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Grasping for the Ends of the Earth: Framing and Contesting Polar Sovereignty, 1900-1955

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Graduate Program in History

A thesis submitted in partial fulfillment of the requirements for the degree in Doctor of Philosophy

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GRASPING FOR THE ENDS OF THE EARTH:
FRAMING AND CONTESTING POLAR SOVEREIGNTY, 1900-1955

(Thesis format: Monograph)

by

Peter Kikkert

Graduate Program in History

A thesis submitted in partial fulfillment
of the requirements for the degree of
Doctor of Philosophy

The School of Graduate and Postdoctoral Studies
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Abstract

During the first half of the twentieth century, state officials, international lawyers and polar experts struggled to apply an underdeveloped and unclear international legal discourse on territorial acquisition and the establishment of state sovereignty to the harsh environment and unique conditions of the Arctic and Antarctic. Drawing upon fresh archival research undertaken in several countries, as well as a thorough interrogation and synthesis of existing historical and legal scholarship, this dissertation explores the knowledge production that occurred on terrestrial polar claims, thus reconstructing the transnational web of ideas, adaptations, strategies and best practices developed to address the confusion and uncertainty that infused the anomalous legal space of the polar regions. By applying a global and bi-polar framework, this study offers a novel conceptual history of polar sovereignty and its constituent parts, including the sector principle, the doctrines of contiguity, constructive occupation and effective occupation, and other arguments used to justify territorial claims. Identifying the specific countries and individual lawyers, advisers and experts that shaped the legal and political context of the Arctic and Antarctic, this dissertation scrutinizes the complex interplay between the law, power, polar diplomacy and state practice.

An exploration of state sovereignty strategies, legal policies, and the historical sociology of international law underlines the central contention of this dissertation: national experiences with polar sovereignty have to be situated in a broader global and bi-polar context. It is only through such a bi-polar framework, which reconstructs the nexus of connections, intersections and networks that enmeshed the polar regions, that this international legal history can be understood without losing the larger currents of practice and thought in the detail of national histories.

By reconstructing the bi-polar legal landscape, this study demonstrates that sustained legal uncertainty represents the most important and prevalent force shaping the international legal history of the polar regions. Within this legal uncertainty, international law and legal argumentation had a significant impact on state behaviour. The official

appraisals of state legal advisers and the opinions of private international lawyers often guided state decision-making, decided internal debates, and created polar policy.

Keywords

Twentieth century, Arctic, Antarctic, polar sovereignty, international legal history, sector principle, contiguity, effective occupation, constructive occupation, Hughes Doctrine, bi-polar, contextual turn, Australia, Britain, Canada, Norway, United States.

Co-Authorship Statement

I hereby acknowledge that elements of Chapter 8, sections 8.2 and 8.3, have appeared in:

Lackenbauer, P. Whitney, and Peter Kikkert. “The Dog in the Manger – and Letting Sleeping Dogs Lie: The United States, Canada and the Sector Principle, 1924-1955.” In *The Arctic Ocean: Essays in Honour of Donat Pharand*, edited by Suzanne Lalonde and Ted McDorman, 216-239. Leiden: Brill, 2014.

I also certify that I am the primary author of the material taken from this chapter.

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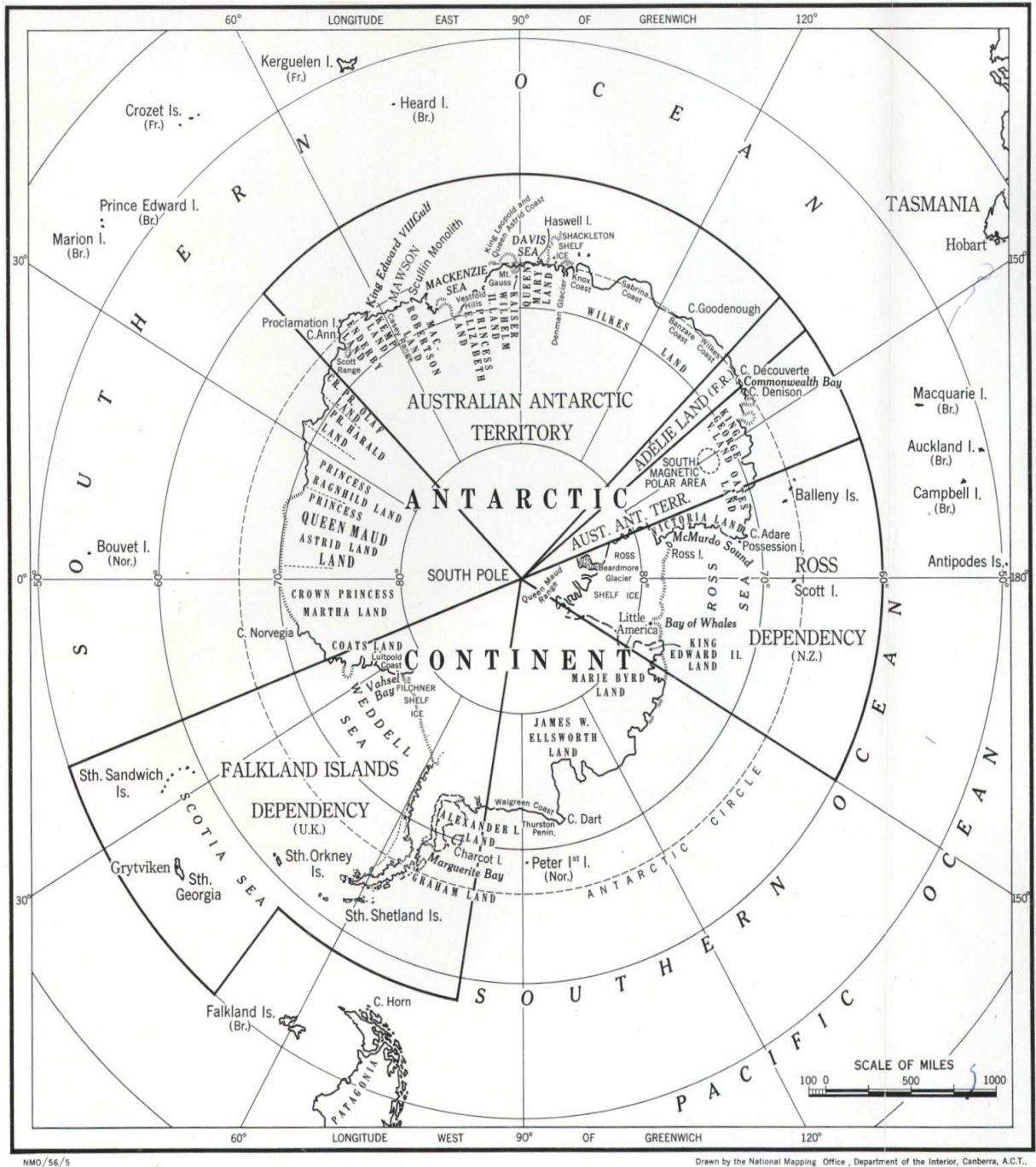
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NMO/56/5

Drawn by the National Mapping Office, Department of the Interior, Canberra, A.C.T.

Figure 1: Map of the Antarctic showing territorial claims circa 1956. National Archives of Australia, A1838, 1495-3-2-1 pt.1.



Figure 2: General map of the Arctic. File:Arctic.svg, from the CIA World Fact Book, licensed under Creative Commons: commons.wikimedia.org/wiki/File:Arctic_circle.svg

Introduction

The Anomalous Legal Space of the Polar Regions

The differences between the polar regions and other parts of the earth create problems which appear to require special development of international law.

- Samuel Whittemore Boggs, Geographer of the State Department, 21 September 1933.¹

It now seems probable that the Antarctic area rather than the Arctic will provide the field for working out general rules of international law...There is a long way to go, however, before a generally recognized definition of what constitutes effective occupancy can be developed.

- Hume Wrong, Canada's Ambassador to the United States, 30 December 1946.²

The question is whether any formula could be found for having one rule in the Arctic and another in the Antarctic; or must any rule apply equally to both areas.

- Brian Roberts, Foreign Office Research Department, 14 November 1952.³

When state officials, international lawyers and other experts investigated polar sovereignty in the first half of the twentieth century, they visualized the uninhabited territory of the Arctic and Antarctic as an interconnected legal space that presented significant barriers to the application of international law. In trying to justify state claims in the polar regions, these actors crowded the international legal landscape with a wide array of arguments, adaptations, novel ideas and competing principles. The prevailing legal discourse on territorial acquisition and the establishment of state sovereignty, which remained underdeveloped and unclear throughout this era, both hampered and aided these efforts.

¹ S.W. Boggs, Department of State, Office of the Historical Adviser, The Polar Regions: Geographical and Historical Data in a Study of Claims to Sovereignty in the Arctic and Antarctic Regions, pg. 113-114, 21 September 1933, United States National Archives and Records Administration (NARA), RG 59, CDF 1930-39, Box 4522, File 800.014, Arctic/31.

² Hume Wrong to Lester B. Pearson, 30 December 1946, Library and Archives Canada (LAC), RG 25, Vol. 2145, File A-2/2-10, pt.1.

³ Note by Brian Roberts, 14 November 1952, National Archives (NA), FO 371/100885.

In his landmark study on territorial acquisition, legal scholar Robert Jennings noted that “the mission and purpose of traditional international law has been the delimitation of the exercise of sovereign power on a territorial basis.”⁴ Since Columbus set sail in 1492, popes, jurists and empires have constructed legal arguments to justify Europe’s territorial aggrandizement and seizure of land often occupied by Indigenous Peoples, most notably using the doctrines of discovery, cession, occupation and conquest. While there was “remarkable stability in these doctrines,” legal historian Andrew Fitzmaurice observes, “they were subjected to ceaseless reinterpretation.”⁵ States and jurists adjusted the law of nations to suit a wide range of legal and political circumstances, and no clear, absolute formula for territorial acquisition emerged. The rules proved incredibly flexible and expendable in shifting historical and geopolitical contexts.

In their quest for overseas territory, European empires developed complex and varied interpretations of sovereignty to deal with different geographical and geopolitical realities.⁶ “Empires did not cover space evenly but composed a fabric that was full of holes, stitched together out of pieces, a tangle of strings,” legal historian Lauren Benton explains. She articulates the concept of “anomalous legal space” to classify places for

⁴ Robert Jennings, *The Acquisition of Territory in International Law* (Manchester: Manchester University Press, 1963), 2. Steven Ratner has insisted that the resolution of conflicting territorial claims has “long stood at the heart of the project of inter-national law...has been a defining struggle for our field, demonstrating to some its promise and to others its futility.” Steven Ratner, “Land Feuds and Their Solutions: Finding International Law Beyond the Tribunal Chamber,” *The American Journal of International Law* 100, no. 4 (2006): 808.

⁵ Andrew Fitzmaurice, “Discovery, Conquest, and Occupation of Territory,” in *The Oxford Handbook of the History of International Law*, eds. Bardo Fassbender and Anne Peters (Oxford: Oxford University Press, 2012), 840; Andrew Fitzmaurice, *Sovereignty, Property and Empire, 1500-2000* (Cambridge: Cambridge University Press, 2014); Ken MacMillan, *Sovereignty and Possession in the English New World: The Legal Foundations of Empire, 1576-1640* (Cambridge: Cambridge University Press, 2006); Anthony Pagden, “The Struggle for Legitimacy and the Image of Empire in the Atlantic, to c. 1700,” in *The Origins of Empire*, ed. Nicholas Canny (Oxford: Oxford University Press, 1998), 34-54.

⁶ For the best description of these legal and political developments, see Lauren Benton, *A Search for Sovereignty: Law and Geography in European Empires, 1460-1900* (Cambridge: Cambridge University Press, 2010). See also Lauren Benton, *Law and Colonial Cultures: Legal Regimes in World History, 1400-1900* (Cambridge: Cambridge University Press, 2002); Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge: Cambridge University Press, 2005); Lauren Benton and Benjamin Straumann, “Acquiring Empire by Law: From Roman Doctrine to Early Modern European Practice,” *Law and History Review* 28, no. 1 (2010): 1-38; Georg Schwarzenberger, “Title to Territory: Response to a Challenge,” *The American Journal of International Law* 51, no. 2 (1957): 308-324.

which European officials struggled to determine the nature of sovereignty.⁷ These difficult-to-define areas inspired “spatial variations” of imperial control that forced states to conceive of new ways of conceptualizing sovereignty and its relationship with global law.⁸ Far from being black and white, the tangled web of juridical writings and state practice made the legal regime on territorial acquisition murky and grey.

The growth of Europe’s formal empires at the end of the nineteenth century, particularly in Africa, utilized multiple legal justifications in support of imperial sovereignty, especially arguments based on effective occupation, prescription and contiguity. Legal jurists insisted that states had to establish an effective occupation over territory to which they wished to acquire a definitive title. As legal scholar Humphrey Waldock explained in 1948, “the word 'occupation' itself is... a legal term of art; it is the Latin *occupatio* meaning appropriation, not occupation in its sense of 'settling on' ... it means, in international law, the appropriation of sovereignty.”⁹ For many state officials and jurists, proper effective occupation demanded actual physical settlement and use of the territory by the claimant state, while others emphasized the establishment of state control and administrative functions. State practice also endorsed prescription or adverse possession, the idea that sovereign rights held over a long period of time could perfect a territorial title, no matter how defective.¹⁰ Contiguity held that the effective occupation of part of a region entitled a state to all the territory (or hinterland) close enough to be considered a single geographic unit.¹¹ Even as these legal constructions appeared to become more consistent and cohesive in scholarly accounts, lawyers and states

⁷ Benton explains that, “it might be said that the whole of the imperial world represented a zone of legal anomaly vis-à-vis the metropole.” Benton, *A Search for Sovereignty*, 28-29.

⁸ Benton, *A Search for Sovereignty*, 2, 5, 9.

⁹ C.H.M. Waldock, “Disputed Sovereignty in the Falkland Islands Dependencies,” *British Yearbook of International Law* 25 (1948): 317 fn. 2.

¹⁰ Legal scholar Vaughn Lowe explains that, “Prescription is international law’s way of deciding when it is appropriate to draw a line under the untidiness of history.” Vaughn Lowe, *International Law* (Oxford: Oxford University Press, 2007), 145. See D.H.N. Thomas, “Acquisitive Prescription in International Law,” *British Yearbook of International Law* 25 (1950): 332-354; Hersch Lauterpacht, “Sovereignty Over Submarine Areas,” *British Yearbook of International Law* 27 (1950): 427.

¹¹ Hans Kelsen, “Contiguity as a Title to Territorial Sovereignty,” in *Rechtsfragen der internationalen Organisation: Festschrift für Hans Wehberg*, eds. Walter Schätzel and Hans-Jürgen Schlochauer (Frankfurt am Main: Klostermann, 1956), 200-210. Also called proximity, propinquity, hinterland, adjacency, continuity, geographic unity, region of attraction. Donat Pharand, *Canada’s Arctic Waters in International Law* (Cambridge: Cambridge University Press, 1988), 28.

consistently found room for interpretation and exception.¹² The arbitration and judicial settlement of territorial disputes brought little clarity as jurists sought to establish which state had a stronger title, rather than “formulate generally applicable rules.”¹³ In particular, state practice and legal treatises offered few guidelines for how states could apply these principles to establish sovereignty over uninhabited areas and harsh environments, remote from centres of power and where, as legal scholar Donald Rothwell observes, “there was no immediate intent to colonise as distinct from acquire.”¹⁴

Historians who examine state claims in the polar regions have largely overlooked or bypassed this convoluted legal environment. This dissertation argues that this complex legal setting formed the key context in which state officials and international lawyers started to draw the Arctic and Antarctic into the realm of international law. However vague and uncertain the rules and practices of territorial acquisition remained at the end of the nineteenth century, they still served as essential building blocks for the polar legal landscape. Working from a weak legal foundation, officials and lawyers faced a bevy of complicated questions. What rights did a state acquire when one of its citizens discovered new land and performed purely symbolic acts, such as planting a flag or installing a cairn? Was it necessary to provide interested states with formal notification of a territorial claim? How could states extend their jurisdiction over inhospitable and often uninhabitable lands? What level of occupation, control or settlement would be required to secure title to land in the polar regions? Did the unique polar conditions allow for a relaxation of the rules used in more temperate zones or demand a completely new legal regime? These questions proved exceedingly difficult for officials and lawyers to answer.

Despite international legal decisions in the *Palmas Island*, *Clipperton Island* and *Eastern Greenland* cases that clarified the requirements of territorial acquisition in the

¹² Milos Vec, “From the Congress of Vienna to the Paris Peace Treaties of 1919,” in *The Oxford Handbook of the History of International Law*, eds. Bardo Fassbender and Anne Peters (Oxford: Oxford University Press, 2012), 672. See also Daniel-Erasmus Khan, “Territory and Boundaries,” in *The Oxford Handbook of the History of International Law*, eds. Bardo Fassbender and Anne Peters (Oxford: Oxford University Press, 2012), 225-49.

¹³ Schwarzenberger, “Title to Territory,” 309. As legal expert Steven Ratner has stressed, territorial settlements have usually been more a reflection of power and politics, rather than “norms” or “principled solutions.” Ratner, “Land Feuds and Their Solutions,” 815-816.

¹⁴ Donald Rothwell, *The Polar Regions and the Development of International Law* (Cambridge: Cambridge University Press, 1996), 2.

1920s and 1930s, the judicial nature of polar sovereignty remained ambiguous in the minds of practitioners at the time. In his 1946 assessment of sovereignty in the Arctic, American intelligence officer James H. Brewster highlighted this uncertainty in his conclusion that

Today it is useless to pretend that the currently accepted legal principles on this subject have crystallized into unchangeable laws, no longer subject to questioning. International law is composed chiefly of a body of customary rules and practices, supplemented by conventions or treaties to which the great majority of civilized states have subscribed. In the absence of a supra-national legislature competent to enact binding laws, the test of the validity of an international rule of conduct is the fact of its general acceptance. As the practice of nations changes, so does the law. Thus the content of the international legal system is permanently in a state of flux, and the uncertainty as to the actual meaning of the law at any given time is increased by the lack of any official organ of interpretation whose dictum is binding upon all states. It follows, then, that there is no unanimity among the authorities as to the correct statement of the international rules governing the establishment of sovereignty over Polar regions. This confusion is heightened by the tendency of many writers to champion the interpretation which, under the circumstances, affords maximum benefit to the states of which they happen to be citizens.¹⁵

To borrow Benton's language, the polar regions represented quintessential anomalous legal space, and in this climate of uncertainty lawyers and state officials stitched together various and often competing versions of polar sovereignty out of a wide array of ideas and arguments. As Frank G. Klotz notes in his study of Antarctic politics, "each government seized on supposed principles of international law that best suited its particular historical circumstances."¹⁶ In 1929, Canadian diplomat Lester B. Pearson captured the sentiment of many commentators when he argued that the Arctic's harsh and unique conditions, "unlike any visualized by international lawyers in the past," called for new rules and practices. His biographer John English notes that Pearson made the case for "Arctic exceptionalism, the assertion that the Arctic did not fit neatly into existing international law." Indeed, every state with interests in the Arctic and Antarctic

¹⁵ *Report on the Arctic, Atlantic Division Air Transport Command, Headquarters, Atlantic-Division Air Transport Command, Report on the Arctic, July 1946, NARA, RG 319, Entry 82 (A1), Box 2975.*

¹⁶ Frank G. Klotz, *America on the Ice: Antarctic Policy Issues* (Washington: National Defence University Press, 1990), 11. For similar arguments see Roberto E. Guyer, "Antarctica's Role in International Relations," in *Antarctic Resources Policy: Scientific, Legal and Political Issues*, ed. Francisco Vicuna (Cambridge: Cambridge University Press, 1983), 267, and F.M. Auburn, *Antarctic Law and Politics*, (London: C. Hurst & Company, 1982), 6.

contemplated the implications of polar exceptionalism and considered unique legal responses. Some officials and legal experts insisted that the requirements of effective occupation should be lower in the uninhabited polar spaces, while others asserted that discovery and symbolic acts should play a greater role, or that contiguity and other geographic arguments should hold more weight.

For his part, Pearson believed that the sector principle represented the best “practical solution” to the problem of polar sovereignty.¹⁷ British diplomat Laurence Collier explained in early 1930 that “the most recent history of territorial claims in the Arctic is really the history of the development of what is now known as the ‘Sector Principle.’”¹⁸ The British used this principle to expand their claim to the Falkland Islands Dependencies (FID) in 1917 and to carve out the Ross Dependency for New Zealand in 1923. Canada applied it in 1925 to its polar regions, followed by the Soviet Union (1926), Australia (1933), France (1938), Chile (1940) and Argentina (1942) in various contexts.

The sector principle allowed states to claim all explored and unexplored land between lines of meridian stretching to the North or South Poles. In both the Arctic and Antarctic, states framed sectors as geographical extensions of territory that they considered firmly under their sovereignty. In both regions, but particularly the Arctic, officials tried to bolster this argument by asserting that sectors emanated from the close proximity of a claimant state, which placed it in the best position to control and develop the enclosed space.¹⁹ As this study demonstrates, British and Commonwealth officials constructed the most elaborate legal foundation for the principle in the interwar years, locating its basis in treaty law and contiguity, and insisting that sectors flowed out of a state’s control over the coastline and other points of access to a polar hinterland. By

¹⁷ John English, *Ice and Water: Politics, Peoples and the Arctic Council* (Toronto: Allen Lane, 2013), 64. For more on Lester B. Pearson’s introduction to polar issues, see Gordon W. Smith, *A Historical and Legal Study of Sovereignty in the Canadian North: Land, 1870-1949*, ed. P. Whitney Lackenbauer (Calgary: University of Calgary Press, forthcoming 2014), 305-306, and Janice Cavell and Jeff Noakes, *Acts of Occupation: Canada and Arctic Sovereignty, 1918-25* (Vancouver: UBC Press, 2010), 245-246.

¹⁸ Laurence Collier, Memorandum Respecting Territorial Claims in the Arctic to 1930, 10 February 1930, NA, DO 35/167/7, Territorial Claims in the Arctic.

¹⁹ Waldock, “Disputed Sovereignty in the Falkland Islands Dependencies,” 339-340. For overviews of the sector principle, see Pharand, *Canada’s Arctic Waters in International Law*; Leonid Timtchenko, “The Russian Arctic Sectoral Concept: Past and Present,” *Arctic* 50, no. 1 (1997): 29-35; Oscar Svarlien, “The Sector Principle in Law and Practice,” *Polar Record* 10, no. 66 (1960): 248-263.

extension, Foreign Office legal advisers argued that effective polar control only required occasional or seasonal visits of state officials, the issue of licenses to foreigners operating in the claimed area, and the establishment of paper administrations. The Canadian government went a step further by establishing a thin line of permanently occupied police posts in the Eastern Arctic.

In his masterful examination of the sector principle from an international legal perspective, Donat Pharand concluded that the idea “has not developed as a principle of customary law, neither general nor regional, and cannot serve as a root of title for the acquisition of sovereignty.”²⁰ Pharand’s dismissal obscures how many international legal experts and state officials, particularly in Britain and the Commonwealth, believed that the sector principle stood on the verge of acceptance as a customary rule of law in the 1930s. Accordingly, the internal logic behind state usage of the sector principle warrants more careful academic scrutiny.²¹ In its historical context, the principle’s supporters

²⁰ Pharand, *Canada’s Arctic Waters in International Law*, 79. For criticism of the sector principle see, Smith, *A Historical and Legal Study in the Canadian North*, Chapter 8. For an overview of the sector principle, see Svarlien, “The Sector Principle in Law and Practice,” 248-263.

²¹ In the Canadian context, historians Janice Cavell, Jeff Noakes and Gordon W. Smith have explored the early origins of the sector principle and Canada’s ambivalent approach to it in the early 1920s. See Janice Cavell, “Sector Claims and Counter-claims: Joseph Elzéar Bernier, the Canadian Government, and Arctic Sovereignty, 1898-1934,” *Polar Record* 50, no. 254 (2014): 293-310.; Cavell and Noakes, *Acts of Occupation: Canada and Arctic Sovereignty*; Smith, *A Historical and Legal Study of Sovereignty in the Canadian North*, Chapter 8. Peter Kikkert and Whitney Lackenbauer have also examined the issues created by Canada’s use of the sector principle after the Second World War. P. Whitney Lackenbauer and Peter Kikkert, “The Dog in the Manger – and Letting Sleeping Dogs Lie: The United States, Canada and the Sector Principle, 1924-1955,” in *The Arctic Ocean: Essays in Honour of Donat Pharand*, eds. Suzanne Lalonde and Ted McDorman (Leiden: Brill, 2014), 216-239; and P. Whitney Lackenbauer and Peter Kikkert, “Sovereignty and Security: The Department of External Affairs, the United States, and Arctic Sovereignty, 1945-68,” in *In the National Interest: Canadian Foreign Policy and the Department of Foreign Affairs and International Trade, 1909-2009*, ed. Greg Donaghy and Michael Carroll (Calgary: University of Calgary Press, 2011), 101-120. For overviews of the Russian application of the sector principle, see William Elliott Butler, *Northeast Arctic Passage* (Alphen aan den Rijn: Sijthoff & Noordhoff, 1978); Timtchenko, “The Russian Arctic Sectoral Concept: Past and Present,” 29-35, and Peter Toma, “Soviet Attitude Towards the Acquisition of Territorial Sovereignty in the Antarctic,” *The American Journal of International Law* 50, no. 3, (1956): 611-629. In the Antarctic context, historians and legal scholars have acknowledged the use of the sector principle by claimant states, but have done little to explore the internal logic behind its application. Beck has commented on the earliest utilization of the principle by the British Empire. See Peter Beck, “British Antarctic Policy in the Early 20th Century,” *Polar Record* 21, no. 134 (1983): 475-483; and Peter Beck, “Securing the dominant ‘place in the wan Antarctic sun’ for the British Empire,” *Australian Journal of Politics and History* 29 (1983): 448-461. Gillian Triggs has explored historical aspects of Australia’s use of the sector principle. Gillian Triggs, *International Law and Australian Sovereignty in Antarctica* (Sydney: Legal Books Limited, 1986). The best overview of the application of the sector principle in the Antarctic stems from the documents and editorial commentary in

rationalized and supported it as the foundation of a new bi-polar legal regime that would effectively resolve territorial claims – a convenient solution to a problem that traditional international law could not solve in the anomalous legal space of the polar regions. This dissertation reveals how, through their articulation and employment of the sector principle, Britain and the Commonwealth countries of Canada, Australia and New Zealand became the primary shapers of the bi-polar legal landscape in the years before the Second World War, an important consideration that has been overlooked in the historiography and legal scholarship.

While some state authorities insisted on relaxed or radically altered rules for the polar regions, others refused to accept that traditional principles should be drastically changed because of harsh environmental conditions. The United States and Norway emerged as the staunchest defenders of a more stringent version of effective occupation. Both states eventually condemned the sector principle as a legally dubious tool used by states to unjustly seize large tracts of unoccupied, unused, and even unexplored polar territory. The Hughes Doctrine, crafted by the U.S. State Department in 1924, demanded the physical settlement and utilization of polar lands as a requisite of territorial acquisition.²² Historians Christopher C. Joyner and Ethel R. Theis identify the U.S. as the “chief architect of law and policy for the Antarctic,” and praise Washington for its “consistency and continuity.”²³ Such an assessment downplays the legal uncertainty evident in American officials’ appraisals and the selective manner in which they asserted their country’s perceived rights.²⁴ As this dissertation reveals, Washington often seriously

W.M. Bush, ed., *Antarctica and International Law: A Collection of Inter-State and National Documents 1-3* (New York: Oceana, 1982-1988).

²² Gordon G. Henderson, “Policy by Default: The Origin and Fate of the Prescott Letter,” *Political Science Quarterly* 79, no. 1 (1964): 76-95; and H. Robert Hall, “The ‘open door’ into Antarctica: An Explanation of the Hughes Doctrine,” *Polar Record* 25, no. 153 (1989): 137-140.

²³ Christopher Joyner and E.R. Theis, *Eagle Over the Ice: The US in the Antarctic* (Hanover: University Press of New England, 1997), 1 and 109.

²⁴ While this dissertation focused on the uncertainty in American legal appraisals, other scholars have highlighted the inconsistencies in overall American Antarctic policy. Frank G. Klotz has characterized the U.S. polar policy in the first half of the twentieth century one of “benign neglect” and concluded that “Policy toward the region traditionally has suffered from a lack of strong direction from the top and a corresponding air of ambivalence.” Klotz, *America on the Ice: Antarctic Policy Issues*, 18 and xv. Moore and Shapely have highlighted that the Antarctic could only hold the interest of senior leadership for brief periods. Jason Kendall Moore, “A ‘Sort’ of Self-Denial: United States policy toward the Antarctic, 1950–59,” *Polar Record* 37, no. 200 (2001): 13-26; Jason Kendall Moore, “Tethered to an Iceberg: United States Policy Toward the Antarctic, 1939-1949,” *Polar Record* 35, no. 193 (1999): 125-134; Jason Kendall Moore,

considered adopting less rigorous requirements designed specifically for the establishment of polar sovereignty in the decades before 1959 – a formula for territorial acquisition that officials labeled “constructive occupation.” Nevertheless, the Hughes Doctrine remained the core of American polar legal policy. Systematic research into the Hughes Doctrine’s origins, its application, the reactions it inspired in the other polar claimant states, its impact on the sector principle and how it became the dominant feature of the polar legal landscape, yield significant new insights into American thinking, political posturing, and international legal culture. Even though Washington never used the Hughes Doctrine to make its own territorial claim, its consistent public espousal of the doctrine eventually led Britain, the Commonwealth and other claimant countries to accept the necessity of physical settlement and use to secure title to territory.

Reconstructing the Bi-Polar Legal Landscape

This dissertation examines how state officials, legal advisers and international lawyers attempted to unravel the tangled “Gordian knot of polar sovereignty” between 1900 and 1955.²⁵ Drawing upon fresh archival research undertaken in several countries, as well as a thorough interrogation and synthesis of existing historical and legal scholarship, it explores the knowledge production that occurred on terrestrial polar claims, thus reconstructing the transnational web of ideas, adaptations, strategies and best practices developed to address the confusion and uncertainty that infused the anomalous legal space of the polar regions. By applying a global and bi-polar framework, this study offers a novel conceptual history of polar sovereignty and its constituent parts, including the sector principle, the doctrines of contiguity, constructive occupation and effective occupation, and other arguments used to justify territorial claims. Identifying the specific countries and individual lawyers, advisers and experts that shaped the legal and political

“Bungled Publicity: Little America, Big America, and the Rationale for Non-Claimancy, 1946-1961,” *Polar Record*, 40, no. 212 (2004): 19-30; Deborah Shapley, *The Seventh Continent: Antarctica in a Resource Age* (New York: Earthscan, 2011). Peter Beck has noted, “The continuing inconsistencies of US Antarctic policy – indeed, some have questioned whether there has ever been any real or coherent US policy – in respect to territorial claims have not prevented non-recognition and no-claims becoming consistent themes in American statements.” Peter Beck, *The International Politics of Antarctica* (London: Croom Helm, 1986). See also F.M. Auburn, “United States Antarctic Policy,” *Marine Technology Society Journal* 12, no. 1 (1978): 31-36.

²⁵ Julia Jabour and Melissa Weber, “Is it Time to Cut the Gordian Knot of Polar Sovereignty,” *Reciel* 1, no. 1 (2008): 27-40.

context of the Arctic and Antarctic, I scrutinize the complex interplay between the law, polar diplomacy and state practice.

Although this study begins with an overview of polar exploration and the development of international legal ideas stretching back centuries, its primary temporal focus starts at the beginning of the twentieth century, when states started to seriously consider polar sovereignty. It ends in 1955, with Britain's failed unilateral application to the International Court of Justice for a judicial settlement of its dispute with Argentina and Chile over the Falkland Islands Dependencies – a pivotal event in the legal development of the south polar region and a decisive moment on the path towards the Antarctic Treaty of 1959. By this point, the legal trajectories of the Arctic and Antarctic had diverged for almost a decade, after American recognition of Canada's sovereignty over the islands of the Arctic Archipelago left the terrestrial claims in the north polar region settled, save for a few peripheral areas.

Geographically, this dissertation focuses on polar spaces that lacked permanent Indigenous inhabitants and where sovereignty remained contested or undetermined at the turn of the twentieth century: the Antarctic continent and adjacent islands, the Subantarctic islands,²⁶ and the islands of the High Arctic, particularly those above Lancaster Sound and Parry Channel in the Canadian Archipelago (now called the Queen Elizabeth Islands).²⁷ Greenland (especially its sparsely populated eastern coast) and the Svalbard Archipelago also play important, but secondary roles, given their unique

²⁶ As Maria Pia Casarini notes, defining the limits of the Antarctic and Antarctica has been a subject of longstanding debate. "It is now officially accepted that the term ['Antarctica'] refers to the continent itself and the off-lying islands, while the term 'Arctic' indicates the area south of the Antarctic Convergence, a belt around the continent at about 56°-58°S where the cold Antarctic surface water, flowing northwards, sinks beneath the warmer sub-Antarctic water." Maria Pia Casarini, "Activities in Antarctica Before the Conclusion of the Antarctic Treaty," in *International Law for Antarctica*, 2nd Ed., eds. Francesco Francioni and Tullio Scovazzi (The Hague: Kluwer Law, 1996), 628.

²⁷ Generally, the High Arctic is defined as the islands lying in the maritime Arctic, including Svalbard, the northern part of Greenland, Franz Joseph Land, Severnaya Zemlya, Novaya Zemlya and the Queen Elizabeth Islands. Historically, the Thule people (the ancestors of the modern Inuit) lived across the Canadian High Arctic, but the region was depopulated during the Little Ice Age. Aside from occasional visits from Inughuit or Inuit hunting parties from Greenland and the southern archipelago, the region lacked a permanent human presence at the turn of the twentieth century. Canada's High Arctic islands now fall within the Nunavut Land Claim Agreement settlement area and the territory of Nunavut. On Inuit settlement processes in this region see, Milton Freeman, *Inuit Land-Use and Occupancy Project* (Ottawa: Thorn Press Ltd., 1976) and Lyle Dick, *Muskox Land: Ellesmere Island in the Age of Contact* (Calgary: University of Calgary Press, 2002).

political and legal development. It focuses on the legal approaches and activities of the British Commonwealth and the U.S. as the primary shapers of the bi-polar legal landscape. To properly reconstruct the transnational network in which states and people thought about polar sovereignty, however, it also examines the arguments and strategies endorsed by the international legal community and the other polar claimants, particularly the Soviet Union, Norway, Denmark, Argentina, Chile and France. Each of these actors added texture and layers to the bi-polar legal landscape.

Scholarly accounts of the historic legal situation in the polar regions often apply current legal standards to analyze past practices and whether these support a country's current position, rather than discerning how historical actors viewed and understood events and legal developments as they unfolded.²⁸ Such studies fall into the trap of what David Bederman calls "Foreign Office International Legal History," succumbing to the "siren sound of historic instrumentalism."²⁹ These accounts try to make sense of the past through what it "has brought about and not for what it meant to the people living it" – an approach that Randall Lesaffer has criticized as one of the major pitfalls in legal

²⁸ Triggs, *International Law and Australian Sovereignty in Antarctica*, 5-61; Rothwell, *The Polar Regions and the Development of International Law*, 59-61; A.C. Castles, "The International Status of the Australian Antarctic Territory," in *International Law in Australia*, ed. D.P. O'Connell (Canberra: Law Book Company, 1966), 341-367; Christopher Joyner, *Antarctica and the Law of the Sea* (Dordrecht: Martinus Nijhoff, 1992), 55; Emilio J. Sahurie, *The International Law of Antarctica* (New Haven: New Haven Press, 1992); Francisco Orrego Vicuña, *Antarctic Mineral Exploitation: The Emerging Legal Framework* (Cambridge: Cambridge University Press, 1988); Christopher C. Joyner and Sudhir K. Chopra, eds., *The Antarctic Legal Regime* (Dordrecht: Martinus Nijhoff, 1988); Susan J. Rolston and Ted L. McDorman, "Maritime Boundary Making in the Arctic Region," in *Ocean Boundary Making*, eds. Douglas M. Johnston and Phillip M. Saunders (Vancouver: UBC Press, 1988), 16-73; Jonathan Charney, "The Antarctic System and Customary International Law," in *International Law for Antarctica*, eds. Francesco Francioni and Tullio Scovazzi (Milan: Giuffrè Editore, 1987), 55-99; Donald Rothwell, "Arctic Sovereignty and its Legal Significance for Canada," *ANU College of Law Research Paper* 13, no. 19 (2013): 1-20; Todd Jay Parriott, "Territorial Claims in Antarctica: Will the United States Be Left Out in the Cold?" *Stanford Journal of International Law* (1986): 67-121; Rolph Trolle-Anderson, "The Antarctic Scene: Legal and Political Facts," in *The Antarctic Treaty Regime*, ed. Gillian Triggs (Cambridge: Cambridge University Press, 1987), 57-64; Svarlien, "The Sector Principle in Law and Practice," 248-63; Christopher D. Beeby, "The Antarctic Treaty System: Goals, Performance and Impact," in *The Antarctic Treaty in World Politics*, Arnfinn Jorgensen-Dahl and Willy Ostreng eds. (London, Houndmills 1991): 5-7; Philip C. Jessup and Howard J. Taubenfield, *Controls for Outer Space and the Antarctic Analogy* (New York: Columbia University Press, 1959); Michael Byers, *International Law and the Arctic* (Cambridge: Cambridge University Press, 2013); Ivor Richardson, "New Zealand's Claims in the Antarctic," *New Zealand Law Journal* 33 (1957): 38-42.

²⁹ David J. Bederman, "Foreign Office International Legal History," in *Time, History and International Law*, eds. Matthew Craven, Malgosia Fitzmaurice and Maria Vogiatzi (Leiden: Martinus Nijhoff, 2007), 44, 46, 47.

history.³⁰ This observation certainly applies to the historiography on the polar regions. Through the ahistorical reconstruction of the legal past, scholars have oversimplified the legal history of the Arctic and Antarctic and ignored many of the different attitudes and interpretations that existed on polar sovereignty.

To reconstruct the complex polar legal landscape, this dissertation embraces the *contextual turn* in legal history, which considers legal ideas and concepts as products of their time, of historic systems of thought and of cultural and political environments.³¹ Legal scholar Matthew Craven maintains that understanding the political-social context of a particular legal idea is “critically important for an understanding of what those ideas actually meant to those using them.”³² A conceptual history of polar sovereignty must, as Martti Koskenniemi advises, take “legal vocabularies and institutions as open-ended platforms on which contrasting meanings are projected at different periods, each complete in themselves, each devised so as to react to some problem in the surrounding world.”³³

This contextual approach is pivotal to explain how officials and lawyers grappled with the problem of determining the definition and function of sovereignty in the polar regions.³⁴ Sovereignty “is not a legal term with any fixed meaning,” international lawyer

³⁰ Randall Lesaffer, “International Law and its History: The Story of an Unrequited Love,” in *Time, History and International Law*, eds. Matthew Craven, Malgosia Fitzmaurice and Maria Vogiatzi (Leiden: Martinus Nijhoff, 2007), 35.

³¹ See Martin Koskenniemi, “Histories of International Law: Significance and Problems for a Critical View,” *Temple International and Comparative Law Journal* 27, no. 215 (2013): 215-40; Bardo Fassbender and Anne Peters, “Introduction: Towards a Global History of International Law,” in *Oxford Handbook of History of International Law*, eds. Bardo Fassbender and Anne Peters (Oxford: Oxford University Press, 2012), 13.

³² Matthew Craven, “Introduction: International Law and its Histories,” in *Time, History and International Law*, eds. Matthew Craven, Malgosia Fitzmaurice and Maria Vogiatzi (Leiden: Martinus Nijhoff, 2007), 17. See also David Kennedy, “International Law and the Nineteenth Century: History of an Illusion,” *Quinnipiac Law Review* 17 (1997).

³³ Martti Koskenniemi, “A History of International Law Histories,” in *The Oxford Handbook of the History of International Law*, eds. Bardo Fassbender and Anne Peters (Oxford: Oxford University Press, 2012), 968. See also Martti Koskenniemi, “Why History of International Law Today?” *Rechtsgeschichte* 4 (2004): 61-66. As Fassbender and Peters note, “Concepts change over time. They are no more solid than the period or context in which they originated. Therefore, the analysis of a legal concept should include a reflection about the social and political context of the concept, and the political agenda behind it...” Fassbender and Peters, “Introduction,” 13.

³⁴ The issues of defining sovereignty more broadly are well documented. See for instance, F.H. Hinsley, *Sovereignty*, 2nd Ed. (Cambridge: Cambridge University Press, 1986); Alan James, *Sovereign Statehood: The Basis of International Society* (London: Allen and Unwin, 1986); James Crawford, “Sovereignty as a

Michael Akehurst notes. “It is doubtful whether any single word has ever caused so much intellectual confusion.”³⁵ Political scientists Thomas Biersteker and Cynthia Weber point out that sovereignty “can be considered as an institution, a discourse, a principle, a structure, or a context” or conceptualized as a set of practices.³⁶ Legal scholar Malcolm Shaw also presents territorial sovereignty as a flexible concept, a collection of legal rights, powers, liabilities and duties, the exact extent of which depends on the circumstances of a particular case.³⁷ In short, seeking a fixed and general definition of sovereignty is both futile and ahistorical. In her excellent study, Benton captures this central tension. “How do we reconcile these two kinds of knowledge about sovereignty, our certainty about its definition and our recognition of its elusiveness? One way would be to refine the theoretical understanding of sovereignty; another, to retell its history.”³⁸ Biersteker and Weber echo this idea, arguing that scholars must not “dehistoricize sovereignty.”³⁹ Polar sovereignty has never been a static concept. As this dissertation demonstrates, this ever-evolving legal, political and intellectual construct must be understood and analyzed in historical context.

Legal Value,” in *The Cambridge Companion to International Law*, eds. James Crawford and Martti Koskenniemi (Cambridge: Cambridge University Press, 2012), 117-133; Robert Jackson, *Sovereignty: Evolution of an Idea* (Cambridge: Polity, 2007); and Daniel Philpott, *Revolutions in Sovereignty: How Ideas Shaped Modern International Relations* (Princeton: Princeton University Press, 2001). On sovereignty as resting on contradictory principles and practices, see Stephen D. Krasner, ed., *Problematic Sovereignty: Contested Rules and Political Possibilities* (New York: Columbia University Press, 2001); Stephen D. Krasner, *Sovereignty: Organised Hypocrisy* (Princeton: Princeton University Press, 1999); and Christopher J. Bickerton, Philip Cunliffe, and Alexander Gourevitch, eds., *Politics without Sovereignty: A Critique of Contemporary International Relations* (London: UCL Press, 2007).

³⁵ Michael Akehurst, *A Modern Introduction to International Law*, 6th Ed. (London: Allen and Unwin, 1987), 15-16. Alan James has asked whether the concept of sovereignty should be treated as a ground rule of international relations or mere “gibberish.” Alan James, “Sovereignty: Ground Rule or Gibberish?” *Review of International Studies* 10, no. 1 (1984): 1.

³⁶ Thomas J. Biersteker and Cynthia Weber, “The Social Construction of State Sovereignty,” in *State Sovereignty as Social Construct*, eds. Biersteker and Weber (Cambridge: Cambridge University Press, 1996), 12. Robert Jackson has argued that, “Sovereignty is like Lego: it is a relatively simple idea but you can build almost anything with it, large or small, as long as you follow the rules.” Robert Jackson, “Sovereignty in World Politics: A Glance at the Conceptual and Historical Landscape,” *Political Studies* 47, no. 3 (1999): 431.

³⁷ Malcolm Shaw, “Introduction: The International Law of Territory: An Overview,” in *Title to Territory*, ed. Malcolm Shaw (Dartmouth: Ashgate, 2005), xii.

³⁸ Benton, *Search for Sovereignty*, 279. For an effective critique see Krasner, *Sovereignty: Organized Hypocrisy*.

³⁹ Cynthia Weber and Thomas J. Biersteker, “Reconstructing the Analysis of Sovereignty: Concluding Reflections and Directions for Future Research,” in *State Sovereignty as Social Construct*, eds. Biersteker and Weber (Cambridge: Cambridge University Press, 1996), 278-286.

So too must the historian situate in appropriate context the appraisals, policy advice and arguments prepared by the international lawyers, legal advisers and other state officials who studied the problems of polar territorial claims. Accordingly, any analysis of the international legal history of the Arctic and Antarctic must take into account different national traditions or attitudes towards international law.⁴⁰ The classical legal ideology held by many of the decision-makers in the State Department in the first decades of the twentieth century shaped their response to polar sovereignty and the crafting of the Hughes Doctrine, just as the British emphasis on state practice led them to support the sector principle. Furthermore, any study of international law that encompasses non-European and American countries needs to engage the issues of universality. Not until the end of the nineteenth century did imperial expansion produce a set of doctrines that was applied to all states.⁴¹ In Latin America or the Soviet Union, legal scholars questioned why European ideas and beliefs should dominate international law.⁴² As Arnulf Becker Lorca reminds us, “The use of comparative analysis requires recognizing that international law can have different meanings in various geopolitical locations.”⁴³ The polar regions were not immune to this reality and should be understood through a “decentering critique of international law,” which recognizes that different states have applied the law in their own particular context.⁴⁴ Alternative conceptualizations of polar sovereignty often stemmed from alternative

⁴⁰ Craven, “Introduction: International Law and its Histories,” 17.

⁴¹ Anghie, *Imperialism, Sovereignty and the Making of International Law*, 32.

⁴² See Liliana Obregon, “The Colluding Worlds of the Lawyer, the Scholar and the Policymaker: A View of International Law from Latin America,” *Wisconsin International Law Journal* 23 (2005): 145-172; Arnulf Becker Lorca, “International Law in Latin America or Latin American International Law? Rise, Fall and Retrieval of Tradition of Legal thinking and Political Imagination,” *Harvard International Law Journal* 47, no. 1 (2006): 283-306; Arnulf Becker Lorca, “Universal International Law: Nineteenth-Century Histories of Imposition and Appropriation,” *Harvard Journal of International Law* 51, no. 2 (2010): 475-552; Umut Özsu, “Agency, Universality and the Politics of International Legal History,” *Harvard International Law Journal* 52 (2010): 58; Jutta Brunnee and Stephen Toope, *Legitimacy and Legality in International Law: An Interactional Account* (Cambridge: Cambridge University Press, 2010); Alejandro Alvarez, “Latin America and International Law,” *American Journal of International Law* 3, no. 2 (1909): 269-353, and Lauri Mälksoo, “Russia-Europe,” in *The Oxford Handbook of the History of International Law*, eds. Bardo Fassbender and Anne Peters (Oxford: Oxford University Press, 2012).

⁴³ Lorca, “International Law in Latin America or Latin American International Law?” 282, n. 2. Martti Koskenniemi, “The Case for Comparative International Law,” *Finnish Yearbook of International Law* 20 (2009): 1-8; At its most basic level, CIL simply entails the textual comparison of different doctrinal positions on a given international law topic. Boris Mamlyuk and Ugo Mattei, “Comparative International Law,” *Brooklyn Journal of International Law* 36, no. 2 (2011): 385-452.

⁴⁴ Lorca, “International Law in Latin America or Latin American International Law?” 283.

conceptualizations of international law. In the Soviet Union, this manifested in new arguments in support of the sector principle,⁴⁵ while Chile and Argentine employed several arguments unique to “Latin American International Law,” namely the doctrine of *uti possidetis juris* (*uti possidetis, ita possideatis* – “as you possess, you may continue to possess”).⁴⁶

While different conceptions of the law played a significant role in the development of polar legal landscape, in the end, power dynamics smoothed out differences created by competing national traditions and conceptualizations. As Shaw has noted, “law cannot be divorced from politics or power.”⁴⁷ Jurist Charles de Visscher explained the role of power when he compared the growth of customary international law to the formation of a path across vacant land. Over time, as the majority of travelers started to follow the same path, they transformed it into a well-worn road accepted as the only regular way. In a similar manner, state practice and acceptance could convert a legal proposal into a customary rule consistent with international law. De Visscher further stressed, “Among the users are always some who mark the soil more deeply with their footprints than others, either because of their weight, which is to say their power in this world, or because their interests bring them more frequently this way.”⁴⁸ The activities

⁴⁵ T.A. Taracouzio, *The Soviet Union and International Law* (New York: Macmillan, 1935; 1972 reprint), 29, 162.

⁴⁶ Shirley V. Scott, “Universalism and Title to Territory in Antarctica,” *Nordic Journal of International Law* 66, no. 1 (1997): 33-53; and Shirley V. Scott, “Ingenious and Innocuous? Article IV of the Antarctic Treaty as Imperialism,” *The Polar Journal* 1, no. 1 (2011): 51-62. For an overview of the doctrine of *uti possidetis*, see Suzanne Lalonde, *Determining Boundaries in a Conflicted World: The Role of Uti Possidetis* (Montreal and Kingston: McGill-Queen’s University Press, 2002).

⁴⁷ Malcolm Shaw, *International Law*, 7th Ed. (Cambridge: Cambridge University Press, 2014), 56. Nico Krisch has argued that dominant states have been “active forces behind the development of international law, and have made extensive use of the international legal order to stabilize and improve their position.” Krisch, “International Law in Times of Hegemony: Unequal Power and the Shaping of the International Legal Order,” *The European Journal of International Law* 16, no. 3 (2005): 383. For an exploration of the impact of power on the creation of custom see Michael Byers, *Custom, Power and the Power of Rules: International Relations and Customary International Law* (Cambridge: Cambridge University Press, 1999). In the Antarctic context, Shirley Scott has insisted that powerful states used the law to provide a convenient “cloak of legality.” Scott, “Ingenious and Innocuous?” 54.

⁴⁷ Shaw, *International Law*, 56.

⁴⁸ Charles de Visscher, *Theory and Reality in Public International Law* (Princeton: Princeton University Press, 1957), 149. See William Pitt Cobbett, *Leading Cases on International Law* 1, 4th Ed., by Hugh H.L. Bellott (London: Sweet and Maxwell, 1922), 5. On customary international law, see Michael Akehurst, “Custom as a Source of International Law,” *British Yearbook of International Law* 47, no. 1 (1975): 1; Anthony D’Amato, *The Concept of Custom in International Law* (London: Cornell University Press, 1971); D.J. Biederman, *Custom as a Source of Law* (Cambridge: Cambridge University Press, 2012); Byers,

and arguments of powerful states, especially those closely connected to a specific issue area, take on greater significance in shaping and universalizing the law. As a result, custom has largely reflected the state practice approved of by the powerful.⁴⁹ In contrast, legal scholar Wilhelm Grewe has noted the difficulty that small states can experience when trying to enforce their legal claims against a great power.⁵⁰ To balance the influence of power on the law, minor states often try to negotiate international rules or agreements in multilateral forums, where they can wield greater influence.⁵¹ This dissertation displays how these power dynamics played out in the polar regions, where first Britain and then the U.S. brought their weight to bear on the legal path to polar sovereignty, and smaller states such as Norway, Argentina and Chile consistently tried to constrain their influence through multilateral talks and conferences.

Imperialism and empire also constitute essential elements of the context that shaped the legal history of the polar regions.⁵² States, after all, started to pursue polar territory at a time when “Territorial accumulation became both a symbolic and material index of national powers and international standing.”⁵³ Furthermore, the legal discourse

Custom, Power and the Power of Rules; Hilary Charlesworth, “Law-Making and Sources,” in *The Cambridge Companion to International Law*, eds. James Crawford and Martti Koskeniemi (Cambridge: Cambridge University Press, 2012), 187-202; Luigi Condorelli, “Customary International Law: The Yesterday, Today and Tomorrow of General International Law,” in *Realizing the Utopia: The Future of International Law*, ed. Antonio Cassese (Oxford: Oxford University Press, 2012), 147-157; Brian D. Lepard, *Customary International Law: A New Theory with Practical Applications* (Cambridge: Cambridge University Press, 2010); and Joost Pauwelyn, *Conflict of Norms in Public International Law* (Cambridge: Cambridge University Press, 2001).

⁴⁹ M.C.W. Pinto, “Making International Law in the Twentieth Century,” *International Law FORUM du droit international* 6 (2004): 141.

⁵⁰ Grewe’s assessed that, “in general, the small nation must already fear political requests by a great power, which are brought forward as legal claims with the shakiest juridical foundation.” Wilhelm G. Grewe, “The Role of International Law in Diplomatic Practice,” *Journal of the History of International Law* 1, no. 1 (1999): 24.

⁵¹ Krisch, “International Law in Times of Hegemony,” 373.

⁵² In applying a framework of imperialism to the Antarctic, Christy Collis and Quentin Stevens have argued that “imperialism and colonialism are fundamentally a matter of the ‘struggle for control over territory’, and not of intercultural relations.” Christy Collis and Quentin Stevens, “Cold colonies: Antarctic Spatialities at Mawson and McMurdo Stations,” *Cultural Geographies* 14, no. 2 (2007): 237. See also Klaus Dodds, “Post-colonial Antarctica: An Emerging Engagement,” *Polar Record* 42, no 1 (2006): 60-62; and Adrian Howkins, “Appropriating Space: Antarctic Imperialism and the Mentality of Settler Colonialism,” in *Making Settler Colonial Space: Perspectives on Race, Place, and Identity*, eds. Tracey Banivanua Marr and Penelope Edmonds (New York: Palgrave Macmillan, 2010), 32-33.

⁵³ Tony Ballantyne and Antoinette Burton, “Empires and the Reach of the Global,” in *A World Connecting, 1870-1945*, ed. Emily S. Rosenberg (Cambridge, Massachusetts: The Belknap Press of Harvard University Press, 2012), 306-308.

that developed around polar territorial acquisition initially stemmed from sites of imperial competition in Africa and Asia.⁵⁴ As legal scholar Antony Anghie argues, European imperialism was central to the formation and expansion of international law, especially its basic doctrines on territorial acquisition and sovereignty.⁵⁵ From a national policy perspective, several scholars have highlighted the imperial dynamics at work in the formation of the polar strategies of Britain, Canada, Australia, New Zealand and South Africa in the first half of the twentieth century.⁵⁶

While this dissertation draws on the conclusions of these national studies, my aim is not to elaborate on what Britain and the Dominions' engagement with the polar regions can tell historians about the broader imperial relationship, but how the imperial relationship shaped the legal discourse on polar sovereignty. I discern how Canadian, British, Australian and New Zealander officials co-created knowledge in their discussion, appraisal and formation of the transnational legal ideas at the core of polar sovereignty, and how profoundly this exchange shaped international law in the Arctic and Antarctic. Political geographer Klaus Dodds has argued that scholars need to re-conceptualize the British Antarctic as a web of relations and places.⁵⁷ He agrees with imperial historian Tony Ballantyne's assertion that there is a "need to reconstruct the networks that structured the empire and trace the transmission of ideas, ideologies, and identities across space and time."⁵⁸ This suggestion is reflected in a wave of recent studies that investigate

⁵⁴ Benton and Struaman, "Acquiring Empire by Law," 38.

⁵⁵ Anghie, *Imperialism, Sovereignty and the Making of International Law*, 3. For an excellent recent study, see Casper Sylvest, "'Our Passion for Legality': International Law and Imperialism in Late Nineteenth Century Britain," *Review of International Studies* 34, no. 3 (2008): 403-423.

⁵⁶ See, for example, Peter Beck, "Britain's Antarctic Dimension," *International Affairs* 59, no. 3 (1983): 429-444; Peter Beck, "British Antarctic Policy in the Early 20th Century," *Polar Record* 21, no. 134 (1983): 475-483; Beck, "Securing the dominant 'place in the wan Antarctic sun' for the British Empire," 448-461; Klaus Dodds, *Pink Ice: Britain and the South Atlantic Empire* (London: I.B. Tauris, 2002); Marie Kawaja and Tom Griffiths, "'Our great frozen neighbour': Australia and Antarctic Before the Treaty, 1880-1945," in *Australia and the Antarctic Treaty System: 50 Years of Influence*, eds. Marcus Howard and Tom Griffiths (Sydney: University of New South Wales Press, 2011), 9-47; Marie Kawaja, "Australia in Antarctica: Realising an Ambition," *The Polar Journal* 3, no. 1 (2013): 31-52; Cavell and Noakes, *Acts of Occupation*.

⁵⁷ Klaus Dodds, "The Great Game in Antarctic: Britain and the 1959 Antarctic Treaty," *Contemporary British History* 22, no. 1 (2008): 51.

⁵⁸ Ballantyne also asserts that "The web captures the integrative nature of this cultural traffic, the ways in which imperial institutions and structures connected disparate points in space into a complex mesh of networks." Tony Ballantyne, *Webs of Empire: Locating New Zealand's Colonial Past* (Vancouver: University of British Columbia Press, 2014), 46.

the production and transfer of knowledge within the empire, and that map out the movement of ideas between its component parts.⁵⁹ This dissertation explores the sharing of information and legal ideas that occurred in Imperial Conference and Polar Committee meetings, diplomatic exchanges, and informal conversations.⁶⁰ Through this knowledge production, Britain and the Commonwealth left a large footprint on the bi-polar legal landscape.

The imperial web, however, was only one nexus in which officials and legal experts came to understand polar sovereignty. This dissertation recreates the historical sociology of the bi-polar legal landscape, portraying state experts and international lawyers as products of various socio-political scenarios, reflections of often opposing national legal traditions, and members of an international legal community – an “invisible college of lawyers” that dealt in transnational ideas, principles and practices.⁶¹ It views historic legal appraisals as state officials and legal experts would have viewed them, within the context of the authors.⁶² By exploring how their thinking unfolded in response to contemporary political and legal developments, this dissertation exposes the complex

⁵⁹ Tony Ballantyne, “Colonial Knowledge,” in *The British Empire: Themes and Perspectives*, ed. Sarah Stockwell (Oxford: Oxford University Press, 2008), 177-199. See, for example, Christopher Alan Bayly, *Empire and Intelligence: Intelligence Gathering and Social Communication in India, 1780–1870* (Cambridge: Cambridge University Press, 1996); Saul Dubow, *A Commonwealth of Knowledge: Science, Sensibility and White South Africa, 1820-2000* (Oxford, Oxford University Press, 2000); and Amiria JM Henare, *Museums, Anthropology and Imperial Exchange* (Cambridge: Cambridge University Press, 2005). Several legal histories have also shown the interconnectedness of empire and the exchange of ideas within it. See Shaunnagh Dorsett and John McLaren, eds., *Legal Histories of the British Empire: Laws, Engagements and Legacies* (Oxford: Routledge: 2014); and B.L. Berger, A.R. Buck and H. Foster, eds., *The Grand Experiment: Law and Legal Culture in British Settler Societies* (Vancouver: UBC Press, 2008).

⁶⁰ The Foreign Office that, “Since Australia, New Zealand and South Africa are especially concerned with the Antarctic, and the main British interest in the Arctic is Canadian, it has been particularly important that British polar policies should be agreed between the Commonwealth nations concerned, and the Polar Committee provided a convenient method of informal consultation between them.” Territorial Claims in the Antarctic, Research Department, Foreign Office, 1 May 1945, National Archives of Australia (NAA), A4311, 365/8, [British Document].

⁶¹ “A third direction of historical sociology might connect international law's development to the development of international law as a professional practice. Who have the international lawyers been? How have they been trained? What types of activity have they been engaged in? Have foreign offices followed their opinions? Some of such work already exists, but more would be needed, and from different parts of the world. The possibilities for a historical sociology of international law are, in fact, almost limitless.” Koskenniemi, “Why History of International Law Today?” 65. On the “invisible college of lawyers,” see Oscar Schachter, “The Invisible College of International Lawyers,” *Northwestern University Law Review* 72, no. 2 (1977-1978): 217-226.

⁶² Lesaffer, “International Law and its History,” 38.

interaction between state legal appraisals, academic studies, national-policy making, and the evolving doctrine surrounding territorial acquisition.

By avoiding a teleological approach and adopting a narrative and chronological methodology, I deliberately chart the twists and turns that characterized legal and political developments in the polar regions. This technique facilitates a deeper understanding of the complexities and uncertainties associated with polar sovereignty, the ways that transnational concepts evolved through space and time, and how events and ideas affected national deliberations as they unfolded. Global historian Lynn Hunt advocates such an approach, suggesting that “Stories by definition have beginnings and ends, and it is very difficult not to read the end of the story back into the past.” Rather than “start from the present and look backward,” historians should start at a point in the past and “ask how different alternatives sorted themselves out going forward.” In this way, scholars can “effectively sidestep the teleological trap.”⁶³

My exploration of state sovereignty strategies, legal policies, and the historical sociology of international law underlines the central contention of this dissertation: national experiences with polar sovereignty have to be situated in a broader global and bi-polar context. While national,⁶⁴ inter-state⁶⁵ and regional histories⁶⁶ provide important

⁶³ Lynn Hunt, *Writing History in the Global Era* (New York: W.W. Norton, 2014), 128.

⁶⁴ See, for example, Kawaja, “Australia in Antarctica,” 31-52; Tim Bowden, *The Silence Calling: Australians in Antarctica, 1977-1997* (St. Leonards: Allen and Unwin, 1997); Robert Arthur Swan, *Australia in the Antarctic: Interest, Activity and Endeavour* (Melbourne: Melbourne University Press, 1961); Stephen Murray-Smith, *Sitting on Penguins: People and Politics in Australian Antarctica* (Surry Hills: Century Hutchinson Australia, 1988); Cavell and Noakes, *Acts of Occupation*; Shelagh Grant, *Sovereignty or Security?: Government Policy in the Canadian North, 1936-1950* (Vancouver: University of British Columbia, 1988); Smith, *A Historical and Legal Study of Sovereignty in the Canadian North*, Richard J. Diubaldo, *Stefansson and the Canadian Arctic* (Montreal: McGill-Queen’s University Press, 1978); Morris Zaslow, *The Opening of the Canadian North, 1870-1914* (Toronto: McClelland and Stewart Limited, 1971); Morris Zaslow, *The Northward Expansion of Canada, 1914-1967* (Toronto: McClelland and Stewart, 1988); Ken Coates, P. Whitney Lackenbauer, William R. Morrison, and Greg Poelzer, *Arctic Front: Defending Canada in the Far North* (Toronto: Thomas Allen Publishers, 2008); Adam Lajeunesse, “Lock, Stock, and Icebergs? Defining Canadian Sovereignty from Mackenzie King to Stephen Harper,” *CMSS Occasional Paper 1* (Calgary: Centre for Military and Strategic Studies, 2007); Malcolm Templeton, *A Wise Adventure: New Zealand in Antarctica, 1920-1960* (Wellington: Victoria University Press, 2000); Dodds, “The Great Game in Antarctic”; Beck, “British Antarctic Policy in the Early 20th Century”; John McCannon, *Red Arctic: Polar Exploration and the Myth of the North in the Soviet Union 1932-1939* (Oxford: Oxford University Press, 1998); Spencer Apollonio, *Lands That Hold One Spellbound* (Calgary: University of Calgary Press, 2008); Klotz, *America on the Ice*.

⁶⁵ See, for example, Adrian Howkins, “Frozen Empires: A History of the Antarctic Sovereignty Dispute Between Britain, Argentina, and Chile, 1939-1959” (Ph.D. dissertation: University of Texas at Austin,

foundations upon which to build a truly international history, I demonstrate that it is only through a bi-polar framework, which reconstructs the web of connections, intersections and networks that enmeshed the polar regions, that this legal history can be understood without losing the larger currents of practice and thought in the detail of national histories.⁶⁷

Many scholars have argued that comparisons between the Arctic and Antarctic should be avoided. Once past the scenery and low temperatures, commentators suggest they are “poles apart”⁶⁸ that, when grouped together, only allow for simplistic and misleading comparisons.⁶⁹ Geographically, the two polar regions are distinct. While the Arctic is an ocean surrounded by land, the Antarctic is a glacially covered continent, surrounded by an ocean. While parts of the Arctic are home to Indigenous groups, the Antarctic has never experienced large-scale, permanent human settlement. Polar historian Michael Bravo recently pointed to a growing “realization that the political and policy synergies between the polar regions are far less substantial than assumed by previous

2008); Peter Kikkert, “Pragmatism and Cooperation: Canadian-American Defence Activities in the Arctic, 1945-1951” (M.A. thesis: University of Waterloo, 2009); Lackenbauer and Kikkert, “The Dog in the Manger – and Letting Sleeping Dogs Lie”; Jason Kendall Moore, “Thirty-Seven Degrees Frigid: U.S. Chilean Relations and the Spectre of Polar Arrivistes, 1950-1959,” *Diplomacy and Statecraft* 14, no. 4 (2003): 69-93; Jason Kendall Moore, “Maritime Rivalry, Political Intervention and the Race to Antarctica: U.S.-Chilean Relations, 1939-1949,” *Journal of Latin American Studies* 33, no. 4 (2001): 713-738.

⁶⁶ Beck, *The International Politics of Antarctica*; Klaus Dodds, *Geopolitics in Antarctica: Views from the Southern Oceanic Rim* (West Sussex: John Wiley and Sons, 1997); David Day, *Antarctica: A Biography*, Shelagh Grant, *Polar Imperative: A History of Arctic Sovereignty in North America* (Vancouver: Douglas and McIntyre, 2010) (although her focus is Arctic North America, mostly the Canadian North); Tom Griffiths, *Slicing the Silence: Voyaging to Antarctica* (Cambridge: Harvard University Press, 2007); Charles Emmerson, *The Future History of the Arctic* (New York: PublicAffairs, 2010).

⁶⁷ This argument reflects recent historiographical trends in diplomatic and international history. Patrick O’Brien has argued that “Comparative history helps to surmount the complexity and tyranny of local detail, looks into at least two mirrors, and seeks to offer persuasive answers to great variety of questions selected for investigation.” Most themes dealt with at national level can be “repositioned within wider geographies and longer temporal periods.” Patrick O’Brien, “Historiographical Traditions and Modern Imperatives for the Restoration of Global History,” *Journal of Global History* 1, no.1 (2006): 5-6. See also Michael J. Hogan, “The ‘Next Big Thing’: The Future of Diplomatic History in a Global Age,” *Diplomatic History* 28, no. 1 (2004): 1-21; Patrick Manning, *Navigating World History: Historians Create a Global Past* (New York: Palgrave Macmillan, 2003).

⁶⁸ Jim Flegg, Eric Hosking and David Hosking, *Poles Apart* (London: Pelham Books, 1990), 10. See also Antoni Lewkowicz, ed., *Poles Apart: A Study in Contrasts* (Ottawa: University of Ottawa Press, 1997).

⁶⁹ Gail Osherenko and Oran Young, *The Age of the Arctic: Hot Conflicts and Cold Realities* (Cambridge: Cambridge University Press, 1989), 244. Osherenko and Young argue that from a political science perspective, comparisons between the polar regions confuse issues.

generations of polar explorers and scientists.”⁷⁰ While such a conclusion is sound in terms of physical geography, it obscures synergies in law, politics and diplomacy that call for a bi-polar approach.

Some legal experts and political geographers have been willing to examine the connections between the Arctic and Antarctic. Legal scholar Natalia Loukacheva has argued that contemporary “polar law” must be viewed in a “bipolar nexus,”⁷¹ and the work of Donald Rothwell emphasizes similarities in legal responses adopted by states working in the unique conditions of the Arctic and Antarctic.⁷² Political geographer Sanjay Chaturvedi has compared the legal, political, environmental and scientific development of the two regions, noting how deeply “the sovereignty discourse, the geography of imperialism and the geopolitics of state power” have affected the polar regions.⁷³ Furthermore, critical geographer Klaus Dodds frequently examines the geopolitical relationship between the Arctic and Antarctic.⁷⁴ In recent discussions about the future of the circumpolar regions, scholars also cite the Antarctic Treaty as a possible model for the Arctic, highlighting (usually superficially) the continuing connections between the polar regions, particularly in governance structures.⁷⁵ Still, these legal pieces

⁷⁰ Michael Bravo, “Legacies of Polar Science,” in *Legacies and Change in Polar Sciences*, eds. Jessica M. Shadian and Monica Tennberg (Farnham: Ashgate, 2009): xiv. Bravo argued that “the similarities between the polar regions tend to relate significant areas of research in geophysical fields such as geomagnetism, auroral studies, and glaciology, rather than ecosystems, human settlement, cultural history, or politics.”

⁷¹ Natalia Loukacheva, “Introduction to Polar Law,” in *Polar Law Textbook*, ed. Natalia Loukacheva (Copenhagen: Nordic Council of Ministers, 2010), 13, 18-17.

⁷² Rothwell, *The Polar Regions and the Development of International Law*; Donald Rothwell, “Polar Lessons for an Arctic Regime,” *Cooperation and Conflict* 29, no. 1 (1994): 55-76; Alex G. Oude Elferink and Donald Rothwell, eds, *The Law of the Sea and Polar Maritime Delimitation and Jurisdiction* (The Hague: Martinus Nijhoff Publishers, 2001); and Donald Rothwell, “The Polar Regions and the Development of International Law: Contemporary Reflections and Twenty-First Century Challenges,” *The Yearbook of Polar Law* 5, no. 1 (2013): 233-251.

⁷³ Sanjay Chaturvedi, *The Polar Regions: A Political Geography* (Chichester: John Wiley and Sons, 1996), 81.

⁷⁴ Dodds, *Geopolitics in Antarctica*; Dodds, *Pink Ice, Britain and the South Atlantic Empire*; Klaus Dodds and Mark Nuttall, *The Scramble for the Poles* (John Wiley, 2015).

⁷⁵ See, for example, Timo Koivurova, “Alternatives for an Arctic treaty—Evaluation and a new proposal,” *Review of European Community & International Environmental Law* 17, no. 1 (2008): 14-26; Donald Rothwell, “The Arctic in International Law: Time for a New Regime?” *ANU College of Law Research Paper* 08-37 (2008): 1-16; Sebastien Duyck, “Drawing Lessons for Arctic Governance from the Antarctic Treaty System,” *The Yearbook of Polar Law* 3 (2011): 683-713; Oran R Young, “If an Arctic Ocean treaty is not the solution, what is the alternative?” *Polar Record* 47, no. 4 (2011): 327-334; Francesca Cava, David Monsma, and Oran Young, “Workshop on Arctic Governance: Drawing Lessons from the Antarctic Experience,” in *Science Diplomacy: Antarctica, Science, and the Governance of International Spaces*, eds. Paul Arthur Berkman, Michael Lang, David Walton and Oran Young (Washington: Smithsonian Institution

rarely engage with the legal history of the polar regions, and ignore the transnational historical context in which states thought about and applied the law.

In certain fields, historians have also embraced the benefits of examining events in a bi-polar context. For example, histories of polar exploration often highlight the involvement of explorers in both regions, and the lessons they drew from their experiences in these final frontiers.⁷⁶ Histories of science and the environment have often bridged the Arctic and Antarctic, especially accounts of the International Polar Years and International Geophysical Year.⁷⁷ Still, northern studies scholar Urban Wråkberg has recently called for more studies that situate the polar regions in their international settings and illuminate the parallels and diversions in their historical paths.⁷⁸

Several historians have attempted to illustrate the historic political and legal developments that connected the Arctic and Antarctic. Historian Peter Beck explores how Canada's perception of the Antarctic was shaped by its own experiences in the Arctic.⁷⁹ Given Norway's territorial interests and rich history in both the Arctic and Antarctic, Norwegian scholars have often engaged in bi-polar analysis.⁸⁰ In his study of Norway's

Scholarly Press, 2011), 295-297; Cornelia Lüdecke, "Parallel Precedents for the Antarctic Treaty," in *Science Diplomacy: Antarctica, Science, and the Governance of International Spaces*, eds. Paul Arthur Berkman, Michael Lang, David Walton and Oran Young (Washington: Smithsonian Institution Scholarly Press, 2011), 253-263.

⁷⁶ See for instance, Dean Beeby, *In a Crystal Land: Canadian Explorers in Antarctica* (Toronto: University of Toronto Press, 1994); Beekman H. Pool, *Polar Extremes: The World of Lincoln Ellsworth* (Fairbanks: University of Alaska Press, 2002); Simon Nasht, *The Last Explorer: Hubert Wilkins, Hero of the Great Age of Polar Exploration* (New York: Skyhorse Publishing, 2005); Stephen R. Brown, *The Last Viking: The Life of Roald Amundsen* (Boston: De Capo Press, 2012). In a popular history, Kieran Mulvaney has explored the connections between exploration and exploitation in the Arctic and Antarctic. Kieran Mulvaney, *At the Ends of the Earth: A History of the Polar Regions* (Washington: Island Press, 2001).

⁷⁷ See, for example, Susan Barr and Cornelia Lüdecke, eds., *The History of the International Polar Years* (Dordrecht: Springer Heidelberg, 2010); Roger D. Launius, James Rodger Fleming and David DeVorkin, eds., *Globalizing Polar Science: Reconsidering the International Polar and Geophysical Years* (New York: Palgrave Macmillan, 2010); Jessica M. Shadian and Monica Tennberg, eds., *Legacies and Change in Polar Sciences* (Farnham: Ashgate, 2009); Rebecca H. Pincus and Saleem H. Ali, eds., *Diplomacy on Ice: Energy and the Environment in the Arctic and Antarctic* (New Haven: Yale University Press, 2015). Peder Roberts, *The European Antarctic: Science and Strategy in Scandinavia and the British Empire* (New York: Palgrave MacMillan, 2011); and Adrian Howkins, *The Polar Regions: An Environmental History* (Wiley, 2015);

⁷⁸ Urban Wråkberg, "Introduction: Interdisciplinary History," *The Polar Journal* 2, no. 2 (2012): 191-199.

⁷⁹ Peter Beck, "Through Arctic Eyes: Canada and Antarctica, 1945-62," *Arctic* 48, no. 2 (1995): 136-146; Peter Beck, "Identifying National Interests in Antarctica: The Case of Canada," *Polar Record* 32, no. 183 (1996): 335-346; Peter Beck, *Canada as a Bi-Polar Power: Canada's Antarctic Dimension* (Thunder Bay: Lakehead University, 1990).

⁸⁰ For an excellent example, see Einar-Arne Drivenes & Harald Dag Jølle, *Into the Ice: The History of Norway and the Polar Regions* (Gyldendal Akademisk, 2006).

historic polar policy, scholar O.G. Skagestad concluded that early polar politics tied the regions together as states determined how to guide activity in “the formerly unregulated territories on the Earth’s ‘Frozen Frontiers.’”⁸¹ In a master’s thesis, historian Thorleif Thorleifsson explores the Canadian-British-Norwegian negotiations for territory in the Arctic and Antarctic in the late 1920s and notes that the two regions “were intrinsically connected as political moves in either of the continents could, and did, develop legal precedents in the wider bi-polar context.”⁸² Although these authors have adopted a bi-polar outlook, they have conducted their studies through narrow national perspectives.

No previous historian has attempted to research and write a bi-polar study of the *international legal history* of the polar regions. Accordingly, the typical fixation on a single nation’s experience or international interactions regarding one of the poles has obscured the historic legal development of a bi-polar world. Transnational legal ideas and arguments took on different meanings and evolved as they flowed between the poles and across the borders of the polar claimants. State officials and international lawyers understood that legal developments and state practice in the Arctic had a dramatic impact on the Antarctic and vice versa. When they visualized the uncertainties of polar sovereignty in the first half of the twentieth century, they saw the Arctic and Antarctic as a conjoined legal space that suffered from the same problems and demanded similar solutions.

The Law Mattered

A reconstruction of the bi-polar legal landscape illustrates how much the law affected state behaviour in the Arctic and Antarctic.⁸³ In making this point, this dissertation builds

⁸¹ Odd Gunnar Skagestad, *Norsk Polar Politikk: Hovedtrekk og Utviklingslinjer* (Oslo: Dreyers Forlag, 1975), 298-301 cited in Thorleif T. Thorleifsson, “Norway ‘Must Really Drop their Absurd Claims Such as That to the Otto Sverdrup Islands.’ Bi-Polar International Diplomacy: the Sverdrup Islands Question, 1902-1930” (Simon Fraser University: Master’s Thesis, 2006), 3.

⁸² Thorleifsson, “Norway ‘Must Really Drop their Absurd Claims Such as That to the Otto Sverdrup Islands,’” 2.

⁸³ The majority of legal scholars and jurists accept that international law matters in the sense of affecting state behaviour. As Louis Henkin insisted in his seminal study, “almost all nations observe almost all the principles of international law and almost all of their obligations almost all the time.” Louis Henkin, *How Nations Behave: Law and Foreign Policy* (New York: Columbia University Press, 1979), 47. Chayes and Chayes maintain that nations have a propensity to comply with international law. Abram Chayes and Antonia Handler Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements*

off the pioneering work of Donald Rothwell's landmark legal treatise, *The Polar Regions and the Development of International Law*, which argues that the polar regions "represent examples of areas in which international law has been actively applied and adapted to meet special conditions." Given the difficulties of applying international law at the global or regional level, "the polar regions then represent important case studies for an understanding of the development and application of international law."⁸⁴

Generally, in the polar regions international law fulfilled its primary functions in world politics, "providing rules of the game, fostering stable expectations, positing criteria by which national governments and others can act reasonably and justify their action, and providing a process of communication in a crisis."⁸⁵ The law provided the normative framework and a set of resources through which they could justify their claims and behaviour.⁸⁶ As legal scholar Michael Byers has noted, constructivist explanations for the development of international law highlight that the "evolution of shared explanations through communicative processes among technocratic and political elites can give rise, not only to normative structures, but also to associated, deeply felt conceptions of legitimacy, which then contribute to resilience of norms."⁸⁷ In the polar regions, claimant states consistently used legal arguments and explanations to defend

(Harvard: Harvard University Press, 1998). For a recent overview see Shima Baradaran, Michael Findley, Daniel Nielson and J.C. Sharman, "Does International Law Matter?" *Minnesota Law Review* 97 (2013): 743-837. Many scholars have also agreed with Wilhelm Grewe's assessment that in the field of foreign relations, "international law is normally more a potential than an actual factor." Grewe, "The Role of International Law in Diplomatic Practice," 22-37. See also Jack Goldsmith and Eric Posner, *The Limits of International Law* (Oxford: Oxford University Press, 2005), (a realist critique denying that international law can influence state behaviour).

⁸⁴ Rothwell, *The Polar Regions and the Development of International Law*, 4.

⁸⁵ Anne-Maria Slaughter, "International Law and International Relations Theory: A Dual Agenda," *American Journal of International Law* 87 (1993): 205.

⁸⁶ This argument adopts the approach towards international law taken by the English School of International Relations. As Peter Wilson has concluded, "By providing a reasonably clear guide as to what is the done thing, and what is not, in any given set of circumstances, of what can be expected and what not, and what will be tolerated and what will likely be met with a disapproving, perhaps vociferous, response, law helps to reduce the degree of unpredictability in international affairs." Peter Wilson, "The English School's Approach to International Law," in *Theorising International Society: English School Methods*, ed. Cornelia Navari (New York: Palgrave Macmillan, 2009), 168. See also Alan James, "Law and Order in International Society," in *The Bases of International Order: Essays in Honour of C. A. W. Manning*, ed. Alan James (London: Oxford University Press, 1973), 60-84.

⁸⁷ Michael Byers, "The Complexities of Foundational Change," in *United States Hegemony and the Foundations of International Law*, eds. Michael Byers and Georg Nolte (Cambridge: Cambridge University Press, 2003), 2. See also Alexander Wendt, *Social Theory of International Politics* (Cambridge: Cambridge University Press, 1999); and Brunnee and Toope, *Legitimacy and Legality in International Law*.

their territorial title and attain the recognition of other powers.⁸⁸ When disputes arose, states generally engaged legal dialogues rather than shows of force (although the trilateral disagreement between Britain, Argentina and Chile veered towards the latter).⁸⁹

The same unique polar environment that made the application of traditional rules so difficult also gave the law added importance. States struggled to display a preponderance of power, or even a modicum of control, that would clearly indicate state ownership over the harsh, uninhabited polar space. Adding to the problem was the reluctance of states to invest in the study, administration or development of the polar regions, which weakened the official presence within these claims even more. Legal arguments and justifications provided a significant and cheap tool for polar claimant's looking to support territorial claims in which they had little physical presence.

As a result, within the state decision-making apparatus, international law played a significant – often leading – role.⁹⁰ Legal scholars Anthony Carty and Richard Smith

⁸⁸ Steven Ratner has argued that persuasion is an essential ingredient in state compliance with international law. He explains persuasion as the Persuasion is the “process of social interaction whereby one actor seeks to convince another to believe or do something through principled rational arguments and interactions, without any over coercion.” Steven Ratner, “Persuading to Comply: On the Deployment and Avoidance of Legal Argumentation,” in *Interdisciplinary Perspectives on International Law and International Relations*, eds. Jeffry Dunoff and Mark Pollack (Cambridge: Cambridge University Press, 2013), 568-590.

⁸⁹ This reflects the words of Christian Reus-Smit generally rang true, “Legal right is as much a power resource as guns and money.” Christian Reus-Smit, *The Politics of International Law* (Cambridge: Cambridge University Press, 2004), 2.

⁹⁰ Scholarship on legal advisors and the impact of legal advice on national policy-making generally ask two core questions: How did these legal advisers interact with policy-makers? How did they engage with the field of international law more broadly? See Ian Sinclair, “The Practice of International Law: The Foreign and Commonwealth Office,” in *International Law: Teaching and Practice*, ed. Bin Cheng (London: Stevens, 1982), 123-134; Arthur Watts, “International Law and International Relations: United Kingdom Practice,” *European Journal of International Law* 2, no. 1 (1991): 157-164; Clive Parry, “Foreign Policy and International Law,” in *British Foreign Policy Under Sir Edward Grey*, ed. F.H. Hinsley (Cambridge: Cambridge University Press, 1977), 89-112; Geoffrey Marston, “The Evidences of British State Practice in the Field of International Law,” in *Perestroika and International Law: Current Anglo-Soviet Approaches to International Law*, eds. Anthony Carty and Gennady Danilenko (New York: St. Martin's Press, 1990), 27-47; Anthony Carty and Richard Smith, eds., *Sir Gerald Fitzmaurice and the World Crisis: A Legal Adviser at the Foreign Office, 1932–1945* (The Hague: Kluwer Law International, 2000); Richard Bilder, “The Office of the Legal Adviser: The State Department Lawyer and Foreign Affairs,” *The American Journal of International Law* 56, no. 3 (1962): 633-684; Michael P. Scharf and Paul Williams, eds., *Shaping Foreign Policy in Times of Crisis: The Role of International Law and the State Department Legal Adviser* (Cambridge: Cambridge University Press, 2010); Harold Hongjiu Koh, “The State Department Legal Adviser's Office: Eight Decades in Peace and War,” *Faculty Scholarship Series* (2012): 1748-1780; F.D. Berman, “The International Lawyer: Inside and Outside Foreign Ministries,” in *Two Worlds of International Relations: Academics, Practitioners and the Trade in Ideas*, eds. Pamela Beshoff and Christopher Hill (London: Routledge, 2005), 79-92; Antonio Cassese, “The Role of Legal Adviser in

have argued that legal advisers usually operate in the context of decided policy, and their job generally involves checking and re-checking the application of the law to strengthen existing strategies.⁹¹ In state deliberations on the polar regions, however, legal considerations often guided decision-making, decided internal debates and created policy. The legal advice offered by officials such as Charles Cheney Hyde, solicitor of the State Department between 1923 and 1925, Foreign Office legal advisers Cecil Hurst, William Eric Beckett and Gerald Fitzmaurice, and geographers Samuel Whittmore Boggs and James White in the U.S. and Canada, had a profound impact on the formation of national polar policies and on the broader bi-polar legal landscape. The legal analysis offered by state officials and international lawyers, for instance, explains Canada's establishment of police posts on uninhabited islands where there was no one to police, state support of polar science and why permanent human inhabitation came to the Antarctic continent.

The ambiguity and complexity of the law throughout the period covered in this dissertation only increased the importance of legal appraisals as states came to grips with polar sovereignty. Without a clear formula for territorial acquisition, state officials and legal experts could formulate creative arguments in defence of territorial title. This ambiguity, however, served as a double-edged sword. Without clear guidelines for the establishment of sovereignty, territorial disputes hinged on which state displayed the stronger title – a reality that worried many officials. For example, the indeterminacy of the law allowed the U.S. to impose the standards of the Hughes Doctrine on the polar regions. In this uncertain context, states recognized that official foreign recognition – particularly from powerful states such as the U.S. and Britain – offered the only sure way of securing sovereignty. As a result, states had to determine whether to aggressively seek international recognition and risk inspiring official foreign rejection, or quietly strengthen their position and hope that in time other countries would consider it unchallengeable. This dilemma, and the search for alternatives, shaped state polar policy deliberations for decades.

Ensuring that Foreign Policy Conforms to International Legal Standards,” *Michigan Journal of International Law* 14 (1992): 139-217; Robbie Sabel, “The Role of the Legal Advisor in Diplomacy,” *Diplomacy and Statecraft* 8, no. 1 (1997): 1-9.

⁹¹ Carty and Smith, *Sir Gerald Fitzmaurice and the World Crisis*, 20-21.

Alongside the uncertainty of the rules, this dissertation shows how considerations of time and technological developments, within the context of Judge Max Huber's theory of intertemporal law, played a profound role in the development of state legal policies on territorial title in the polar regions – a dynamic that previous scholars have failed to examine.⁹² Huber advanced this theory during his arbitration of the *Palmas Island* case in 1928, through which he sought to explain how the changing requirements of certain legal principles should be applied to territorial disputes. His important distinction between the creation of a right and the maintenance of a right stressed the malleability of law in concept and practice.⁹³ According to Daniel-Erasmus Khan, Huber argued that “in concrete terms, acts must be assessed against the law of the time when performed...but at the same time the claimant...must keep up with the law” as it evolved over time to “maintain their title.” This theory highlighted Huber's belief that lawyers must strive for a “dynamic understanding of international law in accordance with the changing international society rather than cling to a static interpretation of rules.”⁹⁴ By implication, no state title could be considered perfected for all time, particularly if a country's occupation had not been continuous or if it had exercised control and administrative functions inconsistently.⁹⁵ The continued validity of a territorial right depended on a state keeping up with developments in the changing requirements of international law.

⁹² Time's impact on international law requires more study generally. See Edward McWhinney, “The Time Dimension in International Law: Historical Relativism and Intertemporal Law,” in *Essays in International Law in Honour of Judge Manfred Lachs*, ed. J. Makarczyk (The Hague: Martinus Nijhoff, 1984), 179-199; Rosalyn Higgins, “Time and Law: International Perspectives on an Old Problem,” *The International and Comparative Law Quarterly* 46, no. 3 (1997): 501-520; Yoshifumi Tanaka, “Reflections on Time Elements in the International Law of the Environment,” *Zeitschrift fuer Auslaendisches Oeffentliches Recht und Voelkerrecht* 73, no. 2 (2013): 139-175.

⁹³ “As regards the question which of different legal systems prevailing at successive periods is to be applied in a particular case (the so-called intertemporal law), a distinction must be made between the creation of rights and the existence of rights. The same principle which subjects the acts creative of a right to the law in force at the time the right arises, demands that the existence of the right, in other words its continued manifestation, shall follow the conditions required by the evolution of law.” *Island of Palmas Arbitration*, Award of 4 April 1928, 2 *UNRIAA*, 845.

⁹⁴ Daniel-Erasmus Khan, “Max Huber as Arbitrator: The Palmas Case and Other Arbitrations,” *The European Journal of International Law* 18, no. 1 (2007): 167.

⁹⁵ Huber ruled that, “A distinction must be made between the creation of rights and the existence of rights. The same principle which subjects the act creative of a right to the law in force at the time the right arises, demands that the existence of the right, in other words its continued manifestation, shall follow the conditions required by the evolution of law.” T.O. Elias, “The Doctrine of Intertemporal Law,” *The American Journal of International Law* 74, no. 2 (1980): 292.

Huber's theory of intertemporal law has faced criticism since he released it in 1928, with legal scholars arguing that its application would "encourage spurious claims and... foster widespread uncertainty as to title to territory" and threaten the stability of the international legal order.⁹⁶ For state officials involved in polar claims, however, Huber's theory raised troublesome possibilities. Every lawyer understood the indeterminate nature of international law and Huber's intertemporal theory underlined the impact that changes in the law could have on territorial claims. Consequently, beyond considering the contemporary requirements of effective occupation, officials also had to worry about what the requirements might become due to environmental changes or technological innovation. Judge Dionisio Anzilotti's dissenting opinion in the *Eastern Greenland* case captured this sentiment when it argued, "natural conditions prevailing in Greenland and their importance changed appreciably as a result of technical improvements in navigation which opened up to human activities a part of that country, especially the East coast, which previously, although known, had been practically inaccessible." Due to the impact of technological changes, "the question of Danish sovereignty over Greenland presented itself in a new light."⁹⁷ Officials considered the impact that long-range aircraft, mechanical vehicles, advanced icebreakers and stations that allowed people to overwinter relatively comfortably in the polar regions would have on the requirements of occupation and territorial acquisition. All state officials worried about how the law might evolve in the decades that followed Huber's ruling in the *Palmas Island* case. It only added further tension and confusion to the anomalous legal space of the polar regions.

The tension created by actual and potential changes to the law is evident in Chapter 1, which sets an essential context by summarizing the history of polar

⁹⁶ Martin Dixon, *Textbook on International Law*, 7th Ed. (Oxford: Oxford University Press, 2013), 167. According to Professor Malanczuk, "...the wide terms in which Max Huber expressed himself seem to virtually deny the effect of the rule that the validity of an acquisition of territory depends on the law in force at the time of the alleged acquisition." In the past conquest could confer title on the conquering state. In the present time, it does not. "Do old titles based on conquest now become void?" Peter Malanczuk, *Akehurst's Modern Introduction to International Law*, 7th Ed. (London, Routledge 1996), 156. For critiques of Huber's theory of intertemporal law, see Philip C. Jessup, "The Palmas Island Arbitration," *The American Journal of International Law* 22, no. 4 (1928): 740; Anthony D'Amato, "International Law, Intertemporal Problems," in *Encyclopedia of Public International Law* 2, ed. Rudolf Bernhardt (Amsterdam: North Holland, 1992), 1234-1236.

⁹⁷ Dissenting Opinion of M. Anzilotti, *Eastern Greenland* (Denmark v. Norway) (1933) Permanent Court of International Justice (PCIJ), Series A-B, No. 53, 84.

exploration and the development of the international law on territorial acquisition. European explorers ventured into the polar regions for commercial prospects, resource exploitation and national prestige. Although these explorers often planted flags and held elaborate ceremonies to claim new territory, at the official level states had little desire to acquire polar territory and rarely thought about the requirements of polar sovereignty. Nevertheless, discovery, acts of possession and flag planting formed the foundation of all territorial claims in the polar regions and played an important role as states and legal scholars finally started to consider polar sovereignty at the turn of the twentieth century. While the unclear and ambiguous international law on territorial acquisition provided a poor roadmap for states hoping to secure polar claims, it clearly indicated that discovery was not enough to perfect a title, even in the Arctic and Antarctic. Hampered by underdeveloped rules, state officials and legal experts explored the additional steps countries would have to take to support their polar claims. This first wave of legal appraisals debated whether states had to support their claims through physical settlement, or if a measure of control or arguments of contiguity would suffice. Another stream of legal thinking questioned if polar territory could be brought under state sovereignty at all, or if parts of the polar regions should be considered a common possession of all mankind.

Chapter 2, stretching from 1907 to 1924, lays out the polar opposite polar policies that came to dominate the legal space of the Arctic and Antarctic in the interwar years: the sector principle and the Hughes Doctrine. By bringing disparate literatures and new primary research into dialogue, this chapter charts how the sector principle evolved from its initial suggestion by Canadian Senator Pascal Poirier in 1907, into a transnational legal idea used in Britain's Letters Patent for the FID in 1917, and the Ross Dependency claim of 1923. It also explains the complex origins of the Hughes Doctrine, which the U.S. State Department crafted in 1924. This chapter argues that these polar policies developed out of a British tradition of international law that emphasized state practice and the classical legal ideology held by many of the decision-makers in Washington. It also maintains that the search for solutions to the problems of polar sovereignty must be understood against the backdrop of the dynamic and flexible character of the international legal landscape that took shape during the interwar years. In a flexible legal system attuned to state interests and practices, and constructed to resolve international issues

expediently and efficiently, there was room to consider a new polar legal regime based on the sector principle.

Chapter 3 argues that 1925 and 1926 constituted pivotal years in the legal development of the polar regions, suggesting the need for a new periodization. During these two years, both Canada and the Soviet Union publicly declared their use of the sector principle. At the same time, an internal debate – which scholars have ignored or overlooked to date – raged amongst British officials about whether London should continue to utilize the sector principle. This argument forced officials to articulate clear and defensible positions on polar sovereignty and the sector principle. The debate culminated in the Imperial Conference of 1926, where British and Commonwealth officials adopted a bi-polar legal policy based on the sector principle, and a new version of effective occupation for the polar regions that emphasized control over the coastline and other points of access leading to a polar interior – whether it be the Arctic Archipelago or the Antarctic interior. In the harsh polar environment, they insisted that control could consist of the occasional visit by state officials, administrative acts, legislation and, in the Canadian context, a small number of occupied police posts. More than ever, British and Commonwealth officials recognized the legal and political connections that bound the Arctic and Antarctic together, and sought bi-polar solutions. They insisted that a regime based on their understanding of the sector principle was the best answer to the anomalous legal space of the polar regions.

At the same time, the Norwegian government arose as a defender of a more stringent version of effective occupation and started to question the polar claims of Britain, the Dominions and the Soviet Union. While Norway anticipated that the Americans might use the Hughes Doctrine to protest the Canadian and Soviet sector claims, Washington remained officially silent, although they seriously considered challenging Canada's sovereignty over the northern islands of the Archipelago. Within the State Department, officials wrestled with the issue of polar sovereignty, what to do about the sector principle, and how to apply existing international law in the polar regions. This chapter reveals that the State Department's confusion and internal debates inhibited its ability to develop a definite policy towards polar sovereignty. At the same

time, political considerations played an important role in constraining America's use of the Hughes Doctrine, a trend that would repeat over the ensuing decades. All of these factors allowed Britain to emerge as the dominant shaper of the bi-polar legal landscape in the interwar years.

Nevertheless, in the late 1920s, the sector principle remained an untested doctrine. Scholars have done little to flesh out state thinking on the sector principle after governments initially applied it to make territorial claims. To address this oversight, Chapter 4 provides a fresh appraisal of the archival record to reveal how British and Commonwealth officials came to believe that the principle stood on the verge of general acceptance as a rule of customary international law for the polar regions in the early 1930s. They based their assessment on the results of Britain's bi-polar diplomacy and negotiations, and the sustained silence of the international community, which officials took as tacit acquiescence to the use of the sector principle and their territorial claims. The continued official silence of the U.S. in particular invested British and Commonwealth officials with hope in the future of the sector principle. While the State Department considered using the Hughes Doctrine to challenge Britain's Antarctic claims, the political repercussions of such an action and its continued struggle with the meaning of polar sovereignty once again inhibited its actions.

As this chapter reveals, only Norway remained a persistent objector to the sector principle as it launched renewed attempts to safeguard its interests in the polar regions after 1926. Norway acknowledged the need to sustain good relations with Britain, however, and proved amenable to negotiations and diplomacy, promising to respect the British Empire's territorial interests in the Antarctic and recognizing Canada's sovereignty over all the Arctic Archipelago. As silence, negotiations, and the passage of time strengthened the legal positions of Canada, Britain, New Zealand and Australia in the polar regions, optimism and confidence in the polar claims of the members of the British Empire and in the sector principle culminated with the establishment of the Australian Antarctic Territory in 1933. British and Commonwealth officials, in the context of the time, anticipated that the broader world might accept the sector principle as the basis of a bi-polar legal regime.

Chapter 5 engages with broader developments in the law on territorial acquisition during the interwar years and their impact on state legal understandings of polar sovereignty. The *Palmas Island* (1928), *Clipperton Island* (1931) and *Eastern Greenland* (1933) cases all dealt with title over uninhabited, or sparsely populated territory, and became the touchstones for all those looking into territorial sovereignty. Many scholars insist that the judicial decisions brought instant clarification to the requirements of territorial acquisition – allowing states to identify the strengths and weaknesses of their claims. However, this chapter reevaluates the discussions and legal appraisals at the time alongside subsequent scholarly assessments to show how confusion and uncertainty continued to define the rules on territorial acquisition. While these three cases (especially *Eastern Greenland*) clarified elements of the law and set a modest threshold for “effective occupation” in regions like the Arctic and Antarctic, they did not lay out specific requirements or establish a simple formula for polar sovereignty. Huber’s theory of intertemporal law further confused the legal situation for officials and international lawyers studying polar territorial claims. Accordingly, the international law on territorial acquisition remained unsettled in the eyes of legal authorities at the time and the judicial nature of polar sovereignty remained as ambiguous as ever. The elusiveness of the law allowed states to craft multiple versions of polar sovereignty, and the bi-polar legal landscape continued to be filled with different interpretations, principles and justifications.

Chapter 6 demonstrates the impact that the U.S. had on the bi-polar legal landscape once it finally decided to engage with the polar regions. Spurred on by the creation of the Australian Antarctic Territory, the activities of American explorers, and growing international interest in the Antarctic, U.S. officials finally considered a more active polar policy. Starting in 1934, the State Department started to take stronger action to safeguard its legal position, eventually reserving its rights in the sectors claimed by Britain, New Zealand, Australia, and France, and insisting that territorial claims required permanent physical occupancy and use. Internally, guided by the arguments of former solicitor Charles Cheney Hyde, the State Department considered rejecting the Hughes Doctrine and adopting the lesser requirements it labeled constructive occupation. For the other polar claimants, however, the confident public American espousal of the Hughes

Doctrine began to shift legal opinions. Britain and the Commonwealth remained tied to the sector principle, a position bolstered by the official recognition that the British, Australian and New Zealand claims received from Norway and France, and the latter's formal use of the principle. Still, the American legal arguments and developments in aviation slowly led to more questions about the validity of the polar sectors.

Chapter 7 reveals the pivotal but underappreciated role that Franklin D. Roosevelt played in the development of American polar legal policy and polar sovereignty. Roosevelt singlehandedly caused the State Department to abruptly shift its support from constructive occupation back to the Hughes Doctrine. This chapter connects Roosevelt's experiences with territorial acquisition in the Pacific, where he consistently emphasized permanent settlement, to his approach to polar sovereignty. Through his support of the Hughes Doctrine and its physical manifestation in the official United States Antarctic Service Expedition (USASE), the President inspired the permanent human occupation of the Antarctic continent. At the same time, Roosevelt's private suggestion that the U.S. utilize a "new form of sovereignty" to claim territory in the Antarctic, such as a condominium or joint control (which also flowed out of his Pacific experiences), significantly impacted the region's legal evolution and laid the groundwork for the Antarctic Treaty in the State Department. Through these developments, the U.S. supplanted Britain as the primary architect of the polar legal landscape.

Roosevelt and the Second World War changed the political and legal context of the polar regions. This dissertation maps out the dramatic influence that the American emphasis on permanent occupation had on the legal policies of the other polar claimants. Given how much stock arbitrators and the Permanent Court of International Justice placed on which state displayed a stronger title during territorial disputes, the American presence was worrisome enough on its own. The USASE also inspired a shift in broader understandings about the legal requirements of polar sovereignty. In the British mindset, even though the USASE had lasted less than two years, the American effort and concurrent technological developments changed the rules by showcasing the possibilities of polar settlement. Foreign Office legal adviser William Eric Beckett concluded that if countries wanted to maintain their title, they should also establish a permanent presence.

This conclusion proved particularly pertinent for Britain when Chile and Argentina challenged its position in the FID during the war. The emphasis on a permanent physical presence also struck home in wartime Ottawa, where the government faced a massive influx of American military and civilian personnel into the Canadian North during the war. Although these activities never spread into the High Arctic, they inspired concern about the legal status of the unoccupied northern islands, which Washington had never recognized as Canadian territory. Although the Chileans and Argentineans introduced a bevy of new arguments and concepts into the legal dialogue on polar sovereignty, and other claimant states continued to utilize the sector principle and contiguity arguments, Roosevelt and the USASE left an indelible mark on the bi-polar legal landscape. From this point, many state officials and legal advisers considered widespread permanent physical occupancy to be an essential requirement of polar sovereignty.

With this need for permanent physical presence established as the dominant feature of the bi-polar legal landscape, Chapter 8 shows how the use and development of claimed territory became the other keys to polar sovereignty. The polar claimants deemed the establishment of presence for the sake of presence far less impactful than the establishment of presence for a purpose. Legal justifications played an increasingly important role in the Antarctic, as territorial competition heated up. Extensive legal argumentation became a staple of the dispute between Argentina, Chile and Britain over the FID. This chapter reveals how Britain leaned increasingly on legal maneuvers and strategies as it perceived its position weakening in the dispute. On several occasions after 1947, Britain invited Argentina and Chile to take the dispute to the International Court of Justice, where London thought it would have the advantage. While its overtures were consistently rejected, Britain still brought the case unilaterally to the ICJ in 1955 for legal and moral reasons. The failure of the court to hear the case and elucidate on the requirements and principles of sovereignty in the Antarctic context ensured that the region remained an anomalous legal space, a pivotal requirement for the creation of the Antarctic Treaty of 1959, which effectively froze all territorial claims and rights.

This chapter also maps the different legal trajectories that the Arctic and the Antarctic embarked upon after 1947. During the early Cold War, the U.S. pushed for

access to Canada's Arctic islands to build defence facilities. Largely out of sovereignty concerns, Canadian officials proved cautious and slow in approving the projects. In the negotiations that followed, the U.S. could have invoked the Hughes Doctrine and challenged Canada's use of the sector principle and its claims to the unoccupied islands of the Arctic Archipelago. Once again, however, political considerations constrained America's use of the doctrine. Rather than jeopardize its strategic and political relationship with Canada, the U.S. recognized Canadian sovereignty over the Arctic Archipelago. At the same time, the U.S. avoided publicizing this recognition, given how much it would have strengthened the sector principle in other geographical contexts, jeopardizing the evolving U.S. legal position in the Antarctic. Nevertheless, the United States quietly and privately conceded to Canada what it was not prepared to acknowledge in international law more generally: a more relaxed interpretation of effective occupation and ownership of territory in polar regions than the Hughes Doctrine allowed.

The American recognition of Canada's sovereignty settled the last potential source of a large-scale terrestrial territorial dispute in the Arctic. In sharp contrast, American recognition of Antarctic claims remained elusive. Nevertheless, political considerations continued to keep the Americans from annexing their own Antarctic territory. As a result, starting in 1948 Washington consistently worked towards joint control or the internationalization of the south polar region. Washington's decision to recognize no Antarctic claims and make none for the U.S. represents another essential pre-condition of the Antarctic Treaty.

The legal paths of the Arctic and Antarctic had diverged, a reality officials and legal experts only slowly started to recognize. At the beginning of the twentieth century, the legal status of territorial claims to the uninhabited spaces of the Arctic and Antarctic was virtually identical. By 1955, however, terrestrial claims in the Arctic had been fixed. Four years later, those in the Antarctic would be frozen.

Chapter 1

1 Explorers and Lawyers: Discovering Land and Law in the Polar Regions

On 6 September 1909, shortly after sailing into Indian Harbour, Labrador, American explorer Robert Peary sent a telegraph to the *New York Times* announcing: “I have the pole, April sixth.” After hundreds of years and dozens of failed attempts by explorers of various nationalities, Peary told the world that he had finally “nailed” the stars and stripes to the North Pole, and taken one of the greatest and last prizes of exploration on the planet.¹ Unfortunately for the explorer, another American had already taken this trophy. Just a week before, the *New York Herald* told the world that Dr. Frederick Cook discovered the Pole in April 1908, a full year before Peary.² Within days, both men started to attack and discredit the other, initiating a war of words that filled the papers in the following weeks.³ On 13 September, however, Captain Robert Falcon Scott, the experienced Antarctic explorer of the Royal Navy, stole the spotlight with his own startling declaration. Riding the wave of publicity created by the discovery of the North Pole, and cognizant of potential challenges from proposed German, American and Japanese expeditions, Scott promised to “reach the South Pole, and to secure for the British Empire the honour of that achievement.”⁴ In a matter of weeks the world had witnessed the discovery of one Pole, and a promise to conquer the other.

¹ “Peary Discovers the North Pole After Eight Trials in 23 Years,” *New York Times*, 7 September 1909. The message Peary sent to the New York office of the Associated Press read, “Stars and Stripes nailed to the Pole.” PEARY.

² “The North Pole is Discovered by Dr. Frederick Cook,” *New York Herald*, 2 September 1909.

³ The battle between Peary and Cook ignited a controversy that is still waged by historians, although there is a growing consensus that both men may have been frauds. See, for instance, Dennis Rawlings, *Peary at the North Pole: Fact or Fiction* (Washington: Robert B Luce Inc., 1973); Bruce Henderson, *True North: Peary, Cook, and the Race to the Pole* (New York: W.W. Norton & Company, 2005); Nancy Fogelson, *Arctic Exploration and International Relations, 1900-1932* (Fairbanks: University of Alaska Press, 1992); Robert Bryce, *Cook and Peary: The Polar Controversy, Resolved* (Mechanicsburg: Stackpole Books, 1997); Pierre Berton, *The Arctic Grail: The Quest for the North West Passage and the North Pole, 1818-1909* (Toronto: McClelland & Stewart, 1988).

⁴ Quoted in David Crane, *Scott of the Antarctic: A Life of Courage and Tragedy in the Extreme South* (London: HarperCollins, 2005), 397. Scott’s intentions were first announced by *Times* and *Daily Mail*. For the motives behind Scott’s announcement, see Roland Huntford, *The Last Place on Earth: Scott and Amundsen’s Race to the South Pole* (New York: Random House Inc, 1999), 236-237.

While the public thirsted for the high drama of polar exploration and enjoyed the stories of adventure, a small group of international lawyers contemplated the new and complicated legal issues created by the actions of Peary, Cook, Scott, and explorers like them. A flurry of activity in the polar regions during the first decade of the twentieth century worked to illuminate the many blank spots in the map of the Arctic or slowly penetrated the little known Antarctic continent, one small piece at a time. “Acts of discovery are never politically innocent,” scholar Klaus Dodds has noted.⁵ When these explorers discovered new lands (or ice), or re-discovered old ones, they raised their national flags and held elaborate ceremonies claiming large parts of the Arctic and Antarctic. Upon Peary’s return to the U.S., for instance, he informed President William Howard Taft that he claimed the North Pole for his country and was pleased to present the trophy to the President. Taft rejected Peary’s “generous offer” explaining he “did not know exactly what [he] could do with it.”⁶ The proffered gift raised the question: what would happen when states decided they wanted these areas, supporting acts of discovery with official polar claims? What about the states that already had?

In the months following September 1909, three prominent international lawyers – James Brown Scott, Thomas Willing Balch and René Dollot (who used the pseudonym René Waultrin) – published their opinions.⁷ Several lawyers had written about the legal status of Svalbard, an archipelago midway between Norway and the North Pole claimed by at least five different countries, and whether it was possible to annex ice in the same manner as land.⁸ The Scott, Balch and Dollot opinions represented the first time legal scholars attempted to articulate and clarify the judicial nature of polar sovereignty more

⁵ Klaus Dodds, *The Antarctic: A Very Short Introduction* (Oxford: Oxford University Press, 2012); 23.

⁶ Quoted in Fogelson, *Arctic Exploration and International Relations*, 37.

⁷ See James Brown Scott, “Arctic Exploration and International Law,” *The American Journal of International Law* 3, no. 4 (1909): 928-941; Thomas Willing Balch, “The Arctic and Antarctic Regions and the Law of Nations,” *The American Journal of International Law* 4, no. 2 (1910): 265-275; René Waultrin, “Le probleme de la souverainete des poles,” *Revue Générale de Droit International Public* 16 (1909): 649-660. Dollot also had an earlier article that largely dealt with Spitsbergen. Waultrin, “La question de la souveraineté des terres arctiques,” *Revue Générale de Droit International Public* 15 (1908): 78-125, 185-209 and 401-423

⁸ Thomas Baty, “Spitzbergen,” *Law Magazine and Review* 33 (1907): 83-88; C. Piccioni, “L’organisation du Spitzberg,” *Revue Générale de Droit International Public* 16 (1909): 117-134; Louis Rolland, “Alaska; maison de jeu etablie sur les glaces au dela de la limite des eaux territoriales,” *Revue Générale de Droit International Public* 11 (1904): 340-345.

generally, at least outside the narrow confines of government offices and research departments. What rights did a state acquire when one of its citizens discovered new land and performed purely symbolic acts, such as planting a flag or firing a volley? What if the explorer spotted new territory but made no attempt to go ashore? How could states extend their control over inhospitable and often uninhabitable lands? Could countries actually claim the Poles?

As these pioneers of polar law looked for answers, they examined not only the activities of the previous decade, but also centuries of polar exploration and developments in international law stretching back to the Roman Empire. European explorers had ventured into the polar regions for scientific interest, commercial prospects, resource exploitation and national prestige. Historically, territorial claims were often the byproduct of polar exploration rather than the primary goal. Even though state officials rarely grappled with the problems of polar sovereignty, they understood that these acts of discovery, flag plantings and ceremonies of possession were at the root of all territorial claims. Therefore, any reconstruction of the bi-polar legal landscape must begin with exploration and the patchwork of claims – both private and state supported – that resulted.

Scholars must also account for the fact that the polar regions remained outside the evolving legal discourse on territorial acquisition. Only in the twentieth century, when whaling, exploration and international competition increased state interest in polar territorial claims, did the worlds of the lawyer and that of the polar explorer come together. Unfortunately, when lawyers tried to visualize the unique natural and political environment of the polar regions as legal space, the ambiguous and confused body of law on territorial acquisition hampered their efforts.

1.1 Into Great Unknown: Polar Exploration, 1550-1800

In the first European forays into the Arctic in the sixteenth century explorers searched for a commercial route to the Orient: either a Northwest Passage above northern North America, or a Northeast Passage along the coast of Siberia. While on their quests, sailors often stumbled upon new land that they usually claimed for their monarchs, even if their

missions were privately funded. During three expeditions in the late 1570s, Martin Frobisher rediscovered Greenland (the Norse abandoned the area in the early 15th century), sailed into the bay on western Baffin Island that now bears his name, and claimed the region for Queen Elizabeth I. By 1620, John Davis, Robert Bylot and William Baffin followed Frobisher's route and pushed further north, into Davis Strait, Smith, Jones and Lancaster Sounds and charted the eastern coastline of Baffin Island. Despite these achievements, the English efforts relocated to the southerly reaches of the North American archipelago, where Henry Hudson found his enormous bay in 1610.⁹ By the end of the century, the newly formed Hudson's Bay Company dominated exploration in the North, but its focus on the subarctic fur trade left little incentive to support forays into the Arctic Archipelago.¹⁰

As English sailors slowly pushed into the North American Arctic, a more diverse cast of explorers moved into the northern waters above Europe and Russia. Starting in the mid-sixteenth century, several English navigators tried to locate the mouth of the Northeast Passage north of the Kola Peninsula, but by 1581 worsening relations between Queen Elizabeth I and Tsar Ivan IV cooled English interest.¹¹ In their place, William Barents, an experienced Dutch navigator, made three voyages into the sea that now bears his name between 1594 and 1596. On the first he reached the western coast of Novaya Zemlya and on the third he discovered Bear Island and the Spitsbergen archipelago¹² (though he perished on the ice soon after).¹³ Several other expeditions searched for the

⁹ Andrew Taylor, *Geographical Discovery and Exploration in the Queen Elizabeth Islands* (Ottawa: Queen's Printer, 1955), 9.

¹⁰ Peter Newman, *Empire of the Bay: An Illustrated History of the Hudson's Bay Company* (Markham: Viking, 1989), 129. The HBC's 1670 charter included a provision to search for a Northwest Passage, but no Company employees actually ventured into the archipelago for the next century. Explorers like Alexander Mackenzie and Samuel Hearne did explore the major waterways to the Arctic Coast, the Mackenzie and Coppermine, greatly assisting later exploration efforts.

¹¹ The first English expedition left in 1553, under Sir Hugh Willoughby, but all died after taking shelter on the Kola Peninsula. William James Mills, *Exploring Polar Frontiers: A Historical Encyclopedia* (Santa Barbara: ABC Clio, 2003), 473.

¹² The name Spitsbergen, meaning "pointed mountains" in Dutch was originally applied to the entire archipelago until Norway officially adopted the name Svalbard for the archipelago in 1925. Spitsbergen is Svalbard's largest island.

¹³ See, Gerrit de Veer, *Three Voyages of William Barents to the Arctic Regions* (1594, 1596 and 1596) (Cambridge: Cambridge University Press, 2010). Barents and his men spent a winter on Novaya Zemlya before attempting to reach the Kola Peninsula in their small boats. While Barents perished on the ice, most of his men survived the ordeal.

Passage in the following decades, but the Arctic ice – particularly around Novaya Zemlya – defeated them all.¹⁴

No one conquered either Passage to reach the wealth of the Orient. Explorers found a different source of riches – reporting a bounty of whales in the Arctic waters that prompted a rush of whalers in the early seventeenth century. In 1614, after establishing shore stations on Spitsbergen, English whalers of the Muscovy Company attempted to claim exclusive rights to the entire archipelago based on their occupation and their annexation of the island in the name of King James I.¹⁵ Danish, French, and Dutch whalers, who claimed Spitsbergen based on Barents' sighting, rejected the English claim. After ferocious competition, the whalers compromised and partitioned the island without any country establishing its sovereignty.¹⁶ Soon after, controversy erupted over Jan Mayen, an island located 450 km east of Greenland, but Dutch whalers with the *Noordsche Compagnie* settled the issue when they established stations on its rocky shore. Over-hunting eradicated the local bowhead whale population and by 1640 the Dutch abandoned Jan Mayen, which would not be visited again for two centuries.¹⁷ The search for new whale populations to harvest led Dutch and English whalers to expand their activities to Davis Strait and the western coast of Greenland, although regular and intensive whaling did not begin there until 1719.¹⁸ In a century, the whalers expanded the European map of the Arctic, settled some of its islands for the first time, and made the northern waters busier than ever.

While Frobisher “rediscovered” Greenland and whalers busily plied the waters around it, the Kingdom of Denmark-Norway maintained its claim to the enormous island that it inherited from the Norse.¹⁹ Despite a failed exploratory voyage in 1579, King Christian IV sent three expeditions to locate the abandoned Norse colonies and create a

¹⁴ Mills, *Exploring Polar Frontiers*, 473.

¹⁵ R. N. Rudmose Brown, “Spitsbergen in 1914,” *The Geographical Journal* 46, no. 1 (1915): 15.

¹⁶ Thor B. Arlov, *A Short history of Svalbard* (Oslo: Norwegian Polar Institute, 1994), 18-19, 60.

¹⁷ Mills, *Exploring Polar Frontiers*, 333; Louwrens Hacquebord, “Jan Mayen Island in Scientific Focus,” *NATO Science Series* 45 (2004): 229-238.

¹⁸ W. Gillies Ross, “The Annual Catch of Greenland (Bowhead) Whales in Waters North of Canada, 1719-1915: A Preliminary Compilation,” *Arctic* 32, no. 2 (1979): 94.

¹⁹ While the last recorded visit of Europeans to the Norse colonies was in 1408, the Danish crown continued to claim lordship over Greenland in the following centuries.

Danish presence in Greenland between 1605 and 1607. The first two expeditions managed to land on the island's west coast, yet they failed to locate the colonies. The third voyage was a disaster.²⁰ Several unsuccessful exploration attempts followed²¹ until the 1720s when Hans Egede, a young Lutheran minister armed with a charter from King Frederick IV, created a permanent settlement at Godthåb (Nuuk) on the southwest coast. Over the next century, the Danish Crown gave out trade monopolies, banned foreign traders from operating in the area, sent naval expeditions and established more settlements in western Greenland.²²

As the Danes attempted to solidify their hold on Greenland, Russian explorers unveiled vast swathes of northern Siberia. In the sixteenth and seventeenth centuries, Russians slowly ventured into Siberia, travelling down major waterways like the Ob, Yenisey and Lena Rivers to the shores of the Kara and Laptev Seas. Implementing the nation-building vision of Peter the Great,²³ Vitus Bering and the Great Northern Expedition (1733-1742) mapped most of Siberia's coastline and discovered the Aleutian, Commander and Kuril Islands, Bering Strait, and Alaska in 1741.²⁴ In the decades that followed, Russian expeditions surveyed and circumnavigated Novaya Zemlya, wintered on Spitsbergen, and made several attempts to sail through the Northeast Passage.²⁵ More importantly, by 1800 fur traders of the Russian-American Company established several permanent settlements in Alaska.²⁶ A Russian-dominated Arctic began to emerge.

²⁰ See Vivian Etting, "The Rediscovery of Greenland During the Reign of Christian IV," *Journal of the North Atlantic* 2 (2009): 151-160. In 1619, the King sent the Norwegian sailor, Jens Munk, to find the Northwest Passage and he made it as far as Churchill, Manitoba.

²¹ Spencer Apollonio, *Lands That Hold One Spellbound* (Calgary: University of Calgary Press, 2008), 10-11. Three Danish sponsored expeditions were sent between 1652 and 1654, but none managed to land on the Greenland coast, while a crown-sponsored voyage to East Greenland was lost in 1671 with all hands.

²² Shelagh Grant, *Polar Imperative: A History of Arctic Sovereignty in North America* (Vancouver: Douglas and McIntyre, 2010), 82-83; See F. Gad, *The History of Greenland 2*, translated by E. Dupont (Montreal: McGill-Queen's University Press, 1973).

²³ See W. Bruce Lincoln, *The Conquest of a Continent: Siberia and the Russians* (New York: Random House, 1994), 101-102.

²⁴ See Lincoln, *The Conquest of a Continent*, 107-133; Lydia Black, *The Russians in Alaska, 1732-1867* (Fairbanks: University of Alaska Press, 2004), 39-78; John McCannon, *Red Arctic: Polar Exploration and the Myth of the North in the Soviet Union, 1932-39* (Oxford: Oxford University Press, 1998), 15-16.

²⁵ Black, *The Russians in Alaska*, 86-93.

²⁶ Black, *The Russians in Alaska*, 102.

At the other end of the globe expert British navigator James Cook opened the door to a new polar frontier in the south. In 1772, Cook sailed from England with orders to find the “Great South Land” – the missing continent that geographers thought dominated the southern hemisphere. French expeditions discovered several islands in the Subantarctic, including Bouvet, the Crozet, the Prince Edward, and the Kerguelen Islands²⁷ but the explorers stopped short of the Antarctic Circle. On 17 January 1773, Cook and HMS *Resolution* became the first to achieve this feat. Gently picking his way through sea ice and bergs, Cook made it to 71°10'S, 120 km from the Antarctic coast, before turning back. On his journey north, Cook landed on the Subantarctic island of South Georgia, hoisted a flag, fired three volleys, and claimed it for King George III. Soon after, he discovered the southern eight islands of the South Sandwich Group (though he did little to investigate them).²⁸ Notwithstanding the discovery of new territory for Britain, the ultimate object of Cook’s voyage remained unfulfilled: the Great South Land lay undiscovered and undisturbed just over the horizon.²⁹

Despite the work of Cook and the other early explorers, the Napoleonic Wars ended further exploratory efforts at the beginning of the nineteenth century.³⁰ No one had yet found the Antarctic continent, navigated the Northeast or Northwest Passages, or reached the Poles. The British claimed the most easterly part of Arctic North America, Russia claimed most of the Siberian coastline and a few of the islands above it, and the

²⁷ The French expeditions were also sent in search of the southern continent. When Yves-Joseph de Kerguelen-Trémarec discovered a desolate archipelago in the southern Indian Ocean in 1772, he thought it was the Antarctic continent. Mills, *Exploring Polar Frontiers*, 96.

²⁸ David Day, *Antarctica: A Biography* (Oxford: Oxford University Press, 2013), 10-12.

²⁹ Although Cook had not found the Great South Land, upon his return to England he explained that such a continent probably existed, but warned: “Should anyone possess the resolution and fortitude to push yet further south...I make bold to declare that the world will derive no benefit from him.” Quoted in Chris Turney, *1912: The Year the World Discovered Antarctica* (Berkeley: Counterpoint, 2012), 11.

³⁰ The Royal Navy and private sealing and whaling expeditions discovered and explored several of the sub-Antarctic islands south of New Zealand during this period. In 1788, just months before the famous mutiny, Captain William Bligh discovered a new group of islands and named them after his ship HMS *Bounty*. In 1800, Captain Henry Waterhouse, on board HMS *Reliance*, became the first to chart the Antipodes. Island Group British whaler, Captain Abraham Bristow discovered the Auckland Islands in 1806, naming them after his friend, William Eden, 1st Baron of Auckland. In January 1810, an Australian sealer, Captain Frederick Hasselborough, set off to look for new hunting grounds on the brig *Perseverance* and discovered the Campbell Islands. In July he also stumbled upon Macquarie Island, half way between Australia and New Zealand. This island would become an important base for later Antarctic expeditions. All of these islands are now territorially part of New Zealand, except for Macquarie, which is attached to Tasmania. Territorial Claims in the Antarctic, Research Department, Foreign Office, 1 May 1945, National Archives (NA), DO 35/1414.

Danes established a presence in southwestern Greenland, leaving most of the land above the Arctic coastline undiscovered and unclaimed. In the “long nineteenth century” this situation changed dramatically.

1.2 For King and Country: Polar Exploration, 1815-1845

After Napoleon’s final defeat at Waterloo in 1815, the Royal Navy ‘ruled the waves.’ Without a war to fight, and Britain’s sea-lanes of trade and communication secure, the Navy struggled to find an outlet for its energies. Government-sponsored polar exploration provided a purpose for the Royal Navy and a testing-ground for its ships and men, while adding to British power and prestige.³¹ Between 1818 and 1845, the Admiralty uncovered large parts of the Arctic North America and the Antarctic, its attention oscillating between the two polar regions with each major discovery.

Due to the work of Cook and George Vancouver along the west coast of North America, the Admiralty knew that no Northwest Passage existed south of Bering Strait. If the passage existed at all, it lay somewhere in the ice and labyrinth of islands above the continent. The Admiralty sent John Ross to find out in 1818. The captain managed to rediscover and raise the flag at Lancaster and Jones Sounds, affirming the work done by Baffin and Bylot. He then turned back when he spotted a mountain range in the distance blocking his way – a figment of his imagination, it turned out.³² Undeterred, the Admiralty sent William Parry to find the Passage. His polar voyage proved one of the most successful ever. With extremely favourable ice conditions, Parry crossed the 110th meridian in early September 1819, penetrating far deeper into the Arctic Archipelago than anyone before him.³³ In little more than a year, Parry discovered, named and raised

³¹ Hugh N. Wallace, *The Navy, the Company, and Richard King: British Exploration in the Canadian Arctic, 1829-1860* (Montreal/Kingston: McGill-Queen’s University Press, 1980), 5. Pierre Berton noted that, by 1817, ninety percent of Britain’s naval officers were unemployed, leaving them desperate for offshore opportunities that brought activity and the potential for promotion. Pierre Berton, *The Arctic Grail: The Quest for the North West Passage and the North Pole, 1818-1909* (Toronto: McClelland & Stewart, 1988), 18.

³² See Fergus Fleming, *Barrow’s Boys* (New York: Grove/Atlantic Inc, 1998), chapters 3 and 4. The Admiralty ordered the second expedition, led by David Buchan and a young John Franklin, to travel north of Spitsbergen and locate the North Pole, but heavy ice thwarted this ambitious plan. Second Secretary of the Admiralty, John Barrow, who had a keen interest in Arctic exploration, pushed for these missions.

³³ Taylor, *Geographical Discovery and Exploration in the Queen Elizabeth Islands*, 27-28.

the Union Jack on Devon, Cornwallis, Bathurst, Byam and Melville Islands. “Though we have not completed the North West Passage,” he wrote to his parents, “we have made a large hole in it.”³⁴

As Parry made his incredible voyage into the Arctic, events unfolding in the Antarctic also grabbed the Admiralty’s attention. Between 1819 and 1820, explorers finally landed on the islands around the Antarctic Peninsula and sighted the continent itself (though who did so first remains hotly debated). On 19 February 1819, after getting caught in strong winds while sailing to Valparaiso, Chile, William Smith, the captain of a British transport, discovered Livingston Island in the South Shetlands, 450 nautical miles south of Cape Horn. The following January, Smith guided Edward Bransfield of the Royal Navy to his discovery and they landed on several islands in the South Shetlands, claimed them for Britain, and started charting their positions.³⁵ On 30 January, the expedition spotted the rocks and peaks of a long coastline, which they called Trinity Land – likely the northernmost point on the Antarctic mainland. Bransfield, thinking Trinity Land might be another island, did not attempt a landing on its icy shore, but did chart part of the coast.³⁶

Other eyes searched the same horizon. On 28 January 1820, two days before Smith and Bransfield spotted Trinity Land, a Russian expedition under Captain Gottlieb von Bellingshausen saw a solid stretch of ice to the south of their position, which they insisted was a piece of the southern continent. Tsar Alexander I sent Bellingshausen to explore the Southern Ocean and, as he circumnavigated the Antarctic in 1820-21, he also investigated the South Shetlands and South Sandwich Islands, and discovered Peter I and

³⁴ Glyn Williams, *Arctic Labyrinth: The Quest for the Northwest Passage* (Toronto: Viking Canada, 2009), 193. As geographer Andrew Taylor has argued, Parry’s recommendation that future expeditions should concentrate on routes in lower latitudes, along the continental coastline where possible, “set the pattern of marine exploration for the Canadian Arctic for the next quarter century. Taylor, *Geographical Discovery and Exploration in the Queen Elizabeth Islands*, 27-28.

³⁵ King George Island, Clarence Island and Elephant Island.

³⁶ A.G.E. Jones, “Captain William Smith and the Discovery of New South Shetland,” *Geographical Journal* 141, no. 3 (1975): 445-461.

Alexander Islands. While he gave Russian names to islands and geographical features, Bellingshausen did not land or try to claim territory for his country.³⁷

Sailing into the South Shetlands in late 1820, Bellingshausen was shocked to find the waters full of British and American sealing ships brought south by word of the discoveries in the area. On 16 November, one of these sealers, the American Nathaniel Palmer, saw “land not yet laid down on his chart” and approached a long stretch of coastline to the south of Bransfield’s Trinity Land, a new part of the Antarctic continent.³⁸ A few months later, John Davis, another American sealer, proclaimed members of his crew the first men to set foot on the continent, though they stayed only an hour.³⁹ Discoveries by American sealers led to appeals in Washington for a national expedition to claim the newly unearthed lands for the U.S., but the Navy could not spare a ship and the idea died.⁴⁰

In the course of a few months, three different expeditions flying three different flags had likely sighted the Antarctic coast, but the members had no idea if the land they saw was part of a continent or new islands. Despite the multi-national discoveries of 1820, the British dominated Antarctic exploration for the next decade and a half. British sealers claimed the South Orkneys, a group of islands 600 km northeast of the Antarctic Peninsula; reached a new furthest south in the Weddell Sea; and raised the flag at Bouvet Island, which the French spotted a century before.⁴¹ Between 1829 and 1831, an official Royal Navy expedition under Captain Henry Foster surveyed parts of the South Shetlands, including Deception Island and its exceptional harbour.⁴² Over the following two years, former naval officer John Biscoe became the third explorer to circumnavigate the continent (after Cook and Bellingshausen), spotted a section of the Antarctic coast south

³⁷ Though at the time, Bellingshausen mistook Alexander Island for part of the continent and called it Alexander Land. Day, *Antarctica: A Biography*, 20-23, 32-36.

³⁸ Day, *Antarctica: A Biography*, 26-29.

³⁹ Many historians remain skeptical of the claims made by Davis. The first confirmed landing on Antarctica did not occur for another 74 years, on 24 January 1895, when a group of men from the Norwegian ship *Antarctic* went ashore to collect geological specimens at Cape Adare.

⁴⁰ Philip Mitterling, *America in the Antarctic to 1840* (Urbana: University of Illinois Press, 1959), 31-35.

⁴¹ Susan Barr, *Norway's Polar Territories* (Oslo: Aschehoug, 1987), 63.

⁴² William Webster, *Narrative of a voyage to the southern Atlantic Ocean in the years 1828, 29, 30 performed in H.M. Sloop Chanticleer under the command of the late Captain Henry Foster* (London: Richard Bentley, 1834).

of Africa that he named Enderby Land after his private sponsor, discovered Adelaide, Anvers and the Biscoe Islands, and sailed along a piece of the Antarctic Peninsula south of Trinity Land, which he called Graham Land.⁴³ When he raised the Union Jack and annexed Graham Land for King William IV, Biscoe made the first territorial claim to the Antarctic continent.

The British added new Antarctic discoveries to their maps, yet the country's real focus never strayed long from the search for the Northwest Passage. Further seaborne expeditions by Parry and overland expeditions by John Franklin uncovered large sections of the continental coastline, Foxe Basin, and Prince Regent Inlet. In concert with these efforts, Frederick William Beechey led an expedition that explored the Alaskan coast between Bering Strait and Point Barrow.⁴⁴ In 1829, John Ross returned to the Arctic on a private expedition financed by gin magnate Felix Booth. During the four years they spent locked in the ice, Ross and his men explored the Gulf of Boothia, Boothia Peninsula, and King William Island. In 1831, his nephew, James Ross, located the North Magnetic Pole, a major scientific accomplishment.⁴⁵ Slowly, the British illuminated more of the Arctic Archipelago, but the Northwest Passage itself remained elusive.

British efforts easily overshadowed those of other countries in the polar regions. The interest of the Russian government in its polar empire lapsed when its strategic attention turned to Europe, the Near East and the Pacific after the Napoleonic Wars.⁴⁶ Despite Bellingshausen's successful voyage, the Russians did not send any more ships to the Antarctic until the 1940s. Reports of islands somewhere above northeastern Siberia led to expeditions by Petr Federovich Anzhu and Baron Ferdinand Petrovich Wrangel,

⁴³ Day, *Antarctica: A Biography*, 52-53; John Biscoe, "Recent Discoveries in the Antarctic Ocean," *Journal of the Royal Geographical Society of London* 3 (1833): 105-112; Ann Savours, "Who was John Biscoe?" *Geographical Magazine* 36, no. 9 (1964): 499-505

⁴⁴ Williams, *Arctic Labyrinth*, 262. In 1827, Parry also led an attempt to reach the North Pole, sailing north from Spitsbergen.

⁴⁵ John Ross and James Ross, *Narrative of a second voyage in search of a north-west passage, and of a residence in the Arctic regions during the years 1829, 1830, 1831, 1832, 1833* (London: A.W. Webster, 1835).

⁴⁶ McCannon, *Red Arctic*, 12.

who charted more of the coastline but found no new territories in the ocean above.⁴⁷ The Russians successfully mapped Novaya Zemlya and the New Siberian Islands, and continued to hunt in the Spitsbergen archipelago.⁴⁸ The imperial government safeguarded its territorial claims in Alaska from the activities of British explorers on its northern coast in the 1825 Treaty of St. Petersburg (Anglo-Russian Convention), which set the 141st degree of longitude as the limit between their respective northern possessions.⁴⁹ Nevertheless, the financial burden created by Alaska, and the belief that it would be indefensible in any war, led the Russians to lose interest in their North American territory as the century wore on.⁵⁰

After retaining Greenland in the 1814 Treaty of Kiel, which broke up the Kingdom of Denmark-Norway, the Danes maintained their presence in Greenland, exploring, surveying and administering its western coast, but made little effort to visit its eastern or northern coasts.⁵¹ On Spitsbergen, Norwegian hunting parties and exploratory expeditions from Britain, Norway, Sweden and France pushed into the island's interior and performed in-depth studies of the area.⁵² By any metric of geographic scope and discovery, however, the British remained in the forefront of polar exploration and discovery.

James Ross' discovery of the North Magnetic Pole piqued the interest of the Admiralty, which directed its efforts to finding the South Magnetic Pole in the late 1830s. It was not alone. Between 1838 and 1843, three large-scale national expeditions set off for Antarctic waters. A French expedition under Sébastien César Dumont d'Urville

⁴⁷ Brian Bonhomme, *Russian Exploration, from Siberia to Space* (Jefferson: McFarland, 2012), 160. In an amazing feat of endurance, Lieutenant Pyotr Anzhu mapped a large section of the Siberian coastline and the New Siberian Islands, covering thousands of kilometers in dog sleds and kayaks.

⁴⁸ Leonid Sverdlov, "Russian Naval Officers and Geographic Exploration in Northern Russia," *Arctic Voice* 27 (1996).

⁴⁹ Donat Pharand, *Canada's Arctic Waters in International Law* (Cambridge: Cambridge University, 1988), 12-13; Anatole G. Mazour, "The Russian-American and Anglo-Russian Conventions, 1824-1825: An Interpretation," *Pacific Historical Review* 14, no. 3 (1945): 303-310.

⁵⁰ Claus-M Naske and Herman Slotnick, *Alaska: A History of the 49th State* (Norman: University of Oklahoma Press, 1994), 59-61; McCannon, *Red Arctic*, 15-16.

⁵¹ The English scientist, William Scoresby, had charted part of the eastern coast of Greenland in 1822, the first real geographic knowledge gathered for the area. Wilhelm August Graah, a Danish naval officer, tried and failed to reach the eastern coast between 1828-1830. Apollonio, *Lands That Hold One Spellbound*, 29-40.

⁵² Arlov, *A Short History of Svalbard*, 42-47.

surveyed the tip of the Peninsula and charted a large section of Antarctic coastline south of Australia in January 1840. While d'Urville could not land on the icy coast, he did set foot on a rocky islet and claimed the coastline he spotted for France, naming it Adélie Land after his wife.⁵³ In December 1839, Lieutenant Charles Wilkes and the U.S. Exploring Expedition, as its name suggests an official American effort, sighted a part of the coast of eastern Antarctica and claimed to have sailed more than 1300 km along the continent's barrier. Never once did they try to raise the stars and stripes.⁵⁴ On orders from the Admiralty, James Ross took his considerable polar experience to the Antarctic between 1840 and 1843. Pushing through heavy pack ice, Ross reached the open water of what is now called the Ross Sea, where he discovered a large section of mountainous coastline he named Victoria Land after his Queen. He found a sheltered anchorage at McMurdo Sound that would serve many future Antarctic explorers, sailed along the massive ice shelf that bears his name,⁵⁵ and confirmed the existence of the Balleny Islands, first discovered by an English whaler in 1839.⁵⁶ Although unable to land on the continent, Ross rowed to a small islet just off the tip of Victoria Land and claimed the entire area he had explored for Britain.⁵⁷ Ross, d'Urville and Wilkes added thousands of kilometres of coastline to maps of the Antarctic, but no one knew if the unconnected lines on the map represented a continent or an archipelago united by ice.

After the three voyages of 1838-1843 failed to locate the South Magnetic Pole, the Antarctic entered into an "age of averted interest."⁵⁸ Whalers and sealers continued to visit the Southern Ocean, the Royal Navy conducted a few surveys in the sub-Antarctic (including one of the Prince Edward Islands),⁵⁹ and American sailors spotted and

⁵³ Day, *Antarctica: A Biography*, 63-70.

⁵⁴ Kenneth John Bertrand, *Americans in Antarctica, 1775-1948* (New York: America Geographical Society, 1971). Due to some confusion in the American logbooks, Wilkes' claims have been contested by historians.

⁵⁵ Turney, *1912: The Year the World Discovered Antarctica*, 19-21.

⁵⁶ Day, *Antarctica: A Biography*, 68.

⁵⁷ Turney, *1912: The Year the World Discovered Antarctica*, 19-21.

⁵⁸ Sanjay Chaturvedi, *The Polar Regions: A Political Geography* (Chichester: John Wiley and Sons, 1996), 62.

⁵⁹ Dodds, *The Antarctic: A Very Short Introduction*, 27. The Royal Navy's *Challenger* expedition, under George Nares, performed oceanographic studies of the Southern Ocean and crossed into the Antarctic Circle between 1872 and 1876.

established shore stations on Heard Island, about 1630 km north of the Antarctic.⁶⁰ Exploratory voyages, however, ceased until the 1890s.

1.3 The Arctic Takes Shape: The Search for Franklin, the European Arctic and Sovereignty Transfers, 1845-1895

By the 1840s, overland expeditions by Hudson's Bay Company explorers had illuminated more of the western end of the Northwest Passage. As a result, the Admiralty felt confident that a new expedition led by the 59-year-old John Franklin would finally conquer the Passage.⁶¹ His two ships, *Erebus* and *Terror*, were the first to sail through Peel Sound but became trapped in the ice near King William Island. Franklin died in April 1847, and the remaining crews abandoned the ships the following spring of 1848 in a fatal attempt to walk to the closest settlement, hundreds of kilometres to the south. Everyone succumbed to starvation and exhaustion.⁶² The subsequent British searches to determine what happened to the expedition, which seemed to vanish without a trace, crisscrossed the centre of the Arctic Archipelago by ship and sledge, filling in a large part of the map and uncovering three Northwest Passages.⁶³ During this torrent of discovery, Edward Inglefield named Ellesmere Island after Francis Egerton, the 1st Earl of Ellesmere and president of the Royal Geographical Society. To the west, a Royal Navy expedition sent to find Franklin via Bering Strait ran into two islands north of the Siberian coast (what would become Herald and Wrangel Islands) that would later occupy an infamous place in Canada's Arctic policy.⁶⁴

⁶⁰ The British maintain that an English sealer, Peter Kemp, first spotted Heard Island in 1833, but the Americans actually named and landed on the islands, starting in 1853. American sealers also spotted the nearby McDonald Island. Brian Roberts, "Historical Notes on Heard and McDonald Islands," *Polar Record* no. 40 (1950): 580-584.

