanent personnel wintering over and funds of U.S.$2.9 million in 1975-76. New Zealand maintains one permanent station and conducts research in cooper-

[51] See generally Webster, Summary of Level of Nations Activities in Antarctica 1976/7, Appendix D.

[52] Birkenmajor K., 'Polish Antarctic Activities 1978-79' (1980) 20 *Polar Record* 156.

ation with the United States with a wintering personnel of 10. France maintains one station on the coast of its sector with a wintering party of approximately 35. The scientific programme is comprehensive and includes the same disciplines covered by Australia. Norway does not maintain an Antarctic station, but the Norwegian Polar Institute conducts occasional expeditions. The Federal Republic of Germany has been more recently active in Antarctic marine research but does not have a permanent station.

11. ASSESSMENT OF AUSTRALIA'S ACTIVITIES IN ANTARCTICA SINCE 1961 IN LIGHT OF EVOLVING CUSTOMARY INTERNATIONAL LAW

Australia's activities in the AAT since 1961 demonstrate a continuous and serious intention to expand scientific research and exploration there. The rapid increase in the budget allocation since 1978 and the plans for an Australian research and cargo ship suggest a determination to consolidate her title. One might question, however, the relevance of these activities where they are patently contrived to improve the legal position against a competing claimant. It may be difficult to prove that this is a basic motivating factor in Australian government policy as distinct simply from the developing technological innovations which make research feasible. Also, the cases in which this problem has arisen have been ones where a dispute between two States was in issue. As has been pointed out, in Australia's case, there is no disputing claimant, only the competing interests of the international community. This may not, however, be a salient distinguishing point to a tribunal as the increase in Australia's activities would have the same effect of excluding any competing claim.

Leaving this problem aside, is it reasonable to conclude that Australia's activities have consolidated her incomplete title? The ARPAC report is significant evidence of the fact that budget allocations to Antarctic research have been minimal, resulting in barely adequate levels of scientific research in some important areas. Marine research in Antarctica has been non-existent or negligible when compared with other States. The United States and Soviet Union commitments to Antarctic research far outweigh Australia's. This is to be expected given their superior resources. A fairer comparison lies with Argentina, Chile and the United Kingdom where Australia's activities are of similar size and quality. They are rather greater than those of Poland, South Africa, Japan, New Zealand, France, Norway and the Federal Republic of Germany. Legislative and administrative control has been minimal though the domestic implementation of the Agreed Measures for the Protection of Flora and Fauna suggests a closer regulation of the environment in the future.

In summary, Australian occupation and settlement of Antarctica has been limited to annual scientific research and exploration. Recent activities

including the hosting of the negotiations for the Antarctic Marine Living Resources Treaty, increased expenditure and environmental protection legislation suggest a firm commitment to Antarctic sovereignty and management. It is probable that Australia can validly claim title to the four permanent bases, three of which are on the Antarctic continent. It is unlikely, applying the minimal control theory, that sovereignty exists in relation to the outlying areas of the present sector. The particularly difficult question to answer is whether the international community will admit the possibility of an inchoate title. The present and probable future political opinion would deny legal validity to inchoate titles in Antarctica. But political murmurings, supported in some instances by academic writers,[53] do not create or deny customary international law. Until clear evidence can be presented that custom has changed, it must be concluded that the concept of an inchoate title will preserve the priority of the first claimant to the extent that it has actually made settlement.[54] Hence Australia can claim an inchoate title in relation to those parts of her sector which have been explored or where research activities have taken place, and may continue to consolidate this title in the future. Such a title remains subject to the possibility, and even probability, that a changed rule of international law will deny validity to consolidated or inchoate titles.

12. CONCLUSION

Australia has satisfied the traditional international law requirements of territorial sovereignty in relation to her permanent Antarctic bases. It has not done so in the vast remaining areas of the Australian sector. Customary law will nonetheless protect Australia's priority of interest or inchoate title to these areas. Whether it will continue to do so in the future, or indeed whether international law will protect even a fully consolidated title in Antarctica, remains in doubt. It is too early to declare that customary international law has changed positively to give effect to the New International Economic Order or the common heritage concept. They are not yet manifested in consistent State practice and have not given rise to anything approaching *opinio juris*. The Antarctic Treaty articulates customary international law in some respects. Such sovereign interests as Australia has in Antarctica are subject to these treaty obligations.

It is in this uncertain and ambiguous legal position that Australia has maintained the policy of consolidating title in Antarctica. As the pressure increases to regulate and exploit non-living resources in Antarctica, particularly off-shore resources, Australia may isolate itself from all but a handful of States in asserting the validity of traditional notions of inter-

[53] See *e.g.* Bernhardt, *op. cit.* 332; Greig, *op. cit.* 117.
[54] See O'Connell, *op. cit.* 417.

national law. It may become legally futile and politically dangerous to maintain this position in the face of profound changes in customary law.

At this point legal analysis drifts to supposition. Ought Australia to accept some status 'less than full sovereignty'[55] in the interests of rational Antarctic resources management by the Treaty parties? If Australia refuses to do so does she threaten this regional system and in turn foster 'global participation and sharing'?[56] Does Australia as a resource rich State weaken her credibility with the third world by clinging tenaciously to the prospect of further Antarctic wealth? These are questions for government policy. The argument of this article has been that the answers depend in part upon a clear view of the validity of Australia's sovereignty at international law.

[55] As suggested by Greig, *op. cit.* 128.
[56] Burton S. J., *op. cit.* 424.