⁶¹ Searching for the Ross party, George Back explored the Great Fish River in 1833-1834. Between 1837 and 1839, Peter Warren Dease and Thomas Simpson connected the coastline from Coppermine River to Great Fish River.

⁶² Wallace, *The Navy, the Company*, 64. As Hugh Wallace has explained, "Indeed, now it was necessary both to find the discoverers and also, so far as possible, what it was that they had found. The search of Franklin had been for a passage within an "extensive blank area" - a search, so to speak, for a rope through a haystack. The search for Franklin was like searching for a needle in an even larger haystack, in as much as it meant finding a single spot that might, or might not, lie within the original area."

⁶³ Wallace, *The Navy, the Company*, 161.

⁶⁴ Williams, *Arctic Labyrinth*, 280-282.

Searches for the lost Franklin expedition took a massive toll on the Royal Navy's energy and resources, leading the Admiralty to take a break from polar exploration.⁶⁵ The Franklin search also internationalized exploration in the Arctic Archipelago by drawing the first American expeditions to the region. Edwin DeHaven of the U.S. Navy ventured into the archipelago in 1850 and discovered a mountainous coastline, the central part of Ellesmere Island, which he named Grinnell Land (after the president of the American Geographical Society). Dr. Elisha Kent Kane's 1853-55 expedition travelled deep into Kennedy Channel and delineated the northern coast of Greenland before ice and scurvy forced their retreat.⁶⁶ Dr. Isaac Hayes told the press he was looking for Franklin, but he really sought "to complete the survey of the north coasts of Greenland and Grinnell Land" in 1860-61. He managed to cross the Greenland ice cap before working up the Ellesmere Island coast to Lady Franklin Bay – 81°35'N, by his calculation the "most northern known land upon the globe."⁶⁷ Further American efforts, including the 3000-mile sledge journey undertaken by U.S. army Lieutenant Frederick Schwatka for the American Geographical Society, added to the geographic knowledge of the southern archipelago.⁶⁸

American expeditions joined a bevy of European efforts throughout the Arctic in the 1860s and 1870s. Their interest was driven, in part, by the belief that a vast amount of land or even a continent remained to be discovered around the North Pole.⁶⁹ Accordingly, the Americans focused on Greenland, Grinnell Land and the pole itself.⁷⁰ With a grant of \$50,000 from a Congress interested in the national pride that would flow from planting the American flag at the North Pole, Captain Charles Francis Hall sailed north from Washington. He reached a record 82°29'N at the northern entrance to Robeson Channel, which separated the northern coasts of Greenland and Ellesmere Island. After collecting the first data on the northernmost coast of Ellesmere, the expedition returned south after

⁶⁵ A notable exception was the 1875 attempt on the North Pole by George Nares and HMS *Alert*, which made it to the Lincoln Sea above Greenland and Ellesmere, and achieved a furthest north record.

⁶⁶ Fogelson, *Arctic Exploration and International Relations*, 12-13.

⁶⁷ Isaac Hayes, *The Open Polar Sea* (London: Sampson Low, Son and Marston, 1867), 1 and 351.

⁶⁸ Fogelson, *Arctic Exploration and International Relations*, 17. Charles Francis Hall also searched for Franklin during two northern voyages, between 1860-62 and 1864-69.

⁶⁹ See for instance, E. Tammiksaar, N.G. Sukhova and I.R. Stone, "Hypothesis versus fact: August Petermann and Polar research," *Arctic* 52, no. 3 (1999): 237-244.

⁷⁰ Svenn Orvig, "A Century of Arctic Meteorology, From Discovery to Science," in *A Century of Canada's Arctic Islands, 1880-1980*, ed. Morris Zaslow (Ottawa, The Royal Society of Canada, 1981), 133.

Hall's mysterious death, possibly from arsenic poisoning.⁷¹ In 1879, James Gordon Bennet, Jr., owner of the *New York Herald*, backed a U.S. Navy expedition to the North Pole via the western Arctic. While the USS *Jeannette* and its commander, George Washington DeLong, confirmed the existence of Herald and Wrangel Islands, and discovered and claimed Bennet, Henrietta and Jeannette Islands above the Russian coast, when the pack ice crushed the ship in 1881 only a handful of men managed to survive the long trek to safety.⁷² In an act with important future consequences, a USN expedition sent to look for the lost *Jeannette*, actually landed on Wrangel Island and claimed it for the U.S., naming it New Columbia.⁷³ During these years, the stars and stripes flew above a vast expanse of the High Arctic, including islands later claimed by Canada and Russia.

Concurrently, European explorers expanded geographic knowledge of the Arctic - including representatives from new nations with rising interests in the region. In 1866, German geographer August Petermann (a strong proponent of Germany's colonization of Africa) urged his country to join the international quest for the North Pole to showcase its growing power. Two German expeditions set out for the Pole in 1868 and 1869-70, but failed to discover any new land (although they explored sections of Greenland's unknown east coast).⁷⁴ In 1873, an Austro-Hungarian expedition, largely funded by the nobility and led by military officers Karl Weyprecht and Julius von Payer, explored to the west of Novaya Zemlya where its members discovered and mapped part of the Franz Josef Land archipelago. They named it after the Austrian emperor, but did not formally claim the island group.⁷⁵ Thus, while German and Austro-Hungarian explorers sowed the seeds for possible polar claims by their respective empires, neither thought the Arctic land valuable enough to annex.

⁷¹ Hall later travelled by sledge to 83° 05'N. See Chauncey Loomis, *Weird and Tragic Shores: The Story of Charles Francis Hall, Explorer* (New York: Alfred A. Knopf, 1971).

⁷² See Hampton Sides, *In the Kingdom of Ice: The Grand and Terrible Polar Voyage of the USS Jeannette* (New York: Random House, 2014); L.F. Guttridge, *Icebound: The Jeannette Expedition's Quest for the North Pole* (Shrewsbury: Airlife Publishing Ltd., 1988).

⁷³ See John Muir, *The Cruise of the Corwin: Journal of the Arctic Expedition of 1881 in search of De Long and the Jeannette* (Dunwoody: Norman S. Berg, 1917).

⁷⁴ Jörg-Friedhelm Venzke, "The 1869/70 German North Polar Expedition," *The Arctic* 43, no. 1 (1990): 83-85; D.T. Murphy, *German Exploration of the Polar World: A History, 1870-1940* (Nebraska: University of Nebraska Press, 2002).

⁷⁵ See Julius Payer, "The Austro-Hungarian Polar Expedition," *Proceedings of the Royal Geographical Society of London* 19, no. 1 (1874-1875): 17-37. Franz Josef Land is made up of 191 small islands.

The exploration of Greenland by the Germans did not sit well with the Danish government. Following the disastrous Second Schleswig War of 1864 against Prussia and Austria, the Danes lacked money for exploration.⁷⁶ Parliament found a solution in the long-term, and relatively inexpensive, research plan of Professor Frederick Johnstrup, Professor of Mineralogy at the University of Copenhagen, who led scientific teams to West Greenland throughout the 1870s. The government reinforced Johnstrup's efforts by creating the Commission for the Supervision of Geological Exploration in Greenland in 1879, and started to publish a research series called *Meddelelser om Grønland*.⁷⁷ The following decade, this Committee supported several expeditions that examined the inland ice shelf as well as the Umiak Expedition, which explored and claimed part of the southeastern coast (which it named King Christian IX Land).⁷⁸ Through these efforts the Danes continued to solidify their hold on Greenland, although they had yet to visit its northernmost parts. The link between science and sovereignty in the polar regions would continue to grow stronger in the twentieth century.

Swedish scientific expeditions also started to make important contributions to Arctic exploration. Between 1858 and 1871, more than twenty expeditions investigated and surveyed Spitsbergen. Given the leading role taken by its citizens in exploring the area, the Swedish government (which also ran Norway's foreign relations during this time)⁷⁹ informed several European nations in 1871 that it was considering claiming sovereignty over Spitsbergen. When the Russians objected to this assertion, the two countries entered into negotiations that culminated in the Agreement of 1872, which officially designated the Spitsbergen archipelago as land that belonged to no one - a legal status it retained until 1920.⁸⁰ In the late 1870s, Swedish King Oscar II also helped fund an attempt to conquer the Northeast Passage. Led by the explorer-scientist Adolf Erik Nordenskiöld, a Finnish-born political exile living in Stockholm, the *Vega* expedition caught the world's attention by finishing the first complete crossing of the Passage in

⁷⁶ For more details on the Second Schleswig War see Michael Embree, *Bismarck's First War: The Campaign of Schleswig and Jutland* (Solihull: Helion and Company Ltd., 2006).

⁷⁷ Apollonio, *Lands That Hold One Spellbound*, 59.

⁷⁸ Apollonio, *Lands That Hold One Spellbound*, 60-69.

⁷⁹ The United Kingdoms of Sweden and Norway existed between 1814 and 1905.

⁸⁰ Andrew Fitzmaurice, *Sovereignty, Property and Empire, 1500-2000* (Cambridge: Cambridge University Press, 2014), 312 n. 24. See also Rudmose Brown, "Spitsbergen in 1914," 10-21.

1879.⁸¹ In the space of a few decades, Sweden made its mark on polar exploration and politics.

Exploration and scientific efforts in the Arctic reached new heights with the First International Polar Year (IPY) in 1882-1883. Inspired by Karl Weyprecht's call for international scientific coordination in the polar regions, scientists set up fifteen geophysical data collection points around the Arctic rim.⁸² The IPY expeditions included a German station on Baffin Island and an Austro-Hungarian party that became the first to winter on Jan Mayen since the 1630s.⁸³ Most famous, however, was U.S. army lieutenant Adolphus W. Greely's expedition. With support from the Naval Committee of the House of Representatives, Greely led a 25-man expedition that established a meteorological base at Fort Conger (Lady Franklin Bay) on the northern coast of Ellesmere Island and achieved a new northern record of 83°24'. When his party retreated south after a second winter, Greely took copies of his scientific records in three tin boxes (fifty pounds each) instead of extra rations—condemning all but seven of his men to death.⁸⁴ Despite the tragedy, Greely's brief occupation highlighted years of American activity in the Arctic and supported the case for American territorial rights in Grinnell Land.

Confronted with American efforts, the British Colonial Office conceded that if the Americans wanted to claim what they called Grinnell Land, Britain would have to let them.⁸⁵ The Americans, however, had no desire to grab an Arctic empire—particularly after the political fallout that followed the \$7.2 million purchase of Alaska from the Russians in 1867.⁸⁶ Criticism of “Seward's folly”⁸⁷ was rampant in the American press

⁸¹ See Nils Adolf Erik Nordenskiöld, *The Voyage of the Vega Round Asia and Europe*, (Cambridge: Cambridge University Press, 2012).

⁸² Kevin Wood and James Overland, “Climate Lessons from the First International Polar Year,” *Bulletin of the American Meteorological Society* 87, no. 12 (2006): 1685-1687. Wood and Overland note that no one collated, analyzed, or synthesized the synchronous data during or after the First IPY.

⁸³ See William Barr, *The Expeditions of the First International Polar Year, 1882-1883*, 2nd Ed. (Calgary: Arctic Institute of North America, 2008).

⁸⁴ Fogelson, *Arctic Exploration and International Relations*, 29.

⁸⁵ Grant, *Polar Imperative*, 105, 160-168.

⁸⁶ On the purchase of Alaska, see Victor John Farrar, *The Annexation of Russian America to the United States* (New York: Russell & Russell, 1966); Ted Hinckley, *The Americanization of Alaska, 1867-1897* (Palo Alto: Pacific Books, 1972); Ronald J. Jensen, *The Alaska Purchase and Russian American Relations* (Seattle: University of Washington Press, 1975); Howard Kushner, *Conflict on the Northwest Coast: American-Russian Rivalry in the Pacific Northwest, 1790-1867* (Westport: Greenwood Press, 1975); Paul S. Holbo, *Tarnished Expansion: The Alaska Scandal, the Press, and Congress, 1867-1871* (Knoxville:

and Senate, where politicians questioned why the U.S. had paid so much for an “icebox” and “polar bear garden.”⁸⁸ The future of the U.S. rested in a western frontier, they argued, not a northern one. Worse, Washington knew almost nothing about its purchase: “a vast wilderness,” Jack London described it, “...as dark and chartless as Darkest Africa.”⁸⁹ While some politicians supported the idea that Alaska could one day become an American Eldorado, others dismissed the purchase of Alaska as a colossal waste of money. The U.S. government declined to claim the land that its explorers discovered in the High Arctic.⁹⁰ After Greely’s disaster, Washington stopped state-sponsored expeditions to the High Arctic until the region again captured its political and strategic interest in the 1920s.

Ironically, given the U.S. government’s lack of interest in establishing an Arctic empire, concerns about a potential American challenge propelled Britain to transfer its sovereignty over the North American Arctic islands to Canada. During the halcyon days of Arctic exploration, the Admiralty and Colonial Office spent little time thinking about Britain’s claim to the islands. Sir John Barrow, Second Secretary of the Admiralty for almost forty years and a major supporter of Arctic exploration, even described planting the flag and making claims as a waste of time in a region unable to support European settlement.⁹¹ In spite of Barrow’s opinion, historian Shelagh Grant points out, the Admiralty carefully charted every discovery and claim made by British explorers and added them to the imperial map.⁹² Nevertheless, Britain never formally annexed the Arctic islands or clarified its territorial rights in the region. Accordingly, when William Mintzer, an American engineer, applied to the British government for a tract of land in the Cumberland Gulf in February 1874 to start a mining industry, he greatly alarmed the

University of Tennessee Press, 1983); and Norman Saul, *Distant Friends: The United States and Russia, 1763-1867* (Lawrence: University Press of Kansas, 1991).

⁸⁷ Secretary of State William Seward had engineered the entire enterprise.

⁸⁸ Charles Emmerson, *The Future History of the Arctic* (New York: Public Affairs, 2010), 63.

⁸⁹ Jack London, *Gold Hunters of the North*, quoted in Emmerson, *The Future History of the Arctic*, 70.

⁹⁰ Department of State, Division of Western European Affairs, Territorial Sovereignty in the Polar Regions, 6 August 1926, 14-15, United States National Archives and Records Administration (NARA), RG 59, CDF 1910-1929, Box 7156, File 800.014. According to this Department of State report, nineteenth century American polar exploration was about science and prestige, not empire building.

⁹¹ John English, *Ice and Water: Politics, Peoples and the Arctic Council* (Toronto: Allen Lane, 2013), 47.

⁹² Grant, *Polar Imperative*, 105.

Colonial Office. Officials pondered how they could clarify British rights in the Arctic while forestalling any further American interest.⁹³

A precedent existed in British North America. In 1869-1870, the Hudson's Bay Company sold its vast territories of Rupert's Land and the North-Western Territory to Great Britain, which subsequently transferred the land to the government of Canada (when it became known as the Northwest Territories). The Colonial Office decided that a similar transfer would work for the Arctic islands. After careful deliberation, the British approved an Order in Council on 31 July 1880 stating that "all British territories and possessions in North America, and the islands adjacent to such territories and possessions which are not already included in the Dominion of Canada, should (with the exception of the Colony of Newfoundland and its dependencies) be annexed to and form part of the said Dominion." By this act, Britain gifted to Canada whatever territories or territorial rights it had in the Arctic Archipelago. The completeness of Britain's own title at that time, and the extent of its territories, were uncertain. In 1921, Canadian associate archivist Hensley R. Holmden quipped, "The Imperial Government did not know what they were transferring and on the other hand the Canadian Government had no idea what they were receiving."⁹⁴ Fortunately for Canada, no foreign state questioned the transfer and no American challenges crystallized.

For its part, after 1880, Canada did little to consolidate its administrative or practical control over its new territorial gift.⁹⁵ In 1882 Ottawa even passed an Order in Council recommending "no steps be taken with the view of legislating for the good government of the country until some influx of population or other circumstances shall occur to make such provision more imperative than it would at the present seem to be."⁹⁶ Not until 1895 did the dominion bother to draw boundaries on the map and subdivide the

⁹³ See Gordon W. Smith, "The Transfer of Arctic Territories from Great Britain to Canada in 1880, and Some Related Matters, as Seen in Official Correspondence," *Arctic* 14, no. 1 (1961): 53-73.

⁹⁴ H. R. Holmden to A.G. Doughty, "Memo re the Arctic Islands," 26 April 1921, Library and Archives Canada (LAC), RG 85, Vol. 584, File 571 pt.5.

⁹⁵ Order in Council PC 1839, 23 September 1882, quoted in Shelagh Grant, *Sovereignty or Security? Government Policy in the Canadian North, 1936-1950* (Vancouver: University of British Columbia Press, 1988), 5.

⁹⁶ Gordon Smith, "Sovereignty in the North: The Canadian Aspect of an International problem," in *The Arctic Frontier*, ed. R. St. J. Macdonald (Toronto: University of Toronto Press, 1966), 204.

Canadian North into administrative districts.⁹⁷ By the 1890s, the Canadian claim to the Arctic Archipelago rested on British acts of discovery and little more. As the ‘heroic age’ of polar exploration dawned, the problems of territorial acquisition became far more pressing. Foreign expeditions fanned throughout the Arctic and Antarctic, forcing Canada – and every other state with interests in the polar regions – to pay closer attention to events unfolding there.

1.4 The Busy Years: The “Heroic Age” of Polar Exploration, 1895-1909

In the summer of 1895, the “age of averted interest” in the Antarctic came to an abrupt end when the Sixth International Geographical Congress declared that “the exploration of Antarctica is the greatest piece of geographical exploration still to be undertaken” and urged scientific and geographical societies to promote expeditions to the area.⁹⁸ In the wake of this rallying cry, European countries launched nine major expeditions to the Antarctic continent between 1898 and 1910.⁹⁹ The Belgian Geographical Society’s Antarctic Expedition (1898-1900) inaugurated the ‘heroic age’ in the south polar region with its attempt on the South Magnetic Pole, but it became locked in the ice west of the Peninsula and was the first expedition to winter in the region.¹⁰⁰ The British Southern Cross Expedition (1898-1900), a privately-funded affair led by the Norwegian Carsten Borchgrevnik, became the first to winter on the continent after setting up a camp on Cape Adare, Victoria Land. Robert Falcon Scott and the British National Antarctic Expedition

⁹⁷ The North was divided into the districts of Ungava, Franklin, Mackenzie and Yukon. The District of Franklin included, “all those lands and islands comprised between the one hundred and forty-first meridian of longitude west of Greenwich on the west and Davis Strait, Baffin Bay, Smith Sound, Kennedy Channel and Robeson Channel on the east which are not included in any other Provisional District.” Gordon W. Smith, *A Historical and Legal Study of Sovereignty in the Canadian North*, ed. P. Whitney Lackenbauer (Calgary: University of Calgary Press, 2014), 188.

⁹⁸ Chaturvedi, *The Polar Regions*, 62; David Crane, *Scott of the Antarctic: A Life of Courage, and Tragedy in the Extreme South* (London: Harper Collins, 2005), 75. The call of the IGC followed on the heels of the creation of the Antarctic Committee by the Royal Geographical Society in 1887, repeated pleas by the noted cartographer Dr. John Murray, and increased whaling activity. Earlier in 1895, a group of men from the Norwegian whaling ship *Antarctic*, went ashore on Cape Adare, Victoria Land, in the first confirmed landing on the continent proper. These events propelled further exploration of the region. In 1899, Murray captured the appeal of Antarctic exploration with the words: “I always feel a little bit ashamed that civilized man, living on this little planet – a, very small globe – should...not yet have fully explored the whole of this little area; it seems a reproach upon the enterprise, civilization, and condition of knowledge of the human race.” Quoted in Dodds, *The Antarctic: A Very Short Introduction*, 27.

⁹⁹ Dodds, *The Antarctic: A Very Short Introduction*, 28.

¹⁰⁰ Turney, *1912: The Year the World Discovered Antarctica*, 27.

(1901-1904) established a base on Ross Island in McMurdo Sound and then set a new farthest south record, reaching 82°17'S and discovering the polar plateau.¹⁰¹ While Scott “paid little attention to claiming a territory that had no obvious value,” historian David Day has pointed out that the explorer’s discoveries, the base he established on Ross Island, and his explorations into the continental interior “all added weight to any claim that Britain might make.”¹⁰²

Between 1901 and 1903, Erich von Drygalski led the first German expedition to the Antarctic and discovered a section of coastline in the eastern part of the continent he called Kaiser Wilhelm II Land.¹⁰³ Meanwhile, the Scottish National Expedition established a meteorological station on Laurie Island in the South Orkneys and explored the Weddell Sea.¹⁰⁴ From 1901-04, a privately-financed Swedish expedition led by geologist Otto Nordenskjöld resurveyed and redrew the charts of the west coast and offshore islands of the Antarctic Peninsula onboard the *Antarctic*. From Snow Hill Island, the Swedish party surveyed four hundred miles of the coastline by sledge, reaching almost as far as the Antarctic Circle. Heavy ice trapped and sank the *Antarctic* in February 1903, however, and an Argentine relief expedition in the gunboat *Uruguay* came to the rescue, completing that state’s first voyage into Antarctic waters.¹⁰⁵ The French also engaged in scientific exploration during this era through expeditions led by Jean-Baptiste Charcot (1903-1905 and 1908-1910). Charcot proceeded to the west coast of the Antarctic Peninsula to carry on the *Belgica*’s research. He conducted scientific investigations on Deception Island and discovered Marguerite Bay, Charcot Island, Renaud Island, Millerand and Rothschild Island (and named part of the coast Loubet

¹⁰¹ Dianne Preston, *A First Rate Tragedy: Captain Scott’s Antarctic Expeditions* (London: Constable, 1997), 57-59.

¹⁰² Day, *Antarctica: A Biography*, 115.

¹⁰³ Murphy, *German Exploration of the Polar World*, 68-85.

¹⁰⁴ Day, *Antarctica: A Biography*, 118, 120-123.

¹⁰⁵ Otto Nordenskjöld and Johna Gunnar Andersson, *Antarctica: Or Two Years Amongst the Ice of the South Pole* (London: Hurst and Blackett, 1905); Andrew Taylor, “Echoes of the Swedish South Polar Expedition of 1902-03,” *Revue canadienne de géographie* 4 (1950): 47-62; and Vivian Fuchs, *Of Ice and Men: The Story of the British Antarctic Survey, 1943-1973* (Oswestry: Anthony Nelson, 1982), 13-16.

Land after the President of France), thus defining the basic geography of the western coast of the Antarctic Peninsula and the islands south of 65°S.¹⁰⁶

Between 1907 and 1909, British explorer, Ernest Shackleton, finally reached the polar plateau, found the South Magnetic Pole, and made it to a point just 97 geographic miles from the South Pole. Here Shackleton performed a ceremony formally claiming the plateau for Britain, raising the Union Jack, leaving behind a brass cylinder to mark the occasion, and naming it King Edward VII Plateau.¹⁰⁷ Thus, while all the expeditions flew their national flags in the Antarctic and named geographical features after their monarchs or countries, only Shackleton made a formal claim to territory.

From this point on, Britain – more than any other nation – viewed the Antarctic through the lens of its imperial ambitions. Historian Adrian Howkins observes that “from the early twentieth century...the history of Antarctica became increasingly caught up with the wider history of the British Empire.”¹⁰⁸ At first, British imperialists used Antarctic exploration as proof of the Empire’s prestige and power, much as they had portrayed the quest for the Northwest Passage. Further, they viewed the heroic tales of British explorers as a potential cure to the pessimism that was an “all-pervasive” characteristic of Edwardian imperialism.¹⁰⁹ During the Boer War, the poor health and performance of British soldiers shocked the country. Heightened international competition, especially from Germany, engendered national doubt, and Antarctic exploration and expansionism “resonated in a society beset with anxieties about national decline.”¹¹⁰ The efforts of the polar explorers became part of a new drive for British efficiency, which included the Boy Scouts, conscription, rifle clubs, and imperial

¹⁰⁶ Maria Pia Casarini, “Activities in Antarctica Before the Conclusion of the Antarctic Treaty,” in *International Law for Antarctica*, 2nd Ed., eds. Francesco Francioni and Tullio Scovazzi (The Hague: Kluwer Law, 1996), 645-46; Fuchs, *Of Ice and Men*, 6-7; and Marthe Emmanuel, *J-B Charcot, le polar gentleman* (Paris: Alsatia, 1945).

¹⁰⁷ Roland Huntford, *Shackleton* (London: Hodder and Stoughton, 1985): 272, map on 242.

¹⁰⁸ Adrian Howkins, *Frozen Empires: A History of the Antarctic Sovereignty Dispute Between Britain, Argentina and Chile, 1939-1959* (PhD Dissertation: The University of Texas, May 2008).

¹⁰⁹ See Ronald Hyam, “The British Empire in the Edwardian Era,” in *The Oxford History of the British Empire*, eds. Judith Brown and Wm. Roger Louis (Oxford: Oxford University Press, 1999), 47-63.

¹¹⁰ Max Jones, *The Last Great Conquest: Captain Scott’s Antarctic Sacrifice*, (Oxford: Oxford University Press, 2003), 12.

motherhood.¹¹¹ British explorers such as Scott and Shackleton even marketed their expeditions as a race against other national competitors and rival empires, which Britain was winning.¹¹² The Antarctic became more than a testing ground for British manhood, however, when the British government made its first formal territorial claim in the region.

In 1893, the Foreign Office questioned whether public notification had ever been given of Britain's claims in the Antarctic and worried that no British explorer had visited the region since James Ross, fifty years before.¹¹³ The British government took steps to solidify its claim to South Georgia in 1905 when it granted a lease to the South Georgia Exploration Company for a pound a year and sent a warship to investigate the island.¹¹⁴ By 1906, the amount of whaling in Antarctic waters increased dramatically and the Norwegian whaler, Carl A. Larsen established a settlement at Grytviken on South Georgia for his *Compañía Argentina de Pesca*. Considering the recent British activity on South Georgia, Larsen thought it best to apply for a whaling license from the British Legation in Buenos Aires, which the Governor of the Falkland Islands granted on 1 January 1906.¹¹⁵ The prospect of increased whaling and the profits that would flow from licensing it forced the Colonial Office to reappraise Britain's rights in the Antarctic.

The reappraisal sped up when the Norwegian government, whose citizens comprised most of the whalers working in the Antarctic, asked the Foreign Office if Britain claimed the South Shetlands or if they were still open to all nations. Norway, newly independent from Sweden in 1905, made a strategic error by asking Britain – its main rival in the whaling industry – instead of simply claiming the territory for itself. In the first public, diplomatic assertion of British possession, the Foreign Office responded

¹¹¹ Hyam, "The British Empire in the Edwardian Era," 51; and Peter Beck, *The International Politics of Antarctica* (London: Croom Helm, 1986), 26.

¹¹² Day, *Antarctica: A Biography*, 110-111.

¹¹³ Foreign Office Memorandum by Sir E. Hertslet Concerning the South Shetland and Other Islands, 26 March 1893, Doc. UK26031893, in W. M. Bush ed., *Antarctica and International Law: A Collection of Inter-State and National Documents 3* (New York: Oceana, 1982-1988), 231-232.

¹¹⁴ Robert Headland, *The Island of South Georgia* (Cambridge: Cambridge University Press, 1992), 64-67; See DWH Walton, "The First South Georgia Leases: *Compañía Argentina de Pesca* and the South Georgia Exploring Company Limited," *Polar Record* 21, no. 132 (1982): 231-240. In 1887, however, the Colonial Office Yearbook began to specify South Georgia as a Dependency of the Falkland Island. See Bush, *Antarctica and International Law* 3, 225.

¹¹⁵ Headland, *The Island of South Georgia*, 67-68; G. E. Fogg, *A History of Antarctic Science, Studies in Polar Research* (Cambridge: Cambridge University Press, 1992), 155-56. Whale oil was in demand for makers of soaps, candles, and was used in making of nitroglycerine.

that they owned all of the islands and Graham Land based on discovery and repeated acts of possession. The whalers could only operate with permission and a licence from the governor of the Falkland Islands.¹¹⁶ In July 1908, after Norway pressed London to provide the legal basis of its claim,¹¹⁷ the British issued Letters Patent that formally claimed South Georgia, the South Orkneys, the South Shetlands, the South Sandwich Islands, and “the territory known as Graham’s Land, situated in the South Atlantic Ocean to the south of the 50th parallel of south latitude, and lying between the 20th and 80th degrees of west longitude.” Despite a glaring lack of geographic knowledge, the British asserted their claim over Graham Land and purposely left the southern extent of the territory open.¹¹⁸ In a sloppy mistake, they also included the southern part of Patagonia in their wide-ranging claim – an oversight that would cause them future embarrassment. Fortunately for Britain, no country formally questioned or protested the annexation.

Although no one immediately challenged Britain’s position, the two countries destined to become its greatest Antarctic rivals, Argentina and Chile, first took interest in the region during these busy years, laying the foundations of their own eventual claims. The Argentine gunboat *Uruguay*’s rescue of the Swedish Antarctic Expedition at Hope Bay, on the extreme northern end of the peninsula, awakened the country’s interest in the south polar region.¹¹⁹ The following year, at the invitation of the Scottish National Antarctic Expedition (approved by the British government), Argentina assumed official

¹¹⁶ Day, *Antarctica: A Biography*, 128-130. See also Robert Hall, “The Norwegian Inquiry of 1906 into Antarctic Sovereignty: Inexperience or Prudence?” *Polar Record* 25, no. 152 (1989): 59-60. See Norwegian Note to the United Kingdom Enquiring About the Sovereignty of Territories Between Longitudes 35°W and 80°W and Latitudes 40°S and 65°S, 23 February 1906, Document UK23021906, in Bush, *Antarctica and International Law* 3, 239-240; British Note to Norway in Reply to the Norwegian Enquiry Concerning the Sovereignty of Certain Antarctic Territories, 16 May 1906, Document UK16051906, Bush, *Antarctica and International Law* 3, 240-241.

¹¹⁷ Norwegian Memorandum to the United Kingdom Requesting Information on Territorial Rights Over the South Orkney Islands, the South Shetland Islands and Graham Land, 4 March 1907, Document UK04031907, Bush, *Antarctica and International Law* 3, 241-242.

¹¹⁸ See the Letters Patent, Letters Patent Providing for the Government of the Falkland Islands Dependencies, 21 July 1908, Document UK21071908, in Bush, *Antarctica and International Law* 3, 251-252. As Sanjay Chaturvedi has explained: “So great was the hunger for more territory and resources, and so intense the urge to deny them to others, that despite the obvious lack of geographical knowledge “Graham Land” was mentioned in the letters patent. The limits within which ‘anything that might be called Graham Land could possibly lie’ were defined to the north, east and west, but the southern extent was deliberately left open.” Chaturvedi, *The Polar Regions*, 64.

¹¹⁹ Christopher Joyner, “Anglo-Argentine Rivalry after the Falklands/Malvinas War: Laws, Geopolitics, and the Antarctic Connection,” *Lawyer of the Americas* 15, no. 3 (1984): 469-470.

control over the weather station on Laurie Island in the South Orkneys – an important action for its future sovereignty claims. While the British viewed the takeover of the station as a scientific endeavour, the Argentine press started referring to the South Orkney Islands as Argentine Southern Territory. Accordingly, British authorities reminded Argentina that the islands belonged to Britain. Upon receiving the note to this effect, Estanislao S. Zeballos, the new Argentine Foreign Minister, requested time for further study of Antarctic claims. To the British Minister, Zeballos expressed that “he was never more surprised in his life than to learn that Great Britain claims the group in question.”¹²⁰ Communication between the two countries on the Antarctic ceased, leaving behind the seeds of future conflict.

The Chileans declined sending an expedition but granted private companies concessions to operate in the region. Between 1902 and 1906, the government issued fishing and sealing concessions to companies for the South Shetlands, the islands further south, and the “lands of Graham.”¹²¹ The Chilean government also thought the south polar regions important enough to include them in its ongoing efforts to clarify the country’s boundary with Argentina. In 1907, Chilean officials proposed a treaty that would divide between the two countries “the islands and American Antarctic continents,” even covering unexplored areas.¹²² The Argentines quietly ignored the idea, but Foreign Minister Zeballos noted “Chile ought to know that England claimed all these lands and that we should have to defend them by joint action.”¹²³ Calls for Latin American

¹²⁰ British Note to Argentina Concerning Reference in a Decree to the South Orkney Islands’ Lying Within Argentine Southern Territory, 4 January 1907, Document AR04011907, Bush, *Antarctica and International Law* 1, 571-572. Zeballos cited in Bush, *Antarctica and International Law* 1, 573.

¹²¹ Supreme Decree No. 3, 3310 Granting a Fishing Concession to Pedro Pablo Benavides, 31 December 1902, Document CH31121902, in Bush, *Antarctica and International Law* 2, 290-291; Application from Enrique Fabry and Domingo de Toro Herrera for a Concession for Sealing and other Purposes, 9 January 1906, Document CH09011906, in Bush, *Antarctica and International Law* 2, 291-293; Supreme Decree No. 260, Granting a Concession For Sealing and Other Purposes to Enrique Farby and Domingo De Toro Herrera, 27 February 1906, Document CH27021906, in Bush, *Antarctica and International Law* 2, 295-296.

¹²² Los territorios antárticos en estudio son material propia de exploraciones aun no completas, que urge estimular i a las cuales se habrán de seguir avenimientos que todo hace fáciles entre los Gobiernos chileno i argentino.” “The Antarctic territories under review fall within the domain of explorations that have not yet been completed, and which should be discouraged and which should be followed by agreements which should not be difficult to reach between the Chilean and Argentine Governments.” Memorial of the Chilean Ministry of Foreign Affairs Reporting Discussions With Argentina on Antarctic Territories, 18 September 1906, Document CH18091906, in Bush, *Antarctica and International Law* 2, 301.

¹²³ “Convenía que Chile supiera que Inglaterra reclamaba todas estas tierras y, que tendríamos que defendernos unidos.” Quoted in Bush, *Antarctica and International Law* 2, 302.

cooperation in the Antarctic would resurface in the 1940s.

Concurrent to the expanding interest in the Antarctic, the heroic age of polar exploration unfolded in the Arctic with dramatic results. Scandinavian expeditions filled in the north polar map around the turn of the century.¹²⁴ Norway's interest in the Arctic grew after Otto Sverdrup and Fridtjof Nansen became the first people to ski across the interior of Greenland in 1888,¹²⁵ and in the ensuing years "the Norwegian state invested economic capital – money – to harvest symbolic profit – honour" through exploratory activities.¹²⁶ By the beginning of the twentieth century, the prospect of acquiring new Arctic territory also motivated the newly independent Norwegian state.¹²⁷ In a brilliant attempt to reach the North Pole, Nansen drifted across the Arctic Ocean onboard the *Fram* from 1893-96. Sverdrup led the *Fram* on a scientific expedition to northwest Greenland and into the waters of the Arctic Archipelago from 1898-1902, overwintering for three years on Ellesmere. From there he set out to discover, claim and partially survey Axel Heiberg, Amund and Ellef Ringnes Islands, and King Christian Island.¹²⁸ When Sverdrup returned to Norway, he embarked on a lifelong effort to persuade his government to pursue his claims. Inspired by his countryman's heroic exploits, Roald Amundsen "carried the Norwegian flag through the North West Passage" in the first successful transit of the waterway from 1903-06, greatly adding to the geographic and scientific knowledge of the Arctic Archipelago.¹²⁹

As the Norwegians pushed deeper into Arctic North America, the Danes expanded their activities on Greenland. In 1894, they established a mission and trading post on the east coast at Ammassalik. Between 1898 and 1899, Lt. Georf Carl Amstrup

¹²⁴ "The years around 1900 were those of Scandinavia's arctic ascendancy," in Tevor Levere, *Science and the Canadian Arctic: A Century of Exploration, 1818-1918* (Cambridge: Cambridge University Press, 1993), 362.

¹²⁵ Einar-Arne Drivenes and Harald Dag Jølle, *Into the Ice: The History of Norway and the Polar Regions* (Gyldendal Akademisk, 2006), 59-60.

¹²⁶ Drivenes and Jølle, *Into the Ice*, 110.

¹²⁷ Drivenes and Jølle, *Into the Ice*, 119. In 1905, Norway split from its union with Sweden. The possibility of acquiring new territory in the Antarctic also started to intrigue the Norwegian government, evidenced by its inquiries into the status of British claims in the region.

¹²⁸ Lyle Dick, *Muskox Land: Ellesmere Island in the Age of Contact* (Calgary: University of Calgary Press, 2002), 218.

¹²⁹ See Stephen R. Brown, *The Last Viking: The Life of Roald Amundsen* (Boston: De Capo Press, 2012), 39-90. Amundsen quoted on pg. 90.

explored the east coast from Ammassalik to Scoresby Sound.¹³⁰ Between 1902 and 1904, the Danish Literary Expedition pushed into northwestern Greenland for the first time.¹³¹ After almost two hundreds years of “steady if unspectacular progress,” however, the full geographic extent of the massive island and long stretches of coast to the northeast remained undefined. Resolved, Denmark launched the Danmark Expedition, its largest venture yet, in 1906. For two years, twenty-six scientists and guides charted the entire coastline of unknown northeast Greenland, making sledge journeys of more than 6,436 km.¹³² The expedition published its findings in *Meddelelser om Grønland*, which became important proof of Danish activity on the island.

The Danes were not alone in exploring northern Greenland. Here Robert Peary honed his skills before his attempt on the North Pole.¹³³ During expeditions in 1891-1892 and 1893-1895, Peary crossed the Greenland ice cap and learned Inuit survival techniques. Between 1898 and 1902 he first tried to reach the North Pole, losing several toes to frostbite in the attempt. Peary extended this expedition into Ellesmere Island (Grinnell Land) and repatriated papers belonging to the abandoned American base at Fort Conger. Three years later, he extensively surveyed West Grinnell Land (Ellesmere) before mapping northern Greenland. Later he claimed to have spotted new land north of Ellesmere, which Peary called Crocker Land – after one of his supporters – noting “if confirmed, the island would add to the list of American prizes.”¹³⁴

The activities of Peary and Otto Sverdrup in the High Arctic islands, coupled with a new flood of American whalers in the western Arctic and Canada’s loss in the Alaska Boundary Dispute of 1903, prompted the Canadian government to extend its efforts in Arctic North America.¹³⁵ In Ottawa, officials harboured lingering doubts about the extent

¹³⁰ Apollonio, *Lands That Hold One Spellbound*, 87-89.

¹³¹ Richard Vaughn, *Northwest Greenland: A history* (Orono, Maine: University of Maine Press, 1991).

¹³² Apollonio, *Lands That Hold One Spellbound*, 101-120.

¹³³ Fogelson, *Arctic Exploration and International Relations*, 41.

¹³⁴ Quoted in Nancy Fogelson, “The Tip of the Iceberg: The United States and International Rivalry for the Arctic, 1900-25,” *Diplomatic History* 9, no. 2 (1985): 132-133.

¹³⁵ Worsening the situation was the Alaska Boundary Dispute, which had nothing to do with territory in the Arctic, but enflamed Canadian paranoia over the Americans seizing control of their territory. The primary disagreement related to a several thousand mile long strip to the west of British Columbia and to the southeast of the Alaska territory. The tribunal ruled in favour of the U.S. and Canada lost access from the Yukon to the sea.

of Canada's northern borders. The Canadian Ministry of the Interior commissioned the first study of the question (and the first Canadian legal appraisal of Canada's claims), from Dr. William Frederick King, the chief dominion astronomer. After decades of experience as a Dominion Land Surveyor, King was one of Canada's leading experts on territorial boundaries having assisted Minister of the Interior Clifford Sifton prepare Canada's case for the Alaska Boundary Tribunal.¹³⁶ King applied his considerable legal and historical knowledge on boundaries and territorial claims to the North American Arctic.

King stressed the ambiguity that surrounded Canadian territorial rights to lands inherited from Britain in 1880. The transfer may have handed Canada all the islands adjacent to the Canadian coastline, but what about unknown islands that lay 400 miles or more from the mainland? King speculated that because British acts of discovery and possession were never formally ratified by the state prior to the 1880 transfer, Canada's assumption of authority might not have had full international force. Given the uncertainties, King concluded "Canada's title to some at least of the northern islands is imperfect."¹³⁷

Canada responded to foreign activities in the Arctic Archipelago, and ongoing concerns about the strength of its title, by embarking "on a long range, though relatively low-key, program of finding out more about her northern territories, securing Canadian sovereignty, and advancing the frontiers of scientific knowledge," historian Richard Diubaldo explained.¹³⁸ To regulate American whaling, the North-West Mounted Police (NWMP) established a post on Herschel Island in the Beaufort Sea in 1903.¹³⁹ Following the footsteps of earlier Canadian northern voyages led by William Wakeham and Albert Peter Low, Joseph-Elzéar Bernier patrolled the waters of Hudson Bay and the Arctic

¹³⁶ Shelagh Grant, "Dominion Land Surveyors and Arctic Sovereignty in the Early 20th Century," *Ontario Professional Surveyor* (2011): 24-27. See also Daniel S. C. Mackay, "James White: Canada's Chief Geographer, 1899-1909," *Cartographica* 19, no. 1 (1982): 51-61.

¹³⁷ W.F. King, *Report upon the Title of Canada to the Islands North of the Mainland of Canada* (Ottawa: Government Printing Bureau, 1905), 8.

¹³⁸ Richard Diubaldo, *Stefansson and the Canadian Arctic* (Montreal: McGill-Queen's University Press, 1978), 7.

¹³⁹ See William R. Morrison, *Showing the Flag: The Mounted Police and Canadian Sovereignty in the North, 1894-1925* (Vancouver: University of British Columbia Press, 1985), 78-85.

islands, asserting control and indicating Canada's supervision over the region. Bernier intercepted and imposed licenses on foreign whalers, collected customs duties, and conducted geographical research.¹⁴⁰ Bernier also performed ceremonies of possession on many northern islands to reinforce Canada's sovereignty. His flag flying annoyed some Canadian officials who thought his actions might actually sow doubts about Canada's sovereignty in the region.¹⁴¹ Although the government took no action to occupy any of the islands in the Archipelago, Bernier's activities marked an important shift from Canadian inactivity in previous decades.¹⁴²

As the amount of state activity in Greenland and the Canadian Arctic increased, the polar area that experienced the greatest explosion of intensive economic development during this era was Spitsbergen. European scientific expeditions continued to study the island, and the Norwegians took the lead on mapping the western coastal areas and

¹⁴⁰ Memorandum to A.G. Doughty from Hensley Holmden, 20 May, 1921, LAC, MG 30-B-57. Ottawa sponsored expeditions led by William Wakeham in 1897, A.P. Low in 1903-1904, J.D. Moodie in 1904-1905. The government of Wilfrid Laurier bought the German Antarctic expedition's ship, *Gauss*, renamed it *Arctic*, and sent it to fly the flag in the Arctic. Under the command of Captain Joseph Elzéar Bernier, the *Arctic* made voyages to the archipelago in 1906-7, 1908-9, and 1910-11.

¹⁴¹ See Janice Cavell and Jeff Noakes, *Acts of Occupation: Canada and Arctic Sovereignty, 1918-25* (Vancouver: UBC Press, 2010), 75-76 and Janice Cavell, "Sector Claims and Counter-claims: Joseph Elzéar Bernier, the Canadian Government, and Arctic Sovereignty, 1898-1934," *Polar Record* 50, no. 3 (2014): 293-310. As Alan MacEachern has noted, after his 1906-1907 voyage, Bernier claimed to have "taken possession of North Lincoln and Cone Island, and all adjacent islands, as far as ninety degrees north," which was, in effect, a longitudinally imprecise sector claim. MacEachern argues that the Canadian government likely stopped his use of this phrasing as he never spoke of the claim in these terms again. In 1909, however, he made a more explicit sector claim, and made it publicly, perhaps knowing the government would try to silence him. Alan MacEachern, "J.E. Bernier's Claims to fame," *Scientia Canadensis* 33, no. 2 (2010): 48. For more on Bernier, see Marjolaine Saint-Pierre, *Joseph-Elzéar Bernier: Capitaine et coureur des mers* (Sillery: Septentrion, 2004); David Eric Jessup, "J.E. Bernier and the Assertion of Canadian Sovereignty in the Arctic," *American Review of Canadian Studies* 38, no. 4 (2008): 409-429; and Season L. Osborne, "Closing the Front Door to the Arctic: Capt. Joseph E. Bernier's Role in Canadian Arctic Sovereignty" (Master's thesis: Carleton University, 2003); Yolande Dorion-Robitaille, *Captain J.E. Bernier's Contribution to Canadian Sovereignty in the Arctic* (Ottawa: Department of Indian and Northern Affairs, 1978); and T.C. Fairley and Charles E. Israel, *The True North, the Story of Captain Joseph Bernier* (Toronto: Macmillan, 1957). Notable primary works are J.E. Bernier, *Report on the Dominion of Canada Government Expedition to the Arctic Islands and the Hudson Strait on Board the C.G.S. 'Arctic' 1906-1907* (Ottawa: Government Printing Bureau, 1909); J.E. Bernier, *Report on the Dominion Government Expedition to the Northern Waters and Arctic Archipelago on the D.G.S. 'Arctic' in 1910* (Ottawa: Government Printing Bureau, 1911); and J.E. Bernier, *Master Mariner and Arctic Explorer: A Narrative of Sixty Years at Sea from the Logs and Yarns of Captain J.E. Bernier, FRGS, FRES* (Ottawa: Le Droit, 1939).

¹⁴² For more on Canada's early efforts in the Arctic Archipelago see Janice Cavell, "'As far as 90 north': Joseph Elzéar Bernier's 1907 and 1909 sovereignty claims," *Polar Record* 46, no. 239 (2010): 372-373 and "'A little more latitude': explorers, politicians, and Canadian Arctic policy during the Laurier era," *Polar Record* 47, no. 243 (2011): 289-309.

interior. While Norwegian hunters continued to winter on the island in search of fox and bear furs, coal became the sought after treasure by end of the nineteenth century. A Norwegian company started the first coal mine along Isfjorden, on the island's west coast, in 1899. Although the British Spitsbergen Coal and Trading Company established a mine at Adventfjorden in 1904, the most powerful company to operate on Spitsbergen was the American Arctic Company at Longyearbyen. The mining activities brought permanent occupation to Spitsbergen for the first time, with miners largely recruited from northern Norway. Legally, however, Spitsbergen fell under no country's sovereignty. In 1909, Italian international jurist Camille Piccioni first described the archipelago as *terra nullius*. The reference did not mean that the area was open to be claimed by the first state to successfully occupy it, but that Spitsbergen was an area without an owner and should remain so. Legal historian Andrew Fitzmaurice has observed that over the decades the polar regions inspired an "explosion in the use of terra nullius in international law" and its meaning and legacy changed over time.¹⁴³

By the end of the first decade of the twentieth century, the level of activity on Spitsbergen called out for jurisdiction and administration. When Norway proposed that it assume control over the entire archipelago, the British and American companies operating on the island opposed the move urging their own governments to make claims. Furthermore, to support the exploration activities of Swedish citizens over the previous half a century, the Ministry of Foreign Affairs in Stockholm persuaded Swedish capitalists to invest in a mining operation on the island – a move the Russians and Dutch copied soon after.¹⁴⁴ Over the next two decades, competing claims to Spitsbergen and its uncertain political status made an important impact on territorial claims in the polar regions more generally.

Despite the rush of activities occurring all over the Arctic, most popular, global attention fixated on the search for the North Pole. Between 1895 and 1909, Swedes,

¹⁴³ Fitzmaurice, *Sovereignty, Property and Empire*, 310. See also Camille Piccioni, "L'organisation du Spitzberg," *Revue Générale de Droit International Public* 16 (1909): 117-134.

¹⁴⁴ See Charles Rabot, "The Norwegians in Spitsbergen," *Geographical Review* 8, no. 4-5 (1919): 209-226. These expeditions left every summer for Spitsbergen and were funded by Norwegian parliament and public support. See also Arlov, 249, 261; R. N. Rudmose Brown, "Spitsbergen, Terra Nullius," *Geographical Review* 7, no. 5 (1919): 318.

Norwegians, Danes, Americans, Germans, British, and Italians all tried to reach the Pole. Finally in September 1909, the world accepted (at least for a time) that the great prize fell to an American – either Cook or Peary. In the wake of this news, Robert Falcon Scott turned the attention of the world to the South Pole, one of the last great prizes of polar exploration.

More importantly, the quest for the Poles finally forced international lawyers to think about the status of the polar regions. The start of the twentieth century witnessed states take far more interest in polar territorial claims. Driven by competition, fear of foreign intervention, and economic interests – mostly involving the whaling industry – several states, notably Britain and Canada, had actively sought to strengthen their legal positions in the Arctic and Antarctic. The planting of the American flag at the North Pole spurred international legal experts to review state activity in the polar regions. After centuries of effort, what exactly had the countries involved in polar exploration accomplished? How much value did the law attach to discovery, exploration, flag planting, scientific research and efforts at state administration? In the eyes of international law, who owned the Arctic and the Antarctic?

1.5 International Law and the Acquisition of Territory

Legal thinkers René Dollot, Thomas Willing Balch, and James Brown Scott explored the frontiers of international law during the climax of the second age of discovery, as explorers pushed into the interior of Africa, the central Asian deserts, the Amazon Basin, and the polar regions, and European powers extended their formal empires throughout the world.¹⁴⁵ These legal experts learned their art during the “zenith of European jurisprudence” as international law formulated by European states and jurists spread throughout the world.¹⁴⁶ From their seat at the pinnacle, lawyers surveyed centuries of development in the international law on territorial acquisition.

¹⁴⁵ Stephen Pyne, *Voyager: Exploration, Space, and the Third Great Age of Discovery* (New York: Viking Penguin, 2010), 43.

¹⁴⁶ Milos Vec, “From the Congress of Vienna to the Paris Peace Treaties of 1919,” in *The Oxford Handbook of the History of International Law*, eds. Bardo Fassbender and Anne Peters (Oxford: Oxford University Press, 2012), 654.

Papal bulls represented the first attempt to regulate and simplify the territorial claims of rival empires. In 1493, the two most important bulls, *Inter caetera* and *Dudum siquidem*, gave Spain exclusive rights to the non-Christian world west and south of a pole-to-pole line that ran one hundred leagues west of the Azores and Cape Verde Islands. A year later, Spain and Portugal clarified their claims in the Treaty of Tordesillas, delivering everything west of a line passing through 60°W latitude to Spain and everything east to Portugal. Ostensibly a simple division of the world, the Treaty included far more complexity. Tordesillas did not give full title to the Iberian powers in their spheres of influence, conditioning sovereignty upon “recurring proofs,” such as ceremonies and mapping. The Treaty did not grant ownership over undiscovered lands in the spheres of influence it created, but gave each state the right to “seek out and take possession of newly discovered lands.”¹⁴⁷ From the beginning of European exploration and colonial expansion, claiming land involved more than drawing lines on the map.

In the fifteenth and sixteenth centuries, as imperial competition increased and European nations took root in colonial territories with widely different geographic and human landscapes, early modern glossators looked to establish clearer guidelines and a common legal language for the acquisition of territory. They struggled to determine a basic formula for establishing sovereignty. Instead, as legal historians Lauren Benton and Benjamin Straumann observe, “asserting and defending [imperial] claims ... involved a scattershot legal approach, with multiple, overlapping, and even conflicting arguments being addressed to various, sometimes imagined, audiences.”¹⁴⁸

To support imperial title and gain international recognition, state agents and legal scholars turned to Roman property law, which held that *dominium* (ownership) of *res nullius* properties (without an owner) could be acquired by *occupatio* (taking possession), which was “an instant conveyor of ownership.”¹⁴⁹ Empires often used the doctrine of *res*

¹⁴⁷ Lauren Benton, *A Search for Sovereignty: Law and Geography in European Empires, 1460-1900* (Cambridge: Cambridge University Press, 2010), 23.

¹⁴⁸ Lauren Benton and Benjamin Straumann, “Acquiring Empire by Law: From Roman Doctrine to Early Modern European Practice,” *Law and History Review* 28, no. 1 (2010): 29.

¹⁴⁹ Benton and Straumann, “Acquiring Empire by Law,” 2, 14-16. In the North American context, for instance, the doctrine of *res nullius* was often vocalized, but since the English and French saw the need to negotiate treaties and cessions from Indigenous groups, they acknowledged a degree of prior Indigenous ownership. See Brian Slattery, “Paper Empires: The Legal Dimensions of French and English Ventures in

nullius to justify their claim to absolute title over lands that they deemed ownerless; the presence of Indigenous polities and rival imperial competitors complicated its use.¹⁵⁰ Broader imperial strategies engaged the law of *usucapio* (taking through use), by which a person could acquire title over property that already had an owner through *possessio* (possession) over a period of time. In order to keep possession, the owner simply showed his claim superior to that of his competitor. Following this legal tradition, expanding European empires focused on acquiring proofs of better title than any possible competitor, rather than trying to “establish title tout court” or explaining the “legitimacy of title and how the thing in question had been acquired.” While Roman law offered a starting point for the legal discourse on territorial acquisition, it became “more resource than road map” due to the weak definition of the steps required for acquiring sovereignty.¹⁵¹

Between the seventeenth and nineteenth centuries, sovereignty doctrine developed alongside European expansion.¹⁵² Lauren Benton shows, however, that empires lacked one version of sovereignty, but used multiple adaptations to deal with different geographical or geopolitical situations. Even in the best of cases, the space of an empire was “politically fragmented, legally differentiated, encased in irregular, porous and sometimes undefined boundaries.”¹⁵³ The agents of empire used the word “‘anomalous’ to describe places for which they could not easily define structures of law or the nature of

North America,” in *Despotic Dominion: Property Rights in British Settler Societies*, eds. J. McLaren, A. R. Buck and N. E. Wright (Vancouver: University of British Columbia Press, 2005). The idea of terra nullius (land without owner) was derived from *res nullius* by analogy, but Benton argues the term was rarely used at this point.

¹⁵⁰ Andrew Fitzmaurice, “Discovery, Conquest, and Occupation of Territory,” in *The Oxford Handbook of the History of International Law*, eds. Bardo Fassbender and Anne Peters (Oxford: Oxford University Press, 2012), 852-853. “Absolute title based on the doctrine of *res nullius* received less importance in this context, but it also made no sense strategically to banish such arguments when the exercise of claims making required reciting any and all arguments, including promoting multiple interpretations of the same symbolic acts.” Benton and Straumann, “Acquiring Empire by Law,” 37.

¹⁵¹ Benton and Straumann, “Acquiring Empire by Law,” 16-17 and 37-38. For another perspective on the ‘struggle for legitimacy’ see Anthony Pagden, “The Struggle for Legitimacy and the Image of Empire in the Atlantic, to c. 1700,” in *The Origins of Empire*, ed. Nicholas Canny (Oxford: Oxford University Press, 1998), 34-54; Anthony Pagden, “Law, Colonization, Legitimation, and the European Background,” in *The Cambridge History of Law in America, Vol. I, Early America (1580–1815)*, eds. Michael Grossberg and Christopher Tomlins (Cambridge: Cambridge University Press, 2008), 1-31.

¹⁵² See for instance, Benton, *A Search for Sovereignty*; Ken MacMillan, *Sovereignty and Possession in the English New World: The Legal Foundations of Empire, 1576-1640* (Cambridge: Cambridge University Press, 2006); Jeremy Adelman, “An Age of Imperial Revolutions,” *The American Historical Review* 113, no. 2 (2008): 319-340.

¹⁵³ Benton, *A Search for Sovereignty*, 2.

sovereignty.” Faced with anomalous legal spaces, jurists and diplomats looked to “inter- and intra-imperial legal politics,” and the sites of imperial competition, as sources for international law.¹⁵⁴ “A symbolic language of possession” took shape that included planting flags or crosses, holding ceremonies, and conducting more tangible acts such as constructing forts. The English aristocrat and explorer Walter Raleigh promised that by “keeping one good fort, or building one towne of strength, the whole Empyre is guarded.”¹⁵⁵ Geographic knowledge also developed into an important class of information that “played a dual function of making strange landscapes subject to control and rendering them as property – one sense of *dominium*.”¹⁵⁶ When polar explorers charted and mapped they engaged in an established method of demonstrating state control. Although the measures deemed necessary for acquiring title grew over the centuries, imperial sovereignty often remained “more myth than reality.”¹⁵⁷

Opposition to the use of discovery and symbolic acts to claim large tracts of territory, and the fictitious sovereignty that they created, steadily grew in both state practice and doctrine. Many English colonies of North America, for instance, argued that title should go to whatever group managed to cultivate the soil first and rows of corn and wheat became incredibly important.¹⁵⁸ By the middle of the eighteenth century, most jurists agreed with Swiss jurist Emmerich de Vattel, who argued in his famous *The Law of Nations*, that a state could not “appropriate to itself countries which it does not really occupy, and thus engross a much greater extent of territory than it is able to people or cultivate.” Such an action violated natural law, which demanded that the earth be occupied and used.¹⁵⁹ German jurist Georg Friedrich von Martens maintained that a state could not acquire territory through first discovery and planting “Crosses, plinths and

¹⁵⁴ Benton, *A Search for Sovereignty*, at 29 and xiv.

¹⁵⁵ Benton, *A Search for Sovereignty*, 56, 82.

¹⁵⁶ Benton, *A Search for Sovereignty*, 11. See also Dale Miquelon, “Envisioning the French Empire: Utrecht, 1711-1713,” *French Historical Studies* 24, no. 4 (2001): 653-677.

¹⁵⁷ Benton, *A Search for Sovereignty*, 279.

¹⁵⁸ Stephen C. Neff, *Justice Among Nations: A History of International Law* (Cambridge: Harvard University Press, 2014), 128-129. The colonies used this legal idea to argue that Indigenous Peoples did not have right to the territory they had lived on since time immemorial.

¹⁵⁹ Emmerich de Vattel, *The Law of Nations, Sixth American Edition* (Philadelphia: T. & J.W. Johnson Law Booksellers, 1844), 99.

inscriptions” if it did “not cultivate” the land.¹⁶⁰ Accordingly, as explorers discovered and claimed huge portions of the Arctic and Antarctic in the nineteenth century, jurists devalued discovery’s weight in territorial acquisition.¹⁶¹ Sir Robert Phillimore, arguably the most eminent British international lawyer of his generation and author of the first comprehensive British treatise on international law in the 1850s, concluded, “Discovery... furnishes an inchoate *title to possession* in the discoverer.”¹⁶² First discovery gave a state the exclusive right (called an inchoate right) to occupy new territory and perfect its title, but this could be lost if the state did not act within a reasonable, though undetermined, period. The idea of inchoate rights would come to play an important role in the polar regions.

While nineteenth century jurists made strong conclusions on the role of discovery, their findings on the doctrines of prescription and contiguity were less clear. Legal scholar Stephen Neff explains that, under prescription, “rights claimed and exercised for extended periods of time – even if they had no legal foundation initially – ripen, with the passage of time, into true legal rights that other parties are obligated to respect. That is to say, the passage of time *alone* can transform usurpation into right.”¹⁶³ Yet no jurist in the nineteenth century could determine exactly how much time had to pass before a right became unchallengeable.¹⁶⁴ Others wondered if time really could cure even the most doubtful and flawed titles.

Legal opinion on the doctrine of contiguity, which became prominent in the nineteenth century, was even less apparent. Contiguity held that the occupation of part of a region entitled a state to all the territory (or hinterland) close enough to be considered a single geographic unit.¹⁶⁵ According to legal scholar Hersch Lauterpacht, “the principle of contiguity played a useful part in the period when some compromise between the fanciful assertions of pure discovery and effective occupation best fulfilled the needs of

¹⁶⁰ Quoted in Fitzmaurice, “Discovery, Conquest, and Occupation of Territory,” 844-845.

¹⁶¹ Fitzmaurice, “Discovery, Conquest, and Occupation of Territory,” 845-846

¹⁶² Robert Phillimore, *Commentaries Upon International Law* 1, 2nd Ed. (London: Butterworths, 1871), 269.

¹⁶³ Neff, *Justice Among Nations*, 126-127.

¹⁶⁴ See, for instance, Henry Wheaton, *Elements of International Law* (Boston: Little, Brown and Company, 1866), 239.

¹⁶⁵ Also called proximity, propinquity, hinterland, adjacency, continuity, geographic unity, region of attraction. Pharand, *Canada’s Arctic Waters in International Law*, 28.

the time.”¹⁶⁶ The United States, for instance, used the doctrine in its long-standing dispute with Britain over the Oregon territory.¹⁶⁷ In 1844, Secretary of State John Calhoun informed Britain that contiguity,

furnishes a just foundation for a claim of territory, in connection with those of discovery and occupation would seem unquestionable. It is admitted by all, that neither of them is limited by the precise spot discovered or occupied...It is evident that, in order to make either available, it must extend at least some distance beyond that actually discovered or occupied; but how far, as an abstract question, is a matter of uncertainty. It is subject in each case, to be influenced by a variety of considerations.¹⁶⁸

Alongside arguments of contiguity, however, the U.S. also based its claim on rights transferred from Spain, the work of American explorers, and the establishment of trading posts in the region.¹⁶⁹ Nevertheless, contiguity caught on in state practice and juridical treatises.¹⁷⁰ While several territorial disputes involving islands during the second half of the century tested the doctrine of contiguity, no one produced a general conclusion on the theory’s applicability.¹⁷¹ Out of the theory evolved the concept of the sphere of influence, which European powers used to notify other states of the territory they considered

¹⁶⁶ Hersch Lauterpacht, “Sovereignty Over Submarine Areas,” *British Yearbook of International Law* 27 (1950): 427.

¹⁶⁷ Travers Twiss, *The Oregon Treaty: Its History and Discovery* (New York: D. Appleton & Co., 1846), 215; Pharand, *Canada’s Arctic Waters in International Law*, 28-29. The Oregon territory was west of the Rocky Mountains between latitudes 42° and 54° 40’ North.

¹⁶⁸ Francis Wharton, *A Digest of the International Law of the United States* (Washington, Government Printing Press, 1887), 6-7. He echoed the words of Gallatin, American commissioner in the same controversy in 1827. “It will not be denied that the extent of contiguous territory to which an actual settlement gives a prior right, must depend, to a considerable degree, on the magnitude and population of that settlement, and on the facility with which the vacant adjoining land may, within a short time, be occupied, settled, and cultivated by such population, as compared with the probability of its being occupied and settled from another quarter.” Twiss, *The Oregon Treaty*, 310.

¹⁶⁹ Pharand, *Canada’s Arctic Waters in International Law*, 29.

¹⁷⁰ Sir Travers Twiss, *The Law of Nations Considered as Independent Political Communities* (Oxford: Oxford University Press, 1861), 170. Twiss, an English jurist, noted, “When a Nation has discovered a country and notified its discovery, it is presumed to intend to take possession of the whole country within those natural boundaries which are essential to the Independence and Security of its Settlement.”

¹⁷¹ The arbitrator between Great Britain and Portugal in their dispute over Bulama, an uninhabited island close to the west coast of Africa, ruled that Portugal be awarded the island based on its discovery, its settlement and sovereignty over the adjacent coast and Bulama’s proximity to mainland, “so near to it that animals cross at low water.” In the dispute between the U.S. and Peru over the Labos Islands, some thirty miles off the Peruvian coast, the Americans refuted the contiguity argument used by Peru. The U.S. took the same position in the dispute with Haiti over the Islands of Navassa. During arbitration between Holland and Venezuela the latter relied on the doctrine of contiguity, she did so on the ground that the doctrine was “well established in the relations of the United States and Great Britain.” See Pharand, *Canada’s Arctic Waters in International Law*, 31-38.

geographically or politically bounded to their empire – a concept most jurists rejected.¹⁷² Thus, state practice and international jurisprudence left the legal status of contiguity unclear in the late nineteenth century.

The uncertainties surrounding the doctrines of contiguity and prescription mirrored the general ambiguity in all international law dealing with territorial claims and sovereignty. The last decades of the nineteenth century witnessed a concerted effort by jurists to address the problem by finally formalizing and fixing the rules of territorial acquisition. This push occurred in the context of the flourishing of international law that transpired in the 1870s. Legal scholar Martti Koskenniemi has described how the peaceful arbitration of disputes, like the Alabama affair between the U.S. and Britain, fuelled a growing professional awareness and enthusiasm amongst international legal jurists.¹⁷³ The trend culminated with the creation of the *Institut de droit International* in Ghent and the *Association for the Reform and Codification of the Laws of Nations* (later called the *International law Association*) in 1873. Through these institutions, “the men of 1873” promoted their positivist doctrine, which held states as the principal actors in international law, bound only by the rules to which they consented.¹⁷⁴ Oliver Wendell Holmes Jr, captured their central idea best in 1881 when he noted, “The life of law has not been logic: it has been experience.”¹⁷⁵ This group wanted to stop studying law as an abstract philosophy and turn it into a science, based on the study of real world experiences and situations that provided concrete and practical rules states could actually use.¹⁷⁶ More than anything, the “men of 1873” wanted states to see the value and practicality of a coherent international legal system.

In the creation of Europe’s formal empires, “the men of 1873” found the opportunity they sought. For most of the nineteenth century informal empires grew, as countries tried to control trade or governments, but states lacked the desire to formally

¹⁷² See J.A. Andrews, “The Concept of Statehood and the Acquisition of Territory in the Nineteenth Century,” *Law Quarterly Review* 94 (1978): 408-427.

¹⁷³ Martti Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law, 1870-1960* (Cambridge: Cambridge University Press, 2001), 40.

¹⁷⁴ Anthony Anghie, *Imperialism, Sovereignty, and the Making of International Law* (Cambridge: Cambridge University Press, 2004), 42-43.

¹⁷⁵ Oliver Wendell Holmes, *The Common Law* (Boston: Little, Brown, 1881), 1.

¹⁷⁶ Neff, *Justice Among Nations*, 223-224.

occupy foreign territory. Their attitude changed in the late 1870s when the European powers took active steps to build formal empires in Africa, the Pacific and Southeast Asia. Koskenniemi highlights that “the end of informal empire meant that European public institutions – in particular, European sovereignty – needed to be projected into colonial territory.”¹⁷⁷ International law and the lawyers that studied it now had a strong sense of purpose and a goal. Legal historian Antony Anghie argues that the empire building of the late 19th century offered to international law “the same opportunity they traditionally extended to the lower classes...the opportunity to make something of yourself, to prove and rehabilitate yourself.”¹⁷⁸ European states used the law to argue that the millions of ‘uncivilized’ people they colonized had no such thing as sovereignty or territory, and their lands were free for the taking. For international lawyers, the colonies (and the competition they generated between Europe’s powers) provided justification for their belief that the law could play an important role in the management of international relations. In the 1880s, lawyers became “locked in an imperialist matrix that compromised their legal aspirations.”¹⁷⁹ This atmosphere later shaped the legal work done on the polar regions.

Solving the legal problems created by the “Scramble for Africa,” demanded the involved European states iron out the rules for acquiring land. To do this, and to answer other pressing questions concerning the freedom of navigation and trade throughout the Congo and Niger Rivers, the European powers organized an international conference in Berlin. In the summer of 1884, the conference’s two founders, German Chancellor Otto von Bismarck and French Foreign Minister Jules Ferry, explained that the meetings would provide “a definition of formalities necessary to be observed so that new occupations on the African coasts shall be deemed effective.” The delegates would try to determine how a state could demonstrate adequate proof of possession, without getting into legal and moral issues like whether they had a “right to colonize” or the status of

¹⁷⁷ Koskenniemi, *The Gentle Civilizer of Nations*, 121.

¹⁷⁸ Anghie, *Imperialism, Sovereignty and the Making of International Law*, 63-64.

¹⁷⁹ When faced with the practical needs of colonialism and imperialism many international lawyers became locked “an imperialist matrix that compromised their legal aspirations.” Caspar Sylvest, “‘Our Passion for Legality’: International Law and Imperialism in Late 19th Century Britain,” *Review International Studies* 34, no. 3 (2008): 422.

Africa's Indigenous polities.¹⁸⁰ When word of the conference seeped out, international lawyers looked expectantly for what had been missing over the last centuries: a clear and concrete guide for territorial acquisition.¹⁸¹ The lawyers should have realized that, “an Empire is never an advocate of an international law that can seem only an obstacle to its ambition.”¹⁸²

The Berlin Conference opened on 15 November 1884 at the German Chancellor's Palace on Wilhelmstraße. Diplomats from fourteen states, including the U.S., Turkey and every European power except Switzerland, attended. On 26 February 1885, every state except the U.S. signed the General Act of the conference.¹⁸³ Unfortunately, the document constructed an incredibly weak and vague legal regime. “None of the thirty-eight clauses [had]...any teeth,” Thomas Pakenham memorably remarked. “It had set no rules for dividing, let alone eating, the cake.”¹⁸⁴ In 1942, Sybil Crowe concluded that the Act's resolutions were “as empty as Pandora's box...a most inadequate piece of legislation.”¹⁸⁵

Chapter VI required that new occupations on the coast of Africa be “effective.” The Chapter only had two articles, written as general formulations “whose applicability was limited to an almost meaningless minimum.”¹⁸⁶ Article 34 required states to make a public declaration (formal notice) of new acquisitions to the other signatory states. Article 35 stated that “the Signatory Powers of the present Act recognize the obligation to insure the establishment of authority in the regions occupied by them on the coasts of the

¹⁸⁰ No one questioned that Africa would be partitioned amongst the European powers. Matthew Craven, “The Invention of a Tradition: Westlake, The Berlin Conference and the Historicisation of International Law,” in *Constructing International Law: The Birth of a Discipline*, eds. Milos Vec and L. Nuzzo (Frankfurt am Main: Klosterman, 2012), 390.

¹⁸¹ Jörg Fisch, “Africa as terra nullius: The Berlin Conference and International Law,” in *Bismarck, Europe and Africa: The Berlin Africa Conference 1884-1885 and the Onset of Partition*, eds. S. Förster, W.J. Mommsen and R. Robinson (Oxford: Oxford University Press, 1988), 348.

¹⁸² Koskenniemi, *The Gentle Civilizer of Nations*, 34. The British, for instance, were extremely worried about the Conference and entered into a flurry of consultation with legal experts to determine precedents and areas of the empire that might be affected. See Ronald Robinson, “The Conference in Berlin and the Future in Africa, 1884-1885,” in *Bismarck, Europe and Africa: The Berlin Africa Conference 1884-1885 and the Onset of Partition*, eds. S. Förster, W.J. Mommsen and R. Robinson (Oxford: Oxford University Press, 1988), 9.

¹⁸³ Craven, “The Invention of a Tradition,” 370-371. France, Belgium, the Netherlands, Germany, Great Britain, Portugal, Spain, the United States, Austria, Russia, Italy, Denmark, Sweden and Norway, Turkey.

¹⁸⁴ Thomas Pakenham, *The Scramble for Africa, 1876-1912* (New York: Random House, 1991), 254.

¹⁸⁵ Sybil E. Crowe, *The Berlin West African Conference, 1884-1885* (New York: Longmans, 1942), 3-4.

¹⁸⁶ Koskenniemi, *The Gentle Civilizer of Nations*, 123.

African Continent sufficient to protect existing rights and, as the case may be, freedom of trade and of transit under conditions agreed upon.” States eagerly signed on to an act that laid out “no criteria for what would constitute ‘effectiveness’” and that applied only to acquisitions along the West African coast, where there was already very little land left to take.¹⁸⁷ The Act watered down the administrative duties thrust on states and generally avoided “surges of colonial liabilities.”¹⁸⁸ The conference established no golden rule for the expectations of colonial sovereignty, or any rigorous general guidelines that might hurt imperial claims the world over.¹⁸⁹

The lack of legal clarity meant that states, unbound by a general rule, could continue to settle global conflicts on an *ad hoc* basis between powers. The European powers embraced the ambiguity in the decades that followed. In the 1880s, Portugal claimed a solid block of land between the Indian and Atlantic oceans, with little attempt at effective occupation. France and Germany accepted the annexation in 1886 and Britain agreed to it five years later (after claiming a large chunk of the territory for itself). In two treaties in 1890, an Anglo-French agreement on western Sudan and an Anglo-German one on East Africa, the ‘rules’ established in Berlin played no role. States continued to justify extensive hinterland and sphere of interest claims based on their control of small sections of African coastline.¹⁹⁰ Exclusivity and proof of a stronger title, rather than establishing an absolute title, remained the most important part of territorial acquisition.

The infamous Fashoda Affair put the last nail in the coffin of effective occupation doctrine in Africa. After Khartoum fell to the Mahdi jihad in 1885, the British and Egyptians formally abandoned the entire territory. The French took the opportunity to challenge the British plan for a Cape-to-Cairo Empire in Africa, disrupting the goal of a British sphere of influence over the whole Nile valley. The French Prime Minister, Léon Bourgeois, approved the plan to send a small French occupation force through the Sudan to establish a presence (occupation) on the island of Fashoda, 469 miles south of Khartoum. After a two-year journey, the leader, Captain Jean-Baptiste Marchand, planted

¹⁸⁷ Koskenniemi, *The Gentle Civilizer of Nations*, 123-124.

¹⁸⁸ Robinson, “The Conference in Berlin and the Future in Africa,” 22-23.

¹⁸⁹ Koskenniemi, *The Gentle Civilizer of Nations*, 125-127.

¹⁹⁰ Jeffrey Herbst, *States and Power in Africa: Comparative Lessons in Authority and Control* (Princeton: Princeton University Press, 2000), 70-72.

the French flag at Fashoda on 10 July 1898. The flag flew until a few months later when Lord Kitchener defeated the Mahdist army at Omdurman and, on the morning of 19 September, British troops appeared outside Fashoda. After a tense standoff, the French decided to withdraw, explaining the British had “the troops...we only have the arguments.”¹⁹¹ The French based their rights on the idea of occupation laid out in Berlin and lost. The African agreements that followed did not even pretend to endorse occupation. In exchange for recognition of British predominance in Egypt and Sudan, France secured a free hand in Morocco and Tunisia. Establishing a suitable *quid pro quo* mattered more to states seizing territory in Africa than articulating a firm legal basis for their claims.

The British refused to accept that Article 34 of the General Act established the need to formally notify other states of their territorial intentions in other parts of the globe. In 1900, British law officers reported, “with reference to a suggestion that the annexation of Transvaal should be notified to foreign powers,” that “it is not necessary that a formal notification should be made to foreign powers.” They concluded that “no rule of International Law has been evoked rendering such notification essential to the validity of annexation. It is not our usual practice to make these notifications.”¹⁹² As a result, when Norway questioned Britain’s claims to the Antarctic territories, it replied accurately; “it is not the practice of H.M. Govt to notify foreign Govts additions to British territory made by annexation, occupation or otherwise.”¹⁹³ Formal notifications could lead to formal challenges – a danger the British sought to avoid, especially in the polar regions.

State practice highlights the almost total lack of influence of the Berlin Act on imperial policies regarding territorial acquisition. Still, despite their emphasis on finding international law in the realities and experiences of state practice, the international lawyers of the late nineteenth century continued to “write as if effective occupation were

¹⁹¹ Koskenniemi, *The Gentle Civilizer of Nations*, 152-153; Pakenham, *The Scramble for Africa*, 524-556; See also Darrell Bates, *The Fashoda Incident of 1898: Encounter on the Nile* (Oxford: Oxford University Press, 1984).

¹⁹² Minute, 19 April 1907, NA, FO 371/194, cited in Bush, *Antarctica and International Law* 3, 247.

¹⁹³ British Note to Norway Giving Information on British Claims to the South Orkney Islands, South Shetlands and Graham Land, 30 April 1907, Document UK30041907, Bush, *Antarctica and International Law* 3, 245-246.

a principal legal requirement of colonial title.”¹⁹⁴ They hailed Berlin as a major benchmark in the development of international law – a sign of its progress from the days of the Treaty of Tordesillas, discovery and symbolic acts, despite the fact that state practice remained largely unchanged since the fifteenth century.¹⁹⁵ While they realized Berlin only dealt with the west coast of Africa, most legal scholars believed that doctrine, legal opinions and state practice would generalize the rules for the rest of the world. The *Institut de droit international* devoted several meetings and articles to start to fill in the details about effective occupation left out of Berlin’s General Act.¹⁹⁶ “Taking possession,” the *Institut* concluded, “is accomplished by the establishment of a responsible local power, provided with sufficient means to maintain order and assure the regular exercise of its authority within the limits of the occupied territory.”¹⁹⁷

Other international jurists expanded the legal discourse on effective occupation, some demanding higher levels of state action than the *Institut*, others less. In 1886, the Swiss jurist Johann Caspar Bluntschli wrote “temporary or artificial occupation can only create an artificial right.”¹⁹⁸ Fyodor Fyodorovich Martens, the Russian international publicist, noted that states had to fulfill the “material occupation of the newly discovered land, the introduction of an administration.” Martens stressed that the state must make its power felt throughout the entire territory.¹⁹⁹ The German jurist-consult Dr. Friedrich Heinrich Geffcken examined the colonial efforts of Belgium in the Congo Free State and argued, “it is very doubtful whether the Congo State can rightfully claim over a territory more than 2,000,000 square kilometers...extending in part over regions entirely

¹⁹⁴ Koskenniemi, *The Gentle Civilizer of Nations*, 155.

¹⁹⁵ E.S. Maine, *International Law: The Whewell Lectures* (London: Murray, 1887), 66-67; Charles Salmon, *L’occupation des Territoires Sans Maître* (Paris: A Giard, 1887), 31-101.

¹⁹⁶ Fitzmaurice, “Discovery, Conquest, and Occupation of Territory,” 857; Ferdinand Martitz, “Occupation des territoires – Rapport et projet let résolutions présentés à l’Institut de droit international” *Revue de droit international et de législation comparée* 19 (1887): 371-376, 373

¹⁹⁷ James Brown Scott ed., *Resolutions of the Institute of International Law Dealing with the Law of Nations, with an Historical Introduction and Explanatory Notes* (New York: Oxford University Press, 1916), 87.

¹⁹⁸ Fitzmaurice, “Discovery, Conquest, and Occupation of Territory,” 846. J.C. Bluntschli, *Le Droit International Codifié* (Paris: Guillaumin, 1886), 178; Supported by Salmon, *L’occupation des Territoires Sans Maître*, 31-101.

¹⁹⁹ Quoted in Balch, “The Arctic and Antarctic Regions and the Law of Nations,” 270-271.

unexplored...even though its right to those limits has been acknowledged by other states.”²⁰⁰ Geffcken acknowledged the gap between state practice and legal doctrine.

While Britain embraced spheres of influence and hinterlands around the world, the major English treatises all called for effective occupation. William Edward Hall, whose major treatise on international law first appeared before Berlin, reflected actual state practice and belief best when he argued that a state could justify “moderate negligence” in claimed territory if “discovery, coupled with the public assertion of ownership, is followed up from time to time by further exploration or by temporary lodgments in the country” (as evidence of “continued interest”).²⁰¹ Legal treatises written after Berlin, however, all presented far more stringent versions of effective occupation. John Westlake, the Whewell Professor of International Law in the University of Cambridge, approvingly cited Geffcken’s conclusions in his 1894 book *Chapters on the Principles of International Law*.²⁰² Lassa Oppenheim, Britain’s leading international law expert, who enjoyed close ties to the Foreign Office,²⁰³ tried to sketch out the requirements of occupation in his magisterial *International Law*.²⁰⁴ In the most authoritative treatise on the subject in the English language, Oppenheim argued a claim was only perfected through settlement accompanied by administrative acts – otherwise, acts of occupation represented “fictitious occupation” only. Still, like all the other jurists, Oppenheim offered few specific examples of what actually constituted *effective occupation* or the level of required activity.²⁰⁵

²⁰⁰ Geffcken cited in John Westlake, *Chapters on the Principles of International Law* (Cambridge: Cambridge University Press, 1894), 166.

²⁰¹ William Edward Hall, *A Treatise on International Law*, 1-3 Eds. (Oxford: Clarendon Press, 1880, 1890, 1917), 89, 106-107, 105.

²⁰² Westlake, *Chapters on the Principles of International Law*, 166-167.

²⁰³ Mathias Schmoeckel, “Lassa Oppenheim,” in *The Oxford Handbook of the History of International Law*, eds. Bardo Fassbender and Anne Peters (Oxford: Oxford University Press, 2012), 1152-1155.

²⁰⁴ Anghie, *Imperialism, Sovereignty, and the Making of International Law*, 39.

²⁰⁵ Oppenheim also argued that, though no rule of the law of nations existed that made notification of an occupation necessary, “the Berlin Act ensured that in time this rule will either by custom or by treaty be extended from occupations on the African coast to occupations everywhere else.” Lassa Oppenheim, *International Law: A Treatise* (Oxford: Clarendon Press, 1905), 275-288.

Arbitrations dealing with territorial disputes at the end of the nineteenth century and beginning of the twentieth brought little clarity to the situation.²⁰⁶ The *British Guiana Boundary Arbitration* of 1897, for instance, awarded sovereignty based on the concepts of contiguity and physical proximity. With no justification, the rules of the arbitration also established a period of fifty years as sufficient to create a good title through prescription.²⁰⁷ In the *British Guiana Boundary Case* of 1904 – the clearest decision in a territorial arbitration from this period – the arbiter noted that “it is indispensable that the occupation be effected in the name of the State which intends to acquire the sovereignty of those regions.” Although the arbiter noted that an occupation required “effective, uninterrupted, and permanent possession,” he did not lay out specific requirements or details. The decision also established that the effective possession of part of a region could give a state title to the whole area “which constitutes a single organic whole.”²⁰⁸ These decisions highlighted many of the problems inherent in arbitration at the turn of the twentieth century. Arbitration was for the settlement of disputes, not the establishment of rules of law, and often jettisoned the law for what the arbitrator considered a fair and equitable result.²⁰⁹ Given their ad hoc nature, it was difficult for arbitrations to build up a substantial body of law.²¹⁰ Arbitral panels were also independent from one other, and

²⁰⁶ For example, the Alaska Boundary Dispute, Behring Sea Arbitration, and the cases involving the Islands of Aves, Lobos, Navassa, and Lamu. In the Island of Aves dispute between the Netherlands and Venezuela, over uninhabitable islands in the Antilles, the Queen of Spain ruled that the islands belonged to the latter based on discovery and affirmation of possession. Malcolm Shaw, *Title to Territory in Africa: International Legal Issues* (Oxford: Clarendon Press, 1986), 93. On the increase in the number of arbitrations in the nineteenth century, see Cornelis G. Roelofsen, “International Arbitration and Courts,” in *The Oxford Handbook of the History of International Law*, eds. Bardo Fassbender and Anne Peters (Oxford: Oxford University Press, 2012), 145-169.

²⁰⁷ Victor Prescott and Gillian Triggs, *International Frontiers and Boundaries: Law, Politics and Geography* (Leiden: Martinus Nijhoff Publishers, 2008), 395. The maritime boundary dispute between Norway and Sweden over Grisbadarna also stressed the need for the exercise of state functions. The tribunal, in awarding Grisbadarne to Sweden, noted that Sweden had performed various acts, such “as for instance, the placing of beacons, the measurement of the sea, and the installation of a lightboat, being acts which involve considerable expense, and in doing which she not only thought that she was exercising her right but even more that she was performing her duty.” Anonymous, “Maritime Boundary Arbitration (Norway v. Sweden) Oct. 23, 1909,” *American Journal of International Law* 4 (1910): 226.

²⁰⁸ *Guiana Boundary (Brazil/Great Britain) (1904)* 11 RIAA 11.

²⁰⁹ Annaliese Quast Mertsch, “The Relationship Between the Permanent Court of Arbitration and the Permanent Court of International Justice, and its Significance for International Law,” in *Legacies of the Permanent Court of International Justice*, eds. Christian Tamas and Malgosia Fitmaurice (Leiden: Martinus Nijhoff Publishers, 2013), 256.

²¹⁰ Quast Mertsch, “The Relationship Between the Permanent Court of Arbitration and the Permanent Court of International Justice,” 248. As Ian Scobbie has explained, arbitration considered too sporadic and

“rulings by one [were] not binding on others.” Finally, many arbitrators were not lawyers and gave only the barest reasons for their decisions.²¹¹ All of these issues worked to limit the impact that arbitrations had on the development of the rules for territorial acquisition and the doctrine of effective occupation.

By the early twentieth century, despite all the ink spilled, effective occupation remained an unclear and ambiguous doctrine, wide open to interpretation. Multiple versions of imperial sovereignty persisted, and a formula for territorial acquisition seemed as distant and obscure as it had in previous centuries. State practice was clearly disconnected from the doctrinal writings of international lawyers. Despite the continued emphasis on settlement and state functions, when actually looking at reality “international lawyers could hardly continue to insist that colonial title could follow only from setting up effective administration.”²¹² Prime Minister Salisbury captured the situation in 1896:

There is no enactment or usage or accepted doctrine which lays down the length of time required for international prescription, and no full definition of the degree of control which will confer territorial property on a nation, has been attempted. It certainly does not depend solely on occupation or the exercise of any clearly defined acts. All the great nations in both hemispheres claim, and are prepared to defend, their rights to vast tracts of territory which they have in no sense occupied, and often have not fully explored. The modern doctrine of "Hinterland", with its inevitable contradictions, indicates the unformed and unstable condition of international law as applied to territorial claims resting on constructive occupation or control.²¹³

After centuries of exploration and territorial claims, the legal discourse on territorial acquisition and the establishment of state sovereignty remained underdeveloped, unclear,

“subject to the influence of the litigants in the determination of the grounds of the awards.” Ian Scobbie, “The Permanent Court of International Justice, Arbitration, and Claims Commissions of the Inter-War Period,” in *Legacies of the Permanent Court of International Justice*, eds. Christian Tamas and Malgosia Fitmaurice (Leiden: Martinus Nijhoff Publishers, 2013), 214. For a contemporary analysis on the problems of arbitrations, see Lassa Oppenheim, “The Science of International Law: Its Task and Method,” *The American Journal of International Law* 2, no. 2 (1908): 342-343.

²¹¹ Stephen C. Neff has noted that, “The connection between arbitration and international law is not so close as might be initially supposed. The reason is that arbitral decisions are not necessarily made on the basis of law, as is the case (by definition) in true *judicial* resolution.” The parties determined the bases on which the arbitrators would make their decision. The parties also determined the selection of arbitrators, so that the arbitral panels became, “the servants of their creators rather than their masters.” Neff, *Justice Among Nations*, 328-329.

²¹² Koskenniemi, *The Gentle Civilizer of Nations*, 154.

²¹³ Lord Salisbury to Sir Julian Pauncefoot, 18 May 1896, in *Foreign Relations of the United States*, 1896 (Washington: Government Printing Office, 1897), 228-231 at 230.

and shrouded in layers of complexity. In this difficult context, international lawyers tried to bring the polar regions into the realm of international law.

1.6 Situating the Polar Regions in International Law

In October 1909, the world recognized James Brown Scott as one of the foremost authorities on international law: a leading member of the American Institute of International Law, editor of the newly created *American Journal of International Law*, and solicitor for the State Department.²¹⁴ His fellow American Thomas Willing Balch was also a successful and experienced legal scholar with several case studies on international law under his belt. A keen interest in the Arctic and Antarctic spurred on the efforts of both men, especially Balch, whose brother Edwin sought to inspire the U.S. government to explore the Antarctic in support of Wilkes' historic work.²¹⁵ Together they applied legal discourse, created over the two decades since the Berlin Conference, to the Arctic and Antarctic. Unfortunately their articles failed to engage the complexities and uncertainties of the international law pertaining to territorial acquisition, nor did they mention the widely accepted use of spheres of influence and the rejection of effective occupation. They overlooked discussions of what rights, if any, states accrued from acts like charting, mapping, repeated visits, or issuing licenses and concessions. Instead, they compared state action in the polar regions to an ideal of territorial acquisition that did not exist.

Both Scott and Balch agreed that the ice of the North Pole, which continuously moved around the Arctic Ocean, should be treated as high seas that could be claimed by no nation.²¹⁶ They argued that the work of many polar explorers was useless because it had never been publicly endorsed by their respective states (precisely the worry of

²¹⁴ Neff, *Justice Among Nations*, 301-302. Scott believed that peace and order in international relations could be best established through the expansion of international law. At the first conference of the American Society for Judicial Settlement of International Disputes, Scott expressed his belief in "judicial decisions according to principles of law, not for compromise according to the standards of diplomacy." Mark Janis, *The American Tradition of International Law: Great Expectations, 1789-1914* (Oxford: Oxford University Press, 2004), 156.

²¹⁵ For an explanation of Edwin Balch's activities, see Day, *Antarctica: A Biography*, 174.

²¹⁶ Scott, "Arctic Exploration and International Law," 938; Balch, "The Arctic and Antarctic Regions and the Law of Nations," 266.

Canada's chief astronomer, W.F. King, in his country's case).²¹⁷ Both thought that only the Danish efforts in Greenland came close to the "actual possession" demanded by the results of the Berlin Conference.²¹⁸ Balch attacked Britain's Letters Patent for the FID as an attempt to unjustly claim unoccupied and, even worse, unexplored land in violation of international law's demand for effective occupation.²¹⁹ No country could justify claiming an enormous tract of land by visiting or occupying a small part of its coast.²²⁰ Here Balch echoed the opinion of Thomas Baty, an international lawyer who, in reviewing the Spitsbergen situation, argued that "it is impossible to annex the twenty-third largest island of the world by putting up a fish-curing house in one corner."²²¹ Scott and Balch both argued that a territorial claim must be supported through effective occupation. Accordingly, they concluded that the Arctic and Antarctic, unoccupied as they were, remained like Spitsbergen – terra nullius, a "no man's land." While Balch argued that these areas should become "a joint possession of all mankind," Scott thought they were open to any state for occupation.²²² In denying that states had any real rights to polar territory in the absence of actual occupation, the two anticipated an American legal tradition that would take form in the Hughes Doctrine.

The article prepared by the great French lawyer and internationalist René Dollot expressed a far more practical viewpoint. He insisted that the rules of acquisition must be tailored to the unique conditions of the polar regions. "In these territories one must reduce the indispensable formalities, reduce them to the strict minimum, we say," Dollot asserted. "To assure oneself of the legitimacy of the discovery, to regularize the possession, to protect it against strangers, such are the fundamental principles." He even suggested that in areas where there was no international competition, "discovery and

²¹⁷ Scott, "Arctic Exploration and International Law," 939. Scott noted that Canada must have come to this conclusion as well because of the recent surge in national exploration it was undertaking.

²¹⁸ Scott, "Arctic Exploration and International Law," 940.

²¹⁹ Balch, "The Arctic and Antarctic Regions and the Law of Nations," 274.

²²⁰ Balch, "The Arctic and Antarctic Regions and the Law of Nations," 269.

²²¹ Baty, "Spitzbergen," 83-88. Later, Baty attacked the British claim to the FID. He argued that no country could annex huge slices of territory by "simply saying that they are hers." He insisted that, "the occupation of one of a group of islands could not confer sovereignty in the others... The occupation of a post on the continent could not carry with it more than a reasonable adjacent zone." Baty concluded that the international community should "concede a clear sovereignty to the first State whose subjects establish a regular occupation" in the polar regions. Thomas Baty, "Arctic and Antarctic Annexation," *Law Magazine and Review* 37 (1912): 326-328.

²²² Scott, "Arctic Exploration and International Law," 941.

notification to the Powers would appear to constitute for a long period sufficient legitimation.” Dollot pointed out, however, that a state had to respond to developments in the area claimed. “A desert is not administered like a metropolis, a glacial island like an African Bazaar,” he observed. “Where there is fishing, hunting, mining, the same organization as there is in a desolate promontory on which an observatory is usefully installed, will not do.”²²³ While Dollot provided few concrete examples of what this kind of administration looked like in practice, he embraced the idea of polar exceptionalism when he raised the possibility that effective occupation doctrine could be relaxed for the polar regions and its “indispensable formalities” reduced.

By 1909, Britain’s Letters Patent, the Danish claim to Greenland, and the vague rights transferred to Canada in 1880 represented the only formal annexations of territory in the Antarctic and the High Arctic – and they were by no means secure. The majority of territory in the polar regions remained unclaimed. With all the uncertainties involved in the law concerning territorial acquisition, and the gulf between those doctrines and state practice, countries that wished to make a credible claim in the Arctic and Antarctic faced a difficult choice. States could choose to endorse the legal opinions of the American lawyers, Balch and Scott, and accept that actual settlement of polar land was required to secure title. Further, the state could embrace Balch’s conclusion that an occupation was impossible in many parts of the High Arctic and Antarctic and accept that these areas be considered a common possession of all mankind. In sharp contrast, states could follow imperialistic state practice and use spheres of influence or the hinterland theory to claim vast portions of territory where they had done little or nothing to establish their title. After all, the British had already embraced the “fictive sovereignty” of their previous colonial endeavours in their Letters Patent for the Antarctic. Finally, states could accept the exceptional nature of the polar regions and move in the direction suggested by Dollot by modifying the regular rules. They could conceive of the polar regions as an anomalous legal space that called for fresh solutions and new legal norms.

²²³ Waultrin, “Le probleme de la souverainete des poles,” 659.

These four ways of looking at territorial acquisition shaped the bi-polar legal landscape for the next half-century.²²⁴ Would the territorial claims of the future be based on occupation, spheres of influence, a combination of both, or some other principle adapted to the anomalous legal space of the polar regions? In his study, Dollot had mentioned an interesting suggestion set forth by an obscure Canadian senator, Pascal Poirier, in 1907: the sector principle. Dollot did not endorse the idea, but the sector principle would go on to influence polar law and politics for decades and shape the evolution of the polar regions.²²⁵

²²⁴ Alejandro Alvarez, "Latin America and International Law," *The American Journal of International Law* 3, no. 2 (1909): 349. Unlike Scott, Balch and Waultrin, the pioneering jurist Alejandro Alvarez did not go into detail on territorial claims and international law in the polar regions. His work focused on broader questions involving the nature of international law and its impact on the Latin American states. When discussing legal issues of important to Latin America, however, Alvarez noted that that the islands and polar regions of Antarctic America were an area of ongoing legal concern for the Latin American, especially "to what extent they could be acquired by occupation or be included in zones of influence of European or American states.

²²⁵ Waultrin, "La question de la souveraineté des terres arctiques," 413-417.

Chapter 2

2 Polar Opposite Polar Policies: The Rise of the Sector Principle and the Hughes Doctrine, 1907-1924

On 20 February 1907, Pascal Poirier, a long-serving member of Canada's Senate, shared a thrilling, if fantastic, vision of the Arctic's future with his colleagues. The region, he explained, would eventually "melt" and fill with fields, cities, mines and railroads. "The possibilities of our northern hemisphere," Poirier insisted, "are unlimited."¹ The senator's prophecy, however, included a warning. Canada's stake in the Arctic's bright future could be stolen by its powerful neighbour, the United States.² American "navigators" had flown the stars and stripes throughout the Arctic Archipelago. The Canadian government must "precede our friends to the south, and assert in as public a manner as possible our dominion over those lands" instead of idly waiting for Washington to raise the "question of title" to Arctic territory, Poirier entreated. With the United States and Britain enjoying closer relations than ever before, and the world stage reverberating with "the echoes and declarations of universal peace," Canada had a window of opportunity to secure its polar possessions.³

Poirier's legal acumen showed in his compelling case for Canada's sovereignty in the North American Arctic Archipelago. He described the history of British exploration in the region and highlighted the territorial rights that Canada inherited from Britain and the Hudson's Bay Company. Alluding to contemporary currents in the international law on territorial acquisition, Poirier maintained that Canada was effectively occupying the region. He believed in the exceptionalism of polar territory and suggested that "in the

¹ Canada, Senate *Debates*, 20 February 1907, 272. Poirier pointed to the expansion of mining and agriculture in northern Alberta and around Hudson Bay as proof that the northern regions could be of great economic value.

² Since the Alaska Boundary Dispute five years before, Poirier had grown increasingly worried about American interest, exploration and commercial activity in the Canadian North. See Canada, Senate *Debates*, 20 October 1903, 1662-1663. Poirier commented: "I think it is time we called a halt and looked forward to see how many other slices we may be called upon to part with. . . . The next possible arbitration may be concerning Hudson Bay. . . . Just consider what our position will be if the Americans discover the North Pole and take possession of it . . ." In his 1907 speech, Poirier alluded to U.S. exploration in the Arctic and its interests in Alaska.

³ Canada, Senate *Debates*, 20 February 1907, 267 and 271.

case of Arctic wastes and recesses what is...sufficient to establish possessions and give a good title, is occupancy as much as occupancy can take place.”⁴ Nevertheless, the senator must have harboured doubts about the strength of Canada’s title, for he offered a fourth, and far more definite method for securing sovereignty in the Arctic: the sector principle.

A year before, a New York-based social group called the Arctic Club held its annual dinner and listened to a keynote address by Canadian captain Joseph Elzéar Bernier.⁵ As the night progressed, the club’s members (who were by no means experts on international law) started to discuss territorial claims in the Arctic.⁶ They concluded,

In future partition of northern lands, a country whose possession today goes up to the Arctic regions, will have a right, or should have a right, or has a right to all the lands that are to be found in the waters between a line extending from its eastern extremity north, and another line extending from the western extremity north. All the lands [discovered and undiscovered] between the two lines up to the north pole should belong and do belong to the country whose territory abuts up there.⁷

By employing simple, uncomplicated sector lines Poirier felt that Canada could secure its “possession of the lands and islands situated in the north of the Dominion, and extending to the north pole.”⁸ Other Canadian politicians had already argued that Canada had rights to all the “contiguous” lands above its coastline to the North Pole.⁹ More importantly, since 1904, Canada’s Department of the Interior had employed the sector principle in a quasi-official manner through the publication of a map prepared by geographer, James

⁴ Canada, Senate *Debates*, 20 February 1907, 268. France, Poirier pointed out, would never be expected to cultivate the Sahara, so why should Canada have to take similar action before it could claim its Arctic territory.

⁵ The polar explorers who largely made up the Arctic club met frequently for annual dinners, reunions and presentations. Its membership included prominent explorers like Adolphus Greely and Frederick Cook. The group published the *Arctic Club of America Bulletin* between 1907 and 1912, too late for their discussion of the sector principle on 28 January 1906 to be included.

⁶ As Cavell and Noakes have described, this was a “a casual conversation amongst explorers.” Janice Cavell and Jeff Noakes, *Acts of Occupation: Canada and Arctic Sovereignty, 1918-25* (Vancouver: UBC Press, 2010), 77.

⁷ Quoted in Ivan Head, “Canadian Claims to Territorial Sovereignty in the Arctic Regions,” *McGill Law Journal* 9, no. 3 (1963): 203-204; Donat Pharand, *Canada’s Arctic Waters in International Law* (Cambridge: Cambridge University, 1988), 9-10.

⁸ Canada, Senate *Debates*, 20 February 1907, 266. This was the actual wording of Poirier’s motion.

⁹ For example, in September 1903, Mr. S. B. Gourley of Colchester noted: “So far as I am concerned, I will support this proposal because I do not think there is the slightest doubt about Canada owning every foot of territory from here to the North Pole. It is contiguous to Canada, and we own every foot of it by right of discovery and exploration.” Canada, House of Commons *Debates*, 30 September 1903, col. 12818, See Gordon W. Smith, *A Historical and Legal Study of Sovereignty in the Canadian North*, ed. P. Whitney Lackenbauer (Calgary: University of Calgary Press, 2014), 188-189.

White. The map used the 141st and 60th meridians running to the North Pole as Canada's northern boundaries.¹⁰ Poirier simply articulated these ideas in a more public, precise and comprehensive manner.

What “transformed Poirier’s resolution from a bit of nationalistic bluster to a footnote in international law,” historian Alan MacEachern has explained, “was his argument that the equation by which Canada should determine its North was also an equation that all other northern nations could apply.”¹¹ Arctic territory should automatically be in the hands of the closest state. In his speech to the Senate, Poirier laid out the sectors that Norway, Russia, the U.S. and Canada could claim, although he excluded a Danish sector emanating from Greenland (perhaps more by oversight than strategic intent). The senator insisted that “From 141 to 60 degrees west we are on Canadian territory... I hold that no foreigner has a right to go and hoist a flag on it up to the north pole, because it is not only within the sphere of possession of England, but it is in the actual possession of England.”¹²

Sir Richard Cartwright, the government leader in the Senate, concisely rebutted and rejected all Poirier’s arguments. Government expeditions operating in the Arctic, the custom’s duties they collected, and other “acts of dominion” had secured Canada’s title to the Arctic Archipelago, Cartwright argued. The passage of time and various “acts of dominion” would strengthen Canada’s territorial title to the point that no foreign power would consider challenging it.¹³ In the face of Cartwright’s firm dismissal, Poirier’s idea abruptly died on the Senate floor.

By bringing disparate literatures and fresh primary research into dialogue, this chapter charts how political developments in the polar regions resuscitated the sector principle and transformed it into an important transnational legal idea. As polar empires

¹⁰ Curiously these borders still appear on certain Canadian maps today; Pharand, *Canada’s Arctic Waters in International Law*, 5. Cavell and Noakes have explored the influence James White may have had on the development of the sector principle. See Cavell and Noakes, *Acts of Occupation*, 73-75.

¹¹ Alan MacEachern, “J.E. Bernier’s Claims to Fame,” *Scientia Canadensis* 33, no. 2 (2010): 56.

¹² Canada, Senate *Debates*, 20 February 1907, 271.

¹³ Cartwright reserved his opinion on sectors and whether Canada could claim title to all the territory to the North Pole, he acknowledged that he could see no “practical advantage” to asserting “jurisdiction quite as far north as that.” Canada, Senate *Debates*, 20 February 1907, 271, 273-274.

expanded and state officials grappled with the meaning of sovereignty in harsh polar environments, some advocates embraced the sector principle as a simple and cost-effective solution to a complex and anomalous legal space that avoided difficult questions about settlement, state administration and undiscovered territory. Other officials, sometimes within the same government, were reluctant to tie their country's sovereignty to a concept that seemed to have little legal precedent and uncertain standing in existing international law.

Britain's employment of the sector principle ensured that it became one of the dominant ideas in the bi-polar legal landscape. Prior to 1925, Canada applied the principle inconsistently and Russia flirted with the idea of a sector claim, but officials in London used it to carve out two sectors in the Antarctic: the Falkland Islands Dependencies (FID) and the Ross Dependency. This chapter argues that London's use of the sector principle emanated from the "technical and analytical" British tradition of international law that avoided abstract basic principles, focusing on "the law as it is, rather than the law as it ideally would be"¹⁴ and finding rules "only through an examination of the practice of states."¹⁵ Although Poirier's sector idea represented a novel solution to the problem of polar sovereignty, it also reflected popular legal assumptions and centuries of state practice. Since the papal bulls of the fifteenth century, states had often used meridian lines as territorial boundaries. By using language like "sphere of possession," Poirier referenced the hinterland claims and spheres of influence approach used by European states in the partition of Africa. These colonial annexations, like Poirier's sectors, were predicated on the doctrine of contiguity – the belief that even the loose control or ownership of an area (usually a section of coastline) allowed a state to claim a vast amount of adjacent territory. In the British mindset, the sector principle represented a logical and proven solution to the problem of sovereignty in the polar regions.

¹⁴ Vaughn Lowe cited in Allison Ross, "Making International Law Work," *Global Arbitration Review*, 31 January 2013.

¹⁵ Colin Warbrick, "Introduction to the Symposium," *European Journal of International Law* 13 (2002): 902, and Colin Warbrick, "The Theory of International Law: Is There an English Contribution?" in *Theory and International Law: An Introduction*, eds. Philip Allott, Tony Carty, Martti Koskeniemi and Colin Warbrick (British Institute of International and Comparative Law, 1991), 49.

The U.S. State Department disagreed. In 1924, American officials crafted the Hughes Doctrine. The theory held that polar sovereignty demanded actual physical settlement and use of territory. Under the Hughes Doctrine, proclamations, repeated visits, temporary outposts and a semblance of control did not allow a country to acquire sovereignty over polar territory. The U.S. position held that countries had to settle, colonize and exploit polar lands before they could successfully claim them. This chapter asserts that, as much as the sector principle reflected the British tradition of international law, the Hughes Doctrine mirrored the classical legal ideology held by many key American officials, characterized by a belief that universal and abstract principles should form the basis of a legally regulated world. With Britain's use of the sector principle and America's support of the Hughes Doctrine, the polar regions became the testing ground of fundamentally different legal approaches to sovereignty, and competing national traditions of international law.

2.1 Sovereignty and Sectors During the Heroic Age of Polar Exploration and the First World War

Discovery and exploration continued to dominate polar affairs in the years preceding the First World War. Explorers of various nationalities ventured into the many blank spots that existed on the maps of the Arctic and Antarctic for personal glory, national prestige, scientific curiosity and, on occasion, to claim new territory.¹⁶ At the official level, states remained relatively disinterested. In the Arctic, Canada, Denmark and Russia took small steps to strengthen their polar territorial claims. Various other states closely monitored the legal and political status of Spitsbergen. In the Antarctic, the great powers did not repeat their actions in Africa by racing to carve up the continent. As historian Peter Beck has demonstrated, Britain played the most active role in the region and even it took a relatively “low key” approach. A whaling boom in the Antarctic waters and Norwegian interest in the South Shetlands drove Britain to officially claim the FID in 1908, but there seemed little reason to annex the rest of the continent. Africa, the Middle East and burgeoning problems in Europe dominated British politics. Although London permitted

¹⁶ Observers pointed to the bravery and self-sacrifice demonstrated by these men in the face of intense hardship, imparting a “heroic quality” to the process of polar exploration. Peter J. Beck, *The International Politics of Antarctica* (London: Croom Helm, 1986), 26.

and sometimes encouraged British explorers to make claims, they neglected to officially ratify them.¹⁷ Only during the First World War did territorial claims and questions of sovereignty in the Arctic and Antarctic start to take centre stage.

Throughout his long career, Oscar Pinochet de la Barra, international lawyer and architect of Chile's Antarctic strategy, argued there was a direct connection between Poirier's proposal and the Letters Patent that Britain issued for the FID in 1908. "As far as polar sectors are concerned, their development in the Antarctic was undoubtedly inspired by the Arctic," de la Barra concluded. "It was not by chance that in 1908, a year after the debate of the Canadian Senate...the London government adopted the doctrine of sectors towards the South Pole and created the Falkland Islands Dependencies."¹⁸ Rather than claim all the known and unknown land in a vast sector, however, the Letters Patent clearly laid out the five territories Britain claimed "in the South Atlantic Ocean to the south of the 50th parallel of south latitude, and lying between the 20th and 80th degrees of west longitude:" South Georgia, the South Orkneys, the South Shetlands, the South Sandwich Islands, and Graham Land.¹⁹ Although the Letters used lines of meridian as convenient boundaries for the Falkland Islands Dependencies (FID), they did not make a sweeping claim to all the land stretching to the South Pole.²⁰

¹⁷ Peter J. Beck, "British Antarctic Policy in the Early 20th Century," *Polar Record* 21, no.134 (May 1983): 453, 476.

¹⁸ Oscar Pinochet De La Barra, "Some Aspects of the Government of Antarctica," in *Poles Apart: A Study in Contrasts*, ed. Antoni Lewkowicz (Ottawa: Ottawa University Press, 1999), 179.

¹⁹ See the Letters Patent, Letters Patent Providing for the Government of the Falkland Islands Dependencies, 21 July 1908, Document UK21071908, in W. M. Bush ed., *Antarctica and International Law: A Collection of Inter-State and National Documents* 3 (New York: Oceana, 1982-1988), 251-252.

²⁰ The British argued that the Letters Patent of 1908 did not represent a clear sector claim in a report written for the Imperial Conference of 1926. Imperial Conference 1926, British Policy in the Antarctic, Paper E101, National Archives (NA), ADM 116/2386. The wording of the 1908 Letters Patent actually resembles that used for West Australia the century before. As Vivian Forbes and Patrick Armstrong pointed out, a sector claim was made for Western Australia in 1829. In granting Captain James Stirling authority as the first governor of the Swan River Colony in western Australia, the British government letters patent gave him command over: "the boundaries of our Territory called Western Australia extending from Cape Londonderry, in latitude thirteen degrees forty-four minutes south; to West Cape Howe, in latitude thirty-five degrees eight minutes south; and from Hartogs (sic) Island on the west coast in longitude one hundred and twelve degrees fifty-two minutes...to one hundred and twenty-nine degrees of east longitude reckoned from the meridian of Greenwich." The Commission also noted that the territory would include, "...all islands adjacent in the Indian and Southern Oceans within the parallels of latitude aforesaid of thirteen degrees fortyfour minutes south and thirty-five degrees eight minutes south and within the longitudes aforesaid." In a fresh letters patent in August 1890, the boundaries were extended to include "...from the parallel of thirteen degrees thirty minutes south latitude, to West Cape Howe in the parallel of thirty-five degrees eight minutes south latitude...including all islands adjacent in the Indian and Southern Oceans

The British made efforts to strengthen their title to the FID by mimicking Canada's acts of dominion in the Arctic Archipelago.²¹ Prior to the First World War, Britain issued 29 licenses to (primarily Norwegian) whaling companies operating in the FID. Despite being hesitant to accept British sovereignty to the entire region, the Norwegian government encouraged its citizens to apply for the licenses. At this point, Norway's commercial interests were for more important than its territorial ones, and the government wanted to avoid aggravating Britain to protect whaling operations.²²

The British considered each Norwegian application an admission of their sovereignty, but they still deemed it necessary to supervise whaling companies and establish an administration within the FID. As a result, they constructed an administrative post and a post office near the large whaling station at Grytviken, South Georgia in 1909. Whalers going to the South Shetlands usually stopped at Port Foster, Deception Island first, so London made it a "port of entry" (where people could lawfully enter the FID) and sent a magistrate there every summer season from 1910 to 1930. To further highlight Britain's jurisdiction in the region, the British government made these administrative stations into post offices in 1912. In the summer of 1913 a customs officer provided a presence in the South Orkneys for two months, followed by other government agents in 1914 and 1915. After 1911, Britain enforced conservation measures throughout the FID, demanding use of the entire carcass, restricting licenses, and sometimes refusing new permits.²³ Although these activities only touched a small part of the FID, they still provided an official British presence in the Antarctic when no other state could.

While administrative acts bolstered British sovereignty in the south polar region, the quest for the North Pole led to the resurrection of the sector principle. In 1908, Bernier took another Canadian expedition into the heart of the Arctic Archipelago, armed

within the latitudes aforesaid." Vivian Forbes and Patrick Armstrong, "The 'Sector Principle': Two Indian Ocean Examples," *IBRU Boundary and Security Bulletin* (1995): 94-98.

²¹ G.E. Fogg, *A History of Antarctic Science* (Cambridge: Cambridge University Press, 1992): 155-156.

²² Einar-Arne Drivenes and Harald Dag Jølle, *Into the Ice: The History of Norway and the Polar Regions* (Gyldendal Akademisk, 2006), 174.

²³ Not only were British administrative acts important signs of its sovereignty, they were also lucrative. By 1914, the Norwegian catch in Antarctic whaling brought in over 2 million pounds annually, with a portion of that flowing to the British government as royalties. Territorial Claims in the Antarctic from 1908 to the end of 1929, 31 July 1930, NA, DO 35/167/7; See also David Day, *Antarctica: A Biography* (Oxford: Oxford University Press, 2013), 129-130.

with the knowledge that two American acquaintances – Robert Peary and Frederick Cook – were simultaneously trying to reach the North Pole. Faced with a likely American claim to the Pole, Bernier took dramatic action to secure Canada’s northern title. On 1 July 1909, Bernier had his entire crew march to Parry’s Rock on Melville Island.²⁴ At this spot, Bernier installed a plaque that took sweeping possession of the “whole Arctic Archipelago lying to the north of America from long. 60°W to 141°W up to latitude 90°N.”²⁵ Historians Janice Cavell and Jeff Noakes have explained that Bernier’s sector claim far exceeded the instructions he had from the Canadian government of Wilfrid Laurier (which authorized him to annex new islands he discovered). His actions, the authors argue, actually overshadowed the more legally valuable work that Bernier accomplished by regulating foreign whalers operating in the Archipelago.²⁶ Faced with Peary’s announcement claiming the North Pole for the United States, however, the Laurier government felt pressured to tacitly accept Bernier’s claim.

In September 1909, publicity on Peary’s journey to the North Pole led Gilbert Parker, a Canadianborn member of the British House of Commons, to ask if Canada had already claimed the lands around the Pole.²⁷ When officials from the Colonial Office examined the matter, they found a copy of Poirier’s speech²⁸ and asked Ottawa “whether Canada makes claim upon all land intervening between the American border and the North Pole...?”²⁹ Canada’s newly created and inexperienced Department of External Affairs answered affirmatively and Under-Secretary of State for the Colonies J.E.B.

²⁴ The names of William Parry’s ships could still be seen etched onto Parry’s rock. MacEachern, “J.E. Bernier’s Claims to fame,” 44.

²⁵ V. Kenneth Johnston, “Canada’s Title to the Arctic Islands,” *Canadian Historical Review* 14, no 1 (1933): 33; Janice Cavell, “Sector Claims and Counter-claims: Joseph Elzéar Bernier, the Canadian Government, and Arctic Sovereignty, 1898-1934,” *Polar Record* 50, no. 3 (2014): 293-310. The boundaries Bernier used included northwestern Greenland.

²⁶ Cavell and Noakes, *Acts of Occupation*, 79.

²⁷ See, for instance, “Who Owns the North Pole,” *Herbrooke Daily Record*, 11 September 1909; “British Statesmen Discuss Ownership of the North Pole,” *Los Angeles Herald*, 9 September 1909; Great Britain, House of Commons *Debates*, 8 September 1909, col. 1308.

²⁸ Cavell and Noakes, *Acts of Occupation*, 78.

²⁹ Crewe to Grey, 10 September 1909, Library and Archives Canada (LAC), RG 25, Vol. 1095, File 1909-238-C.

Seely announced that Canada claimed all the land to the North Pole, though it had “not made a formal declaration of the exact limits of their possessions northwards.”³⁰

Lucien Wolf, a reporter for the *Times* of London who often wrote on foreign affairs and diplomacy, thought the sector principle had merit. As MacEachern has noted, Wolf argued that the claim rested on “the right of discovery and the doctrine of *Hinterland* with a considerable dash of Jacobean Monroeism thrown in.” The journalist admitted that the hinterland doctrine remained unsettled in international law, but he thought the sector principle gave Canada an “arguable case” to take ownership of all the islands of the Archipelago as well as the frozen sea that connected them to the North Pole, which he thought, “for political purposes... must be amenable to the same laws of acquisition.” Canada had to take an important step before this claim could lead to full legal title. “All hitherto recognized *Hinterlands* have become such by virtue either of treaties or of formal notifications to the interested States or of unilateral proclamations or decrees,” the reporter pointed out. If Canada wanted to secure its Arctic possession, Wolf recommended that it adopt Poirier’s original resolution and assert its rights through an official and public sector claim.³¹

After 1909, the Canadian government decided against such a formal and public strategy. No immediate actions entrenched the sector claim in federal statute and the Government issued no official declarations or formal notifications.³² In 1913, the Colonial Office warned Canada’s Governor General that the full extent of the land transferred to Canada in 1880 lacked formal definition and further cautioned, “as it is not desirable that any stress should be laid on the fact that a portion of the territory may not already be British” Ottawa should avoid public statements on its Arctic claims.³³ In the

³⁰ Great Britain, House of Commons *Debates*, 15 September 1909, col. 2128. Cited in Smith, *A Historical and Legal Study of Sovereignty*, 196.

³¹ Lucien Wolf, “Canada’s Claim to the Pole,” *Times* (London), 20 September 1909. Alan MacEachern also utilized parts of Wolf’s interesting piece. See MacEachern, “J.E. Bernier’s Claims to Fame,” 57.

³² Further attempts by Bernier to get Canada to commit to a formal proclamation of a Canadian sector failed, and he was criticized in the Senate and House of Commons for his indiscreet public comments on the issue. In February 1910, Poirier again urged the Ottawa to “take absolute possession” of its northern lands in a “formal manner,” but the government once again ignored his suggestions. See Canada Senate *Debates*, 1 February 1910, 179-184.

³³ Lewis Harcourt to Governor General, 10 May 1913, LAC, RG 7 Ser. G-21, Vol. 412, File 10045.

meantime, Canada continued its policy of quietly extending its knowledge of and presence in the Arctic Archipelago.

The government funded Vilhjalmur Stefansson's two-pronged Canadian Arctic Expedition in the western Arctic from 1913-1918. The last of the "old-fashioned expeditions" in the Arctic Archipelago, the main purpose of Stefansson's northern party was to "discover new land along the 141st Meridian" and to map the edge of the continental shelf in the Beaufort basin. In the end, the explorer discovered and took possession of several hitherto undiscovered Arctic islands north of Parry Channel (Brock, Borden, Meighen and Lougheed Islands) adding several thousand square kilometres to Canada's territory. In addition, the team clarified cartographically ambiguous territory such as Prince Patrick Island. On 12 March 1914, a small party from the expedition ship *Karluk*, which had been caught and crushed in the ice, straggled onto desolate Wrangel Island where they survived for eight months until their rescue. This occupation would come to play an important role in polar affairs.³⁴

Neither Stefansson nor the Canadian government ever referenced the sector principle during the expedition. In fact, Stefansson promoted the idea that Canada could not hope to retain the Arctic simply by colouring it "red in Atlases published in Canada." Instead, he consistently called for effective occupation of the "friendly Arctic."³⁵ While Stefansson was not an official spokesman for Ottawa, his ideas about the need for permanent presence and settlement had a substantial impact on future Canadian polar policy-making.

Much like the Canadians, the Danish government continued to consolidate its claim to Greenland through administrative acts and scientific expeditions. In particular, the Danes worried about the legal status of the eastern and northern parts of the island. Experienced explorer Knud Rasmussen urged Greenland's administrators to establish a

³⁴ Vilhjalmur Stefansson, *The Friendly Arctic: The Story of Five Years in Polar Regions* (New York: Macmillan, 1921), 142-226. See also Robert Bartlett *Last Voyage of the Karluk* (Boston: Small, Maynard, 1916), 306; Richard Diubaldo, *Stefansson and the Canadian Arctic* (Montreal: McGill-Queen's University Press, 1978); and Trevor H. Levere, "Vilhjalmur Stefansson, the Continental Shelf, and a New Arctic Continent," *British Journal for the History of Science* 21, no. 2 (1988): 238, 240.

³⁵ Trevor Levere, *Science and the Canadian Arctic: A Century of Exploration, 1818-1918* (Cambridge: Cambridge University Press, 1993), 382, 393, 406-7, 423; Stefansson, *The Friendly Arctic*.

permanent trading station in the north. A committee created to study the situation, however, concluded that the area represented a “no man’s land” and that any official Danish action might provoke a foreign protest, especially given all the work American explorers like Peary had accomplished in the region. However, the committee told Rasmussen that a private initiative by him might lay the foundation for a future Danish “takeover.” Rasmussen and Peter Freuchen established the Thule Trading Station, then the most northerly post in the world. From this station, the Danes launched a series of explorations (the Thule Expeditions) into northern Greenland establishing a Danish presence for the first time.³⁶

Concurrently, Russian interest and activities in the Arctic enjoyed a strong resurgence, branching out into the ocean above Siberia with the support of the Imperial Navy’s small fleet of icebreakers. Between 1910 and 1915, the Arctic Ocean Hydrographic Expedition found new land off the Taymyr Peninsula (Ostrov Malyy Taymyr), a new archipelago called Zemlya Imperatora Nikolaya II, and further explored the islands initially discovered by the survivors of the American *Jeannette* Expedition in the early 1880s.³⁷ This wave of exploration illuminated another swath of the Arctic Ocean and added fresh territory to Russia’s Arctic empire.

The lure of finding an “Arctic Atlantis” near the North Pole inspired American explorers who wanted to discover and claim new territory for the U.S., even though Washington lacked their enthusiasm. They were spurred on by a report on Arctic Ocean currents from the U.S. Coast and Geodetic Survey that indicated the existence of a large landmass or archipelago near the North Pole.³⁸ Experienced polar explorer Donald MacMillan managed to attain funding from the American Geographical Society, the American Museum of Natural History, and the University of Illinois to find Crocker Land,

³⁶ Rolf Gilberg, “Inughuit, Rasmussen and Thule,” *Études/ Inuit Studies* 12, no. 1-2 (1988): 47. See also Knud Rasmussen, *Across Arctic North America: Narrative of the Fifth Thule Expedition* (Fairbanks: University of Alaska Press, 1999), Introduction; Peter Freuchen, *Arctic Adventure: My Life in the Frozen North* (New York: Farrar & Rinehart, 1935).

³⁷ Derek Hayes, *Historical Atlas of the Arctic*, 168; William James Mills, *Exploring Polar Frontiers: A Historical Encyclopaedia* (Santa Barbara: ABC-CLIO, Inc., 2003), 474. In 1912, two additional Russian expeditions set out for the High Arctic, but both were poorly prepared and disappeared.

³⁸ Douglas Preston, *Dinosaurs in the Attic: An Excursion into the American Museum of Natural History* (New York: St. Martin’s Press, 1986), 46.

the mysterious land mass that Peary claimed to have spotted far to the west of Ellesmere Island on an earlier expedition.³⁹ Throughout much of 1914, MacMillan and a small party explored both Ellesmere, Axel Heiberg and at one point spotted a vast land stretching into the horizon, although it turned to be nothing more than a mirage.⁴⁰

During the expedition, naval ensign Fitzhugh Green, on loan to MacMillan from the U.S. Navy, killed his Inughuit guide Piugaattoq somewhere on the northern coast of Axel Heiberg. Green had lost his sled and worried that Piugaattoq would take the supplies and leave him behind, so he shot the Inuk in the back – an incident that MacMillan deliberately suppressed.⁴¹ While MacMillan's failure to condemn Green is an appalling story, had the press broadcast the murder it would have created a jurisdictional nightmare for Canada. An Inuk from Greenland had been shot by a U.S. naval ensign on a privately funded American expedition to an island ostensibly claimed by Canada, but which no British or Canadian explorer had ever visited. In actual fact, the expedition and murder never raised the question of who owned Ellesmere and Axel Heiberg at the official level, largely because of the State Department's continued lack of interest in the Arctic.⁴² MacMillan's efforts added to the large amount of American activity that had already occurred in the Archipelago and would influence future American questions about Canada's Arctic sovereignty.

For international legal experts, in the decade leading to the First World War the really interesting developments in the polar regions lay not in exploration activity, but in the legal and political status of Spitsbergen. Although mining activities increased on Spitsbergen in the first decade of the twentieth century, states and legal experts continued to consider the whole archipelago an open space where any group could operate freely.

³⁹ MacMillan had previously explored the High Arctic with Peary in 1908.

⁴⁰ See John Franch, "The Search for Crocker Land: Doom, Death and Drama Infuse a University of Illinois expedition to the Arctic," University of Illinois, <http://www.uiaa.org/illinois/news/illinoisalumni/0801b.html> (accessed, 10 August 1914); John Franch's "Grand Illusion: The Search for Crocker Land," *Illinois Alumni*, January/February, 2008.

⁴¹ When MacMillan finally wrote about the incident, he simply explained, "Green, inexperienced in the handling of Eskimos, and failing to understand their motives and temperament, had felt it necessary to shoot his companion." Donald MacMillan, *Four Years in the White North* (New York: Harper & Brothers, 1918), 92.

⁴² Nancy Fogelson, "The Tip of the Iceberg: The United States and International Rivalry for the Arctic, 1900-25," *Diplomatic History* 9, no. 2 (1985): 134.

Consequently, Norway suggested to Britain, Germany, the Netherlands, Sweden, and the United States – the governments with interests in the archipelago – that there was a pressing need to develop a system of administration for the area. The Norwegians proposed that, because of their geographical proximity to Spitsbergen (which lay 800 km north of Norway), they should take the lead on regulating the archipelago. This proposal failed to impress many of the states with interests in Spitsbergen, especially Germany as it became more active in the archipelago. In 1911, for instance, a German expedition established a meteorological observation hut on Spitsbergen, the first permanent manned scientific station on the islands.⁴³

After the Norwegian proposal, officials from the interested states started to work out possible solutions to the problem of governing Spitsbergen. The German station, the coal mines, and hunting activities were all cited as signs of occupation by various states.⁴⁴ Given the potential for competing claims and the probable legal value that could be attached to these various acts of occupation, any decision on Spitsbergen had the potential to affect the polar regions more generally. Historian Andrew Fitzmaurice has observed that, after several small conferences in Kristiania, Norway, the negotiators produced a protocol confirming that, as *terra nullius*, Spitsbergen was “land without owners and that would remain without owners.”⁴⁵ In short, the international community would continue to view Spitsbergen as a common possession of all mankind, just as Thomas Willing Balch envisioned it in 1910. The interested powers held a general conference in June 1914 to develop an international commission with limited powers to administer the archipelago. An aggressive German party waylaid these discussions, when it insisted that Germany be granted a much larger role in the administration than the other

⁴³ Cornelia Lüdecke, “From the Bottom to the Stratosphere-Arctic Climate as Seen from the 1st International Polar Year (1882–1883) until the end of World War II,” in *Climate Variability and Extremes During the Past 100 Years*, eds. S. Brönnimann, J. Luterbacher, T. Ewen, H. F. Diaz, R. S. Stolarsky, and Q. Neu (Heidelberg: Springer, 2008), 29-45.

⁴⁴ See Urban Wråkberg, “The Politics of Naming: Contested Observations and Shaping of Geographical Knowledge,” in *Narrating the Arctic: A Cultural History of Nordic Scientific Practices*, eds. M. Bravo and S. Sörlin (Canton: Science History Publications, 2002), 155-197; Louwrens Hacquebord and D. Avango, “Settlements in an Arctic Resource Region,” *Arctic Anthropology* 46, no. 1/2 (2009):25-39.

⁴⁵ Andrew Fitzmaurice, *Sovereignty, Property and Empire, 1500-2000* (Cambridge: Cambridge University Press, 2014), 313.

countries believed it deserved.⁴⁶ Unable to come to an agreement, the conference ended in deadlock. The outbreak of the First World War stopped any further discussions.

While Spitsbergen intrigued international lawyers, the general public found the race for the South Pole – the last great goal of polar exploration – far more interesting. Between 1910 and 1912, several expeditions descended on the Antarctic to win the prize. On 14 December 1911, after travelling from the Bay of Whales in the Ross Sea, Roald Amundsen planted the Norwegian flag at the South Pole and named the polar plateau after Norway's King Haakon VII. Thirty-three days later, Robert Falcon Scott's exhausted British party straggled to the Pole, only to find that the Norwegians had beaten them. In one of the great tragedies of polar exploration, all five men perished on the return journey.⁴⁷

As Amundsen and Scott headed for the Pole, others circled the edges of the continent. A privately-funded Japanese expedition explored parts of the Ross Barrier, and King Edward VII Land (becoming the first group to land on its coast from the sea), while a German party penetrated into the Weddell Sea to uncover a new section of Antarctic coastline.⁴⁸ While these expeditions opened up new areas of the southern continent, they focused on science and national prestige, not on territorial claims - unlike the explorers sent from the newest Antarctic player: Australia.

Since the 1880s, Australian academics, geographers and scientists interested in the Antarctic had called repeatedly for their countrymen to take a more active role in exploration of the region.⁴⁹ In 1886, Australia's oldest learned society, the Royal Society

⁴⁶ Laurence Collier, Memorandum Respecting Territorial Claims in the Arctic to 1930, 10 February 1930, NA, DO 35/167/7, Territorial Claims in the Arctic.

⁴⁷ For more on the race to the South Pole see, Max Jones, *The Last Great Quest* (Oxford: Oxford University Press, 2003); David Crane, *Scott of the Antarctic* (London: HarperCollins, 2005); Ross MacPhee, *Race to the end: Amundsen, Scott, and the attainment of the South Pole* (New York: Sterling Innovation, 2010); Stephen R. Brown, *The Last Viking: The Life of Roald Amundsen* (Boston, De Capo Press, 2012), 93-172.

⁴⁸ Roland Huntford, *Scott and Amundsen* (London: Hodder and Stoughton, 1979), 527; Chris Turney, *1912: The Year the World Discovered Antarctica* (Berkeley: Counterpoint, 2012), 143-176, 177-212; W.R. Stevenson III, "Science, the South Pole and the Japanese Expedition of 1910-1912," *Endeavour* 35 (2011): 160-168.

⁴⁹ In 1899, the Tasmanian deputy surveyor-general, Chris Sprent, published an impassioned plea for Australia to take a lead in exploration, arguing that "there is more lasting honour to be gained than in fighting the battles of the Old Country against half-armed savages... The scientific world is anxious to see the renewal of Antarctic exploration, and nothing would be more gratifying to them, nothing will be more

of Victoria, alongside the Royal Geographical Society of Australasia, established an Australian Antarctic Exploration Committee in Melbourne. Reflecting the views of the committee, member C.S. Griffiths argued, “the exploration of these regions is a task which, by our geographical position and our wealth, is thrown on Australia as a duty which we cannot evade if we have any adequate conception of our great position in the southern seas.”⁵⁰ The committee’s search for funding abruptly ended in the 1890s when an economic depression rocked the Australian colonies.⁵¹

Calls for action resurfaced after the federation of the colonies in 1901 and the birth of the Commonwealth of Australia. The pressure led the Australasian Association for the Advancement of Science (AAAS) to approve plans and funding for a full expedition in 1910. Douglas Mawson, the geologist who had drawn up the plan would lead the Australasian Antarctic Expedition (AAE). He had explored the Antarctic as part of Shackleton’s 1907-1909 expedition and would apply his past experience and skills to complete a survey of the 2000 miles of Antarctic coastline lying south of Australia.⁵² Mawson had many scientific goals, but made no secret of his hope that the expedition’s work would lay the groundwork for Australian territorial rights in the Antarctic. In 1911 he warned the AAAS that “no time is to be lost. So surely as it lapses a moment foreign nations will step in and secure this more valuable portion of the Antarctic continent for themselves, and for ever from the control of Australia.”⁵³

Unfortunately for Mawson, Whitehall’s uncertainty about Britain’s legal position in the south polar region and concern over France’s interests waylaid the Australian’s desire to claim territory. During his 1840 voyage, Sébastien César Dumont d’Urville had

calculated to give the world an earnest [impression] of our desire to help, than for Australia to take up this work.” Turney, *1912: The Year the World Discovered Antarctica*, 42.

⁵⁰ Cited in Tom Griffiths, *Slicing the Silence: Voyaging to Antarctica* (Cambridge, Massachusetts: Harvard University Press, 2007), 72. See also Lynette Cole, “Proposals for the first Australian Antarctic Expedition,” *Monash Publications in Geography* 39 (1990): 27.

⁵¹ Marie Kawaja and Tom Griffiths, “‘Our great frozen neighbour’: Australia and Antarctic Before the Treaty, 1880-1945,” in *Australia and the Antarctic Treaty System: 50 Years of Influence*, eds. Marcus Haward and Tom Griffiths (Sydney: University of New South Wales Press, 2011), 13-14.

⁵² Douglas Mawson, “The Australian Antarctic Expedition, 1911-1914,” *Geographical Journal* 44, no. 3 (1914): 257-286. See also, Philip Ayres, *Mawson: A Life* (Melbourne: Melbourne University Press, 1999); David Day, *Flaws in the Ice: In Search of Douglas Mawson* (Guilford, Lyons Press, 2014).

⁵³ Gillian Triggs, *International Law and Australian Sovereignty in Antarctica* (Sydney: Legal Books, 1986), 105.

charted and claimed part of the coastline south of Australia and named it Adélie Land. As the Australian expedition prepared to depart for the south, the British Foreign Office reminded the French of d'Urville's activities and asked if the sailor had made a territorial claim. The French government seized the opportunity, to argue that France had, in fact, claimed Adélie Land, although it provided no specific territorial boundaries. (The ambiguity of exactly how much territory France claimed would play a prominent role in Antarctic politics for almost three decades).⁵⁴ Britain considered challenging the claim, but it realized the French government could easily protest Britain's title in the FID in return. The French explorer Jean Charcot had made many discoveries in the area over the last decade. Furthermore, only in 1904 had Foreign Secretary Lord Lansdowne persuaded France to accept the Entente Cordiale, a comprehensive settlement of each state's imperial claims.⁵⁵ London found little reason to initiate a new territorial dispute with France over the Antarctic.⁵⁶

The British rejected Mawson's application to the Colonial Office for a commission from the King allowing him to claim territory in the "Australian Antarctic Quadrant."⁵⁷ Nevertheless, Mawson and his colleagues raised the Union Jack and the Commonwealth flag at Cape Denison, on "the Plateau hinterland some 300 miles from Cape Denison," and at the Possession Rocks in Queen Mary Land, and taking possession for "the Empire and for Australia more particularly."⁵⁸ By the time the expedition returned home in 1914, Mawson and his Australians had laid the foundation for Australia's future Antarctic claim.

⁵⁴ Day, *Antarctica: A Biography*, 185.

⁵⁵ In the Entente Cordial, France recognized British control over Egypt, while Britain accepted France's control over Morocco. John Darwin, *The Empire Project: The Rise and Fall of the British World System, 1830-1970* (Cambridge: Cambridge University Press, 2009), 259-262.

⁵⁶ See Note to French Government, 29 March 1913 and Note from French Government, 16 April 1912, ADM 116/2386.

⁵⁷ Marie Kawaja, "Extending Australia's Control Over its 'Great Frozen Neighbour,'" *Proceedings of the Symposium to Mark 75 Years of the Australian Antarctic Territory* (February 2012): 22-31.

⁵⁸ Report of Dr. Douglas Mawson Taking Possession of Land at Cape Denison, March 1912, Document AU031912, Report of the Southern Sledge Party Taking Possession of Area South of Cape Denison, 21 December 1912, Document AU21121912, in Bush, *Antarctica and International Law* 2, 94-96. Also see Bush's commentary on 94-95. Mawson named the eastern portion of the land explored King George V Land and the western portion Queen Mary Land. He also named a section of the coastline Wilkes Land, in honour of the historic exploratory work of the American naval officer, Charles Wilkes. See also Marie Kawaja, "Australia in Antarctica: Realising an Ambition," *The Polar Journal* 3, no. 1 (2013): 35-36.

Before he left for the Antarctic with the AAE, Mawson had travelled to Canada, befriended many members of the Arctic Club, and voraciously read literature on the polar regions.⁵⁹ At some point, he became aware of the sector principle and decided it could be a useful tool for Australia, which was the nearest continental landmass to the eastern Antarctic. When Mawson returned to Adelaide in March 1914, he inspired applause at his official reception telling the crowd: “he hoped the Australian government would make some claim upon the Antarctic regions. Just as Canada had issued an edict that all the lands north of Canada to the Pole belonged to Canada, so Australia might say that all lands south of the Commonwealth belonged to it. It would be a grand thing to have one country stretching from the equator to the Pole.”⁶⁰ Regardless of the desires of Mawson and his audience, the ultimate decision rested in Whitehall, which promptly decided against formally annexing any of the territories explored by the Australians.

Ernest Shackleton’s Imperial Trans-Antarctic Expedition represented the last expedition of the “heroic age” of polar exploration.⁶¹ Departing just days after Britain declared war on Germany in August 1914, the expedition intended to accomplish the first land crossing of the continent from sea to sea. Shackleton had marketed the expedition as a heroic adventure, a scientific mission, and a chance for “agents of the British nation” to fly the flag and strengthen Britain’s Antarctic claims.⁶² The government provided him with 10,000 pounds and, on 5 August, as Britain entered the First World War, the King sent Shackleton off with his blessing and a flag to wave. The expedition, however, quickly ran into trouble. Ice in the Weddell Sea crushed their ship, the *Endurance*. The 28-man party struggled to Elephant Island in the South Shetlands. From there, Shackleton and five others successfully made an open boat journey of 800 miles to South Georgia for

⁵⁹ Ayres, *Mawson: A Life*, 52, 106-107.

⁶⁰ “Dr. Mawson: Official Welcome,” *The Sydney Morning Herald*, 3 March 1914, 9.

⁶¹ Richard McElrea and David Harrowfield argue that the heroic age ended when Shackleton and his men returned to Wellington, New Zealand on 9 February 1917. See Richard McElrea and David Harrowfield, *Polar Castaways: The Ross Sea Party of Sir Ernest Shackleton, 1914-1917* (Montreal: McGill-Queen’s University Press, 2004). They are supported by Caroline Alexander in *The Endurance: Shackleton’s Legendary Antarctic Expedition* (New York: Alfred A. Knopf, 1998). Others have argued that Shackleton’s death during the Quest Expedition in 1922 marked the end of the age. After this expedition, technology and the mechanical age started to play a more prominent role in polar exploration. See Margery and James Fisher, *Shackleton and the Antarctic* (Boston: Houghton Mifflin, 1958), 449. Other historians have argued for later end dates. See Aang Elzinga, *Changing Trends in Antarctic Research* (Dordrecht: Springer, 1993).

⁶² Day, *Antarctica: A Biography*, 176.

help.⁶³ Shackleton's men returned to a country beset by war and a public uninterested in stories of Antarctic adventure.

Although the First World War effectively reduced activity in the polar regions, the conflict also profoundly impacted their political and legal development. In the Arctic, Norway, which remained neutral during the war, tried to strengthen its legal position on Spitsbergen. Despite statements by American Secretary of State Robert Lansing that the archipelago should remain *terra nullius*,⁶⁴ the Norwegians took the lead in exploration, hunting and coal mining in the archipelago. Norwegian coal companies bought out their American counterparts, who found it difficult to transport coal to southern markets, and succeeded in establishing a strong presence.⁶⁵ Norway's government hoped to use these activities to support its bid for full sovereignty over Spitsbergen at whatever conference ended the war.

The war also brought an end to the Arctic Ocean Hydrographic Expedition in 1915, which inspired Russia's Tsarist government to annex the islands of the High Arctic. In 1916, the Russians forwarded an official declaration to several countries, including Britain and the U.S., outlining the scope of Russia's Arctic claim. The Russian note named Henrietta, Jeanette, Bennet, Herald, Wrangel, Solitude and the New Siberian Islands, even though many of them had been discovered and claimed by American and British explorers. Unable to physically settle or administer the High Arctic islands, the Russians utilized the doctrine of contiguity to claim all the islands "along the Asiatic shores of the Empire" that "form an extension to the north of the Continental expanse of Siberia."⁶⁶ Although it lacked the geographical coordinates of a polar sector, the claim rested on a similar conception of contiguity that gave states rights to the polar lands north

⁶³ See Alexander, *The Endurance*; Ernest Shackleton, *South* (London: Century Publishing, 1983). Eventually the Chilean government ship, *Yelcho*, rescued the men on Elephant Island, the first official Chilean endeavour to venture that far south. Meanwhile, the Ross Sea party of the expedition, which was supposed to lay out supplies for Shackleton's main group, also ran into trouble and three died.

⁶⁴ Lansing actually wrote the article when he was legal adviser to the State Department, shortly before he became its Secretary. He further suggested that in order to "preserve the doctrine of terra nullius," an administration could be set up with political sovereignty over the people on the island, but with no implications on territorial rights. Robert Lansing, "A Unique International Problem," *American Journal of International Law* 11, no. 4 (1917): 767. Though dated 1917, the article was actually written in 1914.

⁶⁵ Drivenes and Jølle, *Into the Ice*, 289.

⁶⁶ The Ambassador in Russia to the Secretary of State, 2 December 1916, in *Foreign Relations of the United States* (FRUS), 1923, Vol. I, (Washington: Government Printing Office, 1938), 278-279.

of their continental coastline. The 1916 communication took the first step towards the Soviet Union's dramatic sector declaration of 1926.

The war had an even greater influence on the south polar region. "The perceptual impact of the First World War had meant that previously remote and inaccessible regions such as the Antarctic could be thought of as part of a global mosaic of competitive economic advantage and strategic significance," Antarctic expert Klaus Dodds has observed. The war dramatically increased the economic and strategic value of the whales in the FID, whose oil contained the glycerin used in explosives. The British military stressed the need to secure as large a supply of glycerin as possible. Shackleton's reports of the vast number of whales he encountered in the waters off the South increased the region's potential in the eyes of the British government.⁶⁷ Given the area's increasing importance, the British government grew worried about its legal position in the FID.⁶⁸ While no state had challenged Britain's claim, London had received several foreign and domestic inquiries about the exact boundaries of Graham Land. The Letters Patent of 1908 deliberately left the southern extent of the British claim open and other states had concluded that Graham Land consisted only of the Antarctic Peninsula (and none of the hinterland beyond). The standard reply to these inquiries was "it is not possible in the present state of geographical knowledge to define the exact extent of territory claimed as British in the Antarctic region."⁶⁹

As Beck has argued, inspiration for how to rectify this situation and clarify Britain's FID claim came from the Russian declaration.⁷⁰ At this stage in Britain's history, the Admiralty took the lead on legal appraisals concerning the Antarctic. The Royal Navy

⁶⁷ Klaus Dodds, *Geopolitics in Antarctica: Views from the Southern Oceanic Rim* (West Sussex: John Wiley and Sons, 1997), 80.

⁶⁸ Territorial Claims in the Antarctic from 1908 to the end of 1929, 31 July 1930, NA, DO 35/167/7. The Foreign Office had even given some thought to trading its claim to the South Orkney's to Argentina, in return for recognition of British title to the Falkland Islands. In 1911, this idea was modified and it was proposed that the South Orkneys be traded for land in Buenos Aires for a British Legation.

⁶⁹ Colonial Office to Captain A.A. Andresen, 19 May 1913, Document UK19051913, Bush, *Antarctica and International Law* 3, 262-263; Colonial Office to the Editor, "Sheffield Daily Independent," 16 May 1914, Document UK16051914, Bush, *Antarctica and International Law* 3, 263; Ralph Paget, Foreign Office to J. Scott Keltie, Royal Geographical Society, 26 May 1914, NA, FO 371/2222.

⁷⁰ Peter Beck, "Securing the dominant 'place in the wan Antarctic sun' for the British Empire," *Australian Journal of Politics and History* 29, no. 3 (1983): 454; See also Colonial Office to Foreign Office, 30 November 1916, NA, CO 78/140/54212.

placed a great emphasis on international law, and lectures on the subject formed a key part in the instruction given at the Naval College.⁷¹ The Admiralty made the suggestion that an extension of the FID could be legally justified by claiming all of the land “contiguous” to the specific territories laid out in the 1908 Letters Patent, even if they had not been explored.⁷²

As a result, on 28 March 1917, the British government issued another Letters Patent which delimited the FID as the lands named in 1908 and “the territories adjacent,” which “included all islands and territories whatsoever between the 20th degree of West longitude and the 50th degree of West longitude which are situated south of the 50th parallel of South latitude; and all islands and territories whatsoever between the 50th degree of West longitude and the 80th degree which are situated south of the 58th parallel of South latitude.” This declaration effectively created a sector ending at the South Pole.⁷³ Two decades later, a government legal appraisal of territorial claims in the Antarctic described the Patent of 1917 as having “sweeping character” that laid “claim to all territories [known and unknown] lying within certain limits of latitude and longitude.”⁷⁴ While Poirier’s Arctic sectors extended northwards from the polar coastlines of adjacent states, the British framed their expansion of the FID as a geographical extension southwards of Antarctic lands they had already explored and claimed.

London’s use of the sector principle must be understood against the backdrop of the British tradition of international law. Sir Cecil Hurst, Foreign Office legal adviser since 1902, reflected the opinion of his colleagues and most British jurists when he wrote that, “what makes international law is the practice of governments.”⁷⁵ The British

⁷¹ D.H.N. Johnson, “The English Tradition in International Law,” *The International and Comparative Law Quarterly* 11, no. 2 (1962): 425.

⁷² Territorial Claims in the Antarctic, Research Department, Foreign Office, 1 May 1945, NA, DO 35/1414.

⁷³ Letters Patent Providing for the Further Definition and Administration of the Falkland Islands Dependencies, 28 March 1917, UK28031917, in Bush, *Antarctica and International Law* 3, 264-264. The Letters Patent claimed all of the territory within the coordinates set down, including the territories listed in the previous 1908 Letters and the “territories adjacent thereto.”

⁷⁴ Imperial Conference 1926, British Policy in the Antarctic, Paper E101, NA, ADM 116/2386.

⁷⁵ Anthony Carty and Richard Smith, eds., *Sir Gerald Fitzmaurice and the World Crisis: A Legal Adviser at the Foreign Office, 1932-1945* (The Hague: Kluwer Law International, 2000), 2.

tradition takes “the law as it finds it” and only locates it in state practice.⁷⁶ Australian jurist William Pitt Cobbett argued: “English lawyers are prone to regard international law as a collection of amiable opinions rather than as a body of legal rules.” Too often, Cobbett explained, the authors of legal treatises described not what was, but what ought to be the practice of nations.⁷⁷ Alexander Pearce Higgins wrote in 1910 that “International Law is *not* a body of rules which lawyers have evolved out of their own inner consciousness: it is *not* a system carefully thought out by University Professors, Bookworms, or other theorists in the quiet and seclusion of their studies.” Higgins conceived of international law as “a living body of practical rules and principles which have gradually come into being by the custom of nations and international agreements.” In the creation of this body, “Statesmen, Diplomats, Admirals, Generals, Judges and publicists have all contributed.”⁷⁸

At the root of the sector principle rested the old argument that geographical position created special legal rights, which state practice had utilized for centuries. Britain’s own practice had recently employed the doctrine of contiguity to justify its hinterland and spheres of influence claims in the imperial partition of Africa. Furthermore, Canada applied the sector principle to the Arctic, and Russia used contiguity arguments to claim its High Arctic islands. All three countries made extensive polar claims that included a vast amount of unexplored and unoccupied territory, and lands discovered by other national expeditions. According to the British tradition, in the face of state practice the opinions of international legal scholars who questioned the legal

⁷⁶ Warbrick, “Introduction to the Symposium,” 902, and Warbrick, “The Theory of International Law,” 47. On the British tradition of international law, see James Crawford, “Public International Law in Twentieth-century England,” in *Jurists Uprooted: German-speaking Émigré Lawyers in Twentieth-century Britain*, eds. Jack Beaston and Reinhard Zimmermann (Oxford: Oxford University Press, 2004), 681-708; Geoffrey Marston, “The Evidences of British State Practice in the Field of International Law,” in *Perestroika and International Law: Current Anglo-Soviet Approaches to International Law*, eds. Anthony Carty and Gennady Danilenko (New York: St. Martin’s Press, 1990), 27-47; Warbrick, “The Theory of International Law: Is There an English Contribution?” 41-60.

⁷⁷ F. Temple Grey, “Is International Law Tending Towards Clarification or Confusion?” *Transactions of the Grotius Society* 19 (1933): 197-203.

⁷⁸ A. Pearce Higgins, *The Binding Force of International Law* (Cambridge: Cambridge University Press, 1910), 3. As Stephen C. Neff has highlighted, “Positivists were frequently very conscious of international law as an ever-growing, ever-evolving subject, requiring constant updating in the light of ever changing conditions in the real world.” Making new law remained the prerogative of the state and not self-appointed intellectuals. Stephen C. Neff, *Justice Among Nations: A History of International Law* (Cambridge: Harvard University Press, 2014), 227, 322.

validity of contiguity mattered not.⁷⁹ The opinion and practice of other states held much more importance. The Russians sent official notification to various interested powers, Canada's sector claim had been well publicized, and the British published the Letters Patent in the *Falkland Islands Gazette* of 2 July 1917.⁸⁰ The public announcements elicited no immediate or official challenges to any of these claims. Unwilling, uninterested, or unable to articulate policies towards these new developments – or simply distracted by the war – governments remained silent. Silence became one of the greatest supports to British Antarctic claims after 1919.

2.2 The Paris Peace Conference, the Polar Regions and International Law

Although the polar regions never featured prominently at the Paris Peace Conference, the results of the meeting still held long term implications for the Arctic and Antarctic. Germany lost all of its extra-territorial rights at the conference, including any created by its pre-war expeditions to the Antarctic and Spitsbergen. The conference's most important impacts stemmed from the Svalbard Treaty, the recognition Denmark won for its sovereignty over Greenland, the Convention of Saint-Germain-en-Laye's stipulations on effective occupation, and the general developments it inspired in international law.

The Norwegian government emerged from the First World War intent on territorial expansion and set its eyes squarely on the polar regions.⁸¹ Its wartime efforts at occupation in Spitsbergen were reinforced by the news that Germany would abandon any rights it had acquired to the archipelago. Supported by arguments from scholars urging

⁷⁹ In a review of contiguity (he called it territorial propinquity - contiguity was land separated by water, while continuity was for land attached to existing state territory), Quincy Wright explained that the idea had caused "considerable controversy" over the last few decades. He believed that the most it provided states was a right to possession, but not exclusive territorial sovereignty. This could only be achieved through "actual occupation." Quincy Wright, "Territorial Propinquity," *The American Journal of International Law* 12, no. 3 (1918): 520-523.

⁸⁰ The 1908 Letters Patent had been published in *The Falkland Islands Gazette*, 1 September 1908, and in *British and Foreign State Papers* (BFSP) 1907-1908, vol. 101 (1912), 76-77. The Letters Patent of 1917 were also published in volume III of the 1917-1918 edition of the *BFSP*, released in 1921.

⁸¹ Drivenes and Jølle, *Into the Ice*, 289.

something be done to regulate the “anarchy” in the Spitsbergen archipelago,⁸² the Norwegians adeptly maneuvered the issue onto the bargaining table at the Paris Peace Conference. Stressing their recent activities, the Norwegians made a strong case for their sovereignty over the entire area.⁸³

Amidst all of the major postwar decisions and territorial adjustments occurring at the peace conference, few states cared what happened to Spitsbergen. British Foreign Minister Lord Curzon stated during the negotiations that “all the other Allied and Associated Powers with vicarious generosity, as they themselves have no interests in Spitsbergen, are prepared to give Norway full sovereignty over the islands.”⁸⁴ On 9 February 1920, fourteen high contracting parties, including Britain, its dominions, the United States, and Denmark, signed the Svalbard Treaty (the Norwegian name for the archipelago).⁸⁵ The treaty recognized Norwegian sovereignty over the archipelago, but also imposed special safeguards that limited Norway’s rights.⁸⁶ Regardless of the restrictions and even if its administration would not come into effect until 1925, Norwegian diplomacy secured the first territory of a polar empire.

The Svalbard Treaty was a success for both Norway and the international community. “Alone among the many experiments of the time – free cities such as Danzig, transfers such as the Saarland, and mandates such as Palestine – the Svalbard compromise has endured,” historian John English has noted.⁸⁷ Still, officials looking for a formula or model for acquiring sovereignty in the polar regions would be hard pressed to

⁸² R. N. Rudmose Brown, “Spitsbergen, *Terra Nullius*,” *Geographical Review* 7, no. 5 (1919): 320. J.E.G. de Montmorency, “The international position of Spitsbergen,” *Journal of Comparative Legislation and International Law* 18, no. 1 (1918): 111-115.

⁸³ Drivenes and Jølle, *Into the Ice*, 288-299.

⁸⁴ Laurence Collier, Memorandum Respecting Territorial Claims in the Arctic to 1930, 10 February 1930, NA, DO 35/167/7, Territorial Claims in the Arctic.

⁸⁵ While commonly known as the Spitsbergen Archipelago, to showcase its sovereignty the Norwegians renamed it the Svalbard Archipelago and called the largest island Spitsbergen. The other high contracting parties included France, Italy, Japan, the Netherlands and Sweden. The Soviet Government at first refused to recognize this treaty, but agreed to recognize Norwegian sovereignty over Spitsbergen on the 16 February 1924. Germany and China followed suit in 1925.

⁸⁶ The islands could not be used for warlike purposes, nationals from the signatories of the treaty could still exploit natural resources on the islands and in their territorial waters, and they could not be taxed in excess of administrative costs. Torbjørn Pedersen, “International Law and Politics in U.S. Policymaking: The United States and the Svalbard Dispute,” *Ocean Development & International Law* 42 (2011): 123.

⁸⁷ John English, *Ice and Water: Politics, Peoples and the Arctic Council* (Toronto: Allen Lane, 2013), 61.

find one in the Svalbard Treaty. The major powers left out references to the doctrine of effective occupation and the rules of territorial acquisition in their decision to give Norway sovereignty over Spitsbergen. Norwegian citizens had neither discovered the archipelago, nor could they claim to be its longest occupiers. While Norway's activities had increased over the previous years, they remained quite small-scale and limited to small parts of the archipelago.⁸⁸ During the Paris negotiations, Norwegian officials used scientific studies that suggested a geological connection between Norway and Svalbard and stressed the geographical proximity of the two areas, but these arguments failed to sway powers like Britain and the U.S.⁸⁹ In the end, the Svalbard Treaty was born out of the major powers' lack of interest in the islands, and their broader desire to ensure a lasting peace by fixing state sovereignty over areas that might spark future conflict. Considering its neutrality during the war, its successful political lobbying and its non-threatening status as a small state, Norway seemed like an ideal candidate to bring order to the archipelago.⁹⁰ The Svalbard Treaty failed to clarify international law on territorial acquisition, but it did provide a new model for resolving territorial disputes in the polar regions.

While Norway celebrated the Svalbard Treaty, its territorial gain came with a price. Much like their Norwegian counterparts, Danish representatives at the Paris Conference used the meeting of the great powers to gain recognition of its own polar claims. During the war, Denmark had transferred the Danish West Indies to the U.S. in return for \$25 million and an American declaration that they would not contest the extension of Danish sovereignty over all of Greenland.⁹¹ With the U.S. agreement in hand

⁸⁸ Torbjørn Pedersen, "Norway's Rule on Svalbard: Tightening the Grip on the Arctic Islands," *Polar Record* 45, no. 233 (2009): 148.

⁸⁹ Roald Berg, "From 'Spitsbergen' to 'Svalbard': Norwegianization in Norway and in the 'Norwegian Sea,' 1820-1925," *Acta Borealis* 30, no. 2 (2013): 168. Results were shown from Norwegian scientific studies that highlighted the geological and geographical connection between Norway and Spitsbergen.

⁹⁰ Berg, "From 'Spitsbergen' to 'Svalbard,'" 167. For more on the politics of the Svalbard Treaty, see Willy Ostreng, *Politics in High Latitudes: The Svalbard Archipelago* (London: C. Hurst & Co., 1977); Geir Ulfstein, *The Svalbard Treaty: From Terra Nullius to Norwegian Sovereignty* (Oslo: Scandinavian University Press, 1995); Elen Singh, *The Spitsbergen Question: United States Foreign Policy, 1907-1935* (Irvington-on-Hudson: Columbia University Press, 1980); Trygve Mathisen, *Svalbard in International Politics, 1871-1925* (Oslo: Norsk Polarinstitut, 1954).

⁹¹ In 1915 the Danes had learned that the U.S. was very interested in acquiring the islands of the Danish West Indies (St. Thomas, St. Jan and St. Croix) because of the position on the maritime approach to the Panama Canal. Here the Danish government saw an opportunity to attain foreign recognition of its

at the Peace Conference, the Danes secured the recognition of the other major powers, including Britain.⁹² Securing Norway's support represented the greatest coup. Their neighbour had always been careful to avoid any recognition of Danish sovereignty over Greenland because of longstanding hunting and trading interests on the island's eastern coastline. During the negotiations over Spitsbergen, Danish authorities offered to trade recognition of Norway's sovereignty over the archipelago in return for Norwegian recognition of their claim to Greenland.⁹³ Desperate for Danish support, the Norwegian Foreign Minister, Nils Claus Ilhen, verbally declared that Norway had no objection to Danish sovereignty over Greenland.⁹⁴ The *Ilhen Declaration* played a key role in the political and legal conflict that would develop between Norway and Denmark over Greenland in the subsequent decade.

The revision of the Berlin Act in the Convention of Saint-Germain-en-Laye (signed 10 September 1919) attracted the attention of legal experts on account of how little it demanded of states taking on new territories in Africa.⁹⁵ Unlike the original, the revised Act did not insist on the formal notification of new acquisitions to interested parties. It demanded only that "the Signatory Powers recognize the obligation to maintain in the regions subject to their jurisdiction an authority and police forces sufficient to ensure protection of persons and of property and, if necessary, freedom of trade and of transit" (Article 10). The preamble to the revised act advised that states only had to provide "administrative institutions suitable to local conditions," much like Pascal Poirier

sovereignty over Greenland from a state whose citizens had discovered and explored a large chunk of the islands (Kane, Hall, Greely, and Peary). See, for instance, Charles Callan Tansill, *The Purchase of the Danish West Indies* (Gloucester: Peter Smith, 1966).

⁹² The British wanted the right of first refusal if Denmark ever decided to dispose of Greenland. The U.S., however, made it clear that it would accept no involvement in Greenland from other European powers. Laurence Collier, Memorandum Respecting Territorial Claims in the Arctic to 1930, 10 February 1930, NA, DO 35/167/7, Territorial Claims in the Arctic.

⁹³ Malgosia Fitzmaurice and Olufemi Elias, *Contemporary Issues in the Law of Treaties* (Utrecht: Eleven International Publishing, 2005), 13-16.

⁹⁴ Surya P. Sharma, *Territorial Acquisition, Disputes and International Law* (The Hague: Martinus Nijhoff Publishers, 1997), 78-79, fn. 194.

⁹⁵ Sharma, *Territorial Acquisition, Disputes and International Law*, 70. Historian William Roger Louis has argued that "of all the sideshows at the circus of the Paris Peace Conference of 1919, the African Peace Settlement perhaps attracted the least attention." William Roger Louis, *Ends of British Imperialism: The Scramble for Empire, Suez and Decolonization* (London: Palgrave Macmillan, 2006), 225.

and René Dollot argued for the Arctic.⁹⁶ In his landmark study of the epochs of international law, Wilhelm Georg Grewe identified the revised act as the beginning of a “turning away from the principle of effective occupation.” This trend continued throughout the interwar years, during which it found its most “striking expression ... in the formulation of new legal titles for the acquisition of polar territories.”⁹⁷

More generally, the development of the polar legal landscape in the interwar years must be understood against the backdrop of the “extraordinarily active period of legal innovation” that started at the Paris Peace Conference. The conference and the birth of the League of Nations gave rise to a “new hope that international law could have substance it previously lacked.”⁹⁸ Most importantly, the conference laid the foundation for the Permanent Court of International Justice (PCIJ) - a world court that could settle disputes between nations before they evolved into conflict.⁹⁹ Fortunately for the British,

⁹⁶ “Convention Revising the General Act of Berlin, February 26, 1885, and the General Act and Declaration of Brussels, July 2, 1890,” *American Journal of International Law* 15, no. 4, (1921): 314-321.

⁹⁷ Wilhelm G. Grewe, *The Epochs of International Law*, translated by Michael Byers (New York: de Gruyter, 2000), 628. International legal treatises continued to present more stringent versions of effective occupation doctrine. See, for instance, Lassa Oppenheim, *International Law: A Treatise*, 3rd Ed., ed. Ronald Roxburgh (London: Longmans, Green and Co., 1920), 387.

⁹⁸ English, *Ice and Water*, 61. The Peace Conference provided international lawyers and state legal advisers with a new level of influence in world affairs as interpreters and creators of treaties and highlighted the growing professionalization of the international legal discipline and its development as a science. Suzanne Katzenstein, “In the Shadow of Crisis: The Creation of International Courts in the Twentieth Century,” *Harvard International Law Journal* 55, no. 1 (2014): 175; and Milos Vec, “From the Congress of Vienna to the Paris Peace Treaties of 1919,” in *The Oxford Handbook of the History of International Law*, eds. Bardo Fassbender and Anne Peters (Oxford: Oxford University Press, 2012), 672.

⁹⁹ In the decade before the war, a small group of Americans, led by prominent lawyers like James Brown Scott, had pushed for the creation of an international court, but their efforts had failed. Jonathan Zasloff, “Law and the Shaping of American Foreign Policy: From the Gilded Age to the New Era,” *NYU Law Review* 78, no. 239 (2002): 304-314. Article 14 of the Covenant of the League of Nations gave the League’s council the responsibility for planning the establishment of a Permanent Court of International Justice (PCIJ). The British government had reservations about the prospect of a compulsory world court. “Whoever represented us in framing this scheme must have been singularly oblivious to British interests,” Lord Curzon concluded. This hostility was largely inspired by the impact that the court might have on their imperial interests, as well as concerns that they could be put in a future position where they would have to defy the court. As a result, the British quietly worked to weaken the court and successfully stripped it of compulsory jurisdiction. Ironically, after the Second World War this fact would frustrate Britain’s legal strategy in the Antarctic. Lorna Lloyd, “‘A Springboard for the Future:’ A Historical Examination of Britain’s Role in Shaping the Optional Clause of the PCIJ,” *American Journal of International Law* 28, no. 43 (1985): 28-51. Article 36 of the League of Nations invited all government to recognize in unilateral declarations the compulsory jurisdiction of the court. See Peter Krüger, “From the Paris Peace Treaties to the End of the Second World War,” in *The Oxford Handbook of the History of International Law*, eds. Bardo Fassbender and Anne Peters (Oxford: Oxford University Press, 2012), 685. See also Cornelis G. Roelofsen, “International Arbitration and Courts,” in *The Oxford Handbook of the History of International Law*, eds. Bardo Fassbender and Anne Peters (Oxford: Oxford University Press, 2012), 145-169; and

given their emphasis on state practice, Article 38 (1) established international conventions and “international custom, as evidence of a general practice accepted as law” as the two primary sources of law. The third source was listed as the “the general principles of law recognized by civilized nations.” Finally, the “judicial decisions and the teachings of the most highly qualified publicists of the various nations” represented a “subsidiary” source of law.¹⁰⁰ Legal scholar Ole Spiermann has pointed out that Article 38 “remained the principal text used by international lawyers in describing the sources, or origins, of international law”¹⁰¹ Similarly, the PCIJ would come to play an important role in the legal discourse surrounding polar sovereignty.

Throughout the interwar years, the PCIJ, international agreements that sought to secure the postwar settlement (like the Locarno Treaties), the work of the League of Nations, the push towards codification and the arguments of legal scholars all strove to give international law a greater standing in world affairs.¹⁰² This innovation was driven by a popular feeling that international law required “rehabilitation” if it was ever to achieve its central purpose – “solving the problems of the society in and for which it

J.H.W. Verzijl, *The Jurisprudence of the World Court: a Case by Case Commentary* (Leyden: Sijthoff, 1965).

¹⁰⁰ While there is debate over whether Article 38 established a hierarchy of sources, it is generally agreed that they are listed in order. Michael Akehurst, “The Hierarchy of the Sources of International Law,” *British Yearbook of International Law* 47, no. 1 (1974-1975): 273-283. See also Ole Spiermann, *International Legal Argument in the Permanent Court of International Justice: The Rise of the International Judiciary* (Cambridge: Cambridge University Press, 2005), 25; and Hilary Charlesworth, “Law-Making and Sources,” in *The Cambridge Companion to International Law*, eds. James Crawford and Martti Koskenniemi (Cambridge: Cambridge University Press, 2012), 187-197. See also Alan Boyle and Christine Chinkin, *The Making of International Law* (Oxford: Oxford University Press, 2007), 302-310.

¹⁰¹ Spiermann, *International Legal Argument in the Permanent Court of International Justice*, 58.

¹⁰² As legal scholar Martti Koskenniemi has explained, “there has never been more talk about international law and organization than in the years immediately following World War I.” Martti Koskenniemi, “History of International Law, World War I to World War II,” *Max Planck Encyclopedia of Public International Law*, <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e715> (accessed December 2014). See also Guillaume Sacriste and Antoine Vauchez, “The Force of International Law: Lawyers’ Diplomacy on the International Scene in the 1920s,” *Law & Social Inquiry* 32, no. 1 (2007): 83-107; Krüger, “From the Paris Peace Treaties to the End of the Second World War,” 679-698, and Carlo Focarelli, “International Law in the 20th Century,” in *Research Handbook on the Theory and History of International Law*, ed. Alexander Orakhelashvili (Cheltenham: Edward Elgar, 2011), 478-526. For contemporary observations on the international legal system see Quincy Wright, “The Understanding of International Law,” *The American Journal of International Law* 14, no. 4 (1920): 565-580; John Bassett Moore, “Post-War International Law,” *Columbia Law Review* 27, no. 4 (1927): 400-412; Jackson H. Ralston, “What is International Law?” *Advocate of Peace through Justice* 92, no. 1 (1930): 59-65; Clyde Eagleton, “The Current Status of International Law,” *Proceedings of the American Philosophical Society* 69, no. 1 (1930): 203-215, and Sir Alfred Zimmern, *The League of Nations and the Rule of Law 1918-1935* (London: Macmillan, 1935).

exists.”¹⁰³ Legal expert James Leslie Brierly argued that the absence of any “authoritative statement of what the rules are” and the quality of the law that states were invited to accept hampered these efforts.¹⁰⁴ International law remained, to borrow legal scholar Wolfgang Friedmann’s memorable phrase, “a very rudimentary system, with vast barren stretches between small cultivated areas.”¹⁰⁵ The solution, Brierly thought, rested in the conception of the international legal system articulated by Professor Roscoe Pound. “The legal order must be flexible as well as stable,” wrote Pound, the Dean of the Harvard Law School. “It must be overhauled continually and refitted continually to the changes in the actual life which it is to govern. If we seek principles, we must seek principles of change no less than principles of stability.”¹⁰⁶

In short, interwar legal scholars such as Brierly and Pound insisted that international law could “no longer be static,” but must be truly dynamic and flexible, able to keep pace with the ever-changing needs of international life. The rules should be the “product of necessity,” created as the system required.¹⁰⁷ To meet new requirements, the international legal system needed to be capable of dramatic change and adaptation. An obvious example in the 1920s was the burgeoning body of law created to deal with the rapidly increasing amount of international aerial navigation, embodied in international agreements such as the Convention on Aerial Navigation (1919) and the Warsaw Convention (1929). If an original body of law could be developed to deal with aerial navigation – a new and unique problem that demanded novel solutions – why not for the polar regions? In a flexible legal system attuned to state interests and practices, and built to solve international issues expediently and effectively, there was room to consider a new polar legal regime based on the sector principle.

¹⁰³ J.L. Brierly, “The Shortcomings of International Law,” *British Yearbook of International Law* 5, no. 4 (1924): 4, 8. See also Manley Hudson, “Prospect for International Law in the Twentieth Century,” *Cornell Law Review* 10, no. 4 (1925): 419-459, and Payson Wild, “What is the Trouble with International Law,” *The American Political Science Review* 32, no. 3 (1938): 478-494.

¹⁰⁴ Brierly, “The Shortcomings of International Law,” 4, 8. See also Hudson, “Prospect for International Law in the Twentieth Century,” 419-459.

¹⁰⁵ Quoted in Neff, *Justice Among Nations*, 343.

¹⁰⁶ Roscoe Pound, *Interpretations of Legal History* (Cambridge: Cambridge University Press, 1923), 1.

¹⁰⁷ Eagleton, “The Current Status of International Law,” 209 and 215.

2.3 Leopold Amery, the Empire and the Antarctic

While international law expanded during and in the aftermath of the Paris Peace Conference, so too did the British Empire. The Empire grew to its greatest geographical extent post-war, adding swathes of territory in the Middle East, the Pacific, and Africa. Britain held much of the new territory in a “sacred trust of civilization” as mandated under the League of Nations, but for all practical purposes it fell under British control.¹⁰⁸ According to historian Ashley Jackson, the early interwar years marked “the high water mark of the British Empire”¹⁰⁹ and not even the Antarctic could escape this phase of imperial growth.

In 1919, armed with a strong desire to continue the expansion of the British Empire, Leopold Amery became the Under-Secretary of State for the Colonies. Antarctic expert Klaus Dodds has pointed out that Amery attended a 1904 presentation given by one of the founding fathers of geopolitics, Halford Mackinder. The presenter spoke on the need for Britain to take an interest in the few remaining “empty spaces” on the globe before other powers claimed what remained of the earth’s surface.¹¹⁰ Amery took to heart the belief that “all real estate was potentially valuable”¹¹¹ and by 1919 he counted a half a million square miles of unclaimed territory in the Antarctic (although he believed the continent was actually much larger).¹¹² Amery viewed the continued value of whaling as reason enough for Britain to claim the entire south polar region, yet he also stressed that wartime developments had proven the southern seas and their islands could be used by surface raiders, submarines and even airplanes.¹¹³ As a result, the Under-Secretary explained to his superior, Colonial Secretary Viscount Milner, that the time had come for Britain to secure the entire Antarctic continent. Amery identified the U.S. and France as

¹⁰⁸ William Roger Louis, “Introduction,” in *The Oxford History of the British Empire*, eds. Judith Brown and Wm. Roger Louis (Oxford: Oxford University Press, 1999), 11.

¹⁰⁹ Ashley Jackson, *The British Empire: A Very Short Introduction* (Oxford: Oxford University Press, 2013), 94.

¹¹⁰ Klaus Dodds, “The Great Game in Antarctica: Britain and the 1959 Antarctic Treaty,” *Contemporary British History* 22, no. 1 (2008): 63 n. 13.

¹¹¹ Peter Beck, “Britain’s Antarctic Dimension,” *International Affairs* 59, no. 3 (1983): 443.

¹¹² Beck, “Securing the dominant ‘place in the wan Antarctic sun’ for the British Empire,” 449.

¹¹³ Leopold Amery to the Governor-Generals of the Commonwealth of Australia, Canada, South Africa and New Zealand, 6 February 1920, LAC, RG 25, Vol. 1263, File 1920-311.

Britain's strongest competitors in the south polar region, but he dismissed their claims as unfounded, incorrectly suggesting that "no American has actually seen the land in question, still less set foot on it" and that there was no "evidence, except in our own imaginations, that Americans ever would claim it."¹¹⁴

Chief Hydrographer Admiral Sir Frederick Learmonth concluded that in light of amount of work accomplished by British explorers, Britain's claim to most of the continent far outweighed that of any other country, except in the South Shetlands, South Georgia and Bouvet Island, where foreign expeditions made any annexation "disputable." The territory that Douglas Mawson and the AAE had recently explored in the Australian quadrant was also threatened since it was "geographically, a continuation of Adélie Land." While this contiguity argument could have proven detrimental to Mawson's desire to secure the Antarctic sector south of Australia, it benefitted British interests in other situations. For instance, although Amundsen planted the Norwegian flag on the South Pole in 1911, the British could argue that they possessed a stronger right to the area based on Shackleton's previous exploration of a more southerly part of the polar plateau, of which the Pole was a continuation.¹¹⁵

Amery's counterpart in the Foreign Office, Cecil Harmsworth, advised differently. He recommended that his country gradually extend its control over the Antarctic, lest it incite a foreign challenge. Historian Peter Beck has pointed out that the sobering Foreign Office conclusion forced Amery to reconsider his proposal for a "once-and-for-all takeover." In January 1920, Amery and his supporters settled on a policy of gradual acquisition of the entire Antarctic continent, without consulting either the Treasury Department or the Cabinet.¹¹⁶ Although the plan sounded good on paper, in reality the British moved very slowly to extend the Empire's jurisdiction in the Antarctic. The government being too preoccupied with Europe's stability, revolts in Egypt and Ireland, new interests in the Middle East, and the protection of India, to invest in the Antarctic.¹¹⁷

¹¹⁴ Cited in Day, *Antarctica: A Biography*, 180. See also, Beck, "Britain's Antarctic Dimension," 429-444.

¹¹⁵ Territorial Claims in the Antarctic Regions, report compiled in the Hydrographic Department, 1919, NA, ADM 1/8566/226.

¹¹⁶ Beck, "Securing the dominant "place in the wan Antarctic sun" for the British Empire," 457.

¹¹⁷ See, for instance, Darwin, *The Empire Project*, 377-378; John Darwin, *Britain, Egypt and the Middle East: Imperial Policy in the Aftermath of War* (London: Macmillan, 1981), 160.

While Whitehall agreed to provide a small amount of funding to several proposed expeditions to create a British presence in the region (including one led by Shackleton), these all ended in abject failure.¹¹⁸

Impressed by the important role played by the Dominions in the First World War,¹¹⁹ Amery thought that the real solution to the problem of claiming the whole Antarctic for the British Empire required their support.¹²⁰ In February 1920, Amery sent his plan for the Antarctic to the Old Dominions – Australia, Canada, New Zealand and South Africa. “It is desirable that the whole of the Antarctic should be included within the British Empire,” Amery asserted. “While that time has not yet arrived when a claim to all the continental territories should be put forward, a definite and consistent policy should be followed of extending and asserting British control.” He stressed the potential strategic value of the Antarctic, the possibility of mineral riches, new trade routes if the ice diminished and the need to control and conserve animal life. He tied the Antarctic to the security of Australia and New Zealand, stating that the “increasing radius of action of

¹¹⁸ Day, *Antarctica: A Biography*, 181. Shackleton died from a heart attack at the start of his expedition.

¹¹⁹ See, for example, Malcolm Templeton, *A Wise Adventure: New Zealand & Antarctica, 1920-1960* (Wellington: Victoria University Press, 2000); Kawaja and Griffiths, “Our great frozen neighbour,” 9-47. Beck, “Securing the dominant ‘place in the wan Antarctic sun’ for the British Empire,” 448-461. Following the Imperial War Conference’s April 1917 resolution that that the constitutional readjustment of the Empire “should be based on full recognition of the dominions as autonomous nations of an imperial Commonwealth,” Amery supported the creation of an Imperial War Cabinet that would allow the Dominions to “assert their full equality and their right to be at the heart of things in deciding the conduct of the war.” In wartime cooperation between Britain and the Dominions, Amery saw the possibility for future imperial consolidation in purpose and action. Nicholas Mansergh, *The Commonwealth Experience*, vol. I (Toronto: University of Toronto Press, 1983), 24, 198-202. As W. David McIntyre has explained, “things could never be the same again after the intimacy of the Imperial War Cabinet.” W. David McIntyre, *The Commonwealth of Nations: Origins and Impact, 1869-1971* (Oxford: Oxford University Press, 1977), 181.

¹²⁰ John Darwin, “The Dominion Idea in Imperial Politics,” in *The Oxford History of the British Empire*, eds. Judith Brown, Roger Louis, Alaine Lowe (Oxford: Oxford University Press, 1999), 85. Amery believed that the strength of the Empire could only be maintained by “quickening the consciousness of Empire and the sense of its possibilities.” He was a disciple of Joseph Chamberlain and Sir Alfred Milner, and worked throughout his career to construct imperial unity. Brian McKercher, “‘The Deep and Latent Distrust’: The British Official Mind and the United States, 1919-1929,” in *Anglo-American Relations in the 1920s*, ed. B.J.C. McKercher (Edmonton: University of Alberta Press, 1990), 213, and Roger Louis, “Introduction,” 19. Historians John Herd Thompson and Philip Wigley have pointed out, however, that Amery faced strong opposition from many British and Dominion statesmen who strongly resisted the centralization of imperial foreign policymaking. While centralization may have appealed to some members of the Colonial Office, the Foreign Office had no interest in being constrained by “collective policy making.” John Herd Thompson, “Canada and the ‘Third British Empire’, 1901-1939,” in *Canada and the British Empire*, ed. Phillip Buckner (Oxford: Oxford University Press, 2008), 98; and Philip Wigley, *Canada and the Transition to Commonwealth, 1917-1926* (Cambridge: Cambridge University Press, 1977), 3-4.

submarines and aircraft will tend to interest your Government in any territories where preparations might secretly be made for raiding operations.” Amery made it clear that the Empire should first focus on the “Ross Sea coasts and their hinterland.” Apart from Graham Land, this was the most accessible part of the Antarctic continent, and had the best potential for whaling operations. While the Under-Secretary asked for Dominion assistance in this imperial endeavour and suggested New Zealand or Australia could take control of the Ross Sea area, he did not elaborate on the role he wanted each country to play. Instead, he suggested the Dominions enter into discussions with one another and sort their interests out first.¹²¹

Amery anticipated a quick, enthusiastic reply from Australia and New Zealand. After all, both countries had shown an interest in expanding their Pacific empires. Before the First World War, Britain transferred Pacific territories to both countries, with Australia administering Papua and New Zealand getting the Cook Islands and Niue. Following the war, under the Class C Mandate system of the League of Nations, Australia was also entrusted with northern New Guinea, the Bismarck Archipelago and the northern Solomon Islands, while New Zealand received Western Samoa. At the Paris Peace Conference, Australian Prime Minister William Hughes had fought hard for the formal annexation of the German colonies, rather than their administration as League of Nation mandates.¹²² As a result, Australia seemed a likely candidate to take on imperial responsibilities in the Antarctic.

Historian Marie Kawaja has noted that the government of William Hughes treated Amery’s proposal as a “discussion paper” rather than settled policy.¹²³ Consequently, the Australians took the time to discuss the plan internally and with New Zealand before responding. Hughes turned to the Australian naval command to inquire if the Antarctic

¹²¹ Leopold Amery to the Governor-Generals of the Commonwealth of Australia, Canada, South Africa and New Zealand, 6 February 1920, LAC, RG 25, Vol. 1263, File 1920-311.

¹²² W. David McIntyre, “Australia, New Zealand and the Pacific Islands,” in *The Oxford History of the British Empire*, eds. Judith Brown and Wm. Roger Louis (Oxford: Oxford University Press, 1999), 667-668. The Australians in particular were avid empire builders and had advanced an imperial program of their own in the Pacific. Darwin, *The Empire Project*, 399, and McIntyre, “Australia, New Zealand and the Pacific Islands,” 671. On Australia’s empire, see, Deryck Schreuder and Stuard Ward, eds., *Australia’s Empire* (Oxford: Oxford University Press, 2008).

¹²³ Kawaja, “Australia in Antarctica,” 33.

held any strategic value or risks for the country. The Navy concluded that there did not seem to be any immediate prospect of a strategic threat emanating from the Antarctic, but speculated that this could change in the future.¹²⁴ Prime Minister Hughes suggested to William Massey, his counterpart in New Zealand, that the two dominions should split territory in the Antarctic.¹²⁵ Refusing to commit, Massey agreed to refer the matter to his new High Commissioner in London who could discuss it with the Imperial Government.¹²⁶ In the meantime, Hughes decided to gather more information on the Antarctic before he pursued the matter further.

Unable to find anyone in the Prime Minister's Department with knowledge of Antarctic affairs, Hughes asked three of Australia's leading Antarctic experts for their opinion. Experienced explorers John Davis and Edgeworth David stressed the potential value of the continent, and Davis suggested that the Antarctic coastline from 150° East to 90° East could be placed under Australian control due to the work of the AAE.¹²⁷ Douglas Mawson offered a more complete and dramatic vision. He believed that the Antarctic should be controlled by one power. A rich history in the region made Britain the obvious choice. Given Australia's exploration activities, he thought it should enjoy more territorial rights than New Zealand, which had contributed little to discovery in the Antarctic. He envisioned a central administrative centre in the Falkland Islands controlling a south polar region divided between Britain, South Africa, Australia and New Zealand.¹²⁸ Mawson concluded that Australia could claim most of the eastern Antarctic because of its proximity to the dominion's southern coastline, even though over a thousand kilometres of open sea separated the two continents.

¹²⁴ Commonwealth of Australia, Department of the Navy, "Control of the Antarctic Regions," 21 July 1920, National Archives of Australia (NAA), MP1185/9, 453/204/938.

¹²⁵ Prime Minister Hughes to Prime Minister of New Zealand, 17 May 1920, NAA, CA 18, A4311, 362/6, Papers re Imperial Conference 1921 concerning Antarctic Matters, 1921-1931. See Kawaja, "Australia in Antarctica," 39.

¹²⁶ Massey to Hughes, 2 June 1920, NAA, CA 18, A4311, 362/6, Papers re Imperial Conference 1921 concerning Antarctic Matters, 1921-1931.

¹²⁷ Personal Memorandum from Captain J.K. Davis, Director of Navigation, Melbourne to Prime Minister's Department, 5 July 1920, NAA, MP1185/9 453/204/938.; Sir T.W. Edgeworth David to Secretary, Prime Minister's Department, 29 November 1920, NAA, MP1185/9 453/204/938.

¹²⁸ Letter from Sir Douglas Mawson to Secretary of Prime Minister's Department, 22 November 1920, NAA, A981, ANT 48 Part 1.

Mawson based his vision of polar sovereignty once more on the precedent he believed Canada had set in the Arctic: an “axiom accepted by the whole world that the uninhabited polar regions should be controlled by the nearest civilized nation.”¹²⁹ He asserted that this axiom – which he called the “Canadian principle” in subsequent years – could justify extensive sector claims.¹³⁰ While Mawson embraced the Canadian-made sector principle as the best solution to the problem of polar sovereignty, Canada itself showcased a distinct lack of confidence in the idea.

2.4 Canadian Legal Appraisals, the Danish ‘Invasion’ and Acts of Occupation

As British officials in the Colonial and Foreign Offices worked to determine what roles Australia and New Zealand would play in the Antarctic, they advised and assisted Canada with an unfolding drama concerning its Arctic sovereignty. The direct catalyst of the situation was Danish explorer and trader Knud Rasmussen, who seemed to question Canada’s sovereignty over Ellesmere Island shortly before announcing his Fifth Thule Expedition, which would travel from Greenland to Alaska across the Canadian Arctic. Historians Janice Cavell and Jeff Noakes have effectively argued that, in reality, Rasmussen and the Danish government never denied Canadian sovereignty in the Arctic.¹³¹ In private correspondence with Canadian officials, Rasmussen described the general area around his trading post as a “no man’s land,” but he was likely referring to northern Greenland, not to Ellesmere Island.¹³² These historians prove that Vilhjalmur Stefansson stoked sovereignty concerns in Ottawa hoping to be rewarded with leadership of a new expedition to occupy the northern islands. With no proof, Stefansson told Prime Minister Arthur Meighen that “the Danes are thinking of colonizing and exploring the islands...north of Lancaster Sound.” To save Canada’s Arctic sovereignty, the self-

¹²⁹ *Argus*, 3 January 1921. Cited in Ayres, *Mawson: A Life*, 151.

¹³⁰ Douglas Mawson in Minutes of Deputation From the Australian National Research Council Regarding the Australian Sector of the Antarctic and the Recent French Claim to Administer Adelie Land, Prime Minister’s Office, 3 July 1925, NAA, A981, ANT 48 Part 1, Antarctic French Interests.

¹³¹ Cavell and Noakes, *Acts of Occupation*. Likewise, Arctic sovereignty expert Gordon Smith also concluded that the “Danish challenge in 1920 was grossly exaggerated, if indeed it existed at all” and that the Canadian government was neurotically seeing “burglars under every bed.” Smith, *A Historical and Legal Study of Sovereignty*, 262.

¹³² See Cavell and Noakes, *Acts of Occupation*, 6 and 47; Smith, *A Historical and Legal Study of Sovereignty*, 221-222.

interested explorer insisted that Ottawa fund more exploration efforts, additional police posts, mapping, and development.¹³³

Regardless of the actual veracity of the Danish threat, the situation forced Canadian officials to rigorously appraise their country's claims in the Arctic and the nature of polar sovereignty more generally.¹³⁴ Armed with a law degree from Harvard University and ample experience as the legal adviser to Prime Ministers Robert Borden and Arthur Meighen, Loring Christie wrote a review of Canada's position at the end of October 1920 (although he possessed little experience dealing with international law or territorial claims).¹³⁵ Christie pointed out that Canada's Arctic sovereignty concerns only involved the islands north of Lancaster Sound, many of which foreign expeditions had discovered and explored. He insisted that contiguity did not bestow title in international law and stressed that occupation was necessary to perfect Canada's title to these islands. In the "special" conditions of the Arctic, however, Christie maintained that repeated local acts and "effective control" should suffice in securing Canadian sovereignty, although he admitted there was some confusion in international law about the "concrete steps" required to achieve a perfect title. Christie surmised that, in the Arctic, it would probably suffice to have "periodical sojourns, say, during the summer months." Along with additional expeditions to the region, Christie thought a police administration should be set up at strategic points.¹³⁶

Several reports from James Bernard Harkin, the commissioner of the Dominion Parks Branch and secretary of the Advisory Technical Board that Prime Minister Meighen had ordered to investigate the Danish threat, produced an even more worrying appraisal of the Canadian position.¹³⁷ Harkin's interest in and enthusiasm for Arctic

¹³³ Cited in Cavell and Noakes, *Acts of Occupation*, 35.

¹³⁴ Meighen's first step was to refer the matter to the Advisory Technical Board, an ad hoc group that investigated matters relating to northern affairs, for further study in July 1920.

¹³⁵ Cavell and Noakes, *Acts of Occupation*, 57.

¹³⁶ Memorandum from L.C. Christie, Legal Adviser, to Prime Minister, Ottawa, *Exploration and Occupation of the Northern Arctic Islands*, 28 October 1920, in *Documents on Canadian External Relations* (DCER), Vol. 3, 1919-25 (Ottawa: Queen's Printer, 1977), 534. Christie's call to action was supported by the head of External Affairs Joseph Pope who insisted that "in the past our territorial claims have suffered not a little by inaction and delay." See Pope to Meighen, 25 November 1920, LAC, RG 25, Vol. 2668, File 9057-40C, pt. 1.

¹³⁷ Harkin is a very interesting figure and is explored in detail in Cavell and Noakes, *Acts of Occupation*.

affairs, however, was not backed by any specific legal expertise. As Cavell and Noakes point out, Harkin relied heavily on Lassa Oppenheim's legal treatise, with its demand for settlement and administration, and seemed to think it presented concrete rules for states to follow.¹³⁸ Harkin argued that Canada had inherited at best an inchoate right to many of the Arctic islands from Britain, but he stressed that no Canadian title existed to others.¹³⁹ He insisted that "any other power at any time would be quite within International Law if it established possession and administration" on these islands. While the clear and present danger was Denmark, Harkin warned that if the U.S. ever realized the value of the Arctic islands their neighbour could "take steps to establish sovereignty" over them.¹⁴⁰

An in-depth study of the history of British and Canadian activities in the Arctic by Canadian associate archivist Hensley R. Holmden bolstered Harkin's negative opinion. The report concluded that the imperial government had intended to transfer only the islands discovered by British explorers, not all of the territory up to the pole. In short, if Canada wanted to secure its sovereignty it had to occupy and control the Arctic Archipelago.¹⁴¹

In sharp contrast to the Christie, Harkin and Holmden appraisals, the British Foreign and Colonial Offices maintained a calm and unworried posture throughout the entire affair. From August 1920, when Ottawa first informed the British about the alleged threat, officials sincerely doubted that the Danes intended to challenge Canada's Arctic

¹³⁸ Cavell and Noakes, *Acts of Occupation*, 63-64. See Lassa Francis Lawrence Oppenheim, *International Law: A Treatise* (Oxford: Clarendon Press, 1905), 275-288.

¹³⁹ Further, he doubted whether the Canadian state actually had the standing in international law necessary to establish its sovereignty over the Arctic islands. J.B. Harkin to W.W. Cory, 4 December 1920, cited in Cavell and Noakes, *Acts of Occupation*, 87. Cavell and Noakes have noted that Harkin used Oppenheim's rigid interpretation of effective occupation in his analysis and that he may have been slightly less worried had he read the latest version of Hall's treatise, which stated, "when discovery, coupled with the public assertion of ownership, has been followed up from time to time by further exploration or by temporary lodgments in the country, the existence of a continued interest in it is evident, and the extinction of a proprietary claim may be prevented over a long space of time." Cavell and Noakes, *Acts of Occupation*, 67. Still, Hall's observation was predicated on the absence of foreign challenges, and given the amount of discovery work done by foreign countries in the Canadian High Arctic and the lack of a formal and official Canadian statute publicly broadcasting Canada's claim Harkin probably still would have worried.

¹⁴⁰ J.B. Harkin to W.W. Cory, Deputy Minister, Department of the Interior, 7 April 1921, LAC, MG 30 B-57, Vol.1 Despatches 1874-1923. "This is specially likely to occur if she ever realizes the potentialities of these islands because the most important economic problems of the United States today concerns her future oil supply."

¹⁴¹ H.R. Holmden to A.G. Doughty, Memo re the Arctic Islands, 26 April 1921, LAC, MG 30 B-57, Vol.1 Despatches 1874-1923.

claims.¹⁴² Britain was in the final stages of negotiations to recognize Denmark's claim to Greenland, a diplomatic success the Danes would not risk by instigating a conflict with Canada. (British recognition was finalized in an exchange of notes on 6 September 1920.) Nevertheless, the Foreign Office sought reassurances from Rasmussen and the Danish government that they had no intention of disputing Canada's sovereignty in the Arctic Archipelago.¹⁴³

In the spring of 1921, the Foreign Office received several conclusive assurances from Rasmussen and the Danish government that they had no intention of challenging Canada's sovereignty in the Arctic. While not touching on the legality of Canada's title in international law, in late May the Danish government explained that it would be against the friendship shared between Denmark and the British Empire to challenge the claims of one of the Dominions.¹⁴⁴ Christie insisted that Canada's continuous assertion of sovereignty over the Arctic islands provided a powerful deterrent to any Danish challenge. If the Danes ever decided to protest Canadian claims in the Arctic, a firm stand by Canada and Britain would quickly disabuse them of the idea. Still, like Harkin and Holmden, Christie remained a proponent of greater Canadian administrative efforts in the Arctic. In his opinion, effective occupation in the Arctic required "continuous effective control."¹⁴⁵ The Advisory Technical Board agreed and outlined a program of occupation built on regular land patrols from established police posts, the enforcement of game laws and annual government ship-borne expeditions into the waters of the Archipelago.¹⁴⁶

By June 1921, a little over a year after Stefansson raised the initial alarm about a Danish threat, the whole affair was over.¹⁴⁷ Canadian appraisals had revealed vulnerability in Canada's legal position and, accordingly, "fear about what Denmark

¹⁴² Cavell and Noakes, *Acts of Occupation*, 81.

¹⁴³ See Smith, *A Historical and Legal Study of Sovereignty*, 257-258.

¹⁴⁴ Smith, *A Historical and Legal Study of Sovereignty*, 256-257; Cavell and Noakes, *Acts of Occupation*, 11, 132-136.

¹⁴⁵ Loring Christie, Exploration and Occupation of the Arctic Islands, 17 February 1921, LAC, RG 25, Vol. 4252, File 9057-40, pt. 1.

¹⁴⁶ Shelagh Grant, *Polar Imperative: A History of Arctic Sovereignty in North America* (Vancouver: Douglas and McIntyre, 2010), 221-222. For a time, the committee considered employing Ernest Shackleton to lead a Canadian expedition to the Archipelago.

¹⁴⁷ Secretary of State for the Colonies to the Governor-General, 9 June 1921, LAC, MG 30 B-57, Vol. 1, Correspondence 1903-1922.

might do in the archipelago was gradually replaced by concern over what Canada herself ought to do,” historian Gordon W. Smith later observed.¹⁴⁸ The Danish ‘threat’ and the legal appraisals produced inspired the “transformation of Canada’s earlier Arctic policy – in which proclamations and other purely ‘formal acts of possession’ were deemed sufficient – into a more active and sustained postwar program that emphasized the need for ‘acts of occupation’ even on remote and uninhabited northern islands like Ellesmere.”¹⁴⁹ Of note, none of the major legal reports written in 1920 and 1921 suggested the government utilize the sector principle or contiguity doctrine in the Arctic. The Canadian government still utilized sector lines in official maps and never denied the principle, but its emphasis had shifted to administration and occupation.

When the Liberal government of William Lyon Mackenzie King came into power in December 1921, it instituted an annual ship patrol in the Eastern Arctic¹⁵⁰ and expanded the number of Royal Canadian Mounted Police (RCMP) posts on the Arctic islands. In the summer of 1922, the Eastern Arctic patrol established posts at Pond Inlet, northern Baffin Island, and at Craig Harbour, on the extreme southeast corner of Ellesmere Islands. Each post had two officers and an Inuit family to help them survive. The officers usually had no one but themselves to police, and when Ottawa asked them to serve as postmasters, they processed their own letters. Nevertheless, Canada established permanent presence in the High Arctic, even if only at a few strategic points. Their long overland patrols flew the flag even further afield.¹⁵¹ The level of activity was far more than Britain, Australia and New Zealand contemplated performing in the Antarctic at the time.

¹⁴⁸ Smith, *A Historical and Legal Study of Sovereignty*, 265.

¹⁴⁹ Cavell and Noakes, *Acts of Occupation*, 6.

¹⁵⁰ The Eastern Arctic Patrol used Bernier’s old ship, *Arctic*.

¹⁵¹ Ken Coates, P. Whitney Lackenbauer, William R. Morrison, and Greg Poelzer, *Arctic Front: Defending Canada in the Far North* (Toronto: Thomas Allen, 2008), 45-47. For more on Canadian government activity in the Arctic in the early 1920s see, William R. Morrison, *Showing the Flag: The Mounted Police and Canadian Sovereignty in the North, 1894-1925* (Vancouver: University of British Columbia Press, 1985); Janice Cavell, “The Origins of Canada’s First Eastern Arctic Patrol, 1919–1922,” *Polar Record* 45, no. 233 (2009): 97–112; Peter Schledermann, “The Muskox Patrol: High Arctic Sovereignty Revisited,” *Arctic* 58, no. 1 (2003): 101-109; and Smith, *A Historical and Legal Study of Sovereignty*, 341-67.

2.5 Another Polar Sector: New Zealand and the Ross Dependency

Meetings between Britain and the Dominions at the Imperial Conference of 1921 emphasized that there should be greater joint control and responsibility within the empire. In his closing speech to the Conference, British Prime Minister David Lloyd George remarked that when the Empire's burdens "become so vast it is well that we should have the shoulders of these young giants...to help us along."¹⁵² For New Zealand, its burden took the shape of an Antarctic sector.

Tri-lateral discussions between British, Australian and New Zealander officials decided the two Dominions should administer separate spheres in the Antarctic, but failed to develop a plan to implement this administration.¹⁵³ In March 1921, the Colonial Office sent the Dominions its legal analysis and a detailed plan for extending the empire's claims in the south polar region. Unlike concurrent Canadian appraisals that called for on the ground acts of occupation in the Arctic, the British report maintained that these acts were only necessary to achieve legal title in temperate zones. In the Antarctic, a state could effectively gain title through discovery and exploration, followed by the issue of paper administrative instruments to provide for a modicum of state control. As such, the Letters Patent of 1917, although they included unexplored lands and territories discovered by other expeditions, likely put the British claim to the FID out of dispute. In a reiteration of long held British legal policy, the report stressed that formal annexation

¹⁵² Nicholas Mansergh, *The Commonwealth Experience*, vol. II, 8-9. The kind of imperial cooperation and planning that Amery instituted for the empire's Antarctic ambitions became the focal point of a two-month long Imperial Conference in London. A Colonial Office paper prepared for the conference contemplating *A Common Imperial Policy in Foreign Affairs* emphasized the need for the unity of policy and better intra-imperial communication. The actual conference proceedings, however, highlighted the problems of collective imperial decision-making after Arthur Meighen refused to accept Australian and British arguments to renew the Anglo-Japanese alliance in favour of closer ties with the United States. In failing to compromise and in issuing ultimatums, Meighen had "rejected the notion of consensual empire policies reached in the interests of the whole." Nonetheless, as events in the polar regions had shown (and would continue to show), Canada, Australia, and New Zealand still relied on British legal advice and assistance in foreign affairs. Cooperation could still be extremely beneficial to the countries of the British Empire. Norman Hillmer and J. L. Granatstein, *Empire to Umpire: Canada and the World in the Twenty-First Century*, 2nd Ed. (Toronto: Nelson, 2008), 72-74.

¹⁵³ Senator Millen to Prime Minister Hughes, 28 April 1921, NAA, CA 18, A4311, 362/6, Papers re Imperial Conference 1921 concerning Antarctic Matters, 1921-1931.

involving a public statement was unnecessary and conferred no additional rights in international law.¹⁵⁴

The Colonial Office plan laid out the separate spheres the two Dominions would administer. Given the proximity of its ports to the Ross Sea, the British decided New Zealand should administer an area between 150°W and 160°E, “the most valuable part of the Antarctic outside the Falkland Island Dependencies” because of its accessibility and whaling potential. The Australian sphere would include the land between 160°E and 89°E. Both claims included the continental coastline, adjacent islands and the hinterland enclosed by meridian lines extending to the South Pole. The Colonial Office concluded that New Zealand’s sphere could be taken whenever necessary with little worry of foreign protest, but the French interest in Adélie Land, which rested in the Australian sector, meant that any claim to this region must be pursued more gradually and carefully.¹⁵⁵

In the summer of 1922, as Canada’s Eastern Arctic patrol steamed into the Arctic Archipelago, the British government received an application from Carl Larsen, owner of a Norwegian whaling company, asking for a license to operate in the vicinity of the Balleny Islands and Ross Sea. Although Britain had yet to formally assert its sovereignty over the area, the Secretary of State for the Colonies, Winston Churchill, believed a granted application implied Norwegian “acknowledgement of Sovereignty” and “would be valuable support of British claims.”¹⁵⁶ Sensing the beginning of increased whaling activities in the Ross Sea area, the New Zealand government, in consultation with the Colonial Office, decided that “in the interests of the Empire steps should now be taken to vest the jurisdiction over the Ross Sea area in the Dominion of New Zealand,” if the British government still wished for the Dominion’s assistance.¹⁵⁷

¹⁵⁴ Colonial Office, Memorandum on Control of the Antarctic, March 1921, NA, ADM 116/2386 and LAC, Vol. 1263, File 1920-311.

¹⁵⁵ Colonial Office, Memorandum on Control of the Antarctic, March 1921, NA, ADM 116/2386.

¹⁵⁶ Winston Churchill, 28 June 1922, cited in Day, *Antarctica: A Biography*, 189.

¹⁵⁷ Cablegram from Colonial Secretary to Governor General of New Zealand, 27 June 1922, in Antarctic – Control of, Imperial Conference, 1921, NAA, CA 18, A4311, 362/6, Papers re Imperial Conference 1921 concerning Antarctic Matters, 1921-1931.

The Colonial Office asked Law Officers of the Crown Douglas McGarel Hogg (the Attorney General) and Thomas Inskip (the Solicitor General) to report on how to best extend New Zealand's sovereignty over the Ross Sea area.¹⁵⁸ The advisors insisted that any formal decree should avoid casting the action as a new annexation, which might invite a foreign protest. Letters Patent, for example, implied that an entirely new area was being claimed. Various British exploration activities in parts of the Ross Sea area over the last decades, they argued, provided proof of Britain's title. Hogg and Inskip advised that an Order in Council be drawn up that treated the region as a settlement under the British Settlements Act of 1887, to be administered under the authority of New Zealand's Governor General. As such, the Ross Sea area would not actually be incorporated into New Zealand's borders, but would be managed as a dependency. Once the Order in Council transferred jurisdiction to New Zealand, the law officers concluded, Britain's existing title could be strengthened through acts of administration.¹⁵⁹

In July 1923 the Privy Council approved an Order in Council that created the Ross Dependency. The order gave New Zealand jurisdiction over a sector covering the coasts of the Ross Sea along with the "islands and territories adjacent thereto between 160 degrees of East Longitude and the 150th degree of West Longitude, which are situated south of the 60th degree of South latitude" (the two lines of longitude met at the South Pole).¹⁶⁰ Soon after, New Zealand's Governor General made the laws of the country applicable to the Ross Dependency and appointed the nautical adviser to the Marine Department to serve as magistrate, Justice of the Peace, and law enforcement officer in the region.

¹⁵⁸ Charles Thomas Davis, Assistant Under Secretary of State, Colonial Office to the Law Officers of the Crown, 27 November 1922, NZ27111922, in Bush, *Antarctica and International Law* 3, 40-42.

¹⁵⁹ Opinion of the Law Officers of the Crown, Douglas McGarel Hogg and T.W.H. Inskip, Concerning British Sovereignty Over the Ross Sea Coasts and Their Hinterland, 3 January 1923, Document NZ03011923, in Bush, *Antarctica and International Law* 3, 42-43.

¹⁶⁰ The discovered and at least partially explored areas enclosed in the Ross Dependency included the Balleny Islands, Victoria Land, the Ross Sea, Ross Island, McMurdo Sound, part of King Edward VII Land and the Ross Ice Shelf. Order in Council Under the British Settlements Acts, 1887, Providing for the Government of the Ross Dependency, 30 July 1923, Document NZ30071923, in Bush, *Antarctica and International Law* 3, 44-45. When Prime Minister Massey tabled the Order in Council in New Zealand's House of Representatives in August, Attorney General Francis Dillon Bell noted the responsibility "must be so taken on behalf of the Empire as a whole, and not specially in the interests of New Zealand." Cited in Templeton, *A Wise Adventure*, 25.

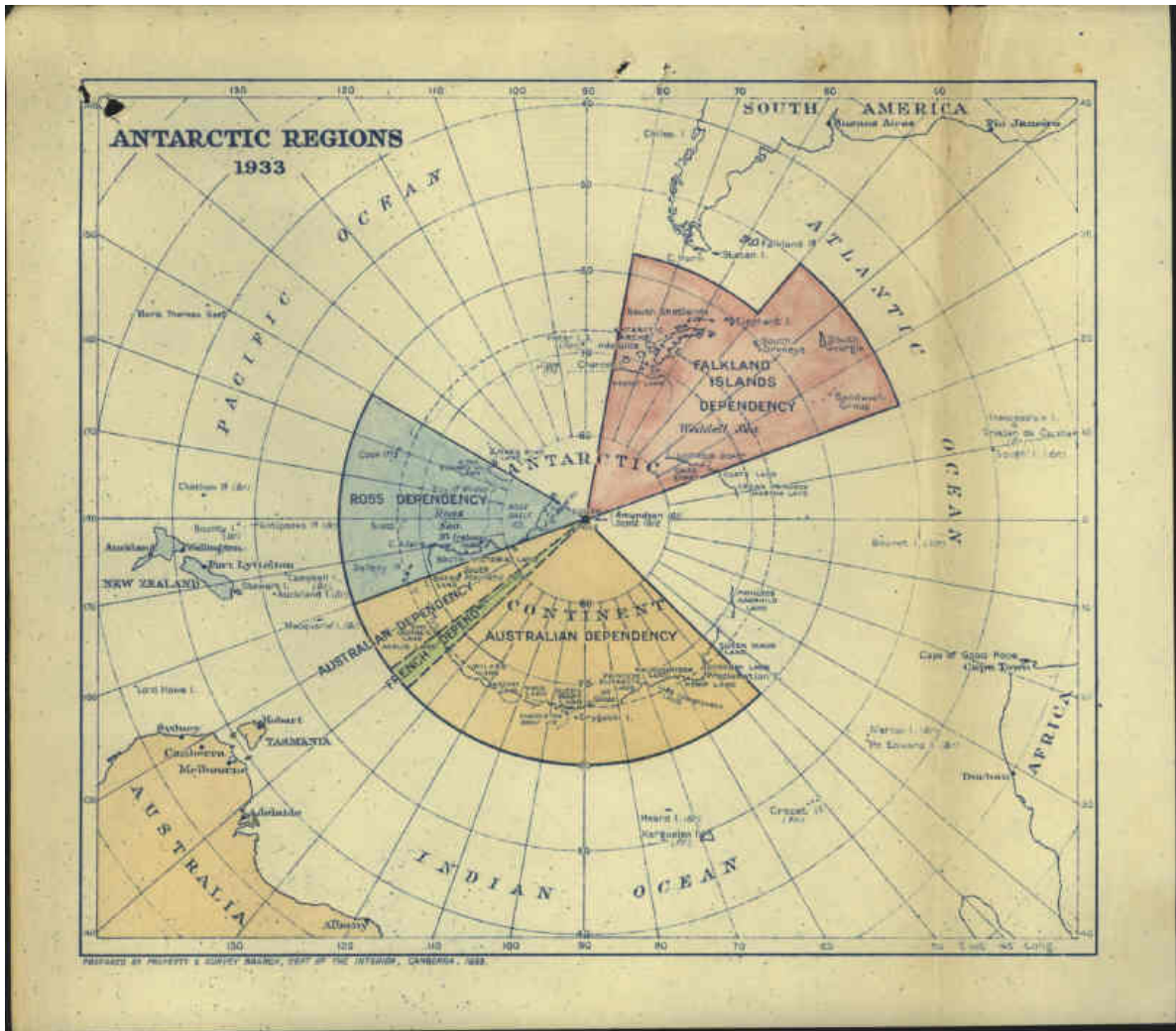


Figure 3: Map showing Antarctic sector claims 1933. NAA, A981, ANT 4, Part 10, Antarctic Control of.

“Thus, almost casually, through an accident of geography, New Zealand was offered a slice of Antarctica larger than New Zealand itself,” foreign relations expert Malcolm Templeton has observed.¹⁶¹ The Dominion, however, proceeded to do very little to support its title through acts of administration. With the government unwilling to purchase a vessel capable of operating in Antarctic waters, New Zealand’s magistrate caught a ride to the Ross Sea with the Norwegian whalers he supposedly regulated. “If, in 1923, we acquired an empire in Antarctica, we scarcely proved to be born imperialists,” J.H. Weir of New Zealand’s Department of External Affairs concluded. “We appointed

¹⁶¹ Templeton, *A Wise Adventure*, 17-18, 27.

Administrators to the Ross Dependency but they never set foot in the territory... Our chief administrative acts were attempts to regulate whaling. But as we had no gunboats in the Dependency to enforce our edicts, they appear to have been for the most part disregarded.”¹⁶² It was an ignominious beginning for New Zealand’s Antarctic policy.

2.6 The Curious Case of Wrangel Island and the American Awakening

In the summer of 1923, the Foreign and Colonial Offices not only crafted the Ross Dependency’s Order in Council, but also managed a rapidly deteriorating situation in the Arctic. In sharp contrast to New Zealand’s inactivity and lack of interest in the Ross Dependency, Canada’s Arctic policy grew more energetic and expansionary. Determined to set its own national course in the North, intrigued by Vilhjalmur Stefansson’s arguments about Wrangel Island’s strategic and economic potential, and with little thought to the long-term political and legal consequences, Mackenzie King’s government publicly announced that it considered the island to be Canada’s property. Wrangel rests 140 km off the Siberian coastline. It had been landed on and claimed by an American naval expedition in 1881, and annexed by Russia in its 1916 note. Unsurprisingly, the Canadian assertion captured the interest of both the Russians and Americans – and constituted a “deliberate violation of the sector principle” which still formed a part of Canada’s legal strategy.¹⁶³ In short, Canada opened a diplomatic and legal Pandora’s box.

The Wrangel Island affair began in 1921, when Stefansson raised the alarm in Ottawa about Rasmussen and the Danes. While he had the government’s ear, the explorer suggested that Canada should claim Wrangel. By staying on the island for an extended period, the survivors of the *Karluk* wreck had laid the foundation for Canada’s title, Stefansson suggested. He encouraged Loring Christie to raise the possibility of

¹⁶² F.M. Auburn, *Antarctic Law and Politics* (London: C. Hurst & Company, 1982), 71.

¹⁶³ Gordon Smith, “Sovereignty in the North: The Canadian Aspect of an International problem,” in *The Arctic Frontier*, ed. R. St. J. Macdonald (Toronto: University of Toronto Press, 1966), 208, 222. On the Wrangel Island affair, see Richard Diubaldo, “Wrangling Over Wrangel Island,” *Canadian Historical Review* 48, no. 3 (1967): 201-26, and Diubaldo, *Stefansson and the Canadian Arctic*, 161-86. D.H. Dinwoodie suggests that “Canada had weakened her case for the sphere theory by a transitory willingness to accept annexation of Wrangel Island ... by the Stefansson expedition.” D.H. Dinwoodie, “Arctic Controversy: The 1925 Byrd-MacMillan Expedition Example,” *Canadian Historical Review* 53, no. 1 (1972): 58.

“encouraging the quiet, unostentatious settlement of Wrangel Island” by a private Canadian enterprise, asserting that this would strengthen Canada’s title.¹⁶⁴

For Canada to claim Wrangel, however, it would have to step away from the sector boundaries used on official maps and invoked by Bernier to outline Canada’s Arctic possessions. Stefansson informed Christie that Canada’s continued use of the sector principle was ridiculous, stating that “it is no more inevitable that every land north of Alaska should belong to Alaska... The countries to the north will belong to whoever appreciates their value and cultivates them.”¹⁶⁵ Christie, in turn, attacked one of the legal precedents used to justify the western boundary of the Canadian sector. The Anglo-Russian Convention of 28 February 1825 defined the boundary between Alaska and British North America as the meridian line 141° West “dans son prolongement jusqu’a la Mer Glaciale.” Although this definition could be seen as applying only to the land boundary and not extending into the Arctic Ocean, the Russo-American treaty of 1867 ceding Alaska to the U.S. stated that the western limit of the territory “passes through a point in Behring Strait on the parallel of 60° 30’ north longitude... and proceeds due north, without limitation into the Frozen (Arctic) Ocean.” Inferentially, the eastern limit – the border between Alaska and Canada – could be seen as running into the Arctic Ocean, which seemed to justify Canada’s sector lines.¹⁶⁶ Christie, however, insisted this interpretation was nonsense and concluded, “the treaty defining the Alaska boundary carried the 141st meridian only ‘to the frozen ocean.’”¹⁶⁷ Therefore, Canada’s Arctic ambitions were not confined by a western limit and it could feel free to expand into the far reaches of the Arctic Ocean.

After a few short months, Christie’s opinion changed. With time to reflect and gather additional opinions, his revised appraisal held that a Canadian claim to Wrangel would be unwise. Christie argued that additions to the British Empire should only be made for “practical reasons,” and he envisaged little strategic or economic advantage in

¹⁶⁴ Memorandum from L.C. Christie, Legal Adviser, to Prime Minister, Ottawa, *Exploration and Occupation of the Northern Arctic Islands*, 28 October 1920, in *DCER*, Vol. 3, 1919-25, 534.

¹⁶⁵ Cited in Cavell and Noakes, *Acts of Occupation*, 56; Diubaldo, “Wrangling Over Wrangel Island,” 203.

¹⁶⁶ Laurence Collier, Memorandum Respecting Territorial Claims in the Arctic to 1930, 10 February 1930, NA, DO 35/167/7, Territorial Claims in the Arctic.

¹⁶⁷ Memorandum from Christie to Prime Minister, *DCER*, Vol. 3, 1919-25, 534.

owning Wrangel. After previously deriding the concept of contiguity, Christie now argued that “by wandering outside our own hemisphere and region we would inevitably detract from the strength of our case for the ownership of the islands immediately north of Canada which we really need and desire.”¹⁶⁸ It made no sense to claim Wrangel Island and jeopardize Canada’s true Arctic interests. The Canadian government had leant towards supporting Stefansson’s plans, but Christie convinced it otherwise.

Despite Ottawa’s expressed wishes, Stefansson sent a private party of four men and an Inuit woman (Ada Blackjack) to occupy Wrangel Island in September 1921. Once on the island, the small group raised the Union Jack and held a claiming ceremony.¹⁶⁹ When Prime Minister Mackenzie King came into office in December, Stefansson saw a new opportunity to gain official support for his actions. He explained to King that any American or Russian rights to the island had disappeared, for any inchoate rights from discovery only lasted five years – an assessment with no basis in international law.¹⁷⁰ Stefansson favourably impressed King, who failed to consult with Christie or the other senior civil servants who advised against claiming the island. When the opposition in the House of Commons asked about the status of Wrangel in May 1922, Minister of Finance W.S. Fielding boldly announced that “what we have we hold” and King declared that the island was “the property of this country.”¹⁷¹

King’s announcement horrified many civil servants who, echoing Christie, believed that claiming Wrangel Island would severely weaken Canada’s title to the Arctic islands contiguous to its northern coastline. After all, if the Canadian government claimed an island so disconnected from its own territory, what would stop other states from occupying islands off Canada’s northern shore?¹⁷² Over the

¹⁶⁸ Cited in Cavell and Noakes, *Acts of Occupation*, 110, Smith, *A Historical and Legal Study of Sovereignty*, 276-277.

¹⁶⁹ Grant, *Polar Imperative*, 223.

¹⁷⁰ Stefansson to King, March 11, 1922, Mackenzie King Papers, MG 26, J 1, Vol. 82, 69270-69275 cited in Smith, *A Historical and Legal Study of Sovereignty*.

¹⁷¹ Canada, House of Commons *Debates* (May 12, 1922), 1750-1751 (Mr. Meighen, MP and Mr. Graham, MP). Graham was the Minister of Militia and Defence; also Diubaldo, “Wrangling over Wrangel Island” 212-213.

¹⁷² See, for instance, Craig to Holmden, 5 April 1923, LAC, RG 85, Vol. 1124, File 1005-5-1 pt. 2J.D. Craig, of the NWT Branch, Department of the Interior, acknowledged that, “everyone in this Branch who has had a chance to make any sort of report or recommendation regarding this question has been strongly

following year, their opinions persuaded King to doubt the wisdom of his decision, as did the steady stream of American and Russian inquiries and protests about Wrangel Island that made their way to the British Foreign Office.

As of 1922, the U.S. State Department had spent little time thinking about the Arctic and Antarctic issues or the broader legal problem of polar sovereignty. When the department became aware of Russia's 1916 claims and Britain's Letters Patent of 1917, it neither acknowledged them, nor protested them, nor reserved U.S. rights to the annexed islands. In place of a coherent polar policy, the U.S. government held a vague notion that, apart from the claims it expressly recognized (Norway's title to Spitsbergen and Denmark's to Greenland), the polar regions remained an international arena open to American interests.¹⁷³ The landing of Stefansson's party on Wrangel, however, led the State Department to re-examine American Arctic interests. With little experience in polar affairs or knowledge of U.S. activities in the region, officials in Washington struggled to determine which state held ownership of the island.¹⁷⁴

A visit to the State Department in March 1922 by Boris Bakhmeteff, the only ambassador to the U.S. of the short-lived Russian Provisional Government, further muddied the waters for American officials. He highlighted Russia's continued use of contiguity doctrine and took a step closer towards an outright sector claim. The official note that the ambassador handed to Russian Division chief D.C. Poole argued that the usual norms of international law calling for "use or settlement" could not be applied to the Arctic regions. "In the past there has been no formal delimitation of sovereignty in the arctic region," Bakhmeteff's report articulated. "There seems to have been a tacit understanding, however, that arctic

against it." See also Joseph Pope's comments cited in Smith, *A Historical and Legal Study of Sovereignty*, 279, 282.

¹⁷³ Department of State, Division of Western European Affairs, Territorial Sovereignty in the Polar Regions, 6 August 1926, United States National Archives and Records Administration (NARA), RG 59, CDF 1910-1929, box 7156, file 800.014. See also Nancy Fogelson, *Arctic Exploration and International Relations, 1900-1932* (Fairbanks: University of Alaska Press, 1992), 41.

¹⁷⁴ Gordon G. Henderson, "Policy by Default: The Origin and Fate of the Prescott Letter," *Political Science Quarterly* 79, no. 1 (1964): 79-81. At the same time, the State Department also investigated American interests in the island of Jan Mayen, after the Norwegian government informed that one of its citizens had occupied the islands. The department concluded the U.S. had no interest in the island.

lands are naturally held as being within the sovereignty of the country to which belongs the continental confines of the Polar Ocean” – an assessment that echoed Poirier’s speech and the conclusions drawn by the Arctic Club. Presenting a completely opposite conclusion to Loring Christie’s about the Russian-American Treaty of 1867, the Russians argued that the agreement’s boundaries “had divided the regions north of the Behring Straits into zones belonging respectively to Alaska and Russia” running to the North Pole.¹⁷⁵ Consequently, Wrangel Island sat within the Russian zone of the Arctic Ocean.

The Russian note and Prime Minister King’s proclamation in the House of Commons gave the State Department a lot of information to digest. Over the next year, departmental officials instructed the U.S. embassy in London to make several inquiries about Canadian and British intentions for Wrangel Island.¹⁷⁶ Meanwhile, advisors in Washington explored the history and legal status of the island. While the State Department Solicitor’s Office speculated that any American territorial rights to Wrangel probably dissolved when Washington failed to protest the original Russian claim in 1916, it offered no firm conclusions on what U.S. policy should be towards the islands, or on polar claims more generally.¹⁷⁷

The Foreign Office kept Mackenzie King well informed of Russian and American inquiries about Wrangel Island. King had not anticipated a strong foreign reaction, and was particularly dismayed by the prospect of a disagreement with the Americans with whom he was trying to build closer ties, not least because he had just entered into negotiations for a treaty to protect the Pacific halibut fishery.¹⁷⁸ Unsure how to proceed, King sent Stefansson to London in the spring of 1923 to confer with British authorities

¹⁷⁵ Memorandum by the Chief of the Division of Russian Affairs, Department of State (Poole), 30 March 1922, in *FRUS*, 1923, Vol. I, (Washington: Government Printing Office, 1938), 279-281.

¹⁷⁶ William Phillips, Secretary of State to the Ambassador in Great Britain, 28 March 1923, in *FRUS*, 1923, Vol. I, (Washington: Government Printing Office, 1938), 283-284; Post Wheeler, Counselor, U.S. Embassy, Great Britain to Secretary of State, 11 April 1923, in *FRUS*, 1923, Vol. I, (Washington: Government Printing Office, 1938), 284-285.

¹⁷⁷ Henderson, “Policy by Default,” 79-81.

¹⁷⁸ See, for instance, Hillmer and Granatstein, *Empire to Umpire*, 77-78.

about how to handle the Wrangel Island situation.¹⁷⁹ In regards to Wrangel, King was ready to follow Britain's lead.

Stefansson sailed to England in May and quickly won the support of two very influential figures: Amery, now First Lord of the Admiralty, and Sir Samuel Hoare, Secretary of State for Air.¹⁸⁰ Amery, in particular, was quite taken with Stefansson, and seemed almost as excited about the prospect of expanding the British Empire in the Arctic as he was about enlarging it in the Antarctic.¹⁸¹ Stefansson next tried to convince an interdepartmental committee chaired by Cecil Hurst, the principal legal adviser in the Foreign Office. In the deliberations that followed Stefansson's presentation, the Admiralty representatives, reflecting Amery's opinion, argued that Wrangel could be important as a base if Arctic air routes developed in the future. They emphasized "the island is the only territory in a vast area to which Great Britain has any claim, and the Admiralty consider that it would be short-sighted policy to surrender our claims to it." Foreign Office officials noted that Russia's claim to Wrangel rested on its proximity to the Russian mainland, and the Americans had only briefly landed on the island. If Britain or Canada decided claiming Wrangel was a strategic or political necessity, an argument could be made based on Britain's discovery of the island and the occupation of Stefansson's party.¹⁸²

From a legal point of view, the Foreign Office concluded a claim would hurt British interests in the Antarctic and the Canadian claim to the Arctic Archipelago.¹⁸³ The deliberations on Wrangel Island unfolded as the final touches were placed on the Order in Council creating the Ross Dependency – a claim that depended, at least in part, on the doctrine of contiguity and the sector principle. Meanwhile, the Canadian government

¹⁷⁹ It was an uncharacteristic decision for a prime minister known for his autonomist position and desire to separate Canadian and British foreign policy making, particularly one who had, only a few months before, rejected Britain's plea for Dominion assistance during the Chanak crisis. See Diubaldo, "Wrangling Over Wrangel Island," 226 and Cavell and Noakes, *Acts of Occupation*, 188.

¹⁸⁰ Vilhjalmur Stefansson, *The Adventure of Wrangel Island* (New York: Macmillan, 1925), 145-150; Stefansson, *The Friendly Arctic*, 692-693.

¹⁸¹ Smith, *A Historical and Legal Study of Sovereignty*, 286; Cavell and Noakes, *Acts of Occupation*, 195.

¹⁸² Foreign Office, Memorandum on the History, Value and Ownership of Wrangel Island, 2 July 1923, NA, A981, ARC 2, Arctic. Canadian Activity.

¹⁸³ Laurence Collier, Memorandum Respecting Territorial Claims in the Arctic to 1930, 10 February 1930, NA, DO 35/167/7, Territorial Claims in the Arctic

could still cite contiguity and the sector principle to justify its claims to islands that remained unoccupied and unvisited in the Arctic Archipelago. Claiming Wrangel Island would weaken these arguments and undermine the Empire's broader position in the polar regions.

Britain also wanted to avoid a territorial dispute with two of the most powerful states in the world. Russia would certainly not give up its claim to Wrangel, and with the British government preparing to recognize the Soviet Union in early 1924 to increase trade relations with the communist state, the Foreign Office could not afford a disagreement over the remote island. These officials were even more troubled by information from the British embassy in Washington that the U.S. planned to officially protest any British-Canadian claim to Wrangel Island.¹⁸⁴ Air Attaché Malcolm Christie gathered from some of his American naval and air force colleagues that, if Britain or Canada claimed Wrangel Island, "it is not unlikely that the incident might be followed by American occupation of some other islands to the immediate North of the Canadian Dominions, for instance in the neighbourhood of the Parry Islands." Christie speculated that the military officers with whom he spoke suspected that Britain might renew its alliance with Japan in case war broke out with the U.S. In this scenario, a British air base on Wrangel would pose a significant threat to American military assets in Alaska.¹⁸⁵ The Wrangel Island affair was inextricably linked to the complexities of the interwar Anglo-American relationship.

Historian Brian McKercher has observed that "in the decade separating the negotiation of the Treaty of Versailles in 1919 from the Wall Street collapse in 1929 and its immediate aftermath, relations between Britain and the United States were distinguished by strain and tension; though masked periodically by outbreaks of goodwill and cooperation, this uneasiness a few times threatened to rupture."¹⁸⁶ While many

¹⁸⁴ Embassy, Washington to Lord Curzon, 15 August 1923, LAC, RG 85, Vol. 1124, File 1005-5-1, pt. 2. See Diubaldo, "Wrangling Over Wrangel Island," 220-221.

¹⁸⁵ British Air Attaché, Washington to British Chargé d'Affaires, LAC, RG 85, Vol. 1124, File 1005-5-1, pt. 2.

¹⁸⁶ Brian McKercher, "Introduction," in *Anglo-American Relations in the 1920s*, ed. B.J.C. McKercher (Edmonton: University of Alberta Press, 1990), 1. For more on the complexities of the Anglo-American relationship, see John E. Moser. *Twisting the Lion's Tail: American Anglophobia between the World Wars* (New York: New York University Press, 1999).

British officials thought that an Atlantic partnership with the U.S. offered the best chance of checking a resurgent Germany,¹⁸⁷ others feared the growing power of the Americans threatened Britain's position in the world. In the early 1920s, tension between the two countries grew due to economic competition and naval rivalry.¹⁸⁸ The Foreign Office had no desire to add a territorial dispute over an unimportant island in the Arctic that they never wanted in the first place to the list of irritants.

Britain's wish that the Canadians drop their claim to Wrangel for the sake of harmonious Anglo-American relations was granted by harsh environmental conditions that sabotaged Stefansson's plans. In September 1923 a relief expedition arrived and found that Stefansson's entire occupying party, save for Ada Blackjack, had perished. The tragedy ended any remaining official interest in claiming Wrangel in Ottawa and London, and this news gradually filtered out to the Americans and Russians.¹⁸⁹ Stefansson was as determined as ever and turned his efforts towards Washington, which was still trying to articulate a clear policy on Wrangel Island.

The Wrangel Island affair illustrated the degree to which state officials struggled to make sense of the legal and political issues involved in polar affairs. Canadian and American officials, in particular, struggled to determine their countries interests, approaches, and legal policies in the Arctic. While Canadian officials grappled with the complicated legal and political issues involved in Arctic sovereignty, they did not yet have the confidence or skill to handle their Arctic affairs independently, particularly when powerful states like the U.S. and Russia were involved. This reality stood in sharp contrast to the arguments Prime Minister King made at the Imperial Conference of 1923,

¹⁸⁷ Darwin, *The Empire Project*, 363; See also M.G. Fry, *Illusions of Security: North Atlantic Diplomacy, 1918-1922* (Toronto, University of Toronto Press, 1972).

¹⁸⁸ The Harding administration had won a great success at the Washington conference in 1921-22 with the end of the Anglo-Japanese alliance and the British agreement to capital ship and aircraft carrier equality between the country's navies. Still, the British were able to win a provision protecting their superiority in cruisers. See John Ferris, "The Symbol and the Substance of Seapower: Great Britain, the United States, and the One Power Standard, 1919-1921," in *Anglo-American Relations in the 1920s*, ed. B.J.C. McKercher (Edmonton: University of Alberta Press, 1990), 55-80; Brian McKercher, *The Second Baldwin Government and the United States, 1924-1929: Attitudes and Diplomacy* (Cambridge, England, 1984).

¹⁸⁹ During meetings in the summer of 1924, the British government informed Soviet officials that the countries of the British Empire had no interest in Wrangel Island. The British asked for a Canadian opinion prior to the conference. See Colonial Secretary J. H. Thomas wrote to Governor General Byng, 18 June 1924, LAC, RG 85, Vol. 1124, File 1005-5-1, pt. 2.

where he fought for an autonomous foreign policy “taken in Canada, for Canada and by Canada.”¹⁹⁰

The British guided the Canadians towards the sector principle and the doctrine of contiguity, which would strengthen the Empire’s respective legal positions in the Arctic and Antarctic. More than ever before, they framed questions of polar sovereignty in a bi-polar context and saw that the legal connections between the two regions required a united approach. Soon after the Wrangel affair, Canada reiterated its faith in the doctrine of contiguity, although it hesitated to evoke the sector principle. In April 1924, Minister of the Interior Charles Stewart explained to the House of Commons that “International law, in a vague sort of way, creates ownership of unclaimed lands within one hundred miles of any coast, even if possession has not been taken. At least there is a sort of unwritten law in that respect.” Still, he insisted on the need for Canada’s acts of occupation, stating that “possession is a very large part of international law as well as any other law.”¹⁹¹

2.7 Australia Ignored: The Empire’s Antarctic Dream Challenged

On the subject of polar affairs, Australian officials were far closer in spirit to their Canadian counterparts than their colleagues in New Zealand. Historians Marie Kawaja and Tom Griffiths have shown that the Australians took an active role in shaping Antarctic policy, reflecting a general desire for inclusion and consultation in imperial matters of interest to their state.¹⁹² In the Antarctic, “Australia was no ‘passive witness’ to

¹⁹⁰ Just as the Wrangel Island affair wrapped up Prime Minister King departed for an Imperial Conference in London in September 1923. Here he continued his fight for an autonomous foreign policy “taken in Canada, for Canada and by Canada.” King fought against British proposals for an imperial foreign policy and forced a statement into the conference’s final report that any of the recommendations made at the meeting were “subject to the actions of the Governments and Parliaments of the various portions of the Empire” thus further opening the door for Dominion autonomy in foreign policy-making. Mansergh, *The Commonwealth Experience*, vol. II, 18; and Hillmer and Granatstein, *Empire to Umpire*, 82, 86.

¹⁹¹ House of Commons *Debates*, 7 April 1924, 1111.

¹⁹² While Canada generally tried to steer a course towards more autonomy in its international affairs, Australia remained a firm believer in an imperial foreign policy. Many Australian officials remained convinced that Dominion independence in foreign policy-making might lead to the disintegration of the Empire. At the Imperial Conference of 1923, Australia’s new Prime Minister, Stanley Bruce, supported British proposals for a united imperial approach to international relations. Nonetheless, Britain’s lack of consultation and inclusion on matters of interest to Australia occasionally irritated the Australian

imperial events but acted according to its own clear and distinctive views and its material self-interest in Antarctic affairs.”¹⁹³ While Australian officials hoped there would be one imperial voice on Antarctic affairs, they framed events in the Antarctic in way that reflected their own national interests.

The success enjoyed by the expanding whaling industry into the Ross Sea and during the summer of 1923-1924 alerted Australian officials to the prospect of greater foreign activity throughout the Antarctic waters.¹⁹⁴ Foreseeing a wave of whaling companies descending on the region, officials believed it prudent for Australia to claim her Antarctic territory as soon as possible. New Zealand had taken control of the Ross Dependency in the face of increased activity, and the Australian government could see no reason why it should not follow the precedent.¹⁹⁵ Prime Minister Bruce, in particular, was adamant that a foreign enclave be kept from forming along his southern border, preventable only through a claim by Australia to the entire Antarctic sector south of its coastline.¹⁹⁶ British officials in London insisted that there was no prospect of any other country claiming this territory in the near future and thus no need for urgent Australian

government. After Britain failed to invite an Australian delegation to the Lausanne Conference (1923) that decided peace terms between Turkey and the allied powers, Stanley Hughes remarked that “the habit of asking Australia to agree to things when they are done and cannot be undone is one which will wreck the Empire if persisted in. You have already seen Canada and South Africa standing aloof on the plea that they had not been consulted.” Hughes explained that “what is wanted, and what we are entitled to, is a real share in moulding foreign and Imperial policy. In foreign affairs the Empire must speak with one voice.” Peter Spartalis, *The Diplomatic Battles of Billy Hughes* (Sydney, Hale and Iremonger, 1983): 246, and Darwin, “The Dominion Idea in Imperial Politics,” 69. See also Neville Meaney, *Australia and World Crisis, 1914-1923*, vol. II (Sydney: Sydney University Press, 2009). The assertive Australian position on its Antarctic interests reflects historian Tom Griffiths’ observation that “the ambiguity of Australian nationalism – new and independent yet proudly British – did not stop Australia’s steady assertion of a distinct national interest within the empire. British race patriotism did not constrain Australia’s determination to maintain and develop exclusive political control over its own affairs and in its own region.” Tom Griffiths, “The AAT and the Evolution of the Australian Nation,” *Proceedings of the Symposium to Mark 75 Years of the Australian Antarctic Territory* (2012): 13-21.

¹⁹³ Marcus Howard and Tom Griffiths, “Introduction,” in *Australia and the Antarctic Treaty System: 50 Years of Influence*, eds. Marcus Howard and Tom Griffiths (Sydney: University of New South Wales Press, 2011), 3. See also Kawaja, “Australia in Antarctica,” 31-52.

¹⁹⁴ Cablegram from Colonial Secretary to the Governor General, 8 July 1922 and Department of Trades and Customs to Prime Minister’s Department, 27 February 1924, NAA, CA 18, A4311, 362/6, Papers re Imperial Conference 1921 concerning Antarctic Matters, 1921-1931. See also William Barr and J.P.C. Watt, “Pioneer Whalers in the Ross Sea, 1923-1933,” *Polar Record* 49, no. 210 (2005): 281-304.

¹⁹⁵ Acting Prime Minister Page to Mr. Bruce in U.K., 1 December 1923, NAA, A4311, 362/6.

¹⁹⁶ See Kawaja, “Extending Australia’s Control Over its ‘Great Frozen Neighbour,’” 22-31.

action.¹⁹⁷ Furthermore, two Empire claims in the span of a year violated the British government's gradualist Antarctic strategy and could provoke foreign response. France had been quiet on its Antarctic claim for a decade and had taken no action to further explore Adélie Land, and the state might lose interest altogether in the region – unless provoked by a perceived British land grab. In British eyes, the Australian Antarctic Territory could wait. The Australian government continued to push the British to activate plans for a claim, but would not act without the sanction of the Empire.

Australian concerns were born out when France – spurred on by the Ross Dependency claim – looked to safeguard its Antarctic interests. On 29 March 1924, Paris published a presidential decree asserting its control over several Subantarctic islands and Adélie Land. In November, France followed the decree with a proclamation that attached the Antarctic territory to its Madagascar colony for administrative purposes, despite the two territories being 8000 miles apart.¹⁹⁸ Neither declaration outlined the precise boundaries of France's Antarctic territory, nor did the French government attempt to back up its claim with an expedition or physical presence in the region. Nonetheless, it posed a direct challenge to Britain's imperial dreams and to Australian territorial ambitions in the Antarctic.

The Australian government urged the British to challenge the French claim. Any concession to France would strip Australia of part of the sphere promised by the Colonial Office in 1921. In 1840, D'Urville had only sailed along 240 km of coastline and had never even set foot on the continent; activity which paled in comparison to the pioneering work of Mawson and the AAE. Walter Henderson, director of the newly-created External Affairs branch of the Australian Prime Minister's Department, advised the Colonial Office that “in view of the unanimous agreement as to the importance of the Antarctic passing under British control, Commonwealth Government feels that unless there are

¹⁹⁷ Bruce to Acting Prime Minister Page, 1 January 1924, NAA, CA 18, A4311, 362/6, Papers re Imperial Conference 1921 concerning Antarctic Matters, 1921-1931.

¹⁹⁸ Kawaja and Griffiths, “Our great frozen neighbour,” 25.

insuperable obstacles in the way it would be advisable to assert rights over these regions at earliest opportunity.”¹⁹⁹

The British weighed other Antarctic and international interests and hesitated to challenge France’s position. Chief Hydrographer Learmonth concluded that d’Urville first spotted and claimed the land on the Antarctic continent, and insisted that this act of first discovery and his excellent charting made the French claim indisputable.²⁰⁰ The Admiralty qualified that, while a French claim was indisputable, it could perhaps be limited to the section of coastline actually spotted by d’Urville.²⁰¹ By November 1924, however, Leopold Amery returned to head the Colonial Office, and he reiterated that there was little the British could do to oppose a French claim. Britain also based its own claims in the Antarctic on similar acts of discovery and paper administration (rather than effective occupation) and any opposition to the French declaration risked challenged to Britain’s claims.²⁰²

The larger issue of Britain’s diplomatic relationship with France loomed in the background of these Antarctic deliberations. By 1924, the bilateral relationship was growing more acrimonious owing to bitter disagreements over Germany’s economic recovery and reparations, as well as heightened imperial rivalry in the Near East. In light of these differences, the British government sought to avoid disagreements, believing its worldwide imperial interests and communications networks depended upon good relations with France.²⁰³ In the end, London decided to ignore the Australians and refused to issue an immediate challenge to the French Antarctic claim.

Britain’s worries about the strength of its legal position in the FID shaped its response to Australia’s proposal and the French claim. The belief that these claims were

¹⁹⁹ Walter Henderson, External Affairs Note, 26 November 1924, NAA, A981, ANT 48 Part 1; Governor-General to Amery, 4 December 1924, NA, ADM, 116/2386.

²⁰⁰ Memo by Learmonth, 17 September 1924, NA, ADM 116/2386.

²⁰¹ Memorandum Prepared in the Hydrographic Department, Admiralty, The French Claim to Part of the Antarctic Continent, January 1925, NA, ADM 116/2386

²⁰² Cable from the Leopold Amery, Secretary of State for the Colonies, 18 February 1925, NAA, A4311, 362/6.

²⁰³ Darwin, *The Empire Project*, 365.

“somewhat prejudiced” by incorrect geographic information²⁰⁴ had led to the establishment of the Discovery Committee in 1923. The committee had instructions to create accurate maps and charts of the FID, and collect information that would allow Britain to better manage the still-booming whaling industry. It did not go into operation until January 1925 with the establishment of a marine biological conservatory at Grytviken, South Georgia. The committee also began a systematic survey of the oceanography of the Southern Ocean, including extensive mapping around South Georgia, the South Orkneys and the South Shetlands.²⁰⁵ From the start, historian Peder Roberts has stressed, the Discovery Committee clearly emphasized the assertion of sovereignty over the conservation and management of whales.²⁰⁶ Science could be portrayed as a noble pursuit free from nationalistic impulses, but states knew that accurate maps, surveying and scientific research also bolstered territorial claims.²⁰⁷ Policy-makers used the committee’s scientific activities to highlight Britain’s activity and sovereignty in the Antarctic. This activity would prove doubly important as a new threat emerged to Britain’s polar interests.

2.8 The Hughes Doctrine

As of the beginning of 1924, the U.S. State Department’s interest in polar issues remained lukewarm. The political and legal questions surrounding Wrangel Island continued to cause concern within the department, especially after Stefansson tried to convince Washington that it should claim the island. Stefansson even sold his rights to Wrangel to American entrepreneur Carl Lomen, known as the “Reindeer King of

²⁰⁴ Klaus Dodds, *Pink Ice: Britain and the South Atlantic Empire* (London: I.B. Tauris, 2002), 13.

²⁰⁵ Klaus Dodds, *The Antarctic: A Very Short Introduction* (Oxford: Oxford University Press, 2012), 35.

²⁰⁶ Roberts has noted that, “Geography was perhaps the quintessential science of empire, while other sciences had long facilitated control over distant objects and people as well as over spaces.” Peder Roberts, *The European Antarctic: Science and Strategy in Scandinavia and the British Empire* (New York: Palgrave MacMillan, 2011), 4.

²⁰⁷ See, G.E. Fogg, *A History of Antarctic Science*, (Cambridge: Cambridge University Press, 1992), 155; Jessica M. Shadian, “Revisiting Politics and Science in the Poles: IPY and the Governance of Science in Post-Westphalia,” in *Legacies and Change in Polar Sciences*, Jessica M. Shadian and Monica Tennberg, eds. (Farnham: Ashgate, 2009), 35-61 at 41; and Urban Wrakberg, “IPY Field Stations: Functions and Meanings,” in *Legacies and Change in Polar Sciences*, Shadian and Tennberg, eds. (Farnham: Ashgate, 2009), 73-97.

Alaska,”²⁰⁸ in the hopes of inspiring Washington to take ownership of the island.²⁰⁹ The State Department officials reiterated that the U.S. had rights to the island, but little inclination to risk an international incident with the Soviet Union. Consequently, when a Russian gunboat removed Lomen’s party from Wrangel Island in the summer of 1924 the State Department offered the businessman compensation in private but remained silent in public.²¹⁰

Unlike the State Department, the U.S. Navy became more interested in the Arctic, especially with growing possibilities for aerial exploration in the region. Stefansson’s outpouring of popular writings presented the Arctic Ocean as a “polar Mediterranean” offering the shortest potential air routes between some of the largest cities in the world.²¹¹ He argued that the emergence of long-range aircraft had finally solved, “after four hundred years, the problem of the northwest passage and giving us at last a short route from Europe to the Far East.”²¹² When Captain Bob Bartlett, a Newfoundlander with a vast amount of Arctic experience, spoke in front of Navy Department hearings about the possibilities of northern aviation in December 1923, he predicted that the “flying route across the Pole is the aerial Panama Canal of the future.” Bartlett argued it was as important for the U.S. to control the area on the American side of the North Pole as it was for it to control the Panama Canal. In these visions of future transpolar air routes, the Arctic islands became potential bases.²¹³

Impressed by these arguments, the U.S. Navy decided to use arctic exploration to gain publicity for the service and secure additional funding from Congress. It laid out tentative plans to send an airship, the *Shenandoah*, to explore the million square miles between Alaska and the North Pole.²¹⁴ “We have to photograph those regions and plant our flag there first,” Secretary of the Navy Edwin Denby told the press in January 1924.

²⁰⁸ See Carl Lomen, *Fifty Years in Alaska* (New York: David McKay, 1954).

²⁰⁹ Stefansson, *The Adventure of Wrangel Island*, 300.

²¹⁰ American Claims to Wrangel Island, Herald Island, Etc., In the Arctic Sector Claimed by Russia, 28 October 1933, NARA, RG 59, Entry 5245, Box 3, Folder 11, File Wrangel Island.

²¹¹ Vilhjalmur Stefansson, *The Northward Course of Empire* (New York: Macmillan, 1924).

²¹² Vilhjalmur Stefansson, “The Arctic as an Air Route of the Future,” *The National Geographic Magazine* (August 1922): 205-218.

²¹³ Fogelson, *Arctic Exploration and International Relations*, 80, 89.

²¹⁴ Fogelson, *Arctic Exploration and International Relations*, 88.

“But for myself it is also a matter of great national pride that we shall not let any other nation step in between us and this region, which is practically contiguous to the territory of the United States; and that is exactly what some nation will do if we do not get there first.”²¹⁵ Despite the Navy’s hopes, Congress rejected the *Shenandoah* project, and the idea was quickly forgotten.

Denby’s comments, however, attracted a great deal of attention. Anson W. Prescott, a prominent Republican and secretary of the Republican Publicity Association, asked Secretary Denby about the *Shenandoah* plan. He also inquired about the legal status of Wilkes Land, the section of Antarctic coastline spotted by the U.S. Exploring Expedition in 1839.²¹⁶ While pondering a response to Prescott’s letter, the State Department received a letter from the Norwegian government informing the Americans of a proposed expedition by Roald Amundsen, who prepared to fly across the unknown section of the Arctic Ocean between Point Barrow, Alaska and Spitsbergen. “In order to avoid any misunderstanding,” the note explained, “I beg to add that possession of all the land that Mr. Amundsen may discover will, of course, be taken in the name of His Majesty the King of Norway.”²¹⁷

The notes forced the State Department to articulate a more coherent polar policy. Historian Gordon Henderson has shown that during this period of short, intense policy review, one of the most active members of the department was geographer Colonel Lawrence Martin, posted to the Division of Political and Economic Information.²¹⁸ Martin warned that Britain seemed intent on assuming control over the entire Antarctic continent, even though its claims had little substance. He insisted neither the United

²¹⁵ Speech recorded on front page of the *New York Times*, 20 January 1924, under headline “Annexation of Land to Pole, if Any, Aim of Navy, says Denby.”

²¹⁶ Given the legal and political nature of Prescott’s inquiry, Denby did not feel qualified to comment, and he forwarded the questions to the State Department, although the Navy Department considered the section of Antarctic coastline known as Wilkes Land as under the sovereignty of the U.S. The Navy also commented on the potential value of the Antarctic, in terms of possible fuel and mineral deposits, but not on the legal problems. U.S. Navy, General Board, Sovereignty of Crozets Island and Wilkes Land, Study 414-3, 9 December 1924. Cited in Barry Merrill Plott, “The Development of United States Antarctic Policy” (Ph.D. dissertation: Fletcher School of Law and Diplomacy, Tufts University, 1969), 28-29.

²¹⁷ Norwegian Minister to the Secretary of State, 25 February 1924, *FRUS*, 1924, 518.

²¹⁸ Henderson, “Policy by Default: The Origin and Fate of the Prescott Letter.” Martin had a deep interest in the polar regions and had served on the national boundaries commission at the Paris Peace Conference. Frank William, “Lawrence Martin, 1880-1955,” *Annals of the Association of American Geographers* 46, no. 3 (1956): 357-364.

States, Norway, nor Great Britain had established a claim to sovereignty over the islands of the Arctic Archipelago, leaving them “Terra Nullius.” Given the difficulties of effectively occupying the Arctic and Antarctic, Martin proposed that Washington take the lead in organizing Spitsbergen-like treaties for both regions in which all interested countries would be granted access for commercial purposes.²¹⁹ In his conclusions, Martin tapped into the opinion expressed by Thomas Willing Balch: that the polar regions be considered a “no man’s land” that belonged to the entire human race.²²⁰

Martin’s superiors rejected his plan to create regional treaties in the Arctic and Antarctic and they neglected to protest any of the existing territorial claims in the polar regions. Instead, they chose a simpler solution. In his appraisal of the Norwegian note, A.B. Haupt, who worked in the Solicitor’s Office, cited the demand for effective occupation in the leading international treatises for territorial acquisition, and insisted that discovery and acts of possession, especially by a pilot flying over a region, could not grant a state sovereignty. Haupt’s opinion reflected the legal digest produced by John Bassett Moore, international lawyer and past adviser to the State Department, which bluntly stated that “Title by occupation is gained by discovery, use and settlement.”²²¹ Haupt argued that the rules guiding territorial acquisition in temperate zones should not be radically altered for application to the polar regions. He advised that, rather than issue its own claim to the territory in the Arctic, the U.S. could reserve its rights by explaining to the Norwegian government that any land discovered by its nationals could not be claimed without occupation.²²² The State Department’s solicitor, Charles Cheney Hyde,

²¹⁹ Lawrence Martin to Solicitor’s Office, 21 March 1924, Cited in Henderson, “Policy by Default,” 85-88.

²²⁰ Balch’s message had been carried on by his brother, Edwin. See Edwin Swift Balch, “Antarctic Names,” *Bulletin of the American Geographical Society* 44, no. 8 (1912): 561-579.

²²¹ John Bassett Moore, *A Digest of International Law*, vol. I (Washington: Government Print Office, 1906), 258.

²²² Henderson, “Policy by Default,” 85-88. See also S.W. Boggs, Department of State, Office of the Historical Adviser, *The Polar Regions: Geographical and Historical Data in a Study of Claims to Sovereignty in the Arctic and Antarctic Regions*, 21 September 1933, NARA, College Park, Maryland, Record Group (RG) 59, CDF 1930-39, Box 4522, File 800.014, Arctic/31. American legal appraisals reflected the arguments of legal scholar T.J. Lawrence, who held that, “a temporary camp withdrawn after a time to the mother country will not be sufficient to keep alive rights of sovereignty over territory purporting to be occupied.” T.J. Lawrence, *The Principles of International Law* (Boston: Heath and Co., 1923), 150.

accepted Haupt's view and applied his reasoning during the drafting of the official responses to the Norwegian note and the Prescott inquiry.²²³

The official response to Prescott sent by Secretary of State Charles Evan Hughes laid out the history of American exploration in the Antarctic, including the discoveries of Palmer and Wilkes. Nonetheless, it also stressed that the U.S. had never supported these activities with an official claim. He also pointed out that, despite British claims and activity in the Antarctic, these areas lacked permanent population or settlement. Hughes explained the State Department's position demanded that discovery be followed by physical settlement, even in the polar regions. The note to the Norwegians insisted that discovery and the "formal taking of possession" had "no significance" beyond heralding "the advent of the settler," which he implied might be impossible in parts of the polar regions. Even if the department thought the U.S. had rights in the Antarctic, Hughes concluded that without "an act of Congress assertative in a domestic sense of dominion over Wilkes Land this Department would be reluctant to declare that the United States possessed a right of sovereignty over that territory."²²⁴

Out of these statements was born the Hughes Doctrine, which formed the foundation of U.S. polar policy. Under the doctrine, official declarations, occasional visits, temporary camps and a semblance of control did not allow a country to acquire sovereignty over polar territory. The U.S. position held that countries must settle, colonize and utilize polar lands before they could successfully claim them, as in more temperate zones. Accordingly, U.S. officials refused to recognize any polar claim that did not meet its very strict interpretation of the requirements of sovereignty. While safeguarding potential U.S. territorial rights in the region, the doctrine left open the

²²³ Trained at Yale and Harvard Law, Hyde had been teaching and practicing international law for twenty-five years and was the author of one of the leading American treatises on international law. He believed "that the absence of a detailed rule...could lead to the legal conclusion that in the area in question a state had freedom to act." He endeavored to provide such a rule in the Antarctic. "Charles Cheney Hyde," *Political Science Quarterly* 67, no. 2 (1952): unnumbered; and L.H. Woolsey, "Charles Cheney Hyde," *The American Journal of International Law* 46, no. 2 (1952): 283-289.

²²⁴ Charles Hughes to Norwegian Minister, 2 April 1924, *FRUS*, 1924 (Washington: U.S. Government Printing Office, 1939), 519-520; Secretary of State Charles Hughes to A.W. Prescott, Secretary, Republican Publicity Association, 13 May 1924, Document US13051924, in Bush, *Antarctica and International Law* 3, 430-432.

possibility of regional treaties and internationalization, which remained a recurring policy option in internal State Department discussions on the polar regions.²²⁵

Scholars have often criticized the Hughes Doctrine as a weak, confused and indecisive policy. Legal scholar F.M. Auburn has argued that the doctrine “unsettled all claims without giving the United States any benefit” and “later worked against American interests by requiring a higher standard than adopted by actual claimants.”²²⁶ Jeffrey Myhre, in his history of the Antarctic Treaty, insisted that “although the Hughes Doctrine was, in actuality, merely a Department of State interpretation of contemporary international law, as opposed to a statement of policy, it was bad.” Rather than articulate a policy more fitting to the polar regions, the State Department simply chose indecision and hid behind a technical legal argument that saved it from making territorial claims that it was not ready to make.²²⁷ These pointed criticisms reflect a broader traditional critique of the interwar Republican Administrations’ foreign policies as uncertain and poorly executed.²²⁸ Historians have accused Charles Hughes of being uncreative and foolishly dependent on law and reason, rather than power, in his foreign policy.²²⁹

These assessments, both of the Hughes Doctrine and American foreign policy in the 1920s, are overly simplistic and narrow. Historian Gordon Henderson has defended the Hughes Doctrine as a necessary stop-gap measure that the State Department used to reserve American rights in the polar regions while providing an inexperienced department time to formulate a long-term polar policy.²³⁰ More nuanced studies of U.S. foreign policy in the 1920s have underlined that the uncertainty previous scholars read

²²⁵ Hughes, for instance, apparently came to the conclusion that the unusual conditions of the polar regions might demand regional treaties and internationalization. Prentiss Gilbert to Castle, 11 June 1926, Henderson, “Policy by Default,” 91. On the Hughes doctrine, see also P. Whitney Lackenbauer and Peter Kikkert, “The Dog in the Manger – and Letting Sleeping Dogs Lie: The United States, Canada and the Sector Principle, 1924-1955,” in *The Arctic Ocean: Essays in Honour of Donat Pharand*, ed. Suzanne Lalonde and Ted McDorman (Leiden: Brill, 2014), 216-239.

²²⁶ Auburn, *Antarctic Law and Politics*, 64.

²²⁷ Jeffrey D. Myhre, *The Antarctic Treaty System: Politics, Law and Diplomacy* (Boulder: Westview Press, 1986), 24.

²²⁸ Selig Adler, *The Uncertain Giant, 1921-1941: American Foreign Policy between the Wars* (New York, 1965); See Brian McKercher, “Reaching for the Brass Ring: The Recent Historiography of Interwar American Foreign Relations,” *Diplomatic History* 15 (1991): 565-598.

²²⁹ See Betty Glad, *Charles Evan Hughes and the Illusions of Innocence: A Study in American Diplomacy* (Urbana: University of Illinois Press, 1966).

²³⁰ Henderson, “Policy by Default,” 77.

into the foreign affairs of the interwar Republican administrations actually represented a consistent policy of cautious non-entanglement through which decision-makers sought actions that gave them a “free hand” to operate.²³¹ Historian George C. Herring has concluded that “the 1920s must therefore be considered on their own terms. Involvement without commitment seems the best way to sum up the U.S. approach to the world during that period. The nation vigorously promoted its interests while scrupulously guarding against entanglements.”²³² After the strong opposition in Congress to American involvement in the League of Nations, Secretary Hughes perceived a clear need to frame cautious policies in foreign affairs.²³³ The Hughes Doctrine was a cautious, defensive strategy designed to ensure potential U.S. rights in the Arctic and Antarctic, without any complicated entanglements.

The Doctrine also reflects the strain of American imperialism that dominated in the early twentieth century. Historian Adrian Howkins has presented it as a modern reiteration of the Monroe Doctrine that invoked a similar sense of manifest destiny in its “implicit reservation” of American rights in the polar regions.²³⁴ Antarctic scholar Robert Hall has argued that the Doctrine grew out of the “new imperialism” embraced by the U.S. in the early twentieth century. He saw parallels between the doctrine and the “imperialism of trade” and Open Door Policy adopted for China, which provided the Americans with access to Chinese markets and a “degree of political control” to prevent any annexations by other powers. During his time in office, Charles Evan Hughes used similar ideas to protect U.S. interests in the Far East and Middle East. “The Hughes doctrine was clearly a part of the United States’ imperial design,” Hall concluded, “and

²³¹ John Dumbrell, *The Making of U.S. Foreign Policy*, 2nd Ed. (Manchester: Manchester University Press, 1997): 8-9; William LaFeber, *The American Age* (New York: Norton, 1989): 34.

²³² George C. Herring, *From Colony to Superpower: U.S. Foreign Relations Since 1776* (Oxford: Oxford University Press, 2008), 436. “This approach brought remarkable short-term successes that concealed major long-term failures.”

²³³ Herring, *From Colony to Superpower*, 444; See also Emily Rosenberg, *Financial Missionaries to the World: The Politics and Culture of Dollar Diplomacy, 1900-1930* (Cambridge: Cambridge University Press, 1999), 97-150.

²³⁴ Adrian Howkins, “The Significance of the Frontier in Antarctic History: How the US West had Shaped the Geopolitics of the Far South,” *The Polar Journal* 3, no. 1 (2013): 9-30.

did not occur in isolation, removed or divorced from world politics and the basic structural changes, such as New Imperialism, which have shaped the modern world.”²³⁵

Hall’s insights fit with a scholarly approach that highlights informal power and fear of territorial commitments as the main attributes of American imperialism.²³⁶ The U.S. participated in the new imperialism of the late 19th century, acquiring territories in the Caribbean and Pacific. Still, some American statesmen argued that acquired territories must be incorporated as states of the union or abandoned.²³⁷ Accordingly, the government generally preferred the Panama Canal model, where the U.S. secured its national interests while avoiding the entanglements of formal and physical territorial acquisition.²³⁸ As Hughes summarized in his letter to Prescott, the State Department had no desire to make a territorial claim in the Antarctic without a congressional mandate.

The Hughes Doctrine also reflected a deeply entrenched legal tradition that scholarly evaluations of the doctrine have failed to explore. Legal scholar Jonathan Zasloff has pointed out that lawyers dominated American international relations in the first decades of the twentieth century. Between 1889 and 1945, every Secretary of State was a lawyer, and the ensuing relationship between law and foreign policy directly affected American diplomacy.²³⁹ Many of these men ardently supported the classical legal ideology, the legal framework in which elite lawyers in the U.S. worked. This highly abstract system of thought, characterized by a strong belief in law and universal principles that could form the basis of a legally regulated world, focused on the creation

²³⁵ H. Robert Hall, “The ‘Open Door’ into Antarctica: An Explanation of the Hughes Doctrine,” *Polar Record* 25, no. 153 (1989): 139-140; Frank Ninkovich, *The United States and Imperialism* (Malden: Blackwell Publishers, 2001).

²³⁶ Bernard Porter, *Empire and Superempire: Britain, America and the World* (New Haven: Yale University Press, 2006), 65.

²³⁷ See A.G. Hopkins, “Comparing British and American Empires: Review Article,” *Journal of Global History* 2, no. 3 (2007): 402; Frank Schumacher, “The American Way of Empire: National Tradition and Transatlantic Adaptation in America’s Search for Imperial Identity, 1898-1910,” *GHI Bulletin* 31 (2002): 35-50.

²³⁸ See Bartholomew H. Sparrow, *The Insular Cases and the Emergence of American Empire* (Lawrence: University of Kansas Press, 2006), chapter 9; Warren Cohen, “The American Dream: Empire Without Tears,” *Global Dialogue* 5, no. 1-2 (2003): 1-11; Warren Cohen, *Empire Without Tears: American’s Foreign Relations, 1921-1933* (New York: Knopf, 1987).

²³⁹ Zasloff, “Law and the Shaping of American Foreign Policy,” 239-373; See also Duncan Kennedy, “Toward an Historical Understanding of Legal Consciousness: The Case of Classical Legal Thought in America, 1850-1940,” *Research in Law and Sociology* 3 (1980): 3-24.

of stability and order through clear international standards and legal regimes. The ideology sought a consistent and relatively closed legal system in which rules could evolve – but not dramatically.²⁴⁰

Zasloff maintains that the classical legal ideology “profoundly influenced the direction of American foreign policy.”²⁴¹ Elihu Root, one of the leading lawyers and statesman in the U.S. between 1890 and 1920, grafted the classical legal ideology into American diplomacy. While serving as Secretary of War for Roosevelt, Root famously asserted, “good diplomacy consists in getting in such a position that upon a conflict's flaring up between two nations the adversary will be the one which has violated the law.” Root wanted to construct a diplomatic environment that focused on whether a state had international law on its side and promoted a robust legal system that could set a clear standard for state practice throughout the world.²⁴²

Root's values had a strong influence on his disciples, including Secretary of State Charles Evan Hughes and his successor Frank B. Kellogg.²⁴³ Historian Mark Janis has labeled Hughes, in particular, a “titan of international law in the early twentieth century,”

²⁴⁰ William M. Wiecek, *The Lost World of Classical Legal Thought: Law and Ideology in America, 1886-1937* (Oxford: Oxford University Press, 1998), 12-13 and 123-174. See also Francis Anthony Boyle, *Foundations of World Order: The Legalist Approach to International Relations, 1898-1922* (Durham: Duke University Press, 1999), 3. See also Mark Janis, *America and the Law of Nations, 1776-1939* (Oxford: Oxford University Press, 2010); Mark Janis, *The American Tradition of International Law: Great Expectations, 1789-1914* (Oxford: Oxford University Press, 2004); Hatsue Shinohara, *US International Lawyers in the Interwar Years: A Forgotten Crusade* (Cambridge: Cambridge University Press, 2012); Shirley V. Scott, *International Law, US Power: The United States' Quest for Legal Security* (Cambridge: Cambridge University Press, 2012); Emily Rosenberg, “Transnational Currents in a Shrinking World, in *A World Connecting, 1870-1945*, ed. Emily Rosenberg (Cambridge: Harvard University Press, 2012), 836; Warren Kuehl, *Seeking World Order* (Nashville: Vanderbilt University Press, 1969); Roland Marchand, *The American Peace Movement and Social Reform, 1898-1918* (Princeton: Princeton University Press, 1972), 42-51 (148 describes role of lawyers in peace movement); Calvin DeArmond Davis, *The United States and the Second Hague Peace Conference: American Diplomacy and International Organization, 1899-1914* (Durham: Duke University Press, 1975); and Calvin DeArmond Davis, *The United States and the First Hague Peace Conference* (Ithaca: Cornell University Press, 1962).

²⁴¹ Zasloff, “Law and the Shaping of American Foreign Policy,” 239-373. Kennedy, “Toward an Historical Understanding of Legal Consciousness,” 3-24; Wiecek, *The Lost World of Classical Legal Thought*, 123-174.

²⁴² Zasloff, “Law and the Shaping of American Foreign Policy,” 290. Of course, as Root displayed during the Spanish-American War, force could be used to secure adherence to the rules the U.S. wanted states to follow.

²⁴³ Zasloff, “Law and the Shaping of American Foreign Policy,” 370; Herring, *From Colony to Superpower*, 442. Herring described Hughes as “last secretary to personally manage U.S. foreign policy.”

who was a “true-believer” in a “utopian vision of international law.”²⁴⁴ In the autumn of 1925, President Calvin Coolidge, also a lawyer, outlined the measures that his government intended take to stabilize the international sphere. “All of these efforts,” he declared, “represent the processes of reducing our domestic and foreign relations to *a system of law*. They consist of a determination of clear and definite rules of action.” These efforts would succeed, the president asserted, because “it has not been brought about by one will compelling another by force, but had resulted from men reasoning together. It has sought to remove compulsion from the business life of the country and from our relationship with other nations.”²⁴⁵ Classical legal ideology lay at the heart of these beliefs.

The Hughes Doctrine was born out of the same classical legal ideology and the legal and diplomatic frameworks that it produced. The Doctrine reflected broader currents in American policymaking that tried to set the country’s foreign relations in a robust system of law, with clear guidelines and rules of action. Hughes and the State Department concluded that even the polar regions should be included within a robust, global legal system predicated on reason and order. Furthermore, the Hughes Doctrine’s close interpretation of the contemporary international law on territorial acquisition represented an attempt to ensure that the U.S. would remain on the right side of the law in any future disagreements related to the polar regions.

Unfortunately, the State Department willingness to fully utilize the doctrine came into question only a few months after its creation. During the summer of 1924, as the Russian gunboat removed Carl Lomen’s occupying party from Wrangel, a small, unsanctioned, privately funded American expedition landed on nearby Herald Island, raised the stars and stripes and claimed it for the United States. In response, the Soviets reasserted their rights in the Arctic and sent notes to foreign governments insisting that they respect the territorial claims the Tsarist government made in 1916. Reiterating their note to the Americans in 1922, the Russians argued that the Russian-American Treaty of 1867 set the Arctic boundary between the two countries as the parallel of 60° 30’ north

²⁴⁴ Janis, *The American Tradition of International Law*, 205.

²⁴⁵ Calvin Coolidge, *Foundations of the Republic: Speeches and Addresses* (Freeport: Books for Libraries Press, 1968), 330-331.

longitude all the way to the North Pole. As a result, the U.S. could not claim any islands to the west of this line, which made the flag raising on Herald a breach of the treaty.²⁴⁶

In November, the Solicitor's Office of the State Department concluded the 1867 treaty never intended to establish a boundary stretching to the North Pole and therefore did not prohibit the U.S. from claiming islands anywhere in the Arctic Ocean.²⁴⁷ The State Department considered the Russian claim to be very weak. Herald Island was 170 nautical miles off the Siberian coastline and could not be considered contiguous with the mainland.²⁴⁸ Furthermore, the Hughes Doctrine demanded permanent physical settlement to validate territorial claims in the polar regions, which the Russians had not yet accomplished on either Herald or Wrangel Island. Thus, Washington could have used the doctrine to reject the Russian annexation, just as they had denied Norway's pretensions earlier in the year. At the same time, the Americans realized that their claim to the islands was also weak, as was the State Department's desire to own them. Rather than risk an international incident, the State Department chose not to endorse an official challenge to the Russian claim, while also refusing to recognize the Soviet Union's sovereignty over the Arctic islands.²⁴⁹ In this instance, politics trumped the clear legal standards established by the Hughes Doctrine. It would not be the last time.

Moving forward, the Americans would have to decide how to utilize the Hughes Doctrine and study many of the core questions it left unanswered. What actual steps did a state need to take to acquire territory in polar regions? No one in Washington clarified what constituted effective state control, use or "actual settlement" in polar regions, and the State Department struggled to determine how much area could be "considered occupied by a single colony or military post." Did a physical settlement of one island in a polar archipelago allow a state to claim additional adjacent islands? Was the physical

²⁴⁶ For a summary see American Claims to Wrangel Island, Herald Island, Etc., In the Arctic Sector Claimed by Russia, 28 October 1933, NARA, RG 59, Entry 5245, Box 3, Folder 11, File Wrangel Island

²⁴⁷ The Americans argued that the most northern point the lines reached was 72° 00' N. American Claims to Wrangel Island, Herald Island, Etc., In the Arctic Sector Claimed by Russia, 28 October 1933, NARA, RG 59, Entry 5245, Box 3, Folder 11, File Wrangel Island.

²⁴⁸ S.W. Boggs, American Claims to Wrangel Island, Herald Island, Etc., in the Arctic Sector Claimed by Russia, 28 October, 1933, NARA, RG 59, Entry 5245, Box 1, Folder 2, File Polar Regions. Sovereignty. Sector Principle.

²⁴⁹ Department of State, Division of Western European Affairs, Territorial Sovereignty in the Polar Regions, 6 August 1926, pg. 49, NARA, RG 59, CDF 1910-1929, Box 7156, File 800.014/Arctic.

settlement called for in the Doctrine necessary or even possible, given the harsh climatic conditions of the polar regions?²⁵⁰ Although answers to these questions would have created a firmer U.S. polar policy erected on a robust legal foundation, State Department officials exerted little effort in trying to address them.

2.9 On a Collision Course

With the declaration of the Hughes Doctrine, the polar policies of the United States and the countries of the British Empire emerged as polar opposites. Through the Hughes Doctrine, the United States adopted the most conservative approach to the acquisition of polar sovereignty of any country with interests in the polar realms. As the *New York Herald Tribune* pointed out in 1929, however, “Hughes’ statement does not necessarily constitute international law, particularly in Great Britain.”²⁵¹ In its official use of the sector principle in the Antarctic, the British Empire articulated one of the most liberal approaches. These fundamentally different conceptions of polar sovereignty set the United States and the countries of the British Empire on a collision course. While the Hughes Doctrine aligned with the calls for effective occupation found in contemporary international legal treatises, the sector principle offered a convenient solution to the problem of polar sovereignty. In 1924, the central question remained the approach of the other polar states with unrecognized claims. Would Norway accept the Hughes Doctrine and its demand for settlement and use? Russia had already utilized the doctrine of contiguity: would it extend these arguments into a sector claim? Would France define its undefined Antarctic claim using lines of meridian and include unknown land? The answers to this question would decide whether the U.S. or Britain would become the primary architect of the polar legal landscape.

²⁵⁰ Department of State, Division of Western European Affairs, Territorial Sovereignty in the Polar Regions, 6 August 1926, pg. 49, NARA, RG 59, CDF 1910-1929, Box 7156, File 800.014/Arctic.

²⁵¹ ‘The Antarctic Crisis,’ *New York Herald Tribune*, 30 November 1929.

Chapter 3

3 The Empire's Principle, 1925-1926

In early March 1925, celebrated Antarctic explorer Douglas Mawson sat down with his academic colleagues on the Australian National Research Council (ANRC) to discuss a pressing national concern: territorial rights in the Antarctic.¹ The council agreed that France's claim to Adélie Land directly challenged Australia's Antarctic interests. The French dependency was closer to the Tasmanian community of Hobart than Perth was. If the Australians allowed the French to establish themselves in an area directly to their south, what would stop other foreign powers from following suit? The greatest worry was an American claim to the coastline discovered by the U.S. Exploring Expedition in 1840. The ANRC speculated that international interest in the Antarctic would only increase given its impressive whaling grounds, mineral potential, possibilities for southern air routes and the role it could play in global weather forecasting. These practical factors combined with "national sentiment" demanded that Australia act quickly to secure its polar interests to the immediate south.

On what basis could Australia lay claim to such a vast swath of territory? While the council maintained that Mawson's 1911-1914 expedition gave Australia "historical rights" in the region, international law did not "lay down any general rule for deciding the ownership of uninhabited or savage lands," the ANRC observed. The committee sought a stronger foundation for the country's claim.

For more than a decade, Mawson had publicly advocated that Australia apply to the Antarctic what he called the "Canadian principle" of sector claims. The explorer incorrectly informed his ANRC colleagues that the Canadian government had successfully used the sector principle to secure "universal recognition of Canada's claim" to "all unoccupied lands, already discovered or to be discovered by future exploration,

¹ Secretary, Australian National Research Committee (ANRC), to Secretary, Prime Minister's Office, 10 March 1925, National Archives of Australia (NAA), A981, ANT 48, Part I, Antarctic French Interests Part I. Antarctic explorer and expert Sir Edgeworth David was also a member of the committee. Philip Ayres, *Mawson: A Life* (Melbourne: Melbourne University Press, 1999), 128 and 151.

situated northwards of Canada as far as the North Pole and lying within the meridians of longitude bounding Canada itself to the east and west.”² Echoing Canadian Senator Pascal Poirier’s initial sector proposal, the ANRC argued that the root of the “Canadian principle” rested in the theory that the polar regions should be controlled by “the most closely adjacent civilized Government.” Based on this logic, Australia could claim much of the eastern Antarctic.

Unlike the Canadian model, the Antarctic sector outlined by the ANRC did not emanate from the ends of Australia’s southern coastline. Instead, the council argued that Australia had a right to the entire section of the Antarctic to which it was geographically closest. They calculated the coastline to be between 90°E to 160°E, and the completely unknown polar interior that these lines of meridian enclosed, right to the South Pole.³ For the “Canadian principle” to work, the ANRC reasoned, there had to be undisrupted contiguity between the polar territory and the claimant country. The French claim to Adélie Land stood in the middle of the proposed Australian sector. France would have to relinquish its polar territorial claim before Australia could make a sector claim. Consequently, the ANRC decided that Prime Minister Stanley Bruce should ask the British government to challenge France’s claim. Only then could the Australians attain “international sanction” to administer their Antarctic sector.⁴ The sector idea, which had failed to secure a seconder on the floor of the Canadian Senate in 1907, formed the core of the ANRC’s Antarctic ambitions.

The ANRC’s call for Australia to take action and claim a sector in the Antarctic came at a time of escalating national rivalries for land in the polar regions. Only a few months after the council meeting, the London *Times* proclaimed that a “Scramble for the Poles” had begun. Over the previous two years, the British Empire’s creation of the Ross

² The ANRC incorrectly asserted that Canada’s sector claim occurred in 1886.

³ Since his expedition of 1911-1914, Mawson had identified the Australian Antarctic Quadrant as the area between between 90° and 180°E. Since 1923, the western part of that quadrant had become the Ross Dependency (160°E - 150°W) and was under the control of New Zealand. As a result, the ANRC recommended that their country should claim the remaining land “which lies directly south of Australia itself” between 90°E to 160°E. The sector laid out by the ANRC corresponded with the Australian sphere laid out by the Colonial Office in 1921. The Australasian Antarctic Expedition had also explored and surveyed much of the sector’s coastline, providing further justification for an Australian claim.

⁴ D. Orme Masson on behalf of the Australian National Research Council, Memorandum on Australian Sector of the Antarctic and recent French claim to administer Adélie Land, NAA, A981, ANT 4, Part 3.

Dependency, France's claim to Adélie Land, and the Soviet Union's assertion of rights to the islands in the Arctic Ocean highlighted that *sovereignty*, not exploration, now drove polar affairs. Spurred on by a thirst for territory and the search for minerals, whales and fisheries, the *Times* predicted that sovereignty claims would multiply.⁵ At the centre of the scramble for the poles lay the sector principle. This chapter establishes 1925 and 1926 as pivotal years in the legal development of the polar regions. In the span of ten months, Canada and the Soviet Union publicly declared extensive sector claims, and the Australian government adopted the ANRC proposal and lobbied London to use the "Canadian principle" to carve out a vast polar territory for Australia. By the end of 1926, the sector principle had become an integral part of the evolving legal and political landscape of the polar regions.

Scholarship on Britain's Antarctic policy has ignored the internal debate that the sector principle generated amongst officials in London. While the Dominions and Foreign Offices supported the principle, the Admiralty vehemently opposed its application, insisting it lacked a basis in international law. The argument that polar territory should be in the hands of the closest governments, the Admiralty warned, would only encourage countries like Argentina and Chile – the closest states to the Antarctic peninsula and its adjacent islands – to challenge Britain's claim to the Falkland Islands Dependencies.⁶

The internal debate forced British officials to study and justify the sector principle. When London had first used the idea in the 1917 Letters Patent for the FID, it viewed the sector as an extension of the contiguity doctrine and hinterland claims Britain had employed in Africa. Now, building upon Canadian legal appraisals, these officials (particularly in the newly created Dominions Office⁷) worked to construct a firmer legal

⁵ "Scramble for the Poles: Claims of Canada and Australia," *Times*, 24 July 1925, National Archives (NA), CO 537/1081. The idea of a scramble for polar territory gained currency over the next decade. For example, in April 1929 the *Adelaide Advertiser* ran a headline, "A Scramble for Antarctica," *Adelaide Advertiser*, 8 April 1929.

⁶ H. Douglas, Hydrographer, *Minute*, 7 January 1926, NA, ADM 116/2386.

⁷ The Dominions Office was created at the beginning of 1925 at the suggestion of Leopold Amery, who also became its first Secretary of State (while he served as Secretary of State for the Colonies). The office's mandate was to deal with the Dominions – Canada, Australia, New Zealand, South Africa, Newfoundland and the Irish Free State – and the colony of Southern Rhodesia.

foundation for the sector principle. They argued that the Anglo-Russian Treaty of 1825 and the Russian-American Treaty of 1867 provided a treaty basis for a systemization of the doctrine. They also insisted that the unique conditions of the polar regions and the limits that they imposed on occupation called for a novel solution. Both Canadian and British legal experts concluded that as long as a state occupied or controlled the main points of access into a polar territory, it could use arguments of contiguity and employ sector lines to claim vast, unoccupied and even unexplored hinterlands. To avoid the central problem that the Admiralty had identified, British officials ignored the “Canadian principle” and explained that polar sectors emanated from “the eastern and western boundaries of territory already held by the Power concerned.”⁸ In 1926, the British argued that sectors had nothing to do with the geographical proximity of the claimant state.

While British officials debated the sector principle between 1925 and 1926, the threats to the Empire’s polar ambitions multiplied, particularly from Norway and the United States. The Norwegian government attempted to protect its territorial and commercial interests throughout the Arctic and Antarctic, and questioned the claims of Britain and the Dominions. Norway was the first state that Washington applied the Hughes Doctrine against, and the Norwegian government’s new approach towards effective occupation reflected the American legal position. Meanwhile, the intrusion of an American expedition into the Arctic Archipelago and the real possibility that Washington might use its presence as a pretext to dispute Canada’s sovereignty over the islands worried Canadian and British officials. Given the strong position on “actual settlement” the State Department had adopted in the Hughes Doctrine, Washington could challenge the burgeoning use of the sector principle and the weak foundations that underlay many existing polar claims.

This chapter uses new archival evidence to illustrate the struggles that American officials had with the issue of polar sovereignty and how to apply international law in the anomalous legal space of the polar regions. The State Department contemplated using

⁸ Laurence Collier, Memorandum Respecting Territorial Claims in the Arctic to 1930, 10 February 1930, NA, DO 35/167/7, Territorial Claims in the Arctic.

the Hughes Doctrine to officially challenge existing claims, but also considered employing the sector principle to claim the area above Alaska, and accepting title to polar lands based only on exploration. They even discussed the complete internationalization of the polar regions. In the end, the State Department's confusion and internal debates inhibited its ability to develop a definite policy towards polar sovereignty, and political considerations played an important role in constraining America's use of the Hughes Doctrine to challenge claims that did not meet its rigid standards.

In Britain, anxieties about American and Norwegian intentions led experts in the Dominions and Foreign Offices to recognize that legal precedents or policy decisions established for one region would shape the development of the other. As a result, the Empire defined bi-polar policies that safeguarded interests in both areas. Imperial unity on the sector principle and congruence in the national legal strategies of Britain and the Dominions became more important as the Empire faced new threats in the polar regions and continued to struggle with the question of polar sovereignty. Despite the Admiralty's objections, by the end of 1926 the Empire had firmly embraced the sector principle and set in motion plans to answer the ANRC's call for an Australian Antarctic sector.

3.1 The Scramble Begins

After securing Norway's sovereignty over the Svalbard Archipelago at the Paris Peace Conference, Norwegian officials witnessed mounting threats to their polar interests. To the north, Canada claimed sovereignty over the Sverdrup Islands, despite their discovery by a Norwegian citizen (and that they had never been visited by a Canadian). Russia excluded the Norwegians from their traditional fishing grounds in the White Sea and seemed intent on expanding into Arctic territories of interest to Norway, such as Franz Josef Land. Worst of all, the *Ilhen Declaration* gave the Danes the upper hand in Eastern Greenland. While Norway maintained that the declaration only recognized Danish sovereignty in the colonized southwestern corner of Greenland, the statement put the Norwegians at a severe disadvantage. When Denmark officially announced that all of Greenland fell under its control in 1921, the Norwegians protested, but the Danes persisted. Norway's dream of an Arctic empire was faltering.

In the Antarctic, the British Empire's claim to the FID and the Ross Dependency threatened Norway's commercial whaling interests. How much more territory the Empire would claim as a pretext to impose whaling licenses and collect royalties from Norwegian whalers was unclear.⁹ With Norway's position in both the Arctic and Antarctic threatened, the Norwegian government decided to take more aggressive political and legal action to defend its polar ambitions.

The Norwegians realized that as a minor power they had to be careful about publicly challenging the polar claims of dominant countries like Britain, or annexing territory that was of interest to other more powerful states. Historian Thorleif Thorleifsson has observed that Norway embraced a flexible polar policy that matched its national status. "Retreat, combined with protest and negotiated agreements to secure the rights of Norwegian commercial interests, were often pursued rather than annexations."¹⁰ At the same time, Norwegian officials and private citizens remained on the lookout for new and uncontested polar land to claim.

The Norwegian government initiated its new approach in 1924. It concluded a convention with Denmark on Eastern Greenland that resolved nothing about sovereignty, but granted hunting and fishing parties from both countries access to the area, which effectively protected Norway's commercial interests.¹¹ Then, in a flurry of activity, the Norwegian Foreign Ministry declared Norway's interest in the whaling grounds off the eastern Antarctic coast to the Australian government,¹² questioned Ottawa on what

⁹ Einar-Arne Drivenes and Harald Dag Jølle, *Into the Ice: The History of Norway and the Polar Regions* (Gyldendal Akademisk, 2006), 292-293; Laurence Collier, Memorandum Respecting Territorial Claims in the Arctic to 1930, 10 February 1930, NA, DO 35/167/7, Territorial Claims in the Arctic; Thorleif T. Thorleifsson, "Norway 'Must Really Drop their Absurd Claims Such as That to the Otto Sverdrup Islands.' Bi-Polar International Diplomacy: the Sverdrup Islands Question, 1902-1930" (Master's thesis: Simon Fraser University, 2006).

¹⁰ Thorleifsson, "Bi-Polar International Diplomacy," 37.

¹¹ That part of the east coast of Greenland stretching from Lindenov Fjord (60° 27'N. latitude) to Nordostrundingen (81° N. latitude) with the exception of the district of Angmagsalik. Shortly after, the Danes continued to strengthen their position on the eastern coast by creating the settlement of Scoresbysund, where legislation giving Inuit preferential hunting rights blocked the access of the Norwegians.

¹² Department of Trades and Customs to the Prime Minister's Department, 20 November 1924, NAA, A4311, 362/6, Papers re Imperial Conference 1921 concerning Antarctic Matters, 1921-1931.

grounds Canada based its claim to the Sverdrup Islands,¹³ and asked the Foreign Office if the Ross Dependency included undiscovered land and if its boundaries extended to the South Pole. Without declaring sovereignty over the south polar plateau, the Norwegians pointed out that Roald Amundsen's 1911 expedition gave their country a "priority to acquire" the area through occupation, along with the territory on both sides of the explorer's route to the Pole.¹⁴ Not only had the Norwegians politely challenged the Ross Dependency sector claim, they defended their inchoate rights in the region, and upheld the need for effective occupation in the Antarctic.

To British officials involved in polar affairs, Norway's note on the Ross Dependency mattered less than France's claim to Adélie Land, but still required a response. Hydrographer of the Navy Henry Percy Douglas insisted the Norwegians had no right to the territory around the South Pole. He argued that Ernest Shackleton had already discovered, explored and claimed the entire south polar plateau when he reached a point less than a hundred miles from the South Pole in January 1909, two years before Amundsen. Douglas believed that Britain's title to the plateau was so strong that "an exact analogy" to Norway's assertion of rights "would be afforded by a Norwegian explorer who, on reaching the summit of Mt. Everest, should take possession of the whole of India for the Norwegian crown." The hydrographer concluded, however, that the Norwegian point on undiscovered islands in the Ross Sea was a "fair one."¹⁵ Douglas mocked the "preposterous nature in asserting the ownership of land yet to be discovered"¹⁶ and insisted that Britain's reply to Norway highlight that "no nation can justly lay claim to undiscovered territories which do not form a part of known

¹³ The Norwegian Minister in London, Benjamin Vogt inquired to the Foreign Office about whether Norway should send inquires about the Sverdrup Islands to London or directly to Ottawa. In a testament to the evolving state of Canada's relationship with Britain, the Foreign Office told the Norwegians they should contact the Canadian government directly. Austen Chamberlain to F.O. Lindley (Oslo), 27 March 1928, NAA, A981, ANT 51 Part 1, Antarctic – Norwegian Claims; B. Confidential Document for use by His Majesty's Government Prepared by Dominions Office, NA, ADM 116/2494, Arctic and Antarctic Regions, 1925-1927

¹⁴ Benjamin Vogt, Norwegian Minister, London to Austen Chamberlain, Foreign Secretary, 24 February 1924, Document NZ24021925, in W. M. Bush ed., *Antarctica and International Law: A Collection of Inter-State and National Documents* 3 (New York: Oceana, 1982-1988), 48-49. See also Confidential Document for use by His Majesty's Government Prepared by Dominions Office, NA, ADM 116/2494, Arctic and Antarctic Regions, 1925-1927.

¹⁵ H. Douglas, Hydrographer, Minute, 16 March 1925, NA, ADM 116/2386.

¹⁶ Memorandum Prepared in the Hydrographic Department, Admiralty, The French Claim to Part of the Antarctic Continent, January 1925, NA, ADM 116/2386.

territory.”¹⁷ Douglas either forgot or ignored the claims to undiscovered territory already made by Canada and Britain in the Arctic and Antarctic over the last two decades.

Before British officials could further contemplate a reply to the Norwegians, news reached London that the U.S. government gave its support to an American expedition headed into the Arctic Archipelago to search for new land around the North Pole. While the Norwegians tentatively questioned the British Empire’s polar claims, Washington seemed poised to directly challenge Canada’s Arctic sovereignty. British officials recognized that any American action in the Arctic, whether it took the form of a claim to newly discovered land or a challenge to Canada’s title, would have a major impact on the rules of territorial acquisition in the polar regions. As they anxiously waited for the Americans to clarify their intentions, officials temporarily shelved the response to the Norwegians. The next few months would be critical, not only for the future of Canada’s Arctic, but for the Empire’s broader polar ambitions.¹⁸

3.2 Canada’s Sector Reaffirmed

In early 1925, American explorer Donald MacMillan joined with Eugene F. McDonald, founder of the Zenith Radio Corporation, and retired naval officer Richard Byrd, to launch a polar expedition into the unknown area north of Ellesmere Island.¹⁹ In February, McDonald wrote to Secretary of the Navy Curtis Wilbur that, “As we all know, Canada arbitrarily lays claim to all lands north of Canada, explored or unexplored, and we have sat pensively by offering no objection in the past because of the supposed uselessness of this land.” With the development of possible Arctic air routes, however, McDonald stressed that the islands had become more valuable and any newly discovered territory

¹⁷ H. Batterbee, Dominions Office, to Under Secretary of State, Foreign Office, 6 August 1925, NA, ADM 116/2386.

¹⁸ A. Document to Be Circulated to Members of Antarctic Committee at the Imperial Conference of 1926, Prepared by the Dominions Office, NA, ADM 116/2494, Arctic and Antarctic Regions, 1925-1927; H. Batterbee, Dominions Office, to Under Secretary of State, Foreign Office, 6 August 1925, NA, ADM 116/2386.

¹⁹ Byrd came from a prominent and political Virginia family, was well connected in Washington, and counted Admiral William Moffet, Chief of the Bureau of Aeronautics, as a close friend. Still, his attempts to secure funding from Ford and Rockefeller were failing, and at a meeting in Moffet’s office at the end of March, he decided to team up with MacMillan and McDonald, though the partnership was not a warm one. Byrd to The Chief of Bureau of Navigation, 26 March 1925, Byrd Polar Research Center Archival Program, The Papers of Richard E. Byrd, Sub-Series I, Donald MacMillan Expedition, Box 113, Folder 4235, Personal Correspondence, 1925, pt. 1.

should be under American control.²⁰ Using bases at Etah, Greenland, and landing on Axel Heiberg and Ellesmere Islands, the MacMillan expedition would test planes and radios in polar conditions while searching for new Arctic islands and the “lost polar continent.”²¹ The quest to claim new territory around the North Pole won the support of the Navy Department, the Bureau of Aeronautics, and even President Coolidge.²² Although the National Geographic Society supplied most of the funding for the expedition, the U.S. Navy provided Byrd with a Naval Arctic Aviation Unit of three amphibious planes and crews, representing Washington’s semi-official support of the venture.²³

The expedition’s planners gave little thought to the legality of territorial claims or to Canada’s potential reaction to a semi-official American party establishing bases in the Archipelago. Consultation with the State Department in early April led to a quick application for the necessary permits from Denmark to allow the expedition to use Etah as a base of operations. In contrast, the department completely ignored Canada’s title to all the land up to the North Pole, and advised the group that MacMillan could claim for the U.S. any land found north of 84°N, the northern edge of the Arctic Archipelago. Unsure of the status of Axel Heiberg and Ellesmere, the department asked the Solicitor’s Office to study Canada’s claim to the islands.²⁴ In the meantime, the department advised against applying for any permits or taking any action that would imply Washington acknowledged Canada’s title over the Arctic Archipelago.²⁵ The State Department’s focus on avoiding any move that might be construed as acceptance of Canada’s claim reflected the incredibly important role recognition played in the realm of territorial claims.

²⁰ John H. Bryant and Harold N. Cones, *Dangerous Crossings: The First Modern Polar Expedition, 1925* (Annapolis: Naval Institute Press, 2000), 181.

²¹ Harold Cones and John Bryant, “Dangerous Crossings: The First Modern Polar Expedition, 1925,” *International Journal of Naval History* 7, no. 3 (2008).

²² Nancy Fogelson, *Arctic Exploration and International Relations* (Fairbanks: University of Alaska Press, 1992), 90-91. See also Bryant and Cones, *Dangerous Crossings*, 30-38.

²³ Richard Byrd to the Secretary of the Navy, 28 March 1928, Byrd Polar Research Center Archival Program, The Papers of Richard E. Byrd, Sub-Series I, Donald MacMillan Expedition, Box 113, Folder 4235, Personal Correspondence, 1925, pt. 1; Byrd, Flying Over the Polar Sea, Byrd Polar Research Center Archival Program, The Papers of Richard E. Byrd, Sub-Series I, Donald MacMillan Expedition, Box 113, Folder 4233, Operations Reports, 1925.

²⁴ Department of State, Office of the Solicitor to William Roy Vallance, 6 April 1925, United States National Archives and Records Administration (NARA), RG 59, CDF 1910-1929, Box 7156, File 800.014.

²⁵ S.W. Boggs, Note, 22 April 1933, NARA, RG 59, Entry 5245, Box 2, Folder 15, File North Polar Regions: Sovereignty Claims by U.S.

No matter what a state did to secure its territorial title, without international recognition the status of its claim remained troublingly uncertain.

The Norwegian inquiry about the Sverdrup Islands and news of the MacMillan expedition arrived in Ottawa within the span of a month, reigniting worries about Canada's sovereignty in the Arctic.²⁶ Ottawa had sent the Eastern Arctic Patrol to the Archipelago every summer since the panic inspired by the Danes in 1920-1921. RCMP occupied new posts at Craig Harbour, at the south end of Ellesmere Island, Pond Inlet and Pangnirtung on Baffin Island, and at Dundas Harbour on the southeastern coast of Devon Island.²⁷ The government planned to send the Patrol back into northern waters in the summer of 1925 with orders to establish an additional RCMP post.²⁸ Despite these efforts, officials in Ottawa knew that Norwegian and American citizens had explored areas of the Archipelago that no Canadian or British explorer had ever seen. The State Department's failure to apply for Canadian permits in addition to those requested from Denmark confirmed their fears. Even when Ottawa sent an official to inform the expedition's planners of the permits that they required to operate in Canadian territory,

²⁶ O.S. Finnie, the director of the NWT and Yukon Branch of the Department of the Interior, was one of the first to raise the alarm. Finnie noted that "so far we have offered no protest and the American Press is so filled with matters pertaining to the MacMillan expedition that the American people will begin to think that they own the entire North and Canada is an intruder." See O.S. Finnie to Gibson, 20 April 1925, Library and Archives Canada (LAC), RG 85, Vol. 268, File 1003-6. Cited in Janice Cavell and Jeff Noakes, *Acts of Occupation: Canada and Arctic Sovereignty, 1918-25* (Vancouver: UBC Press, 2010), 220-221. See also O.S. Finnie to W.W. Cory, Deputy Minister, Department of the Interior, 16 April 1925, LAC, RG 25, Vol. 4252, File 9057-40, pt. 1; "Hunting by Airplane for Polar Continent," *New York Times*, April 12, 1925. See also "Expect Macmillan to Find a Continent," *New York Times*, April 11, 1925 and "Macmillan Hopes to Win Arctic Race," *New York Times*, April 22, 1925.

²⁷ Ken Coates, P. Whitney Lackenbauer, William R. Morrison, and Greg Poelzer, *Arctic Front: Defending Canada in the Far North* (Toronto: Thomas Allen, 2008), 45-47. For more on Canadian government activity in the Arctic in the early 1920s see, William R. Morrison, *Showing the Flag: The Mounted Police and Canadian Sovereignty in the North, 1894-1925* (Vancouver: University of British Columbia Press, 1985); Janice Cavell, "The Origins of Canada's First Eastern Arctic Patrol, 1919-1922," *Polar Record* 45, no. 233 (2009): 97-112; Peter Schledermann, "The Muskox Patrol: High Arctic Sovereignty Revisited," *Arctic* 58, no. 1 (2003): 101-109; and Gordon W. Smith, *A Historical and Legal Study of Sovereignty in the Canadian North*, ed. P. Whitney Lackenbauer (Calgary: University of Calgary Press, 2014), 341-67.

²⁸ See Smith, *Historical and Legal Study*, 326, 337. Canadian officials had been alarmed by the *Shenendoah* plan, relieved when it cancelled. Concerns fuelled by a report by R.A. Logan, a Canadian airman who had been on board the 1922 Eastern Arctic expedition, commenting on his connections with the Explorer Club in New York, Logan wrote, that "I have met and talked with quite a few men well known in Arctic Exploration and the general belief seems to be that Arctic islands are 'no man's lands....'"

the Americans did not forward an application.²⁹ Faced with an imminent challenge to their Arctic sovereignty, the Canadians questioned the strength of their legal position.

To address these concerns, the government of Mackenzie King established a Northern Advisory Board (NAB) to study the complicated legal and political issues involved in the MacMillan expedition and the Norwegian inquiry, and “to place on record with all interested Governments a statement indicating the extent of territory claimed by Canada for the British Empire.”³⁰ An increasingly professional External Affairs department under the able leadership of O.D. Skelton supported the NAB.³¹ Showcasing a sophistication and independence lacking in the Danish affair of 1920-1921 and the Wrangel Island debacle, Canadian officials explored various policy options and set to work crafting a response to the American expeditions.³² Skelton even attempted to situate Canada’s position within a broader bi-polar political and legal context by studying the status of Spitsbergen and Britain’s Antarctic Dependencies.³³ Based on their findings, the members of the NAB decided to ignore the Norwegian inquiry for the time being. To address the MacMillan expedition, the board decided that an act of occupation on Ellesmere would dissuade the Americans from challenging Canada’s claim to the island and so supported plans for the establishment of an RCMP post on the Bache Peninsula, hundreds of kilometres further north than the existing Craig Harbour station. Finally, the NAB drafted a new bill demanding that all scientists and explorers entering Canada’s North apply for a license from the Canadian government.³⁴ Like the whaling licenses that

²⁹ O.S. Finnie to Gibson, 20 April 1925, LAC, RG 85, Vol. 268, File 1003-6 W.W. Cory to Richard Byrd, 12 May 1925, LAC, RG 85, Vol. 14, File 20 – MacMillan, and minutes of the second meeting of the Northern Advisory Board, 13 May 1925, LAC, RG 25, Vol. 2669, File 9062-C-40, cited in Cavell and Noakes, *Acts of Occupation*, 220-221.

³⁰ Order in Council, 23 April 1925, cited by Smith, *A Historical and Legal Study of Sovereignty*, 328-329.

³¹ On the role Skelton played in improving the Department of External Affairs see Norman Hillmer and J. L. Granatstein, *Empire to Umpire: Canada and the World in the Twenty-First Century*, 2nd Ed. (Toronto: Nelson, 2008), 91; Norman Hillmer, “O.D. Skelton: Innovating for Independence,” in *Architects and Innovators: Building DFAT, 1909-2009*, Kim Nossal and Greg Donaghy eds. (Queen’s University: School of Policy Studies, 2009).

³² See Cavell and Noakes, *Acts of Occupation*, 233-234; Smith, *A Historical and Legal Study of Sovereignty*, 321-340.

³³ O.D. Skelton to Martin Burrell, Parliamentary Librarian, 20 April 1925, LAC, RG 25, Vol. 4252, File 9057-40 pt. 1; Lucien Pacaud, Secretary, Office of the High Commissioner, to O.D. Skelton, 1 September 1925 and O.D. Skelton to Lucien Pacaud, 11 September 1925, LAC, RG 25, Vol. 4765, File 50070-40, pt. 1.

³⁴ Minutes of the First Meeting of Northern Advisory Board, 24 April 1925, LAC, RG 25, Vol. 2669, File 9062-C40; Cory to Byrd, 12 May 1925, LAC, RG 85, Vol. 14, File 20 – MacMillan; Minutes of second

Ottawa imposed on foreign whalers entering Arctic waters, and that Britain and New Zealand continued to use in the Antarctic Dependencies, the Scientist and Explorers License demanded positive recognition of Canada's sovereignty.

As the Board decided on a strategy to deal with the MacMillan expedition, James White, a technical adviser with the Department of Justice, prepared a legal appraisal of Canada's sovereignty in the Arctic. White was a geographer with long-standing interest and involvement in territorial boundaries and Arctic claims. In 1904, he drew a map for the Department of the Interior that used the 141st and 60th meridians running to the North Pole as Canada's northern boundaries – an early, quasi-official application of the sector principle.³⁵ Historians Janice Cavell and Jeff Noakes have pointed out that over the next two decades White continued to support the sector principle, while maintaining that Canada's claim had to be supported through acts of occupation and administration.³⁶ In 1925 the geographer used his extensive knowledge of Arctic affairs to conclude, "Canada's title may be claimed to be, if not unquestionable, at least much superior to that of any other nation."

White based his conclusion on the special conditions of the Arctic. In such a harsh environment, measures of control, of contiguity and of settlement had to be "given very much greater weight than would normally be attached to similar measures in more temperate and habitable regions." Previous legal cases, such as the British Guiana Arbitration, had indicated that administrative control over Indigenous inhabitants constituted effective occupation, but White admitted that no Inuit lived north of Parry Channel and Lancaster Sound. In the polar environment, the three existing RCMP posts at Pond Inlet, Dundas Harbour, and Craig Harbour that Canada had "placed so as to dominate the whole of the archipelago" furnished "all the control required to maintain its

meeting of Northern Advisory Board, 13 May 1925, LAC, RG 25, Vol. 2669, File 9062-C-40; Shelagh Grant, *Polar Imperative: A History of Arctic Sovereignty in North America* (Vancouver: Douglas and McIntyre, 2010), 231; Cavell and Noakes, *Acts of Occupation*, 222-232.

³⁵ Curiously these borders still appear on Canadian maps today. See Donat Pharand, *Canada's Arctic Waters in International Law* (Cambridge: Cambridge University Press, 1988), 5.

³⁶ Janice Cavell, "Sector Claims and Counter-Claims: Joseph Elzéar Bernier, the Canadian Government and Arctic Sovereignty, 1898-1934," *Polar Record* 50, no. 3 (2014): 300-310; Cavell and Noakes, *Acts of Occupation*, 75, 221, 227-228; See James White to King, 8 June 1922, LAC, RG 13, Vol. 934, File 6A; James White, Memorandum.

title.” Furthermore, White accepted that contiguity was a valid legal doctrine and highlighted that even the U.S. government had utilized it in past territorial disputes. State practice in Africa and other regions in the last part of the nineteenth century further legitimized the use of contiguity doctrine to create hinterlands and spheres of influence. The geographer suggested that these “principles of law... materially strengthen the claim of Canada.” To White, this legal context proved that in the special conditions of the Arctic, a state could cite contiguity to give greater substance to an element of effective control.³⁷ Thus, due to the points of control offered by the RCMP posts, Canada could use the contiguity doctrine to insist that the unoccupied islands of the Archipelago – and any that might still be found further north – were “simply portions” of the same “geographical entity,” and immune from foreign claims.

White insisted that the U.S. had bound themselves to the sector principle through the Russian-American Treaty of 1867. White insisted that when the U.S. ratified the treaty, which set Alaska’s western limit as a line of meridian that “proceeds due north, without limitation, into the Frozen [Arctic] Ocean,” it accepted the principle of Arctic boundaries running to the North Pole (an interpretation that the State Department rejected). White argued that “inferentially, the United States would make a similar contention respecting its eastern boundary – the 141st meridian,” which formed the western boundary of Canada’s Arctic sector. To provide additional support to Canada’s sector claim, White stressed that the absence of any protest from “all other nations” to his official 1904 map, which clearly outlined the sector, revealed “a tacit acquiescence, during over a fifth of a century.” Their silence barred the right of any state to protest the annexation. He pointed out that the parameters set for the British Guiana-Venezuela Arbitration had established that “unprotested occupation for 50 years constituted a valid title.” In short, the geographer concluded that discovery, control, contiguity, prescription and the Treaty of 1867 all worked to establish Canada’s Arctic “hinterland” as “the area bounded on the east by a line passing midway between Greenland and Baffin, Devon and Ellesmere islands, and, thence, northward to the Pole. On the west, Canada claims, as her

³⁷ In 1950, Hersch Lauterpacht made a similar argument about contiguity in relation to state claims to continental shelves. See Hersch Lauterpacht, “Sovereignty Over Submarine Areas,” *British Yearbook of International Law* 27 (1950): 376-433.

western boundary, the 141st meridian from the mainland of North America northward, without limitation.”³⁸

O.D. Skelton thought that White had crafted a strong case for Canada’s claim to the islands of the Archipelago. He did not, however, believe that either the Anglo-Russian Treaty of 1825 or the Russian-American Treaty of 1867 established territorial boundaries extending to the North Pole. He found “no precedent for any claim on our part to territorial control over part of the Arctic Ocean or over undiscovered islands in that area.” If islands were found above the known Archipelago, Canada could use a “plea of contiguity” to claim them, but it would not stand up against foreign discovery and occupation.³⁹ Still, as legal scholar Donat Pharand has observed, Canada needed something “to assist in establishing her claim to territory of which she did not have quite full control or which she thought was perhaps yet undiscovered but contiguous to her northern coast and within the sector in question.”⁴⁰ With this need in mind, the Northern Advisory Board advised the Canadian government to issue its most explicit assertion of the sector principle yet.

On 1 June 1925, Minister of the Interior Charles Stewart stood in the House of Commons and boldly proclaimed that all the land from Canada’s northern coast “right up to the North Pole” belonged to his country.⁴¹ Ten days later, the Minister elaborated claiming “the territory outlined between the degrees of longitude 60 and 141.” In this speech, Stewart highlighted the Ottawa’s reasons for using the sector principle. He admitted the enclosed territory was “so remote that we know very little about it; we know only the fringe of it and very little about that, and when you get into the confines of Coronation gulf and to the immediate north you are in almost unknown quarters.”⁴² Only through the sector principle could Canada claim the land in the “almost unknown quarters”

³⁸ To support his opinion the geographer delved into major English treatises on international law and some of the key arbitrations on territorial disputes. White also noted that the *British Guiana* case had highlighted the British exercise of control over the Native population as a sign of its sovereignty, a principle that would “materially strengthen” the claims of Canada, but admitted that the islands in questions had no indigenous population. James White to O.D. Skelton, 25 May 1925, and attached “Memorandum Respecting Macmillan Expedition to the Canadian Arctic,” p. 14, LAC, RG 25, Vol. 4252, File 9057-40 pt. 1.

³⁹ O.D. Skelton to R.M. Anderson, 20 June 1925, LAC, RG 25, File 9057-40 pt. 1.

⁴⁰ Donat Pharand, *The Law of the Sea of the Arctic with Special Reference to Canada* (Ottawa: Universtiy of Ottawa Press, 1973), 136-137.

of the Archipelago. While previous Canadian officials had raised the sector principle, and official maps outlined a sector, this official articulation by a Cabinet minister was unprecedented. Regardless of the acts of occupation that Canadians were carrying out in the Archipelago, their government had officially tied Canada's sovereignty in the Arctic to the sector principle.

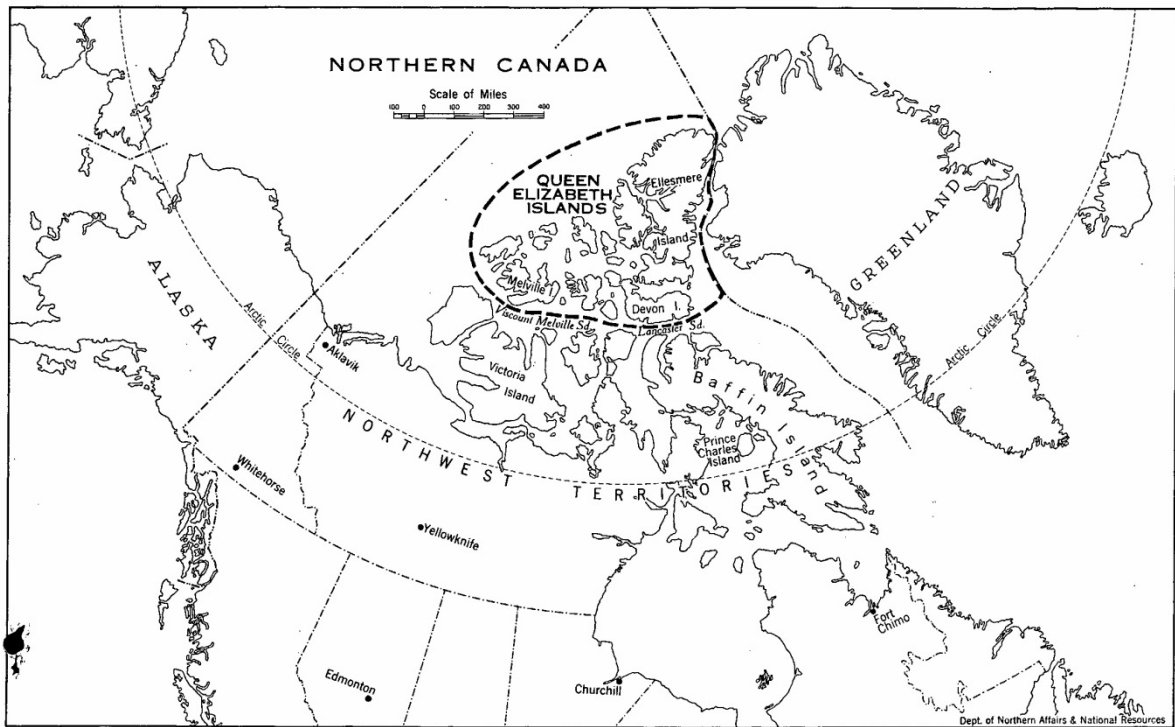


Figure 4: Map showing Canada's sector. LAC, RG 25, Vol. 4253, File 9057-40.

⁴¹ House of Commons *Debates*, 1 June 1925, 3773.

⁴² House of Commons *Debates*, 10 June 1925, 4084-4085. At a press conference, Stewart emphasized that the sector claim was a continuation of a well-established Canadian policy.

3.3 To Challenge or Not to Challenge: A Summer of Indecision

Stewart's parliamentary declaration received wide coverage in the American press. Journalists criticized the move as an unjustifiable attempt to claim the unknown area that America was about to explore.⁴³ MacMillan simply ignored Stewart's proclamation, explaining to Secretary of the Navy Wilbur that he would still claim "all lands discovered in the great unexplored area" regardless of "Canada's protest."⁴⁴ On 20 June 1925, MacMillan and his party set out for Etah, Greenland. Shortly after, the Eastern Arctic Patrol vessel *Arctic* headed north as well, with orders to establish the new RCMP post on the Bache Peninsula and to impose Canada's laws if it met the American expedition.

Lacking their own official representation in Washington, Canada requested the British Embassy send a note drafted by the NAB to Secretary of State Frank Kellogg that highlighted the efforts of the RCMP in the Archipelago, explained the permits required for the MacMillan expedition to operate in Canada's Arctic territory, and offered assistance to the Americans.⁴⁵ Legal scholar W.M. Bush has observed, the "device of explicitly consenting to an expedition and offering assistance as a means of preserving a claimant state's position as regards activities of other states within the area claimed" became an important tool for Britain, Australia and New Zealand in the Antarctic.⁴⁶ The State Department had already given approval for MacMillan to claim any undiscovered land he found, so American officials now focused on whether the U.S. should apply for the permits or officially challenge Canada's claim to the High Arctic Islands.⁴⁷

⁴³ "Canada Asserts Claim to all Land Up to North Pole: Conceded Little Territory to Others," *Washington Star*, 2 June 1925; "Canada Claims Unfound Land; Perplexes U.S.," *Washington Post*, 3 June 1925; "Canada to Take Arctic Lands Ahead of U.S.," *Washington Post*, 9 June 1925,

⁴⁴ MacMillan to Curtis, 5 June 1925, cited in Nancy Fogelson, *Arctic Exploration and International Relations, 1900-1932* (Fairbanks: University of Alaska Press, 1992), 93.

⁴⁵ Governor General Byng to His Excellency, The Right Honourable Sir Esme Howard, 4 June 1925, LAC, RG 25, Vol. 2156, File 30, Arctic Claims; Byng to British Chargé d'Affaires in United States, Telegram 73A, 12 June 1925, LAC, RG 25, Vol. 2156, File 30 – Arctic Claims; British Embassy, Washington, to Austen Chamberlain, 10 June 1925, LAC, RG 25, Vol. 2156, File 30 – Arctic Claims.

⁴⁶ Bush, *Antarctica and International Law* 3, 61.

⁴⁷ The Navy officially asked the State Department whether the MacMillan expedition should apply for permits to operate around Ellesmere and Axel Heiberg Islands, which would be a clear U.S. recognition of

Charles Cheney Hyde, the experienced lawyer in charge of the Office of the Solicitor who had worked on the Hughes Doctrine, questioned whether the Canadians had actually achieved effective occupation in the Arctic. He suggested the region might still be open to the first country that could “settle and occupy” the islands. The lawyer contemplated applying the Monroe Doctrine, the American principle that European powers not interfere in the western hemisphere without it being considered an act of aggression, to the situation if Washington deemed the Canadian claim to be an act of territorial acquisition by Britain.⁴⁸ Adhering to the Hughes Doctrine’s focus on settlement, Kellogg asked what constituted an RCMP post, where the posts were located, how frequently they were visited and whether they were “permanently occupied.”⁴⁹

While they waited for a reply to Kellogg’s questions, American officials continued to study Canada’s Arctic claim. In the Solicitor’s Office, William Roy Vallance researched the basis of Canada’s sector claim. He discussed the issue with David Hunter Miller, a prominent American international lawyer and expert on treaties with a keen interest in polar affairs. Miller explained that he thought the Canadians based their sector claim on the treaties of 1825 and 1867, especially the “use of the words ‘without limitation’” in the latter treaty.⁵⁰ Vallance was well aware that the State Department had rejected this reading of the treaties in the context of the Russian Arctic claim. From the American legal perspective, there was simply no treaty basis for a systematization of sector claims in the Arctic.

The State Department learned from the British Embassy that only four RCMP posts existed in the whole Archipelago, manned by small contingents of two or three constables who also played the role of customs and postal officers, and officials doubted this constituted settlement. Irving N. Linnell from the Division of Western European Affairs questioned how much territory Canada actually thought it could effectively

Canada’s sovereignty. Wilbur to Kellogg, 5 June 1925, cited in .” D.H. Dinwoodie, “Arctic Controversy: The 1925 Byrd-MacMillan Expedition Example,” *Canadian Historical Review* 53, no. 1 (1972): 57.

⁴⁸ Charles Cheney Hyde, Office of the Solicitor, to the Secretary of State, 18 June 1925, NARA, RG 59, CDF 1910-1929, Box 7156, File 800.014, Arctic/6.

⁴⁹ Cited in full, Smith, *A Historical and Legal Study of Sovereignty*, 334.

⁵⁰ William Roy Vallance, Memorandum of Conference with David Hunter Miller Regarding Arctic Lands and the MacMillan Expedition, 2 July 1925, NARA, RG 59, CDF 1910-1929, Box 7156, File 800.014-Arctic/5.

occupy with the posts, regardless of how much the men patrolled or how many administrative roles they played.⁵¹ According to the Hughes Doctrine, the Canadians had failed to effectively occupy most of the Arctic Archipelago. Department officials therefore drew up an official challenge to Canada's Arctic claim, which asserted,

The Government of the United States has given careful consideration to these territorial claims and is in full accord and sympathy with the endeavors of the Canadian Government to extend the rule of law and order to, and to develop the resources of, the lands in question.

It believes, however, that the recognized rules of international law require the establishment and maintenance of an effective occupation of news lands as a prerequisite to the acquisition of sovereignty and it is not understood that such occupation has been effected by Canada in some of the islands within the limits referred to above [the sector boundaries].⁵²

With this note, the Americans could have disputed Canada's claim to any of the islands in the Archipelago, especially the ones without an RCMP post. It would have made for a striking application of the Hughes Doctrine had it been sent.

An explicit and official American challenge to Canada's Arctic claims remained a distinct possibility in the summer of 1925, except State Department officials were wary of the diplomatic fallout. William Castle, chief of the Division of Western European Affairs, quickly rejected the notion of using the Monroe Doctrine, for he could "imagine nothing that could lead to more feeling in Canada, bringing about strained relations for years to come."⁵³ Both Hyde and Linnell stipulated Washington could avoid controversy and recognize its neighbour's claim to the known islands of the Archipelago with a "liberal application" of the doctrines of contiguity and occupation leaving sector theory to the side.⁵⁴ Torn between strong legal arguments supporting a challenge to Canada's claim

⁵¹ See Charles Cheney Hyde, Office of the Solicitor, to the Secretary of State, 18 June 1925, NARA, RG 59, CDF 1910-1929, Box 7156, File 800.014, Arctic/6; Irving N. Linnell, Canada's Territorial Claims in Arctic Ocean, Department of State, Division of Western European Affairs, 13 July 1925, NARA, RG 59, CDF 1910-1929, Box 7156, File 800.014/Arctic 8.

⁵² Suggested Draft Note to the British Embassy, Department of State, Division of Western European Affairs, 16 September 1925, NARA, RG 59, CDF 1910-1929, Box 7156, File 800.014.

⁵³ Irving N. Linnell, Canada's Territorial Claims in Arctic Ocean, Department of State, Division of Western European Affairs, 13 July 1925, NARA, RG 59, CDF 1910-1929, Box 7156, File 800.014/Arctic 8.

⁵⁴ See Charles Cheney Hyde, Office of the Solicitor, to the Secretary of State, 18 June 1925, NARA, RG 59, CDF 1910-1929, Box 7156, File 800.014, Arctic/6; Irving N. Linnell, Canada's Territorial Claims in Arctic

and political considerations that encouraging a more tactful approach, the State Department hesitated and remained undecided in August.

Learning that the Eastern Arctic Patrol was intent on intercepting the MacMillan expedition in the middle of August, the Americans decided on a compromise. In a cable to the expedition, the State Department instructed the explorers should obtain a license or permit from the leader of the Eastern Arctic Patrol, George Mackenzie, “to land and explore Baffin Island or other territory south of Ellesmere Island...to avoid embarrassing diplomatic situation.” The cable described the situation as “most delicate,” noting Washington could not ask Ottawa directly for a permit.⁵⁵ While the explorers would request a permit to land on Baffin, providing tacit recognition of Canada’s sovereignty, they would not do the same for the islands north of Parry Channel.

In the end, Richard Byrd simply decided to lie about the permits his expedition received from Ottawa. When the *Arctic* visited the MacMillan expedition at Etah, Greenland on 19 August, George Mackenzie invited Byrd on board for dinner and asked if the Americans had acquired the necessary licenses to carry out flights over Ellesmere Island. Donald MacMillan later described to a Canadian friend, “Byrd was in a tight place. Here he was under direct orders from his chief in Washington to use no Canadian permits. He was smoking Mr. Mackenzie’s good cigars and had enjoyed his hospitality; he could not openly tell his orders from Washington.” Instead, Byrd fraudulently explained that the American expedition had received all the necessary permits while en route to Greenland.⁵⁶ Although Mackenzie suspected Byrd’s explanation, the radio on the *Arctic* was broken and there was no way for the Canadian to confirm his suspicions.⁵⁷ Shortly after their meeting, both the MacMillan expedition and the Eastern Arctic Patrol retreated southwards in the face of worsening weather, the Americans having failed to discover

Ocean, Department of State, Division of Western European Affairs, 13 July 1925, NARA, RG 59, CDF 1910-1929, Box 7156, File 800.014/Arctic 8.

⁵⁵ Radiogram, Navy Department to Byrd, 17 August 1925, Byrd Polar Research Center Archival Program, The Papers of Richard E. Byrd, Sub-Series I, Donald MacMillan Expedition, Box 113, Folder 4236, Radiogram, 1925.

⁵⁶ M. Anderson, Chief, Division of Biology, National Museum of Canada, to W.W. Cory, CMG, Deputy Minister, Department of the Interior and Commissioner of the NWT, Department of Mines, Canada, Memorandum of Interview with Donald B. MacMillan, LAC, RG 25, Vol. 1513, File 1928-207.

⁵⁷ Dinwoodie, “Arctic Controversy,” 62-63; Smith, *A Historical and Legal Study of Sovereignty*, 335.

any territory, and the Canadians unable to establish their new RCMP post on Ellesmere Island.

When the State Department learned that the MacMillan expedition failed to find new land or establish bases on Ellesmere or Axel Heiberg Islands, it withheld its note of challenge. There seemed little reason to create conflict with the Canadians.⁵⁸ The State Department had time to follow Irving Linnell's advice and flesh out the Hughes Doctrine and determine exactly what "would constitute an effective occupation of Polar lands."⁵⁹ By refusing to apply for Canadian permits, the State Department effectively maintained its defensive legal position, and by deciding not to challenge Canada's claim it protected U.S. relations with Ottawa and, by extension, London. These decisions aligned with the broader context of Washington's efforts to build a closer partnership with Britain in 1925 to further its goal of achieving European stability. Throughout the summer, American officials had worked behind the scenes in Europe to spur on negotiations for the Locarno Pact, which sought to secure the postwar territorial settlement and normalize relations with Germany.⁶⁰ As they worked for stability in Europe, the Americans wanted to avoid creating instability in other parts of the world – particularly in an area as marginal as the Arctic.

The British were similarly disinclined to confront the Americans on the MacMillan expedition and its failure to apply for permits at a time when the Foreign Office wanted closer relations with Washington. Entanglement in an Arctic dispute conflicted with the viewpoint recently expressed by Foreign Secretary Austen Chamberlain that, "it is a fundamental condition of British policy, I might almost say a condition of the continued existence of the British Empire, that we should not be involved in a quarrel with the United States."⁶¹ The Canadians felt the same and despite

⁵⁸ Irving N. Linnell Note, Division of Western European Affairs, 16 September 1925, NARA, RG 59, CDF 1910-1929, Box 7156, File 800.014.

⁵⁹ Irving N. Linnell, Canada's Territorial Claims in Arctic Ocean, Department of State, Division of Western European Affairs, 13 July 1925, NARA, RG 59, CDF 1910-1929, Box 7156, File 800.014/Arctic 8.

⁶⁰ George C. Herring, *From Colony to Superpower: U.S. Foreign Relations Since 1776* (Oxford: Oxford University Press, 2008), 460.

⁶¹ Note by Chamberlain, 12 October 1925, *Documents on British Foreign Policy*, 1st series, vol. XXVII, 866. See John Darwin, *The Empire Project: The Rise and Fall of the British World System, 1830-1970* (Cambridge: Cambridge University Press, 2009), 366.

sending a mild protest about the MacMillan expedition to the State Department in December 1925, the missive did not demand a response.⁶² While Canada's Arctic sovereignty survived the MacMillan affair, Canadian and British officials had proof that the American government did not recognize its neighbour's claim to the entire Archipelago and the possibility of an official challenge from Washington lingered on.

3.4 Britain, the Dominions and the Sector Principle

A month after Charles Stewart's reassertion of Canada's sector claim, Douglas Mawson and the Australian National Research Council met with Prime Minister Stanley Bruce to discuss their proposal for an Australian Antarctic sector. Aside from internal memoranda, no state had officially or publicly denounced Canada's use of the sector principle in the Arctic. The council members therefore insisted "a similar definite allocation" should also work in the Antarctic. Mawson argued that if all the polar regions were divided along the lines of the "Canadian principle" it would "save a great deal of international trouble."

The Prime Minister, previously employed as a barrister at a prestigious London firm, presented a more critical analysis of the sector principle and polar claims in general.⁶³ While Bruce admitted Canada's sector claim provided an "excellent precedent...one had to remember that it was never challenged...as there was no other country interested enough to offer protest." Unfortunately, Bruce elaborated, "the mere saying so, unless unchallenged for a long period of time did not give international rights." An Australian sector claim to territory explored by both American and French expeditions could lead to protest and would make Paris "a little hysterical" likely leading to arbitration. In the end, Bruce could think of no "recognized international law such as makes it perfectly certain [Australia's] rights would be upheld."⁶⁴

⁶² Byng to Howard, 9 December 1925, LAC, RG 25, Vol. 2156, File 30 – Arctic Claims. See also Smith, *Historical and Legal Study of Sovereignty*, 335-336.

⁶³ Bruce worked for the law firm of Ashurst Morris Crisp. Cecil Edwards, *Bruce of Melbourne: Man of Two Worlds* (London: Heinemann, 1965), 16-17.

⁶⁴ Adelie Land, Minutes of Deputation From the Australian National Research Council Regarding the Australian Sector of the Antarctic and the Recent French Claim to Administer Adelie Land, Prime Minister's Office, 3 July 1925, NAA, A981, ANT 48 Part 1, Antarctic French Interests.

Undeterred, the Australians proposed that London challenge the French claim to Adélie Land using the “Canadian principle” and its central idea that the “control and administration of the Arctic and Antarctic lands should be in the hands of those countries whose territories are situated nearest them.” The Australian government wanted this to become a “recognized principle in dealing with Antarctic territories” and thought “it should be urged as strongly as possible.” The French, the Australians suggested, might surrender their claim to Adélie Land for the portion of Antarctic territory closest to their colonial possessions of Kerguelen Island or Madagascar.⁶⁵ The Australian plan amounted to a general territorial settlement in the Antarctic with the sector principle at its core.

The Australian proposal arrived in London in the summer of 1925, as British officials in the Admiralty, Foreign, Colonial, and Dominions Offices attempted to address a sudden deluge of polar sovereignty issues.⁶⁶ They still had to determine a response to France’s claim to Adélie Land and craft a suitable reply to the Norwegian note about the Ross Dependency. The political and legal situation in the Antarctic was further complicated by Argentina’s decision to construct a wireless station alongside the weather station on Laurie Island in the South Orkneys since 1904. When the British Embassy in Buenos Aires had indicated that Argentina would need a license and call sign from the Governor of the Falkland Islands for the station, given its location within the boundaries of the FID, the Argentinean reply implied that the station lay in their national territory.⁶⁷ While officials worked through these challenges, they also considered a new plan laid out by Leopold Amery, now the Secretary of State for the Dominions and Colonial Offices, for Britain to claim all the land from the western boundary of the Ross Dependency to the FID, effectively creating another Antarctic sector from 160° E to 20° W.⁶⁸ British officials also kept a close eye on the events unfolding in the Arctic to assess the strength of Canada’s legal position and to gauge if the Americans would deliver a formal challenge.⁶⁹

⁶⁵ Forster, Governor General of the Commonwealth of Australia to the Secretary of State for Dominion Affairs, 16 September 1925, NAA, A981, ANT 4, Part 3.

⁶⁶ See, for instance, Dominions Office, British Policy in the Antarctic, NA, CO 537/1080.

⁶⁷ South Orkney Islands, Foreign Office, 11 July 1930, NA, CO 78/186/10.

⁶⁸ Sir Charles Davis to H.J. Batterbee, 30 July 1925, NA, CO 537/1075.

⁶⁹ A. Document to Be Circulated to Members of Antarctic Committee at the Imperial Conference of 1926, Prepared by the Dominions Office, NA, ADM 116/2494, Arctic and Antarctic Regions, 1925-1927; L.C.

As Sir Charles Davis worked through the polar issues confronting the Empire, the Permanent Under Secretary for the Dominions Office could see the growing political and legal connections between the Arctic and Antarctic. Davis consistently reminded other officials dealing with polar affairs that it was “very desirable to keep the 2 sets of claims [Arctic and Antarctic] in mind together” and suggested that Britain craft bi-polar policies.⁷⁰ Within discussions of Amery’s proposed sector claim “stretching down to the South Pole,” Davis stressed the need to consult Canada, “in view of the fact that the Canadian claim to sovereignty of all lands north of the Canadian mainland, as far as the North Pole had now become a matter of practical interest.”⁷¹ Davis insisted the British Government keep Canada’s legal position firmly in mind so that no action it took in the Antarctic would hurt the Dominion’s Arctic sovereignty.

The Admiralty remained unconvinced and continued to criticize the sector principle. While the argument that polar territory should be in the hands of the closest government would benefit Canada and Australia given their respective geographic locations, Hydrographer Henry Percy Douglas noted that it would be “highly detrimental to the British position,” given how far away England was from the polar territory it claimed. Furthermore, the Argentines, who already seemed intent on challenging Britain’s claim, could use these geographic arguments to support their case.⁷² The Admiralty disputed the Canadians and Australians naïve claim that the sector principle had won international recognition; the idea was “either openly or tacitly opposed by the only two other powers interested – U.S.A. and Norway.” Even if the international community eventually accepted the Canadian claim and the sector principle, there was no guarantee that the precedent would prove useful to Australia. While the Arctic Archipelago formed a continuous chain northwards, divided only by small channels,

Amery, Dominions Office, to the Governor General, Lord Byng, 31 August 1925, LAC, RG 25, Vol. 4252, File 9057-40, pt. 1.

⁷⁰ Sir Charles Davis to H.J. Batterbee, 30 July 1925, NA, CO 537/1075

⁷¹ Sir Charles Davis to the Under-Secretary of State, Foreign Office, 29 August 1925, NA, CO 537/1075. See also Draft Note, H.J. Batterbee, 30 July 1925, NA, CO 537/1075.

⁷² H. Douglas, Hydrographer, Minute, 7 January 1926, NA, ADM 116/2386; Hydrographic Department, Admiralty, Notes on the Governor-General’s Despatch to Washington, No. 104, 4 June 1925, NA, ADM 116/2494, Arctic and Antarctic Regions, 1925-1927.

arguably supporting Canada's use of contiguity doctrine, the Hydrographic Department highlighted the 1400 miles of ocean that separated Australia from the Antarctic.⁷³

The Admiralty argued that issues of polar sovereignty, especially the use of contiguity doctrine and the sector principle, affected the entire Empire. Officials urged that the British Empire should only claim polar territory it had discovered, explored and, if possible, adequately occupied, "without taking into consideration the continuity or otherwise of such land with other land not claimed."⁷⁴ As such, the Admiralty advised the reply to Norway regarding the Ross Dependency reflect its position on claims to unexplored land.⁷⁵

To Sir Charles Davis and officials in the Dominions Office, the Admiralty's position was not only a "detriment of the claim of Canada to undiscovered islands to the north of the Dominion," but also to the Empire's title to the vast and mostly unexplored hinterlands of the FID and the Ross Dependency. Without the use of contiguity doctrine and sector lines, how could they support claims to sections of the Antarctic that no explorer had ever set foot on? In the opinion of the Dominions Office, Britain was already tied to the sector principle.⁷⁶ The internal British debate mirrored the general trend in the bi-polar legal landscape, which pitted the proponents of physical settlement against the supporters of the sector principle.

At this stage, the Foreign Office remained relatively uninvolved in the debate and "held no strong views" on the sector principle either way.⁷⁷ In the polar regions

⁷³ Note on the Australian National Research Council's Memorandum Respecting the 'Australian Sector' of the Antarctic, Compiled by the Hydrographic Department, Admiralty, January 1926, NA, ADM 116/2386.

⁷⁴ Sir Charles Walker to the Secretary of State, Colonial Office, 15 July 1925, NA, CO 537/1075; H. Douglas, Hydrographer, Minute, 18 June 1925, NA, ADM 116/2386. See also Admiralty, British Territorial Claims in the Antarctic, NA, ADM 116/2386; Hydrographic Department, Memorandum on the Validity of the French Territorial Claims in the Antarctic, October 1925, NA, CO 537/1081.

⁷⁵ H. Batterbee, Dominions Office, to Under Secretary of State, Foreign Office, 6 August 1925, NA, ADM 116/2386.

⁷⁶ H. Batterbee, Dominions Office, to Under Secretary of State, Foreign Office, 6 August 1925, NA, ADM 116/2386. See also Sir Charles Davis to the Under-Secretary of State, Foreign Office 29 August 1925, NA, CO 537/1075; Rough Draft, Annexation of Territories in the Polar Region: Memorandum Prepared for the Committee of Foreign Policy and Defence by the Admiralty, 1926, NA, ADM 116/2494, Arctic and Antarctic Regions, 1925-1927.

⁷⁷ See comments of Chares Orde in Soviet Government Claims in Arctic Waters, Interdepartmental Conference, 15 September 1926, NA, ADM 116/2494, Arctic and Antarctic Regions, 1925-1927.

occupation consisted of two acts. As Gerald Hyde Villiers, the head of the League of Nations and Western Department explained, discovery gave a prior right to annexation, but this lapsed if a formal declaration or a public act implying a “definite claim to sovereignty” did not occur within a “reasonable period of time.” Britain prioritized this because many of their explorers had performed such symbolic acts, while those from other states had not. This first act, the actual annexation, created a priority right to establish an effective administration over the territory, the second act, which “completed” the occupation. Administration could simply take the form of legislation for the whaling industry, but was strengthened by the kind of practical work the Discovery Committee carried out in the waters off the Antarctic, which provided evidence of the government’s continued activity in the territory it claimed. Unlike the Admiralty, the Foreign Office explained that as long as an administration was in place for a claimed area, it had “no objection” to future British claims “extending throughout the whole sector to the South Pole,” even if the vast majority of this territory remained unexplored.⁷⁸

The Foreign Office replied to Norway conveying support for the sector principle, and avoiding a more general discussion of the principles of polar sovereignty. It affirmed that the Ross Dependency consisted of all the territory enclosed by the sector lines that extended to the South Pole. If any undiscovered land remained within this area, the note implied, it was already under British sovereignty. The response also stressed that Shackleton’s claim to the south polar plateau circumvented any of the rights that the Norwegians believed Amundsen had created during his journey to the South Pole.⁷⁹ The British government hoped Norway would stop questioning the Empire’s rights in the Antarctic.

After dispatching its note, the Foreign Office admitted that its conclusions on polar sovereignty should be discussed with all interested government departments before Britain made any further moves in the Antarctic. Amery and the Dominions Office agreed and insisted that Canada, New Zealand and Australia should also be involved in

⁷⁸ G.H. Villiers, Foreign Office, to Dominions Office, 4 November 1925, NA, CO 537/1093. See also David Day, *Antarctica: A Biography* (Oxford: Oxford University Press, 2013), 197.

⁷⁹ Sir Austen Chamberlain to the Norwegian Minister in London, Benjamin Vogt, 3 November 1925, Document NZ03111925 in Bush, *Antarctica and International Law* 3, 50.

the discussions.⁸⁰ They concluded that the upcoming Imperial Conference, set for October 1926, would provide an ideal setting for deliberation on polar issues and the principles the Empire should adopt in pursuing its Antarctic claims. In the meantime, legal and political developments in the Arctic dramatically changed the prospects of the sector principle.

3.5 “Not Worth a Damn:” The Arctic Sectors and the United States

The old quest to discover land in the High Arctic and the new pursuit to be the first to fly over the North Pole propelled expeditions northwards in 1926. In January, Richard Byrd announced his intention to return to the Arctic in the spring in an “independent attempt to explore the North Polar regions from the air.”⁸¹ On 9 May, Byrd and co-pilot Floyd Bennett took off from an airstrip on Spitsbergen and headed north. They returned fifteen hours later and declared that they had flown over the Pole, although this claim has been challenged by explorers, historians and journalists ever since.⁸² A few days later, Byrd’s competition, Roald Amundsen, the Italian adventurer Umberto Nobile and wealthy American explorer Lincoln Ellsworth took the airship *Norge* on a transpolar journey from Spitsbergen to Alaska via the North Pole.⁸³ At the same time, Australian explorer Hubert Wilkins, with financial support from the Detroit Aviation Society, started to fly over the unknown area north of Alaska and planned for a crossing of the polar basin from Point Barrow, Alaska to Spitsbergen.⁸⁴ As they slowly uncovered the last blank spots on the Arctic map, no aerial explorers spotted any additional land around the North Pole.

Officials in Ottawa, London and Moscow had preemptively worried about the legal implications of the flights on territorial claims in the Arctic. When Byrd first

⁸⁰ H.J. Batterbee to Sir Charles Davis, January 1926, NA, CO 537/1097; E.J. Harding, Dominions Office, to Admiralty, 23 March 1926, NA, ADM 116/2386.

⁸¹ “Byrd to Explore Arctic from Air,” *New York Times*, 31 January 1926.

⁸² On Byrd’s North Pole flight and the controversy surrounding his claims, see Lisle A. Rose, *Explorer: The Life of Richard E. Byrd* (Columbia: University of Missouri Press, 2008), 101-143.

⁸³ For more on the Amundsen-Nobile-Ellsworth partnership see Beekman H. Pool, *Polar Extremes: The World of Lincoln Ellsworth* (Fairbanks: University of Alaska Press, 2002), 75-123.

⁸⁴ See “Captain Wilkins’ Arctic Expeditions, 1926-1928: A Summary Statement,” *Geographical Review* 18, no.3 (1928): 489, 492, and Simon Nasht, *The Last Explorer: Hubert Wilkins, Hero of the Great Age of Polar Exploration* (New York: Skyhorse Publishing, 2005), 127-176.

announced his plans, the British Embassy in Washington reported that he could choose Ellesmere as his main base and fly to the Pole over the unknown territory enclosed by the Canadian sector claim. The possibility inspired Ambassador Esme Howard to warn, “no definite expression of opinion has yet been obtained from the United States Government as to their willingness or otherwise to recognise Canadian jurisdiction over” the Arctic Archipelago. Perhaps the time had come, the ambassador suggested, to send an official note to the State Department explaining the basis of Canada’s Arctic title and ask for an official understanding on the issue. “It seems to me,” Howard explained, “that discussions as to the disputed areas would be likely to cause less feeling if they are undertaken before someone plants the American flag, than afterwards.”⁸⁵ Howard’s suggestion embodied a constant tension in Canadian Arctic policy: whether or not to ask the Americans for recognition of Canada’s sovereignty over the northern islands.

Even as Howard urged Canada to seek official American recognition of its polar sector, the U.S. Navy Department tried to convince the State Department to officially challenge existing claims in the Arctic. The Navy felt that the U.S. had territorial rights to many of the Arctic islands based on exploration and symbolic acts of possession, and suggested that “all claims...be considered unsettled until title shall have been confirmed in accordance with International Law and custom.”⁸⁶ Within the State Department, certain officials sympathized with the Navy’s viewpoint⁸⁷ and remembered that the challenge to Canada’s claim prepared the previous summer remained ready “for use in continuing correspondence” with the British if they “raised the question” of Arctic sovereignty again.⁸⁸ Had they been pursued, attempts by London or Ottawa to secure American recognition of Canada’s sector claim would likely have ended in disappointment. Luckily, however, reason to seek American recognition effectively

⁸⁵ The Dominions Office concurred and said it might be advisable to ask the Americans for an official understanding on Canada’s Arctic sovereignty. British Embassy, Washington, to Governor-General Byng, 26 February 1926, LAC, RG 25, Vol. 2156, File 30 – Arctic Claims, and Secretary of State for Dominion Affairs to Byng, 1 April 1926, cited in Fogelson, *Arctic Exploration and International Relations*, 98.

⁸⁶ Navy Department to State Department, 18 February 1926, NARA, RG 59, CDF 1910-1929, Box 7156, File 800.014, Arctic/14.

⁸⁷ Prentiss B. Gilbert to W. R. Castle, 11 June 1926, cited in Gordon G. Henderson, “Policy by Default: The Origin and Fate of the Prescott Letter,” *Political Science Quarterly* 79, no. 1 (1964): 94-95.

⁸⁸ Irving N. Linnell Note, Division of Western European Affairs, 16 September 1925, NARA, RG 59, CDF 1910-1929, Box 7156, File 800.014.

disappeared with Byrd's choice of Spitsbergen over Ellesmere Island as his base of operations.

Canadian officials resolved ignored these aerial expeditions heading to the North Pole, strengthening Canada's position instead through quiet acts of occupation. In the summer of 1926, the Eastern Arctic Patrol once again headed into Arctic waters and managed to successfully replace the Craig Harbour RCMP post with one further north on the Bache Peninsula.⁸⁹ From the new post, a police patrol made the long journey to the Sverdrup Islands – their first sighting by Canadian eyes.⁹⁰

The sector principle played an important role alongside occupation in extending Canada's sovereignty to every corner of the Archipelago and whatever land might still to be found north of Ellesmere Island. As if to underline the principle's relevance, Ottawa used Canada's sector lines to delimit the boundaries of the new Arctic Islands Game Preserve.⁹¹ Oswald Sterling Finnie, the director of the Northwest Territories and Yukon Branch of the Department of the Interior, emphasized that the Game Preserve "and its appearance on our maps also has a bearing on British sovereignty in the North and serves to notify the world at large that the area between the 60th and 141st Meridians of Longitude, right up to the Pole, is owned and occupied by Canada."⁹²

Canada's use of the sector principle received a welcome boost from the Soviet Union. The Soviets had made significant strides in polar exploration in the early 1920s driven by a hope that they might tap into the Arctic's economic potential and by the need to protect their country's territorial claims. Backed by the state, the Academy of Science formed a Polar Commission in 1923 to study the Russian North, and the Soviet Navy's Hydrographic Department had started to chart various parts of the Arctic Ocean. The Northern Scientific-Commercial Expedition (Seveskpeditsiia) continued to expand Soviet

⁸⁹ As the authors of *Arctic Front* have noted, "Bache Peninsula was the quintessential example of symbolic sovereignty." Though there was no one around for hundreds of miles and the post was visited once a year during the annual Eastern Arctic patrol, and could have been stamped in the south. "Since there was no one around to arrest, the police ran a post office," as a display of sovereignty. Coates et al, *Arctic Front*, 48.

⁹⁰ The Canadian Arctic – What Canada Claims, Has Done and is Doing, in the Northland, 1929, RG 25, Vol. 4252, File 9057-40, pt. 2. See also see also Lyle Dick, *Muskox Land: Ellesmere Island in the Age of Contact* (Calgary: University of Calgary Press, 2002), 277-291.

⁹¹ Referred to in Pharand, *Canada's Arctic Waters*, 51, and 1929 map on 52.

⁹² O.S. Finnie to Dr. O.D. Skelton, 31 August 1926, LAC, RG 25, Vol. 4252, File 9057-40, pt. 2.

knowledge of the North, as did the Committee of the Northern Sea Route (the Komseveroput), which controlled the core of the Soviet Union's Arctic strategy.⁹³ Still, by early 1926, the Soviets lacked the aerial capabilities of the western expeditions and officials worried one of these flights might discover new land on the Russian side of the Pole.⁹⁴

The Central Executive Committee (CEC), the highest governing body in the Soviet Union, took pre-emptive action to protect its polar possessions. On 15 April 1926, the Committee issued a decree that claimed, "all lands and islands, both discovered and which may be discovered in the future...located in the northern Arctic Ocean, north of the shores of the Union of Soviet Socialist Republics up to the North Pole" between 32°04'35" E to 168°49' 30"W.⁹⁵ As British official Laurence Collier explained in 1930, the move embraced "the Sector Principle in its most explicit form."⁹⁶ Soviet international lawyer T.A. Tarcouzio later explained that to safeguard against any potential discoveries by western aerial expeditions, Russian officials adopted the position that "irrespective of the nationality of the discoverers or explorers, sovereignty to lands discovered automatically vests with the state within whose sphere or sector or 'terrestrial gravitation' the land is found."⁹⁷ To support this assertion, the Soviets pointed to the existing sector claims of Canada and Britain in the Arctic and Antarctic.

Soviet jurists amassed legal justifications to support the sector claim. Vladimir Leont'evich Lakhtine, secretary-member of the Committee of Direction of the Section of

⁹³ John McCannon, *Red Arctic: Polar Exploration and the Myth of the North in the Soviet Union, 1932-39* (Oxford: Oxford University Press, 1998), 23-25.

⁹⁴ Pier Horensma, *The Soviet Arctic* (New York: Routledge, 1991), 29-31.

⁹⁵ The Russian sector stretched from 32°04'35" E to 168°49' 30"W longitude. The decree stipulated that it did not claim "the territory of any foreign state recognized by the Government of the USSR." Decree of the Presidium of the Central Executive Committee of the USSR, "Proclamation of Lands and Islands Located in the Northern Arctic Ocean as Territory of the USSR," 16 April 1926, *Sobranie Zakonov SSSR* No. 32(203), reprinted in William Elliott Butler, *Northeast Arctic Passage* (Alphen aan den Rijn: Sijthoff & Noordhoff, 1978), 174. For a general overview, see Leonid Timtchenko, "The Russian Arctic Sectoral Concept: Past and Present," *Arctic* 50, no. 1 (1997): 29-35, and Peter Toma, "Soviet Attitude Towards the Acquisition of Territorial Sovereignty in the Antarctic," *The American Journal of International Law* 50, no. 3 (1956): 611-629.

⁹⁶ Laurence Collier, Memorandum Respecting Territorial Claims in the Arctic to 1930, 10 February 1930, 1 NA, DO 35/167/7, Territorial Claims in the Arctic.

⁹⁷ T.A. Tarcouzio, *The Soviet Union and International Law* (New York: MacMillan, 1972 (1935 reprint)), 56-57.

Aerial Law for the Soviet Union, argued that effective occupation was not “an indispensable condition” of international law, and that the “triple formula” of territorial acquisition – discovery, occupation and notification – could not be applied to the Arctic and Antarctic.⁹⁸ He advocated for a “simpler solution” in which “sovereignty ought to attach to littoral states according to region of attraction [rayona tyagoteniya],” effectively substituting occupation for contiguity.⁹⁹ Along with leading Soviet legal experts such as E.A. Korovin and S.V. Sigrist, Lakhtine asserted that within a sector permanent ice should be claimed as land, the enclosed ocean as territorial waters, and the air should be under state control.¹⁰⁰ Although the Soviet state never re-issued its sector claim to officially include the ice, water and air, other countries believed that they had based on the writings of the Soviet jurists.

With one decree the Soviets rendered the international legal doctrines of discovery and effective occupation “moot and inapplicable to the lands in the Soviet Arctic.”¹⁰¹ Nothing underlines this assessment more than the enclosure of Franz Josef Land and Victoria Island by the Soviet sector lines. Franz Josef Land archipelago had been discovered by an Austro-Hungarian expedition, explored by several British scientific parties, and was used by Norwegian hunting groups on an almost yearly basis since the beginning of the century. In comparison, only two Tsarist expeditions had ventured to the islands, and the Soviet research vessel *Persej* had only visited on several occasions. Additionally, in 1898 Norwegian sealers had discovered Victoria Island (which was only 32 km from the Svalbard Archipelago) but no Russian had ever even

⁹⁸ V.L. Lakhtine, “Rights Over the Arctic,” *The American Journal of International Law* 24, no. 4 (1930): 710.

⁹⁹ Lakhtine, “Rights Over the Arctic,” 705.

¹⁰⁰ See comments by E.A. Korovin and S.V. Sigrist in T.A. Tarocouzio, *Soviets in the Arctic* (New York, 1938): 348-350. See also E.A. Korovin, “USSR i polyarnye zemli [The USSR and the Polar lands],” *Sovetskoe pravo*, no. 3 (1926): 43-46; S.V. Sigrist, “Sovetskoe pravo v polyarnykh prostranstvakh [The Soviet law in the polar spaces],” *Rabochiy sud* 13 (1928): 982-987. Lakhtine, “Rights Over the Arctic,” 703-717; For the original Russian article, see V.L. Lakhtine, *Prava na severnye polyarnye prostranstva* [Rights over the Arctic regions] (Moscow: Izdanie Litizdata Narodnogo Komissariata po Inostrannym Delam, 1928). For Soviet legal analysis of claims in the Antarctic see, Toma, “Soviet Attitude Towards the Acquisition of Territorial Sovereignty in the Antarctic,” 611-629.

¹⁰¹ Christopher Joyner, “A Comparison of Soviet Arctic and Antarctic Policies,” in *The Soviet Maritime Arctic*, ed. Lawson W. Brigham (London: Belhaven, 1991), 288-289.

visited the island.¹⁰² Only through the sector principle could the Soviet Union claim this territory.

The Central Executive Committee's sector claim must be understood in the context of Soviet understandings of the international legal system. Legal scholar Lauri Mälksoo has argued that early Soviet leadership and lawyers denied the universality of European-dominated international law, which had been the tool of European imperialism for centuries. In the 1920s, legal expert Evengy Alexandrovich Korovin envisioned a Soviet international law with Russia at the centre, where concepts like the sector principle could be entrenched as valid legal doctrines. The Soviet sector claim represented more than a convenient solution to the problems of polar sovereignty, it reflected one of the primary purposes of Soviet international law (and Marxist-Leninist theory more generally): the rejection of European extra-territorial rights in non-western areas, such as the Russian Arctic.¹⁰³

Despite its utilization of the sector principle, the CEC actually increased the Soviet Union's activity in the Arctic, initiating legislative acts for the region and promoting the use of the polar lands by fishermen, hunters and government scientists. In 1927, Soviet explorers visited the New Siberian Islands and charted parts of the Laptev Sea. In July 1928, the USSR issued a five-year plan for scientific research into its Arctic territory and established a committee to plan for the construction of observatories on Franz Josef Land and Novaya Zemlya, and for Arctic aerial expeditions. Still, actual occupation of the Arctic islands remained a long way off and the sector principle remained integral to bolstering the Soviet claim.¹⁰⁴

¹⁰² Gunnar Horn, *Franz Josef Land: Natural History, Discovery, Exploration and Hunting* (Oslo: Jacob Dybwad, 1930); Ian Gjertz and Berit Mørkved, "Norwegian Arctic Expansionism, Victoria Island (Russia) and the *Bratvaag* Expedition," *Arctic* 51, no. 4 (1998): 330-335.

¹⁰³ Lauri Mälksoo, "Russia-Europe," in *The Oxford Handbook of the History of International Law*, eds. Bardo Fassbender and Anne Peters (Oxford: Oxford University Press, 2012), 764-786, quotation at 784; See also Lauri Mälksoo, "International Law Between Universality and Regional Fragmentation: The Historical Case of Russia," in *Research Handbook on the Theory and History of International Law*, ed. Alexander Orakhelashvili (Cheltenham: Edward Elgar, 2011), 456-477; Timtchenko, "The Russian Arctic Sectoral Concept," 31.

¹⁰⁴ McCannon, *Red Arctic*, 26-29.

The Soviet claims awakened American officials to the implications of the sector principle. In the span of a few years, a State Department report warned, “the doctrine of prior discovery and/or occupation has suddenly been thrust aside by Canada, Great Britain and Russia, and an exaggerated doctrine of contiguity invoked” which mimicked the “division of the world between Spain and Portugal in the late fifteenth century.” By projecting the “meridians of the westernmost and easternmost boundaries of previously owned lands” to the Poles, these states had annexed almost half of the polar regions “without any physical act of occupation to perfect title,” observed the State Department.¹⁰⁵ Department officials believed that more sector claims loomed on the horizon. Irving Linnell, for instance, flagged a story in the magazine *Nature*, which reported that the Australian government (urged on by the ANRC) planned to use the “Canadian principle” to claim an enormous sector of the Eastern Antarctic.¹⁰⁶

State Department officials debated what position the U.S. should take in the face of this “rapid absorption of the polar areas by other powers.” William Roy Vallance personally told James White that Canada’s Arctic title was “not worth a damn.”¹⁰⁷ Some officials thought that the U.S. should simply modify the Hughes Doctrine’s requirements for actual settlement and join the other polar states in staking a territorial claim. Others thought that internationalization with a central governing body comprised of interested states was the only appropriate solution because of the impossibility of occupation in certain parts of the High Arctic and Antarctic.¹⁰⁸ Publicly, the State Department continued to utilize the Hughes Doctrine.

The State Department’s Division of Western European Affairs undertook a broad study called “Territorial Sovereignty in the Polar Regions” to better define U.S. policy options. The report cautioned that Washington still had to answer key legal questions about the role played by effective occupation, contiguity and discovery. The Hughes

¹⁰⁵ Department of State, Division of Western European Affairs, Territorial Sovereignty in the Polar Regions, 6 August 1926, pg. 49, NARA, RG 59, CDF 1910-1929, Box 7156, File 800.014/Arctic.

¹⁰⁶ Vice President, National Geographic Society to Linnell, 16 September 1925, NARA, RG 59, CDF 1910-1929, Box 7156, File 800.014/Arctic/11.

¹⁰⁷ Story recounted by H.G. Chilton, British Ambassador, Chilton to Austen Chamberlain, 26 April 1926, LAC, RG 25, Vol. 2156, File 30, Arctic Claims.

¹⁰⁸ See Henderson, “Policy by Default,” 91.

Doctrine called for actual settlement, but what did that mean in “regions where effective occupation is in great part impossible to civilization as now constituted?” These questions involved broader principles of international law on territorial acquisition, not yet “definitely established” by state practice. In the past, the U.S. government had dealt with issues of territorial sovereignty “as expediency dictated” and as a result the report found its decisions were “insufficient in number and constancy of decision to form a background of fixed policies.”

While the United States had long supported effective occupation as the true test of sovereignty in the temperate regions, the U.S. officials understood the doctrine’s limitations. International legal practice lacked a “clearly specified or decisive manner in which ‘occupation’ becomes ‘effective,’ even in the temperate regions.” The “failure of international usage to establish a norm for ‘effective occupation’” worked to the advantage of the countries that had already made claims in the polar regions. These states could argue that “occasional administrative acts and the retention of power to control may be considered sufficient” and that their claims would be “validated through lapse of time without great effort and with little or no colonization.” The State Department concluded that Canada was the “only nation attempting anything approaching ‘effective occupation,’” with “a slender line of patrol posts extending along the eastern boundary of the territory claimed.” Even so, the Canadians had strategically placed the RCMP stations to control the “entrance offering the least natural physical resistance ... to the remainder of the Canadian sector.” Canada used its control over the points of access to the Archipelago to block the exploration of its sector, except with direct permission from the Canadian government. While the State Department report admitted that Canada’s claim was stronger than most in the polar regions, its efforts at occupation fell far short of the rigid requirements of the Hughes Doctrine.

State Department officials concluded that “sector projections” were outgrowths of the lack of clarity on the rules of territorial acquisition and the hollowness of effective occupation doctrine. They speculated that the existing sector claims rested on a mixture of formal proclamations of sovereignty, the rights of original discovery, contiguity doctrine and control of key points. The report pointed out that in the past the U.S. had

held that “the hinterland of a colonized coastline is included within the sovereignty of the colonized portion.” But, the polar “sector projections” abused the doctrine of contiguity by enclosing territory that remained inadequately explored, or even undiscovered. Despite this objection, the report pointed out that the State Department could still step away from the Hughes Doctrine, join Britain, Canada and Russia, and claim the Alaskan sector between 141°W and 168° 49’ 30”W longitude. This avenue presented an interesting prospect given the possibility that land could still be found north of Alaska.

The report’s strongest conclusion stated that if the U.S. wanted to challenge existing polar claims it could not remain silent for much longer. What international law made abundantly clear was that the failure of the U.S. government to officially protest the polar claims of other states, especially those unsupported by any degree of effective occupation, would constitute a strong advantage to these powers in any future dispute or negotiations. Just as James White had concluded the year before, the Americans recognized that tacit acquiescence could validate a territorial claim over time. The major question that remained unanswered was whether or not the Americans wanted to challenge the polar claims of Russia and the British Empire – a consideration that was more diplomatic and geopolitical than legal in nature. Future value of the polar lands and the strength of the existing claims to these areas required further study. The report therefore suggested that an examination of various state strategies and legal policies in the polar regions be undertaken “as discreetly as possible” to avoid disturbing “any present tranquility of occupational activity.”¹⁰⁹ Above all, the Americans did not want to provoke the polar claimants to further strengthen their positions.

The State Department report highlighted that two years after crafting the Hughes Doctrine, and a year after the MacMillan expedition, the Americans continued to struggle with the meaning of polar sovereignty. While it raised important questions, the report provided few concrete answers. As a result, although the State Department recognized the need to officially protest the territorial claims in the Arctic and Antarctic to preserve the

¹⁰⁹ Department of State, Division of Western European Affairs, Territorial Sovereignty in the Polar Regions, 6 August 1926, NARA, RG 59, CDF 1910-1929, Box 7156, File 800.014/Arctic.

position and interests of the U.S., it remained silent on the Canadian, British and Soviet sector claims.

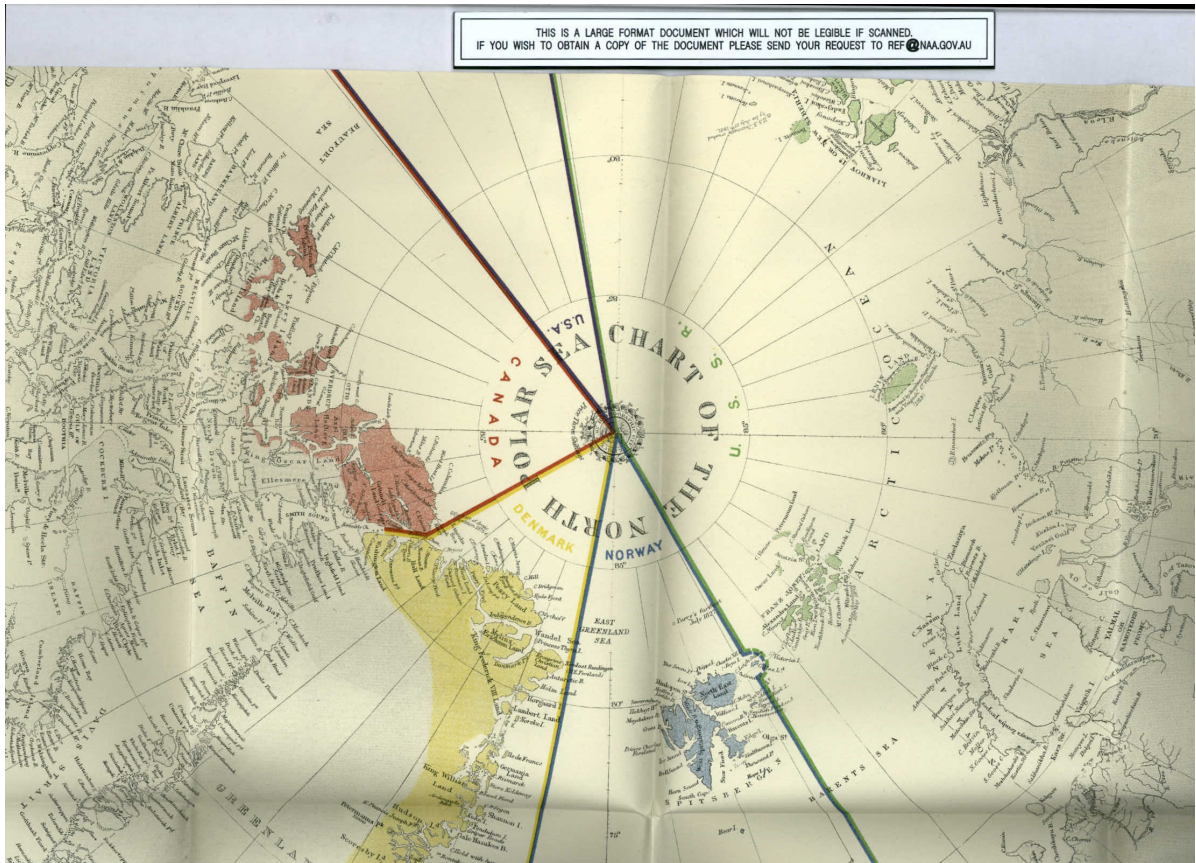


Figure 5: Map from Laurence Collier showing potential sector claims in the Arctic. Memorandum Respecting Territorial Claims in the Arctic to 1930, 10 February 1930, National Archives of Australia, A981, ARC 1, Arctic, 1956 Map, A1838, 1495-3-2-1 Part 1.

3.6 Debating the Sector Principle

Starting in the spring of 1926, British officials from the Admiralty, Foreign, Dominions and Colonial Offices started to prepare for the discussion of polar issues planned for the upcoming Imperial Conference. In a series of interdepartmental meetings, legal appraisals and political reports, they examined topics such as the level of occupation required in the polar regions, the role of contiguity, the Australian proposal and the sector

principle. Officials hoped to answer whether the Empire's future annexations should be "limited to discoveries of known land or extended to all land which lies, or may lie, within specified sectors of the Antarctic."¹¹⁰ The Soviet decree intensified the divisive debate on the sector principle already occurring within British ranks. The Dominions Office suggested that the Empire should recognize the Soviet claim to strengthen its own polar sectors while the Admiralty wanted the Soviet annexation publicly rejected. The Soviet Union's use of the Empire's conduct in the Arctic and Antarctic to support its annexation deeply embarrassed Admiralty officials, and they wanted the British government to make clear that London did not "range itself on the side of Russia as against other Powers" in its approach to polar sovereignty.¹¹¹

The sector principle debate shaped discussions in the interdepartmental committee examining the future of Britain's policy for the Antarctic. Fearing that the "Canadian principle's" (and its arguments about geographic proximity) might inspire Argentina and other South American countries to make claims in the south polar region, the committee rejected the Australian government's wish to use the concept to justify an Antarctic sector claim. Admiralty and Dominions Office officials continued to clash, however, over the idea of expanding "the rights conferred by a strictly limited coastal discovery into ownership of all land subsequently found to be continuous with this" in "vast unexplored areas."¹¹² As a compromise, the committee accepted the Admiralty's argument that future claims should involve only parts of the Antarctic coastline actually sighted by British subjects. The Empire would not use arguments of contiguity or employ sector lines to broaden these claims to adjacent, but unexplored parts of the coast. Sector lines would, however, still be employed to extend the coastal claims to the South Pole, even if they enclosed largely unexplored hinterlands. In practice, the Empire would still use both contiguity and the sector principle to claim vast polar interiors, but only from coastline deemed "definitely known" or "reasonably probable" based on British exploration. Their guiding principle established, the committee agreed that Britain's future Antarctic claims could include Coats Land on the edge of the FID (20° to 164° W), Enderby Land (45° to

¹¹⁰ Hydrographer H. Douglas, 2 May 1926, NA, ADM 116/2386.

¹¹¹ Lords Commissioners of the Admiralty to the Under-Secretary of State for Foreign Office, 30 June 1926, NA, ADM 116/2494.

¹¹² Hydrographer H. Douglas, 2 May 1926, NA, ADM 116/2494.

53° E), Kemp Land (58.5° to 60° E), Queen Mary Land (86° to 101° E), Wilkes Land (131° to 135.5° E), King George V Land (142° to 158° E) and Oates Land (157° to 159° E). Each of these territories would be “so defined as to include the whole of land lying within the various prescribed meridians and between the coast and the South Pole.”¹¹³ In a bold new approach, Britain’s plan for the Antarctic called for seven polar sectors to be overseen by Australia.

The Dominions received copies of the Antarctic plan in the spring of 1926 before the Imperial Conference. The document included Australia’s plan to apply the “Canadian principle” to the Antarctic, the legal appraisal of Canada’s Arctic claim and the Norwegian note on the Ross Dependency. Despite the united front the British government displayed to the Dominions, in London the debate on the sector principle worsened in the months before the Imperial Conference. Both sides became even more deeply entrenched in their respective positions.

Although Whitehall’s departments continued to clash, the British government endorsed the sector principle, for political, practical, legal and even moral reasons. As Foreign Office official Charles Orde explained to Admiralty representatives, “the disadvantages of admitting that principle [sector]... must be balanced against the practical advantage to the Empire which might arise from accepting it and being, in consequence, free to push” claims in the Arctic and Antarctic.¹¹⁴ Charles Davis of the Dominions Office believed that Britain was “morally bound” and “officially committed” to defend Canada’s claim in the Arctic.¹¹⁵

¹¹³ E.101, British Policy in the Antarctic, May 1926, NAA, A981, ANT 4, Part 3.

¹¹⁴ Soviet Government Claims in Arctic Waters, Interdepartmental Conference, 15 September 1926, NA, ADM 116/2494, Arctic and Antarctic Regions, 1925-1927. While the Admiralty refused to accept that Britain had claimed unexplored land in the Antarctic, the legal advisers in the Foreign Office confirmed that the Empire had already made sector claims to known and unknown lands in the Letters Patent of 1917 and in the Order in Council that created the Ross Dependency. While the Foreign Office admitted that Britain could still step away from the principle, it did not believe that such an action would be in the best interests of the Empire. C.W. Orde, Foreign Office to Lt. Commander R.T. Gould, RN, 17 September 1926, NA, ADM 116/2494, Arctic and Antarctic Regions, 1925-1927.

¹¹⁵ Sir Charles Davis, ever the defender of Canada’s position in the Arctic, insisted, “It would be impossible for the D.O. to let Mr. Mackenzie King... go back to Canada without an assurance that the Canadian claim in the Arctic would be fully supported by H.M. Government.” Undeterred, Gould argued that the Dominions Office’s conception of the Empire’s polar policy was far too “pro-Canadian.” Lt. Commander R.T. Gould, RN, Territorial Claims in the Polar Regions: Notes of a Conference held at the Dominions Office, 2 November 1926, NA, ADM 116/2494, Arctic and Antarctic Regions, 1925-1927. Disheartened,

Foreign and Dominions Office officials maintained that sector claims were legally justifiable. Like Canadian expert James White, they argued that the unique conditions of the polar regions meant that sector claims to vast hinterlands could be justified through contiguity and the establishment of some control over a polar coastline or key strategic points – especially if a state could show that “present and future discoveries [would] ultimately form a geographical whole.” Indeed, the arbiter for the British Guiana case had accepted that contiguity could extend a claim based on limited effective occupation over a “single organic whole.” Dominions Office officials believed that both the northern islands above Canada and the hinterlands of the Antarctic Dependencies formed potential “geographical whole[s]” and could be neatly enclosed by sector lines emanating from territory already firmly under British or Canadian sovereignty.¹¹⁶

The work of legal scholar David Hunter Miller supported this contention.¹¹⁷ In 1925, Miller had explored the relevant judicial writings on international law, treaties and even interviewed key legal experts in the Canadian and U.S. governments, including White and Vallance.¹¹⁸ Although Miller recognized the problems that surrounded polar sovereignty he did not believe the polar regions should be considered *terra nullius*, which he characterized as “an unsatisfactory sort of ownership by everyone.”¹¹⁹ Showcasing White’s influence, Miller noted that Canada believed the Archipelago constituted a single geographic entity and asserted, “to project this sentiment still farther north, perhaps

Hydrographer Douglas commented that the Admiralty position was found to be too unsupportive of Canada’s claims. “It would appear that the Dominions Office are determined to support the Canadian claim (and, in consequence, to recognize the Russian claim) at all costs,” he concluded. H. Douglas, Hydrographer, 8 November 1926, NA, ADM 116/2494.

¹¹⁶ Document A. Confidential Document for use by His Majesty’s Government Prepared by Dominions Office, NA, ADM 116/2494, Arctic and Antarctic Regions, 1925-1927; Document B. Confidential Document for Use of His Majesty’s Government, Prepared by Dominions Office; Charles T. Davis to the Admiralty, 12 August 1926, NA, ADM 116/2494.

¹¹⁷ David Hunter Miller published articles on claims in the Arctic and Antarctic. See David Hunter Miller, “Political Rights in the Arctic,” *Foreign Affairs* 4, no. 1 (1925): 47-60, and David Hunter Miller, “National Rights in the Antarctic,” *Foreign Affairs* 5, no. 3 (1927): 508-510. He combined and adapted these articles for an entry into the American Geographical Society’s landmark volume, *Problems of Polar Research*. See David Hunter Miller, “Political Rights in the Polar Regions,” in *Problems of Polar Research*, ed. W. L. G. Joerg (New York: American Geographical Society, 1928), 235-250.

¹¹⁸ O.D. Skelton to Colonel Cortlandt Starnes, Commissioner, RCMP, 17 September 1925, LAC, RG 25, Vol. 4252, File 9057-40, pt. 1; William Roy Vallance, Memorandum of Conference with David Hunter Miller Regarding Arctic Lands and the MacMillan Expedition, 2 July 1925, NARA, RG 59, CDF 1910-1929, Box 7156, File 800.014-Arctic/5.

¹¹⁹ Miller, “Political Rights in the Arctic,” 52.

across a considerable extent of Arctic sea or ice, is less logical but seems equally natural.”¹²⁰ While officials thought that these were strong arguments in support of sector claims, they wanted a firmer foundation for the principle in international law.

The first and clearest source of international law, as elucidated a few years before in the statute of the Permanent Court of International Justice, was “international conventions, whether general or particular, establishing rules expressly recognized by the contesting State.”¹²¹ Foreign and Dominions Office officials recognized that a treaty was thus the strongest foundation the sector principle could have. To provide one, these officials extended James White’s earlier argument about the Russian-American Treaty of 1867 to argue that Britain had “publicly adopted a view” that the Treaties of 1825 and 1867 established the sector principle – a position endorsed by the British participants in the Behring Sea Arbitration of 1893.¹²²

During the proceedings of the 1893 arbitration, the participants had discussed the western limit of Alaska. The British representatives stressed that the official American translation of the 1867 Treaty described the western boundary of Alaska as proceeding “due north without limitation into the same Frozen Ocean” and this strong language left no doubt that the boundary extended all the way to the Pole. Furthermore, the Russians and Americans had agreed to this line “as a ready and definite mode of indicating which of the numerous islands in a partially explored sea should belong to either Power.” The fundamental point, in the eyes of Dominions and Foreign Office officials, was that the treaty clearly established state sovereignty over known and unknown land in the Arctic based on the simple drawing of sector lines.

Additionally, the Treaty of 1867 adopted as the eastern limit of Alaska the line of demarcation established by the convention of 1825, which was described as, “la même

¹²⁰ Miller, “Political Rights in the Arctic,” 55-57, 59. As a result, Miller could confidently conclude that the southern islands of Canada’s Arctic Archipelago, just off the coast, were as “certainly Canadian as Ontario.” “As to the rest,” Miller noted, “there are various shades of doubt - the doubt increasing generally with the latitude.” Miller, “Political Rights in the Arctic,” 51.

¹²¹ *Statute of the Permanent Court of International Justice*, 16 December 1920.

¹²² The Behring Sea Arbitration arose out of a dispute between Canada/Britain and the United States over seal fishery rights in the Bering Strait. Charles T. Davis to the Admiralty, 12 August 1926, NA, ADM 116/2494, Arctic and Antarctic Regions, 1925-1927.

ligne méridienne du 141 degré formera, dans son prolongement jusqu'à la Mer Glaciale.” While the British admitted that the language was somewhat ambiguous, they insisted that its intent was to extend the boundary between Russian Alaska and British North American into the Arctic Ocean. Even if the assumption was wrong, the British stressed that the eastern limit of Alaska must be “interpreted in the same manner as the western limit,” and, thus, be viewed as extending to the North Pole. The British once more found support in Miller’s work, which concluded that the wording of the treaties of 1825 and 1867 was vague enough to “make it at least arguable that the line runs as far as the 141st meridian itself runs, and that means to the North Pole” given that the expression “without limitation” was “pretty strong.”¹²³ Such opinions contrasted with the U.S. State Department’s belief at the time – and what the leading international legal expert on the treaties, Donat Pharand, has concluded since. Pharand maintained that both the language used and the original intent of the treaties clearly indicate that the boundary only extended to the coastal edge of the Arctic Ocean, not to the North Pole.¹²⁴

Dominions and Foreign Office officials maintained that in the two treaties the three most powerful states with interests in the polar regions, the U.S., Russia and Britain (and by extension the other countries of the Empire), had agreed to use lines of meridian meeting at the Pole as an easy way of determining territorial sovereignty over known and unknown land in the partially explored Arctic Ocean. As a result, Canada and the Soviet Union were completely justified in using the treaties as a basis for their sector claims. The legal adviser of the Dominions Office, Sir John Risley, and his counterparts in the Foreign Office would have read the work of Lassa Oppenheim, who had argued that “law-making treaties” could stipulate new rules for international behavior, or confirm and define existing customary laws. While treaties create law for the contracting parties, over time and with the tacit recognition of other nations, they can crystallize into universal

¹²³ Miller, “Political Rights in the Arctic,” 55-57, 59.

¹²⁴ Document A. Confidential Document for use by His Majesty’s Government Prepared by Dominions Office, NA, ADM 116/2494, Arctic and Antarctic Regions, 1925-1927 and Laurence Collier, Memorandum Respecting Territorial Claims in the Arctic to 1930, 10 February 1930, NA, DO 35/167/7, Territorial Claims in the Arctic. For a detailed discussion of the Treaties of 1825 and 1867, and for his contrary opinion on their meaning, see Pharand, *Canada’s Arctic Waters in International Law*, 17-27. Pharand admitted that the term “without limitation” was problematic. Still, he concluded that the “The 1825 and 1867 boundary treaties cannot serve as a legal basis for the sector theory.” Pharand, *Canada’s Arctic Waters in International Law*, 26.

rules.¹²⁵ British experts insisted that the treaties of 1825 and 1867 had created such a legal norm – the “principle of prolonging meridians of longitude to the Pole” and “claiming all land within defined sectors” – and they had the right to apply the new rule to the Antarctic.¹²⁶ In their opinion, the treaties of 1825 and 1867 had created a whole new legal regime based on the sector principle.

The Admiralty insisted that this interpretation was utter nonsense and that the sector theory (the Hydrographer refused to call it a principle) had developed from a fundamental “misconception of the terms” and context of the two treaties. The Admiralty argued that in 1825 the Russian and British negotiators had used a line of meridian reaching to the Arctic Ocean simply because the map of the Arctic coastline was so blank that no fixed point could be specified to mark the boundary.¹²⁷ The authors of the treaty had no intention of extending the line past the unknown coastline into unknown seas to claim unknown islands. While Admiralty officials agreed that the use of the language “without limitation” in the American translation of the Treaty of 1867 was ambiguous, they insisted that the original French text offered a better representation of the treaty’s intent. The French description explained that Alaska’s western limit “remonte en ligne directe, sans limitation, vers le nord, jusqu’a ce qu’elle se perd dans la Mer Glaciale.” Although the French text did not explain where the line ended in the ocean, the Admiralty maintained that the “the boundary (which is entirely a land-boundary) should be regarded as terminating when it arrives at the Arctic Ocean, and not as proceeding 1200 miles

¹²⁵ Lassa Oppenheim, *International Law: A Treatise*, ed. Roland Roxburgh (London: Longmans, Green and Co., 1920), 22-23. On law-making treaties see, Anthony D’Amato, “Treaties as a Source of General Rules of International Law,” *Harvard International Law Journal* 3, no. 1 (1962): 1-43; Anthony D’Amato, *The Concept of Custom in International Law* (Cornell: Cornell University Press, 1971), 105-166, and Catherine Brölmann, “Law-Making Treaties: Form and Function in International Law,” *Nordic Journal of International Law* 74 (2005): 383-404.

¹²⁶ Document A. Confidential Document for use by His Majesty’s Government Prepared by Dominions Office, NA, ADM 116/2494, Arctic and Antarctic Regions, 1925-1927 and Lt. Commander R.T. Gould, RN, Territorial Claims in the Polar Regions: Notes of a Conference held at the Dominions Office, 4 November 1926, NA, ADM 116/2494, Arctic and Antarctic Regions, 1925-1927. See also Leopold Amery’s speech at the first meeting of the Committee on British Policy in the Antarctic, 10 November 1926 in NAA, M4794, 1/17 Part 1, Papers of Sir John Latham as Australian Representative at the Imperial Conference of 1926.

¹²⁷ Rough Draft, Annexation of Territories in the Polar Region: Memorandum Prepared for the Committee of Foreign Policy and Defence by the Admiralty, 1926, NA, ADM 116/2494, Arctic and Antarctic Regions, 1925-1927.

further to the Pole.”¹²⁸ Lt. Commander Rupert Thomas Gould, who worked in the Hydrographer’s Department, argued that if the treaties “intended to define spheres of influence extending as far as the North Pole their wording was, to say the least of it, unfortunate, since there was nothing in either professing to define, or even suggest the existence of a boundary further north than the point where the boundary, as laid down, ran into the Arctic Ocean.” Britain had publicly embraced a misinterpretation of the treaties in the past, but Gould argued that no country should be “permanently bound” by its misunderstanding of an historic legal convention.¹²⁹ To the Admiralty, there simply was no treaty basis for the sector principle and never had been.

Admiralty officials warned that Canada and Britain continued to use the contiguity doctrine at their own peril. After all, as the recognized owner of Greenland, Denmark could argue a “contigual claim” to Ellesmere Island, given that the two land masses were separated by only a few miles. In the south polar region, the French could argue that the entire coastline of the eastern Antarctic belonged to them because it was contiguous to Adélie Land. In both the Arctic and Antarctic, the risk of using contiguity was not worth the reward. The entire Empire, the Admiralty concluded, should step away from “considerations of contiguity.”¹³⁰

The Admiralty also suggested that through a public rejection of the sector principle and the Soviet claim, London could still annex additional islands in the Arctic Ocean, which were valued as potential air bases for future trans-Arctic air routes. In the Antarctic, the only way to stave off massive claims from foreign powers like France was to insist that no country had the right to claim unexplored land.¹³¹ The Admiralty asserted that even if states did not use the sector principle to claim sovereignty over the ocean, the idea violated Britain’s long-standing support of the complete freedom of the seas by

¹²⁸ Remarks on DO Draft Memoranda A and B, NA, ADM 116/2494, Arctic and Antarctic Regions, 1925-1927.

¹²⁹ Lt. Commander R.T. Gould, RN, Territorial Claims in the Polar Regions: Notes of a Conference held at the Dominions Office, 2 November 1926, NA, ADM 116/2494, Arctic and Antarctic Regions, 1925-1927.

¹³⁰ Rough Draft, Annexation of Territories in the Polar Region: Memorandum Prepared for the Committee of Foreign Policy and Defence by the Admiralty, 1926, NA, ADM 116/2494, Arctic and Antarctic Regions, 1925-1927.

¹³¹ Interdepartmental Conference on Russian Claims in the Arctic Regions, 23 September 1926, NA, ADM 116/2494, Arctic and Antarctic Regions, 1925-1927. See also Vice Admiral Percy Douglas, Hydrographer, 13 June 1926 and Vice Admiral Percy Douglas, Hydrographer, 20 August 1926, NA, ADM 116/2494.

allowing a government to claim “that it had rights over that part of the High Seas which were superior to those of any other Power.” Finally, while Britain’s newly proposed Antarctic strategy clearly allowed for sector claims to unexplored interiors, the Admiralty insisted that the sector principle was inconsistent with the decision not to claim any part of the coastline not explored by British subjects.¹³²

The Empire, the Admiralty concluded, did not need the sector principle and could still disown the concept without endangering Canadian, Australian or British interests and claims. Chief Hydrographer Douglas argued that the Canadian sector claim had “not yet been definitely brought into the field of international politics...so that we have a free hand with regard to it.”¹³³ The Admiralty insisted that in the Antarctic, the Empire could rely on discovery, exploration and administrative acts to support its claims to the Dependencies. Similarly, if Canada continued the “peaceful penetration” into the Arctic Archipelago, “extending her effective control,” all foreign powers would have to admit her sovereignty.¹³⁴

Both sides found support for their arguments in the first wave of legal scholarship on the sector principle. International legal expert Paul Fauchille could not support the sector principle because he did not support the doctrine of contiguity. At the best, the sector provided public notification of the territory a state intended to claim, which provided the country with a small window to secure the area through occupation.¹³⁵ Others saw the sector principle and the doctrine of contiguity as practical, if not altogether legal, solutions to the problem of polar sovereignty.¹³⁶ David Hunter Miller

¹³² Lt. Commander R.T. Gould, RN, Territorial Claims in the Polar Regions: Notes of a Conference held at the Dominions Office, 2 November 1926, NA, ADM 116/2494, Arctic and Antarctic Regions, 1925-1927

¹³³ Vice Admiral Percy Douglas, Hydrographer, 13 June 1926, NA, ADM 116/2494. See also Vice Admiral Percy Douglas, Hydrographer, 20 August 1926, NA, ADM 116/2494. The Admiralty maintained that, “it is still doubtful whether we have actually claimed undiscovered lands in that Dependency [the FID], and it is at any time open for a nation to change its policy,” despite the contrary conclusion of the Foreign Office legal advisers: Remarks on DO Draft Memoranda A and B, NA, ADM 116/2494, Arctic and Antarctic Regions, 1925-1927.

¹³⁴ The conclusion on Canada’s sovereignty was also supported by the Dominions Office and Foreign Office. Rough Draft, Annexation of Territories in the Polar Region: Memorandum Prepared for the Committee of Foreign Policy and Defence by the Admiralty, 1926, NA, ADM 116/2494, Arctic and Antarctic Regions, 1925-1927

¹³⁵ Paul Fauchille, *Traité de Droit International Public*, Tome I (Paris: Rousseau, 1925), 733-734.

¹³⁶ Mark Frank Lindley, *The Acquisition and Government of Backward Territory in International Law: Being a Treatise on the Law and Practice Relating to Colonial Expansion* (London: Longmans, Green, and

wrote that the sector principle had a “precedent” in the hinterland claims and contiguity doctrine used in the past, and had a legal basis in the Treaties of 1825 and 1867.¹³⁷ Even the sector principle’s supporters believed that only through a multilateral treaty created by interested states could the idea become a rule of law and form the foundation of a polar legal regime.¹³⁸

Going into the Imperial Conference of 1926, the British sector principle debate continued unabated, both sides entrenched in their respective positions. The disagreement reflected the different pressures, concerns and assumptions that guided Britain’s navigation of the bi-polar legal landscape. It also captured the complexity and malleability of the rules of territorial acquisition, the uncertainty about the nature of polar sovereignty, the difficulties of treaty interpretation and the worries that stemmed from the introduction of a novel principle into the international order. Deadlocked by these various factors, both sides agreed that the committee set up to study polar questions at the Imperial Conference would decide the future of the sector principle.

3.7 A Bi-Polar Policy for the Commonwealth

Historians of the British Empire have long celebrated the Imperial Conference of 1926 as the landmark moment on the journey towards Dominion independence – the culmination of a process towards autonomy that began in earnest during the First World War. The meeting of leaders and representatives from Newfoundland, Canada, New Zealand, Australia, South Africa and the Irish Free State produced the Balfour Declaration, which recognized the Dominions as “autonomous Communities within the British Empire.”

Though “united by a common allegiance to the Crown” the statement stressed that the

Co., 1926), 140-141, 230 and 235. Polar expert Leonid Breitfuss agreed with this assessment and wrote an article in support of the territorial division of the Arctic based on the sector principle. Breitfuss was an émigré Russian oceanographer and zoologist with close ties to the Soviet Union. This plan was published by the author under the title, *Die Einteilung des noerdlichen Polargebiets* (“The Division of the North Polar Region”) in the *Morskoi Sbornik*, Leningrad, January number, 1927. A version of its was translated and published, Leonid Breitfuss, “Territorial Division of the Arctic,” *Dalhousie Review* 8 (1928-29): 456-469. The Canadians paid close attention to the article by Breitfuss. See, for instance, White to Skelton, 11 April 1927, LAC, RG 25, Vol. 4252, File 9057-40, pt. 2; O.S. Finnie to Skelton, 2 March 1928, LAC, RG 25, Vol. 4252, File 9057-40, pt. 2; Skelton to Anderson, 16 March 1928, LAC, RG 25, Vol. 4252, File 9057-40, pt. 2.

¹³⁷ Miller, “Political Rights in the Arctic,” 55-57, 59.

¹³⁸ Miller, “Political Rights in the Arctic,” 59-60, Lindley, *The Acquisition and Government of Backward Territory*, 5-6, 235; Breitfuss, “Territorial Division of the Arctic,” 28.

Dominions were “equal in status, in no way subordinate to one another in any aspect of their domestic or external affairs.” Further, these states were “freely associated as members of the British Commonwealth of Nations.”¹³⁹ An important stage in the evolution of the Empire, the conference became equally significant in the development of the polar regions.¹⁴⁰ Leopold Amery chaired the Committee on British Policy in the Antarctic, which explored the Empire’s future in the south polar region and the Empire’s response to the Soviet Union’s sector claim over the course of three meetings.¹⁴¹ By the conference’s end, the delegates had embraced a unified polar policy that protected the interests of the Commonwealth in both the Arctic and Antarctic.

At first, however, the British interdepartmental debate spilled over into the conference. At the committee’s opening meeting on 10 November, the Admiralty explained to the Dominion representatives that the sector principle could not be justified by treaty-law or any other legal doctrine. In response, Amery insisted that the Russian-American Treaty of 1867 accorded the right to “[claim] all land within defined sectors.” Furthermore the British government “definitely enunciated” this principle in connection with the FID and the Ross Dependency in unchallenged sector claims. Sir Francis Bell, New Zealand’s representative, supported the sector principle by insisting his government would consider any additional islands found in the Ross Sea part of the Ross Dependency, regardless of the nationality of the explorer that discovered them. When the discussion turned to whether there was a danger the sector principle might be used to the advantage

¹³⁹ Nicholas Mansergh, *The Commonwealth Experience*, vol. I (Toronto: University of Toronto Press, 1983), 27-28.

¹⁴⁰ On the Imperial Conference of 1926 and its role in Antarctic politics, see Peter Beck, “British Antarctic Policy in the Early 20th Century,” *Polar Record* 21, no. 134 (1983): 475-83; Sanjay Chaturvedi, *The Polar Regions: A Political Geography* (Chichester: John Wiley and Sons, 1996), 66-68; Tom Griffiths, *Slicing the Silence: Voyaging to Antarctica* (Cambridge, Massachusetts: Harvard University Press, 2007), 81; Gillian Triggs, *International Law and Australian Sovereignty in Antarctica* (Sydney: Legal Books, 1986), 107; Malcolm Templeton, *A Wise Adventure: New Zealand & Antarctica, 1920-1960* (Wellington: Victoria University Press, 2000), 31-34; Marie Kawaja and Tom Griffiths, ““Our great frozen neighbour”: Australia and Antarctic Before the Treaty, 1880-1945,” in *Australia and the Antarctic Treaty System: 50 Years of Influence*, eds. Marcus Haward and Tom Griffiths (Sydney: University of New South Wales Press, 2011), 25; Marie Kawaja, “Australia in Antarctica: Realising an Ambition,” *The Polar Journal* 3, no. 1 (2013): 41-43; Day, *Antarctica: A Biography*, 197-201.

¹⁴¹ The Committee also included, Cecil Hurst (Legal Adviser, Foreign Office), R.H. Campbell (Foreign Office), Captain J.D. Nares (Admiralty), A. Manning (Member of the House of Representatives, Commonwealth of Australia), Jean Désy (Department of External Affairs, Canada), Sir Francis Bell (Minister, New Zealand) and H.F. Batterbee (Dominions Office).

of Argentina, Amery ruled out this concern saying he “did not think that the Argentine claim need seriously be regarded as a matter of practical politics.”¹⁴²

Sir Cecil Hurst, the Legal Adviser to the Foreign Office, addressed the second meeting of the committee with an important appraisal of the requirements of polar claims. A man of considerable experience in international law, Hurst was “highly influential” within British government circles.¹⁴³ He held that even with the “flexibility with which the principles of international law” could be applied to the “uninhabitable regions around the Poles,” an international tribunal was unlikely to support a title based solely on discovery and an act of paper annexation. Therefore, Hurst suggested that the Empire’s next claim in the Antarctic be preceded by formal assertions of sovereignty “on the spot.” In sharp contrast to the Foreign Office’s existing position that territorial claims did not have to be accompanied by a formal notification, Hurst insisted that the first step of any claim was “an intimation to foreign Powers of the intention to acquire title over the area.”

In a statement that echoed James White’s arguments about the Arctic Archipelago, Hurst insisted that Britain must maintain a better degree of control over its claimed areas than any competing state. The legal adviser stressed, “Even in the Polar regions there should be a reasonable probability that persons who ignore the will of the controlling authority will find themselves in trouble.” In the unique environment of the Antarctic state control had to attain whatever level of effectiveness was “reasonably possible along the coasts of the areas” to which the Empire wanted to secure its title. Hurst felt periodic visits from official state expeditions, with officers commissioned to impose the authority of the government, represented the best way to establish such “local control” in the

¹⁴² Imperial Conference, 1926, Committee on British Policy in the Antarctic, Minutes of the First Meeting of the Committee, Dominions Office, 10 November 1926, NAA, M4794, 1/17 Part 1, Papers of Sir John Latham as Australian Representative at the Imperial Conference of 1926. New Zealand contributed little else to the discussions and was content to be guided by British conclusions. Templeton, *A Wise Adventure*, 32-33.

¹⁴³ Clive Parry, “Foreign Policy and International Law,” in *British Foreign Policy Under Sir Edward Grey*, ed. F.H. Hinsley (Cambridge: Cambridge University Press, 1977), 99. See also Charles de Visscher, Kenneth Carpmaeil and C. John Colombos, “Sir Cecil Hurst: Two Tributes,” *International and Comparative Law Quarterly* 18 (1964): 1-5.

Antarctic.¹⁴⁴ Just as White emphasized Canada's control over the main access points into the Arctic Archipelago, Hurst prioritized control over the Antarctic coastline, the access point into the vast hinterlands of the Empire's Dependencies. Both experts agreed that by placing key strategic points under its control, a state could claim contiguous territory with the sector principle. The key difference between the Canadian and British approaches to polar sovereignty was that while the former implemented a program of permanent physical presence via their RCMP posts, Hurst maintained that control and state presence could be "intermittent or periodical" in the polar regions.

International legal scholars Paul Fauchille, Mark Lindley and David Hunter Miller had all recently agreed that the doctrine of effective occupation had to be modified for the polar regions.¹⁴⁵ In territory where settlement was difficult or impossible, a state had to establish an administration and a level of government control suited to the conditions of the area.¹⁴⁶ Miller concluded that "there may be effective occupation of an enormous Arctic area by the establishment of a few posts, here and there" especially if they controlled the means of access into an area like the Arctic Archipelago.¹⁴⁷

By its last meeting, the Committee on British Policy in the Antarctic arrived at a "definite and consistent" polar policy for the Empire. The committee members accepted that France's title to Adélie Land was unchallengeable and therefore the Empire would have to allow the French to extend their claim to the South Pole using the sector principle.

¹⁴⁴ E. 130, Report of the Committee Appointed by the Imperial Conference 1926 to Consider British Policy in the Antarctic, 19 November 1926, Document AU19111926 in Bush, *Antarctica and International Law* 2, 100-107. See also Day, *Antarctica: A Biography*, 200-202.

¹⁴⁵ Fauchille, *Traité de Droit International Public*, 651-663, 733-745; Lindley, *The Acquisition and Government of Backward Territory*; Miller, "Political Rights in the Arctic," 47-60; Miller, "National Rights in the Antarctic," 508-510, and Miller "Political Rights in the Polar Regions," 235-250.

¹⁴⁶ Lindley, *The Acquisition and Government of Backward Territory*, 1401-41; Miller, "Political Rights in the Polar Regions," 239, and Fauchille, *Traité de Droit International Public*, 744-745. Fauchille did not believe that every part of the polar regions was open to state sovereignty. He distinguished between régions arctiques and régions polaires. The former were places, like Spitsbergen, that were capable of settlement, while the latter were places where men could not live for extended periods of time. There could be no annexation of this ice, so that the regions had to remain the communal possession of interested nations. Fauchille suggested that this area could be split into four continental sectors, which all states had the right to exploit. Fauchille, *Traité de Droit International Public*, 658-659. Other jurists agreed that parts of the polar region could not be held under state sovereignty. Arthur Roger Clute, "The Ownership of the North Pole," *Canadian Bar Review* 5, no. 1 (1927): 19-27. Clute was a respected lawyer based in Toronto and a future President of the Royal Canadian Institute. William Edward Hall, *A Treatise on International Law*, 8 Ed., ed. A. Pearce Higgins (Oxford: Clarendon Press, 1924), 124, note 1.

¹⁴⁷ Miller, "Political Rights in the Polar Regions," 239.

More positively, the committee decided that the Empire should claim Coats Land, Enderby Land, Kemp Land, Queen Mary Land, Wilkes Land, King George V Land and Oates Land. Although the committee rejected the proposal to use the “Canadian principle” to support an Australian Antarctic sector claim, it offered the Commonwealth Government the last six territories. Heeding Hurst’s warning that any attempt to immediately annex large unexplored areas would lead to protests from foreign countries, the committee concluded that the process of bringing the rest of the south polar region under British sovereignty would have to be “gradual.”

The committee formulated a three-stage process for the gradual assertion of British sovereignty over the Antarctic, which, as political geographer Sanjay Chaturvedi has pointed out, “became a blueprint for future British action.”¹⁴⁸ In the first step, the committee would publish the names of the seven territories that the Empire intended to claim in the *Summary of Proceedings* for the Imperial Conference, with the explanation that these were lands where “British title already exists by virtue of discovery.” The actual geographic coordinates of the lands were intentionally left blank, to allow for flexibility when making the official claim. An official expedition would then travel to the listed areas and perform formal acts of possession on the actual Antarctic coastline. Finally, the Empire would issue letters patent formally annexing the areas and making provisions for their administration. During this third stage, the committee highlighted, the Empire could enlarge “the areas to be annexed” by the application of the sector principle.¹⁴⁹

The Committee on British Policy in the Antarctic kept Canada’s position in the Arctic firmly in mind throughout its meetings. Its conclusions about the level of occupation required in the polar regions (and the acts of administration that created a successful claim) supported Canada’s position and were in fact less stringent than Ottawa’s. By explicitly embracing the sector principle in its final recommendations the committee implicitly rejected the Admiralty’s call for a challenge to the Soviet sector

¹⁴⁸ Chaturvedi, *The Polar Regions*, 67. See also Beck, “British Antarctic Policy in the Early 20th Century,” 475-83.

¹⁴⁹ E. 130, Report of the Committee Appointed by the Imperial Conference 1926 to Consider British Policy in the Antarctic, 19 November 1926, Document AU19111926 in Bush, *Antarctica and International Law* 2, 100-107.

claim. Britain and the Dominions would remain silent on the annexation. The committee noted that it was “advantageous for the British Government to be able to treat the silence with which the Falkland Island Dependencies Letters Patent and the Ross Dependency Order in Council were received by foreign powers as constituting acquiescence.”¹⁵⁰ The decision makers of the Empire believed that as long as states continued to remain silent about sector claims, showing a tacit acquiescence, the legal cases would grow stronger and the principle would gain greater legal credibility.

3.8 The Sector Principle and Customary International Law

The emphasis the members of the Committee on British Policy in the Antarctic placed on state silence reveals their understanding of customary international law. Legal scholar Hugh Thirlway has described custom as a practice that develops between states because they believe it has advantages or is the most convenient solution to a problem.¹⁵¹ A state makes an offer to the international community of a new way of doing things for a particular area or issue.¹⁵² “At some subsequent moment there is recognition (not necessarily unanimous among those concerned, but at least widespread), that this has become the *way* to deal with that particular problem.”¹⁵³

¹⁵⁰ E.130, Report of the Committee Appointed by the Imperial Conference 1926 to Consider British Policy in the Antarctic, 19 November 1926, Document AU19111926 in Bush, *Antarctica and International Law* 2, 100-107.

¹⁵¹ Hugh Thirlway, *The Sources of International Law* (Oxford: Oxford University Press, 2014), 7. As John Finnis puts it, the community must accept that in an area it is desirable that there be a “determinate, common and stable pattern of conduct and corresponding authoritative rule” and that a particular pattern is “appropriate for that purpose.” John Finnis, *Natural Law and Natural Rights* (Oxford: Oxford University Press, 1980), 238-245. On customary international law, See Michael Akehurst, “Custom as a Source of International Law,” *British Yearbook of International Law* 47, no. 1 (1975); D’Amato, *The Concept of Custom in International Law*; D.J. Biederman, *Custom as a Source of Law* (Cambridge: Cambridge University Press, 2012); Michael Byers, *Custom, Power and the Power of Rules: International Relations and Customary International Law* (Cambridge: Cambridge University Press, 1999); Hilary Charlesworth, “Law-Making and Sources,” in *The Cambridge Companion to International Law*, eds. James Crawford and Martti Koskenniemi (Cambridge: Cambridge University Press, 2012), 187-202; Luigi Condorelli, “Customary International Law: The Yesterday, Today and Tomorrow of General International Law,” in *Realizing the Utopia: The Future of International Law*, ed. Antonio Cassese (Oxford: Oxford University Press, 2012), 147-157; Brian D. Lepard, *Customary International Law: A New Theory with Practical Applications* (Cambridge: Cambridge University Press, 2010); Joost Pauwelyn, *Conflict of Norms in Public International Law* (Cambridge: Cambridge University Press, 2001).

¹⁵² Vaughan Lowe, *International Law* (Oxford: Oxford University Press, 2007), 39.

¹⁵³ Thirlway, *The Sources of International Law*, 7.

Article 38 of the statute of the Permanent Court of International Justice established international custom “evidence of a general practice accepted as law” – as one of the most important sources of international law. The PCIJ’s decision in the *Lotus Case* of 1927 further “anchored the general principles of international law in customary law.”¹⁵⁴ The case arose when a French vessel, the *Lotus*, collided with and sank a Turkish ship. The Turkish authorities started criminal proceedings against the French officer on watch during the collision, but Paris insisted that Turkey had no right to prosecute. The court ruled against the French, arguing that states can “engage in any conduct they wish, unless there is a rule prohibiting that conduct.”¹⁵⁵ “International law governs relations between independent states,” the court’s decision stated. “The rules of law binding upon States therefore *emanate* from their own *free will* as *expressed in conventions or usages* generally accepted as expressing principles of law and established in order to regulate the relations between these co-existing independent communities or with a view to the achievement of common aims.”¹⁵⁶ Customs flowed from the free will of states and their collective decisions.

The problem with customary international law, as Thirlway has pointed out, is “when is it appropriate to expect all participants in the society within which the custom has grown up, perhaps including some who have...not participated in it, to abide by it even when, for those particular participants, or one of them, it is undesired.”¹⁵⁷ In short, when does the crystallization of the practice into rule occur? The North Sea Continental Shelf decision of 1969 set out the two requirements necessary to form customary

¹⁵⁴ J.H.W. Verzijl, *The Jurisprudence of the World Court: a Case by Case Commentary* (Leiden: Sijthoff, 1965), 85. The *Lotus* judgement endorsed an “essentially contractualist paradigm” of international law making and has been deemed extremely positivist. Legal scholar Akbar Rasulov has noted that encased in the decision was one of the court’s most “significant legal-theoretical claims.” Akbar Rasulov, “The Doctrine of Sources in the Discourse of the Permanent Court of International Justice,” in *Legacies of the Permanent Court of International Justice*, eds. Christian Tamas and Malgosia Fitmaurice (Leiden: Martinus Nijhoff Publishers, 2013), 276. See also Ole Spiermann, *International Legal Argument in the Permanent Court of International Justice: The Rise of the International Judiciary* (Cambridge: Cambridge University Press, 2005), 260. Many legal scholars objected to modern positivism. One was Hersch Lauterpacht, who wrote that the positivist lawyer was a “mere chronicler of events laboriously woven into a purely formal pattern of a legal system.” Hersch Lauterpacht, “The Grotian Tradition of International Law,” *British Yearbook of International Law* 23 (1946): 4-5.

¹⁵⁵ Stephen C. Neff, *Justice Among Nations: A History of International Law* (Cambridge: Harvard University Press, 2014), 366.

¹⁵⁶ *SS Lotus* (1927) Permanent Court of International Justice (PCIJ) Series A No. 10 at 18 (emphasis added).

¹⁵⁷ Hugh Thirlway, *The Sources of International Law*, 55.

international law – state practice (the objective element) and *opinio juris* (the subjective element). It described *opinio juris* as “evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it” rather than a political obligation.¹⁵⁸ The idea dates to the nineteenth century, however, and legal experts were referencing it by the 1920s.¹⁵⁹ The *Lotus* ruling, for instance, noted that states must be “conscious of having a duty” to follow a rule.¹⁶⁰

Maurice Mendelson has questioned whether the world court ever looked for proof of *opinio juris* where there is a “well-established practice.” Usually the PCIJ simply assumed the presence of *opinio juris*. Mendelson argues that “Where there is a constant and uniform practice of sufficient generality, in a legal context, it seems legitimate for members of the community to expect all others to continue to observe that practice.”¹⁶¹ In the “wide and elastic doctrine of customary law” held by many international lawyers in the interwar years, state practice played the key role.¹⁶² The 1922 edition of Australian jurist William Pitt Cobbett’s casebook on international law highlighted the centrality of state practice:

Growth of usage and its development into custom may be likened to the formation of a path across a common. At first, each wayfarer pursues his own course; gradually, by reason either of its directness or on some other ground of apparent utility, some particular route is followed by the majority; this route next assumes the character of a track, discernable but not yet well defined, from which deviation, however, becomes more rare; whilst in its final stage the route assumes the shape of a well-defined path, habitually followed by all who pass that way.

¹⁵⁸ *North Sea Continental Shelf*, Judgment, ICJ Reports (1969), at 44 (para. 77).

¹⁵⁹ With François Gény’s *Methode d’interpretation et sources en droit privé positif*. Jörg Kammerhofer, “Uncertainty in the Formal Sources of International Law: Customary International Law and Some of its Problems,” *European Journal of International Law* 15, no. 3 (2004): 534. Oppenheim, *International Law: A Treatise*, 3rd Ed., 21.

¹⁶⁰ Arthur Steiner, “Fundamental Conceptions of International Law in the Jurisprudence of the Permanent Court of International Justice,” *The American Journal of International Law* 30, no. 3 (1936): 416. In his dissenting opinion in the case, Judge Didrik Nyholm elaborated that the foundation of custom was the “united will” of several states constituting a “general consensus of opinion” or a “manifestation of international legal ethics which takes place through the continual recurrence of events with an innate consciousness of their being necessary.” Rasulov, “The Doctrine of Sources in the Discourse of the Permanent Court of International Justice,” 276 n. 16.

¹⁶¹ Maurice Mendelson, “The Subjective Element in Customary International Law,” *British Yearbook of International Law* 66 (1995): 177, 206-208.

¹⁶² Martti Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law, 1870-1960* (Cambridge: Cambridge University Press, 2001), 363.

And yet it would be difficult to point out at what precise moment this route acquired the character of an acknowledged path.¹⁶³

The majority of states do not directly participate in the creation of a norm of customary international law. The role they play, according to Jörg, has been inferred consent – the “qualified silence” of acquiescence taken as evidence that states accept that a practice is consistent with international law.¹⁶⁴ In 1954, Gerald Fitzmaurice highlighted that “it is probably true to say that consent is latent in the mutual tolerations that allow the practice to be built up at all; and actually patent in the eventual acceptance (even if tacit) of the practice, as constituting a binding rule of law.”¹⁶⁵ Although a single act by a single state represents insufficient evidence of state practice, it might be enough if coupled with the acceptance of other States affected by the act.¹⁶⁶ Silence or lack of protest is especially relevant in circumstances that demand a response expressing disagreement or objection. A state’s inaction is thereby interpreted as an “explicit or implicit consent” to another state’s conduct.¹⁶⁷ The passage of time is key to this process. “It is undesirable as a matter of policy that an activity should be tolerated over a period of time, but later condemned as unlawful,” legal scholar Vaughan Lowe has stressed.¹⁶⁸ However, international lawyer Clyde Eagleton noted in 1933, the amount of time and the level of “common consent” required for a practice to become a rule of law are difficult to determine, although some customs have developed quite quickly and without anything close to unanimous

¹⁶³ William Pitt Cobbett, *Leading Cases on International Law* 1, 4th Ed., ed. Hugh H.L. Bellott (London: Sweet and Maxwell, 1922), 5.

¹⁶⁴ Kammerhofer, “Uncertainty in the Formal Sources of International Law,” 533, and Lowe, *International Law*, 46. Hugh Thirlway has noted observed that state practice is two-sided – “one State asserts a right, either explicitly or by acting in a way that impliedly constitutes such an assertion, and the State or States affected by the claim then react either by objecting or by refraining from objection.” If no protest is made, the custom gains support, while it is weakened if there is a protest. Thirlway, *The Sources of International Law*, 70, Hugh Thirlway, *International Customary Law and Codification* (Leiden: Sijthoff, 1972): 58. Of course, as Michael Byers has highlighted, the question arises whether inferred consent can be viewed as proof of state will. The consent in customary international law usually stands for acquiescence, which “often signifies ambivalence or even apathy to the rule in question rather than a conscious support for the rule on the part of the acquiescing State.” Byers, *Custom, Power and the Power of Rules*, 106.

¹⁶⁵ Gerald Fitzmaurice, “The Law and Procedure of the International Court of Justice, 1951-1954: General Principles and Sources of Law,” *British Yearbook of International Law* 30 (1953): 68.

¹⁶⁶ In disputes proof for the belief in the acceptance of state practice as customary international law are: diplomatic correspondence, instructions to diplomats, consuls, opinions and legal document from government officials. Thirlway, *The Sources of International Law*, 64, 65.

¹⁶⁷ Nuno Sérgio Marques Antunes, “Estoppel, Acquiescence and Recognition in Territorial and Boundary Dispute Settlement,” *Boundary and Territory Briefing* 2, no. 8 (2000): 33.

¹⁶⁸ Lowe, *International Law*, 46.

consent.¹⁶⁹ Within this process, there is room for some objection, which does not necessarily derail a practice from becoming a customary rule. The persistent objector is a state that does not accept a rule and has consistently stated this objection since the first application of a new practice.¹⁷⁰

British and Commonwealth officials understood the central role state practice and the silence of acquiescence played in the formation of customary international law. As long as states directly affected by the sector claims chose not to protest the principle, there was a chance it could develop into a well-defined path that all those who endeavoured to claim polar territory might follow.

3.9 The Way Forward

The Imperial Conference of 1926 produced a coherent bi-polar policy that reaffirmed Britain's goal of "trying to paint the whole Antarctic red."¹⁷¹ Henceforth, sectors would be one of the primary tools of the Commonwealth in the Arctic and Antarctic, justifying two years of concerted efforts by officials in Australia, Canada and Britain to construct a firm foundation for the principle. Following from its birth in the Treaties of 1825 and 1867, state practice had continued to develop and shape the principle. Now, when a state established a measure of control over the coastline and the other points of access leading to a polar hinterland – be it the Arctic Archipelago or the Antarctic interior – it had the right to use arguments of contiguity and lines of meridian to extend its sovereignty from the boundaries of the territory it controlled to the Pole. Commonwealth officials maintained that a regime based on their understanding of the sector principle was the best answer to the anomalous legal space of the polar regions. However, the sector principle remained an untested doctrine, justified through a contestable interpretation of two treaties, the doctrine of contiguity, and the argument that state control over the coastline or access points of a polar interior justified claims to the unoccupied and often unknown

¹⁶⁹ "Conclusion of Discussion of Preceding Papers," *Proceedings of the American Society of International Law at Its Annual Meeting (1921-1969)* 27 (1933): 164.

¹⁷⁰ A norm will not apply to the persistent objector, even while it is followed by other states. Thirlway, *The Sources of International Law*, 56.

¹⁷¹ Peter Beck, "Securing the dominant 'place in the wan Antarctic sun' for the British Empire," *Australian Journal of Politics and History* 29, no. 3 (1983): 29.

polar interior beyond. The next few years would be critical as the scramble for polar territory intensified, as states decided whether or not to challenge the Commonwealth's sectors and Australia made plans to claim the largest slice of the Antarctic yet. Would the tacit acquiescence of foreign powers to the sector principle continue? For the time being, Britain's decisive choice to support the sector principle in the Arctic and Antarctic made it the primary shaper of the polar legal landscape.

For the Americans, this pivotal two-year period created more questions than answers about polar sovereignty. Their indecision limited their legal impact on the polar regions. When examined from the standpoint of the Hughes Doctrine, the Americans could easily conclude that the sector claims of the Soviet Union and the countries of the British Empire were "not worth a damn." However, in light of the shortcomings of contemporary international law and no clear blueprint for effective occupation, State Department officials accepted that the Empire and Soviet Union might be justified in writing a new formula for polar sovereignty. If existing international law failed to provide a clear framework for developments in the Arctic and Antarctic, was the Commonwealth really wrong in constructing a new legal regime based on the sector principle, contiguity and limited measures of control? Like all of the other countries with interests in the polar regions, the U.S. needed to answer this question before deciding whether to challenge this new formula for polar sovereignty.

Chapter 4

4 At the Zenith of the Sector Principle, 1927-1933

In January 1948, Foreign Office Legal Adviser Sir William Eric Beckett sat down with a Canadian colleague on the Commonwealth's Polar Committee to discuss the evolution of polar sovereignty over the last half-century. Beckett, who joined the Foreign Office in 1925, had studied territorial claims in the Arctic and Antarctic many times throughout his career. When he spoke on matters of polar sovereignty, British and Commonwealth officials listened.¹ As Beckett reflected on the legal landscape of the polar regions in the 1920s and 1930s, he confidently concluded that the sector principle had been both “fashionable and suitable” at the time. The international community had “widely accepted” that once a state established a modicum of control over “the means of access to virtually uninhabitable territory” – such as the Antarctic interior or the northernmost islands of the Arctic Archipelago – it had the right to extend its sovereignty over these areas using lines of meridian running to the Pole.²

Beckett probably remembered the hopeful conclusions made by the Committee on Polar Questions at the Imperial Conference of 1930. Buoyed by positive reports from the Foreign Office,³ representatives from Canada, Australia, Britain and New Zealand agreed that the Empire's conception of polar sovereignty was on the verge of approval by the international community and that its polar claims were stronger than ever. They concluded that the description of effective occupation articulated by Cecil Hurst at the previous Imperial Conference, which called for “some continuous show of interest” such as the “paying of periodical visits” or the “establishment of some sort of control” over the means of access to a polar territory satisfied the legal requirements of territorial

¹ See, for instance, Statement by Foreign Office Legal Adviser on the Necessity of Physical Occupation as a Means of Securing Sovereignty in the Polar Regions, Polar Committee Meeting, 31 October 1946, Library and Archives Canada (LAC), RG 25, Vol. 3347, File 9092-A-40, part VI.

² Beckett made his comments on the sector principle to Percival Molson, Canada's representative on the Commonwealth's Polar Committee. Percival Molson to the High Commissioner for Canada, London, 16 January 1948, LAC, RG 25, Vol. 3843, File 9092-A-40, pt. 1.

³ See Laurence Collier, Northern Department, Memorandum Respecting Territorial Claims in the Arctic to 1930, 10 February 1930 and Ivone Kirkpatrick, Western Department, Territorial Claims in the Antarctic from 1908 to the end of 1929, 31 July 1930, National Archives (NA), DO 35/167/7.

acquisition in the High Arctic and Antarctic.⁴ Even more optimistically, the committee members decided that the sector principle was close “to securing general acceptance” by all the countries with interests in the polar regions, except Norway.⁵

Scholars have done little to map out state thinking on the sector principle after governments initially utilized it to make their territorial claims. A fresh appraisal of the archival record, however, reveals how British and Commonwealth officials came to believe that the principle stood on the verge of general acceptance as a rule of customary international law for the polar regions. The conclusions of the Committee on Polar Questions stemmed from the international community’s sustained silence on existing polar claims. By 1930, Britain, Canada, New Zealand and the Soviet Union had publicly announced sector claims, thereby asserting a new way of securing title over polar territory. Only Norway persistently and publicly criticized their use of the sector principle.⁶ In the eyes of British and Commonwealth officials, this “qualified silence” represented acquiescence that inferred state consent to the actual territorial claims, and also to the methods and legal arguments used to justify them.⁷ Should such silence continue, officials hoped that the sector principle and the new definition of effective occupation in the polar regions would crystallize into rules of customary international law. To encourage tacit acceptance, British and Commonwealth officials did what they could to safeguard their polar title from official protest and avoided public discussion of the sector principle or the legal foundation of their claims.⁸

Most important, from a British and Commonwealth perspective, was the continued silence of the United States. Customary international law generally reflects the

⁴ Quote taken from Ivone Kirkpatrick, Western Department, Territorial Claims in the Antarctic from 1908 to the end of 1929, pg. 6, 31 July 1930, NA, DO 35/167/7.

⁵ Imperial Conference, 1930, Committee on Polar Questions Report, NA, DO 35/167/7, Report by Committee on Polar Questions, Imperial Conference, 1930, National Archives of Australia (NAA), A981/ANT 4, Part 8; Extract from Imperial Conference Report, 1930, Committee on Polar Questions, NAA, CP452/1, Bundle 2, Imperial Conference 1937, Polar & Antarctic.

⁶ Hugh Thirlway, *International Customary Law and Codification* (Leiden: Sijthoff, 1972), 58.

⁷ As a Canadian legal appraisal highlighted in 1930, the silence of states could “reasonably be accepted as acquiescence” and barred them from protesting Canada’s Arctic title. General Staff, Department of National Defence, “Canadian Political Rights in the Arctic,” 8, 11, LAC, RG 25, File 9057-40 pt.2. See also Jörg Kammerhofer, “Uncertainty in the Formal Sources of International Law: Customary International Law and Some of its Problems,” *European Journal of International Law* 15, no. 3 (2004): 533, and Vaughan Lowe, *International Law* (Oxford: Oxford University Press, 2007), 46.

⁸ Imperial Conference, 1930, Committee on Polar Questions Report, NA, DO 35/167/7.

conduct that is approved or tolerated by the powerful – especially a powerful state directly influenced by the new rule.⁹ Despite the growing public interest in polar affairs and the U.S. Navy’s condemnation of the sector principle, this chapter reveals that the State Department remained indifferent, confused and officially silent on matters of polar sovereignty in the late 1920s and early 1930s. When the British sent a note to Washington laying out their claims and rights in the south polar region in response to Richard Byrd’s Antarctic expedition of 1928-1930 (the first American party to visit the continent since 1840) – which seemed to invite a strong American response based on the Hughes Doctrine – the State Department chose not to issue the note of challenge it prepared. The British, who understood that state silence and a failure to protest were especially relevant in situations that called for a response expressing disagreement or objection, were greatly relieved.¹⁰ Laurence Collier, a Foreign Office expert, concluded that Washington’s unwillingness to formally protest the existing sector claims in the Arctic and Antarctic meant Americans “recognised the Sector Principle to some extent” and were “more or less committed to it in practice.”¹¹

Norway was alone in consistently protesting the use of the sector principle. In the years after the Imperial Conference of 1926, the Norwegian government launched a renewed attempt to secure their own polar empire, threatening Britain’s position in the Antarctic and Canada’s in the Arctic. Norwegian expeditions travelled to the south polar region every Antarctic summer to find and claim new land to support Norway’s whaling interests. At the same time, Norwegian officials questioned the Empire’s conception of polar sovereignty, by asserting their country’s rights in the Ross Dependency and questioning Canada’s title to the Sverdrup Islands by championing a more stringent model of effective occupation. Despite the threat Norway posed to the Empire’s bi-polar interests, Britain found the Norwegian government willing to negotiate. The Norwegians

⁹ M.C.W. Pinto, “Making International Law in the Twentieth Century,” *International Law FORUM du droit international* 6 (2004): 141; Michael Byers, *Custom, Power and the Power of Rules: International Relations and Customary International Law* (Cambridge: Cambridge University Press, 1999).

¹⁰ Gerald Fitzmaurice, “The Law and Procedure of the International Court of Justice, 1951-54: General Principles and Sources of Law,” *The British Year Book of International Law* 30 (1954): 33.

¹¹ See Laurence Collier, Memorandum Respecting Territorial Claims in the Arctic to 1930, 10 February 1930, NA, DO 35/167/7, Territorial Claims in the Arctic and Ivone Kirkpatrick, Western Department, Territorial Claims in the Antarctic from 1908 to the end of 1929, 31 July 1930, NA, DO 35/167/7.

recognized that in practice a minor power required good relations with Britain. As a result, they agreed to respect the Empire's existing sector claims and the territory Australia planned to annex in the Eastern Antarctic. The British hoped that the Norwegians would come to see the benefits of the sector principle and embrace it themselves.

As silence, negotiations and the passage of time strengthened the legal positions of Canada, Britain, New Zealand and Australia in the polar regions, the Empire's optimism and confidence in their polar claims and the sector principle culminated in the establishment of the Australian Antarctic Territory in 1933. The Australian sector covered 5.9 million square miles – approximately 42% of the Antarctic – the interior of which had never been explored. With the creation of the AAT, the sector principle reached its zenith.

4.1 Norway and the Doctrine of Effective Occupation

Norway's attempts to safeguard its Arctic and Antarctic interests achieved few tangible results and, by the beginning of 1927, had even suffered serious setbacks. The British had rejected Norway's assertion of rights in the Ross Dependency and discussions at the Imperial Conference of 1926 revealed the Empire's intent to claim more territory in the Antarctic. The Canadian government had never acknowledged Norway's inquiries about the basis of Canada's claim to the Sverdrup Islands. The most difficult blow for the Danish people was the Soviet's sector claim – especially its inclusion of the Franz Josef Land archipelago, to which the Norwegians believed they had strong territorial rights.¹² Unilaterally, Norway could do little except vigorously protest the Russian claim. Appeals to Britain and the U.S. for support went unanswered. The Norwegians continued to send hunting and scientific expeditions to the archipelago, but there seemed to be little hope of winning the islands from the Soviets.¹³

¹² Between the late nineteenth century and 1926, dozens of Norwegian hunting and scientific parties had ventured to the islands, compared to only five Russian expeditions.

¹³ Norwegian attempts to send an official expedition to the Franz Josef Archipelago to challenge the Soviet sector claim failed, while the Russians had succeeded in raising the flag on the islands and constructed weather stations in the Archipelago with permanent staffs. See Gunnar Horn, *Franz Josef Land: Natural History, Discovery, Exploration and Hunting* (Oslo: Jacob Dybwad, 1930); Susan Barr ed., *Franz Josef Land* (Oslo: Norwegian Polar Institute, 1995), 95-95, 131-134; Ian Gjertz and Berit Mørkved, "Norwegian

Despite these setbacks, the Norwegian government decided to take stronger action to preserve its polar interests, which included whaling and the acquisition of territory. In early 1927, Norwegian Prime Minister Ivar Lykke formally declared that Jan Mayen island was in Norway's sphere of influence, citing a Norwegian meteorological station that had been in operation since 1921. The Norwegian government continued to insist that Denmark's sovereignty did not extend to Eastern Greenland because the Danes had not effectively occupied the region. The government encouraged its citizens to explore, hunt and perform scientific studies in the coastal area of southeastern Greenland, hoping to bolster Norway's rights.¹⁴

Norway also questioned and challenged British claims vis-à-vis the Ross Dependency. Norwegian whalers searched for areas unclaimed by Britain where they could operate without applying for licenses or paying fees.¹⁵ Their efforts found Bouvet Island in December 1927, where the crew of the *Norvegia* – funded by whaling tycoon Lars Christensen and supported by the Norwegian government – landed on, claimed and built a supply hut.¹⁶ On the diplomatic front, Norway's Ministry of Foreign Affairs inquired if the British thought their title extended to the Ross Ice Barrier (Ice Shelf). They reasserted that Amundsen's journey to the Pole gave Norway "a priority to claim sovereignty" over the territory on both sides of his route and the south polar plateau. They also asked how the British justified their claim to King Edward VII Land in the Dependency – an area that had been spotted, but never landed on by Robert Falcon Scott in 1902 – when a Norwegian expedition had actually explored, mapped and occupied the area a few years later.¹⁷ Norwegian challenges to Britain's Ross Dependency claim had become far more pointed than those delivered two years earlier.

Arctic Expansionism, Victoria Island (Russia) and the *Bratvaag* Expedition," *Arctic* 51, no. 4 (1998): 330-335.

¹⁴ Spencer Apollonio, *Lands That Hold Us Spellbound: A Story of East Greenland* (Calgary: University of Calgary Press, 2008), 187.

¹⁵ Einar-Arne Drivenes and Harald Dag Jølle, *Into the Ice: The History of Norway and the Polar Regions* (Gyldendal Akademisk, 2006); Noel D. Barrett, "Norway and the 'winning' of Australian Antarctica," *Polar Record* 45, no. 4 (2009): 360-367.

¹⁶ Ivone Kirkpatrick, "Territorial Claims in the Antarctic from 1908 to the end of 1929," 31 July 1930, NA, FO, 337/95.

¹⁷ Benjamin Vogt to Austen Chamberlain, 13 May 1927, Document NZ13051927, in W. M. Bush ed., *Antarctica and International Law: A Collection of Inter-State and National Documents* 2 (New York: Oceana, 1982-1988), 57-58.

British officials defended the Empire's title to the Ross Dependency. At the Imperial Conference of 1926, the Committee on British Policy in the Antarctic had agreed that the Ross Ice Shelf should be considered a "permanent extension" of the coast that in many places actually rested on solid ground, and therefore could be claimed as land. The Foreign Office repeated this assertion to the Norwegians and further pointed out that Britain's claim to King Edward VII Land stood because no country could show it had done more in the area. As Royal Navy Hydrographer Henry Percy Douglas pointed out, the Norwegians did not "effectively occupy" the land in 1911. They had journeyed some 150 miles from their base, and their "occupation" was a "fortnight's camping in tents, mainly [in] blizzards."¹⁸ The efforts of the Norwegian explorers, according to the British, were legally meaningless in the face of Scott's prior discovery of the area and his effective charting of coastline. Notably, Britain's reply relied on the contiguity doctrine when it argued that from "a geographical standpoint" the area explored by Amundsen on his way to the South Pole was "indissolubly connected" to the territory claimed by Ernest Shackleton in 1909, and as a result was indisputably British.¹⁹

While Britain confidently defended the Ross Dependency, Norway's claim to Bouvet Island proved a greater threat to the Empire's dreams of a "red" Antarctic. A British sealer spotted and claimed the island in 1825, but no one had set foot on it until the Norwegians rowed ashore in 1927. By this point, Foreign Office experts conceded that even in the Antarctic, "where the establishment of any form of continuous control is impossible" a state still had to show its intention to retain sovereignty through administrative efforts and periodic visits. A hundred-year-old claim was legally indefensible.²⁰ Nevertheless, many officials – especially in the Admiralty and Dominions Office – were loathe to admit that the Norwegians had a solid legal footing to Bouvet,

¹⁸ H. Douglas, Hydrographer, Notes on the Norwegian Territorial Claims in the Antarctic, June 1927, NA, ADM 116/2494, Arctic and Antarctic Regions, 1925-1927

¹⁹ Benjamin Vogt to Austen Chamberlain, 13 May 1927, Document NZ13051927, in Bush, *Antarctica and International Law* 2, 57-58; Austen Chamberlain to B. Vogt, 9 December 1927, Document NZ09121927, in Bush, *Antarctica and International Law* 2, 59-60; Territorial Claims in the Antarctic from 1908 to the end of 1929, 31 July 1930, pg. 4-6, NA, DO 35/167/7. See David Day, *Antarctica: A Biography* (Oxford: Oxford University Press, 2013): 203-205.

²⁰ G.H. Villiers to the Under-Secretary of State, Dominions Office, 11 January 1928, NAA, A981, ANT 51 Part 1, Antarctic – Norwegian Claims.

lest they use it to challenge Britain's position in other parts of the south polar region.²¹ The British Empire was simply not interested in having "neighbours at all in the Antarctic."²²

The Norwegians inadvertently bolstered British claims when, shortly after the crew of the *Norvegia* claimed Bouvet, another Norwegian whaling company applied for a license to operate in the general vicinity of the island. The British argued that this represented recognition of their sovereignty, explaining to the Norwegian government that Britain's hundred-year-old claim had been referenced in the 1905 supplement of the 1901 edition of the *Africa Pilot* – an official Admiralty publication.²³ But a defence of its title to Bouvet based on prior discovery, a mere mention in an obscure government publication and a whaling license issued after Norway's claim was a weak position. The British knew it and so did the Norwegians.

In April 1928, Norway's Minister in London, Benjamin Vogt, responded to Britain's rebuttal of the Bouvet Island claim with a detailed legal defence. Despite the British argument that their position on Bouvet Island had been made clear in the Admiralty publication, Vogt maintained that no official notification had ever been given on the status of Bouvet, nor had it been depicted as a British possession in the *Encyclopedia Britannica* or *The Times Atlas of the World*. Furthermore, the island was absent from the list of territories published in the *Summary of Proceedings* for the Imperial Conference of 1926. More importantly, Vogt maintained that his country could not accept any claim to territory based on such a weak foundation as a one-time sighting by a private citizen. The Norwegian note pointed out that leading British jurists – such as William Edward Hall and Lassa Oppenheim – insisted that claims by non-commissioned explorers be ratified soon after by their governments – a practice Britain failed to follow for Bouvet Island and many other areas in the Antarctic where it claimed to have rights. Finally, Vogt insisted that while the Arctic and Antarctic required a lesser degree of

²¹ On the Territorial Status of Bouvet and Thompson Islands, South Atlantic Ocean, NA, ADM 116/2494, Arctic and Antarctic Regions, 1925-1927.

²² R.H. Campbell to A.D.F. Gascoigne, Foreign Office, 18 October 1928, LAC, RG 25, Vol. 1513, File 1928-206-C.

²³ Austen Chamberlain to Norwegian Minister, London, 15 February 1928, Bush, *Antarctica and International Law* 3, 116.

effective occupation than temperate zones, it was “generally admitted” that an occupation in the polar regions still had to be more than “a matter of form.”

The British, Vogt continued, had allowed a hundred years to pass before they took any official action on Bouvet Island. Even if Britain had acquired an inchoate right in 1825, “prominent British writers on international law” agreed that this could “not for an indefinite time constitute a bar to the occupation by another state.” In sharp contrast, Vogt explained, the Norwegian government had commissioned the *Norvegia* expeditions to claim unoccupied lands and a Royal Decree officially and publicly annexed Bouvet, imposing Norway’s laws and police authority on the island.²⁴ The actual expedition had occupied the island for a month, performed sealing, whaling and scientific studies, and constructed a supply hut. They did more in one month than Britain had done in a hundred years. Plans were in place for another party to return to the island and possibly construct a weather station. Vogt concluded that, “Norwegian title to the island is securely founded in international law.”²⁵

In a few pages, Vogt had summed up Norway’s legal position on polar sovereignty. The Norwegians maintained that discovery gave a country special rights, but not a valid title over territory. The rights that flowed from first discovery only crystallized into legal title when a state ratified the actions of the explorer, provided direct official notification to interested governments, and perfected it through effective occupation within a reasonable period, which the Norwegians believed were universal legal principles established at the Berlin Conference of 1884-1885.²⁶

As legal historian Andrew Fitzmaurice has highlighted, during the negotiation over Spitsbergen before the First World War, officials and legal experts used the term *terra nullius* to describe “land without owners and that would remain without owners.”

²⁴ On the laws Norway applied to Bouvet Island, see, for instance, Law No. 3 of 27 February 1930 Concerning Bouvet Island, Document NW27021930A, in Bush, *Antarctica and International Law* 3, 129-130.

²⁵ Benjamin Vogt, Norwegian Minister in London, to Sir Austen Chamberlain, 23 April 1928, Document NW23041928, in Bush, *Antarctica and International Law* 3, 116-119.

²⁶ The Norwegian government followed that practice in the Antarctic, providing official notification of its claims to Bouvet Island, Peter I Island and Queen Maud Land. See Bush, *Antarctica and International Law* 3, 123.

The Norwegians, however, used the term to describe unoccupied polar land, such as Eastern Greenland and the vast majority of the Antarctic, that could be claimed by the first state to properly occupy the territory.²⁷ Although an occupation had to be more than a “matter of form,” even the Norwegians admitted that the requirements should not be too rigid. While they used a permanently staffed weather station on Jan Mayen to justify their annexation of the island, in other polar areas the Norwegians argued that huts – even if used only seasonally or temporarily – and repeated visits by whalers or hunters represented sufficient effective occupation.²⁸ In the Svalbard Archipelago, the first Norwegian governor employed virtually no staff and hired a small boat to take him to the various settlements on the islands. “On a territory twice as large as Belgium, with hardly any resources available it is obvious that the governor could not exercise Norwegian jurisdiction efficiently,” historian Torbjørn Pedersen has pointed out.²⁹ Still, the Norwegians consistently tried to institute something more substantive than paper administrations in the polar territories they claimed.

With a firmly established legal position, the Norwegian government attempted to negotiate with Britain over Bouvet Island. On several occasions, Norwegian officials explained that “while they were adverse to applying such heavy machinery” as the Permanent Court of Arbitration, the level of public interest in Bouvet Island was so high that they could not think of giving up Norway’s claim without an official legal battle. Such a territorial dispute, they warned, could evolve into a general discussion of claims in other parts of the Arctic and Antarctic where British sovereignty was open to challenge and where Norway had special rights based on past exploration. Benjamin Vogt pointed to the Sverdrup Islands, discovered by a Norwegian expedition a little more than two decades earlier, as an example. How could Canada and Britain demand that Norway give up its rights to the Sverdrup Islands because they had not been “utilized since the Norwegian flag was hoisted,” and then ask Norway to accept Britain’s full title to Bouvet

²⁷ Andrew Fitzmaurice, *Sovereignty, Property and Empire, 1500-2000* (Cambridge: Cambridge University Press, 2014), 313.

²⁸ On Bouvet, attempts to build a manned weather station failed, but the Norwegians continued to visit in the summer months and built more huts. Susan Barr, *Norway’s Polar Territories* (Oslo: Aschehough, 1987), 63-64.

²⁹ Torbjørn Pedersen, “Norway’s Rule on Svalbard: Tightening the Grip on the Arctic Islands,” *Polar Record* 45, 233 (2009): 147-148.

Island.³⁰ Prime Minister Johan Ludwig Mowinckel raised this question at the Norwegian Storting. “If Bouvet Island is British, because Captain Norris claimed this island for Britain, without any British citizen visiting it since,” the Prime Minister argued, “then the Sverdrup Islands are Norwegian to a much more substantial extent indeed.” The Norwegian Foreign Ministry supported this assertion with a note to Ottawa in March 1928, recalling there had been no reply to their persistent inquiries about the basis of Canada’s claim to the Sverdrup Islands for three years, and reasserting Norway reserved “all rights ... under International Law in connection with said areas.”³¹

In a flurry of action Norway had threatened the Empire’s position in the Arctic and the Antarctic. Britain’s Minister in Oslo, Francis Lindley, suggested his government seek “an amicable solution.”³² Benjamin Vogt had suggested two courses of action to avoid a territorial dispute between Britain and Norway. First, the two countries could agree on an independent expert jurist to decide on the status of Bouvet Island, whose private verdict could be accepted without all the formalities and dangers of an official arbitration. Or, in a far less complicated course of action, Vogt suggested that Britain renounce its claim to Bouvet Island in return for Norway giving up its rights to the Sverdrup Islands.³³

Waiting in the wings, Lars Christensen sat ready to send another Norwegian expedition to the area of the eastern Antarctic that Australia intended to claim. The Australian government feared that the Norwegian expedition would annex any land that it came upon, including territory laid out by the *Summary of Proceedings* of the Imperial Conference. Richard Casey, Australia’s political liaison officer in London, started his long involvement in Antarctic affairs by insisting that the British government protect Australia’s interests in the region. Casey asked Permanent Under Secretary of Foreign

³⁰ Telegram from Sir F. Lindley to Sir Austen Chamberlain, 17 February 1928, NAA, A981, ANT 51 Part 1, Antarctic – Norwegian Claims; F.O. Lindley to Austen Chamberlain, 12 March 1928, NA, FO 337/91.

³¹ Thorleif T. Thorleifsson, “Norway ‘Must Really Drop their Absurd Claims Such as That to the Otto Sverdrup Islands.’ Bi-Polar International Diplomacy: the Sverdrup Islands Question, 1902-1930” (Master’s thesis: Simon Fraser University, 2006), 52, 63.

³² Sir Francis Lindley to Sir Austen Chamberlain, 17 February 1928; Lindley to Chamberlain, 19 February 1928, NAA, A981, ANT 51 Part 1, Antarctic – Norwegian Claims.

³³ Lord Cushendun to Mr. Gascoigne, Oslo, 23 October 1928, LAC, RG 25, Vol. 1513, File 1928-206-C; Ivone Kirkpatrick, “Territorial Claims in the Antarctic from 1908 to the end of 1929,” 31 July 1930, 7, NA, FO, 337/95.

Affairs Sir Ronald Lindsay to ensure that “that no diplomatic stone be left unturned to warn the Norwegians off.”³⁴ As British officials contemplated how to handle the Norwegian threat, they found the situation in the polar regions growing ever more complicated.

4.2 Britain’s Polar Empire at Risk?

In the summer of 1928, the British set up an Antarctic Committee to better coordinate the Empire’s strategy in the region. As the challenges to Britain’s plan for a “red” Antarctic mounted, the committee concluded that polar issues had to be “visualized as a whole.”³⁵ The picture looked bleak for the Empire. In the spring and summer of 1928, the French government inquired about the Letters of Patent for the Falkland Islands Dependencies (FID), which had absorbed Louis-Phillipe Land, Joinville Island and other territories discovered by the expeditions of Jean-Baptiste Charcot between 1904 and 1911.³⁶ Argentina continued to run its wireless station on Laurie Island in the South Orkneys without a license from Britain, and the government issued its first public enunciation of a claim to territory in the FID. The Argentineans explained to the Universal Postal Union, “Argentine territorial jurisdiction extends de jure and de facto over the continental surface, territorial sea and islands situated off the maritime coast, to a portion of the Islands of Tierra del Fuego, the Archipelago of Staten, New Year, South Georgia, South Orkneys and polar territory not delimited.”³⁷

News of the impending Antarctic expedition of American explorer Richard Byrd was even more worrisome to the British than potential challenges from Norway, France and Argentina. According to historian Tom Griffiths, Byrd was a “systematic colonizer of

³⁴ R.G. Casey to the Prime Minister, 16 August 1928, <http://www.dfat.gov.au/publications/historical/volume-18/historical-document-18-147.html> (accessed 15 April 2014).

³⁵ Minutes of the 4th Meeting of the Interdepartmental Committee on the Antarctic, 15 October 1928, NA, DO 114/34.

³⁶ Ivone Kirkpatrick, Territorial Claims in the Antarctic from 1908 to the end of 1929, 31 July 1930, pg. 10, NA, DO 35/167/7

³⁷ Christopher Joyner, “Anglo-Argentine Rivalry after the Falklands/Malvinas War: Laws, Geopolitics, and the Antarctic Connection,” *Lawyer of the Americas* 15, no. 3 (1984): 471. In academic settings, Argentine international lawyers and scholars also started to assert that their country had territorial rights to large parts of the FID, including South Georgia and the South Orkneys. Laura H. Martin, “The Arctic and the Antarctic,” in *Report of the Round Tables and General Conferences at the Tenth Session, Institute of Politics*, ed. Arthur H. Buffington (Williamstown: Institute of Politics, 1930), 50-56.

the ice” who advocated for permanent occupation in the region from the start of his Antarctic forays.³⁸ With support from the American Geographic Society, Byrd planned for a party of fifty men to complete a two-year stay in the Antarctic supported by three aircraft and two ships. Byrd’s expedition would bring mechanized equipment, modern communications, aerial mapping and advanced scientific equipment to the Antarctic – making it the most expensive and technologically advanced mission to the region. Mirroring the plans he made for the MacMillan expedition in 1925, Byrd again decided to establish his base on polar territory claimed by the British Empire – this time on the Ross Ice Barrier of the Ross Dependency. The site selection, chosen more for accessibility than political reasons, could be interpreted as semi-permanent occupation of British territory. From this base, his expedition would push into the vast unexplored space between the Ross Dependency and the FID, and attempt the first flight over the South Pole.³⁹ While the State Department had not indicated any plans to support an Antarctic territorial claim based on Byrd’s work, British officials feared the worst.

Norway’s attempts to bring the Sverdrup Islands into its Antarctic negotiations over Bouvet Island forced British officials to also consider Canada’s sovereignty in the Arctic. By 1928 there were seven Royal Canadian Mounted Police (RCMP) posts in Canada’s Arctic, the majority situated along the eastern fringe of the Archipelago. That summer, RCMP patrols covered 7500 miles on and between Ellesmere, Axel Heiberg, Devon and Baffin Islands.⁴⁰ Still, Canada’s Under Secretary of State for External Affairs, O.D. Skelton, lamented that “the situation as to the recognition of Canadian sovereignty in the Arctic is not entirely satisfactory.” Several American scientific parties had gone north after the MacMillan expedition and applied for Canadian permits, but they only ventured as far as Baffin Island. As a result, the U.S. government held back its acceptance of Canada’s sovereignty over Ellesmere and the other islands north of Parry

³⁸ Tom Griffiths, *Slicing the Silence: Voyaging to Antarctica* (Cambridge, Massachusetts: Harvard University Press, 2007), 121-122.

³⁹ See Lisle A. Rose, *Explorer: The Life of Richard E. Byrd* (Columbia: University of Missouri Press, 2008), 215-248. See also Richard Byrd, *Skyward* (New York: Putnam, 1928):,305, 317.

⁴⁰ In 1928 the Royal Canadian Mounted Police even acquired its own Arctic patrol vessel the *St. Roch*. Ken Coates, P. Whitney Lackenbauer, William R. Morrison, and Greg Poelzer, *Arctic Front: Defending Canada in the Far North* (Toronto: Thomas Allen, 2008), 52.

Channel. On occasion, the American press and legal experts pointed out that the U.S. did not and should not recognize Canada's sovereignty above latitude 75°N.⁴¹

Unwilling to draw any attention to sovereignty issues, Skelton refused to provide a journalist from the *Toronto Star* with information for an article on Arctic claims because he "considered that our position had not been thoroughly satisfactory in the past but was steadily improving, and that we deprecated premature discussion."⁴² Regardless of their desire to avoid public discourse on the subject, Canadian officials feared that Norway's attempts to draw the Sverdrup Islands into ongoing Antarctic negotiations would cast an unwanted spotlight on Canada's Arctic claim.⁴³ The British understood Ottawa's concerns and sought a strategy that would insulate Canada from the fallout of the Empire's Antarctic dispute.

Despite this dizzying array of polar problems, British officials maintained that Empire's claims were strengthened by acts of occupation conducted by the Discovery Committee in the Antarctic and the RCMP in the Arctic. Administrative efforts, including Ottawa's creation of the Arctic Game Preserve and Britain's control of the whaling industry, also bolstered their position.⁴⁴ Although the French interest in the FID raised some alarm, but the Foreign Office doubted they would challenge Britain's claim.⁴⁵ The possibility of an official Argentine challenge to the FID worried the Antarctic Committee, but the Foreign Office maintained that, if allowed to operate their wireless station unlicensed on Laurie Island, the Argentines would not publicly test Britain's title.⁴⁶

⁴¹ For an example, see "Clash Over Claims to Arctic Regions," *The New York Times*, 5 August 1930. See the discussion of polar sovereignty by the roundtable on the Arctic and Antarctic held at the Institute of Politics conference at Williamstown in 1930. Martin, "The Arctic and the Antarctic," 42–56.

⁴² O.D. Skelton to Vincent Massey, Canadian Minister to the United States, 20 February 1928, LAC, RG 25, Vol. 1513, File 1928-207

⁴³ Thorleifsson, "Norway 'Must Really Drop their Absurd Claims Such as That to the Otto Sverdrup Islands,'" 62, 82.

⁴⁴ Record of Conversation Between Mr. Amery and Sir Ronald Lindsay, 21 September 1928, NAA, A981, ANT 51 Part 1, Antarctic – Norwegian Claims. To combat the Norwegian factory ships that were able to operate outside the territorial waters of the Antarctic Dependencies, Britain and New Zealand imposed new whaling licenses that were only granted if their stipulations were also followed in the High Seas. To support the new system, Amery ordered British officials to stop whalers from taking on the supplies they needed to operate in international water and deny facilities to unlicensed ships. See Day, *Antarctica: A Biography*, 200; Klaus Dodds, *Geopolitics in Antarctica: Views from the Southern Oceanic Rim* (West Sussex: John Wiley and Sons, 1997), 161; Bush, *Antarctica and International Law* 3, 56.

⁴⁵ Territorial Claims in the Antarctic from 1908 to the end of 1929, 31 July 1930, NA, DO 35/167/7.

⁴⁶ South Orkney Islands, Foreign Office, 11 July 1930, NA, CO 78/186/10.

Despite this underlying optimism, British officials realized that they required stronger responses to the Norwegians and the Byrd expedition if they hoped to defend the Empire's polar interests.

4.3 A Gentlemen's Understanding... But Not on the Sector Principle

To dissuade the Norwegians from challenging the Empire's vast annexations in the Antarctic, British officials often leaned on the sector principle. At a meeting on 23 December 1929, for instance, Ambassador Charles Wingfield explained to Prime Minister Mowinckel that "Great Britain has unimpeachable rights to the whole of these sectors, including all land down to the South Pole, an extension which was looked upon as the inseparable hinterland of the coastal territory in each sector."⁴⁷ In defence, Norwegian officials consistently pointed out that their country denounced the use of the sector principle⁴⁸ and, as Mowinckel explained, "could not accept [Britain's] wholesale claims to large sectors of [the] Antarctic."⁴⁹

British officials turned to an unlikely argument to bolster the Empire's position against Norway's rejection of sector claims. In the lead-up to the Imperial Conference of 1926, British officials had rejected Australia's request to claim its Antarctic sector on the basis of the "Canadian principle": that polar territory should simply be governed by the closest state. Instead, they concluded that sector claims did not emanate from the proximity of the claimant state, but from "territory already held by the Power concerned." It was a careful distinction that the British hoped would stop the Argentines and Chileans from considering a sector claim in the Antarctic based solely on their geographic proximity. Despite their initial rejection of the idea, however, the temptation to use the "Canadian principle" against Norway – a northern hemisphere country with no territorial possessions close to the Antarctic – proved too much.⁵⁰

⁴⁷ Cited in Bush, *Antarctica and International Law* 3, 276-277.

⁴⁸ Charles Wingfield, Oslo, to the Right Honourable Arthur Henderson, Principal Secretary of State for Foreign Affairs, 23 December 1929, NAA, A981, ANT 51, Part 2, Antarctic – Norwegian Claims.

⁴⁹ Telegram from Major Casey, 14 January 1930, NAA, A981, ANT 51, Part 2, Antarctic – Norwegian Claims.

⁵⁰ For another discussion of Britain's use of geographic proximity arguments see Sanjay Chaturvedi, *The Polar Regions: A Political Geography* (London: John Wiley and Sons, 1996), 70-71.

On several occasions over the next few years, Foreign Office officials explained to the Norwegians that the projection of the Falkland Islands, South Africa, Australia and New Zealand “down towards the Antarctic continent, gave the British empire a very special interest in the political rights over those areas.”⁵¹ Due to the geographic locations of its component parts, the British Empire held the best position to maintain control in the Antarctic, and thus had a better right to claim territory there than other countries.⁵² Ambassador Wingfield captured the argument best in January 1934 when he noted that the Empire’s sector claims sprang “very naturally” from the proximity of British territory, which caused its subjects to look at the Antarctic as a “special preserve, which should not fall into alien hands.” The sector principle, the ambassador added, was merely an “effort to put this very reasonable idea of propinquity and consequent permanent interest into legal phraseology.”⁵³ The Norwegians, however, remained unconvinced and continued to stress the need for effective occupation.

Foreign Office officials worried that if they pushed the Norwegians too hard on Bouvet Island or the sector principle it might spark an official challenge to the Empire’s claims throughout the Arctic and Antarctic.⁵⁴ The resultant judicial decision from arbitration – especially any comments on the principles of territorial acquisition in the Arctic and Antarctic – could negatively affect the Empire’s polar claims.⁵⁵ At this point, the Foreign Office preferred legal uncertainty in the polar regions rather than risk a definitive legal decision that could have criticized contiguity, the sector principle or set a high bar for effective occupation.⁵⁶

⁵¹ R.H. Campbell to A.D.F. Gascoigne, Foreign Office, 18 October 1928, LAC, RG 25, Vol. 1513, File 1928-206-C.

⁵² Record of Conversation Between Mr. Amery and Sir Ronald Lindsay, 21 September 1928, NAA, A981, ANT 51 Part 1, Antarctic – Norwegian Claims.

⁵³ Charles Wingfield to A.W.A. Leeper, 3 January 1934, NA, CO 78/194/17.

⁵⁴ Charles Wingfield to the Right Honourable Arthur Henderson, Principal Secretary of State for Foreign Affairs, 17 December 1929, NAA, A981, ANT 51, Part 2, Antarctic – Norwegian Claims.

⁵⁵ Sir F. Lindley to Sir Austen Chamberlain, 17 February 1928 and Lindley to Chamberlain, 19 February 1928, NAA, A981, ANT 51 Part 1, Antarctic – Norwegian Claims.

⁵⁶ This strategy reflected Britain’s broader legal approach towards territorial claims. When the British finally signed on to the optional clause of the Permanent Court of International Justice in 1929. They inserted a reservation that Britain only had a duty to arbitrate future disputes. One of the primary reasons for this reservation was Britain’s desire to avoid being drawn into territorial disputes, which were usually grounded in historic events. Lorna Lloyd, *Peace Through Law: Britain and the International Court in the 1920s* (Cambridge: Royal Historical Society, Boydell Press, 1997); and Hugh Lauterpacht, “The British Reservations to the Optional Clause,” *Economica* 29 (1930): 137-172 at 140.

While fears about the legal ramifications of an Antarctic dispute pushed British officials to seek an “amicable solution” with the Norwegians over Bouvet Island, they also appreciated Ronald Lindsay’s desire to take a softer diplomatic approach to the situation. The new Permanent Under Secretary did not like the current political tension in the Antarctic. “We are embarking on a kind of scramble for territory similar to that which took place in the eighties for Africa. This is a reversion to obsolete practices which is very much to be deprecated,” Lindsay insisted. He thought that the crux of the problem was that Australia and Norway were “new states who lack the experience we enjoy. I should have thought that there is room for everybody in the Antarctic, unless Australia is deliberately trying to keep everybody out of it except herself, and this is a *reductio ad absurdum*.”⁵⁷ Lindsay recognized that the Norwegians were heavily involved in the whaling industry and thought it only natural that they wanted land bases in the south polar region to support their efforts.⁵⁸ With these considerations in mind, the British decided to make a deal with the Norwegians.

Britain had to consider the polar interests of Canada, Australia and South Africa while deliberating a suitable bargain with Norway. They first thought to protect Canada’s Arctic claim by accepting Benjamin Vogt’s proposal and trading the Empire’s recognition of Norway’s title to Bouvet Island for the official renunciation of any Norwegian rights to the Sverdrup Islands.⁵⁹ Richard Casey and the Australian government, however, argued that if the British were to make a deal with the Norwegians over Bouvet Island, it should protect Australia’s territorial interests in the Antarctic, not Canada’s in the Arctic.⁶⁰ Regardless of whether the British chose to protect Australia’s or

⁵⁷ Cited in Dodds, *Geopolitics in Antarctica*, 81.

⁵⁸ Record of Conversation Between Mr. Amery and Sir Ronald Lindsay, 21 September 1928, NAA, A981, ANT 51 Part 1, Antarctic – Norwegian Claims.

⁵⁹ H.H. Campbell, Foreign Office to Under-Secretary of State, Dominions Office (Amery), 21 July 1928, NAA, A981, ANT 51 Part 1, Antarctic – Norwegian Claims.

⁶⁰ Major Casey to Right Honourable S.M. Bruce, Prime Minister of the Commonwealth, 23 August 1928 and Casey to External Affairs, 24 August 1928, NAA, A981, ANT 51 Part 1, Antarctic – Norwegian Claims. See also Marie Kawaja and Tom Griffiths, “‘Our great frozen neighbour’: Australia and Antarctic Before the Treaty, 1880-1945,” in *Australia and the Antarctic Treaty System: 50 Years of Influence*, eds. Marcus Haward and Tom Griffiths (Sydney: University of New South Wales Press, 2011), 25-26; See Marie Kawaja, “Extending Australia’s Control Over its ‘Great Frozen Neighbour,’” *Proceedings of the Symposium to Mark 75 Years of the Australian Antarctic Territory* (February 2012): 22-31. On Casey’s involvement with Antarctic affairs see, Carl Murray, “Richard Casey,” in *Australia and the Antarctic*

Canada's polar positions, recognizing Norway's claim to Bouvet would direct the Norwegians into the Antarctic region south of Cape Good Hope – an area to which South Africans officials tentatively considered a claim.⁶¹

In the end, the British concluded that South Africa's fledgling interest in the Antarctic could be sacrificed, while Canada's position in the Arctic required less protection than Australia's territorial rights in the south polar region. Lindsay decided to offer Britain's unconditional acceptance of Norway's claim to Bouvet Island, in return for a private verbal assurance that the Norwegians would not annex any of the territory listed in the *Summary of Proceedings* produced by the Imperial Conference of 1926.⁶² The Antarctic Committee agreed with Lindsay's assessment and concluded that Bouvet Island would serve nicely as a "beau geste" in the game of Antarctic politics.⁶³

Historian Thorleif Thorleifsson has highlighted that while Norway wanted to annex new Antarctic territory for national prestige and to support its whaling interests, maintaining a good relationship with Britain remained an essential part of its foreign policy.⁶⁴ As a result, the Norwegians accepted the "gentlemen's understanding" in November 1928 to stabilize relations with the Empire in the polar regions.⁶⁵ In February 1929, a Norwegian crew landed on and claimed Peter I Island (first discovered by Russian explorer Fabian Gottlieb Thaddeus von Bellinghausen more than a century earlier), absent from the *Summary of Proceedings* – a sign of Norway's adherence to the new agreement. With their claim to Bouvet Island secure, the Norwegians decided to

Treaty System: 50 Years of Influence, eds. Marcus Haward and Tom Griffiths (Sydney: University of New South Wales Press, 2011), 74-77; Klaus Dodds, *Geopolitics in Antarctica*, 81.

⁶¹ As Antarctic scholar Klaus Dodds has related, "South African officials were aware that their interests in the Antarctic were only part of a wider diplomatic and political game that encapsulated both polar regions." Klaus Dodds, "South Africa and the Antarctic, 1920-1960," *Polar Record* 32, no. 180 (1996): 29.

⁶² While some officials wanted to insist Norway issue a public and official assurance, Lindsay thought this would place the Norwegian government in a difficult position with its people, who strongly believed that most of the Antarctic was free for the taking. Sir Ronald Lindley to Earl of Birkenhead, 11 September 1928 and Record of Conversation Between Mr. Amery and Sir Ronald Lindsay, 21 September 1928, NAA, A981, ANT 51 Part 1, Antarctic – Norwegian Claims.

⁶³ Minutes of the 5th Meeting of the Interdepartmental Committee on the Antarctic, 1 November 1928, NA, DO 114/34.

⁶⁴ Thorleifsson, "Norway 'Must Really Drop their Absurd Claims Such as That to the Otto Sverdrup Islands,'" 37, 49, 56.

⁶⁵ Territorial Claims in the Antarctic from 1908 to the end of 1929, 31 July 1930, NA, DO 35/167/7

release the Sverdrup Islands as a bargaining chip. If Canada paid Otto Sverdrup a grant in recognition of his exploratory efforts, Norway would renounce its rights to the area.⁶⁶

The whaling magnate Lars Christensen and other Norwegian citizens wanted more territory in the Antarctic. The British had failed to provide specific boundaries for the areas listed in the *Summary of Proceedings*, leaving their extent open to interpretation.⁶⁷ Christensen used this logic to justify sending the *Norvegia* south again to explore Enderby Land, at the western edge of the proposed Australian sector (which had not been seen since John Biscoe sighted it in 1831).⁶⁸ Although Oslo promised to keep to the gentlemen's agreement – to let the lands lie unclaimed – a suspicious Antarctic Committee concluded that it was “very difficult to predict with confidence the intentions of the Norwegian Government.”⁶⁹ Concerned about the *Norvegia* expedition, Richard Casey warned the Australian Prime Minister that Norway's actions should be considered “ominous” given the country's “militancy...in Antarctic matters.”⁷⁰

Public statements about sovereignty from Norwegian officials raised further concerns from Britain, Australia and Canada. In early November 1929, for instance, Prime Minister Mowinckel gave a public speech on Norway's legal position in the polar regions. While his main intention was to safeguard Norway's rights to Franz Josef Land by attacking its annexation by the Soviet Union, he also criticized sector claims more generally. The Prime Minister explained that his government embraced the “ordinary international point of view” that territorial claims, even in the polar regions, required effective occupation.⁷¹ In short, Mowinckel painted his country as a principled adherent of international law, while Britain, Canada and the Soviet Union ignored the accepted

⁶⁶ Thorleifsson, “Norway ‘Must Really Drop their Absurd Claims Such as That to the Otto Sverdrup Islands,’” 65.

⁶⁷ Barret, “Norway and the ‘winning’ of Australian Antarctica,” 366.

⁶⁸ Ivone Kirkpatrick, “Territorial Claims in the Antarctic from 1908 to the end of 1929,” 31 July 1930, NA, FO, 337/95.

⁶⁹ Meeting of the Antarctic Committee, 18 November 1929 and Telegram from Major Casey, 14 January 1930, NAA, A981, ANT 51, Part 2, Antarctic – Norwegian Claims. Some British officials started to argue that Norway's verbal assurances were of “doubtful value.” Telegram from Casey to External Affairs, 14 October 1929, NAA, A981, ANT 51, Part 2, Antarctic – Norwegian Claims.

⁷⁰ Casey to the J.H. Scullin, Prime Minister of the Commonwealth, ‘Norway and the Antarctic,’ 21 November 1929, NAA, A981, ANT 51, Part 2, Antarctic – Norwegian Claims.

⁷¹ See Laurence Collier, Memorandum Respecting Territorial Claims in the Arctic to 1930, 10 February 1930, NA, DO 35/167/7; Gillian Triggs, *International Law and Australian Sovereignty in Antarctica*, (Sydney: Legal Books, 1986), 91.

rules. Reinforcing Mowinckel's arguments, the Norwegian government sent a third note to London reaffirming Norway's rights to the south polar plateau and to Edward VII Land in the Ross Dependency.⁷²

Throughout 1929, British officials grew more annoyed by perceived Norwegian intransigencies.⁷³ Laurence Collier, a member of the Foreign Office's Northern Department and a representative on the Antarctic Committee, wanted to inform the Norwegian government that its "policy of staking claims all over the world" annoyed London. The latest example was the annexation of Jan Mayen – an island that British citizens had helped explore. Collier thought the British government should clarify that "with regard to this Island there were certain grounds on which we could make trouble if we wanted to." Only if the Norwegians officially dropped their "absurd claims" in the polar regions, Collier advised, should the British recognize their title to Jan Mayen.⁷⁴

The Antarctic Committee discussed Collier's idea at a meeting in October. O.D. Skelton insisted that from Ottawa's perspective Canada's title was strong, resting "on the ground both of contiguity and administrative arrangements," which included RCMP posts and patrols. Although confident, Canada desired the "definite and final abandonment" of Norway's rights to the islands and had accepted the Norwegian overtures to compensate Sverdrup for his exploratory services in return for such an admission. Sverdrup's representatives, however, had set an exorbitant price of £60,000. Skelton suggested that British and Canadian recognition of Norway's claim to Jan Mayen might serve as an "additional counter-weight" in the looming negotiations. Whatever form the final agreement took, Ottawa did not want to acknowledge that Norway did, indeed, have special rights to the Sverdrup Islands.⁷⁵

⁷² Norwegian Minister Benjamin Vogt to Foreign Secretary Arthur Henderson, 8 November 1929, Document NZ08111929, in Bush, *Antarctica and International Law* 3, 62-63.

⁷³ Thorleifsson, "Norway 'Must Really Drop their Absurd Claims Such as That to the Otto Sverdrup Islands,'" 58.

⁷⁴ Minutes of the 20th Meeting of the Interdepartmental Committee on the Antarctic, 13 May 1929, Chaired by Sir H. Batterbee, NA, DO 114/34. The Canadians were informed that the British were considering trading recognition of Norway's claim to Jan Mayen in return for the abandonment of their "extravagant claims" elsewhere in the polar regions, especially to the Sverdrup Islands. H.J. Seymour for the Secretary of State to the High Commissioner in Canada for the United Kingdom, 29 May 1929, NA, DO 114/34.

⁷⁵ Minutes of the Antarctic Committee, 28 October 1929, NA, DO 114/34.

Although some British officials characterized additional negotiations with Norway as akin to “flogging a dead horse,”⁷⁶ most thought it prudent to arrive at a general settlement with the Norwegian government on polar issues. After the private *Norvegia* expedition planted the Norwegian flag in newly discovered territory between Kemp Land and Enderby Land, within the sector Australia hoped to claim, support for settlement grew.⁷⁷ The continued failure of the Canadians and Otto Sverdrup to agree on an amount for his compensation added further impetus for the British to seek another understanding.⁷⁸

By the middle of January 1930, Britain, Norway and Canada all desired to avoid a prolonged conflict over polar issues. Norwegian Prime Minister Mowinckel echoed the sentiments of all three governments when he advised the national council that, “conflict with Britain would only harm our other bi-Polar interests.” The resolution came in a triangular agreement. The Canadians and British agreed to recognize Norway’s claim to Jan Mayen, while the latter encouraged the Norwegians to annex the largely unknown Antarctic sector between Enderby Land and Coats Land on the edge of the FID. In return, the Norwegians agreed to confine their search for Antarctic territory to the west of longitude 45°E, the western limit of the proposed Australian sector (the *Norvegia* expedition had just discovered new stretches of coastline in this area, which it named Dronning Maud Land and Crown Princess Martha Land). They also promised to officially recognize Canada’s sovereignty over the Sverdrup Islands and deny ever having any rights to them as long as Ottawa paid Otto Sverdrup a lump sum (later determined to be \$67,000) for his maps, personal papers and efforts, and gave Norway

⁷⁶ Some probably agreed with Foreign Office official Charles Howard-Smith who argued that the British had already made their position clear and questioned whether there was “any use flogging a dead horse.” Minutes of the Meeting of the Antarctic Committee, 8 January 1930, NA, DO 35 1542/2.

⁷⁷ Although the Norwegian government never officially ratified the claim. Hjalmar Riiser-Larsen, “The *Norvegia* Antarctic Expedition of 1929-1930,” *Geographical Review* 20, no. 4 (1930): 555-573; Charles Wingfield, Oslo, to the Right Honourable Arthur Henderson, Principal Secretary of State for Foreign Affairs, 28 December 1929, NAA, A981, ANT 51, Part 2, Antarctic – Norwegian Claims.

⁷⁸ Telegram to the High Commissioner in Canada for the United Kingdom, 1 January 1930, NA, DO 114/34.

hunting and fishing rights in the region (which it would never use).⁷⁹ With the agreement, the complicated bi-polar diplomacy between Canada, Britain and Norway came to an end.

Despite the concessions it had made, Norway emerged from the tri-lateral negotiations with its legal position on the polar regions intact. While willing to recognize Canada's sovereignty over the Sverdrup Islands, the Norwegians carefully noted that this did not imply their acceptance of the sector principle. Norwegian officials consistently highlighted their country's opposition to sector claims in the Arctic and Antarctic, and its support of a more stringent level of effective occupation.⁸⁰ At the same time, private Norwegian expeditions continued to venture into the Eastern Antarctic territory Australia hoped to claim.⁸¹ Despite Oslo's insistence that it would respect the new polar agreement, in London, Foreign Office officials worried that a change of government could lead to a greater willingness to challenge the Empire's polar claims.⁸² Nevertheless, British officials still hoped that Norway would come to see the benefits of the sector principle, and that it would "secure recognition in theory even by the Norwegian Government, who have now little to lose, and...some to gain by such recognition."⁸³

4.4 The American Challenge that Never Came

Throughout their negotiations with the Norwegians, British officials feared that the U.S. would emerge as a greater threat to the Empire's interests in the south polar region – a

⁷⁹ Sverdrup received his compensation just weeks before he died in November 1930. As Thorleifsson has explained, the hunting and fishing rights had "no practical importance" but "served to satisfy public opinion groups and pressure groups in the Norwegian domestic context." Thorleifsson, "Norway 'Must Really Drop their Absurd Claims Such as That to the Otto Sverdrup Islands,'" 3-4, 80-82; Gordon W. Smith, *A Historical and Legal Study of Sovereignty in the Canadian North*, ed. P. Whitney Lackenbauer (Calgary: University of Calgary Press, 2014), 295-311. See also British Memorandum to Norway Concerning the Activities of the *Norvegia* in the Australian Antarctic Sector, 20 January 1930, Document NW20011930 in Bush, *Antarctica and International Law* 3, 128-129 Norwegian Charge d'Affaires, London to Foreign Secretary Arthur Henderson, 8 August 1930, Document NW08081930 in Bush, *Antarctica and International Law* 3, 133.

⁸⁰ For example, in January 1931, Norwegian Minister in Washington Halvard Bachke gave an address on U.S. radio in which he noted: "The Norwegian Government is firmly opposed to this system of politically dividing up Arctic and Antarctica in sectors of quadrants and has made no concealment of its opposition thereto." R.C. Lindsay, British Embassy, Washington D.C., 20 January 1931, NAA, A981, ANT 51 Part 1, Antarctic – Norwegian Claims.

⁸¹ Day, *Antarctica: A Biography*, 257-258, 270; Philip Ayres, *Mawson: A Life* (Carlton South: Melbourne University Press, 1999), 199.

⁸² Charles Wingfield, British Legation, Oslo, to Foreign Office, 27 June 1931, NA, DO 114/34.

⁸³ See Laurence Collier, Memorandum Respecting Territorial Claims in the Arctic to 1930, 10 February 1930, NA, DO 35/167/7.

feeling spurred on by Richard Byrd's Antarctic expedition and his plans to establish a base in the Ross Dependency. Esme Howard, Britain's ambassador in Washington, reported that since his arrival in the capital four years earlier, the U.S. government had not shown any interest in the Antarctic. In light of the Byrd expedition "and the growing desire of the United States to have a finger in every pie which may produce a plum or two," however, Howard predicted that the Americans would challenge the Empire's claims in the Antarctic.⁸⁴

Howard's comment reflected the broader tensions in the Anglo-American relationship, which reached a low point between 1927 and 1929. The continued disagreements on naval issues (such as how many cruisers each country should be allowed) and London's perception of a lack of consultation by Washington during negotiations for the Kellogg-Briand Pact fed the unease.⁸⁵ The growing economic and technological power of the U.S. also concerned many British officials who now perceived the Americans as a rival that could replace them as leader in world affairs. Just a month after Richard Byrd left for the Antarctic, Robert Craigie, head of the American Department in the Foreign Office, admitted that his country faced, "a phenomenon for which there is no parallel in our modern history – a State twenty-five times as large, five times as wealthy, three times as populous, twice as ambitious, almost invulnerable, and at least our equal in prosperity, vital energy, technical equipment and industrial science."⁸⁶ Byrd's expedition was a manifestation of American ambition, technological achievements, energy and resources into the Antarctic and British officials wondered how they could possibly match these efforts.

⁸⁴ Esme Howard, British Embassy, Washington D.C., to Sir Austen Chamberlain, 12 April 1929, NAA, A981, ANT 54 PART 1, USA Claims I.

⁸⁵ The Kellogg-Briand Pact was an international agreement in which signatory states agreed not to use war to resolve their disputes. See Brian McKercher, *The Second Baldwin Government and the United States, 1924-1929: Attitudes and Diplomacy* (Cambridge: Cambridge University Press, 1984), 140-158.

⁸⁶ Memo by R. Craigie, 12 November 1928, quoted in McKercher, *The Second Baldwin Government and the United States*, 174. See also John Darwin, *The Empire Project: The Rise and Fall of the British World System, 1830-1970* (Cambridge: Cambridge University Press, 2009), 423.

Byrd's ambitious plans for aerial exploration particularly concerned British officials.⁸⁷ As Antarctic expert Klaus Dodds has pointed out, the Byrd expedition raised the prospect of the "aerial colonization of the Antarctic."⁸⁸ Some officials felt confident that flying over new land and dropping flags would never match the legal value of actually landing on and taking possession of the territory.⁸⁹ Others argued that aerial exploration created the same inchoate rights as the sighting of a coastline from ships;⁹⁰ others suggested that Byrd's expedition showed that the whole Antarctic could be annexed and controlled from the air.⁹¹ No concrete answers emerged from these debates, and the legal implications of aerial exploration remained unclear and unsettling to the British in the years that followed.

Opinion differed within the Antarctic Committee. Some members speculated that any attempt to raise Britain's Antarctic claims with Washington might inspire the kind of challenge the British hoped to avoid; others thought remaining silent on Byrd's use of the Ross Dependency could gravely weaken the Empire's legal position.⁹² The British had to show that they would not allow a foreign power to operate in the Ross Dependency without their permission. In November 1928, the British sent a note to Washington that laid out the Empire's existing territorial claims in the Antarctic, enclosed a copy of the *Public Summary of Proceedings* from the Imperial Conference to show the areas that the Empire still planned to acquire, consented to Byrd's expedition and offered assistance. While Ottawa had dispatched a similar note to the Americans in response to the MacMillan expedition in 1925, this was the first time that a state tried to preserve its claims in the Antarctic by preemptively consenting to a foreign expedition and offering

⁸⁷ See Richard Byrd, "The Conquest of Antarctica by Air," *National Geographic Magazine* 58, no. 2 (August 1930): 127-227.

⁸⁸ Klaus Dodds, *The Antarctic: A Very Short Introduction* (Oxford: Oxford University Press, 2012), 37.

⁸⁹ Note by Alexander Clutterbuck, NA, CO 78/186/15.

⁹⁰ Minutes of the 8th Meeting of the Interdepartmental Committee on the Antarctic, 5 February 1929, NA, DO 114/34.

⁹¹ Charles Wingfield, Oslo, to the Right Honourable Arthur Henderson, Principal Secretary of State for Foreign Affairs, 17 December 1929, NAA, A981, ANT 51, Part 2, Antarctic – Norwegian Claims.

⁹² Minutes of the 4th Meeting of the Interdepartmental Committee on the Antarctic, 15 October 1928, NA, DO 114/34.

assistance.⁹³ Britain, New Zealand and Australia would continue to use the tactic to protect their Antarctic claims from foreign expeditions into the 1950s.

In reality, the U.S. government had given very little thought to Antarctic claims or polar sovereignty since the flurry of research inspired by the Soviet sector decree. The head of the map division at the Library of Congress, Lawrence Martin, who had helped draft the Hughes Doctrine while with the State Department, pushed for a U.S. Antarctic claim. He collected the logbook of Nathaniel Palmer and other documents that could prove the primacy of American discoveries.⁹⁴ The State Department was less enthused. When a representative from the Byrd expedition asked the State Department to support a claim to any new territory the party might discover, the department remained noncommittal and indicated that it would provide an answer only if such a situation arose.⁹⁵ The arrival of the British note in Washington prompted State Department officials to once again ponder the problems of polar sovereignty.

Under Secretary of State Joshua Rueben Clark “dust[ed] off [the] Antarctic files” and studied the situation.⁹⁶ Clark, a prominent lawyer in the U.S., served in the Solicitor’s Office for many years and understood that from a legal perspective, this was a very important moment. The British note represented the first time that the Empire had officially drawn to “the attention of the United States the claim of a British title to the areas named.” Clark understood that the note demanded a response or the British would use Washington’s silence as proof of tacit acceptance of their Antarctic claims, their use of the sector principle and a lax definition of effective occupation. Both the claim and the principle were at issue. Clark and other departmental officials maintained that the American response must “safeguard...against such claims to sovereignty as have been

⁹³ British Ambassador to the United States to the Secretary of State, 17 November 1928, Document NZ17111928 in Bush, *Antarctica and International Law* 3, 60-61. New Zealand sent its own offer of assistance directly to Richard Byrd in December 1928. New Zealand Prime Minister to Byrd, 1 December 1928, Document NZ01121928 in Bush, *Antarctica and International Law* 3, 62.

⁹⁴ Scholars and private researchers studied the logbooks of sealers and whalers to prove the primacy of American discovery in parts of the Antarctic ranging from the peninsula to the eastern coast Day, *Antarctica: A Biography*, 236-238. For an early example of these kind of scholarship, see John Randolph Spears, *Captain Nathaniel Brown Palmer* (New York: Macmillan, 1922).

⁹⁵ William Roy Vallance, Legal Adviser, Department of State, 8 August 1933, United States National Archives and Records Administration (NARA), RG 59, CDF, 1930-39, Box 4520, File 800.014 Antarctic/38 1/2.

⁹⁶ Reported in ‘The Antarctic Crisis,’ *New York Herald Tribune*, 30 November 1929.

announced...in the North Polar Regions, by laying down, on maps, sectors running to the North Pole from the extreme points of nearest territory owned south of the North Pole by the country concerned” and from the use of similar “quadrants” in the Antarctic. To Clark, it felt like the U.S. was being squeezed out of an increasingly shrinking polar world. If the U.S. government wanted to maintain its territorial rights in the Antarctic and preserve its broader position on polar sovereignty, Clark concluded, it had to issue a strong reply to the British.

To preserve his country’s legal position, the Under Secretary drafted a bold response that applied the “formula announced by Mr. Hughes” to attack the Empire’s polar territorial claims. Clark’s reply highlighted that the U.S. government did not recognize any “means or method of acquiring sovereignty” in the polar regions beyond those already “accepted as forming part of the rules and principles of accepted international law” and which had been used historically by states to support their territorial claims. Clark explained that the “principles of international law” attached certain rights to the first discovery of territory. He emphasized that the discoveries of American explorers, sealers and whalers gave the U.S. as much right to Graham Land and Wilkes Land (the coastal area of the eastern Antarctic explored by Charles Wilkes in 1840) as the British. Discovery, however, only gave a state a preferential right to occupy territory, not sovereignty. Clark emphasized that the U.S. government would not accept that title to polar territory could “be perfected by a mere temporary possession or by unimplemented, annexive declarations, orders, decrees, or laws” or by any other solution to the problem of polar sovereignty (such as the sector principle) that did not involve actual settlement and use.⁹⁷ Clark’s note went beyond challenging the Empire’s rights in the Antarctic – it attacked the sector principle, upheld the Hughes Doctrine and threatened all existing polar claims. It was a response that could have radically altered the political and legal status of the polar regions, and seriously challenged Britain’s Antarctic ambitions.

⁹⁷ Anna O’Neill, Assistant to the Secretary of State, “Memorandum to Accompany Reply to British Embassy’s Note No. 526, 17 November 1928,” 28 February 1929, NARA, RG 59, CDF 1910-1929, Box 7156, File 800.014, Antarctic/4. See also British Interests and “Russian Claims in the Arctic,” February 1929, NARA, RG 59, Entry 5245, Records Relating to the Arctic and Antarctica, 1912-1965, Box 2, Folder 16.

Since dispatching their note to the Americans, the British had nervously watched Byrd and his fifty-four men establish a base on the Ross Ice Shelf in the Bay of Whales in December 1928. Byrd called the base Little America and it included a mess hall, barracks, an administration building, radio towers, electricity generators, a storehouse, tunnels connecting the buildings and a flag pole flying the stars and stripes. From Little America, the expedition used airplanes, snowmobiles, skis and dog sleds to explore large parts of the Ross Dependency and the Antarctic interior to the east of the Ross Sea, which Byrd named Marie Byrd Land after his wife. With his modern communications equipment, Byrd was able to keep in regular wireless contact with the U.S.⁹⁸ Byrd and his expedition went a long way to achieving the requirements of the Hughes Doctrine, and set a new bar for activity in the Antarctic.

A wave of public support inspired by Byrd's expedition increased Britain's concern. Stories and editorials appeared in U.S. newspapers urging Washington to claim the land discovered by Byrd and previous American explorers, regardless of whether it had already been enclosed by sector lines or not.⁹⁹ American academics seized the opportunity to attack the sector principle and uphold the requirements of the Hughes Doctrine. "Wherefore one wonders at the justice of its projecting this claim to the Pole, which includes, of course, a tremendous area never seen by any one, even the penguins," asked professor of geography Laura Martin (the wife of Lawrence Martin).¹⁰⁰ Professor Jesse S. Reeves captured the opinion of many of his peers when he wrote that the world had to choose between a polar legal regime based on the unlawful sector principle or the Hughes Doctrine, which he called the "correct statement of international law."

⁹⁸ See Rose, *Explorer*, 249-283; Day, *Antarctica: A Biography*, 234-236; Eugene Rodgers, "Richard E. Byrd's First Antarctic Expedition," *The Virginia Magazine of History and Biography* 110, no. 2 (2002): 153-174; Paul A. Carter, *Little America: Town at the End of the World* (New York: Columbia University Press, 1979).

⁹⁹ Esme Howard, British Embassy, Washington D.C., to Sir Austen Chamberlain, 12 April 1929, NAA, A981, ANT 54 PART 1, USA Claims I See, for example, "The Empire of Antarctica," *Daily Chronicle*, 6 April 1929. C.M. Chester, Rear Admiral, Retired to the President of the United States, 4 December 1929, NARA, RG 59, CDF 1910-1929, Box 7156, File 800.014, Antarctic/5.

¹⁰⁰ Laura H. Martin, "Sovereignty in Antarctica," *Journal of Geography* 29, no. 3 (1930): 116.

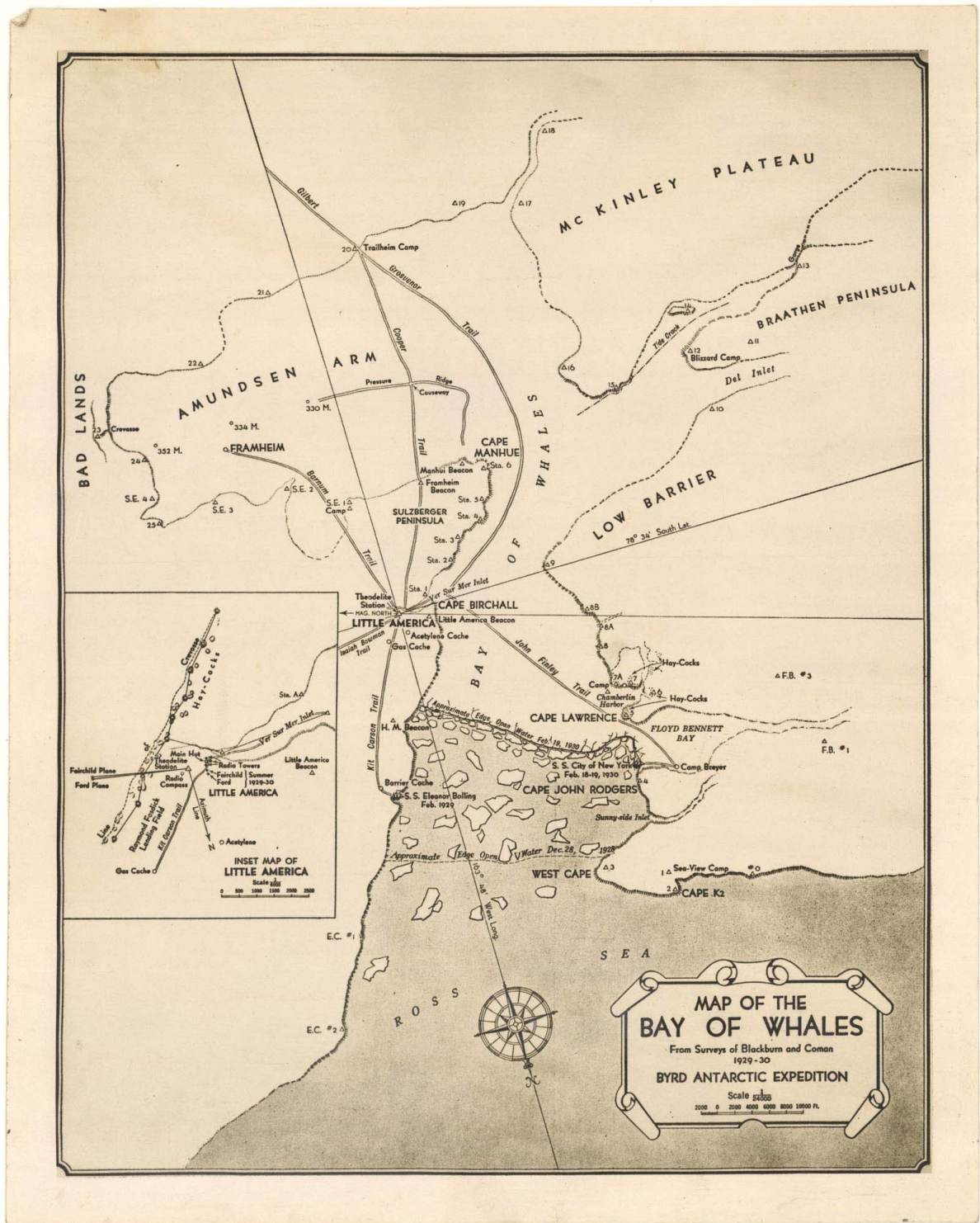


Figure 6: Map showing Little America and the Bay of Whales. Map of the Bay of Whales - Byrd Antarctic Expedition [from the collection of John King Davis]. NAA, P2819, 1364.

Title in the polar regions required actual settlement and government authority, and claims that did not meet these standards, “can hardly be recognized in the present state of international law,” Reeves concluded.¹⁰¹ Given the impossibility of effective occupation in the traditional sense in the High Arctic and Antarctic, several American scholars suggested that Washington take the lead in organizing an international administration for these regions.¹⁰² Regardless of whether the U.S. decided to endorse the internationalization of the polar regions or annex its own territory, Washington had to challenge the Empire’s claims in the Antarctic.

Given the attitude of the press and academics, the British were unsurprised when news leaked that the State Department intended to issue a challenge.¹⁰³ Yet the challenge never came because the State Department’s note, outlining its position, was never sent. A turnover at the White House waylaid Clark’s plans. When Herbert Hoover became president in March 1929, he appointed Henry Stimson and Joseph Potter Cotton as Secretary and Under Secretary in the State Department. The new administration promptly

¹⁰¹ Martin, “The Arctic and the Antarctic,” 46. Reeves was a Professor of Political Science at the University of Michigan and expert on international law. He was associate editor for the *American Journal of International Law*, served as US delegate to Pan-American Commission for the Codification of International Law held in Rio de Janeiro in 1927, and technical advisor to US delegation at the Codification Conference at the Hague in 1930. He made these comments at an Institute of Politics roundtable on Antarctic sovereignty chaired by Laura Martin (1930). Reeves comments matched the recent work of Professor Julius Goebel. In his discussion of sovereignty and the Falkland Islands, the Columbia Law professor had defended the need for effective occupation, stressing that discovery and symbolic acts had never been considered enough support for title to territory. See Julius Goebel, *The Struggle for the Falkland Islands* (Yale University Press, 1927).

¹⁰² One of the supporters of internationalization was well known expert on international jurisprudence and founding member of the American Society of International Law, Arthur Kuhn. He was supported by Reeves and Martin. See Martin, “The Arctic and the Antarctic,” 47. The internationalization of the polar regions was supported by several other prominent American intellectuals at this time. See, for instance, Clyde Eagleton, “International Law and Aerial Discovery at the South Pole,” *Air Law Review* 1, no. 1 (1930): 125-127; Henry Kittredge Norton, “Polar Land Ownership Now Concerns Nations,” *New York Times*, 30 June 1929.

¹⁰³ See for instance, “Antarctic Claims of British Studied,” *New York Times*, 6 April 1929; “Whose Antarctica?” *Chicago Daily Journal*, 8 April 1929, “Antarctic Claims of Britain Will be Protested,” *The Christian Science Monitor*, 5 April 1929; “Antarctic Policy, American Claims Reviewed,” *The Dominion*, 8 April 1929. Based on the press reports and his discussions with State Department officials, Esme Howard predicted that the Americans would claim Marie Byrd Land, parts of the FID and Wilkes Land, which was in the sector the Australians hoped to secure. He advised that the British government might be able to negotiate a trade: its recognition of an American claim to Wilkes Land in return for U.S. recognition of the FID – although Howard did not consider that this course of action would sacrifice Australia’s Antarctic interests. Esme Howard, British Embassy, Washington D.C., to Sir Austen Chamberlain, 12 April 1929, NAA, A981, ANT 54 PART 1.

shelved and then lost Clark's draft challenge.¹⁰⁴ When, in the fall of 1929, American officials finally realized that they had not yet responded to the British, almost a full year had gone by. To the great relief of British officials, when the State Department finally responded to the British note in November 1929, it apologized for the delay, acknowledged the offer of assistance, and offered no comment on claims whatsoever.¹⁰⁵ While the reply purposely avoided recognition of Britain's claims, it said nothing to reserve the rights of the U.S. in the Antarctic. The anticipated U.S. challenge had been dodged for the moment.

Politics also played a part in the American decision not to challenge Britain's Antarctic claims. One of the primary goals of the Hoover administration sought to improve Anglo-American relations. The State Department had started to work towards a new naval agreement with Britain (which was reached at the London Naval Conference of 1930).¹⁰⁶ Challenging Britain's Antarctic claims at such a critical juncture did not make political sense – just as the State Department's note of challenge to Canada's sector claim had not made sense in the summer of 1925.

Debate within the State Department over the legal nature of polar sovereignty also hampered the Americans taking a more assertive stance. In the summer of 1929, Geographer of the State Department Samuel Whittemore Boggs pushed his colleagues to articulate a more coherent polar policy.¹⁰⁷ He urged the State Department to decide whether or not the U.S. should “take steps towards establishing a new kind of

¹⁰⁴ Boggs's points out that Clark's memorandum was “apparently misplaced.” S.W. Boggs, Department of State, Office of the Historical Adviser, *The Polar Regions: Geographical and Historical Data in a Study of Claims to Sovereignty in the Arctic and Antarctic Regions*, pg. 107-109, 21 September 1933, NARA, RG 59, CDF 1930-39, Box 4522, File 800.014, Arctic/31.

¹⁰⁵ Green Haywood Hackworth, *Digest of International Law* 1. (Washington: United States Government Printing Service, 1940), 455.

¹⁰⁶ See O. Babij, “The Second Labour Government and British Maritime Security,” *Diplomacy and Statecraft* 6, no. 3 (1995): 645-671.

¹⁰⁷ S.W. Boggs, Note, 23 July 1929, NARA, RG 59, CDF 1910-1929, Box 7156, File 800.014, Arctic/23 and S.W. Boggs, Department of State, Note on Rear Admiral Chester's Communication to the President, 10 January 1930, NARA, RG 59, CDF 1930-39, Box 4520, File 800.014 Antarctic/25. Boggs had earned his Master's Degree in Geography from Columbia University before joining the State Department in 1924. Audrey M. Cahill, W. Roberts, A. Thompson eds., *Samuel Whittemore Boggs Papers, 1912-1954* (Washington: Manuscript Division, Library of Congress, 2012) <http://hdl.loc.gov/loc/mss/eadmss.ms012129> (accessed 5 August 2014); For an example of Boggs expertise, see his monograph, S.W. Boggs, *International Boundaries: A Study of Boundary Functions and Problems* (New York: Columbia University Press, 1940).

international regime in the polar regions.”¹⁰⁸ If the department concluded that the U.S. should annex its own territory in the Antarctic or Arctic, it had to determine what areas the country had territorial rights to based on discovery, occupation and official proclamations.¹⁰⁹ Once the State Department knew what territory the U.S. could claim, it still had to determine the “necessary legal steps in the acquisition of territory.” While the Hughes Doctrine called for actual settlement and use, the department remained undecided about what constituted effective occupation in the polar regions. Would repeated semi-permanent occupations of the continent, such as Byrd’s expedition, be sufficient?¹¹⁰ Personally, Boggs agreed with his British and Commonwealth peers who insisted that state control in the polar regions did not have to be “continuous, but effective in a sense of practically applicable to regions not habitable in all seasons of the year,” although he insisted the issue required further study.¹¹¹

Boggs also pushed for a definitive position on the sector principle. While the U.S. Navy publicly decried the application of the sector principle in the Arctic as an illegal attempt by a few of the world’s powers to unfairly divide up a large portion of the globe, the State Department remained officially silent.¹¹² “The U.S. should have a well

¹⁰⁸ S.W. Boggs to the Acting Secretary, 11 August 1930, NARA, RG 59, Entry 5245, Box 2, Folder 15, File North Polar Regions: Sovereignty Claims by U.S.; S.W. Boggs, Department of State, Office of Historical Adviser, 22 July 1930, NARA, RG 59, CDF 1930-39, Box 4520, File 800.014 Antarctic/28.

¹⁰⁹ Despite Under Secretary Clark’s assertion that the U.S. had discovery rights to Wilkes Land and Graham Land, other department officials were less certain about the strength of these rights. Withrop Greene, a secretary at the Embassy in Chile and expert in polar exploration wrote a long report on the subject and pointed out that a lot of controversy surrounded Wilkes’ efforts, because several sailors subsequently “sailed over some of the mountains which Wilkes claims to have seen.” Did the U.S. really want to use his the uncertain results of his expedition as the foundation for an Antarctic claim?¹⁰⁹ Memorandum on Antarctic Exploration by Withrop Green, enclosed in dispatch from W.S. Cuthbertson, Embassy of the United States, Chile, 15 April 1929, NARA, RG 59, CDF 1910-1929, Box 7156, File 800.014, Antarctic/7.

¹¹⁰ S.W. Boggs to the Acting Secretary, 11 August 1930, NARA, RG 59, Entry 5245, Box 2, Folder 15, File North Polar Regions: Sovereignty Claims by U.S.; S.W. Boggs, Department of State, Office of Historical Adviser, 22 July 1930, NARA, RG 59, CDF 1930-39, Box 4520, File 800.014 Antarctic/28

¹¹¹ S.W. Boggs, Note, 23 July 1929, NARA, RG 59, CDF 1910-1929, Box 7156, File 800.014, Arctic/23. In part, Boggs his conclusions on his chats with Dr. Isaiah Bowman, the long-serving Director of the American Geographical Society. Bowman believed that “in the polar regions territorial claims bear a quite different stamp as contrasted with those set up in regions of potential permanent settlement.” He argued that claims in the polar regions really rested on “notification of fact” and “reasonable possession,” such as the work carried out by the Discovery Committee in the waters of Britain’s Antarctic Dependencies. See “Land Covered by Byrd in Antarctic Open to U.S. Claim,” *Montreal Gazette*, 10 March 1930.

¹¹² Letter from the Secretary of the Navy (Adams) to the Secretary of State (Stimson), 23 Sept. 1929, quoted in Donat Pharand, *The Law of the Sea of the Arctic with Special Reference to Canada* (Ottawa: Universtiy of Ottawa Press, 1973), 142.

considered reason, either for utilizing or for rejecting the idea of claiming a sector [north of Alaska or in the Antarctic],” Boggs advised. “The question is partly legal and partly political in character.” The role that sector claims were playing in polar affairs demanded the Americans decide quickly.¹¹³

Boggs acknowledged that these were all difficult legal questions, but maintained that they had to be resolved if the U.S. was going to embrace a leading role in the polar regions.¹¹⁴ In his quest to have them answered, however, the geographer was stymied by the indifference of his colleagues. On several occasions, Boggs was told that Arctic and Antarctic affairs were simply not a priority.¹¹⁵ At this point, many American officials probably agreed with the comment made by Laura Martin that unless “penguin eggs become the one delicacy necessary for famishing millions, or penguin oil can be burned in Fords, or unless some material small in bulk and of great value, like diamonds or radium ore should be discovered,” territorial claims in the Antarctic would never be overly important.¹¹⁶ The polar regions simply did not rank very high on the list of American foreign policy priorities.

The State Department let the Hughes Doctrine remain the public face of American polar policy.¹¹⁷ Legal scholar Jonathan Zasloff has pointed out that Henry Stimson and Joseph Cotton were both legal professionals who embraced the same classical legal

¹¹³ S.W. Boggs, Department of State, Office of Historical Adviser, 22 July 1930, NARA, RG 59, CDF 1930-39, Box 4520, File 800.014 Antarctic/28

¹¹⁴ S.W. Boggs, Department of State, Office of Historical Adviser, 22 July 1930, NARA, RG 59, CDF 1930-39, Box 4520, File 800.014 Antarctic/28

¹¹⁵ Office of the Historical Adviser to Under Secretary of State Joseph Cotton, 5 September 1930, NARA, RG 59, CDF 1930-39, Box 4520, File 800.014 Antarctic/33. One of his superiors responded to Boggs request that the department undertake a study of polar sovereignty that he “could not see that such a study would be useful just now from a policy point of view.” Division of Western European Affairs to Samuel Boggs, 14 January 1930, NARA, RG 59, CDF 1930-39, Box 4520, File 800.014 Antarctic/26.5.

¹¹⁶ Martin, “Sovereignty in Antarctica,” 20. This sentiment that ignored the profits Britain made from its control of the whaling industry in the southern seas.

¹¹⁷ Norway’s minister in the U.S. explained that his government took “it for granted” that the U.S. did “not intend to base such possible claims to sovereignty or claims of priority to sovereignty in the South Polar Regions upon the flights of Commander Byrd.” Just five years before, after all, in the first enunciation of the Hughes Doctrine, the State Department had informed the Norwegians that aerial discovery and the “formal taking of possession” of territory had “no significance” beyond heralding “the advent of the settler.” Minister Bachke to Secretary Stimson, 15 April 1929 and Secretary Stimson to Minister Bachke, 7 December 1929, cited in Hackworth, *Digest of International Law* 1, 453-454. See Charles Hughes to Norwegian Minister, 2 April 1924, *Foreign Relations of the United States, 1924* (Washington: U.S. Government Printing Office, 1939), 519-520.

ideology as Charles Evan Hughes. They believed in a rigid and relatively closed international legal system of universal principles, which made them hesitant to act in advance of international law.¹¹⁸ As a result, the difficulties of applying the accepted rules of international law to the unique conditions of the polar regions, and their unwillingness to forge new, radical principles, dissuaded them from pursuing any territorial interests in the Antarctic. Furthermore, scholars like Zasloff and Francis Boyle have established that in the late 1920s, American officials in the State Department placed a great emphasis on defensive legal security, employing international law to avoid war (as embodied by the Kellogg-Briand Pact) and other foreign policy entanglements, while protecting U.S. interests.¹¹⁹ The Hughes Doctrine fulfilled the function of defensive legal security for the U.S. – it could be called upon to challenge polar claims, without sparking the kind of territorial dispute that a formal challenge would. Few staff in the State Department shared Boggs’ fear that a general statement like the Hughes Doctrine would never carry the same kind of legal weight as an official protest, reservation of rights or actual territorial claim.¹²⁰

As Boggs fought the State Department’s indifference towards the Antarctic, Byrd continued his work in the Antarctic. After spending the winter of 1929 locked in the ice, the next summer Byrd launched the first successful flight to the South Pole on 28 November 1929. In December, Congress promoted Byrd to Rear-Admiral in recognition of his expedition’s accomplishments. Meanwhile, Byrd’s second in command, the geologist Lawrence Gould, took his dog sleds to Marie Byrd Land to provide a physical presence in the newly discovered territory and plant the American flag. Following the advice of Isaiah Bowman, the director of the National Geographic Society, Byrd aerially explored the coastline adjacent to the eastern boundary of the Ross Dependency (150°W).

¹¹⁸ Jonathan Zasloff, “Law and the Shaping of American Foreign Policy: The Twenty Years’ Crisis,” *Southern California Law Review* 77 (2003-2004): 682.

¹¹⁹ Francis Anthony Boyle, *Foundations of World Order: The Legalist Approach to International Relations, 1898-1922* (Durham: Duke University Press, 1999), 144-145. For instance, in response to Japan’s seizure on Manchuria in 1931, the Stimson Doctrine applied the principle of *ex injuria jus non oritur* (law does not arise from injustice), to argue that the U.S. would not recognize international territorial changes executed by force. Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (Cambridge: Cambridge University Press, 2006), 187.

¹²⁰ S.W. Boggs, Department of State, Office of the Historical Adviser, *The Polar Regions: Geographical and Historical Data in a Study of Claims to Sovereignty in the Arctic and Antarctic Regions*, pp. 105-111, 117, 120, 21 September 1933, NARA, RG 59, CDF 1930-39, Box 4522, File 800.014, Arctic/31.

Bowman believed that if the U.S. decided to claim Marie Byrd Land that the interior had to be connected with an unclaimed section of coastline that provided independent access to the territory.¹²¹ After adding a great deal to the map of Antarctica, the Byrd expedition left Little America and headed home in February 1930.

Public interest in an American Antarctic claim was alive. In July, Senator Millard Tydings presented a resolution asserting that the U.S. claim “all areas in the Antarctic which have been discovered or explored by American citizens.”¹²² He included Nathaniel Palmer’s first significant discovery of the continent’s coastline, Charles Wilkes’ two decades later, and Byrd’s expedition, which had discovered even more new land. Tydings speculated that Antarctic territory might prove valuable in the future as the site of air or naval bases. “It seems to me that the State Department should be aggressive and should take advantage of this discovery and claim them for the United States,” explained Tydings, “because the citizen of no other nation except our own so far has discovered them.”¹²³ The U.S. Senate passed a resolution allowing the President to exercise his executive authority to claim new territory, but the State Department remained disinterested.¹²⁴ An obviously annoyed Secretary of State Stimson publicly responded that the U.S. had many island possessions, much closer than the Antarctic, which required the government’s attention. Stimson “could not see how Members of Congress could favor giving up the Philippines and still be interested in distant snow-covered territory.”¹²⁵

Stimson’s comment came as a relief to British officials. By the summer of 1930, the British believed that a strong division of opinion existed in Washington about

¹²¹ For contemporary accounts see Richard Byrd, *Little America* (New York: Putnam, 1930) and Laurence McKinley Gould, *Cold: The Record of an Antarctic Sledge Journey* (New York: Brewer, Warren and Putnam, 1931).

¹²² Christopher Joyner and E.R. Theis, *Eagle Over the Ice: The U.S. in the Antarctic* (Hanover: University Press of New England, 1997), 22-23.

¹²³ Senate Resolution 310, 1 July 1930;

¹²⁴ Jason Kendall Moore, “Tethered to an iceberg: United States Policy Toward the Antarctic, 1939-1949,” *Polar Record* 35, no.193 (1999): 127. In Ottawa, Oscar Skelton kept a close on the Tydings resolution, on guard against anything that might have broader polar repercussions. See O.D. Skelton to Mr. M. Mahoney, Charge d’Affaires, 4 July 1930, LAC, RG 25, Vol. 1519, File 1928-519-C.

¹²⁵ “Secretary Stimson Discusses Proposal to Claim Antarctica,” *U.S. Daily*, 3 July 1930. Earlier in 1930, several U.S. senators and Henry Cabot Lodge had urged the U.S. government to grant the Philippines independence for economic and defence reasons.

whether or not to claim land in the Antarctic.¹²⁶ Stimson's dismissive attitude towards a claim and the decision not to act on Tydings' resolution indicated which side was winning. Meanwhile, comments made by Byrd upon his return from Little America further increased Britain and New Zealand's optimism. The explorer explained that his expedition was a "scientific venture and hopefully a sporting one, and we went down there with the utmost respect for the British who had preceded us. Our work should bring us closer together and not farther apart." To the satisfaction of officials in Wellington and London, Byrd stressed that, "We have from the beginning recognised the Ross Dependency."¹²⁷ The great threat posed by the U.S. to the Empire's Antarctic interests had passed. Still, Britain remained vigilant. Until American interest in the Antarctic waned completely, they would avoid any action that would "excite interest in the State Department."¹²⁸

4.5 The Empire's Acts of Possession in the Antarctic

As the British undertook their diplomatic maneuvers with the Americans and Norwegians, they realized that political action alone could not preserve the Empire's position – the situation required a "practical demonstration of interest."¹²⁹ The Antarctic Committee decided that British citizens should physically wave the Union Jack in the Dependencies and in the areas Australia intended to claim. This harkened back to the old belief that, as Antarctic scholar Christy Collis has explained, "explorers are not just government employees or symbolic representatives, but vessels of enormous legal force."¹³⁰

As a first step, in the fall of 1928 the Australians and British gave a whaling license to the South African firm, the Kerguelen Sealing and Whaling Company, stipulating they plant the Union Jack wherever possible in the south polar region,

¹²⁶ Minutes of the Polar Committee, 11 July 1930, NA, DO 35 1542/2. See also Extract from Major Casey Telegram, 31 July 1930, NAA, A981, ANT 54 PART 1, USA Claims I.

¹²⁷ Malcolm Templeton, *A Wise Adventure: New Zealand & Antarctica, 1920-1960* (Wellington: Victoria University Press, 2000), 58.

¹²⁸ Minutes of the 28th Meeting of the Polar Committee, 2 July 1930, NAA, A981, ANT 54 PART 1, USA Claims I

¹²⁹ Foreign Office to Commonwealth Government, 24 November 1928, NA, DO 114/34.

¹³⁰ Christy Collis, "Australia's Antarctic Turf," *M/C Journal* 7, no. 2 (2004) <http://journal.media-culture.org.au/0403/02-feature-australia.php> (Accessed 11 December 2013).

especially in the areas Australia intended to claim.¹³¹ The Antarctic Committee also decided to utilize experienced Australian polar explorer Hubert Wilkins – already en route to undertake a 1900-mile flight from Graham Land to the Ross Dependency – to counteract Byrd’s work by dropping the British flag on any land he might fly over.¹³² Wilkins became the first to fly in the Antarctic on 20 December 1928 (beating Byrd by a few weeks), clocking 11 hours across Graham Land and covering some 1600 miles. Technical and weather difficulties kept Wilkins from travelling to the Ross Dependency, however, and he only managed to drop the Union Jack within the boundaries of the FID.¹³³

Still, the British provided Wilkins with further government funds and use of the Discovery Committee’s ship *William Scoresby* when he decided to try again in 1929. The Antarctic Committee hoped that Wilkins would match Byrd’s aerial efforts and keep the Empire’s “end up in the way of straight discovery.”¹³⁴ Dogged by bad weather and

¹³¹ In October, Richard Casey reinforced this stipulation when he wrote to Sir John Irvin, an associate of the whaling company, that, “we wish to assert British sovereignty in this area at as many points as possible and to have formal records (with photographs, if possible) of such acts so that we will be in a position to meet any challenge to our right of sovereignty with which we may be faced in the future.” R.G. Casey, Commonwealth of Australia Liaison Officer, London, to Sir John Irvin, October 1928, Document AU1011928, in Bush, *Antarctica and International Law* 2, 114. See also Donald Rothwell and Andrew Jackson, “Sovereignty,” in *Australia and the Antarctic Treaty System: 50 Years of Influence*, eds. Marcus Haward and Tom Griffiths (Sydney: University of New South Wales Press, 2011), 52.

¹³² Minutes of the 4th Meeting of the Interdepartmental Committee on the Antarctic, 15 October 1928, NA, DO 114/34. After completing the first trans-Arctic flight in April 1928, Wilkins had caught the eye of newspaper publisher William Randolph Hearst, who provided the funding for Wilkins new expedition in return for the press rights. The request from the Antarctic Committee caught up with Wilkins during his stopover at the Falkland Islands and the explorer immediately replied that he was “ beholden to no one” and that at “heart he remained a Britisher” glad to further “the cause of Empire by dropping or planting British flags” in the Antarctic. Simon Nasht, *The Last Explorer: Hubert Wilkins, Hero of the Great Age of Polar Exploration* (New York: Skyhorse Publishing, 2005), 161-185.

¹³³ Nasht, *The Last Explorer*, 183; Day, *Antarctica: A Biography*, 224.

¹³⁴ RG Casey to Prime Minister, 20 June 1929, <http://www.dfat.gov.au/publications/historical/volume-18/historical-document-18-203.html>. Prior to his departure, Wilkins sent a letter to Canada’s Director of Civil Aviation, looking for two pilots to assist him in his planned flight of 2500 miles from Deception Island to the Ross Sea. “There are, naturally, capable pilots in the United States and it is possible that I can be suited here, but I particularly would like to have with a British pilot this season.” In order to keep my endeavours at least fifty per cent British I just had to have a Canadian pilot this year and am glad that such an arrangement was possible,” Wilkins wrote. If Wilkins found and claimed new land, he wanted the pilot sitting next to him to be a subject of the Empire. He ended up hiring on Al Cheesman, a famous northern Ontario bush pilot. Major-General Andrew McNaughton saw this as an opportunity to gain more Canadian polar experience. “This would appear to be an opportunity to gain experience in Polar exploration which can later be turned to account in the similar work in Northern Canada, which we will probably be asked to undertake within the next few years.” Hubert Wilkins to Mr. Wilson, Director, Civil Aviation, RCAF, 7 September 1929, LAC, RG 24, Vol. 4891, File 1008-1-74; Hubert Wilkins to Mr. Wilson, Director, Civil

mechanical issues, Wilkins' flights were again confined to the FID, where he dropped flags and documents three times.¹³⁵ By this point, the Empire's emphasis on flag planting made some British officials worry that other countries might believe Britain doubted the strength of its sovereignty in the Antarctic and accepted polar claims based solely on flag planting (or dropping). "Other countries will take advantage of our apparently lax procedure to formulate or renew doubtful claims of their own," Dominions Office official Alexander Clutterbuck warned.¹³⁶ The British-Australian-New Zealand Antarctic Research Expedition (BANZARE) – the centerpiece of the Empire's activities on the ground in the Antarctic – would try to address these concerns by mixing its flag planting with science.

During the Imperial Conference of 1926, the Committee on British Policy in the Antarctic concluded that Australia had to send an expedition to the Eastern Antarctic before it issued Letters Patent or an Order in Council claiming the region. The BANZARE expedition project was born. As historians Marie Kawaja and Tom Griffiths have pointed out, disagreements between the Australians and British over who should finance the project delayed the venture.¹³⁷ The Australians and British also fundamentally differed in legal interpretations regarding the need for another expedition. While Australian explorer Douglas Mawson wanted another expedition for scientific purposes, he argued that, legally, his previous efforts – between 1911-1914 – had done enough to place the entire region under Australian control. He noted that Ottawa did "not ask Great

Aviation, RCAF, 20 September 1929, LAC, RG 24, Vol. 4891, File 1008-1-74 and Major-General Andrew McNaughton, Chief of the General Staff, to G.J. Desbarats, Deputy Air Minister, 11 September 1929, LAC, RG 24, Vol. 4891, File 1008-1-74.

¹³⁵ See Nasht, *The Last Explorer*, 204-207.

¹³⁶ P.A. Clutterbuck to Major Casey, 16 June 1930, NA, CO 78/186/15. Much of Clutterbuck's concern was caused by Hubert Wilkins failure to keep his commission from the King a secret, which some British officials worried might inspire other countries to believe that Britain doubted its sovereignty in the FID. When Wilkins continued to discuss his instructions from the British government the Governor of the Falkland Islands wrote that while Wilkins "undoubtedly realizes that speech is silver he has apparently forgotten that silence is gold." Like the Oscar Skelton and the Canadians, the British wanted to avoid any negative publicity that might cast doubt on their Antarctic claims or strengthen another country's position. Government House, Stanley to The Right Honourable Lord Passfield, Secretary of State for the Colonies, 1 April 1930, NA, CO 78/186/15.

¹³⁷ Because the expedition had been decided on as part of a broader British Antarctic policy, Prime Minister Stanley Bruce strongly believed that his government should not bear the cost alone. Kawaja and Griffiths, "'Our great frozen neighbour,'" 25-26; Triggs, *International Law and Australian Sovereignty in Antarctica*, 107.

Britain for permission to explore and take possession of unknown lands to the north of Canada.” He suggested Australia immediately claim its own sector.¹³⁸

Australian External Affairs official Walter Henderson – who had studied law at l’Ecole Libre des Sciences Politiques in Paris and had worked on the Antarctic file – argued that the absence of another expedition to the region would not significantly weaken an Australian territorial claim.¹³⁹ For a year, the *Public Summary of Proceedings* from the Imperial Conference had notified the international community of the areas to which the Empire believed it had special rights with no protest. The silence of foreign powers, Henderson insisted, should be taken as recognition of the Empire’s claim. Considering increasing international interest in the Antarctic, Henderson maintained that delaying a claim would be more harmful than choosing not to send an additional expedition. The Australian government presented Henderson’s argument to the British government (stressing the practical difficulties facing the expedition: finding suitable ship and the exorbitant cost) and sought permission to immediately issue Letters Patent claiming all of the territory explored by Mawson between 160° to 85° East (Queen Mary Land, Wilkes Land, King George V Land and Oates Land). The Australians maintained that Enderby Land and Kemp Land, which had not been explored by Mawson’s previous expedition, could not be claimed until revisited by a British expedition.¹⁴⁰

London concluded that any Australian claim without an additional expedition would lead to foreign protest, especially from the Norwegians and Americans. The interdepartmental committee, made up of officials from the Admiralty, Colonial, Foreign and Dominions offices, stressed that the claims made by Mawson in his earlier expedition

¹³⁸ Mawson to Masson, 2 May 1927, cited in Ayres, *Mawson: A Life*, 157. Mawson worried that the British would “sacrifice Australian interests again as in the past, if it helps them at all to maintain sovereignty over their sector or will assist them to enlarge their sector.” Douglas Mawson to Major Casey, 9 October 1929, NAA, A981, ANT 4 PART 9. Mawson wanted another expedition that could complete the mapping of the Australian sector’s coastline, examine fisheries and elevate Australian science. Douglas Mawson to Major Casey, 21 June 1928 and Douglas Mawson to Major Casey, 5 July 1928, NAA, A981, ANT 4, Part 6, Control of Antarctic.

¹³⁹ Peter Edwards, “Henderson, Walter (1887–1986),” *Australian Dictionary of Biography*, National Centre of Biography, Australian National University, <http://adb.anu.edu.au/biography/henderson-walter-12622/text22739> (accessed 15 April 2015).

¹⁴⁰ See Marie Kawaja, “Australia in Antarctica: Realising an Ambition,” *The Polar Journal* 3, no.1 (2013): 44-45; Stonehaven, Commonwealth of Australia, Governor-General’s Office to Secretary of State for Dominion Affairs, 22 December 1927, NAA: A981, ANT 4, Part 6, Control of Antarctic.

had never been ratified by His Majesty's Government, which weakened their standing in international law.¹⁴¹ Foreign Office Legal Adviser Cecil Hurst agreed and warned that if the Norwegians performed flag plantings in Enderby Land (which they did in 1929), and the Australians did not, it "would be hard to recover the position afterwards by diplomatic means or by arbitration as our claim was weak in international law."¹⁴² The British repeatedly explained to the Australians that the Empire's control over the Antarctic was at stake and that they had to send an expedition as soon as possible.¹⁴³ To ease some of Australia's burden, British officials suggested that the *Discovery*, the ship of the Discovery Committee, could be made available.

In Canberra, Australia's External Affairs department concluded that the Norwegian and American expeditions represented a clear threat to Australia's Antarctic interests and demanded a response. With pressure growing in the Australian press, Prime Minister Bruce accepted the need for an expedition in the summer of 1928, and suggested Britain and New Zealand participate.¹⁴⁴ Although the New Zealand government initially considered declining the offer, elder statesman Francis Bell convinced Prime Minister Gordon Coates to provide funding in the interest of commonwealth solidarity.¹⁴⁵ Months

¹⁴¹ H.H. Campbell, Foreign Office to Under-Secretary of State, Dominions Office (Amery), 21 July 1928, NAA, A981, ANT 51 Part 1, Antarctic – Norwegian Claims; External Affairs, Chartering of the Antarctic Discovery for Exploration and Scientific Work, 24 July 1928, NAA, A981, ANT 4, Part 6, Control of Antarctic; Secretary of State for Dominion Affairs to the Prime Minister, Commonwealth of Australia, 3 August 1928, NAA, A981, ANT 4, Part 6, Control of Antarctic. Major Casey to the Right Honourable S.M. Bruce, Prime Minister of the Commonwealth, 20 August 1928 and Casey to External Affairs, 10 August 1928, NAA, A981, ANT 51 Part 1, Antarctic – Norwegian Claims.

¹⁴² R.G. Casey to the Prime Minister, 16 August 1928, <http://www.dfat.gov.au/publications/historical/volume-18/historical-document-18-147.html> (accessed 15 April 2014).

¹⁴³ Foreign Office Telegram to Commonwealth Government, 24 November 1928, NA, DO 114/34; Minutes of the 6th Meeting of the Interdepartmental Committee on the Antarctic, 23 November 1928, NA, DO 114/34; Antarctic, Australian Department of External Affairs, 4 December 1928, NAA, A981, ANT 4 PART 9. Casey learned from the Foreign Office that they did not think they could rely very much longer on diplomatic means to maintain themselves vis-à-vis foreign claimants in the Antarctic, particularly if no active steps were taken to cement our claims in the event of foreign activity." Casey told the Antarctic Committee that he wanted a message sent by His Majesty's Government to the Bruce government underlining that "diplomatic resources had been exhausted" and that an expedition had to be sent immediately to the Australian sector. Minutes of the 5th Meeting of the Interdepartmental Committee on the Antarctic, 1 November 1928, NA, DO 114/34.

¹⁴⁴ External Affairs, Antarctic – Control of, 4 December 1928, NAA, A981, ANT 4 PART 9. See, for example, "Britain Wants Us to Act in Antarctic – Important London Parleys – Door Still Open For Occupation," *The Herald*, 9 June 1928; "Antarctic Still Open To Us: British Offer Stands," *The Herald*, 23 January 1928, NAA, A981, ANT 4, Part 6, Control of Antarctic.

¹⁴⁵ Templeton, *A Wise Adventure*, 35-36. Two young scientists from New Zealand also participated in the British-Australian-New Zealand Antarctic Expedition (BANZARE).

passed, however, before the British and Australians agreed on a suitable cost sharing formula.¹⁴⁶

In the meantime, Richard Casey pushed for a two-season expedition, so that the party could explore the entire three thousand mile coastline between King George V Land and Enderby Land.¹⁴⁷ Casey noted that “a certain amount of flag planting is all that could be done in one season, but the term 'flag planting' has been used as synonymous with 'consolidating British sovereignty.’” In Casey’s opinion, to actually claim as opposed to consolidate sovereignty, the expedition had to undertake something “more serious than simple landings and placing of flags...such as charting the coast line and some attempts at serious contributions towards the scientific knowledge of the area.” To Casey it was a waste of resources to take the expedition “laboriously halfway round the world for a mere few months' hurried flag planting, that could easily be put in the shade by the Americans and others.”¹⁴⁸ Casey believed that science, such as the work completed by the Discovery Committee, was one of the most important symbols of state sovereignty in the Antarctic. He thought that the Australians should explain to the Norwegians that through the scientific work of BANZARE, “British sovereignty will be cemented in area from

¹⁴⁶ The estimated costs of the expedition were 8000 pounds for the hire of the Discovery, 6500 for insurance and 2500 for the fitting out of a crew. Prime Minister Bruce suggested a cost sharing formula in which the Australian government would pay £7500 pounds towards the venture, if the British matched that sum and New Zealand contributed a further £2500. The British, however, were unable to decide on how much funding to provide or on the loan of the *Discovery* and the 1928-1929 exploration season in the Antarctic soon passed. The Treasury Department argued, “Great Britain did not call upon the Commonwealth of Australia to contribute towards the maintenance of British prestige or the perfection of British claims, say, in the Arctic, and there appeared to be no sufficient reason why the British taxpayer should contribute to similar objects in the Antarctic.” They were convinced to provide funding by Foreign, Colonial and Dominions Office officials. By the beginning of January 1929, Leopold Amery had pulled strings, the *Discovery* and funding came available. To cover the remaining costs, Macpherson Robertson, known generally as MacRobertson, a Melbourne businessman, contributed £10,000, after being approached by Orme Masson. See Prime Minister, Commonwealth of Australia to the Secretary of State for Dominion Affairs and the Prime Minister of New Zealand, 30 July 1928, NAA, A981, ANT 4, Part 6, Control of Antarctic; Antarctic, Australian Department of External Affairs, 4 December 1928, NAA, A981, ANT 4 PART 9; S.M. Bruce to Major Casey, 5 September 1928, NAA, A981, ANT 4, Part 6, Control of Antarctic; Minutes of the 7th Meeting of the Interdepartmental Committee on the Antarctic, 8 January 1929, NA, DO 114/34 and Minutes of the 8th Meeting of the Interdepartmental Committee on the Antarctic, 5 February 1929, DO 114/34. See also Kawaja, “Australia in Antarctica,” 44-46.

¹⁴⁷ Major R.G. Casey to Prime Minister, 28 February 1929, <http://www.dfat.gov.au/publications/historical/volume-18/historical-document-18-177.html>

¹⁴⁸ Major RG Casey to Prime Minister, 21 March 1929, <http://www.dfat.gov.au/publications/historical/volume-18/historical-document-18-186.html>. In this letter Casey also reported the interest of the HBC to participate the exploitation of the seals and penguins on the coastline Australia intended to claim.

Enderby Land to Ross Sea other than Adelie Land.”¹⁴⁹ In the years that followed, the pivotal role that scientific work played in state sovereignty strategies would continue to increase in importance.

Only in March 1929 did the Australian government establish an Antarctic Committee to plan, organize and coordinate the joint effort. It agreed with Casey’s assessment and planned for a two-season expedition. Led by Douglas Mawson, the largely ship-borne expedition (along with a small aircraft) would sail along the coast of the territory between Enderby Land and King George V Land, plant the flag wherever possible on the continent, chart and survey, perform scientific investigations and estimate the region’s economic value and whaling potential.

In its first season, the BANZARE departed from Cape Town on the *Discovery* to take formal possession of Enderby Land and Kemp Land.¹⁵⁰ On his first flight over the Antarctic coastline on 31 December 1929, Mawson flew an airplane over a new stretch he named Mac. Robertson Land, after one of the expedition’s Australian benefactors. Ice conditions, however, frustrated Mawson’s efforts to land on the continent.¹⁵¹ On 13 January 1930, the Australians settled for a small rocky islet off the coast, which Mawson named Proclamation Island. Once on the island, Mawson and his men erected a flagpole, read an official proclamation that claimed Enderby Land, Kemp Land and Mac. Robertson Land, shot some photographs and hauled up the Union Jack in an act of ceremonial possession that had been practiced by explorers for centuries.¹⁵² As historian Tom Griffiths has explained, this act of possession, “clumsily performed with rock, pole, plaque, cloth, paper and voice on an island connected only by ice to the mainland... vested all territories between longitudes 73 degrees east and 47 degrees east, and south of latitude 65 degrees in His Majesty King George the Fifth and His Heirs and Successors

¹⁴⁹ Telegram from Casey to External Affairs, 10 October 1929, NAA, A981, ANT 51, Part 2, Antarctic – Norwegian Claims.

¹⁵⁰ Kawaja, “Australia in Antarctica,” 45-46. While Mawson maintained it was primarily a “scientific expedition,” everyone understood, in the words of Captain John Davis in command of the *Discovery*, “that’s all eye-wash. We’re out to grab land.”

¹⁵¹ Day, *Antarctica: A Biography*, 245-249. The captain of the *Discovery*, John Davis, refused to risk his ship for the “bloody rubbishing business of raising the flag ashore.”

¹⁵² See Christy Collis, “The Proclamation Island Moment: Making Antarctica Australia,” *Law Text Culture* 8, no. 3 (2004): 39-56.

for ever.” Harold Fletcher, a young zoologist on the expedition, sarcastically noted that “We claimed a huge tract of land which we had not landed on and had not even seen all of it.”¹⁵³ During a flight over the mainland on 25 January, Mawson again performed a ceremonial act of possession, dropping a flag while reading a proclamation claiming the territory.¹⁵⁴ Shortly after, the BANZARE headed back to Australia having failed to land on the continent during its first season of work.

After the Depression hit Australia particularly hard, the new Prime Minister, James Scullin, pondered cancelling the second season of the expedition. The Australian government accepted, however, that further flag planting and scientific work was a legal necessity before a claim could be made. As historian David Day has shown, such a territorial annexation was proving ever more attractive to Scullin, who hoped his government would be able to tax foreign whalers. He even speculated that a claim in the Antarctic might jumpstart Australia’s own whaling industry.¹⁵⁵ In 1930-1931, 41 factory ships and 232 whale catchers manned by thousands of men operated in the waters off Antarctica – it was still a lucrative industry and Australia wanted to benefit.¹⁵⁶ In its second season, the expedition would chart the coastline from the Ross Sea to Mac. Robertson Land, most of which Mawson had explored in his 1911-1914 expedition. The Antarctic Committee and Australian government stressed that Mawson needed to land on the continent this time.¹⁵⁷

On 5 January 1931, Mawson fulfilled his orders when he landed on the continent proper at Commonwealth Bay, where the old hut still stood from his 1911 expedition. The small party re-occupied the hut for two days as Mawson prepared to formally claim the territory. With the expedition’s cameraman filming the formal ceremony, the party built a cairn, raised the flag and Mawson read a proclamation claiming as King George V Land all the land between 142° and 160° E extending to the South Pole. One of the expedition’s pilots, Stuart Campbell, contemptuously explained, “And thus were

¹⁵³ Griffiths, *Slicing the Silence*, 109.

¹⁵⁴ A. Grenfell Price, *The Winning of Australian Antarctica: Mawson’s B.A.N.Z.A.R.E. Voyages, 1929-1931* (Sydney: Angus & Robertson, 1962), 71.

¹⁵⁵ Day, *Antarctica: A Biography*, 257-258, 270; Ayres, *Mawson: A Life*, 199.

¹⁵⁶ Griffiths, *Slicing the Silence*, 57.

¹⁵⁷ Day, *Antarctica: A Biography*, 258.

thousands of miles of virgin ice clad land claimed for His Majesty King George V by his dearly beloved servant Douglas Mawson.” The claiming ceremonies, which Campbell called a “bloody farce,” continued.¹⁵⁸ During a flight on 9 February, Mawson spotted new land, dropped the flag, and named it Princess Elizabeth Land. The expedition made it ashore on the coast of Mac. Robertson Land a few days later near a large monolith (which Mawson named after Prime Minister Scullin) and conducted a claiming ceremony. They held another at the eastern edge of Enderby Land on 18 February 1931.¹⁵⁹ Shortly after, Mawson’s expedition turned northwards for home.

Over the course of two seasons, the BANZARE had claimed land, charted the coastline, defined the continental shelf, completed an extensive amount of scientific work and discovered new whaling grounds.¹⁶⁰ The expedition had successfully connected all of the territory between 45°E and 160°E (the western limit of the Ross Dependency) with an unbroken coastline.¹⁶¹ When compared with the temporary settlement and technological achievements of the Byrd venture, the activities of the BANZARE seem modest, but British and Commonwealth officials argued that the expedition had met the requirements for state activity and control in the polar regions articulated by Sir Cecil Hurst at the Imperial Conference of 1926. Still, the question lingered: Had the expedition done enough to allow Australia to claim the *entire* sector between 45°E and 160°E?¹⁶² At the Imperial Conference of 1930, this became one of the central questions explored by the Committee on Polar Questions.

4.6 “All Existing British Claims Have Been Maintained Intact”

In the fall of 1930, leaders and diplomats from the Dominions of the British Empire met in London for another Imperial Conference. As these officials discussed the future of the

¹⁵⁸ Griffiths, *Slicing the Silence*, 119-120.

¹⁵⁹ The ceremony was held on a point Mawson named Cape Bruce after Stanley Bruce. Day, *Antarctica: A Biography*, 266-267; Griffiths, *Slicing the Silence*, 116-117.

¹⁶⁰ Griffiths, *Slicing the Silence*, 120.

¹⁶¹ Kawaja, “Australia in Antarctica,” 47.

¹⁶² Keith Officer, a member of Australia’s External Affairs with legal training, asked whether more needed to be done to place the vast sector Australia wanted to claim under a degree of control before it was claimed. Keith Officer to Scullin, 8 July 1931, NAA, A981/ANT4, Part 8.

Empire and crafted the historic Statute of Westminster (which offered legislative independence to the Dominions), they also attended the meetings of the Committee on Polar Questions.

The late 1920s had produced a host of threats to the Empire's polar interests, and the Committee acknowledged that many still lingered. The U.S. and Norway could still challenge the Empire's polar possessions in the Arctic and Antarctic, while the British emphasized the danger Argentina posed to the FID. Earlier in 1930, the Argentines had disrupted the status quo in the FID when they sent three military officers to take command of the weather and wireless station on Laurie Island in the South Orkneys. The British still believed their title to the South Orkneys and the FID was strong, based on exploration, administrative efforts, the sector principle and historic Argentine acceptance. On two occasions, the Polar Committee highlighted, the Argentines had been told the islands were British and had not protested. Nor had they objected to the Letters Patent of 1908 or 1917. As a result, the British believed that they were in a strong enough position to protest the latest Argentine actions in the South Orkneys. The close trade relationship between the two countries complicated the situation, however, as did the consensus throughout London that "Argentina must be regarded as an essential part of the British Empire."¹⁶³ The British also realized that a protest would lead to arbitration, which they still wanted to avoid. Foreign Office official Allen Leeper stressed the danger, noting that, "The tribunal could scarcely fail, in giving its decision, to enunciate principles of far-reaching importance, and the decision itself would tend to become a precedent which might be highly embarrassing."¹⁶⁴

Given Britain's need to maintain good relations with Argentina and the dangers of arbitration, the Polar Committee considered voluntarily ceding the South Orkneys or Laurie Island to the Argentines.¹⁶⁵ The committee members determined, however, that any deal would "lead other powers to take a renewed interest in the Antarctic and revive

¹⁶³ Britain's Ambassador to Argentina, see Alan Knight, "Latin America," in *The Oxford History of the British Empire*, eds. Judith Brown and Wm. Roger Louis (Oxford: Oxford University Press, 1999), 633.

¹⁶⁴ The Argentine Claim to the South Orkney Islands, Statement Made to the Committee by Mr. A.W. Leeper, NA, DO 35/167/7, Territorial Claims in the Arctic.

¹⁶⁵ The Argentine Claim to the South Orkney Islands, Statement Made to the Committee by Mr. A.W. Leeper, NA, DO 35/167/7, Territorial Claims in the Arctic.

shadowy claims which they would otherwise have abandoned.” Instead, the British decided to continue their policy of maintaining the status quo and avoiding conflicts with the Argentines over the FID – a policy it would try to keep throughout the 1930s. At the same time, they would also avoid discussing the sector principle with the Argentines, due to the long-standing fear that they might use Canada’s sector claim in the Arctic as a precedent to support an annexation of their own in the Antarctic.¹⁶⁶ The Committee on Polar Questions endorsed this strategy.

Despite concern about the Argentines, the Committee on Polar Questions painted a very optimistic picture of the Empire’s position in the polar regions. It celebrated that “all existing British claims have been maintained intact.”¹⁶⁷ Although concessions had been made to Norway, by 1930 the Empire’s bi-polar policies and diplomacy had proven remarkably successful. The strategy adopted at the Imperial Conference of 1926 for the Antarctic continued to proceed through the BANZARE’s activities. Coordination between Britain and the Dominions on polar affairs was better than ever. As a reflection of this cooperation, the British changed the name of the Antarctic Committee to the Polar Committee, and with representatives from Australia, New Zealand and, often, Canada, it adopted a truly bi-polar focus.¹⁶⁸

The Committee on Polar Questions accepted the conclusions of Foreign Office officials Laurence Collier and Ivone Kirkpatrick that the sector principle was close to “securing general acceptance.” The Soviet Union, Canada, Britain and New Zealand had all declared sectors. The British believed that the state practice of these four countries, combined with the implied acquiescence of the international community, could potentially elevate the sector principle to a rule of customary international law. The development would be even more likely if the two other primary players in the polar regions, Norway and the U.S., also embraced the sector principle. The British knew about

¹⁶⁶ Minutes of the 28th Meeting of the Interdepartmental Committee on the Antarctic, 2 July 1930, DO 114/34; Minutes for the 28th Meeting of the Polar Committee, 2 July 1930, NAA, A981, ANT 3, “Antarctic Control British Claims – Polar Committee”.

¹⁶⁷ Imperial Conference, 1930: Policy in the Antarctic, NAA, A981, ANT 4 PART 9; Imperial Conference, 1930, Policy in the Arctic, Memorandum Prepared by His Majesty’s Government in the United Kingdom, September 1930, NA, DO 35/167/7, Territorial Claims in the Arctic.

¹⁶⁸ The name change was made in February 1930. Polar Committee, 25th Meeting, 11 February 1930, NAA, A981, ANT 4 PART 9.

the Hughes Doctrine. But they interpreted Washington's decision not to challenge Canada's Arctic title during the MacMillan expedition or Britain's Antarctic rights during the Byrd expedition to mean that, in practice, the Americans accepted that the sector principle and a show of state control could support a polar territorial claim. Further, the Americans had used arguments based on contiguity in the past and signed on to the Treaty of 1867, which, the British argued, initially established the principle of boundary lines running to the pole. In the Antarctic, the Foreign Office pointed to Byrd's search for an independent coastal access to Marie Byrd Land as proof that the Americans believed a state had to control the coastline to claim a polar interior – the central tenet of the sector principle. As for the Norwegians, despite their strong views on effective occupation, they had been amenable to negotiation and the British still hoped they would recognize the benefits of the sector principle in the future.¹⁶⁹

The Foreign Office reports matched the optimism and conclusions of Canadian authorities. The agreement with the Norwegians over the Sverdrup Islands had boosted Ottawa's confidence in the strength of Canada's Arctic title. In January 1930, a Canadian General Staff study produced by Lieutenant-Colonel Harry Crerar, then a senior staff officer at the Directorate of Military Operations and Intelligence,¹⁷⁰ highlighted how all “the sources of national title to lands” – discovery, effective occupation, control, contiguity and prescription – were working to strengthen and secure Canada's title. The report stressed that Canada's sector boundaries had not been challenged since they first appeared on the Department of Interior's map in 1904. This “tacit acquiescence” from countries such as Norway and the U.S. over a period of 25 years barred them from protesting the Canadian claim, argued Crerar.¹⁷¹

British and Canadian assessments all supported the view that the passage of time and the silence of the international community would continue to strengthen their

¹⁶⁹ See Laurence Collier, Northern Department, Memorandum Respecting Territorial Claims in the Arctic to 1930, 10 February 1930, NA, DO 35/167/7; Territorial Claims in the Arctic and Ivone Kirkpatrick, Western Department, Territorial Claims in the Antarctic from 1908 to the end of 1929, 31 July 1930, NA, DO 35/167/7.

¹⁷⁰ See Paul Dickson, *A Thoroughly Canadian General: A Biography of General H. D. G. Crerar* (Toronto: University of Toronto Press, 2007), 90.

¹⁷¹ General Staff, Department of National Defence, Canadian Political Rights in the Arctic, 28 January 1930, LAC, RG 25, Vol. 4252, File 9057-40, pt. 2.

territorial claims, and bring the sector principle closer to acceptance as a rule of customary international law. To ensure that this silence continued, the Committee on Polar Questions advised against publicly discussing polar claims or the sector principle. The Committee understood the need to avoid any action that might provoke a foreign protest – such as broadcasting the legal foundation of the Empire’s claims.¹⁷²

Canadian and British experts were also sure that time would prove their conception of the doctrine of effective occupation in the polar regions correct. They continued to uphold the conclusions of James White and Cecil Hurst that control constituted effective occupation in the High Arctic and Antarctic. An investigation of Canada’s title to Ellesmere by the External Affairs department concluded that the RCMP post on the northernmost island of the archipelago met the requirements of international law and state practice, effectively extending Canada’s control and sovereignty over the entire island. The document utilized the fourth edition of Oppenheim’s *International Law* which emphasized that a “police sweep” of “remote spots” could show how far a state was able to establish authority without permanent occupation.¹⁷³ The Foreign Office stressed that in the harsh polar environment a state did not have to display continuous control over every part of its territory, just “some continuous show of interest.” By establishing control over the means of access to a polar territory, a state could extend its authority over a vast interior.¹⁷⁴ Crerar’s report captured this sentiment when he argued, “Control may rest on an extension of actual occupation or it may be argued as an obvious, even though unexercised, power which geographical propinquity and natural

¹⁷² Imperial Conference, 1930, Committee on Polar Questions Report, NA, DO 35/167/7.

¹⁷³ Ellesmere, 14 November 1930, LAC, RG 25, Vol. 4252, File 9057-40, pt. 2. At the Imperial Conference, the Committee on Polar Questions concluded that, “The progress made by His Majesty’s Government in Canada in organising a system of police patrols covering all the islands north of the Canadian mainland was such that the title to these islands now rested not only on the theoretical application of the ‘sector principle’ but also on the solid ground of effective occupation.” Imperial Conference, 1930, Committee on Polar Questions Report, NA, DO 35/167/7. In the spring of 1933, scholar V. Kenneth Johnston echoed the positive conclusions many by Canada’s official appraisals of Canada’s title to the Arctic Archipelago. He argued that occupation in the Arctic actually meant the exercise of effective jurisdiction, which Canada had achieved through its RCMP posts and patrols. For Johnston the formula to polar sovereignty was simple: if a British subject discovered the island, and the government of Canada exercised jurisdiction that was publicly declared, the title was secure. V. Kenneth Johnston, “Canada’s Title to the Arctic Islands,” *Canadian Historical Review* 14, no. 1 (March 1933): 24, 36.

¹⁷⁴ The phrase is taken from Ivone Kirkpatrick’s report on territorial claims in the Antarctic. Ivone Kirkpatrick, Western Department, Territorial Claims in the Antarctic from 1908 to the end of 1929, 31 July 1930, NA, DO 35/167/7.

communications confer.”¹⁷⁵ The Committee on Polar Questions embraced this vision of effective occupation in the polar regions, ruling that state control could be “intermittent or periodical, provided, however, that it attains such effectiveness as is reasonably possible along the coasts of the areas which are the subject of a claim.” This level of control could be shown by periodic visits and scientific studies, and by administrative acts, such as those in place to regulate the whaling industry.¹⁷⁶

4.7 Norway’s Occupation of Eastern Greenland and the Australian Antarctic Sector

Despite British hopes that Norway might accept the sector principle, Oslo continued to insist on effective occupation in the early 1930s. Shortly before the *Clipperton Island* decision, Norwegian international lawyer Gustav Smedal took up his country’s defence of the idea in his treatise *Acquisition of Sovereignty Over Polar Regions*. Smedal, an ardent nationalist, headed Norway’s Greenland Association and wanted his country to secure a polar empire.¹⁷⁷ The British Dominions Office pointed out that the “ulterior motive” of Smedal’s book was supporting Norway’s contention that Eastern Greenland was outside Danish sovereignty, but noted his conclusions were not “altogether unprejudiced.”¹⁷⁸

Only in the fifteenth century, lamented Smedal, were territorial claims as excessive as those currently underway in the polar regions. In the Antarctic, Smedal asserted, Great Britain claimed land, “some of which is quite unexplored, has never been seen by any human being, and about the conditions of which there is no positive information.” The Norwegian argued that the sector principle had no legal foundation and no right to become “embodied in international law.”¹⁷⁹ Smedal accepted that the Saint-Germain-en-Laye Treaty (1919) had established that local conditions do matter when

¹⁷⁵ General Staff, Department of National Defence, Canadian Political Rights in the Arctic, 28 January 1930, LAC, RG 25, Vol. 4252, File 9057-40, pt. 2.

¹⁷⁶ Imperial Conference of 1930, Committee on Polar Questions Report, NA, DO 35/167/7.

¹⁷⁷ Frode Skarstein, “Erik the Red’s Land: The Land that Never Was,” *Polar Research* 29, no. 2 (2006): 173-179.

¹⁷⁸ Note on a book written by Herr Gustav Smedal, dealing with ‘The Acquisition of Sovereignty over Polar Regions, 30 December 1930, NA, DO 35/167/7, Territorial Claims in the Arctic.

¹⁷⁹ Gustav Smedal, *Acquisition of Sovereignty Over Polar Areas* (Oslo: Jacob Dybwad, 1931), 33-35, 64.

considering the requirements of occupation, but only to a degree. Unless a state's occupation was "permanent and efficient" other powers did not have to respect its territorial claim.¹⁸⁰ Canada's acts of occupation on the islands of the Arctic Archipelago offered a "good precedent for how to take effective possession of polar areas," but the author maintained that its sovereignty did not "extend to the neighbouring territories, which are not submitted to control." Smedal argued that Canada's police posts only established control over their immediate surroundings. Furthermore, even in the case of a polar island where a state had attained effective possession, its sovereignty did not extend to the other islands in the group. Scientific or exploratory expeditions and establishing scientific posts or wireless stations were also insufficient mechanisms employed by states trying to gain sovereignty over polar territory.¹⁸¹ Smedal concluded that a vast part of the Arctic (such as Eastern Greenland, the northern islands of the Arctic Archipelago and Franz Josef Land) and Antarctic were ineffectively occupied and remained *terra nullius*.¹⁸² Although he used Huber's decision to support his arguments, Smedal expressed a far more rigorous standard of effective occupation.

Norway tested its views on effective occupation against Denmark in Eastern Greenland. Norway contended that Denmark had sovereignty only over those parts of Greenland which she genuinely occupied and administered, that this was all Norway had ever acknowledged and that Denmark's full sovereignty required an extension of this occupation. Afraid of Norway's objection, in early 1930 the Danes issued a three-year plan for the exploration of Eastern Greenland that included three ships, two planes and a

¹⁸⁰ Smedal, *Acquisition of Sovereignty Over Polar Areas*, 9-12. To support his assertions about the weakness of Britain's Antarctic claims, Smedal was able to cite two "English" sources. In his general study of the Antarctic, J. Gordon Hayes noted that, "if an unfriendly Power required, for example, Graham Land, we should have difficulty in convincing an international court that we had occupied it, within the meaning of the law." He went on to argue that some of the geographical boundaries of these dependencies, as they are now fixed, offer extremely thorny possibilities. J. Gordon Hayes, *Antarctica: A Treatise* (London: Richards Press, 1928), 360-361. Smedal also cited an article in the *Dundee Courier and Advertiser* of 6 April 1929 that questioned, "How much of the Antarctic has Great Britain effectively occupied? To the best of our knowledge there is, on the Continent (not counting islands), only one spot of which this can be said."

¹⁸¹ While scientific efforts could serve a purpose in preparing for future colonization they did not meet the requirements of effective occupation unless paired with police authority. Smedal, *Acquisition of Sovereignty Over Polar Areas*, 9-12, 24-25, 31, 33-35, 49.

¹⁸² Other Norwegian international lawyers, followed Smedal's lead, including John Skeie, a Professor of Law at the University of Oslo, who wrote a book on the dispute over Eastern Greenland in which he stressed the need for effective occupation. See John Skeie, *Greenland: The Dispute Between Norway and Denmark* (London: J. M. Dent & sons, 1932).

hundred personnel armed with police authority. In March the Norwegians asked that Denmark scale back its planned activities or they would bring the question of Eastern Greenland's ownership to the Permanent Court of International Justice.

Meanwhile, Adolf Hoel, who was in charge of the Institute for the Exploration of Svalbard and Arctic Ocean (NSIU), allied with Gustav Smedal and his friend Frede Castberg (legal advisor to the Minister of the Foreign Affairs) to raise public support for a Norwegian occupation of Eastern Greenland.¹⁸³ While Hoel, Smedal and the Norwegian Council of Arctic and Antarctic Administration pressured the government, the state sought to secure its interests through bilateral talks. After discussing the matter with Castberg and the Assistant Secretary of Foreign Affairs, Frederik Mastrand, Hoel and Smedal decided to initiate a private occupation of Eastern Greenland. In the summer of 1931 a hunting expedition travelled to Erik the Red Land (Erik Raude's Land – 71°3'N and 75°4'N) with orders to raise the Norwegian flag and declare their occupation of the region. Norwegian newspapers endorsed the occupation and pressured the government to do the same, which it did on 10 July 1931 with a proclamation declaring Norway's sovereignty over the area. On the following day Denmark submitted the dispute to the Permanent Court of International Justice, in accordance with the previous arbitration agreement between the two and also in conformity with the "optional clause" of Article 36 of the Court's Statute, previously accepted by both countries.¹⁸⁴

The British knew Norway would base its case on effective occupation. Smedal accompanied the Norwegian delegation to The Hague.¹⁸⁵ Secretary of State for Dominion Affairs James Thomas stressed that "in pronouncing judgment the Court may seek to lay down general principles regarding the acquisition of sovereignty in polar regions which might be embarrassing." A decision upholding the vision of effective occupation held by Smedal would have a momentous impact on the Empire's claims throughout the polar regions. The judges of the PCIJ could also choose to attack the sector principle if they

¹⁸³ Norway established the Institute for the Exploration of Svalbard and Arctic Ocean (NSIU) with orders to establish "a polar geopolitical and research policy programme." Drivenes and Jølle, *Into the Ice*, 292.

¹⁸⁴ Drivenes and Jølle, *Into the Ice*, 297-302. See also Skarstein, "Erik the Red's Land," 173-179; Apollonio, *Lands That Hold Us Spellbound*.

¹⁸⁵ Charles Wingfield to Sir John Simson, British Legation, Oslo, 1 June 1932, NAA, A981, ANT 4, Part 10, Antarctic Control of.

provided a formula for the acquisition of polar territory. These concerns led Thomas to advise Australia to make its sector claim in the Antarctic “well in advance of the conclusion of the Greenland case.”¹⁸⁶

Australian officials had been seriously considering how to claim their Antarctic sector for more than a year before the oral hearings for the Eastern Greenland dispute started in November 1932. The optimistic conclusions of the Committee on Polar Questions supported Prime Minister Scullin’s belief that the completion of the BANZARE’s second season of activity “completed substantially the second stage of the process recommended by the Imperial Conference of 1926.” Over the course of the previous two years the great portion of the Australian sector between 45°E and 160°E had been revisited and British sovereignty proclaimed on multiple occasions. Scullin asked the Foreign Office if it was time to implement the third stage laid out in 1926 and officially claim the Australian sector.¹⁸⁷ Although the Scullin government fell to the United Australia party of Joseph Lyons in 1931, the new government also prioritized the south polar region. The investment in BANZARE, the thirst for whaling revenues and national pride pushed the Australian government towards an Antarctic claim. Lyons appointed legal expert John Greig Latham his Attorney General and Minister of External Affairs, and requested he determine how to claim an Australian Antarctic Territory.¹⁸⁸

Latham concluded that Mawson’s expeditions afforded Australia a better claim to the sector between 45°E and 160°E than any other state “in the unappropriated regions of either the Arctic or the Antarctic areas.” While some Australian officials questioned whether more must be done to occupy the area Australia intended to claim, Latham thought that any attempt at occupation “would necessarily be so limited in character that it might have the unfortunate effect of prejudicing, rather than assisting, the claims which

¹⁸⁶ Secretary of State for Dominion Affairs to Prime Minister’s Department, 9 January 1933, NAA, A981, ANT 2, Part 1, “Antarctic Control Australian Sector” pt.I. Charles Wingfield to Sir John Simon, British Legation, Oslo, 1 June 1932, NAA, A981, ANT 4, Part 10, Antarctic Control of.

See also Charles Wingfield to Sir John Simon, 13 January 1933, NAA, A981, ANT 2, Part 2, “Antarctic Control – Australian Sector” Pt.2; Charles Wingfield to Sir John Simon, British Legation, Oslo, 1 June 1932, NAA, A981, ANT 4, Part 10, Antarctic Control and Sir Charles Wingfield to Sir John Simon, 12 May 1934, NAA, A981, ANT 51, Part 3, [Antarctic]. Norwegian Claims Part 3.

¹⁸⁷ J.H. Scullin, Prime Minister and Minister for External Affairs, to Foreign Office, 13 July 1931, NA, DO 114/34.

¹⁸⁸ Kawaja and Griffiths, “Our great frozen neighbour,” 36-37.

may now be made upon the basis of exploration and discovery in regions where effective occupation is not possible.”¹⁸⁹ Latham explained that once Australia took over its sector, it would provide “some measure of control over the area, which will have to be effective though not continuous” – which reflected the conclusions of the Committee on Polar Questions.¹⁹⁰

Lengthy discussions began between Latham and the Dominions Office over how to secure international recognition of the Empire’s Antarctic claims.¹⁹¹ In London, most officials agreed that the time had come to claim an Australian Antarctic sector. Australian exploratory work and the Foreign Office’s belief that the international community had “generally recognised” the sector principle provided a firm foundation for Australia’s claim. While some worried that the Australian sector’s vast hinterland had never been penetrated, the British found support in the fact that the interior of the FID had never been seen when it was claimed in 1917, and no state had officially challenged Britain’s sector claim.¹⁹² In keeping with the conclusions of the Imperial Conference of 1926, the British decided that France’s claim to Adélie Land must be respected, although its geographic boundaries remained unknown. When Law Officers of the Crown, Thomas Inskip (who had previously reviewed the claim to the Ross Dependency) and Boyd Merriman (the Solicitor General), appraised the plan for an Australian Antarctic Territory in July 1932, they advised that the claim should proceed using “meridians of longitude” running to the pole. As in 1923 with the Ross Dependency, the Law Officers argued that

¹⁸⁹ In keeping with British policy, in the official notification of an Australian claim, Latham advised that “no reference to the grounds of the claim is made, any objection which may hereafter be made may be dealt with without the disadvantage of our hands being more or less tied in advance.” J.G. Latham, Australia House, to J.H. Thomas, Secretary of State for Dominion Affairs, 30 May 1932, NAA, A981, ANT 2, Part 1, “Antarctic Control Australian Sector” pt.I.

¹⁹⁰ The government, for instance, would have to provide some regulation of the areas when the international convention on whaling came into force. J.G. Latham, Minister of External Affairs, For Cabinet, Antarctic: Control of Australian Sector, 6 December 1932 (and June 1932), NAA: A981, ANT 2, Part 1, “Antarctic Control Australian Sector” Pt.I

¹⁹¹ Kawaja, “Extending Australia’s Control Over its ‘Great Frozen Neighbour,’” 29.

¹⁹² H.N. Tait, Dominions Office to Law Officers of the Crown, 31 December 1931, NA, DO 114/34; Triggs, *International Law and Australian Sovereignty in Antarctica*, 94. British officials believed that most foreign powers would accept an Australian sector claim, except for the Norwegians. The Australians had not implemented the kind of “lasting and real control” that Norway thought necessary. Still, the “gentleman’s understanding” between the two countries held, and the British did not think the Norwegians would protest an Australian sector claim. Charles Wingfield to Sir John Simon, 13 January 1933, NAA, A981, ANT 2, Part 2, “Antarctic Control – Australian Sector” Pt.2 and Telegram (Thomas) to Commonwealth Government, 4:45 pm, 4 October 1932, NA, DO 114/34.

the territory already fell under British sovereignty and a formal act of annexation was neither needed nor desirable. All that the situation required was an “unequivocal assertion of sovereignty” over the sector.¹⁹³

On 8 December 1932, the Australian cabinet recommended that an Order in Council be issued claiming an Australian Antarctic sector, but wanted to delay its release until 1933 when they could determine what legislation to implement in the new territory.¹⁹⁴ The British intervened, warning of the potential impact of the *Eastern Greenland* case. With the PCIJ’s decision on the case looming, the British argued that an official Order in Council claiming the territory had to be released as soon as possible.¹⁹⁵

On 7 February 1933 the British government issued an Order in Council that asserted its sovereignty over “all the islands and territories other than over than Adélie Land situated south of the 60th degree of South Latitude and lying between the 160th degree of East Longitude and the 45th degree of East Longitude” and placed the sector under the authority of the Commonwealth of Australia. In March, Canberra published the Order in Council in the *Commonwealth of Australia Gazette*. When the Australian Parliament debated the legislation at the end of May 1933, Richard Casey explained that the claim capped off twenty years of “continuous and concerted effort.” Casey and

¹⁹³ They also highlighted that the “circumstances are peculiar, and the ordinary principles governing the limitation of the territory to which title to sovereignty extends when such title is acquired by discovery followed by occupation are scarcely applicable.” T.W.H. Inskip and F.B. Merriman, Law Officers of the Crown to Dominions Office, 29 July 1932, NA, DO 114/34. See also, Triggs, *International Law and Australian Sovereignty in Antarctica*, 93-94, 108-109.

¹⁹⁴ J.G. Latham, External Affairs, 10 January 1933, NAA, A981, ANT 2, Part 1, “Antarctic Control Australian Sector” pt. 1.

¹⁹⁵ J.G. Latham, External Affairs, 10 January 1933, NAA, A981, ANT 2, Part 1, “Antarctic Control Australian Sector” pt. 1. While the Order in Council Britain used to claim the Ross Dependency had utilized the British Settlements Act of 1887, London and Canberra decided to assume control of the Australian Antarctic sector using section 122 of the Australian Constitution, which provided that that “The Parliament may make laws for the government of any....territory placed by the King under the authority of and accepted by the Commonwealth...” J.G. Latham, Minister of External Affairs, For Cabinet, Antarctic: Control of Australian Sector, 6 December 1932 (and June 1932), NAA, A981, ANT 2, Part 1, “Antarctic Control Australian Sector” Pt.I; J.G. Latham, Minister for External Affairs for Cabinet, Antarctic: Control of Australian Sector, 6 December 1932, NAA, A432, 1953/3228 Part 1. Solicitor General George S. Knowles concluded that the British Settlement Act worked for territories acquired by settlement, but not for those without. What was required for the Australian sector was a formal notification of the claim to sovereignty rather than an instrument providing for the government of territories. George S. Knowles, Secretary, Solicitor General to the Secretary of External Affairs, Annexation of Territories in the Antarctic, 2 March 1932, NAA, A432, 1953/3228 Part 1. See also Secretary of State, Dominion Affairs to Prime Minister’s Department, 4 October 1932, NAA, A981, ANT 2, Part 1, “Antarctic Control Australian Sector” pt. 1.

Latham highlighted the territory's economic potential, the benefits of the whaling industry and the role the region could play in Australia's security. Some Australian Members of Parliament questioned whether the League of Nations should administer the Antarctic, while others worried the claim might upset the Americans and Norwegians. Most agreed with Casey's assertion, however, that "if we do not take this sector, and claim sovereignty over it, some other country will." The OIC easily passed through Australian Parliament.¹⁹⁶ On 13 June 1933, the Australian Antarctic Territory Acceptance Act received royal assent, and it came into operation in August 1936.¹⁹⁷

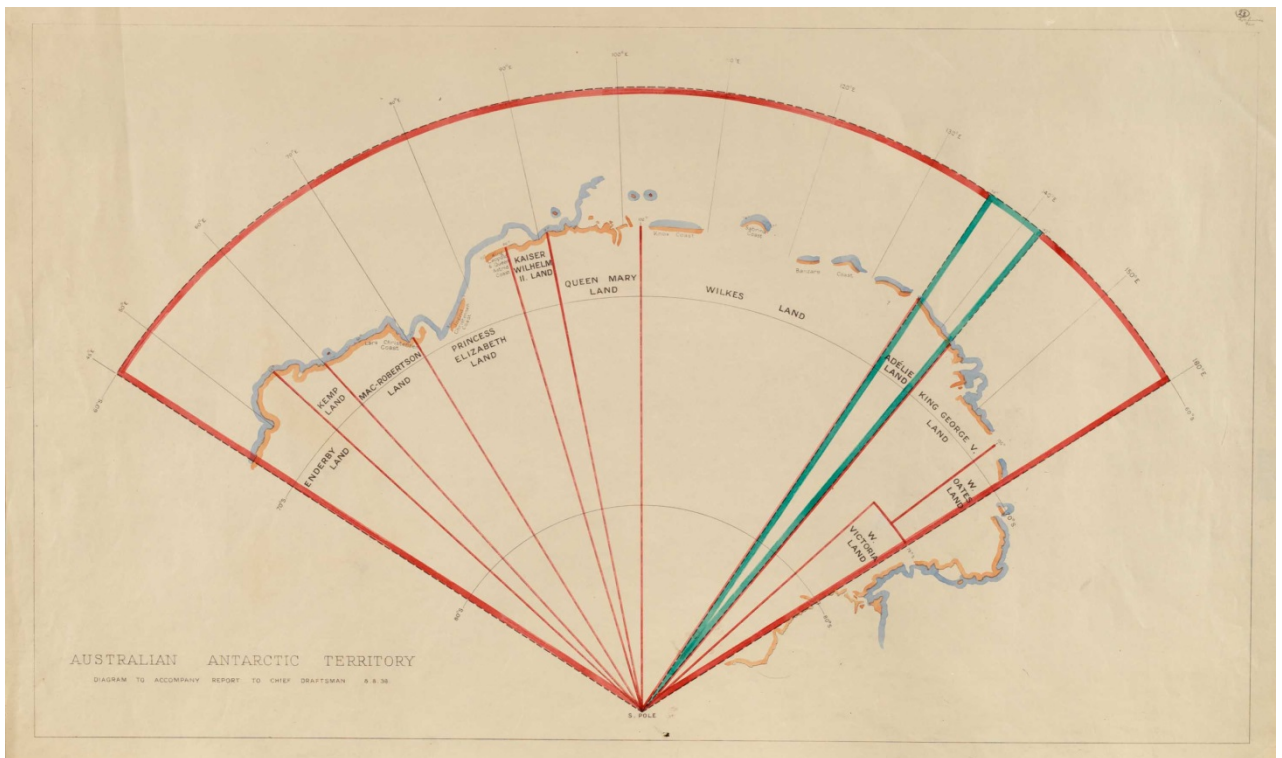


Figure 7: Map showing Australian Antarctic sector. Segment of Antarctica entitled, 'Australian Antarctic Territory.' Diagram to accompany report to Chief Draftsman. NAA, AA1964/7, 23.

¹⁹⁶ Government of Australia, *Hansard*, 26 May 1933, at 1952, 1956, 2020

¹⁹⁷ Philip Law, *Antarctic Odyssey* (Melbourne: William Heinemann Australia, 1983), 8. Casey insisted that "if we do not take this sector, and claim sovereignty over it, some other country will." It might prove valuable for security reasons in the future, or even as a place to train the Australian Navy. Tom Griffiths, "The AAT and the Evolution of the Australian Nation," *Proceedings of the Symposium to Mark 75 Years of the Australian Antarctic Territory* (2012): 13-21. See also Dodds, *Geopolitics in Antarctica*, 83.

4.8 “Sixty-Five Percent” Claimed

With the creation of the Australian Antarctic Territory (AAT), the British Empire used the sector principle to claim millions of square miles of completely unknown polar territory. It was a bold move, spurred by the belief that the passage of time and the silence of the international community had strengthened the Empire’s legal position in the polar regions. In the process, the British, Australians, New Zealanders, Canadians and the Soviets had offered the world a solution to the problem of polar sovereignty. By the beginning of 1933, British and Commonwealth officials, in the context of the time, anticipated that the broader world might accept the sector principle as a rule of customary international law and the basis of a bi-polar legal regime.

The faith British and Commonwealth officials placed in the sector principle hinged on the continued silence and inaction of the U.S. Yet, Australia’s sector claim broke one of the central tenets of the Empire’s polar strategy – avoiding any dramatic action that might “excite interest in the State Department.”¹⁹⁸ The sector lines of the AAT enclosed Wilkes Land, awakening American officials to the advancing legal situation in the polar regions. Anna O’Neill, assistant to the Legal Adviser of the U.S. Department of State, lamented that, in a little over a decade, Britain, Canada and Russia had used the sector principle to claim “approximately sixty-five percent” of the Arctic and Antarctic.¹⁹⁹ This time, American interest in the polar regions was seriously engaged.

The Australian sector claim outraged the Norwegian public as well. Antarctic expert Bjarne Aagard captured their anger in a strong opinion piece in the *Norwegian Journal of Commerce and Shipping* stating, “Norway had bartered her birth-right for less than a pottage of lentils.” With the creation of the AAT, Norwegian whaling companies that were doing the most work in the Antarctic needed to apply for more licenses and pay even more fees. The British and Australians, Aagard persisted, had done nothing to

¹⁹⁸ Minutes of the 28th Meeting of the Polar Committee, 2 July 1930, NAA, A981, ANT 54 PART 1, USA Claims I.

¹⁹⁹ Miss Anna O’Neill, the Arctic Sector Claimed by Russia and American Claims Therein, 30 October 1933, NARA, RG 59, Entry 5245, Box 1, Folder 2, File Polar Regions. Sovereignty. Sector Principle.

effectively occupy their Antarctic Dependencies.²⁰⁰ In the years that followed the creation of the AAT, the Australians and British would continue to fear a Norwegian challenge.

British and Australian officials knew creating the AAT would upset the Norwegians, and possibly the Americans. The looming decision in the *Eastern Greenland* case left little choice but to take immediate action. That single decision had the potential to dramatically change the entire legal landscape in the polar regions. At the time, legal expert Lawrence Preuss captured this sentiment. The court's judgment, Preuss predicted, would determine whether title in the polar regions, "shall be based upon effective occupation or upon the principle of sectors." "In view of the conflicting national claims in the Arctic and Antarctic and of the increasing exploitation of the resources of these areas," Preuss concluded, "the pronouncement of the Permanent Court in the East Greenland case will be awaited with great interest."²⁰¹

²⁰⁰ Extract from the Norwegian Journal of Commerce and Shipping, 21 December 1933, "Norway and the British Claims for Antarctic Sectors," NA, CO 78/194/17.

²⁰¹ Lawrence Preuss, "The Dispute Between Denmark and Norway Over the Sovereignty of East Greenland," *The American Journal of International Law* 26, no. 3 (1932): 487.

Chapter 5

5 “Far From Settled”: Polar Sovereignty and the Rules of Territorial Acquisition in the Interwar Years

In April 1933, the international legal community anxiously awaited the Permanent Court of International Justice’s decision in the *Eastern Greenland* dispute. The case brought together the world’s leading legal minds and polar experts. Professors Gilbert Gidel of the University of Paris and Charles de Visscher of the University of Ghent served as counsels for Norway and Denmark respectively. Amongst the experts brought to advise the Norwegian legal team were the two architects of the Erik Raudes Land occupation, Gustav Smedal and Adolf Hoel. Alongside thirteen other judges sat Sir Cecil Hurst, known for crafting the Empire’s Antarctic legal policy, and Norway’s former minister to Britain, Benjamin Vogt, who served as an ad hoc judge.¹ Given the subject of the case and the pedigree of the participants, observers expected that the PCIJ’s decision would clarify the anomalous legal space of the polar regions.² One of the major roles of the PCIJ was to create a “definite, authoritative statement of the law” in place of the varied opinions of international jurists and state officials.³ The opening arguments of the Norwegian and Danish legal teams in November 1932 reflected this expectation. Both sides highlighted the major impact of the case on the principles of international law: testing the existing rules of territorial acquisition; clarifying the doctrine of effective occupation; and, determining what a state had to do to establish its sovereignty over polar territory.⁴

¹ Both Denmark and Norway had the right to appoint judges to the bench.

² See Lawrence Preuss, “The Dispute Between Denmark and Norway Over the Sovereignty of East Greenland,” *The American Journal of International Law* 26, no. 3 (1932): 469-487; P.T. Federspiel, “The Disputed Sovereignty Over East Greenland,” *International Affairs* 11, no. 6 (1932): 783-811; and Charles Cheney Hyde, “The Case Concerning the Legal Status of Eastern Greenland,” *The American Journal of International Law* 27, no. 4 (1933): 732-738.

³ The *Eastern Greenland* case was the only time that the Permanent Court of International Justice was called upon to decide a territorial dispute, rather than a frontier or boundary dispute. Philip Marshall Brown, “The Codification of International Law,” *The American Journal of International Law* 29, no. 1 (1935): 26.

⁴ See, for instance, Exposition of M. Boeg, 22 November 1932 and Exposition of Professor Gilbert Gidel in *Eastern Greenland* (Denmark v. Norway) (1933) Permanent Court of International Justice (PCIJ), Series C, No. 66, Pleadings, Oral Statements and Documents, 2649 and 3279-3280.

The lawyers in the *Eastern Greenland* case drew upon the judicial decisions given in the two latest arbitrations dealing with territorial sovereignty – *Palmas Island* (1928) and *Clipperton Island* (1931). The cases redefined the nature of effective occupation and brought a degree of clarity to the rules on the acquisition of territory.⁵ While older legal treatises on international law presented a conception of occupation that stressed settlement, permanency, use and physical possession – much like the Hughes Doctrine – these newer decisions shifted the focus to the display and exercise of state functions. Furthermore, the decisions established that the environmental conditions, population size and the special circumstances of a territory all influenced the level of activity required to prove state title.⁶ The PCIJ’s final judgment in the *Eastern Greenland* case upheld the approach to the doctrine of effective occupation taken by the two previous cases. Taken together the three decisions set a modest threshold for occupation in sparsely populated or uninhabited regions like the Arctic and Antarctic.

Historians and lawyers point to the three cases, especially the *Eastern Greenland* decision, as pivotal moments in the evolution of polar territorial claims. They maintain that the legal decisions brought instant clarification to the requirements of territorial acquisition, and relief to the states with claims in the polar regions. This uncritical approach produces an easy narrative in which the problems of terrestrial polar sovereignty were all solved by *Eastern Greenland*, allowing states to easily judge the strengths and weaknesses of their claims. Their clarity is retrospective. Scholars have assessed the influence of the decisions reflecting current legal desires, assumptions and criteria, rather than discerning how they were viewed and understood by contemporaries of the time.⁷ Through this ahistorical reconstruction of the legal landscape scholars have

⁵ An article in the *New York Herald Tribune* captured the feeling when it declared that the international law on territorial acquisition remained a “mystery.” “The Antarctic Crisis,” *New York Herald Tribune*, 30 November 1929. See also Mark Frank Lindley, *The Acquisition and Government of Backward Territory in International Law: Being a Treatise on the Law and Practice Relating to Colonial Expansion* (London, Longmans, Green, and Co., 1926); and C.G. Fenwick, “Reviewed Work: *The Acquisition and Government of Backward Territory in International Law* by M. F. Lindley,” *The American Journal of International Law* 21, no. 2 (1927): 392-393.

⁶ Earlier arbitrations, such as the *British Guiana Case*, had indicated that state control could serve as occupation in certain circumstances. Surya P. Sharma, *Territorial Acquisition, Disputes and International Law* (The Hague: Martinus Nijhoff Publishers, 1997), 97-104; and James Crawford, *Brownlie’s Principles of Public International Law* (Oxford: Oxford University Press, 2012), 225.

⁷ For such analysis of the *Eastern Greenland* case, see, for example, Gordon W. Smith, *A Historical and*

oversimplified the past and ignored the different interpretations, attitudes and ways of thinking the decisions inspired.

The decisions in question clarified certain elements of the law, but they avoided laying out specific requirements, failed to provide a clear formula for territorial acquisition and raised fundamental questions about the doctrine of contiguity, the nature of occupation and the indeterminacy of the law. States could not be sure that the rulings in the three cases would stand the test of time, would not be challenged and overturned, or that developments in the polar regions would not render obsolete the criteria for effective occupation considered in these decisions. Accordingly, in the eyes of the legal authorities at the time, the international law on territorial acquisition remained unsettled with no clear, general guide for states with claims in the polar regions. The “Gordian knot” of polar sovereignty remained uncut.

5.1 Re-Defining Occupation: Palmas Island and Clipperton Island

In 1927, American political scientist C.G. Fenwick proclaimed that “no subject could better illustrate the deplorably neglected condition of international law during the nineteenth and early twentieth centuries” than the rules for territorial acquisition, especially over sparsely populated or uninhabited territory. Fenwick insisted that the

Legal Study of Sovereignty in the Canadian North, ed. P. Whitney Lackenbauer (Calgary: University of Calgary Press, 2014), 313-20; Janice Cavell and Jeff Noakes, *Acts of Occupation: Canada and Arctic Sovereignty, 1918-25* (Vancouver: UBC Press, 2010), 246-247, 260; Shelagh Grant, *Polar Imperative: A History of Arctic Sovereignty in North America* (Vancouver: Douglas & McIntyre, 2010), 193 and 242; Spencer Apollonio, *Lands That Hold One Spellbound* (Calgary: University of Calgary Press, 2008), 189-192; David Day, *Antarctica: A Biography* (Oxford: Oxford University Press, 2013), 239; Gillian Triggs, *International Law and Australian Sovereignty in Antarctica* (Sydney: Legal Books Limited, 1986), 30-31; Adrian John Howkins, “Frozen Empires: A History of the Antarctic Sovereignty Dispute Between Britain, Argentina, and Chile, 1939-1959” (unpublished Ph.D. dissertation, University of Texas at Austin, 2008), 24, 107; H. Robert Hall, “The ‘Open Door’ into Antarctica: An Explanation of the Hughes Doctrine,” *Polar Record* 25, no. 153 (1989): 138. Peter Beck noted some of the uncertainties left by the decisions, but did not explore them in-depth. See Peter Beck, *The International Politics of Antarctica* (London: Croom Helm, 1986), 126. While legal scholars often emphasize the legal uncertainties of the polar regions, they do not often examine how state officials felt about the law in the immediate aftermath of these cases. Triggs, *International Law and Australian Sovereignty in Antarctica*, 5-61; Donald Rothwell, *The Polar Regions and the Development of International Law* (Cambridge: Cambridge University Press, 1996), 59-61; A.C. Castles, “The International Status of the Australian Antarctic Territory,” in *International Law in Australia*, D.P. O’Connell ed. (Canberra: Law Book Company, 1966), 341-367; Christopher Joyner, *Antarctica and the Law of the Sea* (Dordrecht: Martinus Nijhoff, 1992), 55; Emilio J. Sahurie, *The International Law of Antarctica* (New Haven: New Haven Press, 1992), 258, 394.

“chaotic legal situation” urgently called for “constructive treatment by the formulation of new rules of international law.”⁸ A year later, Arbitrator Max Huber released his decision in the *Palmas Island* case, now hailed as the “classical text on the acquisition of sovereignty.”⁹ Huber recognized the shortcomings of the law and sought to address the problem by giving his conclusions universal application. Legal scholar Daniel-Erasmus Khan explained that, unlike the decisions in other arbitrations on territorial disputes, Huber infused his decision with “certain far-reaching doctrinal statements of a general character” that gave it an “unparalleled echo in the international legal community.”¹⁰

The dispute over Palmas Island started in 1898 when the Treaty of Paris ended the Spanish-American War and Spain ceded the Philippines to the United States. Rather than name each of the multitude of islands in the archipelago, the negotiators simply drew a large box around all of the territory that the U.S. would acquire.¹¹ On the fringes of this box lay Palmas, a small island (two miles long and less than a mile wide with a population under one thousand) resting just 48 nautical miles from Mindano, the southernmost major island in the Philippines. The Dutch Talaud Islands of the Netherlands East Indies were just a few miles from Palmas. When an American party travelled to Palmas in January 1906, they were shocked to find a Dutch flag rising from the island. The discovery sparked two decades of diplomatic correspondence. Unable to agree on ownership, in 1925 the Netherlands and U.S. agreed to send the case to arbitration, entrusting the decision to Max Huber, a judge on the Permanent Court of Arbitration and the PCIJ.¹² Prior to hearing the case, Huber decided that the critical date

⁸ Fenwick, “Reviewed Work: *The Acquisition and Government of Backward Territory in International Law* by M.F. Lindley,” 392-393.

⁹ Cornelis G. Roelofsen, “International Arbitration and Courts,” in *The Oxford Handbook of the History of International Law*, Bardo Fassbender and Anne Peters eds. (Oxford: Oxford University Press, 2012), 167. Gillian Triggs has asserted that Huber’s “opinion on the subject of effective occupation has achieved oracular importance.” Triggs, *International Law and Australian Sovereignty in Antarctica*, 5.

¹⁰ Huber prepared his decision to meet his objective. According to Daniel-Erasmus Khan, “the *Palmas* award owes its continuing success” to the feeling “that what had been delivered here was not just another merely technical decision on territorial ownership, but that the significance of Huber’s deliberations went far beyond the rather marginal issue actually at stake.” Daniel-Erasmus Khan, “Max Huber as Arbitrator: The *Palmas* Case and Other Arbitrations,” *The European Journal of International Law* 18, no. 1 (2007): 146-147, 163.

¹¹ Donald Rothwell, Stuart Kaye, Afshin Akhtarkhavari and Ruth Davis, *International Law: Cases and Materials with Australian Perspectives* (Cambridge: Cambridge University Press, 2011), 272.

¹² Philip Jessup, “The *Palmas Island* Arbitration,” *The American Journal of International Law* 22, no. 4 (1928): 735-740. See Oliver Diggelmann, “Max Huber, 1874-1960,” in *The Oxford Handbook of the*

in the dispute was the day that Spain and the U.S. signed the Treaty of Paris – 10 December 1898. At this point, Spain’s title to the island must have been clearly established to allow the country to effectively transfer its sovereign rights to the U.S. The arbiter also determined that actions taken by either state after the critical date could not affect the outcome of the case.¹³

With the critical date set at the moment they took the territory from Spain, the Americans had no chance to fulfill the requirements of settlement and use set out in the Hughes Doctrine. As a result, they turned to legal arguments based on discovery, acquiescence and contiguity to prove they had gained legitimate title to Palmas Island from Spain. The Americans pointed out that Spain first discovered and claimed the islands in the sixteenth century, an act that had to be viewed in light of the “law of the time it was done.” They admitted that in the twentieth century the acquisition of territory required effective occupation, but insisted that in the sixteenth century discovery still provided a state with a title of “unquestioned validity.” For several hundred years, the Americans argued, authors, cartographers and diplomatic treaties recognized Spain’s sovereignty over Palmas Island. No state protested Spain’s title during this period, indicating the international community’s “general acquiescence.”¹⁴

The American application of the doctrine of contiguity accepted that “definite comprehensive rules of international law have not been formulated with regard to the rights accruing to a nation by reason of the geographic situation of territory.” They cited, however, the decision in the British Guiana Case, which indicated effective possession of part of a region gave a state rights to whatever land could be considered a “single geographic whole.” As a result, they argued that Palmas Island should be considered a part of the “geographical unit” that constituted the Philippine Archipelago, an area that was clearly and indisputably under Spanish sovereignty for centuries. The Americans acknowledged that “they obviously could not show specific acts of Spanish administration in every inch of the Philippines, but that it was sufficient merely to show

History of International Law, eds. Bardo Fassbender and Anne Peters (Oxford: Oxford University Press, 2012), 1156-1161.

¹³ Khan, “Max Huber as Arbitrator,” 146-148. For more on the critical date see L.F.E. Goldie, “The Critical Date,” *International and Comparative Law Quarterly* 12, no. 4 (1963): 1251-1284.

¹⁴ For a summary of the American arguments, see Jessup, “The Palmas Island Arbitration,” 737-750.

the occupation and control of the unit.”¹⁵ The consequences of their contiguity argument, and its impact on Canada’s legal position in regards to the Arctic Archipelago, were far from the American mindset.

The Netherlands offered a strong rebuttal to the American arguments about discovery and contiguity. Their counter-memorandum stressed that when considering the legal value of territorial claims, which “instead of being consummated and terminated at one single moment, are of a permanent character,” changes in the law had to be taken into consideration. Since Spain’s discovery of the island, effective occupation had become an essential part of the law of territorial acquisition. Spain established neither occupation nor administration of the island.¹⁶ In sharp contrast, the Dutch argued that they made trade and political agreements with the Indigenous rulers of the island inhabitants as early as the seventeenth century (through the East India Company), and on-going administrative arrangements including barring foreign visits, outlawing slavery and piracy, applying taxation and distributing flags. The Dutch opposed the American use of contiguity doctrine, arguing that Palmas could not be considered part of the Philippines any more than they could consider it part of the Dutch-administered Talaud Islands just six miles from Palmas.¹⁷

Huber’s decision on the case explained that territorial sovereignty “involves the exclusive right to display the activities of a State.” The “constituent elements of territorial sovereignty,” Huber insisted, consisted of the “actual continuous and peaceful display of state functions.”¹⁸ He ruled that the Netherlands displayed “acts characteristic of state authority” on Palmas over the course of several centuries and therefore secured its title to the island. Huber admitted that “gaps” existed in the continuous display of Dutch sovereignty, but allowed that state activity could be less frequent in such a small, sparsely

¹⁵ Legal scholar Philip Jessup had argued that the Americans were clearly not confident about their contiguity doctrine arguments. The argument was not included with the list of principle contentions of the U.S., but used after the Dutch rebuttal of the initial American arguments. Jessup, “The Palmas Island Arbitration,” 743. See *Island of Palmas Case* (or *Miangas*), *United States v Netherlands*, Award, (1928) II RIAA 829, ICGJ 392 (PCA 1928), 4th April 1928, Permanent Court of Arbitration, 837.

¹⁶ Jessup, “The Palmas Island Arbitration,” 739.

¹⁷ Jessup, “The Palmas Island Arbitration,” 742.

¹⁸ Malcolm Shaw, *Title to Territory in Africa: International Legal Issues* (Oxford: Clarendon Press, 1986), xi, xxiii-xxiv.

populated island. “Although continuous in principle, sovereignty cannot be exercised in fact at every moment on every point of territory,” Huber concluded. Further, it was not necessary that “the display of sovereignty should go back to a very far distant period.” Instead, the “establishment of sovereignty may be the outcome of a slow evolution, of a progressive intensification of state control.” Huber found that territorial sovereignty was a flexible concept – a collection of legal rights and duties that depended on the circumstances of a given case.¹⁹ Huber’s emphasis on state activity rather than actual settlement, and the allowances he made for a sparsely populated and isolated island, supported the British and Commonwealth officials approach towards polar sovereignty.

Huber’s theory of “intertemporal law,” however, provided a caveat to his comments about effective occupation; an idea that should have worried all officials dealing with polar claims. Huber utilized this theory of intertemporal law to oppose the American arguments about title by discovery. According to legal scholar Taslim Olawale Elias, Huber’s theory contains two elements. The first is that acts “should be judged in light of the law contemporary with their creation,” as evident by Huber’s willingness to concede Spain’s title may have been created by discovery in the sixteenth century. The second part of the law, however, insists that the maintenance of this right has to “follow the conditions required by the evolution of law.” Plainly stated, a state could lose its title to territory if it did not comply with new developments in international law. “A right or title, once acquired, must not in a dynamic and constantly changing system of law be regarded as good for all time,” notes Elias, “particularly if the occupation has not been continuous or if the exercise or manifestation of authority or sovereignty over the territory has not been constantly kept up by whoever wants to claim a valid title subsequently.”²⁰

¹⁹ See *Island of Palmas Case* (or *Miangas*), United States v Netherlands, Award, (1928) II RIAA 829, ICGJ 392 (PCA 1928), 4th April 1928, Permanent Court of Arbitration, 838-841. Malcolm Shaw, “Introduction: The International Law of Territory: An Overview,” in *Title to Territory*, ed. Malcolm Shaw (Dartmouth: Ashgate, 2005), xi-xii.

²⁰ Huber ruled that, “A distinction must be made between the creation of rights and the existence of rights. The same principle which subjects the act creative of a right to the law in force at the time the right arises, demands that the existence of the right, in other words its continued manifestation, shall follow the conditions required by the evolution of law.” T.O. Elias, “The Doctrine of Intertemporal Law,” *The American Journal of International Law* 74, no. 2 (1980): 292.

Legal scholars immediately understood the ramifications of Huber's theory of intertemporal law on territorial claims. Commenting shortly after Huber's ruling, American legal expert Philip Jessup warned that the theory meant every state would have to constantly re-examine its title to every section of its territory to determine whether any changes to the law had necessitated a "reacquisition."²¹ Subsequent scholars stressed the need to cautiously apply Huber's theory, given the instability it could lead to in the international system.²² Without this caution, David Bederman recently pointed out, "no international claim is ever safe from challenge because some party or other can assert that there has been a change in the law favourable to its position."²³

Huber's ruling also threatened the doctrine of contiguity, a core aspect of the sector principle. The arbiter stated, "The title of contiguity, understood as a basis of territorial sovereignty, has no foundation in international law."²⁴ In the 1950s, legal scholar Hersch Lauterpacht posited that Huber may not have wished to completely do away with the doctrine of contiguity. The arbiter, after all, implied that control could be exercised over a section of territory from another adjacent section of territory. Huber explained that a group of islands may form "in law a unit, and that the fate of the principal part may involve the rest" – similar to how the Canadians viewed the Arctic Archipelago. Lauterpacht argued that Huber, instead of invalidating the doctrine of contiguity, simply meant to show that the only considerations to which contiguity must "cede is that of actual adverse display of sovereignty by the competing state."²⁵ Even if Huber intended to assert that international law did not recognize contiguity, Lauterpacht stated, "it is doubtful whether, notwithstanding the high authority of the arbitrator, it

²¹ Although Jessup did not believe that Huber actually meant to "sanction the theory that land titles, valid under pre-existing national laws, can be wholly disregarded (i.e., confiscated) if a new system of land tenures is instituted," he argued that this was the "logical corollary of the theory of intertemporal law as applied in the award." Jessup, "The Palmas Island Arbitration," 740.

²² Shaw, *Title to Territory in Africa*, 20.

²³ David Bederman also pointed out that the critical date had the chance to solve the problem of intertemporal law. David J. Bederman, *The Spirit of International Law* (Athens: University of Georgia Press, 2002), 105.

²⁴ Huber questioned whether state usage of contiguity doctrine in the past had established "a rule of positive international law" and maintained that it was not "admissible as a legal method of deciding questions of territorial sovereignty." *Island of Palmas Case* (or Miangas), United States v Netherlands, Award, (1928) II RIAA 829, ICGJ 392 (PCA 1928), 4th April 1928, Permanent Court of Arbitration, 60.

²⁵ Robert Jennings, *The Acquisition of Territory in International Law* (Manchester: Manchester University Press, 1963), 75.

could dispose of a doctrine which has figured prominently in the practice of states.”²⁶

While Huber’s theory of intertemporal law and his comments on contiguity proved open to interpretation, his arguments about sovereignty provided an exercise in logic and effective juridical writing. Huber wrote his decision hoping the words would have lasting and universal appeal. Not every arbitrator contextualized their conclusions as a significant contribution to the formation of the rule of law, however, as the *Clipperton Island* decision illustrates.²⁷

French explorers first discovered Clipperton Island – a virtually uninhabitable Pacific island off the coast of Mexico – at the beginning of the seventeenth century. In 1858, a French naval vessel reached the island and made careful geographic observations. Its crew landed ashore, claimed the island, but left no marks of sovereignty. When the vessel’s commander notified the French consulate in Honolulu of his claim, it published the declaration of sovereignty in a local journal. Years passed and the French never again landed on the island. The concession to exploit the island’s guano deposits granted by the French government to a private company went unused. Despite such neglect, France formally protested when several guano collectors raised the American flag on the island. In 1897, the Mexican government asserted its sovereignty over the island as Clipperton’s self-declared rightful and historic owner, and sent military governors to oversee its occupation. In 1909, Mexico and France submitted the territorial dispute to Italian king Victor Emmanuel III for arbitration. His legal representatives prepared a decision for the king’s release in 1931.²⁸

The decision upheld that France took effective possession of the island in 1858, and sufficiently exercised its authority there. Just two pages in length, the decision admitted that a state was usually required to establish an organization in the territory to

²⁶ Hersch Lauterpacht, “Sovereignty Over Submarine Areas,” *British Yearbook of International Law* 27 (1950): 428.

²⁷ Annaliese Quast Mertsch, “The Relationship Between the Permanent Court of Arbitration and the Permanent Court of International Justice, and its Significance for International Law,” in *Legacies of the Permanent Court of International Justice*, Christian Tamas and Malgosia Fitmaurice eds. (Leiden: Martinus Nijhoff Publishers, 2013), 248.

²⁸ Nii Lante Wallace-Bruce, *The Settlement of International Disputes: The Contribution of Australia and New Zealand* (The Hague: Martinus Nijhoff Publishers, 1998), 65. See also Jimmy Skaggs, *Clipperton: A History of the Island the World Forgot* (New York: Walker and Company, 1989).

administer its laws, but that this was sometimes “unnecessary.”²⁹ If an uninhabited territory is, “from the first moment when the occupying state makes its appearance there, at the absolute and undisputed disposition of that state,” a state’s occupation should be considered complete through its initial assertion of possession. Furthermore, France displayed *animus occupandi*, the will to act as sovereign, consistently, including a formal protest when the guano collectors raised the American flag. While the Mexican government argued that France had not fulfilled the requirements of occupation and notification set down in Articles 34 and 35 of the Berlin Act, the decision insisted that these were limited principles and inapplicable to the case. The ruling concluded that because France never had the intention of abandoning the island the fact that “she had not exercised her authority there in a positive manner” did not imply the forfeiture of its title.³⁰

Reporting on the case for the *American Journal of International Law* shortly after the decision, Edwin Dickinson concluded that the “doctrine of occupation had obviously lost its vitality.” The *Clipperton* decision highlighted that the requisite level of occupation was dictated by circumstance, which he thought an “altogether satisfactory solution from the legal point of view.” He immediately recognized the impact that the decision could have on territorial claims in the uninhabited and polar regions of the world.³¹ Writing a few decades after the ruling, legal scholar Hersch Lauterpacht further explained that the *Clipperton Island* case showed “that the notion of occupation, as traditionally understood, may be valueless, in relation to some areas, for the purpose of acquiring title.” In short, the case showed that effective occupation was not a “magic formula applicable to all situations.”³²

Taken together, the decisions in *Palmas Island* and *Clipperton Island* changed the requirements of effective occupation from the actual settlement demanded in older legal

²⁹ “Arbitral Award of His Majesty the King of Italy on the Subject of the Difference Relative to the Sovereignty over Clipperton Island (France-Mexico), Jan. 28, 1931,” *American Journal of International Law* 26, no. 2 (1932): 390, 393-394.

³⁰ Triggs, *International Law and Australian Sovereignty in Antarctica*, 10.

³¹ Edwin D. Dickinson, “The Clipperton Island Case,” *The American Journal of International Law* 27, no. 1 (1933): 133. For similar conclusions see Josephine Burns, “The Clipperton Island Case,” *Cumulative Digest of International Law and Relations* 2 (1932): 94-98.

³² Lauterpacht, “Sovereignty Over Submarine Areas,” 417-418.

treatises to control – in the latter case, the barest semblance of control – and the display and exercise of the functions of government.³³ As the 1931 edition of Pitt Cobbet’s *Cases on International* explained, “in determining the area affected by occupation, some regard must be had to the local configuration of the country, including its geographic unity, access and means of communication, the character and extent of existing population, and the requirements of security although it does not appear possible to formulate any precise rules on the subject.”³⁴ Australian legal scholar Gillian Triggs points out that these cases presented a view of “effective occupation as satisfied by flexible and comparative standards, which depend upon the degree and kind of control appropriate to the particular circumstances and character of the territory.”³⁵ Control did not have to be continuous in every part of the territory, just regular. Legal scholar Surya P. Sharma argues these cases highlighted that state title to sparsely populated or uninhabited territory rested on a genuine exercise of domestic jurisdiction, or a genuine exercise of international dealing with the territory (a protest, or treaty).³⁶

The *Palmas Island* (1928) and *Clipperton Island* (1931) decisions clarified important elements of the law and set a modest limit for the level of state control required in sparsely populated and uninhabited territories. The arguments used to justify the decisions in the two cases could be used by British and Commonwealth officials to defend their claims in the polar regions. Nevertheless, the two cases failed to provide a clear formula for territorial acquisition and left fundamental questions about the specific requirements of effective occupation, contiguity doctrine and the theory of intertemporal law unanswered.³⁷ In the end, arbitration settled disputes, but did not establish rules of law.³⁸ The cases considered divergent opinions and allowed choice in the application of the rules. As Annaliese Quast Mertsch has explained, arbitration decisions often suffered

³³ Triggs, *International Law and Australian Sovereignty in Antarctica*, 6, and Sharma, *Territorial Acquisition, Disputes and International Law*, 97-101.

³⁴ Pitt Cobbett, *Cases on International Law* (London: 1931), 99.

³⁵ Triggs, *International Law and Australian Sovereignty in Antarctica*, 7.

³⁶ Sharma, *Territorial Acquisition, Disputes and International Law*, 101.

³⁷ Legal scholar, F.M. Auburn has actually argued that the *Palmas*, *Clipperton Island* and *Eastern Greenland* cases only served to further confuse the international law on territorial acquisition. F.M. Auburn, “The White Desert,” *International and Comparative Law Quarterly* 19 (1970): 233.

³⁸ Quast Mertsch, “The Relationship Between the Permanent Court of Arbitration and the Permanent Court of International Justice, and its Significance for International Law,” 256.

from a lack of continuity. The major issue remained that “cases were decided in isolation from one another; accordingly, the case law emanating from the various tribunals was not necessarily coherent, and did not make the desired contribution to the establishment and further development of international law.” Thus, in arbitration, the possibility of different or opposing decisions on similar legal issues increased.³⁹ State officials had to wonder if the next legal case dealing with a territorial dispute would uphold the *Palmas Island* and *Clipperton Island* rulings.⁴⁰ Furthermore, both decisions involved small, isolated islands – very different environments than the vast interiors of the Antarctic or the Arctic Archipelago. Would a legal ruling on a territorial dispute involving the polar regions use the two cases as precedents or would a new case establish completely new principles for the acquisition of territory?⁴¹ Perhaps these considerations contributed to the limited appearances of *Palmas Island* and *Clipperton Island* in state legal appraisals until after the *Eastern Greenland* decision.

In his 1928 review of the *Palmas Island* decision, Philip Jessup stressed that “controversies concerning boundaries and the sovereignty over territories” would continue, and international law required more clarity to the “fundamental concepts” of territorial acquisition.⁴² The legal community hoped that in the *Eastern Greenland* ruling the PCIJ would further “define the law, now unsettled” for the acquisition of territory – not only to benefit the polar regions, but other uninhabited and sparsely populated areas more generally.⁴³

³⁹ Quast Mertsch, “The Relationship Between the Permanent Court of Arbitration and the Permanent Court of International Justice, and its Significance for International Law,” 266.

⁴⁰ Quast Mertsch, “The Relationship Between the Permanent Court of Arbitration and the Permanent Court of International Justice, and its Significance for International Law,” 248, 266.

⁴¹ In the *Eastern Greenland* case, both the Norwegian and Danish legal teams, and the PCIJ, used the arguments presented in the *Palmas Island* and *Clipperton Island* decisions as precedents. Legal scholar J.K.T. Chao has criticized the use of the cases as precedents, because it showed a “lack of consideration of the relative scale of the disproportion between the size of the landmass and the exiguous display of authority.” J.K.T. Chao, “The Legal Status of Eastern Greenland Case: a Note on its Legal Aspects,” *Chengchi Law Review* 27 (1983): 202.

⁴² Jessup, “The Palmas Island Arbitration,” 752. See also Donald Greig, “Sovereignty, Territory and the International Lawyer’s Dilemma,” *Osgoode Hall Law Review* 26, no. 1 (1988): 166.

⁴³ Preuss, “The Dispute Between Denmark and Norway,” 487.

5.2 The *Eastern Greenland* Decision as a Problematic Precedent

In the *Eastern Greenland* case, the PCIJ needed to decide if the Norwegian claim to Erik Raudes Land (71° 3'N and 75° 4'N) constituted a “violation of the existing legal situation” and was “accordingly unlawful and invalid.” If the court decided Denmark did not have sovereignty over the area and judged Norway’s claim legal, it then had to determine if Norway had acquired a valid title. The court found that 10 July 1931 – when Norway officially declared its sovereignty over Erik Raudes Land – was the critical date for the dispute. If the court found that Denmark had successfully established its sovereignty over Eastern Greenland prior to the critical date, the Norwegian claim would be invalidated.⁴⁴

Norway’s legal case tried to prove that Denmark never displayed the level of occupation necessary to establish sovereignty over Erik Raudes Land. The Norwegians echoed Smedal’s legal treatise and maintained that the level of occupation required in the polar regions should not be significantly reduced.⁴⁵ As a minimum, they argued that an effective occupation required police or magisterial power, and the physical presence of government authority to be complete.⁴⁶ The Danish administration in Greenland rarely visited Erik Raudes Land, let alone achieved this level of occupation. The Norwegians argued that the land outside the limits of the Danish settlements on Greenland should be considered as *terra nullius* – territory open to the first state to successfully occupy it.⁴⁷ The Norwegians also insisted that the Danish government’s attempts to attain foreign recognition between 1915 and 1921 proved that even Denmark itself did not believe in their historic sovereignty over all of Greenland.⁴⁸ In any case, no amount of foreign

⁴⁴ For an effective survey of the background of the *Eastern Greenland* case, see Oscar Svarlien, *The Eastern Greenland Case in Historical Perspective* (Gainesville: University of Florida Press, 1964). For an examination of the case’s impact on the development of dispute resolution in the interwar years see Dorothy Jones, *Toward a Just World: The Critical Years in the Search for International Justice* (Chicago: University of Chicago Press, 2002), 89-98.

⁴⁵ Expose of M. Arne Sunde, 12 December 1932, *Eastern Greenland* (Denmark v. Norway) (1933) PCIJ, Series C, No. 66, Pleadings, Oral Statements and Documents, 3154-3158.

⁴⁶ Expositions of M. Per Rygh and Professor Gilbert Gidel, *Eastern Greenland* (Denmark v. Norway) (1933) PCIJ, Series C, No. 66, Pleadings, Oral Statements and Documents, 2981 and 3220-3278.

⁴⁷ Norway’s Counter-Memorial, *Eastern Greenland* (Denmark v. Norway) (1933) PCIJ, Series C, No. 62 373-430.

⁴⁸ Denmark had secured recognition from the U.S., Britain, France, Italy and Japan and other minor powers. *Eastern Greenland* (Denmark v. Norway) (1933) PCIJ, Series A-B, No. 53, 44.

recognition should be allowed to replace the need for occupation.⁴⁹ Within this undetermined context, Norway had every right to occupy Erik Raudes Land. Furthermore, the Norwegian lawyers cited the *Palmas Island* and *Clipperton Island* cases to support their argument that Norway's wireless station, magistrate and locally residing parties in Erik Raudes Land fulfilled the legal requirements of territorial acquisition.⁵⁰

The Danish legal defence centred on the argument that Denmark had enjoyed "an ancient, uninterrupted, peaceful, public and undisputed development of this sovereignty over the whole of Greenland, including the East coast" – a clear reference to Huber's decision in the *Palmas* case.⁵¹ Gustav Rasmussen, from Denmark's Ministry of Foreign Affairs, highlighted the *Clipperton Island* ruling's emphasis on *animus occupandi* – the will to act as sovereign – as proof of a state's sovereignty, even if unsupported by the continuous display of activity. The Danish crown, Rasmussen argued, had displayed the intent to act as sovereign for Greenland ever since the union of Norway and Denmark in 1380, when it inherited the rights created by the Norse colonies on the island's southwestern coast.⁵²

Charles de Visscher, counsel for Denmark and close friend of Huber, used the judge's arguments to insist that the law could not require the same degree of occupation over vast, uninhabited and difficult territories as it expected in temperate zones.⁵³ In Canada's immense Eastern Arctic Archipelago, the Danes pointed out, a mere nineteen

⁴⁹ *Eastern Greenland* (Denmark v. Norway) (1933) PCIJ, Series C, No. 63, Norway's Rejoinder, 1373-1380.

⁵⁰ Expose, *Eastern Greenland* (Denmark v. Norway) (1933) PCIJ, Series C, No. 66, Pleadings, Oral Statements and Documents, Professor Gidel, 3276-3278.

⁵¹ Kristian Steglich-Petersen, advocate of the supreme court of Denmark, made this statement. He also stressed that "the consecutive chain of acts of sovereignty and clear and incontrovertible statements by which the Danish government has manifested Denmark's sovereignty." Exposition by M. Steglich-Petersen, *Eastern Greenland* (Denmark v. Norway) (1933) PCIJ, Series C, No. 66, Pleadings, Oral Statements and Documents, 2674. Gustav Rasmussen argued that Denmark had never lost the will to act as sovereign for all of Greenland, and pointed to the conclusions of the *Clipperton Island* case to argue that a display of the will to retain sovereignty could avoid a loss of territory by dereliction. Exposition of M. Gustav Rasmussen, *Eastern Greenland* (Denmark v. Norway) (1933) PCIJ, Series C, No. 66, Pleadings, Oral Statements and Documents, 2660-2662.

⁵² Exposition of M. Gustav Rasmussen, *Eastern Greenland* (Denmark v. Norway) (1933) PCIJ, Series C, No. 66, Pleadings, Oral Statements and Documents, 2660-2662, 2651-2658 and 2665.

⁵³ He also agreed with Huber's comments that contiguity was an imprecise and arbitrary theory. P. Couvreur, "Charles de Visscher and International Justice," *European Journal of International Law* 11, no. 4 (2000): 905-938, at 919-923.

policemen maintained state authority, which was enough given the nature of the territory involved.⁵⁴ Likewise, they admitted that the displays of state authority in Eastern Greenland had been neither continuous nor widespread, but maintained that Denmark achieved the necessary level of control. The display of state authority and government functions included legislation that applied to all of Greenland, administrative efforts, exploratory and scientific expeditions, concessions that granted economic rights in the contested area, and the reservation of hunting and fishing rights off the entire coast. Further, the establishment of the settlements at Angmagssalik in 1894 (65° 36' N) and Scoresbysund in 1925 (76° 32' N), along with the inspection tours of government vessels, brought a physical government organization to the eastern coast.⁵⁵ De Visscher failed to mention that at least some Danish officials had doubted whether Denmark had effectively extended its authority into northern Greenland as recently as 1910.⁵⁶

The Danes put even greater stock in the international community's recognition of their sovereignty over all of Greenland. Importantly, the Treaty of Kiel (1814) provided for the cession of the Kingdom of Norway to Sweden, but accepted that Denmark would retain Greenland, the Faroe Islands and Iceland. The Danes pointed to several historic commercial conventions in which states accepted Denmark's right to exclude all of Greenland from the application of the treaties. Lastly, they highlighted the recognition of Danish sovereignty achieved by their diplomatic overtures between 1915 and 1921.⁵⁷ De Visscher stressed that no land could be considered *terra nullius*, or open for the taking, if the international community recognized it as a state's territory for a long period of time. This question rose above the conflict between the two states and concerned the "general

⁵⁴ Exposition of Gudmund Hatt, *Eastern Greenland* (Denmark v. Norway) (1933) PCIJ, Series C, No. 64, Pleadings, Oral Statements and Documents, 1865.

⁵⁵ See Exposition of Charles de Visscher, *Eastern Greenland* (Denmark v. Norway) (1933) PCIJ, Series C, No. 66, Pleadings, Oral Statements and Documents, 2843-2890.

⁵⁶ Historian Janice Cavell has highlighted that in 1910 officials from the Ministry of the Interior and the Royal Greenland Company called northern Greenland a no man's land. Based on this new historical evidence, she argues that the Danes clearly thought much of northern and eastern Greenland was no man's land before 1920, and did believe they had full sovereignty over the entire island. Janice Cavell, "Historical Evidence and the Eastern Greenland Case," *Arctic* 61, no. 4 (2008): 433-441.

⁵⁷ The Danes attained recognition from the United States, the British Empire, Italy, France, Japan and Sweden. *Eastern Greenland* (Denmark v. Norway) (1933) PCIJ, Series C, No. 62, Danish Memorial, 101-107.

international order.”⁵⁸ When Norwegian lawyers argued that Norway could not be bound by the declarations of recognition made by foreign states, de Visscher stressed that Denmark’s sovereignty over Greenland did not require the complete consent of the international community. He argued that “International practice on the contrary shows that many international positions have regularly been established throughout history from the effect of an agreement among a restricted number of Powers.”⁵⁹ Regardless, the Danes stressed that Norway had agreed not to object to the extension of Danish sovereignty over all Greenland through the verbal declaration made by the Norwegian Foreign Minister Nils Claus Ilhen at the Paris Peace Conference (the *Ilhen Declaration*).⁶⁰

After deliberating on the arguments presented by the Danish and Norwegian legal teams, the PCIJ released its decision in April 1933. The PCIJ ruled that a claim to territorial sovereignty must be based on a “continued display of authority” that showcased two elements: “the intention and will to act as sovereign, and some actual exercise or display of such authority.” The court further observed that “it is impossible to read the records of the decisions in cases as to territorial sovereignty without observing that in many cases the tribunal has been satisfied with very little in the way of the actual exercise of sovereign rights, provided that the other State could not make out a superior claim.” This was particularly true, the court noted, in claims to sovereignty over uninhabited or thinly populated areas.⁶¹ In the court’s opinion, Denmark had displayed the necessary intent and actual exercise of state authority to secure its sovereignty over all of Greenland.

The court concluded that the sovereign right established by the Norse colonies on Greenland’s southwestern coast and passed to the Kingdom of Denmark-Norway, survived the disappearance of the settlements in the fifteenth century and formed a

⁵⁸ Jones, *Toward a Just World*, 93.

⁵⁹ Couvreur, “Charles de Visscher and International Justice,” 920.

⁶⁰ Kristian Steglich-Petersen, advocate of the supreme court of Denmark, insisted that the statement of a foreign minister must be considered binding to the state he represented. Exposition by M Kristian Steglich-Petersen, *Eastern Greenland* (Denmark v. Norway) (1933) PCIJ, Series C, No. 66, Pleadings, Oral Statements and Documents, 2749 and 2761.

⁶¹ *Eastern Greenland* (Denmark v. Norway) (1933) PCIJ, Series A-B, No. 53, 22, 45-46.

foundation on which to build a claim.⁶² From 1721, when the Kingdom of Denmark-Norway supported the establishment of a colony at Godthåb, to the Treaty of Kiel in 1814, the Danish crown sufficiently established a claim to all of Greenland through the concessions it granted to its citizens and the General Trading Company of Copenhagen, and through ordinances that the government applied to the island as a whole.⁶³ As proof of the exercise of Danish sovereignty between 1814 and 1915, the court accepted several abortive trading concessions, legislation which never applied outside the south-west coast settlements, provisions for the non-application of bilateral treaties to Greenland, and the absence of competing claims as sufficient proof of Denmark's sovereignty. The court clearly established legislation as "one of the most obvious forms of the exercise of sovereign power."⁶⁴ The establishment of Angmagssalik on the southeastern coast in 1894 and the work of Danish scientific expeditions supported these administrative efforts.⁶⁵

Between 1915 and 1921, the Danes managed to secure foreign recognition of their sovereignty from many of the leading world powers including Norway's Foreign Minister.⁶⁶ Pivotaly, the court ruled "beyond all dispute" that the *Ilhen Declaration* represented an official reply from a Minister of Foreign Affairs to a diplomatic request

⁶² Hyde, "The Case Concerning the Legal Status of Eastern Greenland," 734.

⁶³ Ole Spiermann, *International Legal Argument in the Permanent Court of International Justice: The Rise of the International Judiciary* (Cambridge: Cambridge University Press, 2005); *Eastern Greenland* (Denmark v. Norway) (1933) PCIJ, Series A-B, No. 53, at 48, also 46, 47, 53, 62.

⁶⁴ Spiermann, *International Legal Argument in the Permanent Court of International Justice*, 345-346; *Eastern Greenland* (Denmark v. Norway) (1933) PCIJ, Series A-B, No. 53, at 48, also 46, 47, 53, 62.

⁶⁵ *Eastern Greenland* (Denmark v. Norway) (1933) PCIJ, Series A-B, No. 53, 54. Chao, "The Legal Status of Eastern Greenland Case," 208. The Court found that at the beginning of the twentieth century, private Danish citizens had felt that the absence of effective occupation in the uncolonized parts of Greenland exposed the area to the risk of permanent occupation by a foreign state. This opinion led to more effective occupation by the Danish authorities. Nevertheless, while private officials may have expressed doubts, the court found that Danish government had always maintained "there was no doubt as to the existence of the Danish sovereignty over the East coast of Greenland." *Eastern Greenland* (Denmark v. Norway) (1933) PCIJ, Series A-B, No. 53, 33-35, 55.

⁶⁶ The court found that in the four notes of recognition from France, Japan, Italy and Britain, the first two countries accepted an extension of Danish sovereignty over all Greenland, while the last pair recognized that Danish sovereignty already existed over all Greenland. The court concluded that in judging the impact of these notes, "too much importance must not be attached to particular expressions here and there. The correspondence must be judged as a whole." Although the word 'extension' had been used, the court accepted the Danish viewpoint that the state was actually seeking acknowledgement of its pre-existing sovereignty over all of Greenland. *Eastern Greenland* (Denmark v. Norway) (1933) PCIJ, Series A-B, No. 53, 55.

from another power that bound Norway to respect Denmark's sovereignty.⁶⁷ The court also accepted Denmark's argument that Norway's failure to protest its sovereignty over Greenland until 1921 was essential, supporting Danish Supreme Court advocate Kristian Steglich-Petersen's observation, "silence here means consent."⁶⁸

Finally, the court found that between 1921 and 1931, Danish activity on the eastern coast of Greenland increased considerably. The Danish authority legislated for hunting and fishing, closed the territorial waters to foreign ships, sent a naval vessel on inspection tours of the coast, established the settlement of Scoresbysund, and sent government-supported hunting and scientific expeditions to the area. These facts led the court to conclude that, even if this decade was "taken by itself and without reference to the preceding periods, the conclusion reached by the Court is that during this time Denmark regarded herself as possessing sovereignty over all Greenland and displayed and exercised her sovereign rights to an extent sufficient to constitute a valid title to sovereignty."⁶⁹

The PCIJ's decision in the *Eastern Greenland* case reinforced the low bar set for effective occupation established by the *Palmas Island* and *Clipperton Island* cases. The decision focused on the display and exercise of government authority, rather than actual settlement and use. As such, the court gave legal value to legislation (even if unenforced), periodic patrols, hunting parties and scientific expeditions, and demanded no permanent occupation. After reviewing the case, legal scholar Hersch Lauterpacht argued that in "modern international judicial practice the borderline between the attenuated conditions of effectiveness of occupation and the total relinquishment of the requirement of effectiveness has become shadowy to the point of obliteration." The historical

⁶⁷ *Eastern Greenland* (Denmark v. Norway) (1933) PCIJ, Series A-B, No. 53, 71.

⁶⁸ Steglich-Petersen also commented that, "In order to escape the legal consequences of silence, an objection (protest) must be uttered." Exposition by M. Steglich-Petersen, *Eastern Greenland* (Denmark v. Norway) (1933) PCIJ, Series C, No. 66, Pleadings, Oral Statements and Documents, 2749 and 2761. The court also found that Norway's acceptance of the Universal Postal Conventions of 1920, 1924 and 1929, which described Greenland as being part of Denmark, also debarred the Norwegians from contesting Danish sovereignty. *Eastern Greenland* (Denmark v. Norway) (1933) PCIJ, Series A-B, No. 53, 68.

⁶⁹ *Eastern Greenland* (Denmark v. Norway) (1933) PCIJ, Series A-B, No. 53, 62-63.

requirement of effective occupation had, he concluded, only a “bare existence.”⁷⁰

Certainly, many in the international legal community at the time recognized the potential impact of the *Eastern Greenland* decision on the doctrine of effective occupation and polar claims. Law expert Jesse Reeves conceded that the case showed a state could support its claim to territory upon bases other than effective and permanent occupation.⁷¹ A review of the decision published in *The Geographical Journal* in August 1933 underlined the PCIJ’s conclusions on occupation and insisted that they were of “profound importance beyond the limits of the immediate case, not least in showing grounds upon which similar cases which may arise in the future will be decided.” The decision held particular significance for Britain, “with her large arctic and antarctic territories that cannot be closely settled or administered.”⁷² In the view of the last author, Eastern Greenland would provide an important precedent in future polar disputes.⁷³ But what precedent had the PCIJ actually set in the *Eastern Greenland* decision?

Charles Cheney Hyde, the former solicitor at the State Department who had helped craft the Hughes Doctrine, and professor of international law at Columbia University, doubted the significance of the precedent. In 1933, Hyde (and other contemporary experts) wrote that several variables restricted the value of the case as a model, including the long history of Danish settlement and activity in Greenland, the foreign recognition, the court’s finding of a decisive Norwegian acknowledgement of

⁷⁰ Lauterpacht, “Sovereignty Over Submarine Areas,” 416. Legal scholar Gillian Triggs has pointed out that the three decisions showcased the great degree to which special circumstances could modify occupation doctrine. Some territory reduced “the doctrine of effective occupation to an absurdity, or at least to an empty, valueless and vague criterion.” Triggs, *International Law and Australian Sovereignty in Antarctica*, 19.

⁷¹ J.S. Reeves, “George V Land,” *The American Journal of International Law* 28, no. 1 (Jan., 1934): 119.

⁷² Anonymous, “The Legal Status of Eastern Greenland,” *The Geographical Journal* 82, no. 2 (1933): 155 and 151.

⁷³ Technically, the legal decisions of the court in a particular case were not binding upon other states or other disputes. Still, given that the court often referred to past decisions, the judges played the role of quasi-legislators. Hilary Charlesworth, “Law-Making and Sources,” in *The Cambridge Companion to International Law*, eds. James Crawford and Martti Koskenniemi (Cambridge: Cambridge University Press, 2012), 197. Sir Cecil Hurst always maintained that the international legal community should view the “decisions of the Court as precedents building up international law.” Ijaz Hussain, *Dissenting and Separate Opinions at the World Court* (Dordrecht: Martinus Nijhoff Publishers, 1984), 21. On factors influencing the weight given to judicial opinions see Alan Boyle and Christine Chinkin, *The Making of International Law* (Oxford: Oxford University Press, 2007), 302-310.

Danish sovereignty, and the lack of competing claims.⁷⁴ The international legal expert also pointed out that the court was more concerned with establishing the extent of the polar territory to be assigned to a claimant state, rather than identifying the acts “to be regarded as requisite for the creation of right of sovereignty therein.”⁷⁵ In view of these factors, Hyde concluded, the Eastern Greenland decision “may perhaps be deemed to lack the significance otherwise to be assigned to it as an enunciation of legal principle concerning” the acquisition of territorial sovereignty.⁷⁶

In the following years, many other legal scholars struggled to determine clear legal principles amongst the tangle of points and considerations within the PCIJ’s judgment. To Wilhelm Grewe, the PCIJ accepted “a more or less fictitious or symbolic occupation” and offered no “clear-cut decision” on the requirements of acquisition. Instead, Grewe thought that the court gave sovereignty to Denmark on the grounds “that it had exercised sovereignty for a long time without having encountered opposition,” basing its decision on the tacit recognition of the international community rather than occupation.⁷⁷ Humphrey Waldock and Hersch Lauterpacht argued that the doctrine of contiguity played a far larger role in the court’s decision than the judges admitted. It seemed the court extended the legal consequences of displays of sovereignty “to uninhabited and uncolonized parts of Greenland forming an integral part of the territories which the Court considered to have been occupied.”⁷⁸ Lauterpacht also argued that

⁷⁴ Hyde did find significance in the “the readiness of the court to find in the conduct in behalf of the monarchs of Norway and Denmark the creation and maintenance of rights of sovereignty over an unoccupied area, and the early development of the territorial limits of those rights by assertions of authority that were and remained unsupported by the exercise of actual administrative control or occupation.” Here, however, Hyde again argued that the importance of the PCIJ’s decision rested in its findings on the importance of historic rights and actions, not in its statements about the modern doctrine of effective occupation. Hyde, “The Case Concerning the Legal Status of Eastern Greenland,” 737. Other scholars also pointed out that the case was dealing with a claim to sovereignty of very early origin which had not been contested, a context that could not be replicated in most of the potential polar territorial disputes. Reeves, “George V Land,” 117-119. See also James Simsarian, “The Acquisition of Legal Title to Terra Nullius,” *Political Science Quarterly* 53, no. 1 (1938): 111-128.

⁷⁵ Charles Cheney Hyde, “Acquisition of Sovereignty Over Polar Areas,” *Iowa Law Review* 19, no. 293 (1933-34): 287, n. 3.

⁷⁶ Hyde, “The Case Concerning the Legal Status of Eastern Greenland,” 737.

⁷⁷ Wilhelm G. Grewe, *The Epochs of International Law*, translated by Michael Byers (New York: de Gruyter, 2000), 627-628.

⁷⁸ Lauterpacht also argued that the decision highlighted that “effectiveness need not be as complete as appears at first sight and that contiguity is not as theoretical and arbitrary as may appear at first sight.” Lauterpacht, “Sovereignty Over Submarine Areas,” 428. Waldock noted that within idea of effective

international legal stability was the court's foremost consideration. After all, had the court "adhered to the rigid requirement of complete occupation" it would have declared the territory "*terra nullius* and open henceforth to a competitive scramble between the two countries – and others – with the ensuing uncertainty and confusion." That decision would have been contrary to the principles of finality and stability held by the court.⁷⁹ Lauterpacht raised the unsettling prospect that the desired outcome drove the doctrinal findings, not the reverse, in the *Eastern Greenland* decision.⁸⁰

Legal scholar Ole Spiermann has recently argued that two principles derived from international jurisprudence motivated the court. First, the judges decided between the competing claims to territory by considering "which of the two is the stronger." Secondly, if a "superior claim" existed, the court made do "with very little in the way of the actual exercise of sovereign rights." The intention and will to act as sovereign superseded the actual exercise of sovereignty. Rather than provide a clear elucidation of legal principle, in settling the dispute, the court "carried out a hugely complicated act of balancing the competing claims, which indicated that no rule met the imperative need for a solution."⁸¹

Martti Koskenniemi has adopted a similar position. The argumentative structure of the *Eastern Greenland* case highlighted the dispute between which element was more critical to proving territorial title: effective possession or foreign recognition.⁸² While

occupation "proximity, by raising a presumption of an actual intention and ability to control the outlying areas, operated to give the claimant the benefit of the rule that an effective occupation need not make an impact in every nook and cranny of the territory." C.H.M. Waldock, "Disputed Sovereignty in the Falkland Islands Dependencies," *British Yearbook on International Law* 25 (1948): 343 and 345. For a similar argument, see D.J. Millard, "Heard and MacDonald Islands Act, 1953" *Sydney Law Review* 25 (1953-1955): 377.

⁷⁹ Hersch Lauterpacht, *The Development of International Law by the International Court* (Cambridge: Cambridge University Press, 1958), 241.

⁸⁰ Steven Ratner has identified this as a major problem. "As for the substantive rules, although panels and courts have invoked numerous rules, the challenge of reading opinions is to discern whether the doctrine drives the outcome or the reverse. One example is the fate of the black letter doctrine on the acquisition of territory." See Steven Ratner, "Land Feuds and Their Solutions: Finding International Law Beyond the Tribunal Chamber," *The American Journal of International Law* 100, no. 4 (2006): 808-829.

⁸¹ Spiermann, *International Legal Argument in the Permanent Court of International Justice*, 345.

⁸² Koskenniemi captured the problem with the PCIJ's decision when he concluded that, "Effective possession and general recognition are so interpreted as to point to the same solution. Either both are present or both are absent. The question what if they were to point to differing solutions is neither raised nor answered. Nor can it be because this would emerge the need to establish priority between them – a priority which cannot be made." Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (Cambridge: Cambridge University Press, 2005), 288.

state title based on general recognition seemed to lack a factual foundation, title based on effective possession went against the consent of the international community. As a result, Koskenniemi argued, the Court decided to uphold the value of both arguments by making each point in Denmark's direction. "The conduct of third States implied recognition of Danish sovereignty; Danish conduct constituted effective possession; Norway had recognized Danish sovereignty... The decision was overdetermined: the same conclusion was drawn from conflicting premises."⁸³ In its choice not to indicate "a preference between fact (possession) and views about fact (recognition)" the court failed to provide any guidance to dispute resolution at all, Koskenniemi concluded.⁸⁴

The PCIJ's use of dissenting opinions added to the ambiguity surrounding the *Eastern Greenland* decision. In the PCIJ's judgment, Judge Dionisio Anzilotti issued a strong dissenting viewpoint.⁸⁵ He questioned whether Denmark indeed had sovereign control over Eastern Greenland. Anzilotti maintained that in the area in question, "there were perhaps laws in force but no authority to enforce them." Unlike his peers, he refused to accept that the mere existence of legislation covering a territory could create title if no one had ever been appointed to ensure it was followed. Sounding much like Max Huber, Anzilotti argued that international law "established an ever closer connection between the existence of sovereignty and the effective exercise thereof, and States successfully disputed any claim not accompanied by such exercise." He further opined that the legal situation had changed due to "technological improvements" opening up the previously inaccessible eastern coast of Greenland to "human activities," which demanded more occupation and control. Considering these technological developments, the questions of Danish sovereignty "presented itself in a new light."⁸⁶

Anzilotti also believed the Danes, in their overtures to foreign government, asked for the right to extend their sovereignty over all of Greenland, not for formal recognition

⁸³ Koskenniemi, *From Apology to Utopia*, 290-292, quote at 293.

⁸⁴ Koskenniemi, *From Apology to Utopia*, 288.

⁸⁵ Anzilotti was one of three judges who served on the PCIJ from its creation in 1922, to its end in 1946. Jose Maria Ruda, "The Opinions of Judge Dionisio Anzilotti at the Permanent Court of International Justice," *European Journal of International Law* 3 (1992): 100-122.

⁸⁶ Dissenting Opinion of M. Anzilotti, *Eastern Greenland* (Denmark v. Norway) (1933) PCIJ, Series A-B, No. 53, 84.

of their existing sovereignty.⁸⁷ States agreed to recognize the extension, not the existence, of Danish sovereignty over all of Greenland. For these reasons, Anzilotti found that the Norwegian occupation was invalid only insofar as it violated the *Ilhen Declaration*, which he deemed binding.⁸⁸ Anzilotti wanted the court to base its decision on just the guarantee given in the *Ilhen Declaration* and not on Denmark's non-existent occupation of the area.⁸⁹

The separate opinions offered by Judges Walther Schücking and Wang Chung-hui concurred with the Court's final decision, but echoed Anzilotti's concerns about Danish occupation. The judges observed that the Danes based their case largely on legislative acts, the "effective application of which" was an "indispensable requirement under the international law," and they deemed Denmark's application lacking.⁹⁰ Norway's ad hoc judge, Benjamin Vogt, agreed. In his dissenting opinion, he questioned Denmark's display of intent to act as sovereign on the eastern coast of Greenland. In a region visited by the citizens of Norway since at least 1889, Denmark never established police powers. Danish officials based in Angmagssalik and Scoresby Sound had never attempted any kind of authority outside their limited districts.⁹¹ Vogt believed that the court's decision made a mockery of the doctrine of effective occupation.

In future disputes over polar claims, especially ones that lacked the long list of historic variables present in the *Eastern Greenland* case, these dissenting and separate opinions could have played an important role. Legal scholar Ijaz Hussain noted that when the notion of dissenting opinions had been debated during the drafting of the statute of

⁸⁷ Dissenting Opinion of M. Anzilotti, *Eastern Greenland* (Denmark v. Norway) (1933) PCIJ, Series A-B, No. 53, 81.

⁸⁸ Anzilotti's opinion was that "This claim should in my view, be rejected, for an unlawful act cannot serve as a basis for an action in law." Ruda, "The Opinions of Judge Dionisio Anzilotti," 103-104.

⁸⁹ Dissenting Opinion of M. Anzilotti, *Eastern Greenland* (Denmark v. Norway) (1933) PCIJ, Series A-B, No. 53, 94-95.

⁹⁰ Like Anzilotti, they also agreed that the Danes reaching out for recognition between 1915-1921 was not an indication of existing sovereignty, but they planned to extend their sovereignty. Observations by Walther Schücking and M. Wang Chung-hui, *Eastern Greenland* (Denmark v. Norway) (1933) PCIJ, Series A-B, No. 53, 96-97.

⁹¹ Vogt focused on Norway's arguments about Denmark's pursuit of foreign recognition. "To concede the right of a government to put forward claims to an ancient sovereignty, only a few years after that very government has solemnly proclaimed that it did not possess that sovereignty, would be to open the door to instability in international affairs." Dissenting Opinion by Benjamin Vogt, *Eastern Greenland* (Denmark v. Norway) (1933) PCIJ, Series A-B, No. 53, 102-104.

the PCIJ, the advocates for their inclusion argued that they would serve as a “vehicle for the development of international law.” In 1929, when the Committee of Jurists met to discuss revising the PCIJ statute and the court’s use of dissenting opinions, Sir Cecil Hurst commented that views of dissenting judges, even if the minority, “were as important to the building-up of an international system of law as the views of the majority.”⁹² Legal scholar Hersch Lauterpacht maintained that dissenting opinions contributed a great deal to the development of international law. Far from detracting from the PCIJ’s judgments, Lauterpacht felt that dissenting opinions added “to their vitality, comprehension and usefulness and greatly facilitate the fulfillment of the indirect purpose of the Court, which is to develop and to clarify international law.”⁹³

Dissenting opinions could be cited as an authority in future cases to inspire changes in the law. In 1928, Charles Evans Hughes – chief justice of the U.S. Supreme Court, judge of the PCIJ, and the former Secretary of State who gave the Hughes Doctrine its name – characterized dissenting opinions as “appeal[s] to the brooding spirit of the law, to the intelligence of a future day, when a later decision may possibly correct the error into which the dissenting judge believes the court to have been betrayed.”⁹⁴ Lauterpacht agreed and added that the formal authority of the court could not “in the long run shield a defective decision from the impact, in proportion to its merits, of a dissent. Mere dissent cannot weaken the authority of the decision. The merits of the dissent may have that effect.”⁹⁵ In short, the polar claimants could not be sure that the clear and coherent dissent offered by Anzilotti, and the separate opinions given by Schücking and Wang, would not be referenced in a future polar territorial dispute to “correct the error” on the requirements of occupation that they believed the PCIJ had committed.

From its release in 1933, various legal scholars questioned the value of the *Eastern Greenland* decision as a precedent. Commentators underlined the volume of

⁹² Hussain, *Dissenting and Separate Opinions at the World Court*, 21-23.

⁹³ Lauterpacht, *The Development of International Law by the International Court*, 66-68. See also R.P. Anand, “The Role Of Individual And Dissenting Opinions In International Adjudication,” *International And Comparative Law Quarterly* 14 (1965): 788-808, and Edward Dumbauld, “Dissenting Opinions in International Adjudication,” *University of Pennsylvania Law Review* 90, no. 8 (1942): 929-945.

⁹⁴ Charles Evan Hughes, *The Supreme Court of the United States* (Columbia: Columbia University Press, 1928), 68.

⁹⁵ Lauterpacht, *The Development of International Law by the International Court*, 67.

variables that complicated the case, the role played by foreign recognition, the length of time involved, the careful balancing of legal values carried out by the court and its failure to lay out the acts required to create and maintain a right to sovereignty. The *Eastern Greenland* ruling reflected a common problem with the PCIJ's decisions: they were often too specific and focused on the particular circumstances of each case to establish general principles of international law.⁹⁶ The dissenting and separate opinions on the case only added to its ambiguity. No one could predict how the arguments, conclusions and opinions of the *Eastern Greenland* decision would be applied to any future polar dispute with any degree of certainty. Former judge of the International Court of Justice, Arnold McNair, has highlighted this reality, explaining, "when I have been confronted with the same rule of law in the course of writing a professional opinion or of contributing to a judgment, I have been struck by the different appearance that the rule of law may assume when it is being examined for the purpose of its application in practice to a set of ascertained facts."⁹⁷ For all these reasons, the *Eastern Greenland* decision failed to provide a simple solution to the problems of polar sovereignty for state officials investigating territorial claims in the 1930s and beyond.

5.3 The Confusion Continues

Historians examining state territorial claims in the Arctic and Antarctic often adopt the *Palmas Island*, *Clipperton Island* and, in particular, *Eastern Greenland* decisions as pivotal benchmarks in the legal development of the polar regions. They present these legal decisions as if they brought instant certainty to the uncertainty of the

⁹⁶ Stephen C. Neff, *Justice Among Nations: A History of International Law*, (Cambridge: Harvard University Press, 2014), 356.

⁹⁷ Arnold McNair, *The Development of International Justice: Two Lectures Delivered at the Law Center of New York University in December 1953* (New York: New York University Press, 1954), 16-17. The PCIJ provided institutional memory that could be drawn upon in each new dispute and that promoted the use of a common legal language between states. Eric Posner and John Yoo, "Judicial Independence in International Tribunals," *California Law Review* 93, no. 1 (2005): 7. The built up, for the first time, a substantial body of international judicial practice." Stephen Neff, "A Short History of International Law," in *International Law*, 3rd Ed., Malcolm D. Evans ed. (Oxford: Oxford University Press, 2010), 23. As Hugh Thirlway has noted, however, there is always an "exercise of choice in the application of general rules to particular cases." Hugh Thirlway, "The Proliferation of International Judicial Organs: Institutional and Substantive Questions," in *Proliferation of International Organization*, eds. N.M. Blokker and H.G. Schermers (The Hague: Kluwer Law International, 2001), 262.

bi-polar legal landscape.⁹⁸ Historians Janice Cavell and Jeff Noakes provide an example of this uncritical sentiment in their comment that “the Eastern Greenland case stands as an important milestone. Although the sector theory remained controversial, the 1933 decision of the PCIJ demonstrated the validity of the overall approach taken by Canada.” Likewise, Canadian scholar Gordon Smith concluded that the decision immediately provided a “potent precedent” to states dealing with polar claims in the 1930s. In his Antarctic history, Adrian Howkins simply concludes that the PCIJ’s ruling “reduced the requirements for effective occupation of Polar Regions” – a verdict that states immediately accepted and applied to their claims.⁹⁹ These assessments fail to explain how historical actors viewed these cases and legal developments as they unfolded. They ignore many of the complex issues that have been identified in the decisions, and how these limitations affected state officials charged with appraising state legal titles in the immediate aftermath of the cases. Further, they tend to minimize or ignore the uncertainty that remained about the requirements of polar sovereignty and the rules of territorial acquisition.

In sharp contrast, many modern legal scholars have highlighted the confusion and uncertainty that continued to surround the rules of territorial acquisition and the doctrine of effective occupation after the *Palmas Island*, *Clipperton Island* and *Eastern Greenland* cases. After reviewing the three decisions in 1970, F.M. Auburn concluded the cases only cast “further darkness on the question” of territorial acquisition.¹⁰⁰ The confusing and unclear snarl of legal points and administrative, geographical, political and historical variables on which the decisions of each case rested greatly diminished their value as legal precedents.¹⁰¹ In the end, all three cases highlighted how malleable and expendable the doctrine of effective occupation had become. As legal scholar Steven Ratner points, the danger in such a fluid situation is that “one cannot be sure to what extent the doctrine

⁹⁸ See references, fn. 7.

⁹⁹ Cavell and Noakes, *Acts of Occupation*, 246-247, Smith, *A Historical and Legal Study*, 320; Howkins, “Frozen Empires,” 107.

¹⁰⁰ Auburn, “The White Desert,” 233, and Sharma, *Territorial Acquisition, Disputes and International Law*, 338.

¹⁰¹ F.M. Auburn, *Antarctic Law and Politics* (London: C. Hurst & Company, 1982), 13; F.M. Auburn, *The Ross Dependecy* (The Hague: Martinus Nijhoff, 1972), 21.

is malleable enough to justify numerous outcomes.”¹⁰² Accordingly, legal scholar Jeffrey Myhre has argued that, “in synthesizing the results of these cases, one finds the law on title by occupation neither black nor white but an unsatisfying shade of grey.”¹⁰³

The confusion about the rules of territorial acquisition is best represented by the very different conclusions reached in two articles on polar claims written shortly after *Eastern Greenland*. After reviewing the results of the three cases, German legal scholar Friedrich August Freiherr von der Heydte felt he could argue that “sovereignty over a region completely uninhabited and seldom frequented is acquired merely by symbolic annexation.” Once a state acquired a territory, it was not required to extend its occupation to every “nook and cranny” as long as it had enough power to provide for the minimum requirements of control. In places that had no people and no property, however, there could be no jurisdiction. At this point, the exercise of jurisdiction was no longer necessary for the maintenance of sovereign rights.¹⁰⁴ Von der Heydte also maintained “geographic contiguity with an occupied region gives the same full and perfect sovereignty rights as an actual occupation.” The doctrine of contiguity could produce sovereignty because “boundary lines of any application of the rule of contiguity are drawn, precisely, by its very origin from the general principle of effectiveness.” In other words, the boundary lines drawn using the doctrine of contiguity emanated from territory clearly under state control. In von der Heydte’s eyes, polar sectors were “sphere[s] of virtual effectiveness” – extending the state’s authority throughout the area enclosed by the sector lines.¹⁰⁵

Thomas Edward Maurice McKitterick took strong issue with von der Heydte’s views. He agreed with the PCIJ that the “acid test of the admissibility of a claim” should be the “intention and will to act as sovereign, and some actual exercise or display of such authority,” as determined in the *Eastern Greenland* case. He maintained that the exercise or display of such authority must be “reasonably permanent and not merely intermittent.”

¹⁰² Ratner, “Land Feuds and Their Solutions,” 816.

¹⁰³ Jeffrey D. Myhre, *The Antarctic Treaty System: Politics, Law and Diplomacy* (Boulder: Westview Press, 1986), 11.

¹⁰⁴ Friedrich August Freiherr von der Heydte, “Discovery, Symbolic Annexation and Virtual Effectiveness in International Law,” *The American Journal of International Law* 29, no. 3 (1935): 448 and 464.

¹⁰⁵ Von der Heydte, “Discovery, Symbolic Annexation and Virtual Effectiveness in International Law,” 470.

To secure title, the state must “have some effective and permanent means of controlling those who wish to visit the region claimed.” Referencing Canada and the Arctic Archipelago, McKitterick posited that if Ottawa was incapable of exercising its jurisdiction over the islands, “the only conclusion which could be reached would be that she did not possess a good title to the ownership of those areas.” A state could lose its legal title if it did not continuously make effective its claims.¹⁰⁶ McKitterick and von der Heydte studied the same legal decisions, but came to very different conclusions on effective occupation and the doctrine of contiguity.

State officials involved in analyzing or validating polar claims also carefully studied the *Palmas Island*, *Clipperton Island* and *Eastern Greenland* cases. They pulled out principles and ideas from the decisions that provided guidance or support for the claims of their countries in the Arctic and Antarctic, including the importance of foreign recognition and acquiescence in territorial disputes. They recognized that the cases changed the doctrine of effective occupation to require that a state must showcase the “intention and will to act as sovereign” as well as “some actual exercise or display of such authority” in any territory it claimed. The law, it seemed, would not require the same degree of occupation over enormous, uninhabited and environmentally challenging places as it expected in temperate and populated zones.¹⁰⁷

However, these officials, many of them the leading lawyers and legal experts of their day, also acknowledged the limitations of the cases and the uncertainty they left. How much uninhabited or sparsely populated territory could a state claim to occupy through a settlement or an administrative post? How continuous and permanent did state control have to be? Although the Danes could point to two settlements on the eastern

¹⁰⁶ T.E.M. McKitterick, “The Validity of Territorial and Other Claims in Polar Regions,” *Journal of Comparative Legislation and International Law* 21, no. 1 (1939): 93-94 and 96-97.

¹⁰⁷ For examples of state legal appraisals that analyze and assess these three cases, see: Hugh Cumming, Division of European Affairs, Department of State, American Policy Relating to the Polar Regions, 28 July 1938, United States National Archives and Records Administration (NARA), RG 59, CDF 1930-39, Box 4520, File 800.014 Antarctic/126; T.L. Cory, compiled for the Northwest Territories Council, *British Sovereignty in the Arctic*, 3 June 1936, Library and Archives Canada (LAC), RG 25, Vol. 4253, File 9057-40 pt. 4, Law Officers of the Foreign Office and Colonial Office, Paper B on the Legal Authorities, 12 January 1947, National Archives (NA), FO 371/61288; and E.R. Hopkins, Legal Adviser for External Affairs, *Legal Aspects of Sovereignty in the Canadian Arctic*, 22 January 1949, LAC, RG 2, Vol. 122, File A-25.

coast of Greenland to support their claim, what about polar territory that lacked permanent presence? While the cases decided that state control was not constantly required for every nook and cranny, countries still struggled to determine the limits that the PCIJ or an arbiter would place on this allowance in future disputes. When did official state protests play a role in the preservation of a territorial claim? How much foreign recognition did the law require to secure a claim? More important than the questions left unanswered was knowledge that the doctrine of effective occupation had been malleable and expendable in the three cases. That malleability kept the door open for claims based on previously used arguments of contiguity, symbolic annexation, periodic visits and the sector principle.¹⁰⁸ The elusiveness of the law allowed states to continue producing multiple versions of polar sovereignty and the bi-polar legal landscape remained crowded with the different arguments states used to justify their claims.

State officials involved in researching polar claims, recognized the shades of grey that continued to surround the requirements of effective occupation and the rules of territorial acquisition. After reviewing all three cases in 1935, William Roy Vallance, who worked in the State Department's Office of the Legal Adviser, lamented that international law had "not very definitively established" the steps necessary for a state to make a successful territorial claim.¹⁰⁹ A few years later, the co-founder and director of the Scott Polar Research Institute, Frank Debenham, advised the Foreign Office that "there being no such thing as a formal code of international law with respect to countries which are uninhabitable, claims to polar lands rest upon a variety of evidence, every one of which is open to debate and may be upset on other grounds."¹¹⁰ In 1936, T.L. Cory, the solicitor of Canada's Northwest Territories Branch of the Department of the Interior, captured the essence of the problem when he explained that international law had "not

¹⁰⁸ The Foreign Office legal advisers were amongst the best in the world, and the fact they still felt comfortable supporting the legal validity of the sector principle in the years after the three cases showcases the continued ambiguity of the law. See Imperial Conference, 1937, Committee on Polar Questions, Notes of the First Meeting of the Committee, 26 May 1937 and Committee on Polar Questions, Notes of the Second Meeting of the Committee, 8 June 1937, LAC, RG 25, Vol. 1789, File 1936-318-Q.

¹⁰⁹ William Roy Vallance, The Legal Adviser, Department of State to Mr. R. Walton Moore, 30 March 1935, NARA, RG 59, CDF 1930-39, Box 4520, File 800.014 Antarctic/79.

¹¹⁰ Frank Debenham, Director of the Scott Polar Research Institute, Memorandum on the Australian Sector of the Antarctic, 21 August 1937, National Archives of Australia (NAA), A981, ANT 2, Part 1, 'Antarctic Control Australian Sector' Pt.I.

definitely” established “what is necessary to constitute absolute sovereignty in the Arctic islands.”¹¹¹

Over the next two decades, state officials from many of the polar claimants expressed concern about the ambiguity of the law. In 1946, the U.S. State Department admitted that it struggled to find a coherent set of “clear legal principles” that dictated how polar territory was properly acquired,¹¹² while another report lamented “the lack of international rules for acquisition of uninhabitable territories.”¹¹³ Eight years later, departmental legal expert James Bonbright explained that “international law on the acquisition of sovereignty in the Polar Regions” was “far from settled.”¹¹⁴ In the postwar years, the legal advisers of the Foreign and Colonial Offices could not determine exactly how much the local environment could modify the doctrine of effective occupation.¹¹⁵ In Australia, Richard Casey complained there was “no general agreement on what suffices” to make a claim in the polar regions.¹¹⁶ Meanwhile, after carefully studying the problems of polar sovereignty, Canadian diplomat Hume Wrong remarked that the “general rules of international law concerning the relative merits of claims based on occupancy, formal annexation and discovery” still had to be worked out. He cautioned that there was a “long way to go...before a generally recognized definition of what constitutes effective occupancy can be developed.”¹¹⁷ To these officials, and others like them in all of the polar states, the rules of territorial acquisition and the doctrine of effective occupation remained unclear, ambiguous and open to interpretation.

It was more than just the requirements of effective occupation that confused state officials. They also worried about what those requirements might become. Every lawyer

¹¹¹ T.L. Cory, compiled for the Northwest Territories Council, *British Sovereignty in the Arctic*, 3 June 1936, LAC, RG 25, Vol. 4253, File 9057-40 pt. 4.

¹¹² Department of State, *Polar Regions: Policy and Information Statement*, 1 July 1946, NARA, RG 59, CDF 1945-49, Box 4073, File 800.014 Antarctic 7-146.

¹¹³ OIR Report, No. 4296, Map Intelligence Division, Office of Intelligence Collection and Dissemination, State Department, *History and Current Status of Claims in Antarctic*, 3 October 1947, NARA, RG 59, CDF 1945-1949, Box 4074, File 800.014, Antarctic.

¹¹⁴ James Bonbright to Mr. Matthews, G, 15 July 1952, NARA, RG 59, CDF 1950-54, Box 3066, File 702.022 / 7-1552, Antarctic.

¹¹⁵ Law Officers of the Foreign Office and Colonial Office, *Paper B on the Legal Authorities*, 12 January 1947, NA, FO 371/61288.

¹¹⁶ R.G. Casey, Minister for External Affairs, to Cabinet, “Antarctic: Position Regarding Claims,” NAA, A4926/1039/Antarctic - position regarding claims - Decision 1214.

¹¹⁷ Hume Wrong to Lester B. Pearson, 30 December 1946, LAC, RG 25, Vol. 2145, File A-2/2-10, pt.1.

understood the mutable nature of international law and Huber's intertemporal theory had stressed the impact that changes in the law could have on territorial claims. Officials that studied polar claims considered the impact of technological developments on the requirements of effective occupation as they opened up inaccessible areas and allowed for greater levels of control and habitation (as Anzilotti had mentioned in his dissenting opinion). How would long-range aircraft impact the requirements of occupation? What about new and more powerful icebreakers? Or advanced stations that could allow people to overwinter in the polar regions? All state officials worried about these questions in the decades that followed Huber's ruling in the *Palmas Island* case. Shortly after the Second World War, the Foreign Office legal advisers highlighted, "You can acquire sovereignty in 1926 in accordance with the law of 1926, but if you wish to maintain it in 1946 you must fulfill the requirements of the law of 1946."¹¹⁸ Trying to gauge evolving requirements proved an incredibly difficult task for state officials.

¹¹⁸ Law Officers of the Foreign Office and Colonial Office, Paper B on the Legal Authorities, 12 January 1947, NA, FO 371/61288.

Chapter 6

6 Between Sectors and the Doctrine of Constructive Occupation, 1933-1939

Charles Cheney Hyde served as solicitor for the U.S. State Department between 1923 and 1925. During his tenure, he grappled with ongoing polar territorial claims, helped draft the Hughes Doctrine, analyzed the 1924 Soviet claim and led the review of Canada's Arctic sovereignty during the MacMillan expedition. Afterwards, Hyde became a professor of international law at Columbia University, where he continued his attempts to unravel the 'Gordian knot' of polar sovereignty.¹

The professor identified several major complications for the acquisition of land in the polar regions: the unique environmental conditions, the difficulties of actual settlement and use, and the contested belief that certain polar areas should be considered "geographical prolongation[s]" of existing state territory. Most importantly, Hyde observed, the international law on territorial acquisition had never been properly adapted to the polar regions. Lacking clear legal guidelines, states "yielded to the temptation to rely upon easier and less rigorous modes of acquiring rights of sovereignty," which led to a "recrudescence of ideas and tests that appeared to suffice generally in the sixteenth century."² The massive state claims in the polar regions relied on symbolic acts such as flag plantings, the reading of official proclamations and the occasional visit. Emphasizing

¹ In his role as the Hamilton Fish Professor of International Law and Diplomacy at Columbia University, Hyde attempted to address the legal issues in the polar regions in articles and through the school's Joint Seminar in International Law in the 1930s. The Joint Seminar in International Law was actually studying the idea of *terra nullius*, but focused on the concept's role in the polar regions. The seminar was led by Hyde and experienced legal expert Phillip Jessup, who was his assistant at the State Department. The participants in the seminar included James Simsarian, Arthur Keller and Frederick Mann. The results of the seminar led a rapid increase in the use of *terra nullius* outside the polar regions, where it was applied to explain the history of European expansion, especially in Australia. See Andrew Fitzmaurice, *Sovereignty, Property and Empire, 1500-2000* (Cambridge: Cambridge University Press, 2014), 319-325. On some of the historical research completed by the seminar see Arthur S. Keller, Oliver Lissitzyn and Frederick Mann, *Creation of Rights of Sovereignty Through Symbolic Acts, 1400-1800* (New York: AMS Press, 1967). The book was originally published in 1937.

² The sector principle was equally problematic, and Hyde accused states of using it to bypass the need to display the "the actual power to control what is claimed to be subject to a right of sovereignty." Hyde elaborated that the sector principle allowed states to claim polar territory based on its "unique relationship with the claimant state" or proximity to an explored coastline. Charles Cheney Hyde, "Acquisition of Sovereignty Over Polar Areas," *Iowa Law Review* 19, no. 293 (1933-34): 286, 289-292.

the absurdity of Antarctic claims based on so little, Hyde asked what would happen if “a hungry penguin devoured the stars and stripes and never let them wave bravely over the land of those free and brave birds – would that make a difference?”³

The American legal expert believed that a “pertinent law evolved” for the acquisition of polar territory was overdue and he took it upon himself to outline such a legal regime.⁴ In a radical departure for the Hughes Doctrine crafter, Hyde admitted that the polar environment demanded a “relaxation of the requirements of the law demanding occupation...within rigid bounds.” Although the conditions in the polar regions made physical settlement difficult, from a “convenient” strategic point (“*point d'appui*”) a polar state could “exercise regularly a civil or administrative control over a large yet unpopulated area.” A claimant state could therefore “actively engage itself, through the facilities of transportation by air, over the entire district which it claims as its own.” While Hyde admitted that his framework was “not occupation,” he maintained that it was also “not contemptuous of the modern requirements of the law of nations that demands the exercise of control over what a state claims as its own.”⁵ Hyde’s formula for polar sovereignty closely resembled the system of RCMP posts and patrols that the Canadians already employed in the Eastern Arctic Archipelago, but with an additional aerial component.⁶ Hyde’s emphasis on air transportation underlined the impact that technology and aerial advancements could have on the law.

Hyde wanted the United States to take a more active role in the Arctic and Antarctic. If the *Eastern Greenland* decision provided one clear lesson, Hyde insisted, it was how much emphasis the court placed on recognition, acquiescence, and the absence of official protest. No doubt recalling his government’s failure to protest the Russian and

³ Charles Cheney Hyde, “Who Owns Antarctica?” *The Independent Journal of Columbia University* 21 (1936).

⁴ Hyde, “Acquisition of Sovereignty Over Polar Areas”: 286. Hyde hoped that the *Eastern Greenland* decision would fulfill this need, but he found that the Permanent Court of International Justice’s decision offered no clear road map for how a state could acquire polar sovereignty. Charles Cheney Hyde, “The Case Concerning the Legal Status of Eastern Greenland,” *The American Journal of International Law* 27, no. 4 (1933), 732-738. See also Hyde, “Acquisition of Sovereignty Over Polar Areas”: 289 n. 3.

⁵ While Hyde was willing to concede that contiguity could bolster state claims to the Arctic islands, there had to be proof of “the requisite power to control.” Hyde, “Acquisition of Sovereignty Over Polar Areas,” 288-289, 294.

⁶ Imperial Conference of 1930, Committee on Polar Questions Report, National Archives (NA), DO 35/167/7.

Canadian annexations in the Arctic during his tenure as solicitor, he advised the U.S. to protest rival polar claims and announce its own without delay. Hyde encouraged Washington to take immediate action, “lest by inadvertence or perhaps by undue respect for the requirements of the law applicable to temperate zones, it may...find itself deprived in the estimation of an international tribunal of the slightest vestige of a right in something greatly useful to itself, and greatly coveted by a rival.”⁷

Scholars have largely ignored Charles Cheney Hyde’s impact on the legal development of the polar regions, but his clear and effective arguments on polar sovereignty influenced the legal appraisals conducted by polar claimants for the next two decades, particularly in the U.S. State Department where his work was effectively required reading.⁸ His views resonated in the department, which, spurred on by the activities and annexations of foreign states in the polar regions, including the massive sector claim made by Australia, finally gave sustained and “serious consideration...to whether this Government should take steps to assert its territorial claims in the Arctic and Antarctic...or whether we in fact do not have and do not anticipate having a desire to acquire such territories.”⁹ The exploratory work of Lincoln Ellsworth and Richard Byrd in the south polar region, the strength of the Canadian and Soviet Arctic claims and Washington’s lack of strategic interest in the North all resulted in the U.S. government adopting an Antarctic focus. Reflecting Hyde’s emphasis on protests and the dangers of remaining silent, starting in 1934 the State Department took stronger action to safeguard its legal position by reserving American rights in the sectors of the British Empire and by questioning the foundation of these claims using the Hughes Doctrine. These American legal statements reverberated throughout the polar states, and shaped their perceptions, concerns, policies and diplomacy. While the United States Antarctic Service Expedition

⁷ Hyde pointed out the great stock that the British put in “formalities through which assertions of sovereignty have been made” and the lack of official protest against them. Hyde, “Who Owns Antarctica?”

⁸ See, for example, S.W. Boggs to O’Neill, 15 March 1934, United States National Archives and Records Administration (NARA), RG 59, CDF 1930-39, Box 4520, File 800.014, Antarctic 45 ½; S.W. Boggs, Division of Research and Publication, Department of State to Mr. R.W. Moore and Mr. Moffat, 17 August 1938, NARA, RG 59, CDF 1930-39, Box 4520, File 800.014 Antarctic/126; Hugh Cumming, Division of European Affairs, Department of State, American Policy Relating to the Polar Regions, 28 July 1938, NARA, RG 59, CDF 1930-39, Box 4520, File 800.014 Antarctic/126.

⁹ Hugh Cumming, Division of European Affairs, Department of State to Mr. Moffat, 28 July 1938, NARA, RG 59, CDF 1930-39, Box 4520, File 800.014 Antarctic/126.

of 1939-1941 or Operation High Jump in 1946 are often viewed as the critical turning points in U.S. engagement with the Antarctic,¹⁰ the legal action taken by the State Department in the 1930s really marked the beginning of America's replacement of Britain as the primary shaper of the bi-polar legal landscape.

The confident espousal of the Hughes Doctrine by the State Department masked an internal debate that questioned whether the principle's emphasis on settlement and use ignored the climatic conditions of the polar regions and developments in the doctrine of effective occupation. Department officials took note of the dramatic change in Hyde's opinions on the requirements of polar sovereignty after he approved the Hughes Doctrine. Often citing the professor's arguments, officials slowly began to construct a doctrine of constructive occupation – a concept that has been largely ignored by historians and legal scholars. The new and less rigorous formula for polar sovereignty was designed specifically for the acquisition of territory in the Arctic and Antarctic.¹¹ As the political will for an American Antarctic claim grew in the late 1930s, the State Department stood on the brink of revoking the Hughes Doctrine and embracing the doctrine of constructive occupation.

Unaware of the internal American discussions about constructive occupation, British and Commonwealth officials grew increasingly worried by Washington's continued emphasis on physical settlement and use as the only valid basis for polar claims. They started to explore various options to increase the control and physical presence of their states in the polar regions. Nevertheless, although the sector principle often fades into the background of polar histories that cover the 1930s, this chapter shows that the idea remained in the foreground of British and Commonwealth legal thinking.¹²

¹⁰ Frank G. Klotz, *America on the Ice: Antarctic Policy Issues* (Washington: National Defence University Press, 1990); Christopher Joyner and Ethel Theis, *Eagle Over the Ice: The US in the Antarctic* (Hanover, 1997); Jason Kendall Moore, "Tethered to an iceberg: United States policy toward the Antarctic, 1939-1949," *Polar Record* 35, no. 193 (1999): 125-134; Jason Kendall Moore, "Maritime Rivalry, Political Intervention and the Race to Antarctica: U.S.-Chilean Relations, 1939-1949," *Journal of Latin American Studies* 33, no. 4 (2001): 713-738.

¹¹ Deborah Shapley mentioned the doctrine very briefly in *The Seventh Continent: Antarctica in a Resource Age* (New York: Earthscan, 2011): 43.

¹² Malcolm Templeton, *A Wise Adventure: New Zealand & Antarctica, 1920-1960* (Wellington: Victoria University Press, 2000); Shelagh Grant, *Polar Imperative: A History of Arctic Sovereignty in North America* (Vancouver: Douglas and McIntyre, 2010); David Day, *Antarctica: A Biography* (Oxford: Oxford

Even as legal experts started to question if the penetration of polar hinterlands by aircraft threatened to make the doctrine obsolete, others insisted that it remained the best possible solution to the problem of polar sovereignty. By the end of the 1930s, British and Commonwealth officials, as well as private legal experts, still believed that the sector principle either had or would “become established as a rule of law applying to Arctic and Antarctic territory.”¹³

6.1 A “More Definite” American Polar Policy?

Following the Australian sector claim, which encompassed almost half of the Antarctic continent, State Department officials realized the British Empire and Soviet Union had annexed a vast portion of the polar regions in a little over a decade. American officials believed that their country also possessed historic rights based on discovery, exploration and use in each of these claim areas.¹⁴ Starting in the summer of 1933, State Department officials began to advise that Washington had to end its complacency and indifference towards the polar regions if it ever hoped to secure these rights.¹⁵ As a result, officials with experience in polar affairs, such as Samuel Whittemore Boggs, Lawrence Martin and the international lawyer, David Hunter Miller (now the Historical Advisor at the State Department), worked together to “develop a more definite American policy relating to the polar regions.”¹⁶

Before a new American polar policy could be crafted, however, the State Department had to firmly decide its position on the requirements of territorial acquisition

University Press, 2013), 312-313; Tom Griffiths, *Slicing the Silence: Voyaging to Antarctica* (Cambridge, Massachusetts: Harvard University Press, 2007).

¹³ D.F. Howard for Neville Chamberlain to H. Lloyd Thomas, Paris, 16 September 1937, NA, CO 323/1599/7.

¹⁴ Note by John D. Hickerson, Assistant Chief, Division of Western European Affairs, 19 May 1933, NARA, RG 59, CDF 1930-39, Box 4520, File 800.014 Antarctic/37 1 1/2. See also Miss Anna O’Neill, the Arctic Sector Claimed by Russia and American Claims Therein, 30 October 1933, NARA, RG 59, Entry 5245, Box 1, Folder 2, File Polar Regions. Sovereignty. Sector Principle and S.W. Boggs, Department of State, Office of Historical Adviser, 22 July 1930, NARA, RG 59, CDF 1930-39, Box 4520, File 800.014 Antarctic/28.

¹⁵ See Hickerson to Boggs, 16 August 1933, NARA, RG 59, CDF 1930-39, Box 4520, File 800.014 Antarctic/38-1/4 and P.M. to Phillips, 5 October 1933, NARA, RG 59, CDF 1930-39, Box 4520, File 800.014 Antarctic/37 3/4.

¹⁶ S.W. Boggs, Department of State, Office of the Historical Adviser, *The Polar Regions: Geographical and Historical Data in a Study of Claims to Sovereignty in the Arctic and Antarctic Regions*, pg. 122, 21 September 1933, NARA, RG 59, CDF 1930-39, Box 4522, File 800.014, Arctic/31.

and effective occupation in the polar regions.¹⁷ The department leaned heavily on its recently established Office of the Legal Adviser for advice.¹⁸ The office's head, Green Hackworth, displayed a keen interest in the problems of territorial acquisition, as did two of his assistants, William Roy Vallance and Anna O'Neill, both of whom had previously assessed the legal situation in the Arctic and Antarctic.¹⁹ Hackworth instilled a new "pragmatic or functional approach to international law" in his office. Officials viewed the law as a "flexible tool" for crafting practical solutions to international problems, rather than as a "body of fixed and unchangeable rules." The approach differed significantly from the classical legal ideology that once dominated State Department officials' thinking. Under Hackworth, the office worked on a case-by-case basis, and avoided enunciating broad and sweeping principles, such as the Hughes Doctrine.²⁰ The Office of the Legal Adviser's new approach complemented a growing desire by State Department officials for pragmatic and realistic solutions to the problems of polar sovereignty.

In addition to seeking practical solutions to problems, the Office of the Legal Adviser also insisted that adopted doctrines should be "calculated to stand the test of good conscience, fair dealing, and sound principle of law and practice."²¹ In the early 1930s, the State Department finally concluded that the sector principle could not pass such a test. The department agreed with Charles Cheney Hyde's conclusion that

¹⁷ Miss Anna O'Neill, the Arctic Sector Claimed by Russia and American Claims Therein, 30 October 1933, NARA, RG 59, Entry 5245, Box 1, Folder 2, File Polar Regions. Sovereignty. Sector Principle. Boggs had been urging the State Department to answer the complicated questions of polar sovereignty and occupation for years. S.W. Boggs, Department of State, Office of Historical Adviser, 22 July 1930, NARA, RG 59, CDF 1930-39, Box 4520, File 800.014 Antarctic/28.

¹⁸ In 1931 the office of the solicitor for the State Department had been abolished, replaced by the position of legal adviser.

¹⁹ See Green Hackworth, *Digest of International Law* 1 (Washington: U.S. Government Printing Office, 1940), 393-482 especially the section on Polar and Subpolar Regions, 449-476.

²⁰ Richard Bilder, "The Office of the Legal Adviser: The State Department Lawyer and Foreign Affairs," *The American Journal of International Law* 56, no. 3 (1962): 633-684 at 680. Richard Steinberg and Jonathan Zasloff have argued that the death of classical legal thought amongst U.S. decision-makers came as a result of the Stimson Doctrine, Henry Stimson's failed response to the Manchurian Crisis. In 1940, Hans Morgenthau launched an attack on classical legal ideology. Unlike those who embraced classical legal thought, for legal realists legal rules were simply politics by other means. Richard Steinberg and Jonathan Zasloff, "Power and International Law," *The American Journal of International Law* 100, no. 64 (2006): 72-73. For more on the State Department Legal Adviser see Michael P. Scharf and Paul Williams eds., *Shaping Foreign Policy in Times of Crisis: The Role of International Law and the State Department Legal Adviser* (Cambridge: Cambridge University Press, 2010).

²¹ Harold Hongjiu Koh, "The State Department Legal Adviser's Office: Eight Decades in Peace and War," *Faculty Scholarship Series* (2012): 1752.

Washington had never approved the sector principle nor was it “obliged or prepared to admit” that the acceptance of the Treaty of 1867 constituted “approval in principle of the sector system.” As a result, the U.S. could ignore sector claims in which a state did not display “the requisite power to control.”²² Anna O’Neill and Samuel Boggs suggested if the U.S. declared that the sector principle had no legal value, there would be “little basis for recognizing” many polar claims – especially in the Antarctic – providing the U.S. with more freedom of action. Changing opinions on the sector principle were also motivated by the ever diminishing prospect of finding land between Alaska and the North Pole, which reinforced the view that the U.S. had little to lose and much to gain by challenging the sector principle.²³ Hackworth and his legal advisers also condemned the symbolic acts that supported the polar claims of the countries of the British Empire.²⁴ “In the theory and practice of international law it is laid down that sovereignty over a No-man’s-land must be acquired by occupation,” stressed O’Neill, “there is no valid reason for departing from this rule in the polar regions.”²⁵

The central debate within the State Department involved the level of occupation required to successfully claim polar territory. Boggs (who at this point was an expert on polar sovereignty) led a group of officials who believed that the State Department gave “undue consideration...to the idea of ‘effective occupation.’” The geographer suggested to John D. Hickerson, assistant chief of the Division of West European Affairs, that the Hughes Doctrine ignored the unique environmental conditions of the Arctic and

²² Hyde admitted that the U.S. had never admitted that there should be a “a “relaxation of the requirements of international law” in the polar regions, but believed it still could. Hyde, “Acquisition of Sovereignty Over Polar Areas,” 291.

²³ These opinions on the sector principle were also motivated by the ever diminishing prospect of finding land between Alaska and the North Pole, which reinforced the view that the U.S. had little to lose and much to gain by challenging the sector principle. At one point, Boggs suggested that the United States could stress the differences between the sector principle in the Arctic and Antarctic, and only challenge its use in the Antarctic. Miss Anna O’Neill, the Arctic Sector Claimed by Russia and American Claims Therein, 30 October 1933, NARA, RG 59, Entry 5245, Box 1, Folder 2, File Polar Regions. Sovereignty. Sector Principle; and Samuel Boggs, The Sector Principle in the Polar Regions, 1 November 1933, NARA, RG 59, Entry 5245, Box 1, Folder 2, File Polar Regions. Sovereignty. Sector Principle.

²⁴ Legal Adviser, 12 November 1934, NARA, RG 59, CDF 1930-39, Box 4520, File 800.014, Antarctic 39 ½.

²⁵ Miss Anna O’Neill, the Arctic Sector Claimed by Russia and American Claims Therein, 30 October 1933, NARA, RG 59, Entry 5245, Box 1, Folder 2, File Polar Regions. Sovereignty. Sector Principle.

Antarctic.²⁶ Boggs insisted, “actual settlement should not be made a condition of establishing sovereignty.” Instead, he urged the U.S. to take the lead in the “special development” of the law for the polar regions, which could be agreed upon by the claimant countries through multilateral negotiations or an international conference. A key point, Boggs suggested, should be the elevation of the role of initial discovery, especially in the Antarctic. He also recommended that the U.S. decide whether explorers could claim land by dropping flags from airplanes, which he thought would become an increasingly common practice.²⁷ Most importantly, Boggs wanted the U.S. to outline a “special definition” of occupation for the polar regions. He thought they should be classified as “ice deserts” and treated like the deserts of Africa. Echoing Charles Cheney Hyde’s arguments, Boggs insisted that the occupation of an “ice desert” should consist of physical state control over its points of access and an official notification to interested governments. Within this “special definition” of occupation, a state could extend its control through aerial activities.²⁸ Beyond his emphasis on aerial control, Boggs’ definition of effective occupation matched closely with what British and Canadian experts concluded in the 1920s.

William Roy Vallance supported Boggs’ assessment of effective occupation in light of new developments in international law. In 1926, the legal adviser examined Canada’s occupation in the Arctic and concluded that its claim was “not worth a damn.” In 1933, however, he pointed out that the *Palmas Island*, *Clipperton Island* and *Eastern Greenland* cases changed the nature of effective occupation and showed how little state activity was necessary to support a claim to uninhabited territory. Vallance and Hackworth both reflected that the arbiter of the *Clipperton Island* case accepted an initial symbolic act of possession as proof of title. The arbiter upheld France’s claim even

²⁶ Boggs, Office of the Historical Adviser, Department of State, to Mr. Hickerson, 21 September 1933, NARA, RG 59, CDF 1930-39, Box 4520, File 800.014 Antarctic/37-1/4

²⁷ Boggs also proposed that the U.S. develop a doctrine on the status of permanent ice, which he called *glacies nullius* or *glacialis regio nullius* (no man’s ice). S.W. Boggs, Department of State, Office of the Historical Adviser, *The Polar Regions: Geographical and Historical Data in a Study of Claims to Sovereignty in the Arctic and Antarctic Regions*, pg. 31, 35, 21 September 1933, NARA, RG 59, CDF 1930-39, Box 4522, File 800.014, Arctic/31.

²⁸ S.W. Boggs, Department of State, Office of the Historical Adviser, *The Polar Regions: Geographical and Historical Data in a Study of Claims to Sovereignty in the Arctic and Antarctic Regions*, pg. 31-35, 21 September 1933, NARA, RG 59, CDF 1930-39, Box 4522, File 800.014, Arctic/31.

though its citizens only went ashore once and left no sign of their country's sovereignty. The need for actual settlement in the polar regions stipulated in the Hughes Doctrine seemed undone by the current trend in international law.²⁹ Although the permanent settlement and formal use of uninhabited territory no longer appeared to be a requirement of territorial acquisition, the Office of the Legal Adviser maintained that the specific actions required to support a successful claim remained unclear.³⁰

A draft congressional resolution "Relating to the Arctic and Antarctic Regions" drawn up by the State Department at the end of 1933 reflected its changing opinion on the doctrine of effective occupation. The document rejected claims that did not meet the "accepted requirements of international law" or lacked recognition in an international agreement to which the United States was a party. The draft resolution asserted that many countries staked claims to polar areas without effective occupation or jurisdiction, based only on discovery, official proclamation and the sector principle, which had "no basis in international law." While these statements were all in keeping with the Hughes Doctrine, the tone changed when the resolution stated that the Arctic and Antarctic were not "adapted to continuous human inhabitations, on account of prevailing climatic conditions." Nevertheless, the authors insisted that sovereignty could not be acknowledged in advance of "acts essential to the establishment of sovereignty." As a result, the resolution recommended Congress "authorize and request the President to take appropriate steps to lay claim to all land and islands in the polar regions to which the United States is entitled to assert a claim because of discoveries, exploration and other acts of officers and men of official American expeditions and of American citizens."³¹ Displaying the State Department's continued uncertainty about the requirements of polar sovereignty, the draft resolution offered no elaboration on the "acts essential," the "appropriate steps," or the level of state activity necessary to acquire sovereignty over

²⁹ William Roy Vallance, Office of the Legal Adviser, Department of State, 8 August 1933, NARA, RG 59, CDF, 1930-39, Box 4520, File 800.014 Antarctic/38 ½; William Roy Vallance, The Legal Adviser, Department of State to Mr. R. Walton Moore, 30 March 1935, NARA, RG 59, CDF 1930-39, Box 4520, File 800.014 Antarctic/79.

³⁰ Office of the Legal Adviser, Department of State to Mr. R. Walton Moore, 30 March 1935, NARA, RG 59, CDF 1930-39, Box 4520, File 800.014 Antarctic/79.

³¹ Third Draft, Resolution Relating to the Arctic and Antarctic Regions, 4 November 1933, NARA, RG 59, Entry 5245, Box 2, Folder 15, File North Polar Regions: Sovereignty Claims by U.S.

polar territory. Despite its ambiguity, the wording of the resolution would have allowed the U.S. to challenge many of the existing polar claims.

By the mid-1930s, however, many State Department officials concluded that the U.S. would have a difficult time successfully challenging the Arctic claims of the Soviet Union and Canada, given the measures taken by both countries to strengthen their positions. Stalin's Soviet Union initiated a dramatic increase in state activity in the High Arctic in the 1930s. The Soviets wanted to achieve "physical mastery" of the entire region to pave the way for economic development and a "suitable payoff," historian John MacCannon has argued.³² Under the institutional control of the Glavsevmorput – the Main Administration of the Northern Sea Route, or the "Commissariat of Ice" – the Soviets initiated a frenzy of exploration, meteorological studies, scientific programs, aerial advancement and permanent physical occupation in a systematic investigation of the region.³³ In the High Arctic, their signature projects involved the development of aviation and the Northern Sea Route, which a Soviet icebreaker transited for the first time in a single season in 1932, raising hope that it could be used as a regular shipping lane.³⁴ The Soviets also established a system of stations and sub-stations across the Arctic islands, which increased to ninety by 1940. These stations fulfilled a wide array of practical functions, serving as meteorological posts, storage depots, coal bases for the icebreakers, radio stations, and platforms for scientific research.³⁵ Soviet scientific efforts peaked in May 1937, when a four-man party landed on the North Pole and maintained a station there for three quarters of the year. Meanwhile, three long distance flights across

³² John MacCannon, *Red Arctic: Polar Exploration and the Myth of the North in the Soviet Union, 1932-39* (Oxford: Oxford University Press, 1998), 42. In 1932 Stalin declared that, "the Arctic and our northern regions contain colossal wealth. We must create a Soviet organization which can, in the shortest period possible, include this wealth in the general resources of our socialist economic structure. Charles Emmerson, *The Future History of the Arctic* (New York: Public Affairs, 2010), 25, 42-43.

³³ To foster development, the Soviets attempted to produce a better understanding of Arctic geography and climate, employing almost 300 scholars and explorers at the Arctic Institute for this purpose. MacCannon, *Red Arctic*, 36-37, 41-46. In the vast northern region below the Arctic coastline, the state's focus on massive infrastructure projects built at great loss of life on the back of the gulag system, produced the White Sea Canal, a vast system of mines at the Kolyma complex, and the first ever railway above the Arctic Circle. MacCannon, *Red Arctic*, 57.

³⁴ Emmerson, *The Future History of the Arctic*, 31.

³⁵ MacCannon, *Red Arctic*, 57-58.

the North Pole to destinations on the western coast of the United States highlighted Soviet advancements in polar aviation.³⁶

The Soviet Union continued to uphold its sector claim, but diplomats and lawyers became less vocal about the principle during the 1930s as the state demonstrated occupation and use.³⁷ When prominent jurist Evengy Pashukanis discussed the Soviet Union's title in the Arctic in 1935, he explained that "the polar voyages of our icebreakers, the work of aviation, the opening up of the Northern Sea Route, the organization of the network of stations and settlements (on Franz Josef Land, Severnaya Zemlya, Wrangel Island, etc.), the great and systematic scientific work, all these facts [provide] evidence about rather effective occupation by the Soviet Union of the adjacent polar areas."³⁸ American legal assessments accepted that Russian efforts at effective occupation – which often met the requirements of the Hughes Doctrine – and Washington's failure to protest the Russian sector claim barred the U.S. from challenging Soviet title to the islands north of the Siberian coastline.³⁹

Americans were less impressed by Ottawa's administrative efforts in the Arctic Archipelago, yet admitted that Canada's title was also growing progressively stronger. Despite the State Department's continued assertion of American interests and possible rights in the Canadian Arctic sector, especially to Ellesmere Island, Boggs observed that these claims could "not be presented, however meritorious, if allowed to lapse much

³⁶ Valery Pavlovich Chkalov, the Soviet Charles Lindbergh, and his crew took off from Moscow on 18 June 1937 and made it to Vancouver, Washington, sixty-three hours and 5288 miles later. In July 1937, Mikhail Gromov flew over the Pole and made it to California, 6305 miles away. Sigismund Levanevsky and his crew tried to do the same, but disappeared. The state embraced the heroism of polar aviation to present to the world a carefully crafted picture of a "heroic Arctic, infused with glory," which they "paraded endlessly." After the long distance flights, the Arctic craze in the Soviet Union ended in the face of Stalin's purges, which even the Glavsevmorput could not escape, and the approach of the Second World War. McCannon, *Red Arctic*, 70-80.

³⁷ William Elliot Butler, *Northeast Arctic Passage* (Alphen aan den Rijn: Sijthoff & Noordhoff, 1978), 71-77.

³⁸ Leonid Timtchenko, "The Russian Arctic Sectoral Concept: Past and Present," *Arctic* 50, no. 1 (1997): 31.

³⁹ S. W. Boggs, American Claims to Wrangel Island, Herald Island, Etc., in the Arctic Sector Claimed by Russia, 28 October 1933, NARA, RG 59, Entry 5245, Box 1, Folder 2, File Polar Regions. Sovereignty. Sector Principle; Preliminary Report Relating to Islands in the Caribbean, the Pacific and the Polar Regions, to Which the United States May Have a Basis for Making Claims to Sovereignty, 11 August 1932, RG 59, Entry 5245, Records Relating to the Arctic and Antarctica, 1912-1965, Box 1, Folder 23, File Polar Regions - Sovereignty Claims by the United States.

longer” because the Canadians were “rather effectively” establishing jurisdiction in their sector.⁴⁰ As the State Department considered re-defining its approach to occupation in the polar regions, more officials came to support Boggs’ view that Canada’s sovereignty over the Arctic Archipelago was becoming more difficult to dispute.⁴¹

Perhaps if more American expeditions had ventured to the northern islands above Parry Channel in the 1930s, the U.S. would have been more inclined to question Canada’s legal position. U.S. explorers were far more active in the Antarctic than the Arctic at this time, making the southern continent the logical focus of U.S. interest. Furthermore, when the U.S. government accepted that there was little chance of finding undiscovered land above Ellesmere Island much of the incentive to challenge Canada’s sector claim was lost. Finally, although American air power advocate Billy Mitchell emphasized air power’s amplification of the importance of the Arctic and declared Alaska to be “the most important strategic place in the world,” the State Department and U.S. military did not yet view Canada’s Arctic islands as essential to continental defence – an opinion that would change dramatically after the Second World War.⁴² In the 1930s, the United States saw little advantage in challenging the Arctic claims of its neighbour.

Boggs and other American officials focused their country’s polar ambitions on the Antarctic.⁴³ In particular, Boggs argued that the exploration work of Nathaniel Palmer and other American sailors combined with the “natural interest” that the U.S. had in the Antarctic peninsula, given its proximity to South America, laid the groundwork for an American claim in the Falkland Island Dependencies. In the eastern half of the Ross

⁴⁰ Nevertheless, Boggs did not suggest that “such claims be capitalized on.” Office of the Historical Adviser, Department of State, to Mr. Hickerson, 21 September 1933, NARA, RG 59, CDF 1930-39, Box 4520, File 800.014 Antarctic/37-1/4.

⁴¹ Samuel Boggs to Hill, 11 September 1935, quoted in Thomas M. Tynan, “Canadian-American Relations in the Arctic: The Effect of Environmental Influences upon Territorial Claims,” *The Review of Politics* 41, no. 3 (1979): 402-427.

⁴² Mitchell quoted in Galen R. Perras, *Stepping Stones to Nowhere: The Aleutian Islands, Alaska, and American Military Strategy, 1867-1945* (Vancouver: UBC Press, 2003), 30, and John J. Teal, Jr., “Alaska: Fulcrum of Power,” *Foreign Affairs* 27 (1948): 89. On the emerging bilateral defence relationship between Canada and the U.S., see Galen R. Perras, *Franklin Roosevelt and the Origins of the Canadian-American Security Alliance, 1933-1945: Necessary But Not Necessary Enough* (Westport: Greenwood Press, 1998).

⁴³ Lawrence Martin and other officials continued to build up a file supporting American claims to various parts of the Antarctic. Lawrence Martin, Chief, Division of Maps, to Meyer, 5 December 1933, NARA, RG 59, Entry 5245, Box 1, Folder 2, File Polar Regions. Sovereignty. Sector Principle.

Dependency, Washington could cite Richard Byrd's work to challenge the Empire's sector claim. Finally, the discoveries of the U.S. Exploring Expedition in the Eastern Antarctic in 1840 gave the U.S. the right to contest the recent Australian claim, especially if the Americans followed up with additional measures of occupation.⁴⁴ Official American interest in the AAT grew when the State Department observed that Australia failed to consolidate her claim following Mawson's expeditions to the area in 1929-1930 and 1930-1931.⁴⁵ The U.S. could find reasons to challenge the Empire's claims across the entire Antarctic.

The political climate precluded an official dispute with the Britain over polar claims. President Franklin D. Roosevelt foresaw the threat posed by Germany, Italy and Japan worsening. Starting in 1934, Roosevelt sought to "get closer" to Britain, "with a view to preventing a war or shortening it if it should come."⁴⁶ Nevertheless, Boggs felt the United States could still claim Marie Byrd Land, the unclaimed area between the Ross Dependency and the FID explored by Byrd, or initiate an "international conference, perhaps agreeing to a division of rights and responsibilities among several countries" without raising Britain's ire.⁴⁷ The Great Depression impeded such planning, however, as American officials determined it was not in the national interest to invest resources to acquire what were seen as "frozen wastes" in the midst of severe economic downturn.

Despite a growing movement within the State Department to redefine the American legal stance on occupation in the polar regions, there was hesitation to leave behind the Hughes Doctrine. On the one side, if the U.S. disposed of the Hughes Doctrine and accepted less stringent requirements for effective occupation, a claim to Marie Byrd

⁴⁴ S.W. Boggs, Department of State, Office of the Historical Adviser, *The Polar Regions: Geographical and Historical Data in a Study of Claims to Sovereignty in the Arctic and Antarctic Regions*, pg. 117-122, 21 September 1933, NARA, RG 59, CDF 1930-39, Box 4522, File 800.014, Arctic/31. See Day, *Antarctica: A Biography*, 304-308.

⁴⁵ S.W. Boggs, Office of the Historical Adviser, Department of State, to Mr. Hill, 26 December 1935, NARA, RG 59, CDF 1930-39, Box 4520, File 800.014 Antarctic/85

⁴⁶ Geroge C. Herring, *From Colony to Superpower: U.S. Foreign Relations Since 1776* (Oxford: Oxford University Press, 2008), 509-511. See also Richard Harrison, "A Presidential Demarche: Franklin D. Roosevelt's Personal Diplomacy and Great Britain," *Diplomatic History* 5 (1981): 245-272, and Richard Harrison, "A Neutralization Plan for the Pacific: Roosevelt and Anglo-American Cooperation, 1934-1937," *Pacific Historical Review* 57 (1988): 47-72.

⁴⁷ S.W. Boggs, Department of State, Office of the Historical Adviser, *The Polar Regions: Geographical and Historical Data in a Study of Claims to Sovereignty in the Arctic and Antarctic Regions*, 21 September 1933, NARA, RG 59, CDF 1930-39, Box 4522, File 800.014, Arctic/31.

Land based on Richard Byrd's work existed. At the same time, if the Americans accepted something less than "continuous human inhabitations," they would provide support to the Empire's Antarctic claims, which enclosed areas the State Department viewed as more important than Marie Byrd Land. At the end of 1933, the State Department shelved the draft congressional resolution challenging existing polar claims and requesting that President Roosevelt claim polar territory for the U.S. Until Washington decided what areas of the polar regions it wanted to claim, the Hughes Doctrine provided a convenient tool to challenge existing polar claims by setting a standard for acquiring sovereignty that no state could meet.

6.2 A Reservation of Rights

Not ready to annex territory in the Antarctic, the State Department refused to grant American explorers Lincoln Ellsworth and Richard Byrd authorization to claim land during their expeditions to the Antarctic in 1933. The Ellsworth Trans-Antarctic Flight Expedition departed for the Ross Dependency in December 1933 with the intention of flying between the Ross Sea and the Weddell Sea.⁴⁸ Meanwhile, Byrd returned to Little America to continue exploring the area east of the Ross Dependency. His expedition consisted of a meteorologist, geologists, physicists, biologists, radio engineers, geographers, surveyors and aerial surveyors, and the most rigorous photo-surveying methods available.⁴⁹ The fifty-six-man overwintering party planned to spend two years in the Antarctic, during which time they would strive to answer whether the continent was one land mass or two land masses separated by a channel running from the Weddell Sea to the Ross Sea – a waterway connecting the Atlantic to the Pacific at the bottom of the world.⁵⁰ Although the State Department refused authorization of territorial claims, Byrd and his brother Harry, a U.S. Senator, convinced their close friend President Roosevelt to give the expedition quasi-official support. Not only did the President lend the expedition

⁴⁸ See Beekman H. Pool, *Polar Extremes: The World of Lincoln Ellsworth* (Fairbanks: University of Alaska Press, 2002), 149-181.

⁴⁹ Day, *Antarctica: A Biography*, 298-299.

⁵⁰ Richard Byrd, *Antarctic Discovery: The Story of the Second Byrd Expedition* (London: Putnam, 1936).

a government meteorologist, he also agreed to issue a special three-cent stamp for the expedition and assign members of the party to act as post officials at Little America.⁵¹

News of Ellsworth's planned flight and Byrd's second expedition arrived in London the fall of 1933, as the Polar Committee celebrated the unopposed creation of the Australian Antarctic Territory. Officials lauded the British policy of extending its control over the Antarctic.⁵² The Antarctic served as an imperial success story at a time when the British Empire really needed one. The hardships of the Great Depression, Britain's economic decline, growing nationalism in countries under colonial rule and worries over a great power assault on British interests led officials to question the Empire's future. Winston Churchill predicted, in early 1934, that "the storm clouds are gathering, others are ready to take our place."⁵³ In the Antarctic, Britain's imperial dreams seemed alive and well until American expeditions threatened to supplant the Empire in the south polar region.

Worry over Lincoln Ellsworth's small-scale flight quickly subsided when the British realized that the explorer lacked official support from the U.S. government. Furthermore, the Polar Committee learned that Hubert Wilkins, Australian explorer and supporter of the Empire, accompanied Ellsworth. The British continued the practice started with Byrd's first expedition and directed New Zealand to dispatch a note to Ellsworth welcoming him to operate in the Ross Dependency and offering any assistance possible. Ellsworth's small ship, the *Wyatt Earp* battled its way through thick ice and arrived in the Bay of Whales, twelve miles north of Little America, on 9 January 1934. The expedition tested its plane in the Antarctic conditions, but the craft was damaged beyond repair and the team returned to New Zealand.⁵⁴

British officials worried more over Byrd's large-scale effort, with its technological superiority and focus on extended occupancy. The empire took some

⁵¹ Lisle Rose, *Explorer: The Life of Richard E. Byrd* (Columbia: University of Missouri Press, 2008), 316, 318-319.

⁵² Minutes of the 37th Meeting of the Polar Committee, 5 October 1933, NA, DO 35/1542/2.

⁵³ John Darwin, *The Empire Project: The Rise and Fall of the British World System, 1830-1970* (Cambridge: Cambridge University Press, 2009), 418-421, quote on 419.

⁵⁴ Pool, *Polar Extremes*, 149-181.

assurance from the absence of an official claim by State Department based on Byrd's previous occupation of the Ross Dependency. Furthermore, although some officials dreamed of annexing the massive sector between the FID and the Ross Dependency (where Marie Byrd Land lay), most concluded that a British claim would provoke the Americans or Norwegians to challenge existing territorial claims "in which they would otherwise acquiesce."⁵⁵ In the end, Britain had never sent an expedition to Marie Byrd Land and it could not expect the Americans to refrain from claiming the territory.⁵⁶ By the time Byrd's second mission departed for the Antarctic, many British officials halfheartedly resigned themselves to an American claim to Marie Byrd Land.

Worry about the expedition mounted when the press published a note from President Roosevelt to Byrd which stated that "when you re-establish the Post Office at Little America be sure to send me a letter for my stamp collection."⁵⁷ When the Polar Committee learned that Washington planned to issue a special three-cent postal stamp for use by the expedition at Little America, and would appoint members of the party to act as postal officials, it concluded that "if unchallenged" these actions "might...derogate from British sovereignty."⁵⁸ Some relief came when Byrd gave an "emphatic assurance" that his expedition had no intention of "encroaching upon British territory or the British sphere of influence or discovery within the Antarctic."⁵⁹ Still, the Dominions Office stressed to the government of New Zealand that London felt "very strongly that although Byrd himself may not intend any infringement of British territorial rights, actions of

⁵⁵ Minutes of the 37th Meeting of the Polar Committee, 5 October 1933, NA, DO 35/1542/2.

⁵⁶ The Polar Committee concluded that enough territory had been annexed at the moment, and that it "might be better to consolidate control in areas already claimed." Minutes of the 38th Meeting of the Interdepartmental Committee on the Antarctic, 20 October 1933, NA, DO 114/34. See also Minutes of the 37th Meeting of the Polar Committee, 5 October 1933, NA, DO 35/1542/2. The British still hoped that they might one day explore the region Byrd had opened up. Byrd's naming of geographical features in Marie Byrd Land concerned the Admiralty, so when it made a new chart of the Antarctic it excluded 75% of the American names so that they could be given British names in the future. Day, *Antarctica: A Biography*, 274.

⁵⁷ Minutes of the 38th Meeting of the Interdepartmental Committee on the Antarctic, 20 October 1933, NA, DO 114/34. Minutes of the 37th Meeting of the Polar Committee, 5 October 1933, NA, DO 35/1542/2.

⁵⁸ Minutes of the 38th Meeting of the Interdepartmental Committee on the Antarctic, 20 October 1933, NA, DO 114/34.

⁵⁹ Quoted in W. M. Bush ed., *Antarctica and International Law: A Collection of Inter-State and National Documents* 3 (New York: Oceana, 1982-1988), 65.

United States Government...infringe British sovereignty, and in view of publicity which they have received should not be passed over without comment.”⁶⁰

In January 1934, the British, on behalf of His Majesty’s Government in New Zealand forwarded a welcome and offer of assistance to Byrd’s expedition to the State Department. In addition, the British noted that the expedition appeared to have the “official backing of the United States Government.” They explained that the use of U.S. postage stamps and the establishment of postal services at Little America without the permission of the “sovereign owner” could be viewed as an infringement of British sovereignty and New Zealand’s administrative rights. The British chastised the Americans for failing to apply for permits to fly and establish a wireless station in the Ross Dependency. London and Wellington were willing to recognize their offer of assistance as covering the required permissions. However, the British stressed that they would have preferred prior notice and an application.⁶¹ The note carefully placed on record Britain and New Zealand’s opposition to a potential American claim in a carefully worded manner that they hoped would avoid a reply from Washington.

The American response to Britain’s note dramatically changed the legal context of the Antarctic.⁶² In 1928, when the State Department received a similar note from the British in response to Byrd’s first expedition, it drafted a response that challenged the Empire’s Antarctic claims, but ended up sending a reply that simply acknowledged the offer of assistance and offered no comment on claims whatsoever. In 1934, the department decided to issue a stronger response. American legal appraisals prepared over the previous months had warned that if the U.S. was not ready to immediately annex land

⁶⁰ Telegram from Secretary of State for Dominion Affairs to the Governor General of New Zealand, 16 January 1934, NA, CO 78/195.

⁶¹ R.C. Lindsay, British Embassy, Washington to Department of State, 29 January 1934, NA, CO 78/195/5. See also Telegram from Foreign Office to Sir R.C. Lindsay, 16 February 1934 and Telegram from Secretary of State for Dominion Affairs to the Governor General of New Zealand, 16 January 1934, NA, CO 78/195/5.

⁶² Many scholars have explored the role that the American postal plans played in the Antarctic diplomacy of Britain, New Zealand and the U.S., however, the broader impact of these events on the polar legal landscape needs to be highlighted. For overviews of the controversy around U.S. postal services, see Templeton, *A Wise Adventure*, 62-67 and Day, *Antarctica: A Biography*, 300-307.

in the polar regions, it must take caution not to prejudice any future claims.⁶³ The U.S. had to actively protest, or at least actively refrain from recognizing, another state's claims to territory that was of interest. A formal protest would lead to an official legal dispute with the British Empire over territory that the U.S. government was unsure it wanted to claim. Instead, the State Department's reply to the British note "reserve[d] all rights which United States or its citizens may have with regard to this matter." The Americans told the British that they would not make a claim to the Ross Dependency at that time, but reserved the right to do so in the future. The State Department's reply represented the first American reservation of its rights in the polar regions and represented the most direct legal and political action yet taken by the United States in relation to polar sovereignty.

Reluctant to escalate the situation and enter into protracted talks on the nature of sovereignty in the Ross Dependency, the American response stressed that it did "not seem necessary at this time to enter into a discussion of interesting questions which are set forth in your note."⁶⁴ London also had no desire to escalate the situation and push Washington into asserting a claim, and so took the Americans up on their offer not to discuss the matter. However, when news reached London in October 1934 that the Americans had appointed a postal cancellation expert to Little America to handle all the mail that would arrive with the summer re-supply expedition, the British could remain silent no longer. British ambassador R.C. Lindsay informally questioned State department officials on American intentions and asked for an explanation for "what appeared to be the official recognition of a United States Post Office in British territory under New Zealand administration." Lindsay warned that this action "might be construed as assertion of American sovereignty."⁶⁵

⁶³ This was one of the strongest messages in Boggs' report. See S.W. Boggs, Department of State, Office of the Historical Adviser, *The Polar Regions: Geographical and Historical Data in a Study of Claims to Sovereignty in the Arctic and Antarctic Regions*, 21 September 1933, NARA, RG 59, CDF 1930-39, Box 4522, File 800.014, Arctic/31.

⁶⁴ The American response was sent in a telegram from Ronald C. Lindsay to Foreign Office, 26 February 1934, NA, CO 78/195/5. See Day, *Antarctica: A Biography*, 300.

⁶⁵ When Lindsay first broached the subject, the U.S. Assistant Secretary of State, had stated that "he presumed that any action taken...must be unofficial." Telegram from Sir R. Lindsay, 7 November 1934, NA, CO 78/195/5 and Dominions Office to New Zealand Government, 13 November 1934, NA, CO

The next American reply had far broader ramifications on the bi-polar legal landscape than the initial reservation of rights. Provoked by the repeated assertions of Britain's sovereignty over the Ross Dependency, the Americans decided to make their position clearer. Under direct orders from Roosevelt, the State Department sent a note that challenged the British claim to the Ross Dependency. Even as they debated the merits of the Hughes Doctrine in the State Department, the Americans used it to attack Britain's claim to the Ross Dependency. The Americans explained that they "understood" that the British Empire based its title to the Ross Dependency on discovery of a portion of the area. The note, signed by Secretary of State Cordell Hull, then asserted that "in the light of long established principles of international law...I can not admit that sovereignty accrues from mere discovery unaccompanied by occupancy and use." For the first time since 1924, the Americans revealed their opposition to all polar claims that did not meet their rigid requirements for occupancy and use.

Although forced to be more explicit, the Americans still hoped to avoid "detailed discussion of the subject at this time."⁶⁶ To officials in London, however, the American response was "unnecessary and gratuitous and a definite challenge to British sovereignty as well as an abuse of the hospitality extended to the Byrd expedition." More than that, if the Americans rejected the claim to the Ross Dependency, what would keep them from challenging the Empire's other polar annexations? The British drafted a response on behalf of New Zealand that insisted the Americans were "quite wrong" in alleging that the Empire based its claim to the Ross Dependency only on discovery. The Ross Dependency had been "formally annexed" and placed under New Zealand's administration. Since then, New Zealand had "continuously" upheld the Empire's title by the "very definite exercise" of "administrative and governmental powers," including the issue of whaling licenses and the appointment of magistrates, which to British officials represented a suitable demonstration of state sovereignty in the polar regions. Due to these efforts, the Ross Dependency must be considered "indubitably British territory." On

78/195/2. See also Foreign Office to Lindsay, 6 November 1934, Quoted in Bush, *Antarctica and International Law* 3, 67.

⁶⁶ Cordell Hull, U.S. Secretary of State to R.C. Lindsay, British Ambassador, Washington, 14 November 1934, Document NZ14111934, in Bush, *Antarctica and International Law* 3, 67. Note from Moore, State Department, 14 November 1934, NARA, RG 59, Box 4520, File 800.014 Antarctic/70.

top of these written observations, the British ambassador would explain that although the Americans had put London in a difficult position, it did not wish to dwell on the issue. The whole conflict would be resolved if the U.S. provided “formal written assurance” that the visitation of the postal cancellation expert was not an “official exercise” of the U.S. postal service.⁶⁷ At the end of November 1934, the British passed this plan to the government of New Zealand.

Historian Malcolm Templeton has shown that, in a rare display of concern over Antarctic politics, government of New Zealand officials from the Prime Minister’s Department, Marine Department and Post Office met to discuss the problem. They worried about how the Americans might respond to such a strong British approach and reminded London that, “no officer of the Dependency has ever set foot in the territory” and “there has been no occupation of the Territory whatsoever.” Any extended discussions on the dispute with the State Department would bring these compromising facts to light. Furthermore, the New Zealanders could see little reason to aggravate the situation, and suggested that London and Wellington simply accept that the American “postal proposals” were of “little importance.”⁶⁸ The British agreed, and decided to treat the American postal plans as legally and politically meaningless. A toned down version of the British draft note formed the basis of New Zealand’s reply on 27 December 1934. The note explained that Britain based its claim to the Ross Dependency on administration, regulations, whaling licenses, appointment of a magistrate and other governmental powers. It admitted that there was no postal service in the Dependency, so New Zealand willingly recognized the need for the American postal plans. Had the British and New Zealanders thought that the actions taken by the U.S. constituted an assertion of sovereignty, rather than a “matter of philatelic interest,” they would have been “compelled to make a protest.”⁶⁹ The U.S. responded that no useful purpose could

⁶⁷ Dominions Office to Government of New Zealand, 29 November 1934, quoted in Templeton, *A Wise Adventure*, 64-65. The Foreign Office cautioned against approaching the Americans along these lines, because they might take the impossibility of occupation further and make it a basis for contending that Polar territories are by their nature incapable of being made to annexation by any country. Telegram to New Zealand Government, 17 December 1934, NA, CO 78/198/2.

⁶⁸ Templeton, *A Wise Adventure*, 65.

⁶⁹ R.C. Lindsay, British Ambassador, Washington, to U.S. Secretary of State Cordell Hull, 27 December 1934, Document NZ27129134, in Bush, *Antarctica and International Law* 3, 68.

be served by any further discussion of these points at the time, but concluded the disagreement with another reservation of its rights.

“I reserve all rights which the United States or its citizens may have with respect to this matter,” became the standard American response to state claims in the Antarctic.⁷⁰ Both Samuel Boggs and William Vallance concluded that a private communication reserving U.S. rights adequately preserved the American legal position.⁷¹ For such a reservation of rights to succeed, the Americans understood that it had to be persistent and thorough. In the *Eastern Greenland* decision, for example, the PCIJ found that Norway’s ratification of the Universal Postal Conventions of 1920, 1924 and 1929, which described Greenland as being part of Denmark, debarred the Norwegians from contesting Danish sovereignty.⁷² A similar scenario started to unfold when, in the spring of 1935, the British tried to include the Falkland Islands and Dependencies in a schedule of territories covered by an international arrangement concerning the operation of civil aircraft. The State Department caught the inclusion of the FID in the agreement and sent a note to London explaining that the U.S. could not accept the addition of the Dependencies in the agreement, nor could its ratification of the convention imply its acceptance of Britain’s sovereignty in the Antarctic.⁷³ The response represented the first American non-recognition of the FID.

As the State Department took action to preserve its legal position in the Antarctic, American explorers continued to lay the basis for an eventual territorial claim. Byrd’s expedition successfully established its base at Little America – the most technically advanced party to overwinter on the continent to that point. The expedition’s communications equipment allowed for the first successful broadcast of human voices directly from the Antarctic. Generating plants provided the base with a constant supply of

⁷⁰ Boggs to Mr. Miller and Mr. Vallance, 27 March 1935, NARA, RG 59, CDF 1930-39, Box 4520, File 800.014 Antarctic/77.

⁷¹ Boggs to R. Walton Moore, 13 February 1936, NARA, RG 59, CDF 1930-39, Box 4520, File 800.014 Antarctic/88.

⁷² *Eastern Greenland* (Denmark v. Norway) (1933) Permanent Court of International Justice (PCIJ), Series A-B, No. 53, 68.

⁷³ Secretary of State Cordell Hull to British Ambassador, Washington, 30 April 1935, Document UK30041935 in Bush, *Antarctica and International Law* 3, 281. See also S.W. Boggs, Division of Research and Publication, Department of State to Mr. R.W. Moore and Mr. Moffat, 17 August 1938, NARA, RG 59, CDF 1930-39, Box 4520, File 800.014 Antarctic/126.

electrical power. Scientific studies included seismic investigations, meteorological observations, and various geological and biological programs. Charles Anderson, the American postal cancellation expert, made it to Little America in January 1935 and processed more than 70,000 letters that had been sent to the expedition. The Americans again performed aerial surveys of Marie Byrd Land and its coastline. A sledging party explored 862 miles of new territory in 77 days. During the first winter, Byrd set up his famous Advance Base, some 160 km from Little America, where he stayed by himself taking meteorological observations, until he suffered carbon monoxide poisoning and had to be rescued.

Byrd's second expedition ended in February 1935 and the party returned home to a hero's welcome. Upon his return, Byrd told the American public that he had "discovered, explored and photographed about 200,000 square miles additional territory to the east of the 150th meridian, to all of which the name 'Marie Byrd Land' is applied." In contrast to his first expedition, Byrd spoke far more openly about the possibility of the U.S. taking possession of Marie Byrd Land.⁷⁴

After the failure of his expedition to the Ross Dependency, Lincoln Ellsworth decided to fly from a base in the South Shetlands to the Ross Sea on a one-way flight. Once again, the State Department refused to grant Ellsworth permission to claim any new territory he discovered for the U.S.⁷⁵ To the department's annoyance and Britain's delight, the explorer sought permission from the Governor of the Falkland Islands to establish a base in the South Shetlands.⁷⁶ Ellsworth made it to Deception Island in late 1934, but mechanical problems and weather conditions made the planned flight impossible. He tried again the following year and, on 23 November 1935, he successfully took off from Dundee Island on his way to the Bay of Whales, a distance of 4600 km. During a stop mid way through the flight, Ellsworth claimed the 350,000 square miles of

⁷⁴ Boggs to Mr. Miller and Mr. Vallance, 27 March 1935, NARA, RG 59, CDF 1930-39, Box 4520, File 800.014 Antarctic/77. See also Day, *Antarctica: A Biography*, 308.

⁷⁵ Legal Adviser to Under-Secretary, 3 October 1934, NARA, RG 59, CDF 1930-39, Box 18, File 031.11, Ellsworth Expedition

⁷⁶ Colonial Office Note, Day, 16 October 1934, CO 78/195/5. Day, *Antarctica: A Biography*, 292.

territory adjacent to Marie Byrd Land (80°W and 120°W) for the U.S. and named it James Ellsworth Land.⁷⁷

In a dramatic episode, Ellsworth lost radio contact and was forced to land 16 miles short of his destination, Little America. Even though Ellsworth lost contact over the Ross Dependency, not the AAT, Canberra quickly took the lead in organizing a search and rescue mission, which it believed would provide a fine demonstration of the Empire's sovereignty in the Antarctic. With financial support from Britain, Australia and New Zealand, the Discovery II (the Discovery Committee's vessel) and two Royal Australian Air Force planes set off for the Ross Dependency, where they quickly located Ellsworth and his Canadian pilot, Herbert Hollick-Kenyon, at Little America.⁷⁸

The personal claims made by Byrd and Ellsworth of Marie Byrd Land and James Ellsworth Land underlined for State Department officials that the U.S. had never officially annexed territory in the Antarctic.⁷⁹ Green Hackworth warned that an admission by the U.S. of the absence of an Antarctic claim would “prove extremely embarrassing” in future arbitration.⁸⁰ International lawyer David Hunter Miller insisted at the time, “The United States will always have to admit in any future discussion of the subject that up to this date it has made no formal claim to any such territory. Accordingly, I do not see how it can become embarrassing to state now a fact which of necessity will have to be admitted to be a fact whenever the question is raised.”⁸¹ In the months that followed, the American public's interest and excitement over the Byrd and Ellsworth expeditions increased the political will in Congress for an Antarctic claim. In June 1936, Congress took an important step forward by adopting an act permitting President Roosevelt to

⁷⁷ Territorial Claims in the Antarctic, Research Department, Foreign Office, 1 May 1945, pg. 176-177, National Archives of Australia (NAA), A4311, 365/8.

⁷⁸ See Pool, *Polar Extremes*, 189-213.

⁷⁹ When, in March 1935, the British asked if an American had ever made a formal, state sponsored claim in the south polar region, the State Department struggled to respond. R. Walton Moore, The Legal Adviser, Department of State, 9 April 1935, NARA, RG 59, CDF 1930-39, Box 4520, File 800.014 Antarctic/75.

⁸⁰ Green Hackworth, The Legal Adviser, Department of State to Mr. R. Walton Moore, 30 March 1935, NARA, RG 59, CDF 1930-39, Box 4520, File 800.014 Antarctic/79; and R. Walton Moore, The Legal Adviser, Department of State, 9 April 1935, NARA, RG 59, CDF 1930-39, Box 4520, File 800.014 Antarctic/75. William Roy Vallance insisted that instead of dwelling on what they had not done, the State Department should focus what it had done. William Roy Vallance, 29 March 1935, NARA, RG 59, CDF 1930-39, Box 4520, File 800.014 Antarctic/77.

⁸¹ Note, Department of State, Office of the Historical Adviser to Vallance and Moore, 29 March 1935, NARA, RG 59, CDF 1930-39, Box 4520, File 800.014 Antarctic/78.

present Ellsworth with a gold medal for “claiming on behalf of the United States approximately three hundred and fifty thousand square miles of land in Antarctica between the eightieth and one hundred and twentieth meridians west of Greenwich, representing the last unclaimed territory in the world.”⁸²

6.3 The Commonwealth, the Hughes Doctrine and Polar Sovereignty

In the 1930s, the American emphasis on “occupancy and use” levied a greater impact on the legal appraisals of officials in London, Canberra, Ottawa and even for a short time Wellington, than the *Palmas Island*, *Clipperton Island* and *Eastern Greenland* cases did. To the annoyance of British and Commonwealth officials, despite the modest threshold for effective occupation set by the three cases, the U.S. continued to uphold the rigid standards set by the Hughes Doctrine. Worse, the Americans seemed ready to support their legal position through actual physical occupation in the Antarctic, as shown by the Byrd expedition’s two-year occupancy of the Ross Dependency.

Initially, the British argued that the *Eastern Greenland* decision established that the “principle of permanent human occupation” that the U.S. upheld as a necessity to create a good title could not be applied to the polar environment.⁸³ The Foreign Office legal advisers insisted that the exercise of sovereignty in the polar regions did not demand settlers or police forces, only legislation, administrative functions, the occasional visit, and the appointment of magistrates.⁸⁴ In the Antarctic, Britain’s control of the whaling

⁸² OIR Report, No. 4296, Map Intelligence Division, Office of Intelligence Collection and Dissemination, State Department, History and Current Status of Claims in Antarctic, 3 October 1947, NARA, RG 59, CDF 1945-1949, Box 4074, File 800.014, Antarctic.

⁸³ Telegram to New Zealand Government, 17 December 1934, NA, CO 78/198/2. For a similar argument, see League of Nations and Western Department, Foreign Office to the Chancery, British Embassy, Washington, 30 September 1936, NA, DO 114/56 also in Document UK30091936, in Bush, *Antarctica and International Law* 3, 291-293.

⁸⁴ W.E. Beckett, “Les questions d'intérêt général au point de vue juridique dans la jurisprudence de la Cour permanente de justice internationale (juillet 1932-juillet 1934),” *Recueil des Cours* 50 (1934): 247-248. Beckett believed that *Eastern Greenland* was “the biggest case that ever came before” the PCIJ. W.E. Beckett to Sir Donald Somervell, 14 May 1944, NA, CO 78/217/1. See also Extract from Foreign Office Print, No. 1428/1428/30, 5 March 1934, Annual Report, 1933, on Norway, NAA, A981, ANT 2, Part 2, 'Antarctic Control - Australian Sector' Pt.2; Telegram to New Zealand Government, 17 December 1934, NA, CO 78/198/2; and League of Nations and Western Department, Foreign Office to the Chancery, British Embassy, Washington, 30 September 1936, DO 114/56 also in Document UK30091936, in Bush, *Antarctica and International Law* 3, 291-293.

industry, the legislation it passed for the region, as well as the charting, surveying and scientific studies performed by the Discovery Committee represented sufficient demonstrations of the Empire's sovereignty.⁸⁵ Furthermore, the Foreign Office trumpeted the successful search for Ellsworth as proof that "the British administration of the Ross Dependency had been effectively exercised" by ensuring the "safety of visitors to the region."⁸⁶

Despite the optimism in the Foreign Office about the strength of the Empire's polar claims, legal adviser William Eric Beckett pointed out that the three legal cases left an unclear formula of effectiveness, and advised that the specific facts of each case be considered. Furthermore, Beckett stressed that the PCIJ's decision in *Eastern Greenland* came down to competition and which state submitted the stronger claim.⁸⁷ The British could critique the Hughes Doctrine all they wanted, but if the Americans continued to send expeditions to occupy Britain's Antarctic territory, the U.S. would soon establish a stronger claim. As a result, some officials believed that more British acts of occupation might be necessary to keep pace with the Americans.

The warning of Frank Debenham, Director of the Scott Polar Research Institute at the University of Cambridge, rang loud. Debenham often discussed polar claims with the officials and private experts of foreign powers. In these situations, he was "frequently reminded...of the slender grounds upon which we claim the Falkland Islands sector of the Antarctic Continent." While French, Belgium, Swedish and German expeditions had all wintered in the region, only Shackleton's Endurance expedition had done so for the British. "It appears, then, that whatever may be our activities outside the Antarctic Circle in the Dependencies, we have little to be proud of inside it."⁸⁸ At this point, the British

⁸⁵ Importantly, the soundings taken by the Discovery Committee in one location off the South Shetlands had allowed Norwegian whaling ships to use a channel previously deemed too dangerous. J.O. Borley, Colonial Office, to Sir Harry Batterbee, 25 January 1934, NA, CO 78/194/17. See also Note, W.E. Beckett, 20 December 1933, NAA, A4311, 365/8, [British Document] Territorial Claims in the Antarctic by Research Department, Foreign Office, May 1st, 1945.

⁸⁶ Lincoln Ellsworth to Cordell Hull, 17 April 1939, NARA, RG 59, CDF 1930-39, Box 18, File 031.11, Ellsworth Antarctic Expedition/111. Day, *Antarctica: A Biography*, 297.

⁸⁷ Beckett, "Les questions d'intérêt général au point de vue juridique dans la jurisprudence de la Cour permanente de justice internationale," 247-248.

⁸⁸ Frank Debenham, Director, Scott Polar Research Institute to the Secretary, Discovery Committee, 28 January 1932, NAA, A981, ANT 3, Antarctic Control British Claims - Polar Committee.

did not even know whether or not Graham Land was separated from the continental interior by a strait. Given Ellsworth's activities in the FID, the British government felt it time for another expedition to the area.

John Rymill, an Australian polar explorer and pilot, volunteered to lead an expedition to overwinter on Graham Land.⁸⁹ Rymill wanted his small party of nine men to explore and survey the southernmost parts of the FID. With only £10,000 from the Colonial Office, the British hoped that the Graham Land Expedition would bolster their claim. Rymill's Graham Land Expedition was one of the last predominately privately sponsored Antarctic expeditions. The three-year expedition set out in 1934 and made an intensive geographical survey of Graham Land, with a shore party of nine men, dog sledges and a De Havilland Fox Moth based at the Debenham Islands in Marguerite Bay, on the west side of the peninsula. Rymill and his men performed geological, glaciological, zoological, biological and meteorological studies. They named many geographic features and disproved the existence of a channel separating Graham Land from the rest of the continent, determining that the Antarctic was a single continent.⁹⁰ Rymill's efforts provided London with some reassurance about its sovereignty over the FID, and laid the groundwork for the more rigorous acts of occupation carried out by the British in subsequent years.

Rymill's aerial exploration, along with the flights carried out by American and Norwegian expeditions, resulted in new considerations in British legal appraisals. Technological developments could clearly change international law, and aerial exploration embodied this idea. Foreign Office legal adviser Gerald Fitzmaurice saw no difference between dropping a flag from an airplane or hoisting one on the ground, and believed that such actions could create an inchoate right, at least for a short time. A perfect title, however, could only be acquired by establishing an administration and state control over the area.⁹¹

⁸⁹ John Rymill, British Graham Land Expedition, to Sir Harry Batterbee, 29 May 1934, NA, CO 78/195/5.

⁹⁰ John Rymill, *Southern Lights: The Official Account of the British Graham Land Expedition 1934-1937* (London: Chatto and Windus, 1938); John Rymill, "British Graham Land Expedition, 1934-37," *Geographical Journal* 91, no. 4/5 (1938): 297-312.

⁹¹ G.G. Fitzmaurice, Foreign Office to R.A. Wiseman, Dominions Office, 26 March 1936, NA, DO 114/56 also Document UK26031936, in Bush, *Antarctica and International Law* 3, 282-283.

More importantly, the flights finally led some in the Foreign Office to doubt “the validity of the sector principle.” Throughout the early 1930s, British officials remained, as the Foreign Office representative on the Polar Committee pointed out, “deeply committed to the sector principle.”⁹² Only Norway had publicly protested the use of the principle in the Arctic and Antarctic. Although the U.S. State Department stressed the need for occupancy and use, it had not yet expressly spoken out against sectors. As a result, the British continued to argue that a “definitive occupation” of a polar coastline or the “northern fringe of the Antarctic” provided a country with “a right of sovereignty over the whole hinterland.”⁹³ In British eyes, polar sectors made sense because only a state that controlled the points of access into a territory (the coastline) could regulate the hinterland. As a result, by allowing a state complete access to any polar hinterland, aerial flights threatened the very core of the sector principle.⁹⁴

Even as concerns about the validity of sector claims grew, British officials, including the Foreign Office legal advisers, acknowledged that the claims to the FID and the AAT depended on the principle.⁹⁵ Furthermore, many officials continued to argue that the sector principle offered a “convenient and plausible” solution to the complexities of polar sovereignty.⁹⁶ The new Hydrographer, Rear Admiral J.A. Edgell explained to an interdepartmental committee looking at polar affairs that “I cannot help thinking that the Sector principle is the most satisfactory method by which we can deal with Antarctic

⁹² Minutes of the 38th Meeting of the Interdepartmental Committee on the Antarctic, 20 October 1933, NA, DO 114/34.

⁹³ League of Nations and Western Department, Foreign Office to the Chancery, British Embassy, Washington, 30 September 1936, NA, DO 114/56 also in Document UK30091936, in Bush, *Antarctica and International Law* 3, 291-293. For more on the sector principle, see Minutes of the 38th Meeting of the Interdepartmental Committee on the Antarctic, 20 October 1933, NA, DO 114/34.

⁹⁴ The Foreign Office report argued that if aerial exploration de-legitimized the sector principle, the PCIJ could rule that a sector claim only gave a state an inchoate right to the claimed hinterland based on acts of annexation. In this case, Britain, New Zealand and Australia would have only three to five years to perfect their titles. League of Nations and Western Department, Foreign Office to the Chancery, British Embassy, Washington, 30 September 1936, NA, DO 114/56 also in Document UK30091936, in Bush, *Antarctica and International Law* 3, 291-293.

⁹⁵ Legal Adviser Gerald Fitzmaurice assisted in presenting this conclusion to the Committee on Polar Questions. Imperial Conference, 1937, Committee on Polar Questions, Notes of the First Meeting of the Committee held in Conference Room ‘C’ at 2, Whitehall Gardens, S.W.L, on Wednesday 26 May 1937, Library and Archives Canada (LAC), RG 25, Vol. 1789, File 1936-318-Q

⁹⁶ League of Nations and Western Department, Foreign Office to the Chancery, British Embassy, Washington, 30 September 1936, NA, DO 114/56 also in Document UK30091936, in Bush, *Antarctica and International Law* 3, 291-293

Territorial Claims. It is simple to apply, easily understood and had already a large measure of acceptance by other nations.” Really, if the British Empire adopted “some new method of staking out claims” it would only “arouse suspicion and antagonism.” This position represented a complete reversal of the views adopted by the Admiralty prior to the Imperial Conference of 1926, when it had been so critical of the sector principle. Ignoring the occupancy accomplished by Byrd and his expedition, Edgell concluded that while effective occupation was “a fine phrase...it must remain meaningless for a very, very long time.” On the other hand, if claims were based on discovery, or on exploratory work, and held to what the human eye had actually seen, one country could claim a swath of territory some 60 km wide by sledging or overflight, and then another country could make a claim to the next 60 km stretch. Very quickly, the Antarctic would become a confusing hodgepodge of claims. The sector principle remained the best solution to the problem of polar sovereignty, Edgell concluded. He suggested that the British Empire should encourage Norway and France to take up sectors of their own, cementing the principle’s status as a rule of law in the polar regions.⁹⁷

The British put Arctic and Antarctic affairs on the agenda of the next Imperial Conference, to be held in May and June 1937. The situation report prepared for the Conference highlighted the Empire’s continued reliance on the sector principle, Norway’s sustained opposition to the theory, and the emphasis the U.S. placed on occupancy and use.⁹⁸ As with the Imperial Conferences of 1926 and 1930, the British hoped that the meetings of the Committee on Polar Questions would provide a clear roadmap for the Empire’s polar policy.

The Australians were also keen to discuss the Empire’s Antarctic claims and the sector principle at the upcoming Imperial Conference.⁹⁹ Canberra had not sent an expedition to the Antarctic since the creation of the Australian Antarctic Territory in

⁹⁷ Rear Admiral J.A. Edgell, Hydrographic Department, to R.A. Wiseman, 24 May 1937, NA, DO 35/890/2.

⁹⁸ Imperial Conference, 1937: Situation in the Antarctic, Memorandum by His Majesty’s Government in the United Kingdom, 4 February 1937, LAC, RG 25, Vol. 1789, File 1936-318-Q; The Antarctic, Prepared for the Imperial Conference of 1937, NAA: A981, IMP 145A Part 9, Imperial Conference 1937. Antarctic

⁹⁹ The Australians list of subjects they wanted to have discussed at the Imperial Conference included the Empire’s Antarctic policy Mr. J. A. Lyons, Prime Minister, to Mr. S. M. Bruce, High Commissioner in London, 2 February 1937, <http://www.dfat.gov.au/publications/historical/volume-01/historical-document-01-02.html>

1933. Australian officials were well aware of the American emphasis on occupancy and use, its reservation of rights in the Ross Dependency and the FID, and the expanding exploratory work of its citizens. Furthermore, private Norwegian expeditions continued to venture into the AAT, often planting Norway's flag on the continent.¹⁰⁰ Historians Marie Kawaja and Tom Griffiths have noted that the economic situation in Australia simply did not allow for another voyage. Although the search for Ellsworth took place in the Ross Dependency, not the AAT, Canberra highlighted the role played by the two Royal Australian Air Force planes and their crews as proof of Australia's exercise of the control and state responsibilities required in the Antarctic.¹⁰¹

Without funds for another expedition, Canberra had sought other ways to justify Australia's Antarctic claim.¹⁰² The Australians continued to believe in the validity of the sector principle and insisted that their country fell in the best geographic position to administer the Eastern Antarctic, but generally avoided discussing the southern limits of their territory to avoid antagonizing the Norwegians.¹⁰³ Cultural geographer Christy Collis has looked at the Australian government's historical use of textual strategies such as movies and scientific publications to legitimate its annexation.¹⁰⁴ The government provided funds for a film production on Australia's efforts in the BANZAR expedition called *Siege of the South*, which was advertised with the line, "British courage wins a

¹⁰⁰ Annex B, Acquisition of Sovereignty Over Polar Areas, NAA: A981, ANT 2, Part 2, 'Antarctic Control - Australian Sector' Pt.2. On January 1934 Norwegian flights were made between 65°E and 86° E. In February 1935, yet another Norwegian expedition planted the flag on the Antarctic Continent on land they called Ingrid Christensen Land, which was the Princess Elizabeth Land explored by Mawson in February 1931. In January 1937 Lars Christensen made flights over land at 68° and 50°E, dropped a flag, and landed at 70°E and at 66°E.

¹⁰¹ R.A Swan, *Australia in the Antarctic: Interest, Activity and Endeavour* (Melbourne: Melbourne University Press, 1961), 219.

¹⁰² Marie Kawaja and Tom Griffiths, "'Our great frozen neighbour': Australia and Antarctic Before the Treaty, 1880-1945," in *Australia and the Antarctic Treaty System: 50 Years of Influence*, eds. Marcus Howard and Tom Griffiths (Sydney: University of New South Wales Press, 2011), 37.

¹⁰³ Officer advised that "Although it would strengthen the Australian claims to that part at least of the Antarctic Territory which lies immediately South, it might serve to arouse Norwegian opposition. A more serious obstacle to its employment is that, if it supports the Australian title in this case, it would similarly support the Argentine claim to the South Orkney Islands, a portion of the Falkland Island Dependencies." Keith Officer, External Affairs Note, Note to the Minister of External Affairs, 25 May 1933, NAA, A981, ANT 2, Part 2, 'Antarctic Control - Australian Sector' pt. 2.

¹⁰⁴ See Christy Collis, "The Proclamation Island Moment: Making Antarctica Australian," *Law Text Culture* 8, no. 3 (2004): 39-56; Christy Collis, "Australia's Antarctic Turf," *M/C Journal* 7, no. 2 (2004).

continent for the empire.”¹⁰⁵ While the legal value of these textual strategies was limited, the Australian plan to publish a map of their new Antarctic Territory carried more weight.¹⁰⁶ The project soon expanded into a map of the entire Antarctic, based on the best available record from every country that had explored in the region.¹⁰⁷ The map that Canberra released in late 1938 was the most thorough and accurate produced to that time. The map and its accompanying handbook recorded the efforts of the BANZARE, Norwegian activities, and the recent work completed in by the Americans. In particular, the handbook provided a detailed description of the work that the Discovery Committee had completed around the Antarctic, including in the waters off the AAT. By the time the Australians finished their map, the committee’s achievements included the circumnavigation of the continent, extensive survey work, whale marking cruises and oceanographical work in the waters off the Ross Dependency, the FID and the AAT.¹⁰⁸ Just like London, Canberra lauded the efforts of the Discovery Committee as a demonstration of the Empire’s sovereignty in the Antarctic.

The Australians also highlighted the role that legislation and administrative efforts played in the *Eastern Greenland* decision.¹⁰⁹ Accordingly, laws became an important aspect of Australia’s sovereignty, even though there was no one to enforce them in the AAT.¹¹⁰ Legal scholar Gillian Triggs has highlighted Australian efforts to legislate the whaling industry. The *Whaling Act of 1935*, for example, applied the League of Nation’s International Convention for the Regulation of Whaling to the Antarctic.¹¹¹ The

¹⁰⁵ Day, *Antarctica: A Biography*, 269.

¹⁰⁶ At first, Canberra worried that publishing a map with so many unknown spots might weaken Australia’s legal position, but the Foreign Office explained that because the whole world already knew that those gaps of knowledge existed, they would have little affect on their claim. Minutes of the 41st Meeting of the Polar Committee, 26 June 1934, NA, DO 35/1542/2.

¹⁰⁷ Prime Minister, Joseph Aloysius Lyons to Secretary of State, Dominion Affairs / Prime Minister of New Zealand, 13 July 1938, NAA, A461, T413/6, Australian Antarctic Expedition. See also Kawaja and Griffiths, “Our great frozen neighbour,” 37.

¹⁰⁸ Commonwealth of Australia, Department of External Affairs, Handbook and Index: Map of Antarctica, 1939, NAA, A3300, 184, [1941 file - green tab] Territories - Antarctic - duplicate 1939..

¹⁰⁹ Extract from Foreign Office Print, No. 1428/1428/30, 5 March 1934, Annual Report, 1933, on Norway, NAA, A981, ANT 2, Part 2, 'Antarctic Control - Australian Sector' Pt.2.

¹¹⁰ Donald Rothwell and Andrew Jackson, “Sovereignty,” in *Australia and the Antarctic Treaty System: 50 Years of Influence*, eds. Marcus Howard and Tom Griffiths (Sydney: University of New South Wales Press, 2011), 53.

¹¹¹ Japan refused to follow the regulations and it rejected the League’s convention on whaling. Gillian Triggs, *International Law and Australian Sovereignty in Antarctica* (Sydney: Legal Books, 1986), 241-242.

Australian whaling ordinance forbade killing right whales, calf or suckling whales, female whales accompanied by calves, and demanded that whalers get licenses to work in the waters off the AAT.¹¹²

The Australians hoped that the Imperial Conference of 1937 would provide further guidance on safeguarding their claim. Canberra submitted a preparatory paper for the conference that asked how existing claims could be consolidated, bearing in mind the legal principles accepted at previous conferences. In addition, Canberra wanted to know how much territory the French actually claimed through Adélie Land. After “exhaustive investigation” of the claim, the Australians concluded that Paris should be unable to define Adélie Land as a sector. Given that Sébastien César Dumont d’Urville, the only French explorer to ever reach the area, had not landed on the continent in 1840, France’s claim could “hardly be sustained in international law,” the Australians argued. Nevertheless, while they disliked the idea of the French claim becoming a sector, the Australians realized that “the non-acceptance of the sector principle to French territory in the Antarctic raises an important question of principle.”¹¹³

The Canadian government also welcomed the opportunity to discuss polar affairs. During the early 1930’s, the Canadians paid close attention to events in the Antarctic – especially American involvement in the region. In the fall of 1933, Richard Byrd asked the Canadians for sled dogs to take on his expedition to the Ross Dependency. Concerned over the U.S. position on the Empire’s Antarctic claims, however, Canada’s Under Secretary of State for External Affairs O.D. Skelton decided not to “lend sanction to the present expedition by presenting dogs or other equipment” to Byrd.¹¹⁴ The Canadians also took note of the American reservation of rights in the Ross Dependency, and the emphasis on occupancy and use in the State Department’s rebuttal of the British claim to the Ross Dependency.

¹¹² Australian Antarctic Territory, Antarctic Whaling Ordinance, 1934, NAA, A432, 1953/3228 Part 1.

¹¹³ Imperial Conference, 1937, Situation in the Antarctic, Memorandum Prepared by His Majesty’s Government in the Commonwealth of Australia, NAA, A981, IMP 145A Part 9, Imperial Conference 1937. Antarctic. See also W.R. Hodgson to Sir Douglas Mawson, 4 November 1936, NAA, CA 18, A461, E412/1/1, File Territories – Antarctic Territory.

¹¹⁴ O.D. Skelton to H.H. Rowatt, Deputy Minister of the Interior, 22 September 1933, LAC, RG 25, Vol. 1673, File 1933-703.

The actions of the U.S. in the Antarctic struck a chord amongst Canadian officials worried about Washington's intentions in the Arctic. Ottawa distrusted that the applications of American expeditions to operate on Baffin Island or other southern portions of the Archipelago indicated acceptance "by the United States Government of Canadian rights in the doubtful areas (northern parts of Ellesmere Island and Axel Heiberg Island)." In fact, the External Affairs Department surmised that the policy of the U.S. government was "neither to accept nor to reject Canadian claim to the disputable territories" but retain its freedom of action in the islands of the High Arctic.¹¹⁵ The Americans' reiteration of their insistence on occupation as a requirement of polar sovereignty came at a time when Canada's own efforts at effective occupation in the northern part of the Arctic Archipelago had diminished. When the Conservative government of R.B. Bennett took office in 1930, it cut the administrative budget for the North. In the summer of 1933, the government closed the RCMP posts at Dundas Harbour, Devon Island and Bache Peninsula, Ellesmere Island, although it re-opened the old post at Craig Harbour.¹¹⁶ The government's administrative efforts continued to decline in the Archipelago throughout the decade. A British scientist working in the Arctic observed, "the Canadian government in the thirties maintained a low profile in the north, so low as to be practically indistinguishable."¹¹⁷

Given Canada's weakened efforts at occupation in the Arctic Archipelago, the legal appraisal prepared by T.L. Cory, solicitor of Canada's Northwest Territories Branch of the Department of the Interior, read like a call to action. Cory undertook his lengthy study of polar sovereignty and Canada's title in the Arctic in 1936, responding to what he perceived as the heightened level of "activity with regard to sovereignty in the Polar regions." He worried about the strength of Canada's title and wanted the government to invest more in its Arctic. Cory's legal appraisal highlighted the American demand for "rigorous occupation," and accordingly emphasized the need for a permanent physical presence more than any other prepared by British and Commonwealth officials in the

¹¹⁵ Letter from the British High Commissioner in Ottawa to R.A. Wiseman, Dominions Office, London, 3 January 1934, I, NA, DO 35/154/4.

¹¹⁶ Grant, *Polar Imperative*, 236. On the administration of Canada's North in the 1930s see Shelagh Grant, *Sovereignty or Security? Government Policy in the Canadian North, 1936-1950* (Vancouver: University of British Columbia Press, 1988), 22-48.

¹¹⁷ Grant, *Sovereignty or Security?*, 24.

1930s. The solicitor based his analysis on documents received from External Affairs on sovereignty issues in the Antarctic, the findings of international adjudications and arbitrations and the writings of legal scholars.

Cory feared that the sector principle carried “little if any weight under International Law.” Canada, he insisted, must stop leaning so heavily on the sector principle and contiguity, and focus on occupation. Despite the placement of several RCMP posts along the eastern fringe of Canada’s “vast Arctic claim,” he worried about “all the unoccupied islands lying to the west and within the Canadian Arctic sector.” Cory accepted that the *Palmas Island* decision indicated that a state did not have to make its authority felt in every corner of its territory all the time. He ignored the results of the *Eastern Greenland* case and cited Gustav Smedal, a Norwegian legal scholar of dubious objectivity, to argue the insufficiency of periodic visits to a region and scientific expeditions to uphold a claim. Cory also underlined Smedal’s conclusion that efficient possession of one polar island did not grant a state sovereignty over all the other islands in a group, only to the immediate areas where it exercised control. Cory maintained that Canada’s annual Arctic patrol did not extend Canada’s sovereignty in the Arctic, nor was it a “substantial factor in maintaining the claim already established.”

After laying out the weaknesses of Canada’s Arctic title, Cory presented a comprehensive sovereignty strategy that sounded like an amplified version of Charles Cheney Hyde’s idea for polar control. The lawyer argued for a new main base on Devon Island from which administrators, surveyors and scientists could operate throughout the Arctic, to establish more “permanent occupation.” He envisioned parties travelling and establishing substations across the Archipelago, assisted and supported by a fleet of Arctic capable airplanes. When re-supplied by air, camps and substations could operate for months “without fear of being lost or perishing from lack of food and supplies.” Subsequently, a second large scale station could be set up in the western half of the archipelago, at Baillie Island. From there, parties “empowered to administer the laws of Canada” would carry “active jurisdiction into many of our outlying Western islands.” Cory believed his plan would effectively secure Canada’s title but he admitted that, “the cost of the proposed project will have to be investigated and that this will to a very great

extent be the governing factor.”¹¹⁸ In the end, the cost proved prohibitive, and Ottawa barely even considered the plan. Although the government dismissed them, Cory’s appraisal and plan reflect the influence of the American emphasis on permanent physical settlement and use in the 1930s. Furthermore, Cory’s emphasis on physical presence and on the ground scientific activity continued to shape Canadian and British legal appraisals in the decade that followed.

Knowing that discussions on polar policy at the upcoming Imperial Conference could lead to important decisions on effective occupation and the sector principle, the Canadians wanted to participate in discussions “with a view to seeing that no principles will be adopted for the Antarctic region that will in any way bear upon the question of Canadian sovereignty in the Arctic regions.”¹¹⁹ This became a long-standing reason for Canadian engagement with the Antarctic over the next two decades. At the same time, the Canadians viewed the south polar region as a legal testing ground for many of the principles that formed the foundation of Canada’s Arctic sovereignty. Despite Cory’s negative opinion on the sector principle and contiguity, both still appeared on the list of justifications for Canada’s claims, alongside discovery, reaffirmation of discovery, administrative acts, “occupation where feasible,” and the Eastern Arctic Patrol. These factors represented the building blocks of Canada’s Arctic sovereignty and they matched the foundation of the Empire’s Antarctic claims. The central differences, Ottawa concluded, were Canada’s focus on more permanent physical presence and Britain’s efforts at “quieting the claims of other nations through diplomatic measures.”¹²⁰ In the

¹¹⁸ T.L. Cory, compiled for the Northwest Territories Council, *British Sovereignty in the Arctic*, 3 June 1936, LAC, RG 25, Vol. 4253, File 9057-40 pt. 4; See also Laurent Beaudry, Under-Secretary of State for External Affairs to T.L. Cory, 20 March 1937, LAC, RG 25, Vol. 1658, File 1933-253.

¹¹⁹ *The Situation in the Antarctic*, Letter and Memorandum by the Department of Mines and Resources, Canada, 22 March 1937, LAC, RG 25, Vol. 1789, File 1936-318-Q.

¹²⁰ While Commissioner of the Northwest Territories Charles Camsell agreed with Cory’s conclusion the sector principle, he insisted that contiguity may have “slight weight before a court of international law as to the sovereignty of the islands concerned.” During their preparation for the Imperial Conference of 1937, the Canadians concluded that “The British claim to the regions in the Antarctic, while not of the best in the eyes of International Law, is perhaps the strongest that any nation can put forward.” *The Situation in the Antarctic*, Letter and Memorandum by the Department of Mines and Resources, Canada, 22 March 1937, LAC, RG 25, Vol. 1789, File 1936-318-Q; See also *Imperial Conference 1937: The Situation in the Antarctic – Letter and Memorandum*, by the Department of Mines and Resources, LAC, RG 25, Vol. 4765, File 50070-40 pt. 1; R.A. Gibson, Deputy Commissioner, Administration of the NWT to Mr. T.L. Cory, Department of Mines and Resources, 4 March 1937, LAC, RG 25, Vol. 1658, File 1933-253.

1930s, the focus of the international community rested on the Antarctic, not the Arctic. If a polar territorial dispute developed that tested the value of the legal principles at the root of Canada's and the Empire's polar claims, it would be in the south, not the north.

The Imperial Conference finally convened in May 1937 with long standing polar enthusiast Australian Richard Casey sitting as Chair of the Committee on Polar Questions. The committee's membership consisted of officials from Canada, Australia, New Zealand, South Africa and various British departments.¹²¹ Its first meeting discussed the sector principle. The Australian delegation suggested that the French claim to Adélie Land be relegated to the area actually spotted by Dumont D'Urville or rejected altogether. The British, including legal adviser Gerald Fitzmaurice, argued that this action explicitly rejected the sector principle, and insisted that the Empire's title required the principle, especially in the AAT and the FID. The British title to parts of these areas, "if based on other grounds, appeared in fact to be less substantial, if anything, than the French title to Adélie Land." Furthermore, if the Committee agreed to relegate the French claim to what D'Urville actually spotted, other states might use this argument against Britain, New Zealand and Australia and it would be impossible to counter if the legal validity of the sector principle had been "impunged." Norman Robertson, the Canadian representative, warned that any "denial" of the sector principle in the Antarctic should be avoided given the broader bi-polar impact such an action would have, especially on Canada's Arctic title.¹²² In the end, the Committee decided to avoid any action that might weaken sector claims, reaffirming the Empire's need for the continued application of the principle in the Arctic and Antarctic.

British and Commonwealth officials argued that polar sectors flowed from a state's control of the coastline or points of access to a territory. Now the Committee on

¹²¹ Representing the United Kingdom was .A. Wiseman, Dominions Office, A.J. Down, Colonial Office, J.O. Borley, Colonial Office, J.A. Edgell, Admiralty, Gerald Fitzmaurice, Foreign Office and J. Thomson, Ministry of Agriculture and Fisheries. Canada was represented by Norman Robertson, from External Affairs and Paul Fontaine, a legal officer with the Department of Justice. Australia was represented by Casey and the solicitor general, G.S. Knowles and W.R. Hodgson. For New Zealand there was C.A. Berendsen, P.M.'s Department and Sir Cecil Day, while South Africa was represented by Dr. A.J. Stals, a member of the Board of Trade.

¹²² Imperial Conference, 1937, Committee on Polar Questions, Notes of the First Meeting of the Committee held in Conference Room 'C' at 2, Whitehall Gardens, S.W.L, on Wednesday 26 May 1937, LAC, RG 25, Vol. 1789, File 1936-318-Q.

Polar Questions examined ways to increase that level of control and activity through a more robust physical presence. The Committee concluded that the activities of the Discovery II were helping to consolidate British title in the Antarctic with its focus on whaling and the Antarctic waters, coastal surveys and other oceanographic work. It also debated sending another cooperative Dominion expedition to the Empire's sectors. Weather stations, the Committee agreed, would provide even greater foundation for the Empire's title to its Antarctic sectors. These stations could provide long-range forecasts, and possibly assist climate predictions.¹²³ J.O. Borley, from the Colonial Office, explained that permanent meteorological stations benefit science and, "at the same time, assist in consolidating their title."¹²⁴ For well over a decade, the British had pointed to the scientific activities of the Discovery Committee as a demonstration of Britain's sovereignty in the FID; the proposals at the Imperial Conference gave science an even greater legal role. Science could represent the occupancy and the use that the Americans required in the polar regions. In the years that followed, weather stations and meteorology played a pivotal role in the sovereignty strategies and polar diplomacy of claimant states in the Arctic and Antarctic.

The Committee on Polar Questions firmly upheld the Empire's continued reliance on the sector principle despite failure to arrive at firm conclusions on weather stations or another expedition to the Antarctic. In September, Prime Minister Neville Chamberlain concluded that his government would not challenge the French Government's claim to a "sector extending southwards to the Pole...because there are other areas in the Antarctic where His Majesty's Government might wish to rely on the sector principle and it is considered to be in the general interest to allow the sector principle to become established as a rule of law applying to Arctic and Antarctic territory."¹²⁵ London continued to hope that the sector principle would become part of customary international law for the polar regions.

¹²³ Imperial Conference, 1937, Committee on Polar Questions: Report, LAC, RG 25, Vol. 1789, File 1936-318-Q.

¹²⁴ Imperial Conference, 1937, Committee on Polar Questions, Notes of the First Meeting of the Committee, 26 May 1937 and Committee on Polar Questions, Notes of the Second Meeting of the Committee, 8 June 1937, LAC, RG 25, Vol. 1789, File 1936-318-Q.

¹²⁵ D.F. Howard for Neville Chamberlain to H. Lloyd Thomas, Paris, 16 September 1937, NA, CO 323/1599/7

Canada emerged from the deliberations of the Committee on Polar Questions satisfied with its treatment of the sector principle and comments on occupation. The conference led to no major changes in Canada's Arctic policy. The Craig Harbour RCMP post on Ellesmere Island remained Canada's only occupied spot above Parry Channel. Meanwhile, the Canadians continued to espouse their faith in the sector principle. In May 1938, Minister of Mines and Resources T.A. Crerar reiterated in the House of Commons that the sector principle was "now very generally recognized, and on the basis of that principle...our sovereignty extends right to the pole within the limits of the sector. My own view is that our supremacy there is established to a point where it could not be successfully challenged by any other country."¹²⁶

The Australians continued to rely on the sector principle and took the Imperial Conference's suggestions on occupation quite seriously. After the Imperial Conference, Director of the Scott Polar Research Institute Frank Debenham visited Canberra and, just as he had with the British a few years earlier, insisted Australia undertake additional acts of occupation in the AAT.¹²⁷ To strengthen Australia's sovereignty, especially over the vast hinterland and the western end of the claim which he predicted Norway might still contest, Debenham laid out a multi-faceted strategy. First, an Australian expedition would establish a permanent occupation site in Mac. Robertson Land on the western edge of the sector. From the post, an occupying party could conduct scientific activities and surveys throughout the AAT. Further, Debenham suggested that Canberra form its own Australian Polar Committee. It would update Australia's map of the Antarctic, publish an official history, create a public brochure on the AAT and appoint an expert in Australia's External Affairs department to study territorial issues in the Antarctic, especially the sector principle and occupation. In short, Debenham's message was for the Australians to get informed about the AAT and stop relying on the British.¹²⁸

¹²⁶ House of Commons *Debates*, 20 May 1938, 3081; See Donat Pharand, *The Law of the Sea of the Arctic with Special Reference to Canada* (Ottawa: University of Ottawa Press, 1973), 138.

¹²⁷ Debenham was born in New South Wales and studied with Antarctic expert Edgeworth David before moving on to Cambridge.

¹²⁸ In the Colonial Office at least, Debenham often encountered officials "who had not the remotest knowledge of Antarctic matters and who were therefore obstructive as the simplest way of covering up ignorance." Frank Debenham, Director of the Scott Polar Research Institute, Memorandum on the Australian Sector of the Antarctic, 21 August 1937, NAA, A981, ANT 2, Part 1, 'Antarctic Control Australian Sector' Pt.I.

Debenham's ideas aligned with Australian officials who were independently considering another expedition to the AAT and a permanent meteorological station on the coastline of the Australian sector. Historian David Day has pointed out that Canberra sent government meteorologist Allan Cornish aboard the *Discovery II* to the waters off the AAT in the Antarctic summer of 1937-1938 with orders to keep a lookout for possible sites for meteorological stations, and to report on any foreign landings and whaling activities in the AAT. The intent was the exercise of Australia's control over the AAT, but Cornish never actually landed on the continent.¹²⁹

In June 1938, William Hughes, Minister of External Affairs, noted that the AAT comprised 3 million square miles, along with one thousand miles of coastline largely unexplored and even unseen by human eyes. While the Empire's conception of polar sovereignty had only called for occasional visits and some form of control, Hughes stressed that the U.S. and Norway believed a more permanent occupation necessary to "obtain recognition and title." As a result, Hughes believed another Australian expedition would make a "material contribution" to Australia's sovereignty. To give greater weight to his argument, Hughes pointed to Lincoln Ellsworth's new plan to aerially explore the Antarctic close to the western boundary of the AAT by air. While Hughes accepted that the total cost of a two-year expedition would be a hefty £30,000, he thought this a manageable sum for such a necessary task.¹³⁰

Unfortunately, no Australian ship was capable of visiting the Antarctic, meaning Britain and New Zealand had to be asked for assistance.¹³¹ New Zealand quickly rejected

¹²⁹ Day, *Antarctica: A Biography*, 313-315. From the beginning, Canberra's plans for an expedition also involved the establishment of a semi-permanent or permanent weather station in the AAT to provide long range forecasting for Australia. As historian Marie Kawaja has pointed out, "the government's financial support reflected Australia's strategic objectives." For a nation reliant on primary production, long-range weather forecasting was a primary concern. Marie Kawaja, "Australia in Antarctica: Realising an Ambition," *The Polar Journal* 3, no.1 (2013): 49.

¹³⁰ W.M. Hughes, Minister of External Affairs to Cabinet, Suggestion for an Australian Antarctic Expedition, 28 June 1938, NAA: A311, 365/9/1, Suggestion for an Australian Antarctic Expedition- W M Hughes 1938. Prime Minister J.A. Lyon also supported another expedition to "give greater weight to existing claims to British sovereignty in the Antarctic." J.A. Lyon, Prime Minister, Commonwealth of Australia to the Secretary of State for Dominion Affairs, 8 July 1938, NA, DO 35/890/10.

¹³¹ J.A. Lyon, Prime Minister, Commonwealth of Australia to the Secretary of State for Dominion Affairs, 8 July 1938, NA, DO 35/890/10.

Australian pleas for a financial contribution.¹³² When the Polar Committee discussed the proposal for an Australian Antarctic expedition at the end of 1938, the British representatives offered to provide assistance if the party also ventured to the Empire's other Antarctic Dependencies. In the end, however, the British offer proved hasty. As the British increased their military and defence spending in response to the increasing strength of Hitler's Germany, funds for an Antarctic expedition quickly dried up.¹³³ If Australia wanted to send an expedition to the Antarctic, it would have to do so on its own.

From 1934 onwards, the American support for the Hughes Doctrine forced British, Australian and Canadian officials to consider additional acts of occupation they might need to undertake in the polar regions. Nevertheless, these officials continued to view sector claims as a viable legal solution to the problems of polar sovereignty. By the end of the decade, Britain's Antarctic diplomacy had only reinforced this belief.

6.4 Britain's Polar Diplomacy, Mutual Recognition and the Sector Principle

One of the most important lessons the Foreign Office took from the *Eastern Greenland* case was the impact of foreign recognition and protest on territorial claims.¹³⁴ When legal counsel Charles de Visscher discussed the role of recognition in Denmark's claim to Greenland during the oral proceedings of the case, he had argued that an international position could be established "from the effect of an agreement among a restricted number of Powers."¹³⁵ London concluded that neither the U.S. nor Argentina would come to a favourable agreement with Britain over Antarctic claims. The British hoped, however, that France and Norway might prove more willing to come to an agreement on the Empire's Antarctic claims.

¹³² Templeton, *A Wise Adventure*, 69.

¹³³ Prime Minister's Department, Proposal to Send Expedition to Antarctic to Explore Australian Territory, 20 January 1939, NAA, A461, T413/6, Australian Antarctic Expedition. See also 46th Meeting of the Polar Committee, 11 November 1938, NA, FO 371/22501.

¹³⁴ Extract from Foreign Office Print, No. 1428/1428/30, 5 March 1934, Annual Report, 1933, on Norway, NAA, A981, ANT 2, Part 2, 'Antarctic Control - Australian Sector' pt. 2.

¹³⁵ P. Couvreur, "Charles de Visscher and International Justice," *European Journal of International Law* 11, no. 4 (2000): 920.

Reflecting upon the 1930s, historian Adrian Howkins has shown that Britain attempted to maintain the status quo with Argentina over the FID.¹³⁶ Officials in London feared that the Argentine weather and wireless station on Laurie Island weakened Britain's title. They also worried that attempting to counter the station by occupying the island would escalate into an official legal dispute.¹³⁷ The Foreign Office's legal advisers therefore argued that it was "preferable that any authoritative decision in this class of case should, if possible, be avoided." London continued to worry that a conflict over the Dependencies might lead Argentina to challenge Britain's hold on the Falkland Islands (or lead other states to question the Empire's polar sovereignty elsewhere).¹³⁸ As a result, good relations with Argentina remained essential to Britain's economic security and the country received significant British investment (in excess of £300 million).¹³⁹

As the decade wore on, however, it was harder for Britain to maintain good relations with Argentina. While the latter's focus in the south polar region had remained on the South Orkneys, by the late 1930s Argentina had clearly started to consider its rights to the Antarctic Peninsula. In June 1937, for instance, in response to remarks made by the British delegation at the League of Nations Whaling Convention, the Argentine ambassador in London visited the Foreign Office and reserved his country's rights in the Falkland Islands Dependencies. On 22 September 1938, the Argentine government announced that its ratification of the 1934 Universal Postal Convention did not imply acceptance of Britain's claims to the Antarctic territories it listed, which included "the

¹³⁶ Adrian John Howkins, "Frozen Empires: A History of the Antarctic Sovereignty Dispute Between Britain, Argentina, and Chile, 1939-1959" (Ph.D. dissertation: University of Texas at Austin, 2008).

¹³⁷ William Eric Beckett thought "we can probably say is maintained by the Argentine Government with our assent, though the Argentine Government, of course, did not admit the necessity for any such assent." Note, W.E. Beckett, 20 December 1933, NA, FO 371/24168.

¹³⁸ While Britain had signed on to the optional clause of the PCIJ, the matter of sovereignty over the FID was not one that could not be referred because it was "not a dispute with regard to some issue arising after HMG ratification." H. Godwin, Falkland Islands and Dependencies, 3 February 1936, NA, FO 371/24168. See also Confidential of 1936, The Possible Effects of Resorting to Arbitration of the South Orkney Islands Dispute in Territorial Claims in the Antarctic, Research Department, Foreign Office, 1 May 1945, pg. 176-177, NAA, A4311, 365/8, [British Document] Territorial Claims in the Antarctic by Research Department, Foreign Office, May 1st, 1945.

¹³⁹ In addition, the Roca-Runciman Treaty of 1933 had guaranteed Argentina continued access to the British market in return for lower tariffs on British exports. As Alan Knight has pointed, the Pact highlighted Britain's alliance with the conservative elite, and was actually derided by Argentine nationalists in their broader critique of British imperialism. Alan Knight, "Latin America," in *The Oxford History of the British Empire*, eds. Judith Brown and Wm. Roger Louis (Oxford: Oxford University Press, 1999), 635-636. See also Roger Gravil, *The Anglo-Argentine Connection, 1900-1939* (Boulder: Westview Press, 1985).

territory of the islas Malvinas and dependencies, which belong to the Argentine Nation by inalienable right.”¹⁴⁰ The British took note of these assertions, but decided to avoid an official dispute over the FID.¹⁴¹ Despite London’s best efforts, open conflict between Britain and Argentina over the FID loomed just over the polar horizon.

The British felt far more confident in their negotiations with Paris. In October 1933, France proposed that the territorial boundaries for Adélie Land be set at 136°E and 147°E longitude.¹⁴² Whitehall responded in April 1934 with a proposal for a boundary of 136 1/2°E and 142°E longitude, the limits used in D’Urville’s charts published by France.¹⁴³ Paris retorted that it “expected that when the British Empire was annexing with a stroke of the pen an expanse of territory in the midst of which Adélie Land constituted only a small portion, the British Government would have given the widest definition to the sector.” The French based their sector claim on the work completed by D’Urville and various legislative decrees they had applied to their Antarctic territory, including the creation of a national park for the protection of wildlife, the reservation of economic rights, and the region’s attachment to the Government of Madagascar.¹⁴⁴

The Australians understood and grudgingly accepted the reasons why the French should be allowed to make Adélie Land into a sector, but they refused to approve of the enlarged boundaries suggested by Paris. Canberra maintained that France’s efforts to expand its sector were thinly veiled attempts to seize Commonwealth Bay, the most accessible anchorage on the Eastern Antarctic coastline. This area represented the key to any future development or occupation of the AAT. The Australians insisted that the best part of the whole coastline was between 138° and 146° E, all of which lay in the

¹⁴⁰ Presidential Message to Congress Concerning a Reservation in Argentine Ratification of the Universal Postal Convention Signed at Cairo on 20 March 1934, 22 September 1938, Document AR2202091938B, in Bush, *Antarctica and International Law* 1, 594.

¹⁴¹ Territorial Claims in the Antarctic, Research Department, Foreign Office, pg. 60, 1 May 1945, NAA, A4311, 365/8, [British Document] Territorial Claims in the Antarctic by Research Department, Foreign Office, May 1st, 1945.

¹⁴² French Note to the United Kingdom of 24 October 1933, Document FR24101933, in Bush, *Antarctica and International Law* 2, 498.

¹⁴³ British Note to France, 13 April 1934, Document FR13041934, in Bush, *Antarctica and International Law* 2, 499.

¹⁴⁴ Imperial Conference, 1937, Situation in the Antarctic, Memorandum Prepared by His Majesty’s Government in the Commonwealth of Australia, NAA, A981, IMP 145A Part 9, Imperial Conference 1937. Antarctic.

proposed French sector. “When it comes to real coast occupation and production,” the Australians argued, “this sector must take first place.”¹⁴⁵

Armed with the Australian arguments, the British explained to Paris that they could not accept an enlarged French sector. Further, there was no proof that D’Urville had even spotted territory past 142°E. Using the main argument made by Canberra, London highlighted that the sector proposed by Paris enclosed Cape Denison (the point at the head of Commonwealth Bay), which was only 16 miles to the east of the 142nd meridian. Cape Denison had been the site of the Australasian Antarctic Expedition’s (1911-1914) main base and had been revisited by the BANZAR expedition. The British insisted that the site was “indelibly associated with Australian tradition and history.”¹⁴⁶ The French could not have Commonwealth Bay.

The conclusions on the sector principle reached by the Committee on Polar Questions at the Imperial Conference of 1937 provided further impetus for London to finish its negotiations with Paris over the borders of Adélie Land. Paris recognized the value of British recognition of its Antarctic sovereignty and understood the weaknesses in its bargaining position (D’Urville had never landed on the continent proper). Therefore, on 5 March 1938, the French government finally advised London that it would limit the Adélie Land sector to all of the territory between 136° and 142° East Longitude, the limits approved by the Australian government.¹⁴⁷ A month later, France, Australia, Britain and New Zealand signed a treaty granting one another the right of free aerial passage over their respective Antarctic territories, which reflected the mutual recognition of their claims.¹⁴⁸ The British Empire had secured the first official recognition of its claims in the Antarctic and London celebrated this diplomatic coup. Nevertheless, Norway’s recognition of the Empire’s Antarctic claims remained the greater prize.

¹⁴⁵ Imperial Conference, 1937, Situation in the Antarctic, Memorandum Prepared by His Majesty’s Government in the Commonwealth of Australia, NAA, A981, IMP 145A Part 9, Imperial Conference 1937. Antarctic.

¹⁴⁶ See Letter from French Embassy to the United Kingdom, 5 October 1936, Document FR05101936, in Bush, *Antarctica and International Law* 2, 499-501; British Note to France Elaborating Reasons for Insisting on Confining Adélie Land to Narrow Limits, Document FR13101937, 13 October 1937, in Bush, *Antarctica and International Law* 2, 501-503.

¹⁴⁷ Kawaja, “Australia in Antarctica,” 48.

¹⁴⁸ C.W. Dixon to Sir Cecil Day, 19 April 1938, FO 371/22501. See also Klaus Dodds, “South Africa and the Antarctic, 1920-1960,” *Polar Record* 32, no. 180 (1996): 32.

During the 1930's the Americans emerged as the greatest threat to the Empire's polar interests yet Norway continued to worry officials in Canberra and London. After the *Eastern Greenland* decision, British Ambassador Charles Wingfield thought the time perfect to offer Norway an Antarctic deal: recognition of Britain's claims in return for recognition of a Norwegian sector between the FID and Enderby Land, to which the British had been directing Norwegian efforts since 1928. Given the string of defeats in the polar regions over the last decade, Wingfield felt the Norwegian government would "swallow their theories about effective occupation which the Hague Court has not confirmed." The Norwegian public, which believed Norway had "moral" and valid legal polar claims on the grounds of settlement and use that were ignored because of its status as a minor power, would support a government that secured a "considerable portion of the Antarctic continent."¹⁴⁹ Attaining official recognition of the Empire's Antarctic sector claims from a country that had persistently objected to the sector principle would be a major legal victory for the British.

The Australians were uninterested in recognizing Norway's sovereignty in the Antarctic. External Affairs official Keith Officer argued that Wingfield's proposed deal would not work and warned that it might lead the Norwegians to contest the Australian claim, especially with their tempers still flaring over the PCIJ decision in the *Eastern Greenland* case.¹⁵⁰ The Foreign Office proved equally hesitant to bargain with a wounded government.¹⁵¹ A few months later, however, Norway forced London to discuss Antarctic sovereignty.

In January 1934, the Norwegians complained to London about the creation of the AAT. The British Empire had claimed nearly two-thirds of the continent, and the Norwegians worried about their whaling interests in the region. The Australian claim enclosed a portion of Haakon VII Land on the south polar plateau, to which the Norwegians had persistently asserted their rights. The Norwegians also questioned the AAT's western boundary line, which enclosed a significant portion of Dronning Maud

¹⁴⁹Charles Wingfield to Howard Smith, 4 September 1933, NA, CO 78/194/17.

¹⁵⁰ Keith Officer to Minister of External Affairs, 4 July 1933, NAA, A981, ANT 2, Part 2, 'Antarctic Control - Australian Sector' Pt.2.

¹⁵¹ P. Leigh Smith (Foreign Office) to Mr. H.N. Tait (Dominions Office), 3 October 1933, NA, DO 114/34.

Land, a coastline Norwegian explorers had worked hard to chart. To resolve its outstanding disagreements with the Empire, the Norwegians suggested an international conference of all interested states with claims or interests in the Antarctic, or bi-lateral talks between experts from the two countries.¹⁵² As the Norwegian government delivered its note, Lars Christensen sent another private expedition to continue his exploration of the Antarctic. The Norwegians circumnavigated the continent and explored parts of its interior by air, including a section of the Australian sector Norway named King Leopold and Queen Astrid Land. Christensen urged his government to officially challenge the Australian claim to Enderby Land and Mac. Robertson Land.¹⁵³

In the spring of 1934, Wingfield lamented Britain's lost opportunity to negotiate with the Norwegians from a position of power. He believed that Norway would come to a conference or bilateral talks entrenched behind its fundamentally different approach to polar sovereignty. Rather than make Norwegian officials rethink their approach to claims in the Arctic and Antarctic, the *Eastern Greenland* decision hardened their stance on the need for effective occupation. "Encouraged to do so by their professors of international law," Norwegian officials would argue that polar claims demanded "effective occupation or utilization" and that sectors claims were "quite untenable."¹⁵⁴ Foreign Office legal adviser Gerald Fitzmaurice concurred; an international conference on Antarctic claims would only lead to formal challenges to Britain's Antarctic Dependencies or inspire proposals to internationalize the region. Fitzmaurice agreed with Wingfield's original plan: offer the Norwegians recognition of their own Antarctic sector. Both he and the members of the Polar Committee believed a deal would tie the Norwegians to the sector principle, providing an important legal victory for Britain.¹⁵⁵

The Australians continued to fear that negotiations with the Norwegians would lead to challenges of the boundaries of the AAT. Canberra felt that an agreement over territory between Britain and Norway might lead other countries – especially the U.S. – to think that the two countries were dividing the Antarctic between them. They thought it

¹⁵² Norwegian Minister to the Foreign Office, 26 January 1934, NAA, A981, ANT 51 PART 3.

¹⁵³ Day, *Antarctica: A Biography*, 277.

¹⁵⁴ Charles Wingfield to Sir John Simon, 24 May 1934, NA, CO 78/196/3.

¹⁵⁵ Gerald Fitzmaurice to R.A. Wiseman, 21 February 1934, NA, CO 78/194/17.

best not to engage in any discussions at all with the Norwegians.¹⁵⁶ Fitzmaurice rebutted the Australian viewpoint as ridiculous,¹⁵⁷ and explained so at a meeting of the Antarctic sub-committee of the Polar Committee. Convinced by Fitzmaurice's argument, the sub-committee decided to send a note to the Norwegians admitting that Norway had "special interests" in the Antarctic and reiterating that Britain had no intention of claiming land between the western boundary of AAT and the eastern Boundary of the FID.¹⁵⁸

The Norwegian government accepted the understanding, just as it had in 1928 and 1930. As the 1930s progressed, however, private Norwegian expeditions explored parts of the AAT, much to Australia's chagrin. Annoyance grew when Hubert Wilkins reported to Canberra the belief held by of his Norwegian colleagues: Australia's title to the western part of the AAT was "defective, as Sir Douglas Mawson had not actually landed on the mainland, but had raised the flag at Proclamation Island (Enderby Land), which is not attached to the Continent, and that he had never set foot upon the Antarctic Continent."¹⁵⁹ Nevertheless, officials in London, and to a certain extent Canberra, continued to feel that the Norwegians would not challenge the Empire's sector claims, given the assurances provided over the last few years. At the same time, British officials gave up on the idea of trading recognitions with Norway. Oslo could not, after all, "recognize British sovereignty over a large area which, in their opinion, did not fulfill that condition" of effective occupation.¹⁶⁰

Norway took note of France's claim and the increasing interest of the U.S. in the Antarctic in 1938.¹⁶¹ As the Antarctic grew busier, Norway once again sought out formal assurances that Britain and Australia would not expand into the unclaimed sector between Enderby and Coats Land (Dronning Maud Land), which had been the site of a great deal

¹⁵⁶ Keith Officer to Batterbee, 26 June 1934, NA, CO 78/196/3. See also Meeting of the Antarctic Subcommittee of the Polar Committee, 12 July 1934, NA, CO 78/196/3.

¹⁵⁷ Fitzmaurice, Foreign Office, to C.E. Boyd Shannon, Dominions Office, 9 July 1934, NA, CO 78/196/3.

¹⁵⁸ Meeting of the Antarctic Sub-Committee of the Polar Committee, 12 July 1934, NA, CO 78/196/3.

¹⁵⁹ W.R. Hodgson, Secretary, External Affairs, to Alfred Stirling, Australian Counselor in London, 18 November 1938, NAA: A981, ANT 22, Antarctic Ellsworth's Flights Enderbyland - Ross Sea.

¹⁶⁰ Imperial Conference, 1937: Situation in the Antarctic, Memorandum by His Majesty's Government in the United Kingdom, 4 February 1937, LAC, RG 25, Vol. 1789, File 1936-318-Q; The Antarctic, Prepared for the Imperial Conference of 1937, NAA, A981, IMP 145A Part 9, Imperial Conference 1937. Antarctic.

¹⁶¹ Walter Roberts to Under Secretary of State, 10 June 1938, NA, FO 371/22501.

of Norwegian exploration work.¹⁶² Australia had no interest in extending the western boundary of the AAT into Dronning Maud Land, but it also desired to be separated from British assurances. In the previous four years, Norwegian explorers had repeatedly flouted Australia's sovereignty by flying over the AAT and naming its features.¹⁶³ Eventually, however, Canberra realized that the communication with the Norwegians presented an opening to request Norway's recognition of the boundaries set for the AAT. In November 1938, the British and Australians sent a note to Oslo assuring that they would not claim any land between the FID and the AAT, but also asking that Norway recognize and respect the boundaries of the AAT.¹⁶⁴

Shortly after the British note arrived in Oslo, Adolf Hoel, head of Norway's Institute for the Exploration of Svalbard and Arctic Ocean (NSIU), left on a trip to Germany. He learned of the Nazi's secret plans to send an expedition to the Antarctic.¹⁶⁵ Germany began to establish its own whaling fleet in 1935, which started to operate in the waters off Dronning Maud Land.¹⁶⁶ Ostensibly to support these whaling efforts, Herman Goering authorized an Antarctic expedition as part of the German four-year economic plan for development. The Germans would seek out a suitable site for a whaling base, test equipment in polar conditions, explore the strategic possibilities of the south polar region and establish the basis for a territorial claim. In December 1938, the German Antarctic Expedition departed for the Antarctic on board the *Schwabenland*.¹⁶⁷

¹⁶² Erik Colban, Norwegian Legation, to George Mouncey, Foreign Office, NA, FO 371/22501. See also C.W. Dixon, Dominions Office, to Stirling, Australia's Department of External Affairs, 30 June 1938, NA, FO 371/22501.

¹⁶³ Stirling, Commonwealth of Australia, Department of External Affairs to C.W. Dixon, Dominions Office, 19 July 1938, NA, CO 78/208/1. In the southern summer of 1933-34, Consul Lars Christensen circumnavigated the Antarctic continent and claimed Princess Astrid Land, which was within the AAT. Another Norwegian expedition landed within the AAT in February 1935. In the 1936-1937 exploration season, Lars Christensen did extensive work in Antarctic, mapping the coastline and conducting survey flights in the AAT.

¹⁶⁴ Stirling, Department of External Affairs, Australia, to C.W. Dixon, Dominions Office, 5 September 1938, NA, FO 371/22501; and Sir George Mounsey, Foreign Office, to Erik Colban, Norwegian Legation, 11 November 1938, NA, CO 78/209/1.

¹⁶⁵ Einar-Arne Drivenes and Harald Dag Jølle, *Into the Ice: The History of Norway and the Polar Regions* (Gyldendal Akademisk, 2006): 307. See also Einar-Arne Drivenes, "Adolf Hoel – Polar Ideologue and Imperialist of the Polar Sea," *Acta Borealia* (1994-1995): 63-72.

¹⁶⁶ W.J. Mills, *Exploring Polar Frontiers: A Historical Encyclopedia* (Oxford: ABC-CLIO, 2003), 552.

¹⁶⁷ Colin Summerhayes and Peter Beeching, "Hitler's Antarctic Base: The Myth and the Reality," *Polar Record* 43, no. 224 (2007): 1-21.

The impending arrival of the German expedition left the Norwegians with little choice but to state their claim. On 14 January 1939, five days prior to the arrival of the German expedition in the Antarctic, the Norwegians announced that Dronning Maud Land, “that portion of the shore of the Antarctic continent which stretches from the boundary of the Falkland Island Dependency in the west (Coats Land boundary) to the boundary of the Australian Antarctic Dependency in the east (45 east Longitude) with the territory lying inside this shore and washing it,” was under Norwegian sovereignty.¹⁶⁸ The Norwegians purposely couched their claim in vague terms that left its southern boundary open to interpretation. As legal scholar W.M. Bush has observed, the ambiguity in the Norwegian declaration seemed “to allow for the possibility of Norway asserting at a later time that its claim extends in a sector from the coast to the Pole.”¹⁶⁹ The ambiguity of Norway’s statement led many contemporaries to conclude it had claimed a sector. On the same day that the Norwegians asserted their claim, they also solidified their arrangement with the Empire in the Antarctic by officially recognizing the boundaries of the AAT.¹⁷⁰

In the span of a year, the British Empire had secured the recognition of its Antarctic claims from France and Norway. Shortly after concluding the agreement with France on polar overflights, Britain received welcome news from the Soviet Union. After the media spread rumours of a Soviet expedition to the Antarctic, the British had questioned Moscow about its intentions. In response, Soviet officials explained that there was no such expedition, but that if they ever sent one into any of Britain’s possessions they would secure London’s permission. This promise sounded like Soviet recognition of the Empire’s Antarctic claims.¹⁷¹ Despite the threat of U.S. and Argentine maneuvers against the Empire’s Antarctic interests, British and Commonwealth officials breathed a little easier following these diplomatic coups.

¹⁶⁸ Sanjay Chaturvedi, *The Polar Regions: A Political Geography* (Chichester: John Wiley and Sons, 1996), 68. Royal Proclamation Defining the Area of Norwegian Sovereignty in Antarctica, 14 January 1939, Document NW14011939C, in Bush, *Antarctica and International Law* 3, 149.

¹⁶⁹ Bush, *Antarctica and International Law* 3, 148.

¹⁷⁰ Norwegian Minister to Foreign Secretary, 14 January 1939, Document AU14011939 in Bush, *Antarctica and International Law* 2, 158.

¹⁷¹ Despatch from British Embassy in Moscow Concerning Future Soviet Antarctic Expeditions, 2 May 1938, Document UK02051938, in Bush, *Antarctica and International Law* 3, 296.

In 1939, Professor Jesse S. Reeves, a political scientist and active member of the American Society of International Law, concluded that Britain, New Zealand, Australia, France and Norway had all claimed Antarctic sectors. Importantly, these states also recognized one another's claims. Just six years before, Reeves had been adamantly opposed to the sector principle and was an ardent defender of the Hughes Doctrine. He had argued that where effective occupation proved impossible, polar territory should be considered *res communis* – land that was internationalized by necessity. He observed that the partition of the Antarctic into sectors “involved scarcely greater absurdities” than the division of the New World between Spain and Portugal.¹⁷² In light of Norway's claim, however, Reeves concluded that, “one may assert that the sector principle as applied at least to Antarctica, is now a part of the accepted international legal order.”¹⁷³ The sector principle finally appeared to be on the verge of the major legal transformation that the British had been hoping for since 1926: its crystallization into a rule of customary international law.

6.5 The Doctrine of Constructive Occupation

In his 1939 commentary on Antarctic annexations and the sector principle, Professor Reeves pointed out that the sector lying between 80° and 150°W (the site of Marie Byrd Land and James Ellsworth Land) remained unclaimed. Like Charles Cheney Hyde, Reeves argued that the U.S. should take immediate action, refute the rigid requirements of effective occupation set by the Hughes Doctrine and claim the sector. Time was an “important factor” and Reeves did not want the U.S. to miss its chance to attain territory in the south polar region.¹⁷⁴

At the beginning of 1938 a confluence of external factors led the State Department to the same conclusion. The Americans knew that Britain, Canada, New

¹⁷² Reeves was chair of the Department of Political Science at the University of Michigan. J.S. Reeves, “George V Land,” *The American Journal of International Law* 28, no. 1 (1934): 117-119.

¹⁷³ J.S. Reeves, “Antarctic Sectors,” *The American Journal of International Law* 33, no. 3 (1939): 519-521. Legal scholar T.E.M. McKitterick was also no supporter of the sector principle, but thought it served as a suitable foundation to a convention partitioning the polar regions to interested parties. T.E.M. McKitterick, “The Validity of Territorial and Other Claims in Polar Regions,” *Journal of Comparative Legislation and International Law* 21, no. 1(1939): 96.

¹⁷⁴ At one point, Reeves had supported the internationalization of the Antarctic, but he now stated that time was “long past.” Reeves, “Antarctic Sectors,” 519-52

Zealand, Australia and South Africa had discussed polar affairs at the Imperial Conference of 1937 and they worried about what action the Empire might take next.¹⁷⁵ The State Department suspected Germany and Japan were growing more interested in the Antarctic. As historian Jason Kendall Moore has reflected, this recognition represents the first time American officials viewed the south polar region through the lens of national security. The Antarctic Peninsula, for example, formed the southern limit of Drake's Passage and the Americans were adamant that potentially hostile states be denied access to it.¹⁷⁶ Given these new realities, Boggs again pushed for Washington to take more direct action in the Antarctic. He cautioned, "in my opinion we should not sleep on whatever rights we may have acquired." Boggs suggested that Washington use the rights it had acquired in the Antarctic as leverage to initiate an international regime in the region, involving "countries which are entitled to assert any interest in the Antarctic by virtue of discovery, exploration and perhaps temporary occupation."¹⁷⁷

At the same time, Richard Byrd started to push the State Department to annex the unclaimed territory he had explored in his previous expeditions. He advised against claiming any land in the British Antarctic territories. The explorer thought that there was enough territory for both countries in the Antarctic and with international matters as critical as they were "elsewhere there [was] no point, in his opinion, in creating any unnecessary dispute." Between the activities of Ellsworth and himself, Byrd believed that the U.S. could claim all the land between the Ross Dependency and the FID (80°W to

¹⁷⁵ S.W. Boggs to Mr. Hickerson, 14 October 1937, NARA, RG 59, CDF 1930-39, Box 4520, File 800.014 Antarctic/114. When U.S. Embassy officials in London tried to ask a South African official what the British and Commonwealth countries had discussed, he had said science and weather stations, and insisted that the sector principle had not been discussed. Herschel V. Johnson, Charge d'Affaires, U.S. Embassy, London to the Secretary of State, 1 September 1937, NARA, RG 59, CDF 1930-39, Box 4520, File 800.014 Antarctic/114.

¹⁷⁶ See Moore, "Tethered to an Iceberg," 127. The Japanese government had informed the Americans that in any discussion of the territory discovered by the expedition of Nobu Shirase in 1910-1912 it would need to be consulted. Meanwhile, German officials began to inquire about Antarctic affairs to their American counterparts. See Memorandum of Conversation Between Tamo Sakamoto, First Secretary of the Japanese Embassy and Hamilton, 12 March 1938, NARA, RG 59, CDF 1930-39, Box 4520, File 800.014 Antarctic/117; S.W. Boggs, Memorandum of Telephone Conversation, 28 July 1938, NARA, RG 59, DF 1930-39, Box 4520, File 800.014 Antarctic/125 and Mr. Hugh Cumming, Division of European Affairs, Department of State to Mr. Moffat, 28 July 1938, NARA, RG 59, CDF 1930-39, Box 4520, File 800.0014 Antarctic/126.

¹⁷⁷ S.W. Boggs, Office of the Historical Adviser, Department of State to Mr. Sturgeon, 18 March 1938, NARA, RG 59, CDF 1930-39, Box 4520, File 800.014 Antarctic/117.

150°W).¹⁷⁸ In response, Dr. Ernest Gruening, head of the Division of Territories and Island Possessions, Department of the Interior initiated the study of an official state expedition to the Antarctic to claim the suggested territory. Richard Black, who had been on Byrd's second Antarctic expedition, wrote up the report for Gruening, and determined that, while the U.S. already had a solid claim to Marie Byrd Land, it would be greatly strengthened if a party could occupy a part of the coast for a time, and effectively survey the area.¹⁷⁹ Intrigued by the Department of the Interior's report and Richard Byrd's desire for a territorial claim, President Roosevelt ordered a complete re-examination of American polar policy. The job fell to the department's newest polar expert, Hugh S. Cumming Jr., a graduate of the University of Virginia's School of Law.

In his report, Cumming focused on two questions: whether and how the U.S. should claim additional territory in the polar regions?¹⁸⁰ He believed that the historic rights created by American explorers throughout the polar regions, the possibilities of future trans-Arctic air routes, the new interest of Germany and Japan in the south polar regions, potential mineral wealth and the desire of Americans to explore the Antarctic demanded an end to Washington's "passive" polar policy. Like Boggs, Cumming applauded the attempts at permanent physical occupation carried out by the Soviet Union and Canada in their respective Arctic sectors. Even in the Antarctic, Cumming noted, the British Empire was undertaking activities designed specifically to support its claims.

Cumming identified three polar policy options for the U.S. government. First, Washington could maintain its traditional position and uphold the requirements of actual settlement called for in the Hughes Doctrine, even though it was a "condition almost impossible of fulfillment in vast areas of such regions." Meanwhile, other states would continue to make claims and establish rights in the region based on their own beliefs surrounding the rules of international law. As a second option, a more assertive polar policy would see the U.S. issue a Congressional Resolution or an Executive Order to notify other interested states that it "does not recognize sovereignty in the Polar regions

¹⁷⁸ S.W. Boggs, Memorandum of Conference with Admiral Byrd, 17 June 1937, NARA, RG 59, CDF 1930-39, Box 4520, File 800.014 Antarctic/113.

¹⁷⁹ Mills, *Exploring Polar Frontiers*, 90-92.

¹⁸⁰ Mr. Hugh Cumming, Division of European Affairs, Department of State to Mr. Moffat, 28 July 1938, NARA, RG 59, CDF 1930-39, Box 4520, File 800.0014 Antarctic/126.

on the basis of mere unilateral assertion on the part of individual Governments.” This alternative borrowed the language of the resolution drawn up by the department in 1933 to explain that the U.S. would “recognize only such claims of sovereignty as meet the requirements of international law, or such claims as shall be recognized by international agreement to which the United States is a party.” Third, drawing heavily on the arguments made by Charles Cheney Hyde, Cumming suggested that the U.S. assert its own claims in the polar regions without delay.

The first option would allow more acts of possession from other states, and the more time passed the weaker the U.S. position would be in any future arbitration or in front of the PCIJ. Official protests against other sovereign claims might defend American legal rights throughout the polar regions, but Cumming established that it would give the U.S. few tangible benefits, and instead anger several foreign governments with which Washington wanted to maintain closer relations. If Washington adopted the third course, the state would have to publicly jettison the Hughes Doctrine, explaining that it gave “insufficient consideration of the peculiar climatic conditions” which led to an “overemphasis of the principle of effective occupation.” At the same time, the State Department must officially and publicly disavow the sector principle as an established principle of international law and indicate that the U.S. would not respect sector claims. Then, the U.S. would announce that discovery should be regarded as one basis for a formal claim to sovereignty, to be supported by “subsequent exploration by air or by land, coupled with a formal claim to possession, and other acts short of actual and permanent settlement.” Such acts would include the establishment of a regime for fish and wildlife regulation, rules for aerial navigation, various administrative acts, consistent land based and aerial exploration in which explorers were appointed as magistrates, scientific activities and extended occupations like those undertaken by Byrd. Cumming called this new formula for acquiring polar sovereignty “constructive occupation.”¹⁸¹ The State Department believed that the “traditional” doctrine of effective occupation demanded actual settlement and use of territory, coupled with permanent state control and administration. With the Hughes Doctrine it had applied these standards – rules

¹⁸¹ The *Eastern Greenland* and *Clipperton Island* cases, Cumming explained, supported the adoption of “flexible principles” for the territorial acquisition of uninhabited or sparsely populated regions.

crafted for territorial acquisition in the temperate regions – to the polar regions. Constructive occupation, however, was specifically crafted for application to the polar regions and set much less rigorous standards for state activity. In reality, it represented a doctrine of polar occupation. Embracing this doctrine, the U.S. could claim all the territory to which it was entitled by the “discoveries, exploration and other acts” of American expeditions (both state sponsored and private) throughout the polar regions.

Cumming stressed that time was running out for the U.S. to claim the polar territory in which it had rights. The PCIJ had “paid great respect to the value of early formal claims to the sovereignty of Greenland, laying stress upon the fact that they had never been challenged.” The absence of an official claim to any polar territory discovered by Americans in the Arctic or Antarctic weakened its legal position. Even if the U.S. was uncertain about claiming territory that had already been annexed, Cumming thought “it might be well to do so for bargaining purposes at a later date.” Of course, if the U.S. chose this path it could expect disputes with many foreign countries, which would, no doubt, intensify their own efforts in the polar regions or lead them to make new claims in response to the U.S. actions. Cumming predicted that the end result would be bilateral negotiations between interested countries, culminating in a multilateral international conference that would finally decide sovereignty in the polar regions.¹⁸²

Although Cumming’s proposals applied equally to the Arctic and the Antarctic, State Department officials retained their focus on the south polar region – the site of recent American activity and interest, and of weaker competing national claims. Cumming had suggested that while the government deliberated on what polar areas the U.S. should claim, the State Department “give official sanction to future acts and explorations of American citizens which would add strength to American sovereignty claims.” Boggs indicated Lincoln Ellsworth’s plans to fly over the hinterland of the AAT past the coast of Enderby Land. He advised sending a note to Ellsworth telling him to claim whatever territory he explored and photographed from the air.¹⁸³

¹⁸² Hugh Cumming, Division of European Affairs, Department of State, American Policy Relating to the Polar Regions, 28 July 1938, NARA, RG 59, CDF 1930-39, Box 4520, File 800.014 Antarctic/126.

¹⁸³ Hugh Cumming, Division of European Affairs, Department of State, American Policy Relating to the Polar Regions, 28 July 1938, NARA, RG 59, CDF 1930-39, Box 4520, File 800.014 Antarctic/126; Cordell

The suggestions made by Cumming and Boggs led to a significant development in U.S. Antarctic policy. On their advice, in August 1938 Secretary of State Cordell Hull ordered American Embassy staff in Capetown, South Africa, to inform Ellsworth “in strict confidence” that he should “assert claims in the name of the United States as an American citizen” to all unexplored territory he uncovered, “regardless of whether or not it lies within a sector or sphere of influence already claimed by any other country.” Ellsworth should also endeavour to re-assert claims to territory previously explored by American explorers, such as Wilkes Land. Hull explained that Ellsworth should drop notes or personal proclamations, attached to parachutes, containing assertions of claims. Of the greatest importance, indicated Hull, was that Ellsworth never acknowledge that the U.S. government gave approval to making his claims.¹⁸⁴ Hull sent a second explanatory telegram to Cape Town in October, thanking Ellsworth for his willingness to comply with Washington’s demands, but refused to send him a copy of his instructions. Hull explained that the State Department could not provide Ellsworth with the extent of territory he should claim. The note from the Secretary of State, however, pointed Ellsworth to the work accomplished by American explorers in Wilkes Land, Palmer Land (Graham Land) and Marie Byrd Land stressing that the U.S. did not recognize the sector principle, and that Ellsworth could ignore existing territorial claims.¹⁸⁵

As the State Department seriously considered adopting the doctrine of constructive occupation and discarding the Hughes Doctrine, it continued to reserve American rights throughout the Antarctic. Learning of the air rights agreement between France, New Zealand, Britain and Australia, the Americans sent a note to all four countries stating that the “United States reserves all rights which it or its citizens may have with respect to the question of aerial navigation in the Antarctic as well as those

Hull to James Orr Denby, 30 August 1938, NARA, RG 59, CDF 1930-39, Box 18, File 031.11, Ellsworth Expedition. Others in the department questioned how Ellsworth could make claims for the U.S. when he had a Canadian pilot, an Australian second in command and a Norwegian crew. Day, *Antarctica: A Biography*, 322.

¹⁸⁴ Cordell Hull to James Orr Denby, 30 August 1938, NARA, RG 59, CDF 1930-39, Box 18, File 031.11, Ellsworth Expedition.

¹⁸⁵ Cordell Hull to the U.S. Consul, Capetown, 22 October 1938, Document US22101938, in Bush, *Antarctica and International Law* 3, 439-440.

questions of territorial sovereignty implicit therein.”¹⁸⁶ Georges Bonnet, the French Minister for Foreign Affairs, told the American Ambassador in France that the U.S. misunderstood the nature of French sovereignty to Adélie Land. “The discovery and acquisition were, in conformity with the procedure usual at that time, the object of notices published in *Moniteur* and *Annales Maritimes* as well as in the *Sydney Herald*.” The Americans had been notified of the claim in 1924.¹⁸⁷ The Americans bluntly replied that no French citizens had ever landed on the continent and that the U.S. could not accept a claim with such a weak legal foundation.¹⁸⁸ When the Norwegians told the State Department about their claim to Dronning Maud Land, the Americans sent the standard response: the U.S. “reserves all rights which it or its citizens may have in the area mentioned.”¹⁸⁹

Finally, in January 1939, Under Secretary of State Sumner Welles sent a note to President Roosevelt (prepared by Cumming, John Hickerson and Jay Pierrepont Moffat in the Western European Division) detailing Cumming’s assessment, and suggesting that the U.S. adopt his third option. While the State Department had assiduously reserved its rights in the Antarctic over the previous six years, a “naked reservation” of rights lacked the force of “the positive steps to preserve their territorial rights which have been and are being taken by other countries pursuing vigorous and acquisitive Polar politics.”

Welles argued that, with respect to polar sovereignty, American policy gave “undue respect for the requirements of the law applicable to temperate zones.” He insisted that the Hughes Doctrine “over-emphasizes the necessity of ‘effective occupation.’” Welles pointed out that Charles Cheney Hyde, one of the original architects of the Hughes Doctrine, had himself suggested the time had come to change the policy. Welles proposed that the State Department determine precisely what land the U.S. should

¹⁸⁶ Sumner Welles, Acting Secretary of State to the Chargé in the United Kingdom, 6 January 1939, in *Foreign Relations of the United States* (FRUS), 1939, Vol. II, (Washington: Government Printing Office, 1956), 1.

¹⁸⁷ Georges Bonnet, The French Minister for Foreign Affairs to American Ambassador to France, Bullit, 21 February 1939, in *FRUS*, 1939, Vol. II, (Washington: Government Printing Office, 1956), 4-5.

¹⁸⁸ Walton Moore for Secretary of State to the Ambassador in France, 16 May 1939, in *FRUS*, 1939, Vol. II, (Washington: Government Printing Office, 1956), 5.

¹⁸⁹ Cordell Hull to Norwegian Minister, 16 January 1939, cited in Bush, *Antarctica and International Law* 3, 150.

claim in the polar regions, and publicly assert that the sector principle was not an “established principle of international law,” nor were any claims done in advance of “the exercise therein of acts essential to the establishment of sovereignty.” Following Cumming’s playbook, the State Department could then assume the position that discovery and constructive occupation were sufficient grounds on which to base polar claims. Welles’ note stressed that the international situation in the polar regions warranted “early and serious consideration of the measures which should be taken by the United States to assert its claims, before the successful assertion of such claims is prejudiced through further undue delay.”¹⁹⁰

Since 1924, officials and lawyers outside the State Department had viewed the Hughes Doctrine as a strong legal position. In reality, the clear doctrine masked a department that was often confused and always indecisive on matters of polar sovereignty. At the end of the 1930s, however, it finally seemed like the State Department was ready to engage with the polar regions in a concrete way. The department prepared to step away from the Hughes Doctrine and re-define its legal approach towards polar sovereignty, and stood ready to support American polar claims based on the doctrine of constructive occupation. In the eyes of the State Department, it was time for the United States to take a well-deserved leading role in the polar regions. Nevertheless, the plan still required President Roosevelt’s approval.

6.6 The Bi-Polar Legal Landscape in January 1939

In 1909 and 1910, James Brown Scott, Thomas Willing Balch and René Dollot had laid out four ways that states could approach territorial acquisition in the Arctic and Antarctic. The American lawyers, Balch and Scott, insisted that governments treat polar territory like land in temperate zones and only consider it under state sovereignty when effectively occupied and used. Balch deemed such occupation impossible in parts of the Arctic and Antarctic, and suggested that states view this polar land as the common possession of all mankind. Dollot suggested that states accept the exceptional nature of the polar environment and modify the rules for the acquisition of territory. Finally, all three authors

¹⁹⁰ Sumner Welles to Roosevelt, 6 January 1939, NARA, RG 59, CDF 1930-39, Box 4520, File 800.014 Antarctic/129.

acknowledged that states could use spheres of influence or the hinterland theory to claim vast portions of territory where they had done little to establish their title, just as they had during the partition of Africa.

Three decades later, the same approaches to polar sovereignty continued to dominate the bi-polar legal landscape. Legal experts of the time kept alive the opinion that states view the polar regions as the common heritage of mankind. Professor Thomas Edward Maurice McKitterick, for example, advocated for “these territories to be put permanently outside the sphere of colonial acquisition by any state, and for them to be governed by an international commission, which would have the power to further and regulate their development for the common benefit.”¹⁹¹ For their part, state officials from the Commonwealth, Soviet Union and France continued to uphold the sector principle – which bore a close resemblance to the hinterland theory – as the best solution to the complicated problem of polar sovereignty. Furthermore, by the beginning of 1939, advocates could reasonably argue that the principle had become part of the accepted international legal order. Commonwealth officials also emphasized the need for control, rather than occupation, in the polar regions, echoing the arguments made by Dollo. They insisted that in the harsh polar environment control could consist of legislation, administrative acts, the occasional visit and, in the Canadian context, a thin network of occupied police posts. Officially, the Americans remained tied to the Hughes Doctrine and its demand for permanent occupation and use, even while they prepared to embrace the less stringent requirements of the doctrine of constructive occupation.

By the end of the 1930s, the U.S. espousal of the Hughes Doctrine began to have a major impact on the way other states conceptualized the polar regions as legal space. The State Department’s public focus on occupancy and use led Commonwealth officials to examine more permanent forms of occupation in their own polar claims, unaware of internal American discussions about constructive occupation. As America’s engagement with the polar regions increased over the years it started to challenge the British Empire as the primary architect of the bi-polar legal landscape. All of the polar claimants had to

¹⁹¹ McKitterick, “The Validity of Territorial and Other Claims in Polar Regions,” 96-97. See also Reeves, “George V Land,” 117-119.

wonder which ways of looking at the legal space of the polar regions would survive the American legal re-construction of the Arctic and Antarctic.

Chapter 7

7 More Than “Two Men and a Dog”: Permanent Occupation and the Polar Regions, 1939-1945

President Franklin D. Roosevelt had a long-standing interest in the polar regions, especially the Antarctic, driven initially by his close friendship with explorer Richard Byrd.¹ At the beginning of January 1939, the President reviewed Under Secretary of State Sumner Welles’ proposal that government officials undertake “early and serious consideration of the measures” to ensure a “successful assertion” of American claims in the Arctic and Antarctic. At the time, Roosevelt accepted that the southern continent could become valuable for mineral exploitation and in the development of communications, meteorology, and southern air routes. Uncertainty over the intentions of Germany and Japan in the Antarctic and the threat that it might fall into unfriendly hands increased the region’s importance.² The President gave Welles approval to consult with the Departments of War, the Navy and the Interior to “work out concrete suggestions” for staking out an American claim to the “South Polar area.”

Roosevelt inserted one important caveat. The President disagreed with Welles’ suggestion that the U.S. embrace constructive occupation, the new formula for acquiring polar sovereignty championed by the State Department. “None of us can be certain,” he observed, that legislation, administrative efforts and “making occasional surveys” would “obtain international recognition of American jurisdiction in the South Polar area.” As a result, Roosevelt insisted on “another step” to bolster a future American claim. He suggested that the U.S. send “to two separate South Polar regions an expedition every

¹ On Roosevelt’s friendship with Byrd and interest in the Antarctic see, Lisle A. Rose, *Explorer: The Life of Richard E. Byrd* (Columbia: University of Missouri Press, 2008), 3, 28-29, 178, 298, 394-395.

² In the spring of 1938, he instructed the State Department to review its polar policy and formulate a strategy “designed to protect such territorial rights as the United States possesses” in the polar regions. Sumner Welles to Roosevelt, 6 January 1939, United States National Archives and Records Administration (NARA), RG 59, CDF 1930-39, Box 4520, File 800.014 Antarctic/129a. On American interests in the Antarctic during this period, see Peter Beck, *The International Politics of Antarctica* (London: Croom Helm, 1986), 27; Sanjay Chaturvedi, *The Polar Regions: A Political Geography* (Chichester: John Wiley and Sons, 1996), 75; Christopher Joyner and E.R. Theis, *Eagle Over the Ice: The U.S. in the Antarctic* (Hanover: University Press of New England, 1997), 26; Jason Kendall Moore, “Tethered to an iceberg: United States policy toward the Antarctic, 1939–1949,” *Polar Record* 35, no. 193 (1999): 125-134.

autumn,” representing the first official American venture to the Antarctic since Charles Wilkes and the U.S. Exploring Expedition of 1840. Exploratory parties could be placed ashore in seasonal bases at Little America in the Ross Dependency and in the area south of Cape Good Hope (either Dronning Maud Land or the Australian Antarctic Territory) at the start of every Antarctic summer and then disembark in the spring. While there, the men would perform useful activities such as meteorological and geological studies – the two areas that the President believed offered the greatest chance for economic return in the Antarctic.³

A few months later, Roosevelt’s additional step became ambitious plans to establish a permanent occupation in the Antarctic. The President explained to Richard Byrd, the commander of the new and official United States Antarctic Service Expedition (USASE), “The most important thing is to prove...that human beings can permanently occupy a portion of the Continent winter and summer.” Secondly, the expedition had to establish the region’s material value and prove that it was “well worth a small annual appropriation to maintain such permanent bases.”⁴

While scholars have taken note of Roosevelt’s role in creating and supporting the USASE, they have largely ignored the pivotal impact he had on American polar legal policy.⁵ His suggestion of “another step” caused the State Department to abruptly shift focus from constructive occupation back to the Hughes Doctrine. Roosevelt developed strong views on the legal value of permanent occupation through his efforts to secure islands for trans-Pacific air routes. Although some have noted a connection between the President’s attempt to secure Pacific islands and his interest in the Antarctic, the legal implications have not been adequately explored.⁶ Roosevelt’s experiences with territorial

³ President Roosevelt to Acting Secretary Welles, 7 January 1939, File 800.014 Antarctic.

⁴ Roosevelt to Byrd, 1939, quoted in Beck, *International Politics*, 27. The name, United States Antarctic Service, was chosen because it sounded permanent. Memorandum by Mr. Hugh Cumming, Division of European Affairs, 18 July 1939, in *Foreign Relations of the United States* (FRUS), 1939, Vol. II, (Washington: Government Printing Office, 1956), 7-8.

⁵ See, for example, P. Quigg, *A Pole Apart: The Emerging Issue of Antarctica* (New York: McGraw Hill, 1983), 132; Moore, “Tethered to an iceberg,” 125-134; Joyner and Theis, *Eagle Over the Ice*, 24-25; David Day, *Antarctica: A Biography* (Oxford: Oxford University Press, 2013), 331-356

⁶ Historians Malcolm Templeton and David Day have pointed out the connections between Roosevelt’s attempts to acquire territory in the Pacific and his interest in the Antarctic, but did not adequately explain

acquisition in the Pacific shaped the legal lens through which he viewed the Antarctic. He doubted territorial title based on constructive occupation would secure international recognition because he had already rejected claims based on similar grounds in the Pacific. Roosevelt's vision of territorial sovereignty, which he applied equally to the small Pacific islands and to the vast spaces of the Antarctic, involved occupation and functional use. This choice dramatically altered the nature of polar sovereignty and inspired permanent human occupation of the Antarctic continent. Through the President's support of the Hughes Doctrine and its physical manifestation in the USASE, the U.S. became the principal architect of the bi-polar legal landscape.

Roosevelt's private suggestion that the U.S. utilize a "new form of sovereignty" to claim territory in the Antarctic also significantly impacted the region's legal evolution. Borrowing another idea from his Pacific islands experience, Roosevelt was willing to limit American sovereignty in order to establish alternative forms of governance in the Antarctic, so long as the resulting agreement protected the rights and goals of the U.S. The idea still involved U.S. occupation of the Antarctic, but Roosevelt also tapped into the suggestions for an alternative and internationalist approach to polar sovereignty made by American legal scholars such as Thomas Willing Balch for decades.

The dramatic influence that the American emphasis on occupation and use had on the legal policies of the polar claimants is not properly appreciated. In the aftermath of the official American occupation, Foreign Office legal advisers accepted that a state wanting to secure sovereignty over a polar territory had to meet the standards of the Hughes Doctrine. Although British legal appraisals highlighted the low bar for effective occupation in uninhabited spaces set by the *Clipperton Island* and *Eastern Greenland* decisions, they recognized that the U.S. had not accepted these standards. As the power of the U.S. increased, gaining American recognition of territorial claims became pivotal, and the British realized that their only chance of attaining their assent rested in permanent occupation. In 1937, the British predicted that the sector principle would become established as a rule of law for the polar regions, but by 1945 the Foreign Office rejected

the legal implications. Malcolm Templeton, *A Wise Adventure: New Zealand & Antarctica, 1920-1960* (Wellington: Victoria University Press, 2000), 70-71; Day, *Antarctica: A Biography*, 314.

its legal validity.

These developments occurred against the backdrop of the Second World War, which significantly changed the legal and political status of the polar regions. Encouraged by Britain's involvement in the war, Argentina and Chile challenged its position in the FID, spurring on London's conclusions about the need for permanent inhabitation of its Antarctic claim.⁷ Washington's legal requirements for polar sovereignty struck home in wartime Ottawa. The government faced a massive influx of American military and civilian personnel into the Canadian North during the war. Although these activities stopped short of the High Arctic, they caused concern about the legal status of the unoccupied northern islands, which Washington had never recognized as Canadian territory. In the wake of the USASE, Australia also contemplated the requirement for greater permanent occupation in the AAT, but its plans were cut short by wartime exigencies. While the Canadians and Australians accepted the need for greater acts of occupation in their polar territory, they proved more hesitant to move on from the sector principle than most British officials.

Even as the Hughes Doctrine came to dominate the way states envisioned the Arctic and Antarctic as legal space, Argentina and Chile introduced new arguments and re-introduced old ones into the polar legal landscape while asserting their sovereign rights in the south polar region. As Foreign Office legal advisers turned away from the sector principle, Argentinean and Chilean legal experts embraced it, along with arguments based on the doctrine of contiguity and geographical unity, which they argued formed the foundation of "modern polar international law."⁸ Further, they introduced "Latin American international law" to the Antarctic utilizing the doctrine of *uti possidetis juris* (*uti possidetis, ita possideatis* – 'as you possess, you may continue to possess').

⁷ As Antarctic scholar Klaus Dodds has noted, events during the Second World War led Britain to "develop a new *modus operandi* for claim protection." In Klaus Dodds, *Pink Ice, Britain and the South Atlantic Empire* (London: I.B. Tauris Publishers, 2002), 18.

⁸ Chilean legal scholars, such as Oscar Pinochet de la Barra, and government officials often referred to "modern polar international law" Speech Concerning the Grounds of Chile's Claim to Antarctica Delivered to the Senate by the Minister for Foreign Affairs, Raúl Juliet Gómez, 21 January 1947, Document CH21011947 W. M. Bush ed., *Antarctica and International Law: A Collection of Inter-State and National Documents 2* (New York: Oceana, 1982-1988), 334.

Although the bi-polar legal landscape remained a scene of conflicting ideas and arguments, the American focus on permanent settlement and use imposed new and more rigorous requirements for polar sovereignty by the end of the war. Moving forward, state officials and legal advisers considered a permanent physical presence a cornerstone of sovereignty in the bi-polar landscape.

7.1 The Trans-Pacific Air Routes and Permanent Occupation

President Roosevelt's demand that the State Department consider "another step" to successfully acquire sovereignty in the Antarctic emanated from the legal policy he adopted to claim islands along the trans-Pacific air routes. By the mid-1930s the small, often barren and mostly uninhabited islands of the central Pacific had become essential stepping-stones and refueling sites for air clippers travelling across the vast ocean. Roosevelt understood the value of these islands to commercial and military aviation, and foresaw their potential strategic importance. As a result, he encouraged Pan American Airways, the principal international air carrier in the U.S., to develop a service across the Pacific. Before a route between Hawaii, New Zealand and Australia could become operational, however, Pan American required additional island stopover points, which Roosevelt endeavored to provide.⁹

In late December 1934, the President signed an executive order placing Kingman Reef, Johnston Island and Sand Island – all previously claimed by the U.S. – under the Navy Department's control. Next, Roosevelt considered how to demonstrate America's sovereignty over the islands "in some tangible form." He told Secretary of the Navy Claude Swanson to consult with the State Department about whether the "establishment of a small supply base or the fixing up of a landing place would be adequate to sustain

⁹ The U.S. already controlled enough island landing points for travel to most of Asia. In 1935, Pan American's China Clipper began a regular run to the Philippines and South China, via the Midway Atoll and Wake Island. See Lowell Young, "Franklin D. Roosevelt and America's Islets: Acquisition of Territory in the Caribbean and in the Pacific," *The Historian* 35 (1973): 205-220; David Neal Leff, *Uncle Sam's Pacific Islets* (Stanford: Stanford University Press, 1940), 55-63; Beatrice Orent and Pauline Reinsch, "Sovereignty Over Islands in the Pacific," *The American Journal of International Law* 35, no. 3 (1941): 451; Franklin D. Roosevelt and J. S. Reeves, "Agreement Over Canton and Enderbury Islands," *The American Journal of International Law* 33, no. 3 (1939): 521-526; and M. Ruth Megaw, "The Scramble for the Pacific: Anglo-United States Rivalry in the 1930s," *Historical Studies* 17, no. 69 (1977): 458-473.

sovereignty.” Perhaps, Roosevelt speculated, the planting of trees and grasses represented enough government activity. Although the President pondered a model of territorial acquisition involving something less than effective occupation, he soon concluded that the U.S. claims required a “colony of American citizens.”¹⁰ The emphasis on occupation matched the 1934 reply on the Ross Dependency that the State Department issued to New Zealand, which explained that the U.S. refused to recognize claims “unaccompanied by occupancy and use.”

In 1935, the U.S. placed the uninhabited Baker, Howland, and Jarvis Islands, which all rested on the proposed air route to New Zealand and Australia, under the jurisdiction of the Interior Department.¹¹ The U.S. had already taken possession of the islands under the broad terms of the Guano Act of 1856. The act established that whenever an American citizen discovered a deposit of guano on any “island, rock or key, not within the lawful jurisdiction of any other government or occupied by its citizens,” the President could declare it a U.S. possession.¹² Roosevelt landed parties of soldiers and civilian volunteers from Hawaii on the islands.

At first, Roosevelt estimated that colonization should be maintained for a year; which required a ship with replacement personnel every three months. Historian Lowell Young has established that the President still felt the need to bolster the claim to the islands and a year later increased the American presence, even building landing strips and weather stations on Jarvis and Howland.¹³ The Interior Department administered the islands from Honolulu, and the occupation parties consisted of four Hawaiian Americans on three-month tours of duty. While on the rocky and austere islands, the occupants

¹⁰ The original suggestion for the establishment of a colony came from Secretary of the Navy Swanson. Young, “Franklin D. Roosevelt and America’s Islets,” 211-213.

¹¹ Baker and Howland Islands rest just north of the equator and are often considered extensions of the Phoenix Islands group, a group of eight atolls and two coral reefs in the central Pacific east of the Gilbert Islands. Jarvis Island is part of the Line or Equatorial Islands, a chain of eleven atolls in the Central Pacific south of Hawaii.

¹² Orent and Reinsch, “Sovereignty Over Islands in the Pacific,” 451.

¹³ It was while travelling to the landing strip on Howland, that Amelia Earhart perished. Young, “Franklin D. Roosevelt and America’s Islets,” 212-213.

performed functional tasks such as gathering and transmitting weather data.¹⁴ The outbreak of the Second World War in the Pacific led to their evacuation, ending the colonization exercise.

Roosevelt's program of territorial acquisition in the Pacific hit an obstacle when the Americans set their sights on Canton and Enderbury Islands, two small pieces of mostly bare coral in the Phoenix Islands group. London, also wanting secure air route islands, had officially annexed the Phoenix Islands in March 1937 (it had considered them British territory since the late nineteenth century).¹⁵ When the U.S. Navy (USN) escorted a National Geographic Society party to Canton Island a few months later, they found the Union Jack flying over the island with notices of annexation attached. The State Department insisted that American whalers first discovered the islands, that Washington claimed them through the Guano Act, and that no country had occupied them. As a result, the U.S. rejected Britain's sovereignty over the Phoenix group. The USN sent a clear message by installing a cement pad with a painted stainless steel U.S. flag on Canton.¹⁶ Over the next year, the British and Americans negotiated ownership of Canton and Enderbury. Roosevelt desired a mutually favourable solution, noting that in the "strong friendship between the United States and the British Empire, an attitude of grabbing everything on sight on the part of one of the parties does not exactly conform to a Good Neighbor policy."¹⁷

¹⁴ One of the colonists died from a ruptured appendicitis. Center for Oral History, University of Hawai'i, *Hui Panala'au: Hawaiian Colonists in the Pacific, 1935-1942* (University of Hawai'i: Center for Oral History, 2006).

¹⁵ The order in council incorporated the Phoenix group into the Gilbert and Ellice Islands Colony. British Ambassador R.C. Lindsay to the Secretary of State, 16 July 1937 and 22 July 1937, *FRUS*, 1937, vol. II, 126. See also Young, "Franklin D. Roosevelt and America's Islets," 214.

¹⁶ William Leahy, Admiral, USN to Secretary of State, 20 February 1937, *FRUS*, 1937, vol. II, 125; Secretary of State to the Secretary of the Navy, 9 March 1937, *FRUS*, 1937, vol. II, 126; British Ambassador R.C. Lindsay to the Secretary of State, 16 July 1937 and 22 July 1937, *FRUS*, 1937, vol. II, 126.

¹⁷ Roosevelt to R. Walton Moore, 15 October 1937, cited in Young, "Franklin D. Roosevelt and America's Islets," 215. Cordell Hull to Roosevelt, 29 July 1937, *FRUS*, 1937, vol. II, 127-128. Roosevelt's decision to negotiate was also driven by concern that, given the lack of permanent occupation on the islands, the U.S. claim was weak. R. Walton Moore explained that in any dispute, it was likely neither side would be able to prove "a perfectly good title." Cordell Hull to British Ambassador, 9 August 1937, *FRUS*, 1937, vol. II, 129 and Memorandum by the Counselor of the Department of State, 22 October 1937, *FRUS*, 1937, vol. II, 132-133. With Roosevelt's approval, on 9 August 1937, Hull explained to London that the U.S. did not recognize the British claim, and that Canton along with several other Pacific islands were subject to conflicting claims. The Americans proposed negotiations with the

The President held steadfast to effective occupation while the British based their title on exploration, legislation and the occasional visit, just as they justified the Empire's polar claims. Roosevelt insisted that Britain's legal position was a "sheer case of bluff." Reiterating the Hughes Doctrine, the President insisted only "permanent occupation" in a reasonable time after discovery established a title to territory. Roosevelt argued that a "purely temporary occupation such as, for example, occupation for the purpose of recovering guano and nothing else does not give sovereignty to the country to which the guano company belongs." While the U.S. had not occupied Canton and Enderbury Islands, the failure of any other state to settle and use them meant that they were "open to occupancy by us today."¹⁸

News that a British naval force visited Canton Island and deposited two radio operators on the island at the end of August 1937 further complicated matters.¹⁹ Roosevelt met with the legal expert Robert Walton Moore and Jay Pierrepont Moffat from the State Department, and Dr. Ernest Gruening, Director of the Division of Territories at the Department of the Interior, to discuss the Pacific islands in February 1938. Mocking British efforts, Roosevelt explained to the group that the "only occupancy which had any validity was permanent occupancy and by that he meant *bona fide* occupancy and not merely the sending of 'two men and a dog' to a given part of the world." In a comment that would have raised Canadian concerns about their Arctic Archipelago had they heard it, Roosevelt asserted that even "permanent occupancy of one island when speaking of archipelagos did not give a clear title to a whole group of islands." To back up his views on occupation, Roosevelt ordered Gruening to send settlers to Canton and Enderbury Islands within the month.

Despite the President's dismissal of Britain's claim to the islands, Roosevelt wished to avoid a long drawn out dispute that would slow the development of commercial aviation. Joseph Kennedy, the American ambassador in London, explained

caveat that either side avoid any acts of possession, like occupation. Cordell Hull to British Ambassador, 9 August 1937, *FRUS*, 1937, vol. II, 129.

¹⁸ Roosevelt to the Secretary of State, 26 July 1937, *FRUS*, 1937, vol. II, 127.

¹⁹ The British explained that while they were willing to enter into negotiation over islands in the Pacific, they regarded the Phoenix Group as "definitely British territory." VAS Mallet, British Charge d'Affaires, to the Secretary of State, 20 October 1937, *FRUS*, 1937, vol. II, 131.

the American position on effective occupation to the British. Next, Kennedy drew attention to the several hundred Pacific islands over which the two countries had conflicting claims. Roosevelt's administration, however, saw "nothing to be gained by entering into legalistic discussions as to the sovereignty of individual islands," which would be a "long drawn out process and possibly acrimonious," and could inspire a race to settle the contested territory. In the end, Kennedy pointed out, both the British and Americans wanted to keep Japan from the islands. With this strategic necessity in mind, Washington suggested the two countries reach an agreement for mutual use.²⁰

On 3 March 1938, American settlers rushed to Canton and Enderbury, while President Roosevelt claimed the islands for the U.S. and placed them under the jurisdiction of the Interior Department.²¹ On 10 March, he sent a letter to Prime Minister Neville Chamberlain proposing that the U.S. and Britain occupy and hold Canton and Enderbury as a condominium for 25 to 50 years, during which the islands would be placed under a joint administration.²² After protracted negotiations, the two countries

²⁰ If the negotiations with Britain were inconclusive, Roosevelt also planned to issue an Executive Order to place under the jurisdiction of the Interior Department all the islands between Samoa and Hawaii, followed by the settlement of each island. Memorandum of a Conversation between President Roosevelt, Judge Moore (Counselor of the State Department), Dr. Gruening, Director, Division of Territories, Department of the Interior, and Pierrepont Moffat, Chief of European Division, State Department, 16 February 1938, *FRUS*, 1938, vol. II, 77-79.

²¹ Memorandum of Conversation, Chief of the Division of European Affairs, 5 March 1938. *FRUS* 1938, vol. II, 81-81. The Americans explained to the press that the U.S. government did not admit that title came through mere discovery, but it had assumed the right to occupy the islands based on discovery, former occupation, and failure of any other power to settle or use the islands. Memorandum by the Chief of the Division of Current Information, M.J. McDermott, White House Press Conference, 7 March 1938, *FRUS* 1938, vol. II, 83. Unaware of American plans for occupation, the *New York Times* highlighted that it seemed that the State Department had rejected the "thesis informally put forward by Charles Evans Hughes when Secretary of State that discovery alone was not sufficient to lay a basis for a claim of sovereignty but that discovery had to be followed by occupation." *New York Times*, 6 March 1938.

²² In the meantime, the British had thought up their own proposal. They would offer American citizens free access to any island under their jurisdiction on the trans-Pacific route. The British maintained that their interest in the Phoenix Island group extended past concern for an air route because they were considered removing a part of the population from the over-crowded Gilbert and Ellice Group to the Phoenix group. When American overtures that the British give up their idea to transplant Indigenous Peoples to the islands so as not to impact the question of title failed, Roosevelt himself got the Interior Department to look at the possibility of moving a half dozen families from Samoa or Hawaii to Canton Island. "If the British can do a little colonizing, why can't we also," asked the President. The Ambassador in the United Kingdom to the Secretary of State, 30 March 1938, *FRUS*, 1938, vol. II, 84-86 and Roosevelt to the Secretary of State, 28 June 1938, *FRUS* 1938, vol. II, 109. The British dug in their heels when the Americans granted a license to Pan American Airways to use Canton Island and debate over whether British companies could have access to Hawaii if, "Great Britain can't use Hawaii it can't fly the Pacific." Memorandum of Conversation with Ronald Lindsay and Pierrepont Moffat, 11 April 1938, *FRUS*, 1938, vol. II, 90-91. Both the British

created an Anglo-American condominium in April 1939.²³ Within months, Pan American finished construction of the facilities required to support its flying boat service to New Zealand.

Roosevelt's experiences in the Pacific shaped his response to the Antarctic. In his mind, little difference existed between the small and barren islands of the Pacific and the vast spaces of the Antarctic. In pursuing territory in both places, Roosevelt refused to accept that anything less than "bona fide" permanent occupation could give a state title to territory. More than that, the President emphasized functional activities (such as meteorology) and development, arguing that a state had to do more to claim a territory. With these arguments and bold, assertive practice, Roosevelt breathed new life into the Hughes Doctrine at a time when international law seemed to accept a more modest threshold for effective occupation.

7.2 Occupying the Antarctic

Under Roosevelt's direction, American officials turned to the Antarctic in January 1939. Led by Secretary of State Cordell Hull, the State Department decided that the additional step should be permanent, not just recurring seasonal occupation.²⁴ Not every American official agreed. Some, including Hugh Cumming, who originally suggested a doctrine of constructive occupation, still believed that the U.S. might abandon the Hughes Doctrine, especially if settlement attempts failed and proved the impossibility of the legal principle's standards.²⁵ Department of the Interior official Dr. Ernest Gruening also

and the Americans were eager to avoid an official dispute. At the time, legal scholar J.S. Reeves pointed out that had the dispute gone to arbitration or the Permanent Court of International Justice, it would have raised many difficult and potentially far-reaching questions. To what extent had there been abandonment by either side? "Was there failure to institute or to maintain those administrative activities which are the badges of sovereign possession?" Most importantly, the case would have clarified how much activity was "necessary to preserve title as against abandonment in the case of a small island incapable of sustaining human life, once valuable for its guano deposits, then becoming worthless, only to become again of value for purposes undreamt of until very recently?" Roosevelt and Reeves, "Agreement Over Canton and Enderbury Islands," 521-526

²³ Canton and Enderbury Islands remained under a condominium that last until 1979. Today they are administered by the Republic of Kiribati.

²⁴ Cordell Hull to the President, 13 February 1939, NARA, RG 59, CDF 1930-39, Box 4520, File 800.014 Antarctic/155A.

²⁵ Cumming explained this to British counselor in Washington, R.C. Lindsay. British Embassy Washington to the Viscount Halifax, 18 July 1939, National Archives of Australia (NAA), A981/ANT 54 PART 2. In June, Lewis Clark, who represented the State Department in hearings before Congress on the advisability of

doubted the necessity of permanent occupation, noting that only the U.S. maintained such rigid legal standards for the acquisition of polar territory.²⁶ Still, with marching orders direct from the President, Gruening and Cumming led polar experts such as Samuel Boggs, Lawrence Martin and Richard Byrd in the investigation of where the American settlements should be located. Early discussions suggested on bases in Marie Byrd Land, James W. Ellsworth Land, Little America in the Ross Dependency, Palmer (Graham) Land, Deception Island and in Enderby Land, Princess Elizabeth Land, or Wilkes Land in the AAT.²⁷

The proposed base locations challenged every claim the British Empire had in the Antarctic. Planning for Antarctic bases – which Roosevelt kept a close eye on – occurred as the President quietly worked to strengthen ties with Britain, whose strength he hoped would serve as a bulwark against German and Italian aggression towards the western

an Antarctic expedition, noted the Hughes Doctrine and then remarked, “However, international law on that subject is not entirely clear, and it has not been fixed. There is a possibility that we might recede somewhat from a strict interpretation of the requirement of occupancy, or permanent occupancy in the Antarctic.” Lewis Clark cited in D.A. Graber, “Struggle for a Continent: Who Will Rule Antarctica?” *World Affairs* 113, no. 1 (1950): 14.

²⁶ When asked by Committee on Appropriations for the House of Representatives, Gruening stated that the question of permanent occupancy, “is largely a question of whether the legal experts of the State Department feel that something of that sort is necessary to perfect our title.” See OIR Report, No. 4296, Map Intelligence Division, Office of Intelligence Collection and Dissemination, State Department, History and Current Status of Claims in Antarctic, 3 October 1947, NARA, RG 59, CDF 1945-1949, Box 4074, File 800.014, Antarctic.

²⁷ Dr. Ernest Gruening, Director, Division of Territories and Island Possessions, Department of the Interior and Mr. Cumming, Division of European Affairs, Proposed Settlements in the Antarctic, 14 January 1939, NARA, RG 59, CDF 1930-39, Box 4520, File 800.014 Antarctic/149; Conversation between Dr. Ernest Gruening, Director, Division of Territories and Island Possessions, Department of the Interior and Mr. Cumming, Division of European Affairs, S.W. Boggs, Commander Earl G. Rose, Coast Guard, Commander William Hatch, Hydrographic Department, USN, 17 January 1939, NARA, RG 59, CDF 1930-39, Box 4520, File 800.014 Antarctic/151; Memorandum of Conversation, Colonel Lawrence Martin, Library of Congress, Mr. W.L. Joerg, National Archives, Mr. Boggs, Geographer and Mr. Cumming, Division of European Affairs, 20 January 1939, NARA, RG 59, CDF 1930-39, Box 4520, File 800.014 Antarctic/152; and Conversation between Richard Byrd, Samuel Boggs and Hugh Cumming, 28 January 1939, NARA, RG 59, CDF 1930-39, Box 4520, File 800.014 Antarctic/153. See also, Rose, *Explorer*, 405-408. Throughout the planning, the Department of the Interior fought for as comprehensive an Antarctic claim as possible and was adamant that permanent bases be established in all three areas claimed by the British Empire. The Interior Department maintained that permanent bases at strategic posts would fulfill the requirements of the Hughes Doctrine, especially if the members were made into postmasters. Based on Black’s observations, the Department of the Interior plan evolved into four bases: Base One would be near Little America in the Ross Dependency, Base Two on the coast in Princess Elizabeth Land of the AAT, Base Three on Heard Island, and Base Four on the coast of Graham Land. For more on the planning of the Department of the Interior see Day, *Antarctica: A Biography*, 333-335. See also Quigg, *A Pole Apart*, 132.

hemisphere.²⁸ Interestingly, these diplomatic considerations were absent from the American Antarctic discussions. The Americans knew that their bases would annoy Britain, especially in the FID, but discussions centred on legal, rather than political considerations.²⁹ Samuel Boggs and Hugh Cumming insisted that the U.S. had the legal right to occupy the FID and challenge the weak British claim. To Boggs, it seemed “untenable that one nation should maintain that it has sovereignty over an area so little known and of so little present utility” – particularly when it represented one of the most accessible parts of the Antarctic offering entry to areas to the southeast and southwest that usually had impenetrable ice fields along their coasts. America’s espousal of the Hughes Doctrine, its reservation of rights to the FID and its rejection of the sector principle, gave the U.S. government freedom of action in the area. Furthermore, early American exploration activities provided a firm foundation to build a claim through further occupation. Even if the Americans did not wish to claim the territory, the mere presence of the bases provided “bargaining points in any negotiations which might arise with respect to other [Antarctic] territory having a more immediate value to this country.”³⁰

American desire for a base in the AAT stemmed from their belief that the discoveries of the U.S. Exploring Expedition of 1840 and Lincoln Ellsworth’s flight over a section of the territory on 11 January 1939 gave them territorial rights in the area. Armed with the State Department’s permission to make a claim to whatever territory he

²⁸ After the Munich Agreement of September 1938, Roosevelt feared Italian and German aggression more than ever. The air superiority of the Axis powers had the potential to threaten the security of the U.S. He also realized that the U.S. needed time to rearm and catch up to her potential allies and enemies. In the meantime, strengthened ties with Britain could provide for American security. In June 1939, Roosevelt invited the King and Queen of England to visit Washington. He also reached out to Winston Churchill, who the President had hoped might become the next Prime Minister. His attempts to provide direct financial and material support to Britain were limited by strict neutrality laws and the widespread isolationism in Congress. For overviews of these efforts see, Lynne Olson, *Those Angry Days: Roosevelt, Lindbergh and America’s Fight Over World War II, 1939-1941* (New York: Random House, 2013); and Richard Harrison, “A Presidential Demarche: Franklin D. Roosevelt’s Personal Diplomacy and Great Britain,” *Diplomatic History* 5 (1981): 245-272.

²⁹ Secretary of State Cordell Hull wondered if Britain’s history of discovery in the FID, the work of the Discovery Committee and the length of time the claim had gone uncontested made the claim too strong to challenge. Cordell Hull to the President, 13 February 1939, NARA, RG 59, CDF 1930-39, Box 4520, File 800.014 Antarctic/155A.

³⁰ S.W. Boggs, Division of Research and Publication, Department of State, 3 March 1939, NARA, RG 59, CDF 1930-39, Box 4521, File 800.014 Antarctic/224; Hugh Cumming, Proposed Location of Bases in the Antarctic, 6 March 1939, NARA, RG 59, CDF 1930-39, Box 4521, File 800.014, Antarctic/176.

flew over, Ellsworth took off from a point along the coast of Princess Elizabeth Land in the AAT and headed inland along longitude 79°E to latitude 72°S. He ignored the land lying within 60 miles of the coast which he knew the Australians had surveyed during the BANZARE unclaimed. But after he went through half a tank of gas at 210 miles inland, he dropped a brass cylinder, which claimed for the U.S. “so far as this act allows, the area south of latitude 70 and to a distance 150 miles east and 150 miles west of my line of flight and to a distance 150 miles south of 72 longitude 79 east.” Ellsworth named the claimed area the American Highland.³¹ The State Department considered a base in the area to perfect the American claim through occupation.

While Ellsworth’s flight encouraged U.S. interest in the AAT, the German Antarctic expedition immediately fuelled the State Department’s desire to spread American bases around the Antarctic. On 19 January 1939, the M.S. *Schwabenland* reached the coast of Dronning Maud Land, which Norway had claimed just days before. Using two aircraft, the Germans started mapping operations in the region. As they flew over the continent and took aerial photographs, the expedition dropped specially designed, five hundred pound steel javelins, complete with swastikas on their tops, that could land upright in the ice. The planes flew over hundreds of thousands of square kilometers they called Neu-Schwabenland. In addition, expedition members landed on the coast and established a temporary base.³² Shortly after the Germans left at the end of the Antarctic summer, Berlin announced plans for follow up expeditions in 1939 and 1940. Dr. Helmuth Wohlthat, a deputy of Hermann Goring in charge of Germany’s Antarctic program, announced that “the acquisition of unclaimed land” required “the intention to occupy it, i.e. to people the land and administer and rule it.” The State Department anticipated that the Germans would intensify their activities through

³¹ Beekman H. Pool, *Polar Extremes: The World of Lincoln Ellsworth* (Fairbanks: University of Alaska Press, 2002), 224-233, quotation on 233. After his flight, Ellsworth told the press that, “he had claimed the inland area he had explored and which no man had seen before for his country, and that it is for governments and lawyers concerned with international affairs eventually to consider and rule upon the support and permanency of such a claim.” Keith Officer, Antarctic, NAA, A981/ANT 22.

³² Colin Summerhayes and Peter Beeching, “Hitler’s Antarctic Base: The Myth and the Reality,” *Polar Record* 43, no.224 (2007): 1-21; Bush, *Antarctica and International Law* 2, 2-3, 140, 149, 154, and Maria Pia Casarini, “Activities in Antarctica Before the Conclusion of the Antarctic Treaty,” in *International Law for Antarctica*, 2nd Ed., Francesco Francioni and Tullio Scovazzi eds. (The Hague: Kluwer Law, 1996), 663-64; Rose, *Explorer*, 407; D.T. Murphy, *German exploration of the Polar World: A History, 1870–1940* (Nebraska: University of Nebraska Press, 2002).

occupation and expand their efforts to the unclaimed Pacific sector that contained Marie Byrd Land and James W. Ellsworth Land. Fear that the Germans would establish bases in the Antarctic, or at the very least challenge the legal rights of the U.S. in the region, became a significant factor in American plans.³³

Germany's Antarctic intentions also played an important role in convincing the U.S. House of Representatives Committee on Appropriation, which had little interest in funding the project initially, to provide \$340,000 for the United States Antarctic Service Expedition at the end of June 1939.³⁴ The planners decided that they had enough funds to establish two bases. Despite the temptation to follow up Ellsworth's flight with a physical occupation, Boggs successfully argued against situating bases in the AAT citing the lowest temperatures and strongest winds on the continent, and a coastline so often beset by impenetrable ice that a ship would be unable to consistently reach a base situated there. Eventually, the expedition's planners and its commander, Richard Byrd, decided to situate the two bases in Graham Land and the eastern Ross Dependency. The bases would allow the explorers to venture into the unclaimed Pacific sector, which had been the scene of most American activity over the last decade. The expedition would utilize a 37-ton snow cruiser equipped with sleeping quarters, galley, scientific laboratory, and a plane carried on the roof. The expedition's planners hoped the cruiser would serve as a

³³ As one State Department report to Roosevelt stated, "There is strong reason to believe that we will have the Germans in the Antarctic ahead of us in the regions in which we are interested if we do not act quickly to forestall them." Quoted in Pool, *Polar Extremes*, 238. See also Jason Kendall Moore, "Maritime Rivalry, Political Intervention and the Race to Antarctica: U.S.-Chilean Relations, 1939-1949," *Journal of Latin American Studies* 33, no. 4 (2001): 720-721. Raymond H. Geist, Chargé d'Affaires, U.S. Embassy, Berlin to Secretary of State, 20 March 1939, NARA, RG 59, CDF 1930-39, Box 4521, File 800.014, Antarctic\159.

³⁴ On 2 May 1939 Congress agreed to provide \$10,000 in initial funding for the expedition. When Interior Department officials first made their presentations to the Committee on Appropriations, the politicians proved reluctant to support the plans. Even when the officials argued that the bases would "establish and strengthen the claims of the United States," the committee questioned whether the expedition was worth the cost. Fortunately, as historian David Day has stressed, the State Department used the German intention to build the foundation for an Antarctic claim, as well as fears that Japan might do the same, to convince the committee that it should invest in the Antarctic expedition. Although the committee rejected additional funding twice, eventually these arguments proved persuasive. Day, *Antarctica: A Biography*, 342-344. See OIR Report, No. 4296, Map Intelligence Division, Office of Intelligence Collection and Dissemination, State Department, History and Current Status of Claims in Antarctica, 3 October 1947, NARA, RG 59, CDF 1945-1949, Box 4074, File 800.014, Antarctic.

mobile base that could be situated at the South Pole and other locations where the Americans wanted to strengthen their legal position.³⁵

The American occupation plans aimed to give the U.S. the best legal rights throughout the parts of the Antarctic that most interested them, including the FID, the Ross Dependency and the unclaimed sector. While Roosevelt wanted to secure this territory, his Good Neighbor policy and fears of being labeled an imperialist ensured he would consult with and involve the American Republics before making any claim. Almost from the expedition's inception, Roosevelt insisted that the American Republics be invited to participate.³⁶ The President presented the USASE as an effort to keep European states from intruding in the Antarctic area resting in the western hemisphere.³⁷

Roosevelt pushed the State Department to think about a “new form of sovereignty” in which the U.S. claimed the “whole sector lying south of the Americas, on behalf of and in trust for, the American Republics as a whole.” Roosevelt had toyed with this idea before. Throughout his presidency, he consistently shied away from direct territorial acquisition in the western hemisphere and preferred Pan American trusteeships.³⁸ His experiences with the Canton and Enderbury condominium also underlined that alternative forms of sovereignty could work if they allowed America to effectively reach its goals. In the context of the Antarctic, the President suggested that the

³⁵ Department of State, Memorandum of Conversation, Antarctic Expeditions, 27 April 1939, NARA, RG 59, CDF 1930-39, Box 4521, File 800.014 Antarctic/227. With funding secured, an Executive Committee formed of officials from State, Treasury, Navy, and Interior to guide the operation. President Franklin D. Roosevelt to the Secretary of State, 13 July 1939, in *FRUS*, 1939, Vol. II, (Washington: Government Printing Office, 1956), 7. On the snow cruiser see Day, *Antarctica: A Biography*, 344-346.

³⁶ Upon becoming President, Roosevelt had committed to an internationalist approach to Latin America. The Good Neighbor policy centred on non-intervention and non-interference in the domestic affairs of Latin American states, but also sought greater general engagement. In the Antarctic expedition, Roosevelt thought that Latin American participation could take the form of personnel on the expedition, joint sponsorship of the bases, a limited internationalization of the region under the American republics, although he admitted that sharing sovereignty would create issues. Participation by other American Republics in United States project for settlement and scientific research in the Antarctic, 4 March 1939, NARA, RG 59, CDF 1930-39, Box 4520, File 800.014 Antarctic/156. On the Good Neighbor policy see Frederick D. Pike, *FDR's Good Neighbor Policy: Sixty Years of Generally Gentle Chaos* (Austin: University of Texas Press, 1995).

³⁷ Sumner Welles, Secretary of State, to American Diplomatic Officers, American Republics, 11 December 1939, NARA, RG 59, CDF 1930-39, Box 4521, File 800.014, Antarctic\321.

³⁸ In 1936, for example, Roosevelt suggested that the Galapagos be turned into a Pan American International Park with rules against militarization. Fears that Chile would sell Easter Island to Germany or Japan led Roosevelt to suggest in March 1939 that a “new form of sovereignty” be embraced, one taken up by the “American Republics as a whole.” Young, “Franklin D. Roosevelt and America's Islets,” 209-211.

U.S., “being the only Republic which has taken the initiative in exploring and possibly settling the area, would act not only in behalf of its own exclusive sovereignty but would include all the other Republics.” If the sector proved valuable in the future, the President suggested a joint governing body could manage the region.³⁹

Assistant legal adviser William Roy Vallance, who had studied polar claims since the 1920s, investigated how Roosevelt’s suggestion could be implemented. The obvious model was a condominium, in which sovereignty could be shared between the states. The lessons from practical experience were, however, mixed. Although the Canton and Enderbury condominium had worked well for the Americans, the New Hebrides condominium – an island group in the South Pacific governed under an Anglo-French administration – was problematic. Vallance explained that the two separate government systems only came together in a joint court, and the condominium suffered from excessive machinery – two sets of laws, two legal currencies, two groups of postage stamps – which created a confusing legal and political situation. An even more confusing situation could evolve in the Antarctic if a joint governing body involved all of the American Republics. Vallance remembered the failed international condominium established for the Samoan Islands consisting of the U.S., Britain and Germany in 1889. The U.S. found the condominium so “unsatisfactory” after ten years it simply split the islands with Germany. Of one thing Vallance was absolutely certain. The President had to be more careful with his language and avoid using the word “sector” to describe any claim the U.S. might make, lest it be taken by the international community as “acceptance and recognition of certain claims of Great Britain and some of its Dominions, including Canada.”⁴⁰

As planning for the expedition progressed, the Americans placed questions of claims and sovereignty on the backburner. Roosevelt stressed that “any question of ultimate or final sovereignty as between individual members of the twenty-one American

³⁹ Quoted in Quigg, *A Pole Apart*, 132. See also Moore, “Tethered to an iceberg,” 125-134.

⁴⁰ W.R. Vallance, The Legal Adviser, Department of State, 21 August 1939, NARA, RG 59, CDF 1930-39, Box 4521, File 800.014, Antarctic\237. Other ideas included a condominium of only Chile, Argentina and the U.S., with the understanding that they would hold the area in trust for the other American. RA- Mr. Briggs, Division of the American Republics, Department of State, 23 August 1939, NARA, RG 59, CDF 1930-39, Box 4521, File 800.014, Antarctic\237 ½.

Republics is, of course, premature. Good faith and common sense on the line of good neighbor, continental ideals will work it out.” Officers in the American Republics explained to their hosts that sovereignty questions would be sorted out “along mutually satisfactory lines.” They even explained that any vital minerals found by the expedition would be used for the mutual benefit of all.⁴¹ First, the USASE had to occupy the Antarctic and prove its value.

As Europe descended into war in September 1939, the Americans continued to prepare for their Antarctic mission. On 25 November, Byrd received his official orders direct from President Roosevelt. He was to establish an East Base near Charcot Island or on the shores of Marguerite Bay, a large bay on the west side of the Antarctic Peninsula, and a West Base on the east shore of the Ross Sea or near Little America. A primary objective was the delineation of the continental coastline between the meridians 72° W and 148° W, and further exploration of James W. Ellsworth Land and Marie Byrd Land. Roosevelt explained that “members of the Service may take any appropriate steps such as dropping written claims from airplanes, depositing such writings in cairns, et cetera, which might assist in supporting a sovereignty claim by the United States Government.” The explorers could not discuss the claims publicly, however, without the approval of the Secretary of State.⁴²

As the USASE departed for the Antarctic, Byrd announced to the world that, “the idea would be to continue settlement on the ice for some years, possibly five or six. The present group would be relieved by others after thirteen months.”⁴³ A total of 125 men left the U.S. on the USS *Bear* and the USMS *North Star*. Fifty-nine of those men planned to overwinter on the continent. In January 1940, the expedition arrived in the Bay of Whales in the Ross Sea, established West Base and named the settlement Little America

⁴¹ Sumner Welles, Secretary of State, to American Diplomatic Officers, American Republics, 11 December 1939, NARA, RG 59, CDF 1930-39, Box 4521, File 800.014, Antarctic, 321.

⁴² The secondary objective was the delineation of the unknown west coast of the Weddell Sea, and the exploration of its hinterland. President Roosevelt to the Richard Byrd, Commanding Officer of the United States Antarctic Service, 25 November 1939, in *FRUS*, 1939, Vol. II, (Washington: Government Printing Office, 1956), 11-14. See also Rose, *Explorer*, 423.

⁴³ Memorandum to the Secretary, Commonwealth of Australia, Department of External Affairs, from the British Embassy, Washington, 15 November 1939, NAA, A981/ANT 54 PART 2; and Byrd Party to Survey Vast Antarctic Domain, *New York Times*, 19 November 1939, NAA, A981, ANT 54 PART 2.

III. They brought along the massive snow cruiser, but found the machine utterly useless on the ice and snow. In February, the two ships departed for the Antarctic Peninsula, surveying the South Pacific coastline of the Antarctic (the coast of the unclaimed sector) for the first time and accomplishing one of the mission's main goals. In March 1940, Byrd established a post on an island in Marguerite Bay, near where John Rymill had stayed during his Graham Land Expedition (1934-1937). The USASE named the island Stonington, after the home-port of Nathaniel Palmer, whom the Americans considered the original discoverer of the Antarctic Peninsula. The parties successfully overwintered in the bases, flew and sledged over as much territory as possible, and filled in many blank spaces on the map. The expedition performed a lot of survey work and made scientific observations in multiple disciplines ranging from meteorology to cosmic ray studies. During their explorations, the Americans filled out eighteen different claim forms, marking where, when and how they had claimed territory for the U.S.⁴⁴

Despite the USASE's surveying and scientific accomplishments, by November 1940 the dream of permanent occupation of the Antarctic was already failing. Mineral deposits remained undiscovered and, with the war spreading in Europe, Congress refused further funding, considering the insertion of a new cadre of occupants into the Antarctic bases neither wise nor a priority.⁴⁵ Even Roosevelt's argument about the need to secure the Antarctic for the purposes of western hemispheric defence fell on deaf ears. In February and March 1941, the occupants of East Base and West Base left the Antarctic.

⁴⁴ Rose, *Explorer*, 408-419; Day, *Antarctica: A Biography*, 353-359. See also, Richard Black, "Geographical Operations from East Base, United States Antarctic Service Expedition, 1939-1941," *Proceedings of the American Philosophical Society* 89, no. 1 (1945): 4-12; A.J. English, "Preliminary Account of the United States Antarctic Expedition, 1939-1941," *Geographical Review* 31, no. 3 (1941): 466-478. For the technical planning, organization and execution of the files in NARA, RG 126.8, Office of Territories, Records of the United States Antarctic Service

⁴⁵ Roosevelt, however, also used the war to justify to continued expenditure. "I consider it of great importance to the continental defense, to keep for the twenty-one American Republics, at least one more year of occupancy of that part of the Antarctic continent south of America. It seems to me vitally important to the twenty-one American Republics to keep a clearer title than that of any other non-American country." Roosevelt seemed to think that Antarctic activity should be kept up due to diplomatic swapping that may have followed war in Europe. Franklin D. Roosevelt to Jed Johnson, House of Representatives, 27 May 1940, NARA, RG 59, CDF 1940-44, Box 3116, File 800.014, Antarctic/498; Franklin D. Roosevelt to Edward Taylor, Chairman, Committee on Appropriations, House of Representatives, 27 May 1940, NARA, RG 59, CDF 1940-44, Box 3116, File 800.014, Antarctic/498.

Roosevelt, retained his interest in the south polar region, and considered the withdrawal more a hiatus than an ending. Richard Byrd said the U.S. would return to the continent, and left two airplanes, the snow cruiser, food and supplies at the bases as proof. The State Department filed the claims forms and converted the aerial photographs into maps, complete with American names, to provide support to any future claim. The State and Interior Departments collected the other research completed by the expedition to help show that the U.S. possessed the greatest knowledge of the Antarctic. The Americans believed these would also bolster their legal rights and, throughout the war, continued to study the legal side of an Antarctic claim, in preparation for whatever action Washington decided to take after war's end.⁴⁶

The USASE had a profound and lasting impact on the legal landscape of the polar regions and the history of the Antarctic more generally. Roosevelt's emphasis on occupation recommitted the State Department to the Hughes Doctrine. Although the department would flirt with the doctrine of constructive occupation in the future, it never moved past Roosevelt's demand for "another step." At the same time, the President's suggestion that a "new form of sovereignty" be created for the Antarctic had a ripple effect on American polar policy. The idea tapped into the suggestions for an alternative and internationalist approach to polar sovereignty that had circulated amongst the American legal community for decades. In the wake of the USASE, the Women's International League for Peace and Freedom (WILPF) picked up the call for the U.S. to take the lead on internationalizing the Antarctic. The organization's President, Gertrude Bussey wrote to Secretary of State Hull, "In this crucial time when our hopes are pinned on elimination of all the old imperialist land grabbing and the general acceptance of a new ethic and a new practice in international relations, we should deplore any policy in the Antarctic which looked toward further acquisition of territory by the United States." Emily Greene Balch, who would win a Nobel Peace Prize in 1946 for her work with the WILPF, wrote in the *New York Times* that the U.S. should forgo its own claim in the Antarctic and advocate "international administration" of "polar regions" by "a

⁴⁶ S.A. Saucerman, Office of the Geographer, Department of State, 28 July 1942, NARA, RG 59, CDF 1940-1944, Box 3117, File 800.014, Antarctic/651; and Study of Antarctica in the Department, 25 July 1944, NARA, RG 59, CDF 1940-1944, Box 3117, File 800.014, Antarctic/7-2544.

consortium of all, a world trust.”⁴⁷ In the postwar years, the idea of an Antarctic condominium and full internationalization of the region gained greater traction in Washington. The American quest for a “new form of sovereignty” would eventually lead to the Antarctic Treaty.

7.3 “Leave the Rest of Us Alone”

The British, Australians and New Zealanders watched the official American interest in the Antarctic intensify throughout 1939. Hubert Wilkins served as an advisor on Ellsworth’s mission to the American Highland and informed Canberra about the explorer’s secret instructions from the State Department while en route to the Antarctic. Wilkins reported that if Ellsworth made his claim and it was “taken notice of in official circles” the action would “do little more than bring about a definite decision as to the legality of claims based on the ‘Sector’ principle.”⁴⁸ Canberra gave Wilkins secret instructions to explore and report on the AAT as a representative of the Australian government. Australia’s External Affairs Department hoped Wilkins would “demonstrate that it had not been content merely to make a formal claim to territory in the Antarctic, but has taken action to enhance the probability of international recognition of that claim by the exercise of additional acts of sovereignty over the territory.”⁴⁹ As Ellsworth conducted his flight and made his claim, Hubert Wilkins landed on small islands off the coast and on the mainland at the western end of the Vestfold Hills three times between 8 and 11 January 1939, flew the Australian flag and left records of his visits.⁵⁰

⁴⁷ Gertrude C. Bussey, National President, Women’s International League for Peace and Freedom to Secretary of State, 5 December 1939, NARA, RG 59, CDF 1930-39, Box 4521, File 800.014, Antarctic\315; Mercedes Moritz Randall, *Improper Bostonian: Emily Greene Balch* (New York: Twayne Publishers, 1964), 375-377; and Rip Bulkeley, “Polar Internationalism, Diplomacy and the International Geophysical Year,” in *National and Trans-National Agendas in Antarctic Research from the 1950s and Beyond. Proceedings of the 3rd Workshop of the SCAR Action Group on the History of Antarctic Research*, eds. Cornelia Lüdecke, Lynn Tipton-Everett and Lynn Lay (Columbus: Byrd Polar Research Center, 2012), 29.

⁴⁸ Sir Hubert Wilkins to the Minister of External Affairs, 8 February 1939, NAA, A981, ANT 22, Antarctic Ellsworth's Flights Enderbyland - Ross Sea.

⁴⁹ W.R. Hodgson, Secretary, External Affairs, to Alfred Stirling, Australian Counselor in London, 18 November 1938 and W.R. Hodgson, Department of External Affairs to Sir Hubert Wilkins, 12 September 1938, NAA, A981, ANT 22, Antarctic Ellsworth's Flights Enderbyland - Ross Sea.

⁵⁰ See Simon Nasht, *The Last Explorer: Hubert Wilkins, Hero of the Great Age of Polar Exploration* (New York: Shyhorse Publishing, 2005), 269-272. Sir Hubert Wilkins to the Minister of External Affairs, 8 February 1939, NAA, A981/ANT 22.

The Australians concluded that the flag waving performed by Hubert Wilkins, reliance on the sector principle and unenforced administrative acts from Canberra would not be enough to forestall American interest in the region or support Australia's claim. The Ellsworth affair reinforced Canberra's desire for an Australian Antarctic expedition.⁵¹ Since the Imperial Conference of 1937, the Australians had worked on such a venture, only to have their plans thwarted by the lack of funds and a suitable ship. Now, Wilkins pushed his government to purchase Ellsworth's polar equipment, including his ship, the *Wyatt Earp*, and use it to establish permanent weather stations in the AAT.⁵² Minister of External Affairs William Hughes agreed that ownership of the *Earp* would help to address the problem that "Australia has, in the eyes of the outside world, done very little to keep alive its claim to the Australian Antarctic Territory."⁵³ The Australians purchased the *Earp* in February 1939 and started to plan for the establishment of meteorological bases in the AAT.

Keith Officer, Australia's counselor at the British Embassy in Washington, asked the State Department about U.S. Antarctic intentions on several occasions.⁵⁴ During a meeting in March, Chief of the State Department's Western Europe Division, Jay Pierrepoint Moffat, reported that Officer started in a "jocular tone, 'Have you been claiming any more territory lately?'" Officer, now "seriously speaking," explained that

⁵¹ F. Stewart, for Acting Prime Minister to the Secretary of State for Dominion Affairs, 23 April 1941, NAA, CA 18/A461/P413/2, File Antarctica - Sovereignty of Antarctic Territory.

⁵² Wilkins wanted a summer cruise of Wyatt Earp, a base on Macquarie Island, a weather station at the western end of the AAT and another base built at Cape Freshfield, already ready by 1941. W.M. Hughes, Department of External Affairs, Offer by Ellsworth to Sell His Vessel 'Wyatt Earp' to the Commonwealth Government, 27 January 1939, NAA, A981/ANT 22; and Telegram from the Australian Government Trade Commissioner, New York, 20 July 1939, NAA: A981, ANT 4 Part 10. See also G.G. Gullett, Minister of External Affairs. Suggested Visit by Sir Hubert Wilkins, 3 August 1939, NAA, A6006, 1939/08/03; and Hugh Cumming, Jr., European Division, 19 July 1939, NARA, RG 59, CDF 1930-39, Box 4521, File 800.014, Antarctic\201.

See Nasht, *The Last Explorer*, 272, and Memorandum of Conversation between L.R. Macgregor, Australian Government Trade Commissioner in the U.S., Hubert Wilkins, and Hugh Cumming, Jr., European Division, 19 July 1939, NARA, RG 59, CDF 1930-39, Box 4521, File 800.014, Antarctic\201

⁵³ W.M. Hughes, Minister for External Affairs, Antarctic: Utilization of Wyatt Earp and Employment of Sir Hubert Wilkins, NAA, A981/ANT 54 Part 2, [Antarctic]. USA Claims Part II.

⁵⁴ Officer's first discussion with Pierrepoint Moffat revealed nothing, with the official simply repeating America's standard reservation of rights in the region. Keith Officer to Secretary, Department of External Affairs, 31 January 1939, NAA, A981/ANT 22. The Dominions Office tried to convince the Australians to take the same route that London had during Byrd's previous expeditions to the Ross Dependency and send an offer of assistance, which would be tantamount to "telling the world" of Australia's claims. See also Keith Officer, British Embassy, Washington, D.C., Antarctic, 12 January 1939, NAA, A981/ANT 22.

his government “hoped very much that we would take no affirmative action in supporting Ellsworth’s claim, but leave matters in their present stage.” In response, Moffat simply repeated the standard American reply about the reservation of its rights in the Antarctic.⁵⁵

Shortly after, Australian and British officials heard about the official American expedition to the Antarctic. Early press reports indicated that the Americans would support Ellsworth’s claim through an occupation party stationed in the AAT.⁵⁶ The British noted that State Department officials were less than forthcoming about their plans and the exact location of their bases.⁵⁷ The British Embassy sent warnings about the snow cruiser, which they feared would give the Americans a mobile base capable of providing occupation across the continent, making every historic expedition to the Antarctic seem small and insignificant. Mallet further reported that the Americans would establish three permanent bases in the three territories claimed by the British Empire, with the sole purpose of placing their existing claims to these areas “beyond any question of international law.”⁵⁸

On 7 May, Keith Officer told Pierrepont Moffat “he was much disturbed” by the news and asked if the U.S. intended to make a formal Antarctic claim. Officer then pleaded that “whatever you do, please let us know in advance so there may be no ‘surprises,’ that is the thing that would be most resented in Australia, New Zealand and elsewhere.” Officer then argued that the Americans should direct their attention to the unclaimed sector where Byrd had done most of his work. “Why don’t you claim that,” demanded Officer, “and leave the rest of us alone?”⁵⁹

⁵⁵ Officer also jokingly told Moffat that he hoped Wilkins was not “tried for high treason” for his participation in Ellsworth’s expedition. Memorandum of Conversation between Keith Officer, Australian Counselor at the British Embassy and Pierrepont Moffat, Chief, Division of European Affairs, 3 March 1939, NARA, RG 59, CDF 1930-39, Box 4521, File 800.014, Antarctic\158.

⁵⁶ Telegram from Lt. Colonel Hodgson, Canberra to the Australian Counsellor, Washington, 12 July 1939, NAA, A981/ANT 4 Part 10, Antarctic, Control of.

⁵⁷ R.C. Lindsay, counselor at the British Embassy, sensed that the Americans believed they had inchoate rights in the south polar region that they could perfect into territorial title through occupation. R.C. Lindsay, British Embassy Washington to the Viscount Halifax, 11 July 1939 and Lindsay to the Viscount Halifax, 18 July 1939, NAA, A981/ANT 54 PART 2. See also OCL Bertram, University of Cambridge to R.A. Wiseman, Dominions Office, 26 April 1940, National Archives (NA), FO 371/24168.

⁵⁸ V.A.L. Mallet, British Embassy, Washington D.C. to the Viscount Halifax, 11 July 1939, NAA, A981, ANT 54 Part 2, [Antarctic]. USA Claims Part II.

⁵⁹ Department of State, Memorandum of Conversation, Antarctic Expeditions, 7 May 1939, 27 April 1939, NARA, RG 59, CDF 1930-39, Box 4521, File 800.014 Antarctic/228; and Keith Officer, British Embassy,

The British and Australians had little chance to respond to the American expedition, however, with another European war looming on the horizon. London did not have the time or resources to counter the American challenge in the Antarctic with an expedition of its own. The south polar region fell to the bottom of a very long list of British foreign policy priorities. The Polar Committee was quietly suspended. The only concrete measure came in the form of letters dispatched by London and Wellington offering assistance to the Americans if they intended to operate in the Ross Dependency or the FID.⁶⁰ Hubert Wilkins continued to push Canberra to establish a meteorological post in the AAT, but by the summer of 1939 those plans were dead in the water. As much as the government wanted to bolster Australia's territorial claim in the Antarctic, defence interests were paramount in Canberra. Instead of sending the *Wyatt Earp* to the AAT, the government loaned it to the Defence Department to haul men and munitions.⁶¹

After September 1939, British, Australian and New Zealander officials preoccupied with the war effort could only watch as the wave of American activity approached the continent. As if to reinforce why Washington dispatched the expedition, in November 1939 the Americans issued the 1924 edition of *Foreign Relations of the United States*, which included Secretary Hughes' response to the Norwegian government that the "formal taking of possession" had "no significance" beyond heralding the "advent of the settler." The British had known about the Hughes Doctrine for years, but they still took note of this "published view" of the U.S. government.⁶² After referencing the document, Keith Officer informed Canberra that the USASE was an attempt to fulfill the requirements of the Hughes Doctrine.⁶³

Washington on Meeting with Pierrepoint Moffat, 8 May 1939, NAA, A981/ANT 54 PART 2. As the summer of 1939 wore on, the Australians only grew more convinced that the Americans intended to claim a part of the AAT. Telegram from Lt. Colonel Hodgson, Canberra to the Australian Counsellor, Washington, 12 July 1939, NAA, A981, ANT 4 Part 10, Antarctic, Control of.

⁶⁰ The Americans responded that they required no assistance. Templeton, *A Wise Adventure*, 74-76.

⁶¹ Telegram from the Australian Government Trade Commissioner, New York, 20 July 1939, NAA, A981/ANT 4 Part 10, Antarctic, Control of; and Minister of External Affairs to Hubert Wilkins, 3 August 1939, NAA, A981/ANT 54 PART 2.

⁶² Territorial Claims in the Antarctic, Research Department, Foreign Office, pg. 94, 1 May 1945, NAA, A4311, 365/8.

⁶³ Memorandum to the Secretary, Commonwealth of Australia, Department of External Affairs, from the British Embassy, Washington, 15 November 1939, NAA, A981/ANT 54 PART 2; and Byrd Party to Survey Vast Antarctic Domain, *New York Times*, 19 November 1939, NAA, A981, ANT 54 PART 2

When the USASE established its bases in the FID and the Ross Dependency, instead of the AAT, the Australians breathed a sigh of relief, while the Colonial Office lamented “another case of American aggression.”⁶⁴ In London, polar explorer and scientist Colin Bertram warned that the establishment of East Base at Marguerite Bay, just a few miles from the old British Graham Land Expedition base, was a deliberate challenge to Britain’s priority of discovery to the Antarctic Peninsula, and would now cement American sovereignty over the FID by carrying out an occupation “over a number of years.”⁶⁵ A war of words erupted between British and American academics as the latter attempted to justify American interest and territorial rights in the FID by proving that Nathaniel Palmer had been the first to discover the Antarctic Peninsula.⁶⁶ The official British response to the American intrusion into the FID was far more subdued. When news reached London that the Americans had raised the stars and stripes at East Base in the FID, the British told the State Department that they hoped the action “had no political significance.” The British followed their weak protest up by insisting that they had no wish to discuss the matter further. Wartime exigencies demanded a

⁶⁴ The Colonial Office called it another case of American “aggression” and suggested objecting to the flag raising on British territory. Colonial Office Note, 19 November 1940, NA, CO 78/213/1.

⁶⁵ OCL Bertram, University of Cambridge to R.A. Wiseman, Dominions Office, 26 April 1940, NA, FO 371/24168.

⁶⁶As the USASE prepared for the Antarctic, the State Department continued to promote research into the whaling logbooks that it hoped would prove the priority of American discovery of the Antarctic continent. As historian David Day has maintained, this led to intense academic fighting. Together with geographer Professor William Hobbs, Lawrence Martin, now Library of Congress Cartographer, went to international geographic conferences and meetings of the American Philosophical Society, and wrote articles, in 1939 and 1940 to argue that Nathaniel Palmer’s logbook provided definitive proof of American first discovery of the Antarctic continent and to discredit the efforts of British explorer, Edward Bransfield. Although Bransfield’s charts indicated that he sighted the Antarctic coastline in January 1820, Martin and Hobbs argued that this was only the result of a concerted campaign by British officials and writers. When Arthur Hinks, a British geographer who worked closely with the Admiralty and Foreign Office rose to Bransfield’s defence, the debate intensified. Hinks, who stressed the lack of clarity in the historical record, admitted that Palmer had spotted the Antarctic coast on 18 November 1820, but Bransfield had done so on 30 January 1820. Eventually the debate expanded to include other academics, but the results proved inconclusive, and remain so to this day. Day, *Antarctica: A Biography*, 367-368. See William Hobbs, “The Discoveries of Antarctica Within the American Sector, as Revealed by Maps and Documents,” *Transactions of the American Philosophical Society* 32, no. 1 (1940): 214-218; R.N. Rudmose Brown, “Antarctic History: A Reply to Professor W.H. Hobbs,” *Scottish Geographical Magazine* 55, no. 3 (1939): 170-173; Arthur Hinks, “Review: On Some Misrepresentations of Antarctic History,” *Geographical Journal* 94, no. 4 (1939): 309-330; Arthur Hinks, “Antarctica Rediscovered: A Reply,” *Geographical Review* 31 (1941): 491-498. Lawrence Martin, “Antarctica Discovered by a Connecticut Yankee, Captain Nathaniel Brown Parker,” *Geographical Review* 30, no. 4 (1940): 529-552.

gentle response.⁶⁷ In March 1941, shortly before the British issued their protest, military cooperation between the two countries tightened with the landmark Lend-Lease agreement, which formalized official American aid to Britain. The Colonial Office may have privately condemned the “aggression” of the U.S. in the Antarctic, but all British officials realized how important American support was to the war effort.

British experts understood that the USASE had changed the legal and political context of the Antarctic. While the American withdrawal in early 1941 provided some relief in London, the Colonial Office wondered whether Washington considered “Byrd’s ‘semi-permanent’ expedition sufficiently near to settlement,” satisfying the Hughes Doctrine and justification for a sovereignty claim.⁶⁸ Colin Bertram warned that, “despite the war it would be a short sighted policy for this country to neglect too completely its Antarctic possessions, in particular the Graham Land sector, which undoubtedly has the greatest potential value.”⁶⁹ The British sent ships and men to parts of the FID in 1941, but it was for strategic purposes and not to explicitly protect sovereignty. German surface ships and U-boats operating in the South Atlantic posed a threat to the pivotal supply chain bringing food supplies from Argentina, as well as the free passage around Cape Horn that connected Britain to New Zealand. The British erected coastal defence batteries in the Falkland Islands and South Georgia and the armed merchant cruiser HMS *Queen of Bermuda* destroyed old oil and coal stocks in the South Shetlands to prevent them from falling into German hands in March 1941. Later that year, HMS *Neptune* patrolled the islands east of South Georgia looking for evidence of German

⁶⁷ Memorandum of Conversation between Hoyer Miller and Hugh Cumming, 5 August 1941, NARA, RG 59, CDF 1940-1944, Box 3116, File 800.014 Antarctic/637. Andrew B. Acheson, head of the Pacific and Mediterranean Department at the Colonial Office, stressed that “the hoisting of a national flag may in certain circumstances be held to confer rights over the territory on which the flag is hoisted.” An official photo the Americans released to the press noted, “True to old exploring traditions, a small island in Marguerite Bay is established as base by Admiral Byrd and his associates by hoisting an American flag over rock-strewn coastline.” The Foreign office responded that, “it was quite natural for Admiral Byrd to hoist his own national flag over his camp...[and was] not convinced that this action is liable...to give rise to misunderstandings as to the British sovereignty of the territory concerned.” A.B. Acheson to the Under-Secretary of State for Foreign Affairs, 28 December 1940, NA, FO 371/24168; Colonial Office Note, 19 November 1940; and Foreign Office to Colonial Office, 14 December 1940, NA, CO 78/213/1.

⁶⁸ A.B. Acheson to the Under-Secretary of State for Foreign Affairs, 28 December 1940, NA, FO 371/24168.

⁶⁹ John R. Dudeney and David Walton, “From Scotia to ‘Operation Tabarin’: developing British policy for Antarctica,” *Polar Record* 48 (247 (2002): 347-348.

activity.⁷⁰ Legally, these actions did little to counter the occupation efforts of the U.S. in the FID. With the British Empire fighting for its life against Hitler's Germany, Antarctic sovereignty would have to wait. In the meantime, another threat to Britain's sovereignty in the FID emerged.

7.4 New Sectors Claims: Chile, Argentina and the Antarctic

The USASE and the outbreak of the Second World War opened the door for an Argentinean and Chilean challenge to Britain's FID claim. Historian Adrian Howkins has ably charted the renewed interest of the Argentinean and Chilean governments in the question of Antarctic sovereignty. Argentina's interest in the south polar region grew steadily since the 1920s, but an invitation from Norway to attend an international polar conference in Bergen sparked greater awareness of Antarctic affairs for both the Argentinean and Chilean governments. The defence of Argentina's Antarctic interests provided President Roberto Ortiz with a mechanism to appease growing nationalist sentiment in the country and to promote the traditional "territorial nationalism" of the Argentine elite who dominated his government. In Chile, the government worried that Argentinean sovereignty in the Antarctic would pose a direct geopolitical challenge to national security and these concerns propelled them to take pre-emptive action.⁷¹

Distrustful of Roosevelt's assurances of a mutually satisfactory agreement on sovereignty issues, both countries believed the Americans might unilaterally claim territory.

Accordingly, Argentina and Chile established Antarctic Commissions to study their

⁷⁰ Adrian John Howkins, "Frozen Empires: A History of the Antarctic Sovereignty Dispute Between Britain, Argentina, and Chile, 1939-1959" (Ph.D. dissertation: University of Texas at Austin, 2008), 51; Dudeney and Walton, "From *Scotia* to 'Operation Tabarin,'" 347-48. Bush, *Antarctica and International Law* 2, 2-3, 140, 149, 154, and Casarini, "Activities in Antarctica," 663-64. On German raider activities in the southern ocean in 1940/41, see J.D.M. Blyth, "German Raiders in the Antarctic during the Second World War," *Polar Record* 6, no. 43 (1952): 399-403. When Japanese advances in the Pacific in late 1941 and 1942 amplified fears about South Atlantic security, Winston Churchill ordered that British troops be sent to the Falklands to deter the Japanese, given that the loss of the islands "would be a shock to the whole Empire." See Galen R. Perras, "Anglo-Canadian Imperial Relations: The Case of the Garrisoning of the Falkland Islands in 1942," *War & Society* 14 (1996): 73-97.

⁷¹ Howkins, "Frozen Empires," 41, 46-49, 55. The Argentines also thought it important that the Americans asked them to provide the weather data from the Laurie Island post, rather than directing their queries to the British, who officially claimed the islands. Sumner Welles to Government of Argentina, 25 July 1939, Document AR25071939, in Bush, *Antarctica and International Law* 1, 596-597. For background on the Chilean interest in the Antarctic, see Consuelo León Woppke, "The Formation and Context of the Chilean Antarctic Mentality from the Colonial Era through the IGY," in *Legacies and Change in Polar Sciences*, eds. Jessica M. Shadian and Monica Tennberg (Farnham: Ashgate, 2009), 145-170.

sovereign rights in the south polar region.⁷²

With Britain's attention fixated on stopping German advances, Argentina and Chile – both officially neutral until 1945 – saw an opportunity “to pursue their reawakened territorial ambitions in Antarctica with relative impunity.” In November 1940 – to the annoyance of Roosevelt and the State Department – Chile announced they had existing sovereign rights over “all lands, islands, reefs of rocks, glaciers, already known, or to be discovered, and their respective territorial waters, in the sector between longitudes 53°W and 90°W,” a jurisdiction that clearly over-lapped Britain's FID.⁷³ At a meeting of the Argentine and Chilean Antarctic Commissions, disagreements arose concerning the boundaries between their countries on the southern continent, yet the experts concurred that the Antarctic Peninsula belonged to South America and not a distant colonizer. Although Buenos Aires did not immediately advance an official declaration akin to Chile's, it informed Britain of its dominion over an Antarctic “zone” which it considered an “inalienable part” of Argentina's “national territory.” Argentina proposed a conference to discuss the legal and political status of the south polar region – an idea raised multiple times during and after the war.⁷⁴

The Argentineans established a post office at their Laurie Island meteorological station in late 1941 and sent the naval ship *Primero de Mayo* to visit islands and plant

⁷² The decree establishing the Argentine committee was poorly worded. While it discussed the special interest Argentina had in the region and how “closely connected” the Antarctic lands were to Argentina, the decree did not mention pre-existing legal rights. When the press asked if the new committee had been created to lay out an Argentina's claim to the Antarctic, the Argentinean government said that it had no designs against friendly countries and “only contemplated undeniable Argentine interests in the Antarctic regions in a spirit of permanent collaboration.” Decree No. 35,821, Establishing a Committee to Report Upon Antarctic Matters, 15 July 1939, Document AR15071939, in Bush, *Antarctica and International Law* 1, 594-596 and Argentine Press Statement, 28 July 1939, Document AR28071939, in Bush, *Antarctica and International Law* 1, 597.

⁷³ Howkins, “Frozen Empires,” 42. Decree No. 1747 Declaring the Limits of the Chilean Antarctic Territory, 6 November 1940, Document CH06111940A, in Bush, *Antarctica and International Law* 2, 310-311. When it heard about the Chilean claim, the State Department argued that the U.S. “regards the Antarctic regions as regions which should be developed for the benefit of all of the American peoples and not for the exclusive benefit of any one of them.” Undersecretary of State to Duggan, 12 November 1940, NARA, RG 59, CDF 1940-1944, Box 3116, File 800.014 Antarctic/569.

⁷⁴ Ministry of Foreign Affairs to British Embassy, Buenos Aires, 11 September 1940, Document AR11091940, cited in Bush, *Antarctica and International Law* 1, 605-606; Argentine Foreign Minister to Chilean Ambassador, 12 November 1940, Document AR12111940, in Bush, *Antarctica and International Law* 1, 606; Norman Armour, Embassy of the United States, Buenos Aires, to Secretary of State, 15 November 1940, NARA, RG 59, CDF 1940-44, Box 3116, File 800.014, Antarctic/556.

flags as ceremonies of possession the following year. The ship visited Deception Island and erected an automatic lighthouse at Dallmann Bay, between Brabant Island and Anvers Island. In 1942, the Argentineans started to insist they had “sovereign rights over all Antarctic lands and dependencies south of 60 degrees latitude South and between meridians 25 degrees and 68 degrees longitude West.”⁷⁵ The *Primero de Mayo* went south again in 1943 and performed acts of possession at Marguerite Bay, Deception Island and Port Lockroy, on the northwestern shore of Wiencke Island.⁷⁶

During the war, officials and academic experts in Chile and Argentina crafted the legal foundations to support the territorial ambitions of their countries in the Antarctic. Legal scholar Shirley Scott has observed that the Chileans and Argentineans were not “playing the same game” as their European and North American counterparts. Both countries appealed to the principle of *uti possidetis juris*.⁷⁷ The Latin American Republics first utilized the principle in 1810 to establish that their boundaries would be the frontiers of the Spanish provinces they succeeded. The new states used the doctrine to prevent territorial squabbles and avoid additional attempts at European colonization. The doctrine also reflected the historic efforts by many Latin American international lawyers to assert a “separate, American international law. In its strongest expression, this particular law would rank equal to, and in cases of conflict, trump general or European international

⁷⁵ In 1946, the National Antarctic Commission set new limits for the Argentine Antarctica between the Meridian 25° and 74° West.

⁷⁶ As Adrian Howkins had explained in his excellent study of the dispute between Britain, Argentina and Chile over the Antarctic, he noted that the South Americans considered region an “integral part” of their national territories, so the British claims represented, “a claim to colonial annexation of their territory.” Howkins, “Frozen Empires,” 27, 42-74. On Argentina’s moves towards asserting sovereignty in Antarctica, see also Bush, *Antarctica and International Law* 1, 579-87, 594-5, 599-600, and Bush, *Antarctica and International Law* 2, 310-11, 323-24. On Chile’s assertion of rights see Moore, “Maritime Rivalry, Political Intervention and the Race to Antarctica,” 722-723.

⁷⁷ For an overview of the doctrine of *uti possidetis*, see Suzanne Lalonde, *Determining Boundaries in a Conflicted World: The Role of Uti Possidetis* (Montreal and Kingston: McGill-Queen’s University Press, 2002). “To be sure there were many regions that had not been occupied by the Spanish and many regions that were unexplored or uninhabited by uncivilized natives,” explained the Swiss Federal Council during its arbitration of the boundary questions between Columbia and Venezuela explained in 1922. “But these sections were regarded as belonging in law to the respective republics that had succeeded the Spanish provinces to which these lands were connected by virtue of old royal decrees of the Spanish mother country.” Although these frontier may not have been effectively occupied in fact, they were occupied in law, ruled the arbitration. Arbitral Award of the Swiss Federal Council on Various Boundary Questions Pending Between Columbia and Venezuela, 24 March 1922, Document CH24031922 in Bush, *Antarctica and International Law* 2, 306.

law.”⁷⁸

In the Antarctic context, Chile and Argentina argued that Spain had claimed title to all territory discovered and undiscovered west of a line extending “from the Arctic pole to the Antarctic pole” as specified by the *Bull Inter Caetera* (1493) and revised by the Treaty of Tordesillas (1494). Since at least the sixteenth century, Spanish monarchs maintained that the boundary of their territory in South America extended to the unknown southern continent.⁷⁹ As a result, both states insisted that they had no need to claim what had belonged to them for centuries. While the British and Americans sought to establish sovereign rights in the region, in Chile and Argentina’s opinion, they only had to delimit an acceptable Antarctic border between one another – something the Chileans first proposed in 1907.⁸⁰ Argentina and Chile continued to use *uti possidetis juris* to justify their territorial ambitions in the Antarctic, but in response to challenges

⁷⁸ Jorge L. Esquirol, “Latin America,” in *The Oxford Handbook of the History of International Law*, eds. Bardo Fassbender and Anne Peters (Oxford: Oxford University Press, 2012), 562. Arnulf Becker Lorca argues that discussions about a distinctive international law for the region lasted from the 1880s to the 1950s. Arnulf Becker Lorca, “International Law in Latin America or Latin American International Law?: Rise, Fall and Retrieval of a Tradition of Legal Thinking and Political Imagination,” *Harvard International Law Journal* 47, no. 1 (2006): 283-305. See also Umut Özsu, “Agency, Universality and the Politics of International Legal History,” *Harvard International Law Journal* 52 (2010): 58-72. Alejandro Alvarez, “Latin America and International Law,” *The American Journal of International Law* 3, no. 2 (1909): 269-353.

⁷⁹ Shirley Scott, “Ingenious and Innocuous? Article IV of the Antarctic Treaty as Imperialism,” *The Polar Journal* 1, no. 1 (2011): 51-62. Chile argued that the Chileans continued to maintain this boundary after independence. It stressed the post-independence a letter written by Bernard O’Higgins in 1831 to a friend in the Royal navy that Chile extended to the South Shetlands and that “she evidently holds the key to the Atlantic from 30°South Latitude to the Antarctic Pole and to the whole of the Pacific.” They had never had the chance to protest the British claim, because they had never been given proper notification. The British thought it the “personal expression of opinion of a great Chilean patriot.” Appendix IX. The Case for Chilean Antarctic Claims, Territorial Claims in the Antarctic, Research Department, Foreign Office, 1 May 1945, NAA: A4311, 365/8, [British Document] Territorial Claims in the Antarctic by Research Department, Foreign Office, May 1st, 1945. Report based off of Oscar Pinochet de la Barra, *La Antártica Chilena* (Santiago: Imprenta universitaria, 1948).

⁸⁰ Scott, “Ingenious and Innocuous?” 51-62. In 1907, Chilean officials proposed a treaty that would divide between the two countries “the islands and American Antarctic continents,” even over unexplored areas. Los territorios antárticos en estudio son material propia de exploraciones aun no completas, que urje estimular i a las cuales se habrán de seguir avenimientos que todo hace fáciles entre los Gobiernos chileno i argentino.” “The Antarctic territories under review fall within the domain of explorations that have not yet been completed, and which should be encouraged and which should be followed by agreements which should not be difficult to reach between the Chilean and Argentine Governments.” The Argentines quietly ignored the idea, but Foreign Minister Zeballos noted that “Chile ought to know that England claimed all these lands and that we should have to defend them by joint action.” Memorial of the Chilean Ministry of Foreign Affairs Reporting Discussions With Argentina on Antarctic Territories, 18 September 1906, Document CH18091906, in Bush, *Antarctica and International Law* 2, 301 and Convenía que Chile supiera que Inglaterra reclamaba todas estas tierras y, que tendríamos que defendernos unidos.” Quoted in Bush, *Antarctica and International Law* 2, 302.

from Britain and the U.S., the Latin American states felt the need to compete for Antarctic sovereignty using the ideas and language of “general” European international law.⁸¹

Both states were adamant that it was not “possible to apply to polar regions the usual juridical standards for the acquisition of public domain.” Chilean government and legal experts even argued that there existed a special legal regime of “modern polar international law.”⁸² To undermine Britain’s position, both states attacked the legal value of discovery – which the Chileans labeled a “false method of acquisition” – and emphasized the doctrine of contiguity (“contiguidad”) and geographical arguments. Both states cited Canadian Senator Pascal Poirier’s original arguments for the sector principle to insist that territory in the Arctic and Antarctic should be viewed as a natural extension of the countries closest to the Poles. To add strength to their geographic argument, Chile and Argentina argued that the Andean Range continued beyond Cape Horn and the Drake Passage to the Antarctic Peninsula, which made the continent a prolongation of South America and their natural inheritance. Given the separation that existed between Cape Horn and the Antarctic continent, Argentina and Chile chose not to draw sector lines from their eastern and western borders. In order to fix the lines of meridian, “one must take into account the extent of the coastal zone over which sovereignty has been exercised, and to project it into the interior, in the form of a triangle, with its apex at the Pole.”⁸³ Both sides used language like “geographically dependent,” “geographical unity” and “hinterland,” echoing statements used in Canadian legal assessments of their position

⁸¹ Scott maintained that the Antarctic became the scene of two competing legal regimes – one based on the old colonial notions of effective occupation enshrined in “general” European international law and the other on the doctrine of *uti possidetis juri*, a part of accepted Latin American international law. Soon, however, Chile and Argentina’s arguments were influenced by the ideology of universalism that upheld “general” European international law. Shirley Scott, “Universalism and Title to Territory in Antarctica,” *Nordic Journal of International Law* 66, no. 1 (1997): 33-53. Both countries strived to justify their claims using legal ideas and language employed during Europe’s colonial expansion. As Antarctic expert Klaus Dodds has shown, “Argentina and Chile copied the behaviour of Britain, “mimicking the behaviour of an imperial state.” Klaus Dodds, *The Antarctic: A Very Short Introduction* (Oxford: Oxford University Press, 2012), 53.

⁸² In 1944, Oscar Pinochet de la Barra, published his book *La Antártica Chilena*, which stressed the special legal situation of the polar regions. Barra, *La Antártida Chilena*. See also Juan Carlos Rodríguez, *La República Argentina y las Adquisiciones Territoriales en el Continente Antártico* (Buenos Aires: Imprenta Caporaletti, 1941) Appendix ix. The Case for Chilean Antarctic Claims, Territorial Claims in the Antarctic, Research Department, Foreign Office, 1 May 1945, NAA, A4311, 365/8.

⁸³ Barra, *La Antártida Chilena*, 111-113, in Bush, *Antarctica and International Law* 2, 355-356.

in the Arctic Archipelago.⁸⁴ Britain had always feared that Argentina and Chile would utilize the sector principle to claim territory in the Antarctic. In anticipation the British had insisted that all polar sectors emanated from discovery and control of a polar coastline, and not from simple proximity (although they deviated from this philosophy during negotiations with Norway using the geographic positions of the Falkland Islands, South Africa, Australia and New Zealand to justify their own Antarctic claims).

International lawyer Oscar Pinochet de la Barra elaborated on Chile's use of the sector principle. First of all, only countries considered direct neighbours could use the principle. No state could draw a sector simply because it faced the Antarctic, which effectively ruled out claims by countries such as Peru and Brazil. Second, Chile clarified that the sector principle granted states a preferential right to sovereignty, not full legal title. The principle did, however, imbue Chile's acts of sovereignty with greater legal strength than those completed by non-neighbouring states. De la Barra concluded that, in Chile's opinion, the theory of polar sectors was not "synonymous with proximity: it is the combined influence of the legal and economic acts; of a fact of nature which complements and perfects acts of will and human endeavour."⁸⁵

Within the context of Chile's application of the sector principle, acts of state legislation and administration played a pivotal role. Having made no attempt to physically occupy any part of the south polar region, the Chileans leaned on the historic

⁸⁴ Canada's ambassador to Argentina, Warwick Chapman noted in 1946, "The Argentine legal experts proceed then to state the case for Argentina's rights in the Antarctic specifically by application of Arctic jurisprudence." Warwick Chipman, Canadian Ambassador, Buenos Aires to The Secretary of State for External Affairs, 8 January 1947, Library and Archives Canada (LAC), RG 25, Vol. 3843, File 9091-40, pt.1. For arguments using contiguity and the sector principle, see Appendix VIII, The Case for Argentine Territorial Claims in the Antarctic, Territorial Claims in the Antarctic, Research Department, Foreign Office, 1 May 1945, NAA, A4311, 365/8; José Carlos Vittone, *La Soberanía Argentina en el Continente Antártico* (Buenos Aires: El Ateneo, 1944); Raul Martínez Moreno, *Soberanía Antártica Argentina* (Tucumán, Universidad Nacional de Tucumán, 1951); "The Question of the Antarctic," 21 January 1947, as reported in *El Diario Ilustrado*, NA, FO 371/61290; Polar Committee: Copy of a Statement on the Chilean Antarctic Claim Made by the Chilean Minister of Foreign Affairs before the Chilean Senate on 22 January 1947, 24 March 1947, LAC, RG 25, Vol. 3843, File 9092-A-40, pt. 1; Chancery, Australian Legation, Santiago, Chile to Australian Embassy, Washington, 25 April 1947, NAA, A3300, 541A, [1947 file - pale blue tab] Territories - Antarctic - claims; Argentine Foreign Minister to Chilean Ambassador, 12 November 1940, Document AR12111940, in Bush, *Antarctica and International Law* 1, 606; Norman Armour, Embassy of the United States, Buenos Aires, to Secretary of State, 15 November 1940, NARA, RG 59, CDF 1940-44, Box 3116, File 800.014, Antarctic/556.

⁸⁵ Barra, *La Antártida Chilena*, 111-113, in Bush, *Antarctica and International Law* 2, 355-356.

concessions the government granted to fishermen and sealers at the beginning of the century as evidence of sufficient state activity. Between 1902 and 1906, the government issued fishing and sealing concessions to companies for the South Shetlands, the islands further south, and the “lands of Graham.”⁸⁶ De la Barra, concluded that, because no country protested these concessions in 1906 (Argentina being the sole objector) Chile’s “sovereignty over the Antarctic polar regions continued to be universally recognized.”⁸⁷ After reviewing these arguments, even the British admitted, “If the decrees are genuine, they appear to constitute the best point the Chileans have yet been able to find in favor of their claims.”⁸⁸

Argentina could apply a substantial legal argument that Chile could not – its decades long occupation of the meteorological station at Laurie Island, in operation since 1904. Argentinean experts and officials insisted that Britain’s title to the FID rested on symbolic deeds, while Argentina had exercised “effective and continuous” occupation of its Antarctic territory for almost half a century. In the special conditions of the Antarctic, that occupation, no matter how modest, had significant legal value.⁸⁹ Furthermore, the Argentineans argued that the station represented the “exercise of a responsible authority

⁸⁶ Supreme Decree No. 3, 3310 Granting a Fishing Concession to Pedro Pablo Benavides, 31 December 1902, Document CH31121902, in Bush, *Antarctica and International Law* 2, 290-291; Application from Enrique Fabry and Domingo de Toro Herrera for a Concession for Sealing and other Purposes, 9 January 1906, Document CH09011906, in Bush, *Antarctica and International Law* 2, 291-293; Supreme Decree No. 260, Granting a Concession For Sealing and Othr Purposes to Enrique Farby and Domingo De Toro Herrera, 27 February 1906, Document CH27021906, in Bush, *Antarctica and International Law* 2, 295-296.

⁸⁷ See Oscar Pinochet de la Barra quoted in Bush, *Antarctica and International Law* 2, 297.

⁸⁸ South American Department to the Chancery, British Embassy, Santiago, 8 March 1945, NA, CO/217/5.

⁸⁹ Argentine Foreign Minister to Chilean Ambassador, 12 November 1940, Document AR12111940, in Bush, *Antarctica and International Law* 1, 606; Norman Armour, Embassy of the United States, Buenos Aires, to Secretary of State, 15 November 1940, NARA, RG 59, CDF 1940-44, Box 3116, File 800.014, Antarctic/556. Two Argentine papers, *La Prensa* and *El Diaro* published Argentine official views. The claims of foreign powers were based on “symbolic deeds and aerial explorations during which flags were dropped.” The papers argued that Britain’s claim had not fulfilled the requisites of occupation that had been set since the Berlin Conference and the rules laid out by the meeting of the Institute of International Law at Lausanne in 1889. *El Diario*, 13 November 1940, Text of Note Addressed by the Argentine Government to the Chilean Government; *La Prensa*, 8 November 1940, Argentine Rights on a Section of Antarctica, NARA, RG 59, CDF 1940-44, Box 3116, File 800.014, Antarctic/557. As Canada’s ambassador to Argentina, Warwick Chapman noted in 1946, “The Argentine legal experts proceed then to state the case for Argentina’s rights in the Antarctic specifically by application of Arctic jurisprudence.” Warwick Chipman, Canadian Ambassador, Buenos Aires to The Secretary of State for External Affairs, 8 January 1947, LAC, RG 25, Vol. 3843, File 9091-40, pt.1.

in the Argentine Antarctic sector, unequalled by any other nation.”⁹⁰ Trying to derive as much legal benefit as possible out of its station, they also insisted that Argentina’s sovereignty was “tacitly recognized by all those who availed themselves of the Argentine meteorological services of the Orkneys.”⁹¹

Even as Chilean and Argentinean officials laid out legal cases for their countries, neither state took concrete action. In Argentina, a military coup led by Juan Domingo Perón in June 1943 ousted the government of Ramón Castillo. The overthrow of the *Concordancia* government pushed the country into a three-year period of political uncertainty that halted Antarctic activity. Meanwhile, the Chileans simply could not secure a ship to attempt a voyage to the south polar region.⁹² During this lull in activity, however, both countries took significant steps to spark the popular and economic interest of their citizens in the Antarctic, and worked to convince them that a vast portion of the region was their national birthright.⁹³

In the aftermath of the Second World War, Argentina and Chile redoubled their efforts in the south polar region and played an important role in political and legal developments. They continued to imbue the polar legal landscape with their arguments about contiguity, geographic connections and the sector principle. Regardless, both countries wholeheartedly joined the rush in the scramble to occupy the Antarctic.⁹⁴

7.5 Operation Tabarin: Britain’s Permanent Occupation

Britain’s survival as an island nation demanded a secure food supply, and Argentina was its main supplier of beef. Any action that alienated Argentina might jeopardize this food security, putting Britain in a political quagmire. Historians John Dudeney and David Walton have pointed out that while officials in the Foreign Office questioned the value of the FID and worried about the impact any response might have on Argentina, the

⁹⁰ Polar Committee: Argentine Antarctic Claim, 29 March 1947, LAC, RG 25, Vol. 3843, File 9092-A-40, pt. 1.

⁹¹ Warwick Chipman, Canadian Ambassador, Buenos Aires to The Secretary of State for External Affairs, 8 January 1947, LAC, RG 25, Vol. 3843, File 9091-40, pt.1.

⁹² Howkins, “Frozen Empires,” 76-78, 86-92. On the mission of *Carnarvon Castle*, see Dudeney and Walton, “From *Scotia* to ‘Operation Tabarin,’” 350-51.

⁹³ Jack Child, *Antarctica and South American Geopolitics* (New York: Praeger, 1988).

⁹⁴ Dodds, *The Antarctic: A Very Short Introduction*, 53.

Admiralty and Colonial Office were adamant that Britain defend its title to the territory. While both departments cited the region's economic potential and strategic requirements (such as the need to control the Drake Passage and bar enemy raiders from using the South Orkneys and the South Shetlands as bases), prestige arguments played an important role. The thought of giving up territory to Argentina, Chile or the U.S. was out of the question. The Colonial Office wanted to send a "reply to those of our American friends who are making ready to assist at the dismemberment of the Empire." In 1942-1943, the British dispatched the HMS *Carnarvon Castle* on an "administrative tour" of the FID (conducted with the pretext of countering Axis raider activity). Although they had strict orders to avoid confrontation with the Argentineans, the ship's crew obliterated sovereignty markers left in the South Shetlands by previous Argentine expeditions.⁹⁵

If Britain wanted to keep the FID, Foreign Office legal adviser William Eric Beckett advised its weak legal title must be strengthened. In a radical departure from British polar legal policy, Beckett insisted that "if we want to make sure of our title to these islands we must establish something permanently there ourselves, difficult and tiresome as it may be." As he explained, "paper protests have some value...the greatest weight is attached to actual physical occupation and use."⁹⁶ The days of papers administration and the occasional visit were over.

⁹⁵ Foreign Secretary Anthony Eden commented on the Foreign Office's argument that protests would not be enough. He noted that the British had been "extraordinarily dilatory about this business." Eden commented that he did not "know how much these islands matter, but I agree...that if we want to keep them we are not likely to do so by these means." Dudeney and Walton, "From *Scotia* to 'Operation Tabarin'," 348-351 quote from 350. When the Argentineans discovered the British activities, they reiterated the boundaries of the Antarctic sector, and criticized the removal of national emblems "where previous to the placing of such, there was no effective occupation or possession belonging to the British government." Klaus Dodds, *Geopolitics in Antarctica: Views from the Southern Oceanic Rim* (West Sussex: John Wiley and Sons, 1997), 51.

⁹⁶ W.E. Beckett, Note, 16 September 1942, NA, FO 371/30313. Quoted in Dudeney and Walton, "From *Scotia* to 'Operation Tabarin'," 349. Beckett had investigated territorial claims in the polar regions before and had reviewed the *Eastern Greenland* and *Palmas Island* cases for the department. The lawyer had an excellent reputation, and "his clear views on what legal solutions might be practicable and effective in a given situation were not always popular with everybody, but they had an almost alarming habit of proving to be right." Beckett's best qualities as legal adviser were his ability to make complicated principles sensible and prescribe practical solutions to meet the needs of a situation. He utilized all of these qualities in his analysis of polar sovereignty. Gerald Fitzmaurice and F.A. Vallat, "Sir (William) Eric Beckett, KCMG, QC (1896-1966): An Appreciation," *International and Comparative Law Quarterly* 17 (1968): 267, 278, 283, 289, 290.

Foreign Minister Anthony Eden agreed with Beckett and the cabinet decided to send a military operation ostensibly looking for enemy raiders to establish bases of “effective occupation” in the Antarctic.⁹⁷ The utmost secrecy had to be maintained to prevent Argentina and Chile from confronting the British, which might damage the Anglo-Argentine commercial relationship.⁹⁸ Throughout 1943, British officials in the Colonial Office, the Admiralty, and the Foreign Office Research Department prepared for the expedition, working through the night so frequently that the expedition was dubbed Operation Tabarin, after the famous Bal Tabarin nightclub in Paris. The operation’s manuals clearly indicated that the objective was to establish occupation not necessarily deny access to other states. Marr and his men were to avoid violence, but establish bases at selected points in the FID, from which they would conduct scientific research and surveys.⁹⁹

The British government had utilized scientific research to demonstrate its sovereignty in the FID since the Discovery Committee began operations in 1925. The scientific program for Operation Tabarin included the study of sea ice, geology and physiography, glaciers, surveying, meteorology, zoology, botany, and tidal observations. Brian B. Roberts, a Scott Polar Research Institute scientist and member of the British Graham Land expedition, assisted with the creation of the research agenda, as did prominent polar explorer James Wordie. Both would come to play an important role in British Antarctic policy.¹⁰⁰ Howkins has observed that “the demonstration of superior

⁹⁷ By winning the “race to install permanent bases at the relevant locations” (and simply avoiding the Argentine outpost on Laurie Island), officials believed that Britain could contain any official Argentine response. Although launched as a military operation, Tabarin “had little direct bearing on the conduct of the war against the axis powers,” historians John R. Dudeney and David W.H. Walton noted. “Rather, it was an integral part of a long term imperial strategy from the earliest years of the twentieth century” to claim the Antarctic. Dudeney and Walton, “From *Scotia* to ‘Operation Tabarin,’” 351. The history of Operation Tabarin has been well covered. See Vivian Fuchs, *Of Ice and Men: The Story of the British Antarctic Survey, 1943-1973* (Shropshire: Anthony Nelson, 1982); Howkins, “Frozen Empires”; Dodds, *Pink Ice*; Beck, *The International Politics of Antarctica*; Stephen Haddelsey, *Operation Tabarin: Britain’s Secret Wartime Expedition to Antarctica, 1944-1946* (Stroud: The History Press, 2014).

⁹⁸ Howkins, “Frozen Empires,” 91-92. Although funded out of the Admiralty budget, British officials anticipated that the costs of the operation would be offset by revenues earned from philatelists (stamp collectors) who would purchase special Falkland Islands Dependencies stamps issued during the operation. Ironically, the issuing of these stamps undermined the secrecy of the operation. Dudeney and Walton, “From *Scotia* to ‘Operation Tabarin’,” 351, 352-53.

⁹⁹ Dudeney and Howkins, “From *Scotia* to ‘Operation Tabarin’,” 352.

¹⁰⁰ Note on Early History of Operation Tabarin, Brian Roberts, Scott Polar Research Institute (SPRI), MS 1308/22/1; ER, Roberts, Brian. On the impact of Brian Roberts on Britain’s Antarctic policy, see H.G.R.

scientific capabilities offered a convenient way to... prove [Britain's] sovereignty rights without an outright display of physical force."¹⁰¹ With Operation Tabarin, science served both a legal and diplomatic role.

As the Foreign Office legal advisers accepted the need for occupation, their new approach to polar sovereignty clashed with the Colonial Office's older ideas about the legal value of issuing FID postage stamps for use by Tabarin's personnel. While the legal advisers argued that the stamps offered little to the strength of title, the Colonial Office considered the act an essential sign of state administration and demonstration of sovereign rights. The Foreign Office stressed the need for "utmost secrecy" and pointed out that issuing a special stamp for Tabarin would do the opposite. Despite the warning, the Colonial Office issued the stamps.¹⁰² Learning about the postage stamps, Chile reserved its rights in the South Shetlands and Graham Land, to the great annoyance of the Foreign Office.¹⁰³ The clashing of legal ideas – old and new – would continue to complicate British decision making.

The British expedition reached the FID in January 1944. After re-occupying the former whaling base at Deception Island, the ships headed for Hope Bay at the very tip of the Graham Land peninsula. Poor ice conditions thwarted repeated attempts to enter the bay and establish a base on the Antarctic mainland. Instead, the expedition sailed for the northwest coast of Graham Land and eventually established a base at Port Lockroy, from

King and Ann Savours, *Polar Pundit: Reminiscences about Brian Birley Roberts* (Cambridge: Polar Publications, Scott Polar Research Institute, 1995). James Wordie was one of the most experienced polar explorers in Britain, having conducted a multitude of expeditions in the Arctic and Antarctic from Shackleton's Imperial Trans-Antarctic Expedition in 1914. During the war he worked for British Naval Intelligence on its geographical handbook series. Michael Smith, *Sir James Wordie: Polar Crusader* (Edinburgh: Birlinn Limited, 2012).

¹⁰¹ Howkins also pointed out that the involvement of "scientists in the Antarctic problem ensured that British interest towards the region continued to have an important scientific component... Despite the pressures of the war, these scientists saw Operation Tabarin as offering a still rare opportunity to conduct scientific research... and this connection between Antarctic politics and Antarctic science would set the tone for much of the ensuing Antarctic sovereignty dispute." Howkins, "Frozen Empires," 93-94.

¹⁰² Note, J.V. Perowne, 6 March 1944, NA, FO 371/37729.

¹⁰³ Chilean Ambassador, London, M. Bianchi to Anthony Eden, British Foreign Secretary, 29 September 1944, Document CH29091944, in Bush, *Antarctica and International Law* 2, 327. April 1944, Churchill asked "What is the reason for sending an expedition of perfectly good fighting men to the South Pole? If you are seeking to establish our claims as against the United States the fact might at least have been kept secret during this period of preparation for solemn events." Winston Churchill to Foreign Office, 24 April 1944, NA, FO 371/37729.

which the men could walk to the mainland in the winter. In the summer of 1944-45, the expedition established two more bases, including one at Hope Bay and one at Sandefjord Bay. By the end of the war, Operation Tabarin successfully set up four occupied bases in the FID, and one unoccupied base on Coronation Island in the South Orkneys. On top of the scientific program, Howkins has observed that the bases took six meteorological readings a day, hoping functional activity would bolster Britain's legal position. As a demonstration of British authority and state function, the base leaders acted as magistrates, postmasters, harbour masters and issued sets of stamps.¹⁰⁴

With the occupation parties of Operation Tabarin in place, British officials prepared for a postwar Antarctic. What would the region look like and what policies should be adopted? Despite the challenges Argentina and Chile posed to the FID, London believed the Americans represented the greatest threat to the Empire's Antarctic interests and they anticipated "a revival of US claims" and renewed American activity in the FID, Ross Dependency and the AAT.¹⁰⁵ Given the tangle of potential territorial disputes that covered the continent, the Foreign Office predicted that the U.S. or Argentina would call an international conference. W.E. Beckett insisted the British government decide whether it wanted to maintain its entire claim to the FID or strengthen its legal title only to improve its bargaining position at a postwar conference, which would involve concessions of territory.¹⁰⁶

The Foreign Office Research Department compiled a comprehensive handbook (only recently declassified) on the historical, legal and political elements involved in Antarctic claims.¹⁰⁷ Brian Roberts, who spearheaded the project, examined a wide array of material and solicited opinions from across the Commonwealth. He even drew on the report prepared by Canadian solicitor T.L. Cory in 1936, *British Sovereignty in the*

¹⁰⁴ On meteorology at the stations see Adrian Howkins, "Political Meteorology: Weather, Climate and the Contest for Antarctic Sovereignty, 1939-1959," *History of Meteorology* 4 (2008): 27- 40. For the day to day activities of Operation Tabarin, see Stephen Haddelsey, *Operation Tabarin*; Fuchs, *Of Ice and Men*.

¹⁰⁵ Dudeney and Walton, "From *Scotia* to 'Operation Tabarin'," 348-349. Quotation in note by James Wordie, NA, DO 35/1424; See also notes by G.E. Boyd Shannon, Dominions Office, 3 November 1943 and 17 November 1943, NA, DO 35/1423; B.B. Roberts to Acheson, 24 November 1944, NA, CO/217/5; and Winston Churchill to Foreign Office, 24 April 1944, NA, FO 371/37729.

¹⁰⁶ Note, Beckett, 8 May 1944, NA, FO 371/37729.

¹⁰⁷ Notes by G.E. Boyd Shannon, Dominions Office, 3 November 1943 and 17 November 1943, NA, DO 35/1423.

Arctic, which he discussed with its author during a visit to Ottawa.¹⁰⁸ The overarching conclusion of the volume's 300-pages astutely predicted that British Antarctic policy had "reached the stage when it may be considered necessary for His Majesty's Governments to take a much more active part in the development of these territories if they are not to be faced with the alternative of relinquishing some of the British claims."¹⁰⁹

The handbook highlighted that there existed a "difference of opinion between the British and United States Government as to what constitutes definitive occupation for Antarctic purposes." Since 1934, the Americans had demanded occupancy and use to support territorial claims in the polar regions, and the USASE had put American beliefs into practice. In sharp contrast, Britain had contended that "British title" existed to the FID, the AAT and Ross Dependency "on various grounds and is good, whether or not expressly recognised by foreign countries." The British version of "definitive occupation and control" amounted to the paper administration of the territories, the issue of whaling licenses, the work of the Discovery Committee, the occasional exploratory expedition, appointment of magistrates as required, and generally the exercise of "sovereign functions so far as the material conditions of the territory call for the exercise of these functions." While the vast majority of this British activity was relegated to the continental coastline and the adjacent islands, the sector principle extended the title into the vast and mostly unknown Antarctic hinterland.¹¹⁰

Brian Roberts and the Foreign Office legal advisers stressed that chinks were appearing in Britain's legal arguments. Terminating support of the sector principle represented a significant break. The Foreign Office insisted that Roberts clarify that "whatever the validity of the sector principle before the war, it has been impaired by the development of aviation."¹¹¹ The handbook asserted that "the general agreement on

¹⁰⁸ Brian Roberts, *Journal of Visit to the United States and Canada, August-November 1943*, SPRI, MS 1308/5 BJ, Roberts, Brian.

¹⁰⁹ *Territorial Claims in the Antarctic*, Research Department, Foreign Office, 1 May 1945, NAA, A4311, 365/8.

¹¹⁰ *Territorial Claims in the Antarctic*, Research Department, Foreign Office, pg. 71, 126-141, 1 May 1945, NAA, A4311, 365/8.

¹¹¹ The British also thought that any reference to the sector principle would only confuse the legal situation given its recent use by Argentina and Chile. Boyd Shannon to P. Clutterbuck, 15 May 1945, NA, DO 35/1414.

which the ‘sector principle’ has hitherto rested...is that only the Power in effective occupation of the coast possessed the means of access to, and subsequently control over, the hinterland.” The fact that polar sectors claimed “hinterland which may never have been occupied, or even visited” weakened the claim, as did “developments in aviation [which] have rendered the hinterland accessible without possession of the coastal fringe.” The Foreign Office concluded that some territory within the Empire’s Antarctic sectors were “not within definitive British sovereignty, but are rather territories to which one of His Majesty’s Governments possess an inchoate right based on discovery and/or some formal act of annexation which still remains to be followed up.”¹¹²

The handbook also laid out the opinions of the Foreign Office legal advisers on permanent settlement. They noted the recent decisions in the *Clipperton Island* and *Eastern Greenland* cases where the judges were satisfied with very little in the way of the actual exercise of sovereign rights. Yet, these cases had not established a formula for the acquisition of absolute title. Given the ambiguity in the law, what truly mattered in territorial disputes was which state had a stronger title. If a state claimed a territory, but a different country exercised physical authority over it, the claimant state would not win a legal dispute merely by showing that it had annexed the area years previous. The legal advisers also took note of Huber’s statement that the requirements of territorial sovereignty could change and a state could lose its title if it did not adequately address these developments. Britain recognized Washington had remained steadfast in its demand for occupation and use, and had in fact displayed the ability to fulfill those requirements during the USASE. The American occupation, technological developments that made it

¹¹² The handbook noted that the formal annexation of territory served an important purpose as a definite indication of “an intention of making a claim” and created an inchoate right. While the normal method was “to land and hoist a flag...it would be quite wrong to suppose that there is any magic in that particular action or that a claim cannot be legally asserted in other ways.” The inchoate rights such acts created could last for three to five years in the Antarctic, the length of time required to dispatch another expedition to the area. In reality, the Foreign legal advisers were not even sure if inchoate rights had legal validity, though some legal scholars had “shown a strong tendency towards crystallizing” it into one. The British admitted that inchoate rights blurred the lines between a legal and political right. It was, after all, impolite to jump on territory without giving the discover enough time to administer and occupy the region. Territorial Claims in the Antarctic, Research Department, Foreign Office, pg. 140, 1 May 1945, NAA, A4311, 365/8.

easier to inhabit the polar regions, and aviation had all changed the nature of polar sovereignty. Britain had to respond.¹¹³

Having fallen behind during wartime, W.E. Beckett judged that “Over the unoccupied territory of the dependencies we have only the inchoate title by discovery plus paper annexations, for what they are worth, and if Judge Huber is right these may not be worth much legally if any other state establishes and maintains a physical occupation.”¹¹⁴ Further, he advised that even an occupation of one or two years would not be enough to protect a territorial claim in the Antarctic. If efforts were allowed to lapse “someone else can nip in when we give up.”¹¹⁵ Summarizing Beckett’s arguments, Roberts’ handbook concluded, “In the view of the Foreign Office it is essential to arrange for continuous occupation, summer and winter, or, at least, for a continuous service of occupying parties every summer.”¹¹⁶ In short, the Foreign Office advised that if Britain wanted to preserve its sovereignty in the Antarctic it had to embrace the Hughes Doctrine. In the postwar years, it would.

7.6 The Second World War and Canada’s Arctic Sovereignty

During the Second World War, the real developments in the evolution of polar sovereignty and the shaping of the legal space of the polar regions occurred in the Antarctic. The Arctic, however, played a far greater role in world affairs. In fact, the war brought more interest and people to the Arctic and sub-Arctic than ever before. As historian Charles Emmerson has summarized, parts of the region played an important role in the areas of supply, logistics and meteorology including: the Arctic convoys on the Murmansk Run, the Russian use of the Northern Sea Route, the establishment of Allied and German weather stations on Greenland, Jan Mayen and Svalbard to support aerial and naval operations, and the supply line between Ladd Field, Alaska and the Soviet

¹¹³ Territorial Claims in the Antarctic, Research Department, Foreign Office, pg. 71, 126-141, 1 May 1945, NAA, A4311, 365/8.

¹¹⁴ W.E. Beckett to Sir Donald Somervell, 14 May 1944, NA, CO 78/217/1.

¹¹⁵ Beckett, September 1944, NA, FO 371/37730. See also Dudeney and Walton, “From *Scotia* to ‘Operation Tabarin’,” 355.

¹¹⁶ Territorial Claims in the Antarctic, Research Department, Foreign Office, pg. 136-141, 1 May 1945, NAA, A4311, 365/8.

Union. The Arctic and sub-Arctic became the scene of high-intensity conflict, including fierce fighting in northern Norway, Finland, and on the Aleutian Islands, and much smaller operations on Spitsbergen and Greenland.¹¹⁷

Greenland played an important role in the Allied war effort and the country changed dramatically as a result. The fall of Denmark in April 1940 raised complicated questions about the island's sovereignty.¹¹⁸ Ottawa and London considered occupying strategic points on the island, like the cryolite mine at Ivgtut, to ensure the enemy did not threaten them. Cryolite constituted a key component used in the production of aluminum, and the mine provided the only natural source for the Allied war machine. Washington, however, strongly objected to any third party occupation of Greenland. To solve the dilemma, the Senate discussed purchasing or taking over the island from the Danes. Instead, the Danish administration for Greenland signed a bilateral agreement with the U.S. in 1941, giving the Americans blanket approval for all defence activities deemed necessary. Between 1941 and 1945, the United States established extensive facilities for air and sea transportation in Greenland, as well as radio beacons, radio stations, weather stations, defences and search-and-rescue stations.¹¹⁹ Upon Germany's defeat, Denmark resumed administration of the island.

¹¹⁷ Many of the wartime Arctic operations are well documented in the historiography, especially the Arctic convoys in support of the Soviet Union, the Japanese raid on Dutch Harbor, Alaska and the subsequent Anglo-Canadian campaign to retake Attu and Kiska in the Aleutian Islands in 1943. Less well known are the small-scale military operations that took place on Spitsbergen. During Operation Gauntlet in August 1941, a Canadian led raid destroyed coal mines, supplies and equipment and evacuated 2000 Soviet miners on Spitsbergen. Two years later, the German Navy launched its own raid on the community of Barentsburg on the island. For information on the Second World War in the Arctic, see Charles Emmerson, *The Future History of the Arctic* (New York: Public Affairs, 2010), 106-108; Thor Arlov, *A Short History of Svalbard* (Oslo: Norwegian Polar Institute, 1994), 74-76; Richard Woodman, *Arctic Convoys 1941-1945* (London, John Murray, 2004); Wilhelm Dege, *War north of 80: the last German Arctic weather station of World War II* (Calgary: University of Calgary Press, 2004); Brian Garfield, *The Thousand-Mile War: World War II in Alaska and the Aleutians* (Fairbanks: University of Alaska Press, 1995); Galen Roger Perras, *Stepping Stones to Nowhere, The Aleutian Islands, Alaska, and American Military Strategy, 1867-1945* (Vancouver: University of British Columbia Press, 2003); and Shelagh Grant, *Polar Imperative: A History of Arctic Sovereignty in North America* (Vancouver: Douglas and McIntyre, 2010);

¹¹⁸ In occupied Norway, the polar expert Adolf Hoel, who had become a member of Vidkun Quisling's National Socialist Party after the *Eastern Greenland* case, went with Gustav Smedal to the Administrative Council in charge of civil administration. Hoping to reinvigorate Norway's rights in Eastern Greenland, the two men asked for supplies to establish meteorological stations. The stations would "send an important political signal; that even in these dark times, Norway meant to uphold its interests in Greenland." The British intercepted several parties of Norwegians trying to establish the stations. Einar-Arne Drivenes and Harald Dag Jølle, *Into the Ice: The History of Norway and the Polar Regions* (Gyldendal Akademisk, 2006), 307-308.

¹¹⁹ Grant, *Polar Imperative*, 247-257.

The face of the Canadian North was also marked by a series of defence projects, largely initiated by the U.S. In 1938, President Roosevelt and Prime Minister King made mutual pledges to work together for continental security. Size dictated that the Americans would assume primary responsibility for continental defence, and geography tied Canada's security to that of its southern neighbour. With Britain's survival in doubt, King and Roosevelt signed the Ogdensburg agreement in August 1940, establishing a bilateral Permanent Joint Board on Defence. The North, however, remained a distant priority. "On the Dominion's northern territories those two famous servants of the Czar, Generals January and February, mount guard for the Canadian people all year round," historian Charles Stacey wrote in his 1940 study of Canadian defence policy. Aircraft, however, could make the Arctic and Subarctic regions more strategically significant, he concluded, but hardly constituted an immediate, practical threat.¹²⁰

After the Japanese attack on Pearl Harbor on 7 December 1941, the Canadian Northwest became an important strategic link to Alaska. The Americans increased the size of their garrison in Alaska from 21,500 to 40,424 men to secure their northern defence. Worried the enemy could cut off the sea link between Alaska and the lower forty-eight states, the U.S. military looked to northern Canada. The Americans assisted in the completion of the Northwest Staging Route (NWSR), establishing a string of airfields from Edmonton to Alaska.¹²¹ In February 1942, against the backdrop of a potential Japanese invasion, the Canadian Government allowed the U.S. to construct an overland route to Alaska – at American expense with the promise that at wars end the highway would become "an integral part of the Canadian highway system." The United States hastily constructed the Alcan (Alaska) highway – a herculean construction feat that

¹²⁰ "We as good neighbors are true friends," American President Franklin D. Roosevelt assured Canadians in 1938. He promised that the United States would "not stand idly by" if any foreign power threatened Canadian territory. For his part, Mackenzie King declared that Canada also had its obligations as a friendly neighbour and would ensure that no enemy forces would ever to pass through the dominion on their way to the United States. C.P. Stacey, *The Military Problems of Canada: A Survey of Defence Policies and Strategic Conditions, Past and Present* (Toronto: Ryerson Press, 1940), 5.

¹²¹ Even before 1939, Canada had planned to build a string of aerodromes along an air route from Edmonton over northwestern Canada and onward to Alaska. The exigencies of war pushed the project forward with two main purposes: first, to supply American bases in Alaska, and second to facilitate the transfer of Lend-Lease aircraft to the Russians for use on the Eastern Front. Edwin R. Carr, "Great Falls to Nome: the Inland Air Route to Alaska, 1940-45" (Ph.D. dissertation: University of Minnesota, 1946); Kenneth Charles Eyre, "Custos Borealis: The Military in the Canadian North," (Ph.D. dissertation: King's College, University of London, 1981), 82-95.

transformed northeastern British Columbia, the Yukon, and the Mackenzie Valley.¹²² Concurrently, the Canol project – a 1000-km pipeline from the oilfield at Norman Wells to a refinery at Whitehorse – was built to support the Alcan with transportation and storage facilities.¹²³ The wartime influx of nearly 40,000 American military personnel (as well as American and Canadian civilians) into the Northwest – three times the pre-war population – had tremendous socio-economic, political, and environmental implications.¹²⁴

Amidst this changing landscape, the Americans developed several ambitious projects in the Northeast, including the Crimson Route, an alternate path for ferrying planes and material to Britain.¹²⁵ The plan fit with the development of the massive subarctic airbase at Goose Bay, Labrador, started in 1941, and the prospect of Greenland-Iceland route to Britain that avoided the fog off the Newfoundland coast. The Crimson Route involved installations at Churchill, Manitoba; Southampton Island in Hudson Bay; Fort Chimo (Kuujuaq); Frobisher Bay (Iqaluit); Padloping Island, in Davis Strait's

¹²² At the end of 1943, a 2451 km long, permanent, all-weather, surfaced 'Alaska Highway' opened for military use, with a final pricetag over \$150 million. It proved indispensable to transport thirty million tons of supplies and equipment to forces stationed in Alaska in 1944 before its military importance lapsed as the tide of the war in the Pacific turned. C.P. Stacey deemed the highway insufficient and with little military utility (apart from its connection with the air route). C.P. Stacey, *Arms, Men and Governments: The War Policies of Canada 1939-1945* (Ottawa: The Queen's Printer for Canada, 1970), 382-83. Of the many books on the Alaska Highway project, the best remain Ken Coates and William R. Morrison, *The Alaska Highway in WWII: The U.S. Army of Occupation in Canada's Northwest* (Norman: University of Oklahoma Press, 1992); and Ken Coates and William R. Morrison, *Working the North: Labor and the Northwest Defense Projects 1942-1946* (Anchorage: University of Alaska Press, 1994). See also Gregory Johnson, "Strategic Necessity or Military Blunder: Another Look at the Decision to Build the Alaska Highway," in *Three Northern Wartime Projects*, ed. Bob Hesketh (Edmonton: Canadian Circumpolar Institute and Edmonton and District Historical Society, 1992), 18, 28; and Stanley W. Dziuban, *Military Relations Between the United States and Canada, 1939-1945* (Washington: Office of the Chief of Military History, Department of the Army, 1959), 217-28.

¹²³ James Eayrs, *In Defence of Canada Vol. 3: Peacemaking and Deterrence*, (Toronto: University of Toronto Press, 1972), 349.

¹²⁴ For overviews on wartime developments, see Shelagh Grant, *Sovereignty or Security?: Government Policy in the Canadian North, 1936-1950* (Vancouver: University of British Columbia Press, 1988), and Ken Coates, P. Whitney Lackenbauer, William Morrison, and Greg Poelzer, *Arctic Front: Defending Canada in the Far North* (Toronto: Thomas Allen, 2008). David Judd estimated that between 1941-46, the American military population in northern Canada outnumbered Canadian residents three to one. David Judd, "Seventy-Five Years of Resource Administration in Northern Canada," *Polar Record* 14, no. 93 (1969):791-806.

¹²⁵ Two renowned Arctic specialists, the geologist William H. Hobbs and aviation expert Bernt Balchen, lobbied the State, Navy, and War Departments to expand the North Atlantic air route through the Arctic. On their role, see William S. Carlson, *Lifelines Through the Arctic* (New York: Meredith Press, 1962), 50-51.

Merchants Bay; and other northern sites.¹²⁶ Generally, the U.S. paid for the construction costs of these projects and operated the completed facilities independent from Canadian command.¹²⁷ Before the Americans completed the required infrastructure, however, the Allies managed to lease bases in the Azores from Portugal, allowing for a better trans-Atlantic route that nullified the need for the Crimson Route.

When American personnel swept into the Canadian North to complete their tasks, Prime Minister William Lyon Mackenzie King became paranoid that American developments, taken in the name of military security, would undermine Canada's sovereignty and control.¹²⁸ None of these activities occurred on the northern islands of the Arctic Archipelago, where Ottawa had the most concern about its territorial title. The only defence projects undertaken in the Archipelago involved air facilities at Frobisher Bay (Iqaluit), on southern Baffin Island, and Padloping Island. Instead, Ottawa worried that the sheer dominance of the U.S. on the ground ultimately undermined Canada's *de facto* control over its territory, which King worried might endanger public support for these projects as well as for his government.¹²⁹

¹²⁶ Coates et al, *Arctic Front*, 61. The Crimson Route included bases at Frobisher Bay, Southampton Island, Churchill and The Pas. Although the projects in the Northeast were large, most of the sovereignty concerns revolved around the North-western projects. While historians have questioned the utility of the wartime projects in the Canadian North, the American chairman of the Permanent Joint Board on Defense stressed that they made since in the context of late 1941 and 1942. The projects had "been done by reason of military necessity in the light of the situation as it existed some 18 months ago. It was insurance against a worsening of the position. If, however, during this period of time the situation had changed so much in our favor as to make the measures put in hand on too large of scale, he could only ask what the public opinion would have said if, instead of improving the situation had changed against us." Maurice Pope, *Soldiers and Politicians: The Memoirs of Lt.-Gen Maurice A. Pope* (Toronto: University of Toronto Press, 1962), 220.

¹²⁷ See Grant, *Sovereignty or Security?*; Grant, *Polar Imperative*; Dziuban, *Military Relations between United States and Canada, 1939-1945*, 358; Gordon W. Smith, "Weather Stations in the Canadian North and Sovereignty," *Journal of Military and Strategic Studies* 11, no. 3 (2009): 1-63. On the origins of Frobisher Bay, see Melanie Gagnon and Iqaluit Elders, *Inuit Recollections on the Military Presence in Iqaluit* (Iqaluit: Nunavut Arctic College, 2002); Robert V. Eno, "Crystal Two: The Origin of Iqaluit," *Arctic* 56, no. 1 (2003): 63-75; Matthew Farish and P. Whitney Lackenbauer, "High modernism in the Arctic: Planning Frobisher Bay and Inuvik," *Journal of Historical Geography* 35, no.3 (2009): 517-544; and P. Whitney Lackenbauer and Ryan Shackleton, "When the Skies Rained Boxes: The Air Force and the Qikiqtani Inuit, 1941-64," Working Papers on Arctic Security No. 4, Munk-Gordon Arctic Security Program and the ArcticNet Emerging Arctic Security Environment Project (Toronto, 2012).

¹²⁸ For overviews on wartime developments, see Grant, *Sovereignty or Security?*; P. Whitney Lackenbauer, "Right and Honourable: Mackenzie King, Canadian-American Bilateral Relations, and Canadian Sovereignty in the Northwest, 1943-1948," in *Mackenzie King: Citizenship and Community*, eds. John English, Ken McLaughlin, and Lackenbauer (Toronto: Robin Brass Studio, 2002), 151-168; Ken Coates et al, *Arctic Front*; and Dziuban, *Military Relations Between the United States and Canada*.

¹²⁹ Lackenbauer, "Right and Honourable"; and Elizabeth Elliot-Meisel, *Arctic Diplomacy: Canada and the United States in the Northwest Passage*, (New York: Peter Lang, 1998), 5. See also Randall Lesaffer,

Historians Kenneth Coates, W.R. Morrison, Shelagh Grant and others¹³⁰ have pointed out the local and national controversies that accompanied these northern projects. Between 1941 and 1943, the King government let American military officials in Canada's northern expanses operate virtually unchecked. By 1943, the government's "fit of absence of mind," to borrow Canadian official Norman Robertson's apt characterization, was matched by Washington's ignorance of what was actually transpiring on the ground.¹³¹ Although Prime Minister King allowed the Americans onto Canadian soil en masse and with few constraints on the "army of occupation,"¹³² he remained suspicious of their intentions. As early as March 1942, King told British High Commissioner Malcolm MacDonald that the Alaska Highway "was less intended for protection against the Japanese than as one of the fingers of the hand which America is placing more or less over the whole of the Western hemisphere."¹³³

In 1943, worrisome reports appeared from Malcolm MacDonald, the British High Commissioner, and other concerned Canadian officials and journalists who grew alarmed at the scale of American activities when they visited the defence projects. King finally moved to regain control of events in the Canadian North.¹³⁴ The government appointed a

"Argument from Roman Law in Current International Law: Occupation and Acquisitive Prescription," *The European Journal of International Law* 16, no.1 (2005): 25-58.

¹³⁰ See the chapters by Ken Coates, Julie Cruikshank, and Richard Stuart in *The Alaska Highway: Papers of the 40th Anniversary Symposium*, ed. K.S. Coates (Vancouver: UBC Press, 1985); Ken Coates and William R. Morrison, *The Alaska Highway in World War II: The U.S. Army of Occupation in Canada's Northwest* (Toronto: University of Toronto Press, 1992); Ken Coates, *North to Alaska* (Toronto: McClelland & Stewart, 1992); Grant, *Sovereignty or Security?*

¹³¹ J. L. Granatstein, *Canada's War* (Oxford: Oxford University Press, 1975), 323.

¹³² The Americans also were given the right of extraterritoriality—that is, their military and civilian employees in Canada were answerable only to American, not Canadian authorities Eays, *In Defence of Canada Vol. 3*, 349.

¹³³ William Lyon Mackenzie King Diary, microfiche (Toronto: UTP, 1980), 21 March 1942. The editors of King's diary noted that, despite the prime minister's "close friendship with Roosevelt," he "was never without suspicions of the ultimate designs of the Americans." J.W. Pickersgill and D.F. Forster, *The Mackenzie King Record* 1 (Toronto: University of Toronto Press, 1960), 436.

¹³⁴ MacDonald "points out that whilst on paper the position of Canada is fully safeguarded events show that there is some cause for alarm." Dominion's Office Note, 26 April 1943, NA, DO 35/1645. See also Malcolm Macdonald to Clement Attlee, Secretary of State for Dominion Affairs, 7 April 1943, NA, DO 35/1645; C. Costley-White, Office of the High Commissioner, Ottawa, to G. Boyd-Shannon, Dominions Office, 23 August 1943, NA, DO/1646; and Malcolm Macdonald, Note on Developments in North-Western Canada, 6 April 1943, NA, DO 35/1645. See also Clyde Sanger, *Malcolm MacDonal: Bringing an End to Empire* (Montreal & Kingston: McGill-Queen's University Press, 1995), 237-239. Historian Elizabeth Elliot Meisel has argued that the failure of External Affairs to properly regulate American defence activities in Canada during the war stemmed from its small size and its relative inexperience. With a severe shortage of personnel, External Affairs had to set feasible priorities – which did not include the Canadian North

special commissioner, Brigadier-General W.W. Foster, to oversee the American defence projects in the North, began to set parameters on new American proposals, blocked plans to build more roads and air-staging routes and secured assurances that the American troops would depart from the North after the war. Furthermore, the Canadians made plans to buy back from the United States those facilities and installations that were already built or in progress in the North.¹³⁵ The Americans welcomed Foster's appointment and complied with the King Government's wishes regarding post war turn over.¹³⁶ Canadian sovereignty emerged unscathed, but senior decision-makers in Ottawa had learned valuable lessons about the need to monitor and/or participate in Northern development.¹³⁷ They would soon apply these lessons to the High Arctic.

Although the Americans had respected their northern neighbour's interests – and chronic insecurities – many Canadian officials feared that the wartime activities would spread to the northern islands of the Archipelago. With his warning to the King government, Malcolm MacDonald noted that American military officers openly discussed the need to build Arctic infrastructure for “waging war against the Russians in

early in the war. Neither did the Department plan for the difficult sovereignty issues that arose during the war or develop an effective way of dealing with American pushiness. As the war progressed, however, it grew in size and sophistication and began to handle complex problems more effectively. Through trial and error, Canadian officials learned how to deal with their far more powerful southern neighbour. Elliot-Meisel, *Arctic Diplomacy*, 43, 56.

¹³⁵ By the end of the Second World War, Canada had spent \$76,811,551 to purchase all American bases on Canadian soil. Elliot-Meisel, *Arctic Diplomacy*, 56; Lackenbauer, “Right and Honourable,” 154.

¹³⁶ According to the American Army historian, the American officials found Foster agreeable and cooperative and they were pleased to have a Canadian counterpart with wide powers. Dziuban maintained that the key problem that caused many of the misunderstandings and breaches in protocol that so upset the Canadians during the war, rested in the disorganization of hemispheric defence planning, especially after Pearl Harbour. Ideally, all projects would have been approved at the governmental level, but in reality approvals were granted by recommendations from the PJBD, direct arrangements at the service level, at different diplomatic levels or a combination of all these actions Stacey, *Arms, Men and Governments*, 386-87; Dziuban, *Military Relations*, 137-41. For the wartime debate over Canada's sovereignty-security equilibrium, see Lackenbauer, “Right and Honourable,” 154.

¹³⁷ Lackenbauer, “Right and Honourable,” 151-68; and Lackenbauer and Peter Kikkert, “Sovereignty and Security: The Department of External Affairs, the United States, and Arctic Sovereignty, 1945-68,” in *In the National Interest: Canadian Foreign Policy and the Department of Foreign Affairs and International Trade, 1909-2009*, eds. Greg Donaghy and Michael Carroll (Calgary: University of Calgary Press), 101-120. The obvious exception was the government's absolute disregard for Aboriginal rights in the North, a subject worthy of additional research. See Coates and Morrison, *The Alaska Highway in World War II*, chapter 3.

the next world crisis.”¹³⁸ Canadians started to envision American run airfields, weather stations and permanent bases in the High Arctic.

Regardless of the respect shown during the last two years of the war, an American presence in the remote and rarely-visited northern islands concerned Canadian officials. During the war, the Canadian government’s presence all but disappeared from most of the Arctic Archipelago. In 1940, the government dispatched the Royal Canadian Mounted Police Arctic patrol vessel, the *St. Roch*, to venture through to Northwest Passage to Greenland. A sovereignty demonstration formed part of the justification, but the real purpose was to protect the cryolite supply in Greenland.¹³⁹ At the same time, Ottawa closed the RCMP post at Craig Harbour, Ellesmere Island, leaving no government presence in the islands north of Parry Channel – the area of the Archipelago to which the U.S. had refused to accept Canada’s sovereignty.¹⁴⁰ If the Americans wanted to establish airfields or weather stations in the High Arctic, would they ask permission? What would happen if the wave of American activity discovered new islands in Canada’s sector?

The Canadians understood the Americans’ prioritization of occupancy and use, and knew the Foreign Office had also accepted the need for permanent occupation to support polar territorial claims. Canadian officials examined Brian Roberts’ handbook on Antarctic sovereignty and saw the opinion on archipelagos articulated by the Foreign Office in 1942. Examining the legal status of the South Shetlands and South Orkneys, the legal advisers explored whether it was possible to establish effective possession over a whole group of islands through a party residing on one island. The answer depended “on whether the islands are so situated that a party on one island can maintain control over the whole group, that is to say a sufficient control in the light and the character and position of the islands in question.” In a “closely packed group of islands” sovereignty could be

¹³⁸ Malcolm Macdonald, Note on Developments in North-Western Canada, 6 April 1943, NA, DO 35/1645.

¹³⁹ The voyage took two years, and by the time the ship arrived the Americans had already secured Greenland. The vessel headed back through the Passage in 1944, becoming the first ship to navigate it in a single season. Shelagh Grant, “Why the *St. Roch*? Why the Northwest Passage? New Answers to Old Questions,” *Arctic* 48, no. 1 (1993): 82-87.

¹⁴⁰ Lyle Dick, *Muskox Land: Ellesmere Island in the Age of Contact* (Calgary: University of Calgary Press, 2002), 291.

maintained by the inhabitation of one island. On the other hand, there were groups of closely packed islands in which one power did not have total sovereignty. “One of the ways in which this can come about,” the legal advisers argued, “is that one Power establishes itself in control of one island, does not look after the others, and then another Power comes and occupies the others.”¹⁴¹

Canadian officials understood that to secure their Arctic title they would need to increase their permanent physical presence in the High Arctic, especially if the Americans tried to enter the region following the war. An External Affairs report relayed that while there was no clear definition of what constituted effective administration and control in polar territory, Canada was clearly not “extending enough jurisdiction throughout lands already discovered to make her claim to these territories unquestionable.” The report mused that in the near future this control should be extended throughout the Archipelago through a greater state presence, and expanded to encapsulate stricter customs laws, air regulations, immigration control, and the enforcement of specific Northwest Territories (NWT) Acts, such as rules against the importation of intoxicants and game laws.¹⁴² Other government departments focused on providing a permanent government presence in the regions through weather and scientific stations. Senior officials emphasized that any expansion of weather services in the region should fall under Canadian control “to avoid any possible future difficulties with the United States.”¹⁴³ In February 1944, J.G. Wright, a member of the Northwest Territories Administration, highlighted the far and western islands were administered “mostly in theory” and should have weather and scientific stations established to strengthen

¹⁴¹ The Legal Division noted that a similar study conducted for the Arctic “might well reveal the need for greater effort on the part of Canada to occupy effectively the larger Arctic islands.” Legal Division, External Affairs, Reference to Dominions Office Circular Despatch D. No. 158 Covering Copy No. 40 of “Territorial Claims in the Antarctic” prepared by the Research Department, Foreign Office, 1 May 1945, 18 October 1945, LAC, RG 25, Vol. 4765, File 50070-40 pt. 1. See also RAJ Phillips to Hume Wrong, United States Claims in the Antarctic, 12 June 1946, LAC, RG 25, Vol. 4765, File 50070-40, pt. 1; and Territorial Claims in the Antarctic, Research Department, Foreign Office, 1 May 1945, NAA, A4311, 365/8, [British Document].

¹⁴² Memorandum to Legal Adviser, 31 May 1944, *Documents on Canadian External Relations* (DCER), Vol. 11, 1944-1945 (Ottawa: Queen’s Printer, 1977); Under-Secretary of State for External Affairs to Director, Lands, Parks and Forests Branch, Department of Mines and Resources, 1 June 1944, LAC, RG 25, Vol. 3347, File 9061-A-40.

¹⁴³ *Minutes and Documents of the C.W.C.*, Doc. No. 704, memo, Heeney to C.W.C., 3 February, 1944; and Minutes of meeting of Canadian officials in Ottawa, 26 January 1944, LAC, RG 85, Vol. 823, File 7140.

Canada's claim, much as his colleague T.L. Cory suggested in 1936.¹⁴⁴ The following January, Wright's superior, R.A. Gibson, also suggested that Canada establish weather stations in the region to resolve the pressing "sovereignty question."¹⁴⁵ The Americans, however, started to plan for weather stations before Ottawa had decided on the matter.

In March 1945, Lt. Colonel Charles Hubbard of the United States Army Air Force (USAAF), veteran of the Crimson Route, met with Canadian diplomats Escott Reid and Lester Pearson in the Canadian Embassy in Washington to discuss his plans for a system of Arctic weather stations.¹⁴⁶ Hubbard opened the meeting by stating that Canada and the United States lagged behind the Russians in the study of meteorology and of the north polar region. It was impossible to forecast more than twenty-four hours in advance without an enormous margin of error and Arctic weather stations would remedy the problem. Hubbard envisioned ten weather stations spread across the Arctic from Alaska to Greenland at 500-mile intervals. The forecasting capability provided by these stations, would potentially allow for an improved economy, better civil aviation and aid continental defence activities. Hubbard gave an unofficial personal presentation, but expected the U.S. government would formally approach Ottawa.¹⁴⁷ When Pearson pointed out that officials in Ottawa would be hesitant to allow foreign meteorological stations in Canada's Arctic, Hubbard rebutted, "that some doubt still existed as to the extent of our sovereignty over some of these Arctic districts north of Canada."¹⁴⁸ Whether he made his comment in ignorance of the sensitive chord it would strike in the Canadians or intended it as a threat, Hubbard erred politically. When Pearson and Reid reported on the meeting, they stressed that the stations represented a potential challenge to sovereignty.¹⁴⁹ The Canadians quickly rejected his proposal.¹⁵⁰ Although a private

¹⁴⁴ Wright to Gibson, 9 February 1944, LAC, RG 85, Vol. 823, File 7140.

¹⁴⁵ R.A. Gibson to Dr. John Patterson, 2, January 1945, LAC, RG 85, Vol. 823, File 7140.

¹⁴⁶ Over the last year he had shared his plans for the system with several prominent Canadians in the Arctic Institute of North America, but this was his first approach to External Affairs. C. W. Jackson, Acting Deputy Minister Mines and Resources, to Deputy Minister of Transport, 13 October 1944, LAC, RG 25, Vol. 3347, File 9061-A-40C.

¹⁴⁷ Escott Reid, Meteorological Stations in the North American polar region, 2 March 1945, LAC, RG 85, Vol. 823, File 7140.

¹⁴⁸ L.B. Pearson to N.A. Robertson, 6 March 1945, LAC, RG 85, Vol. 823, File 7140.

¹⁴⁹ L.B. Pearson to Norman Robertson, Under-Secretary of State, 6 March 1945, LAC, RG 25, Vol. 3347, File 9061-A-40.

endeavour, Hubbard's proposal validated concerns that the Americans would seek to establish defence facilities in the Arctic Archipelago after the war.

The U.S. had never recognized Canada's sovereignty over the islands of the Archipelago.¹⁵¹ The Canadian claim also failed to meet the high standards of the Hughes Doctrine. Still, the State Department had been disinclined to challenge Canada's title. In 1925, the Americans failed to protest the Canadian claim during the MacMillan expedition, choosing to protect their positive relationship over disputing polar sovereignty. In the 1930s, the State Department's focus turned to the Antarctic, and its respect for the Canadian claim grew. Secretary of State Cordell Hull wrote to a member of Congress in April 1944 that "all known land areas in the Arctic regions are under the ownership and government of Canada, the Union of Soviet Socialist Republics, Denmark, Norway and the United States, and so far as the Department is aware there is no current dispute as to the sovereignty over these regions."¹⁵² By the end of the war, however, these past sentiments remained private; in public the Americans had reserved their rights, interests and position in the polar regions by refusing to recognize anyone else's claims, giving Washington complete freedom of action from a legal standpoint. In previous decades, the U.S. had little incentive to challenge the Arctic claims of its neighbour and ally. As the Arctic's strategic importance stood poised to rise in the postwar world, the question lingered: What would happen if the United States pressed its interests in the Canadian Arctic?

¹⁵⁰ L.B. Pearson to N.A. Robertson, 6 March 1945, LAC, RG 85, Vol. 823, File 7140. External Affairs questioned several high ranking officers with the Arctic, Desert and Tropic Information Centre of the USAAF about the plan. These officers explained that Hubbard's suggestions should not be taken too seriously. "I gather that Hubbard is far from being persona grata to the Arctic experts of that organization who, in fact, managed some months ago to forestall his assignment work with them," R.M. Macdonnell informed Pearson. R.M. Macdonnell to L.B. Pearson, Canadian Ambassador to the U.S., 8 March 1945, LAC, RG 85, Vol. 823, File 7140. Macdonnell was a member of External who often worked on defence issues with the Americans.

¹⁵¹ Charles Camsell, Deputy Minister of Mines and Resources, noted that three wartime publications issued with the consent of the US War Department "refer repeatedly to the islands north of the Canadian mainland as 'the Canadian archipelago.'" Charles Camsell, Deputy Minister Mines and Resources to Under-Secretary of State for External Affairs, 13 March 1945, LAC, RG 25, Vol. 3347, File 9061-A-40.

¹⁵² Secretary of State Cordell Hull to Clarence F. Lea, chairman of the Committee on Interstate and Foreign Commerce of the House of Representatives, in Thomas M. Tynan, "Canadian-American Relations in the Arctic: The Effect of Environmental Influences upon Territorial Claims," *The Review of Politics* 41, no. 3 (1979): 407.

7.7 The Dawn of a New Age in the Polar Regions

The Second World War changed the context and opened a new chapter in the international politics and law of the polar regions. The Arctic played an important strategic role in the broader military conflict, while legal events in the Antarctic dramatically changed the nature and requirements of polar sovereignty. The scramble for the Antarctic also intensified as an increased number of claimant states (now Norway, France, New Zealand, Australia, Britain, Chile and Argentina) sought to bolster their claims. The U.S. also strengthened its position throughout the continent while the Soviet Union insisted it had rights in the region as well. Meanwhile, the Arctic emerged as a critical strategic space, particularly as relations between the Soviet Union and the United States deteriorated post-War. Polar projection maps made the United States' proximity to the Soviet Union strikingly obvious. Strategists made nightmarish predictions of hostile bombers flooding over the northern approaches to wreak havoc on the continent's urban, industrial heartland, and some planners contemplated ambitious projects to serve the broader interests of continental defence.¹⁵³ American defence interests in the Arctic Archipelago would force Canada and the U.S. to confront their differing ideas on sovereignty and international law.

As the polar regions entered a new era, President Roosevelt and the United States Antarctic Service Expedition ensured permanent occupation played the central role in their legal and political development. Given the ambiguity in the law on territorial acquisition, what truly mattered in territorial disputes was which state had a stronger title. As legal scholar Steven Ratner has concluded, "in the absence of clear title, to the state with the strongest display of governmental authority go the spoils."¹⁵⁴ A permanent physical presence always trumped the occasional visit and legislative acts. Furthermore, as Foreign Office legal advisers reiterated on several occasions when studying polar

¹⁵³ Vilhjalmur Stefansson's much publicized idea of the Arctic becoming the world's 'new Mediterranean' no longer seemed so far-fetched. Indeed, what seemed prophetic in 1922, now seemed a reality. In 1945 Stefansson noted that "If you shoot robot bombs (As heaven preserve us from ever doing) they will cross the Arctic on their way from London to Seattle, from Pieping to New York, from San Francisco to Moscow. This is the way bombers will fly if we ever permit them to." Trevor Lloyd, "Aviation in Arctic North America and Greenland," *Polar Record* 1, no. 35 (1948): 163-176.

¹⁵⁴ Steven Ratner, "Land Feuds and Their Solutions: Finding International Law Beyond the Tribunal Chamber," *The American Journal of International Law* 100, no. 4 (2006): 821.

sovereignty, international law was “not static.” If a state wanted to maintain its sovereignty over a territory, it had to fulfill changing requirements. Technological developments and the USASE had brought that kind of change to the polar regions, by showcasing the possibilities of polar settlement.¹⁵⁵ Even as the polar claimant states developed new occupation strategies centred on the Hughes Doctrine, the requirements remained elusive. How much presence was enough, especially considering another state could move in while you were absent? How important was presence for the sake of presence? What kind of state powers should the polar occupants be given? Was the true importance of occupation in the useful activities undertaken by the resident state representatives? Within the context of occupation, what role did contiguity, geographical unity and even the sector principle play? In recognition of the postwar power of the U.S. and its interests in the polar region, for many states the questions boiled down to one consideration: what kind of occupation would win American recognition?

¹⁵⁵ Law Officers of the Foreign Office and Colonial Office, Paper B on the Legal Authorities, 12 January 1947, NA, FO 371/61288.

Chapter 8

8 No Room for Dogs in the Manger: Occupancy, Use and Recognition, 1946-1955

On 31 October 1946, Foreign Office legal adviser William Eric Beckett delivered a presentation on the necessity of “physical occupation as a means of securing sovereignty in the polar regions” to British and Commonwealth officials on the Polar Committee. Beckett cited Max Huber’s decision in the *Palmas Island* case to argue that the requirements of polar sovereignty could evolve. To Beckett, a change had been “quite perceptible in the last twenty years.” Technological developments, increased international competition and, in particular, the legal position of the United States, had made the requirements of effective occupation more “onerous.” In Beckett’s eyes, permanent human settlement of the Antarctic was a proven possibility, making the continuous physical presence of state representatives a necessity. “International law abhors a vacuum...it does not permit the dog in the manger,” Beckett explained. “If you do not maintain effective control over your territory, someone else may step in and establish physical possession.”

The legal adviser laid out the dynamics and norms that determined the standing of claims in the polar regions. If a polar claimant provided only a paper administration and visited its claimed territory occasionally, but no other competing claims existed and expeditions only ventured into the region with its permission, Beckett explained that the “light is “green,” indicating that the state had a strong legal position. If foreign expeditions went to the claimant’s territory without permission, however, the “light may be amber,” and the state should take action to strengthen its claim. If another state made a claim to the area and maintained a physical occupation, however, “then the light is red.” For Britain, the light in the Falkland Islands Dependencies had turned red during the

war.¹ At various points over the last two decades, the lights had flashed amber in the polar claims of Canada, Australia and New Zealand.

Beckett's allusion to the "dog in the manger," referenced an ancient Greek fable in which a dog lays in a manger full of grain and prevents other animals from eating it, even though he took no action to eat the grain himself.² To avoid becoming the dog in the manger, Beckett suggested that a polar claimant needed to be physically present in its territory to effectively control the area. At the same time, states had to show they were developing and using their polar territory, which provided visible proof of the exercise of sovereignty. In other words, a state should not establish a presence for the sake of presence, but presence for a purpose. Within this context, science, surveying and other functional tasks reached new levels of importance in the polar regions, particularly in the Antarctic. These functional tasks became the grain in the polar manger that every claimant state felt it had to eat to secure sovereignty.

In the immediate postwar years, legal experts and state officials continued to visualize the Arctic and Antarctic as the same legal space. In early 1947, Philip Jessup noted that, "Any decision in regard to [the Antarctic] would obviously be a powerful precedent for the settlement of comparable claims in the Arctic."³ By this point, however, the legal trajectories of the polar regions had started to diverge significantly. This chapter explains the complex interplay between legal and political considerations, continental

¹ Minutes of the Polar Committee Meeting, 31 October 1946, National Archives (NA), DO 35/1171; Statement by Foreign Office Legal Adviser on the Necessity of Physical Occupation as a Means of Securing Sovereignty in the Polar Regions, Polar Committee Meeting, 31 October 1946, Library and Archives Canada (LAC), RG 25, Vol. 3347, File 9092-A-40; and Statement by Foreign Office Legal Adviser on the Necessity of Physical Occupation as a Means of Securing Sovereignty in the Polar Regions, November 1946, National Archives of Australia (NAA), A1209, 1957/4937.

² People writing about polar sovereignty used the dog in the manger imagery widely. In 1936, for instance, Charles Cheney Hyde (the former U.S. State Department solicitor) insisted that his country "reveals no dog in the manger policy, when uncertain of what the future may bring, such a state is alert to preserve its rights, whatever they may be, and not find itself caught napping." Despite Hyde's denial, the Hughes Doctrine did represent a 'dog in the manger' approach to the polar regions. For decades, the United States could not decide if it wanted to make claims to various parts of the Arctic and Antarctic, so it set a standard for acquiring sovereignty in the regions that no country could meet. See Hugh Cumming, Division of European Affairs, Department of State, American Policy Relating to the Polar Regions, 28 July 1938, United States National Archives and Records Association (NARA), RG 59, CDF 1930-39, Box 4520, File 800.014 Antarctic/126.

³ Philip Jessup, "Sovereignty in Antarctica," *The American Journal of International Law* 41, no. 1 (1947): 117-119.

security and America's Antarctic policy that led to Washington's recognition of Canada's terrestrial Arctic sovereignty in early 1947. Although the U.S. could have used the Hughes Doctrine to challenge Canada's sovereignty, once again politics constrained American legal action. Careful appraisal of the archival record suggests that the United States quietly and privately conceded to Canada what it was not prepared to acknowledge in international law more generally: a more relaxed interpretation of effective occupation and ownership of uninhabited territories in polar regions than the Hughes Doctrine allowed. This stance served a broader political 'good neighbor' strategy while simultaneously defending its legal position. With American recognition of Canada's sovereignty, the last of the major terrestrial sovereignty disputes was settled in the Arctic. With the claims settled, the legal situation in the Arctic finally achieved certainty and stability.

The Antarctic claimants also tried to secure American recognition of their claims in the postwar years, without success. The broad strokes of state polar policy in the postwar Antarctic, the impact of the Cold War on the region and the origins of the Antarctic Treaty have been well covered.⁴ This chapter sheds new light on this period by focusing on how uncertainty about the legal requirements of polar territorial acquisition continued to shape state action in the south polar region. Despite a clear focus on physical presence and use, a specific formula for polar sovereignty remained elusive. Attempts to clarify the rules culminated in 1955, with Britain's failed attempt to attain a legal settlement of its dispute with Argentina and Chile over the FID at the International Court of Justice. In the absence of an ICJ judgment on the principles of territorial acquisition in

⁴ See, for example, Klaus Dodds, *Pink Ice: Britain and the South Atlantic Empire* (London: I.B. Tauris Publishers, 2002); Klaus Dodds, *Geopolitics in Antarctica: Views from the Southern Oceanic Rim* (Chichester: John Wiley and Sons, 1997); Klaus Dodds, "The Great Game in Antarctic: Britain and the 1959 Antarctic Treaty," *Contemporary British History* 22, no. 1 (2008): 43-66; Klaus Dodds, "Geopolitics in the Foreign Office: British Representations of Argentina, 1945-61," *Transactions of the Institute of British Geographers* 19, no. 3 (1994): 273-290; Adrian John Howkins, "Frozen Empires: A History of the Antarctic Sovereignty Dispute Between Britain, Argentina, and Chile, 1939-1959" (Ph.D. dissertation: University of Texas at Austin, 2008); Peder Roberts, *The European Antarctic: Science and Strategy in Scandinavia and the British Empire* (New York: Palgrave MacMillan, 2011); Malcolm Templeton, *A Wise Adventure: New Zealand & Antarctica, 1920-1960* (Wellington: Victoria University Press, 2000); Peter Beck, *The International Politics of Antarctica* (London: Croom Helm, 1986); David Day, *Antarctica: A Biography* (Oxford: Oxford University Press, 2013); Tom Griffiths, *Slicing the Silence: Voyaging to Antarctica* (Cambridge, Massachusetts: Harvard University Press, 2007); and Paul Arthur Berkman, Michael Land, David Walton and Oran Young, eds., *Science Diplomacy: Antarctic, Science, and the Governance of International Spaces* (Washington: Smithsonian Institution Scholarly Press, 2011).

the Antarctic, the region remained an anomalous legal space – a key factor in the creation of the Antarctic Treaty.

8.1 Keeping the Empire's Antarctic

As historian David Day has pointed out, after forty years of minimal effort spent on its Antarctic possessions, Britain had a choice to make after the Second World War: withdraw or defend its territorial claims. By 1945, the Treasury rested on the cusp of bankruptcy and Britain entered the “age of austerity.”⁵ To address this financial crisis, the British withdrew from troublesome foreign entanglements such as the Greek Civil War, and increasingly depended on American financial and strategic support. London was immersed in the long process of dismantling the British Empire, granting independence to India and Pakistan in 1947, followed by Burma (Myanmar) and Ceylon (Sri Lanka) in 1948. Despite reducing some of its overseas commitments, Britain still funded a large air force and conscript army in an attempt to remain a global power. Furthermore, its defence responsibilities in central Europe, the Middle East and Southeast Asia remained considerable.⁶ At a time when the British government was making hard decisions about where to exert itself and where to retrench, the Antarctic seemed a natural place to withdraw from, saving money and resources for more strategically important areas. “That might have happened,” Day concludes, “had Britain not established the four bases in the Falkland Islands Dependencies, which made it a matter of prestige for the waning empire not to concede to any challenges from its territorial rivals.”⁷

Historian John Darwin points out that even as postwar British governments came to understand the sharp decline of the nation's power, they sought to retain as much visible authority and stature as possible.⁸ Political geographer Klaus Dodds has argued that the Antarctic became a venue where Britain could still demonstrate its influence over

⁵ On Britain's age of austerity see, David Kynaston, *Austerity Britain* (New York: Walker & Company, 2008).

⁶ William Roger Louis, “The Dissolution of the British Empire,” in *The Oxford History of the British Empire*, eds. Judith Brown and Wm. Roger Louis (Oxford: Oxford University Press, 1999), 329-356.

⁷ Day, *Antarctica: A Biography*, 380.

⁸ John Darwin, *The End of the British Empire: The Historical Debate* (Oxford: Basil Blackwell Ltd., 1991), 18; John Darwin, “Imperial Twilight, or When Did the Empire End,” in *Canada and the End of Empire*, ed. Phillip Buckner (Vancouver: University of British Columbia Press, 2005), 15-24.

international affairs.⁹ “Unlike other parts of the empire, the Antarctic offered national prestige safe from any interference by an indigenous population,” Dodds explains.¹⁰ Darwin has further argued that London took drastic action to avoid appearing weak, in particular refusing to give in to threats or military posturing, especially challenges from lesser powers. In the Antarctic, national pride was at stake, and no British government wanted to explain why they lost a treasured possession to the Argentineans, Chileans or Americans.¹¹ As a result, even as the strategic importance of the region declined in the eyes of British officials, arguments about prestige consistently led to government investment in the 1940s and 1950s.

To assist in planning Britain’s strategy in the Antarctic, London reconstituted the Polar Committee in the spring of 1945.¹² As Dodds has shown, Britain wanted to increase its engagement with the old Commonwealth countries on polar issues, an expression of the “belief that Britain’s legal position was precarious and thus Commonwealth support

⁹ Klaus Dodds, “To Photograph the Antarctic: British Polar Exploration and the Falkland Islands and Dependencies Aerial Survey Expedition (FIDASE),” *Cultural Geographies* 3, no. 1 (1996): 63-89.

¹⁰ Dodds, *Pink Ice*, xviii.

¹¹ Darwin, *The End of the British Empire*, 18. In Britain, the public angrily recalled that Chile and Argentina had tried to steal away the FID as the British fought to Hitler’s Germany. In Parliament, the main arguments centred on how to counter the South Americans, rather than withdrawal from the Antarctic. As one Member of Parliament, a Brigadier Rayner, proclaimed, “Does not the right hon. Gentleman realize that these small countries would never, in their wildest dreams, have contemplated facing us in this way in the hundred years leading up to July 1945?” House of Commons, *Debates* 16 June 1948, LAC, RG 25, Vol. 4765, File 50070-40, pt. 1. See also His Excellency the Governor Broadcasts from Government House on “OUR DEPENDENCIES,” 22 February 1948, LAC, RG 25, Vol. 4765, File 50070-40, pt. 1.

¹² James Wordie first called for the revival of the committee in November 1943, noting that Operation Tabarin should have involved the Dominions to a far greater extent than it did. Wordie insisted that the Polar Committee had “served a very useful purpose in associating the Dominions with our polar policy and in focusing political issues in the Arctic and Antarctic, which are the concern of several Departments of State...it would be a pity to lose any organ which associates the Dominions with our policy at the departmental level.” The Committee would better facilitate the sharing of key ideas and perspective and allow for joint action. By the spring of 1945, plans to re-start the Polar Committee were in full swing, with experts from the Foreign, Dominions and Colonial Offices concluded it would serve as “useful piece of inter-Imperial machinery” for discussions between Canada, Australia, New Zealand and South Africa. Notes by G.E. Boyd Shannon, Dominions Office, 3 November 1943 and 17 November 1943, NA, DO 35/1423; Memo by James Wordie, 14 February 1945, NA, DO 35/1424. Proposed Revival of Polar Committee, Note of a Meeting in the Dominions Office, 9 March 1945, NA, FO 371/50431; Dominions Office, Draft Note on the Polar Committee, March 1945, NA, FO 371/50431; G.ST.J. Chadwick, Polar Committee, 17 April 1945, NA, FO 371/50341; High Commissioner, London to the Secretary of State for External Affairs, 12 April 1945, LAC, RG 77, Vol. 281, File 25-1-14.

was crucial in maintaining the UK's title to the FID."¹³ Much as it had since the 1920s, the Dominions Office (renamed Commonwealth Relations in 1947) ensured that any discussion of Antarctic actions considered their possible impact on Canada's position in the Arctic.¹⁴

In one of its first moves to assist in the "maintenance and strengthening of territorial claims," the Polar Committee advised that the Discovery Committee continue its operation.¹⁵ They listened to the arguments of polar explorer and scientist James Wordie, who insisted there was still much work to be done in the areas of surveying, oceanography, meteorology, the exploration of air routes and radio communication.¹⁶ The Polar Committee insisted that these state activities would significantly bolster Britain's legal position.

The British government decided to maintain its permanent physical presence in the FID even before the war ended. On 30 May 1945, an interdepartmental meeting agreed that Operation Tabarin would be renamed the Falkland Islands Dependencies Survey (FIDS) and managed by the Colonial Office.¹⁷ As Klaus Dodds has highlighted, the FIDS would support the claim, address the problem of intruders, assess economic value and evaluate the region's strategic importance.¹⁸ Between twenty and forty men mapped and surveyed the FID, while carrying out other scientific research, particularly

¹³ Dodds, *Pink Ice*, 17. British officials accepted that polar policy was "essentially a matter requiring the cooperation of the Dominions and cannot be settled by the U.K. Govt alone." Dominions Office, 24 November 1943, NA, DO 35/1423.

¹⁴ R.A. Wiseman, Dominions Office, to J.V. Perowne, Foreign Office, 25 November 1943, NA, DO 35/1423; and Proposed Revival of Polar Committee, Note of a Meeting in the Dominions Office, 9 March 1945, NA, FO 371/50431.

¹⁵ Minutes of the Polar Committee Meeting, 16 May 1945, NA, DO 35/1171; Boyd Shannon to Roberts, 7 July 1945, NA, DO 35/1414

¹⁶ J.M. Wordie, Discovery Committee, to Captain Hayward, Colonial Office, 18 January 1944, NA, DO 35/1171. See also J.M. Wordie, Chairman, Scientific Sub-Committee, Discovery Committee, J. Middleton, S.W. Kemp, N.A. MacKintosh, Memorandum by the Scientific Sub-Committee of the 'Discovery' Committee on the Future Prospects of the Committee's Work, NA, DO 35/1171; and Discovery Committee: Report of the Sub-committee appointed to the future of the Committee, 21 November 1944, NA, DO 35/1171.

¹⁷ The Colonial Office was adamant that when referring to British attempts at occupation in the FID, the word expedition had to be avoided as sounding too temporary. E.V. Luke, Colonial Office, to Brian Roberts, 19 June 1945, NA, DO 35/1414.

¹⁸ Klaus Dodds, "The End of a Polar Empire? The Falkland Islands Dependencies and Commonwealth Reactions to British Polar Policy, 1945-61," *The Journal of Imperial and Commonwealth History* 24, no. 3 (1996): 397.

meteorology.¹⁹ London gave the British surveyors administrative titles, such as postmaster, justice of the peace and magistrate with orders to protest the presence of any Argentinean and Chilean groups they encountered, and to remove the symbols of sovereignty left by “intruders.”²⁰ In the 1945-1946 Antarctic summer, the FIDS opened a base close to the Argentinean meteorological station on Laurie Island in the South Orkneys and another at Marguerite Bay, at the site of the United States Antarctic Service Expedition post abandoned in 1941.

The dual role assumed by the British surveyors as scientists and government representatives reflected British legal thinking on polar sovereignty. The legal advisers of the Colonial and Foreign Offices emerged from the war convinced of the need for a “policy of continuous occupation” to support state polar claims.²¹ The exact requirements of territorial acquisition remained unclear, however, and William Eric Beckett admitted he could give only an “oracular” answer to what the law expected from a state. Of course in uninhabited areas, large sections of territory could be controlled from small settlements, and if these posts were situated at the access points of a territory, “there is probably no need to do much about the interior.”²² Still, the legal advisers ruled that to protect Britain’s rights the FIDS must extend state jurisdiction to as wide an area as possible.²³ Brian Roberts, who was central in convincing officials in the Foreign Office

¹⁹ Between November and February they undertook field work, while between March and October they would hunker down and survive. Dodds, “The Great Game in Antarctic,” 55. For activities of the FIDS see also Note on the history of the Falkland Islands Dependencies Survey Committee, Brian Roberts, 1 January 1962, Scott Polar Research Institute (SPRI), MS 1308/22/1; ER, Roberts, Brian; Vivian Fuchs, *Of Ice and Men* (Oswestry: Anthony Nelson, 1982); Vivian Fuchs, “Exploration in British Antarctica,” *Geographical Journal* 116 (1951): 399-421; and Dodds, “To Photograph the Antarctic: British Polar Exploration and the Falkland Islands and Dependencies Aerial Survey Expedition (FIDASE).”

²⁰ The political instructions given to the leaders of the FIDS parties that would encounter Americans were softer. Involved notes assuming that American marks of sovereignty were not to make a claim. The Colonial Office insisted that the leader of the FIDS, Vivian Fuchs, brought his army uniform with him in case he ran into intruders and need visible proof of his administrative authority. Secretary of State for the Colonies to the Governor, Falkland Islands, Miles Clifford, 20 January 1947, NA, FO 371/61285.

²¹ R.H. Allen, Falkland Islands Dependencies, 9 January 1946, NA, DO 35/1171.

²² Law Officers of the Foreign Office and Colonial Office, Paper B on the Legal Authorities, 12 January 1947, NA, FO 371/61288. See also Law Officers of the Foreign Office and Colonial Office, Paper A on the Falkland Islands Dependencies, January 1947, NA, FO 371/61288; and Statement by Foreign Office Legal Adviser on the Necessity of Physical Occupation as a Means of Securing Sovereignty in the Polar Regions, Polar Committee Meeting, 31 October 1946, LAC, RG 25, Vol. 3347, File 9092-A-40.

²³ Minute Sheet, R. Best, Falkland Islands Dependencies Survey, 10 May 1946, NA, FO 371/51821.

of the need to invest in the FID,²⁴ suggested in early 1946 that an aerial survey would be the best means of expanding British control in the territory. Furthermore, an aerial reconnaissance could identify valuable areas where Britain could strengthen its claim.²⁵ Monetary and resource constraints delayed an aerial survey of the FID until 1955.

The legal advisers also insisted on the importance of “continuous use.” The British considered it insufficient to “just to have small parties living at certain places.”²⁶ British scientific research had to be strong, so that it “could be used if necessary to demonstrate to foreign Government or to a Tribunal that HM Government is taking all reasonable steps to develop, and exercise sovereignty over, the area and is not merely attempting to prevent foreign encroachments.”²⁷ At this point, no government could show they knew more about the region than the British, and London believed that this strengthened its legal position.²⁸ Thus, when the FIDS established its base on Laurie Island, the Foreign Office stressed that, “With our much more fully equipped meteorological station now working at Cape Geddes, the scientific value of the Argentine station will be very small.”²⁹ The British reports would be more reliable, making the old Argentinean station obsolete and unnecessary. The science carried out by the FIDS proved particularly important, given London’s decision not to expel foreign intruders by force, which would further destabilize relations with Chile and Argentina and possibly

²⁴ Klaus Dodds, “The Great Game in Antarctic,” 44.

²⁵ Brian Roberts, FORD, to G.W. Henlen, 6 May 1946, NA, FO 371/51821; and Minutes of a meeting held in Air Ministry on 18 June 1947: Colonial Office Request for an Aerial Survey of Graham Land, NA, FO 371/61296. See also Howkins, “Frozen Empires,” 149.

²⁶ Minute Sheet, Brian Roberts, Falkland Islands Dependencies Survey, 6 May 1946, NA, FO 371/51821. In September 1946, Roberts noted that, “There is no doubt that both the Chilean and Argentine Governments would like to set up meteorological stations in the Dependencies for political reasons. It is essential therefore that while we have to exclude them from doing so we must take every possible step to ensure that we do not lay ourselves open to the same charge.” While FIDS was political in origin, “it is important to maintain it as far as possible as a normal administrative activity in which motives of research, exploration and development predominate.” Meeting between Brian Roberts and Gordin Howkins, head of the Falkland Islands Meteorological Service, September 1946, in Adrian Howkins, “Political Meteorology: Weather, Climate and the Contest for Antarctic Sovereignty, 1939-1959,” *History of Meteorology* 4 (2008): 27- 40.

²⁷ J.V. Perowne to J. Barton, 1 June 1946, NA, FO 371/51821; J.V. Perowne, Foreign Office, to J. Barton, Colonial Office, 6 July 1946, NA, DO 35/1171; and Minute Sheet, R. Best, Falkland Islands Dependencies Survey, 10 May 1946, NA, FO 371/51821.

²⁸ Wrong to Pearson, 7 February 1947, Some Questions and Answers About Antarctica, from the Information Office, British Embassy, 5 February 1947, LAC, RG 25, vol. 4765, file 50070-40, pt. 1.

²⁹ Note, Brian Roberts, 20 February 1946, NA, FO 371/51821.

lead to violence.³⁰ Unwilling to carry out one of the most basic functions of a state in the FID (keeping out trespassers), scientific research became one of the clearest proofs of the exercise of sovereignty.

In early 1946, Beckett insisted that Britain must act quickly to strengthen its legal position because Chile and Argentina showed no signs of giving up their Antarctic interests after the war.³¹ Chilean officials publicly espoused the legal defence that they crafted for their country. Government official Antonio Huneeus Gana summarized these arguments succinctly, writing that, “Nature, the *uti possidetis*, polar possessions and fisheries exploitation have given it to her. And it is ratified by her own spirit of frank and constant full mastership.”³² In 1946, the Argentinean National Antarctic Commission set new limits for the Argentine Antarctica between latitude 25° and 74° West, and prepared to send an expedition to its sector. Both Argentina and Chile protested when Britain issued new postage stamps for the FID in early 1946.³³

In March 1946, the British learned that the Argentineans planned to erect a cross and build a chapel at the meteorological station at Laurie Island. A priest would bring the cross, which had the fitting inscription, “He shall extend His rule unto the uttermost end of the earth.” Foreign Office official J.D. Murray worried that the “Catholic chapel [would] constitute a kind of implicit symbol of sovereignty” since it could “only have been put there by the Argentines.” Murray admitted “this looks like a rather wily move by the Argentines, since we obviously cannot start tearing down crosses and chapels.”³⁴ The construction of the chapel only highlighted what British officials had already grudgingly accepted: Argentina had definitely acquired legal title to Laurie Island. Although some officials suggested that London should negotiate with the Argentineans to

³⁰ C.A.E. Shuckburgh to Secretary of the Admiralty, 3 November 1947, NA, FO 371/61300.

³¹ In early 1946, Beckett predicted that Argentina or Chile would take their Antarctic dispute with Britain to the International Court of Justice. W.E. Beckett, 11 July 1946, NA, FO 371/51821. The British got “the Law Officers to examine and set out our claims so that we can respond, if necessary, to any challenge before the International Court.” M. Butler to Sir Orme Sargent, The Antarctic, 17 January 1947, NA, FO 371/24168.

³² From Santiago Chancery, Translations of Extracts from Sr. Antonio Huneeus Gana’s Article on the Antarctic, 6,7,8, January 1945, NA, CO/217/5.

³³ Howkins, “Frozen Empires,” 107-134.

³⁴ Buenos Aires to Foreign Office, 26 January 1946 and J.D. Murray, Foreign Office, to J. Barton, 22 March 1946, NA, FO 371/51821.

draw a boundary line down the middle of Laurie Island, the Foreign Office realized this would be counterproductive to their other interests in the FID. The British certainly wanted “to argue that a post on polar and uninhabited territory carried with it something very much more than a circumference of 15 miles.”³⁵ London privately conceded that Argentina’s meteorological post secured its title over Laurie Island, and in the 1947 season, the FIDS moved their post from Cape Geddes to Signy Island in the South Orkneys.

Throughout 1946, the British anticipated that Chilean, Argentinean and American activity in the Antarctic would increase. While the first two would focus on the FID, the latter might venture anywhere in the Antarctic without warning. Caught up in postwar reconstruction, New Zealand and Australia had done nothing to strengthen their claims to the Ross Dependency and the AAT.³⁶ Brian Roberts argued that the New Zealanders and Australians had to be warned that the British no longer considered administration and the occasional visit as sufficient, and that permanent occupation, coupled with an active programme of research and exploration should be considered the new standard of sovereignty in the Antarctic.³⁷ Thus, on 31 October 1946, William Eric Beckett gave his talk to the Polar Committee on the necessity of physical occupation and warned that Australia and New Zealand were failing to safeguard their territorial claims.³⁸ The Dominions Office followed this up with a plea that Canberra and Wellington must “take some prompt and active measures of settlement in their own sectors.”³⁹ The Americans were coming, the British predicted, and everyone had to be ready.

³⁵ J.V. Perowne to H.A. Meyer, Admiralty, January 1947, NA, FO 371/61285.

³⁶ As historian Malcolm Templeton has shown, in early 1946, New Zealand officials had, for a change, considered the claim to the Ross Dependency. Crown Solicitor AE Currie highlighted that the American occupation of the Ross Dependency, while temporary, “must be admitted to have been at least more valid than any absentee exercise of legislative or executive powers.” While Currie argued that New Zealand had to maintain control in the Ross Dependency, occupy and perform scientific studies, nothing was done to follow up his advice. Templeton, *A Wise Adventure*, 79-84.

New Zealand persistently worried about the validity of the British Settlements Act. Canadian High Commissioner, Wellington, to Secretary of State for External Affairs, 12 March 1948, LAC, RG 25, Vol. 4765, File 50070-40, pt. 1.

³⁷ Brian Roberts, Foreign Office, to John Chadwick, Dominions Office, 25 October 1946, NA, DO 35/1171.

³⁸ Minutes of the Polar Committee Meeting, 31 October 1946, NA, DO 35/1171.

³⁹ J. Chadwick, Dominions Office, to Boyd Shannon, 12 November 1946, NA, DO 35/1171.

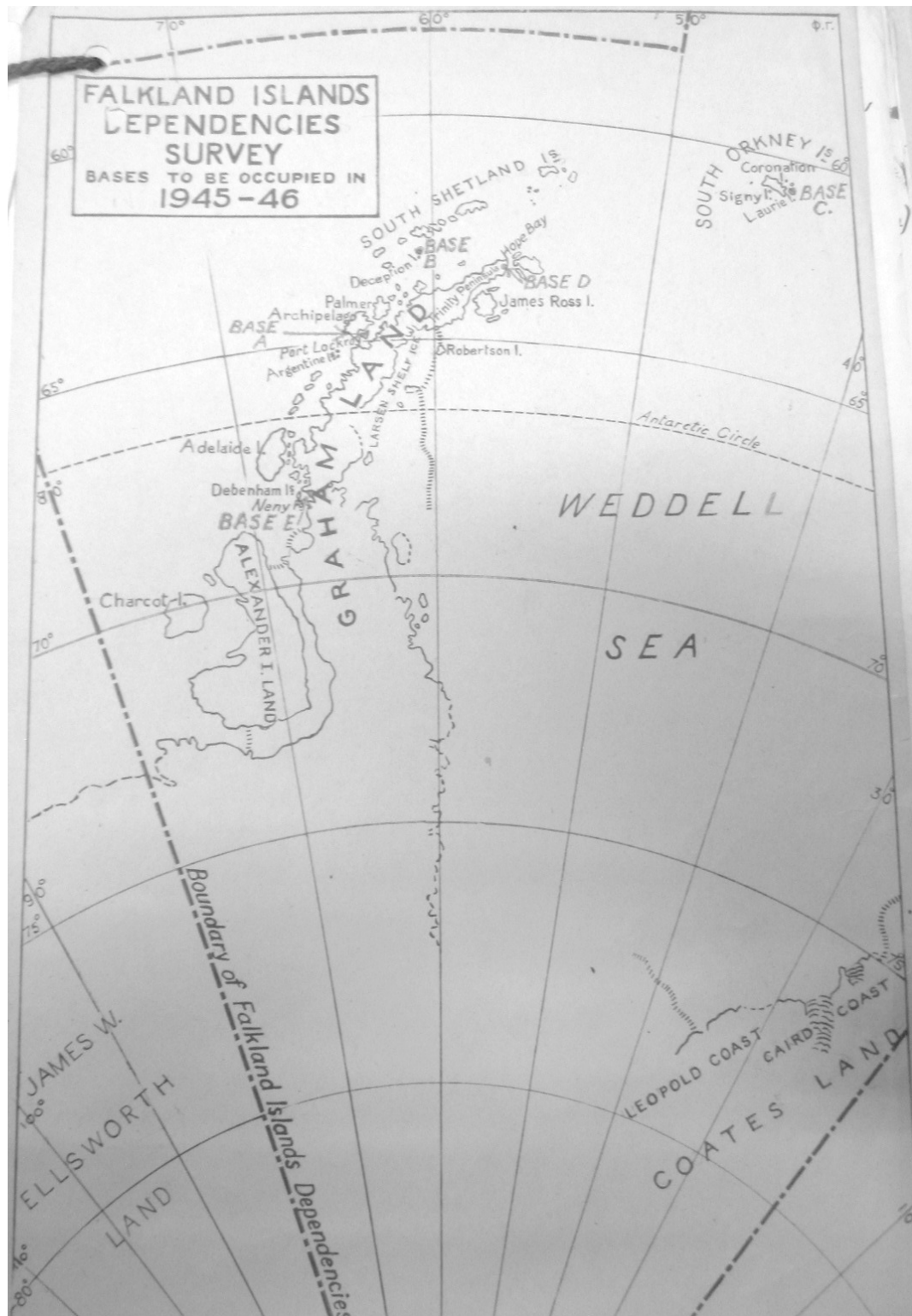


Figure 8: Map of Graham Land 1945-1946. Law Officers of the Foreign Office and Colonial Office, Paper A on the Falkland Islands Dependencies, January 1947, NA, FO 371/61288.

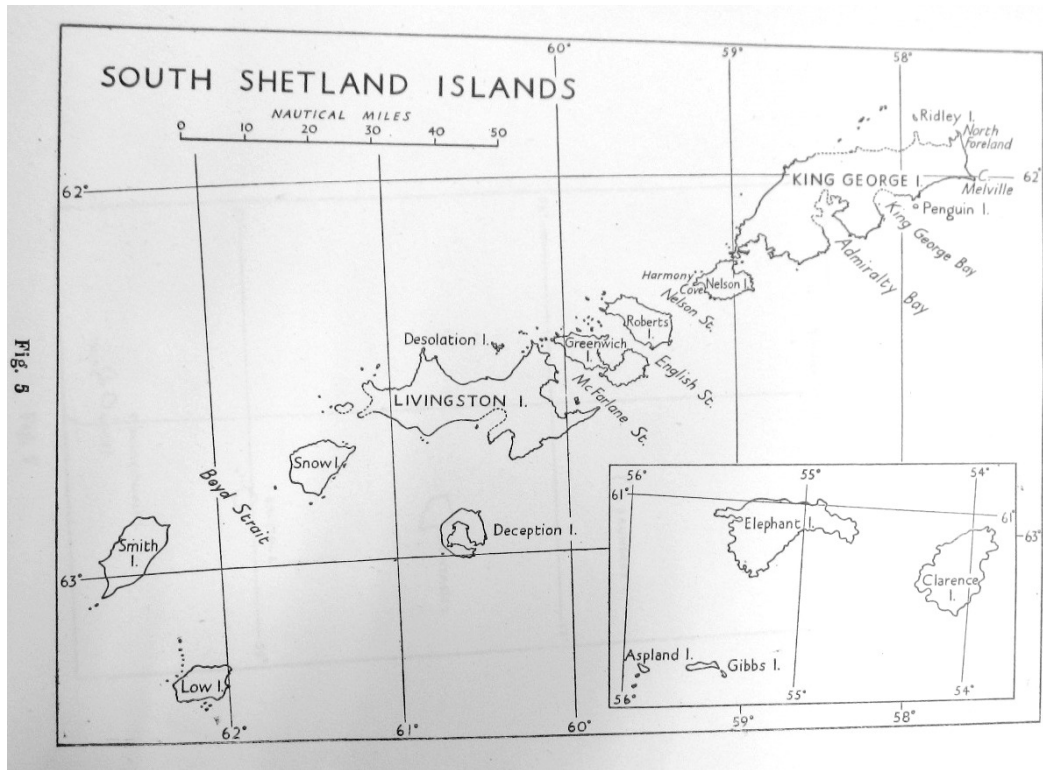


Figure 9: Map of South Shetland Islands 1946. Law Officers of the Foreign Office and Colonial Office, Paper A on the Falkland Islands Dependencies, January 1947, NA, FO 371/61288.

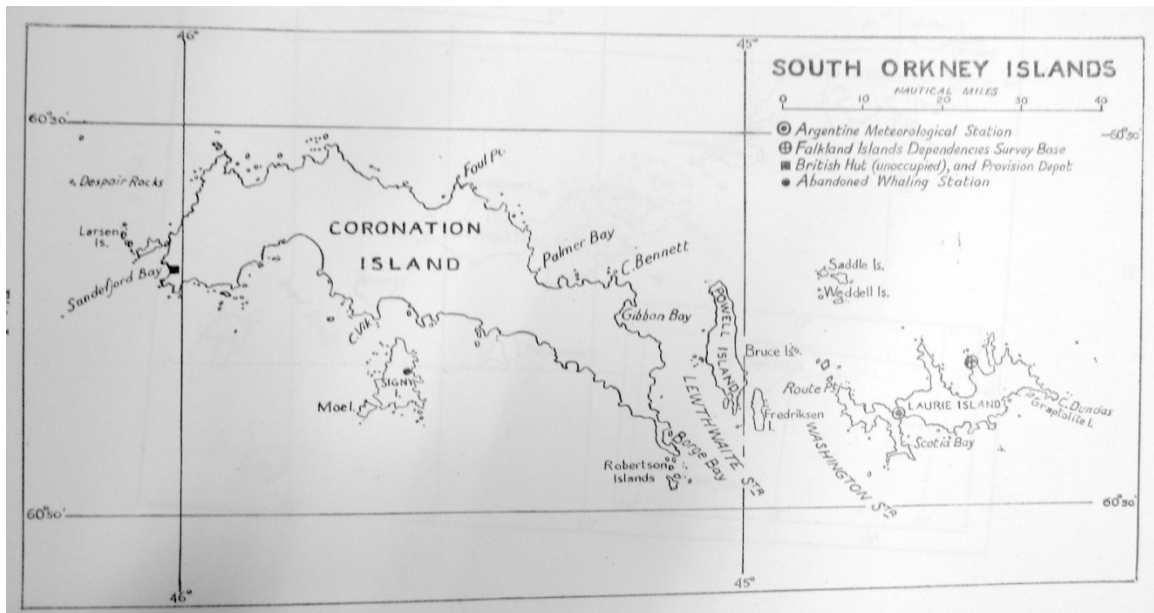


Figure 10: Map of South Orkney Islands 1946. Law Officers of the Foreign Office and Colonial Office, Paper A on the Falkland Islands Dependencies, January 1947, NA, FO 371/61288.

8.2 Defending North America, Defending Canada's Arctic Sovereignty

In the months following the end of the Second World War, Washington's focus lingered on the Arctic, rather than the Antarctic.⁴⁰ As relations between the United States and the Soviet Union deteriorated, North American defense analysts replaced the Mercator projections with polar projection maps, which emphasized the United States' proximity to the Soviet Union. American officials looked to the Arctic Archipelago and saw an undefended attic. On 5 December 1945, General Henry H. Arnold, the retiring Commander in Chief of the U.S. Army Air Force declared publicly that the Arctic would become the frontline in a potential conflict.⁴¹ Accordingly, U.S. defence planners contemplated ambitious Arctic projects to serve the broader interests of continental security.

Samuel Boggs, the resident polar explorer at the State Department, anticipated that Ottawa would deny the United States full access to the Arctic Archipelago because of sovereignty concerns. This problem could be easily resolved if Washington simply acknowledged Canada's sovereignty "over all of the land which is now known to lie north of Canada and west of Greenland." Boggs concluded that the U.S. could recognize Canada's sovereignty without acknowledging "the sector principle as a principle."⁴²

⁴⁰ Several proposals for Antarctic activity did come to the State Department. Shortly after watching the Japanese surrender on board USS Missouri, Richard Byrd wrote out a plan for the U.S. to establish permanent bases on the Antarctic continent. He wanted to have the United States Antarctic Service reinstated and aircraft carrier based planes to complete a massive survey of the continent. Lisle A. Rose, *Explorer: The Life of Richard E. Byrd* (Columbia: University of Missouri Press, 2008), 426-428. Lawrence Martin, still the chief of the map division at the Library of Congress, crafted a less ambitious plan to set up permanent bases on the Antarctic Peninsula and Deception Island using volunteer Alaskan Inupiat for colonization. Albert H. Gerberich, OSA, to Bernbaum and Barall, OSA, 10 April 1953, NARA, RG 59, CDF 1950-54, Box 3066, File 702.022/3-151.

⁴¹ Referred to in David Beatty, *The Canadian-United States Permanent Joint Board on Defence* (Ann Arbor: University Microfilms International, 1969), 117. This matched a recent assessment made by Prime Minister King remarked that "if there is another war, it will come against America by way of Canada from Russia." On 11 September 1945, this became all too apparent to the King government, which desperately wanted to avoid involvement in another global crisis. Igor Gouzenko, a cipher clerk at the Soviet embassy in Ottawa, provided evidence of an extensive spy network that reached into the Department of External Affairs, the labs of Canada's atomic program, and the bureaucracies of its senior allies. King, 11 September 1945. James Eayrs, *In Defence of Canada Vol. 3: Peacemaking and Deterrence* (Toronto: University of Toronto Press, 1972), 320.

⁴² Boggs argued that recognition of Canada's sovereignty over the Archipelago had recently heard from several of his Canadian friends that Canada's Department of External Affairs had recognized the

Graham Parsons of the British Commonwealth Affairs division at the State Department rejected the proposal, stating that he “would not think it necessary to make any pronouncement by way of quid pro quo for the concession from Canada of permitting Americans to participate in these Arctic exercises... Our joint defence cooperation is now so close that we could secure any participation desired by asking for it.”⁴³ Events proved he was overly optimistic.

In the spring of 1946, Washington peppered Ottawa with proposals to improve American capabilities in the Arctic, including the establishment of several permanent weather stations on uninhabited islands (Melville, Prince Patrick, Axel Heiberg and Ellesmere) in the northern part of the Archipelago.⁴⁴ The United States repeatedly assured Canadian officials that the weather stations program would not jeopardize Canadian sovereignty, but never offered to recognize Canada’s sector claim or title to the islands of the entire Archipelago.⁴⁵ Canadian politicians and civil servants quietly raised concerns about whether Canada had established clear sovereignty over its remotest Arctic

limitations of the sector principle, and would not commit Canada to the theory. Samuel Boggs to J.G. Parsons, 27 November 1945, NARA, RG 59, CDF 1945-49, box 6037, file 842.9243 / 12-745.

⁴³ J.G. Parsons to Mr. Wailes, Division of British Commonwealth Affairs, 7 December 1945, NARA, RG 59, CDF 1945-49, Box 6037, File 842.9243/12-745.

⁴⁴ The major American focus at this point, rested on the establishment of meteorological stations across the North American Arctic. After his dismissal by the Canadians in early 1945, Charles Hubbard had worked to gain political support for the construction of weather stations. On 12 February 1946, the House of Representatives passed the legislation as Public Law 296, which authorized the weather bureau to construct and operate weather stations in cooperation with the meteorological services of other countries. Personnel from the U.S. Weather Bureau noted that “given the wartime cooperation in the Canadian North, “we have every reason to believe that the Canadians would agree to any reasonable arrangement for us to establish and maintain stations at points that would be of benefit to them but which they cannot establish and maintain under present circumstances.” *Hearings Before the Committee on Agriculture, House of Representatives*, Seventy-Ninth Congress, Second Session on H.R. 4611 (S.765), 22 January 1946, NARA, RG XPOLA, Entry 17, Charles Hubbard Papers, Box 1, File Miscellaneous. On these U.S. proposals, see: Shelagh Grant, *Polar Imperative: A History of Arctic Sovereignty in North America* (Vancouver: Douglas & McIntyre, 2011), 283-300; David Bercuson, “Continental Defense and Arctic Security, 1945-50: Solving the Canadian Dilemma,” in *The Cold War and Defense*, eds. K. Neilson and R.G. Haycock (New York: Praeger, 1990), 153-170; and P. Whitney Lackenbauer and Peter Kikkert, “Sovereignty and Security: The Department of External Affairs, the United States, and Arctic Sovereignty, 1945-68,” in *In the National Interest: Canadian Foreign Policy and the Department of Foreign Affairs and International Trade, 1909-2009*, eds. Greg Donaghy and Michael Carroll (Calgary: University of Calgary Press, 2011), 101-120.

⁴⁵ Though usually concerned by U.S. activities, even R.M. Macdonnell noted that “[i]n presenting this request, the United States Embassy made it clear that there was no question of interfering in any way with Canadian sovereignty. I think that their approach to the problem should reassure your minister if he is troubled by any thought of Canadian sovereignty in the Arctic being called into question by the United States.” R.M. Macdonnell, Associate Under Secretary of State for External Affairs, to Dr. Charles Camsell, 11 May 1946, LAC, RG 25, Vol. 3347, File 9061-A-40.

islands – particularly areas in which the Americans now proposed development projects. Officials cautioned that the Americans wanted to establish permanent bases on islands that had not been effectively explored, let alone policed.⁴⁶ Having received the Foreign Office arguments about the need for continuous effective possession, Ottawa’s bureaucrats realized Canada lacked this level of control in much of the Archipelago.⁴⁷ While the government had re-opened the police post at Dundas Harbour, Devon Island in 1945, re-establishing a permanent presence north of Lancaster Sound, this seemed insignificant next to Washington’s plans. Doubts about the strength of Canada’s Arctic sovereignty were aptly summed up by Hume Wrong, Under Secretary for External Affairs, who concluded that Canada’s title remained “unchallenged, but not unchallengeable.”⁴⁸ Accordingly, Ottawa delayed approving the weather station program.⁴⁹

A U.S. Air Coordinating Committee report from December 1945 exacerbated Canadian worries by recommending American reconnaissance flights look for undiscovered Arctic islands in the unexplored area north of Prince Patrick Island and west of Grant’s Land (Ellesmere) – areas theoretically within Canada’s sector – which the United States could use as platforms for weather stations and polar communications. The report indicated that “the U.S. may not have recognized” Canada’s claims to everything within its sector and requested more research on the Canadian position.⁵⁰ Although the report’s rejection of the sector principle caused alarm in Ottawa, Canada

⁴⁶ See, for example, R.M. Macdonnell to A. Heeney, 3 November 1945; Hume Wrong to A.D.P. Heeney, 24 Jun 1946; Minister of Mines and Resources to Louis St. Laurent, 25 May 1946, Minister of Mines and Resources to Louis St. Laurent, 25 May 1946, LAC, RG 25, vol. 3347, file 9061-A-40; and Memorandum by the Department of Mines and Resources, 18 May 1946, *Documents on Canadian External Relations* (DCER), Vol. 12, (Ottawa: Queen’s Printer, 1977), 1946, 1553.

⁴⁷ Legal Division, External Affairs, Reference to Dominions Office Circular Despatch D. No. 158 Covering Copy No. 40 of “Territorial Claims in the Antarctic” prepared by the Research Department, Foreign Office, 1 May 1945, 18 October 1945, LAC, RG 25, Vol. 4765, File 50070-40 pt. 1

⁴⁸ Hume Wrong to A.D.P. Heeney, 24 Jun 1946, LAC, RG 25, Vol. 3347, File 9061-A-40, part 1.

⁴⁹ Memo for file by R.M. Macdonnell, 28 June 1946, LAC, RG 25, Vol. 3347, File 9061-A-40. At the same time, Ottawa granted permission for a aerial reconnaissance of the Arctic, and allowed an American naval task force, Operation Nanook, to carry out operations in the waters of Baffin Bay and Lancaster Sound.

⁵⁰ For the December 1945 Air Coordinating Committee reports, see: LAC, RG 25, Vol. 3047, PJBDF File 113. In the summer of 1945 the Air Coordinating Committee, composed of the Assistant Secretaries for Air of the Department of State, War, Navy, Commerce and the Chairman of the Civil Aeronautics Board, appointed a Sub-committee on the Arctic. The sub-committee held meetings all summer and fall, and in December released its report.

should have taken comfort in the document's general tenor. By focusing on potential "undiscovered" islands, the report implicitly acknowledged that all discovered islands belonged to Canada – a significant outcome for Canadian sovereignty.

The 1946 Canadian Cabinet Defence Committee's study on Arctic sovereignty issues, largely written by Vice Chief of the General Staff D.C. Spry, highlighted the vulnerability of Canada's sovereignty claims in the "Canadian sector." Spry defined sovereignty as "power, right or authority over a clearly defined and delimited area." Unfortunately, Spry argued that Canada's claims were largely based on contiguity and exploration, with "little support on the grounds of effective occupation, settlement or development." Canada's claim to sovereignty was "at best somewhat tenuous and weak." While Canada's claims had gone unchallenged when the Arctic "represented little but empty space," the region's new strategic importance changed this situation. Spry worried that "hitherto unknown islands may be discovered within the Canadian sector by a foreign power, and claim laid to them by right of discovery and primary occupation." Even though Spry admitted that the U.S. "tacitly acknowledges Canadian sovereignty over...discovered islands," he warned that Canada had to "carefully safeguard her sovereignty in the Arctic at all points and at all times, lest the acceptance of an initial infringement of her sovereignty invalidate her entire claim."

Despite his warning, Spry also stressed that the Canadian Arctic had an important role to play in continental defence, "considered as vital to the United States as a defence frontier as to Canada, and its military security requires closely coordinated action." Spry did not advocate closing the Canadian frontier to the Americans, but recommended allowing access while balancing the twin imperatives of sovereignty and regional security. The "problem is thus seen to devolve into finding a suitable *modus operandi*," Spry suggested. Canada must find a way of granting essential facilities and rights to the U.S. without infringing its sovereignty.⁵¹ Historian David Bercuson has concluded, "The dilemma then was this: how could Canada help protect the continent against the Soviet

⁵¹ Department of National Defence to Cabinet Defence Committee, "Sovereignty in the Canadian Arctic in Relation to Joint Defence Undertakings," [May 1946], and marginalia, D.M. Page, ed., *DCER*, Vol. 12, 1946, 1556-1558. Hume Wrong noted that Canada's claim was stronger than Spry's memorandum suggested. See: Cabinet Defence Committee Minutes, 6 June 1946, LAC, RG 25, PJBD File 113.

Union – a job Ottawa agreed needed doing – while, at the same time, it protected the Canadian north against the United States?”⁵²

In Ottawa, a major debate over how to proceed arose between those who wanted to force the United States into a public recognition of Canada’s sovereignty along the lines of the sector principle and those who thought more informal guarantees were the best option. Lester Pearson, Canadian Ambassador in Washington, argued Ottawa should secure “public recognition of our sovereignty of the total area above our northern coasts, based on the sector principle.” Pearson had been a supporter of the sector principle since he first worked on Canada’s Arctic file in 1929. He thought that the Americans could be persuaded that “it would be in their own interest at this time to reinforce our claim to the area under the sector principle.” Pearson reasoned that in the past the Americans had been reticent to recognize Canada’s sovereignty in case they might occupy the islands at some point in the future. If the situation remained “undetermined in international law,” however, there was always the chance that some other country, notably Russia, might try and establish an occupation over the islands. “An open and formal statement on some suitable occasion by the United States that Canada’s sovereignty over this area is recognized might remove the possibility of such a contingency; or at least make it more

⁵² Bercuson, “Continental Defense and Arctic Sovereignty,” 155. As senior Cabinet minister Louis St. Laurent stated, “Canada could not stay out of a third World War if 11,999,999 of her 12,000,000 citizens wanted to remain neutral.” Cited in Lt. Colonel Bernd Horn, “Gateway to Invasion or the Curse of Geography? The Canadian Arctic and the Question of Security, 1939-1999,” in *Forging a Nation: Perspectives on the Canadian Military Experience*, ed. Bernd Horn (St. Catherines: Vanwell Publishing Limited, 2002), 318. For the debate on the sovereignty-security equilibrium during the early Cold War, see Kenneth. Eyre, “Custos Borealis: The Military in the Canadian North” (Ph.D. dissertation: University of London - King’s College, 1981); Joseph Jockel, *No Boundaries Upstairs: Canada, the United States, and the Origins of North American Air Defence, 1945-1958* (Vancouver: UBC Press, 1987); Elizabeth Elliot-Meisel, *Arctic Diplomacy: Canada and the United States in the Northwest Passage* (New York: Peter Lang, 1998); Shelagh Grant, *Sovereignty or Security?: Government Policy in the Canadian North, 1936-1950* (Vancouver: UBC Press, 1988); and Ken Coates, P. Whitney Lackenbauer, William Morrison, and Greg Poelzer, *Arctic Front: Defending Canada in the Far North* (Toronto: Thomas Allen, 2008); P. Whitney Lackenbauer, “Right and Honourable: Mackenzie King, Canadian-American Bilateral Relations, and Canadian Sovereignty in the Northwest, 1943-1948,” in *Mackenzie King: Citizenship and Community*, eds. John English, Ken McLaughlin, and Lackenbauer (Toronto: Robin Brass Studio, 2002), 151-168; Peter Kikkert, “Pragmatism and Cooperation: Canadian-American Defence Activities in the Arctic, 1945-1951” (M.A. thesis: University of Waterloo, 2009); Lackenbauer and Kikkert, “Sovereignty and Security,” 101-20.

difficult to bring it about,” he concluded. Pearson would trade public recognition of Canada’s sovereignty for access to Canada’s Arctic.⁵³

Although several senior civil servants advocated for Pearson’s approach, Ottawa rejected the proposed course.⁵⁴ Appraisals by Hume Wrong and RAJ Phillips attributed the reluctance of the “United States to take any step which would confirm or deny Canada’s claims to sovereignty in the Arctic...to the United States interests in the Antarctic.” Recognizing Canada’s sector claim would have implied U.S. recognition of the sector principle more broadly, thereby strengthening various states’ Antarctic claims. As long as the sector principle remained unestablished in international law, the U.S. government could contemplate claiming Antarctic territory within other claimant states’ sectors and operate freely throughout the southern continent. This freedom also had strategic implications, given the U.S. military’s conclusion in the summer of 1946 that the Antarctic could serve as a valuable area for polar training and experimentation – far away from the Arctic borders of the Soviet Union.⁵⁵ More significant than validating the sector principle, public American recognition of Canada’s claims would have invalidated the Hughes Doctrine and broadcast to the world that the United States considered the Canadians’ efforts at effective occupation acceptable, setting a precedent for the required

⁵³ Ambassador in the United States to Acting Undersecretary of State for External Affairs, 5 June 1946, *DCER*, Vol.12, 1946, 1565-1566. It is striking that Pearson, having so much experience working with the Americans, misunderstood the US position so fundamentally. While External Affairs refrained from mentioning Canada’s sector claim in its discussions with the State Department, Pearson was unwilling to jettison the principle. In a July 1946 article titled “Canada Looks Down North” in the influential American journal *Foreign Affairs*, he publicly tied Canada to the sector principle. He explained that Ottawa used the principle to claim Canada’s northern mainland as well as the islands and the frozen sea up to the North Pole, the first public indication of a Canadian maritime claim in the Arctic. Although this did not reflect official policy, Pearson’s position as Ambassador gave the assertion tremendous weight. He used the article to tell the US exactly what he thought belonged to Canada, an example of the loud and public diplomacy he so abhorred. In actuality, conveying to the Americans a stronger Canadian connection to the sector than External Affairs would have likely simply confused matters. L. B. Pearson, “Canada Looks ‘Down North’,” *Foreign Affairs* 24, no. 4 (1946): 638-647.

⁵⁴ Shelagh Grant, “Northern Nationalists: Visions of a ‘New North’, 1940–1950,” in *For Purposes of Dominion: Essays in Honour of Morris Zaslow*, eds. K. Coates and W.R. Morrison (Toronto: Captus University Publications, 1989), 47-69. See also Lieutenant-General C. Foulkes, Chief of the General Staff, to Chief of the Air Staff, 31 May 1946, Canada, Department of National Defence, Ottawa, Directorate of History and Heritage (DHH) 2002–17, Box 113, File 2, pt. 1; Chiefs of the General Staff Memorandum 2 June 1946, DHH 2002-17, Box 113, File 2, pt. 1.; Minister of Mines and Resources to Louis St. Laurent, 25 May 1946, LAC, RG 25, Vol. 3347, File 9061-A-40.

⁵⁵ Beck, *International Politics of Antarctica*, 37.

level of effective state activity in the polar regions.⁵⁶ As Phillips concluded: the United States “has never officially recognized the basis of Britain’s claims in the Antarctic. It might be difficult for the United States not to do so if they recognized Canada’s claims in the Arctic.”⁵⁷

Most External Affairs officials recommended avoiding a position that could trigger an outright rejection by the U.S. of Canada’s application of the sector principle. They argued that Canada should continue to assume that sovereignty existed over all land in the Canadian sector, while quietly improving its position in the region.⁵⁸ In the meantime, Wrong recommended that Canada wait to see how international law on sovereignty in polar regions developed before taking a firm stand.⁵⁹ Wrong urged Canadian officials to cooperate with the Americans, on the basis of practical, mutual interest, rather than forcing them into a legal corner. It was politically and legally astute to work with the United States and avoid provoking a challenge.⁶⁰ In the end, Ottawa adopted a prudent and cautious strategy that encouraged joint projects where Canada retained full title and control over its territory and any permanent facilities, and the United States helped to build, equip and operate Arctic stations that served broader North American interests.⁶¹

⁵⁶ Hume Wrong to Mr. Abbot, 13 June 1946, LAC, RG 2, Vol. 56, File A-25, Arctic 1944-49; and RAJ Phillips to Hume Wrong, United States Claims in the Antarctic, 12 June 1946, LAC, RG 25, Vol. 4765, File 50070-40, pt. 1.

⁵⁷ Hume Wrong to Mr. Abbot, 13 June 1946, LAC, RG 2, Vol. 56, File A-25, Arctic 1944-49; and RAJ Phillips to Hume Wrong, United States Claims in the Antarctic, 12 June 1946, LAC, RG 25, Vol. 4765, File 50070-40, pt. 1.

⁵⁸ See the reply made by Cartwright to Pascal Poirier’s sector proposal in 1907 (Chapter 2) Note for Mr. Wrong, R.A.J. Phillips, 27 May 1946, LAC 25, RG 25, Vol. 3347, File 9061-A-40. On 8 May 1946, E.R. Hopkins, a member of External Affairs’ Third Political Division, advised that “we should not raise any question concerning our sovereignty in the Arctic in advance of necessity.” It did not make legal sense to cast doubt about Canada’s own claims. Memorandum from E.R. Hopkins, Legal Division, to Head, Third Political Division, 8 May 1946, *DCER*, Vol. 12, 1946, 1547.

⁵⁹ Hume Wrong to Pearson, 30 December 1946, LAC, RG 25, Vol. 2145, File A-2/2-10, Pt. 1.

⁶⁰ H. Wrong to Secretary to the Cabinet, 24 June 1946, *DCER*, Vol. 12: 1946, 1569.

⁶¹ “Sovereignty in the Canadian Arctic in Relation to Joint Defence Undertakings,” *DCER*, Vol. 12, 1946, 1558-1561; Memorandum from the Under-Secretary of State for External Affairs to the Prime Minister, 12 November 1946, *DCER*, Vol. 12, 1946, 1670-1672; *Cabinet Conclusions*, 15 November 1946, *DCER*, Vol. 12, 1946, 1686-1695; and Bercuson, “Continental Defence and Arctic Sovereignty,” 157-158.

8.3 An American Challenge or American Recognition?

Coming to this cooperative conclusion took Ottawa much of the fall and summer of 1946, during which time the Americans contemplated applying the strict standards set by the Hughes Doctrine to challenge Canada's sovereignty. The intelligence branch of the Atlantic Division, Air Transport Command, asked whether, and on what grounds, the United States could, "either by pleading military necessity, or by establishing a legal claim to one or more Arctic areas... justify undertaking a program of polar defence without the consent of Canada."⁶²

Intelligence officer Lt.-Colonel James Brewster pointed out that the Canadian Arctic was "little-known, only incompletely explored, and inadequately administered and patrolled." In his view, Canada had done little to actually "settle" the Arctic, and its decision to close police posts in remote regions such as Ellesmere Island in the interwar years eroded its claim to effective occupation in the northern half of the Archipelago.⁶³

A second report entitled, "Problems of Canadian-United States Cooperation in the Arctic," from the intelligence branch of the Atlantic Division, Air Transport Command, concluded that Canada's activities in the Arctic Archipelago did not "meet the rigid standards which the American Government has steadfastly maintained were a prerequisite to the assumption of sovereignty over uninhabited areas." The report described Canadian exploration and state activity as "meager and sporadic." Most of Grant Land, Prince Patrick Island and Banks Island have "remained virtually untouched insofar as the establishment of local administrative agencies or the maintenance of a regular patrolling system are concerned." Meanwhile, Washington had "consistently maintained that sovereignty cannot be claimed without a degree of effective occupation, colonization and use." As a result, the U.S. could make a strong legal case if it tried to unilaterally establish an American presence in Melville Island, Prince Patrick Island, and

⁶² *Problems of Canadian-United States Cooperation in the Arctic*, Headquarters, Atlantic Division, Air Transport Command, 29 October 1946, NARA, RG 319, Entry 82 (A1), Box 2785.

⁶³ *Report on the Arctic, Atlantic Division Air Transport Command*, Headquarters, Atlantic-Division Air Transport Command, Report on the Arctic, 1946, NARA, RG 319, Entry 82 (A1), Box 2975.

Grant Land (northern Ellesmere Island).⁶⁴ In short, the U.S. reports justified a challenge to Canada's claims on the basis of the Hughes Doctrine.

These criticisms of Canada's claim fit with concurrent American critiques of British efforts in the Antarctic. The State Department viewed the outposts of the FIDS as "token settlements" that could not represent "true colonization." It doubted "whether any of these stations could be regarded as fulfilling the conditions of occupation in the accepted sense. No occupant plans to spend his life there and no families have been established or are likely to be established in the Antarctic." Appraisals questioned whether the operation of such posts gave title to anything more than the limited area visited regularly by station personnel.⁶⁵ The Americans could have applied the same criticisms to Canada's Arctic RCMP post on Devon Island.

Despite these legal arguments, neither American 1946 report recommended challenging Canada's Arctic claims. First, there was no guarantee that a legal challenge would succeed. While Canada's claims did not meet U.S. standards for effective occupation, because of the *Eastern Greenland Case* outcome (that polar sovereignty did not appear to require development or mass settlement comparable to benchmarks for occupation in temperate regions), the United States concluded that an international judicial body would likely find in Canada's favor. The State Department reached the same conclusion in its July 1946 classified policy statement on the polar regions. Although the United States had not "formally recognized Canadian claims within any alleged 'sector' nor recognized Canadian title to any specific islands," there was little incentive or "inclination to challenge Canadian claims." By this point, the State Department had conceded that state sovereignty in the Arctic was virtually settled. Both the Canadians and Russians were "in a position to support their claims to superior title by

⁶⁴ *Problems of Canadian-United States Cooperation in the Arctic*, Headquarters, Atlantic Division, Air Transport Command, 29 October 1946, NARA, RG 319, Entry 82 (A1), Box 2785.

⁶⁵ OIR Report, 4436, Map Intelligence Division, Office of Intelligence Collection and Dissemination, State Department, "Basis for Possible U.S. Claims in Antarctica," 12 September 1947, NARA, RG 59, CDF 1945-1949, Box 4074, File 800.014, Antarctic; OIR Report, No. 4296, Map Intelligence Division, Office of Intelligence Collection and Dissemination, State Department, History and Current Status of Claims in Antarctica, 3 October 1947, NARA, RG 59, CDF 1945-1949, Box 4074, File 800.014, Antarctic and Webb, NWC, to Mills, NWC, Summary of OIR Report No. 4436, Basis for Possible U.S. Claims in Antarctica, 26 September 1947, NARA, RG 59, CDF 1945-49, Box 4074, File 800.014, Antarctic/9-2647.

concrete evidence of acts of possession and control exercised without challenge for a considerable period.”⁶⁶ In the State Department’s opinion, the U.S could claim only undiscovered Arctic islands.

Political considerations also militated against American actions in the Arctic. Although the Hughes Doctrine provided legal grounds for the United States to challenge Canada’s claims, the repercussions for bilateral relations would be “so severe that the violation, except in the case of emergency, would not be worth it.” The breach would deal a greater blow to the “American security system than a failure to obtain Arctic bases.” Consequently, U.S. experts advocated cooperation and joint defense, recommending that the United States make it “unequivocally clear that this country entertains no possessive design upon the polar territories to which Canada lays claim.”⁶⁷ Although the Americans could not explicitly recognize Canada’s sector, “the dictates of political expediency...forbid [U.S.] encroachment” on any territory lying within it.⁶⁸ The United States would respect Canada’s claims – even to new lands discovered in the so-called Canadian sector – to avoid a pyrrhic victory that might serve short-term defense interests and reinforce international legal principles, but would irreparably harm bilateral relations.

Accordingly, during the negotiations between November 1946 and January 1947 that laid the foundation for Canadian-American defence cooperation in the Arctic, American officials avoided discussions of the sector principle, given the incompatibility of the two countries’ positions on it.⁶⁹ The U.S. never offered to publicly recognize Canada’s claims, given that this would have required articulating a legal basis for this acquiescence. Behind closed doors, however, the U.S. accepted Canadian guidelines for defence projects that confirmed Canada’s sovereignty over the High Arctic islands, which amounted to American recognition. In practical terms, the U.S. avoided legal

⁶⁶ Department of State, Polar Regions: Policy and Information Statement, 1 July 1946, NARA, RG 59, CDF 1945-49, Box 4073, File 800.014 Antarctic 7-146.

⁶⁷ *Problems of Canadian-United States Cooperation in the Arctic*, Headquarters, Atlantic Division, Air Transport Command, 29 October 1946, NARA, RG 319, Entry 82 (A1), Box 2785.

⁶⁸ *Report on the Arctic, Atlantic Division Air Transport Command*, Headquarters, Atlantic-Division Air Transport Command, Report on the Arctic, 1946, NARA, RG 319, Entry 82 (A1), Box 2975.

⁶⁹ Joint Defence Discussions, 21 November 1946, NARA, RG 59, Entry 1177, PJBD Subject Files, 1940–59, Box 2, File: Basic Papers.

confrontation and reinforced the excellent relations it enjoyed with its neighbor and closest ally.

The United States chose a middle road, enhancing its relationship with Canada in the Arctic without setting formal precedents that could have undermined the Hughes Doctrine and American interests in the polar regions more generally. The early postwar negotiations between Canada and the United States reveal a careful dance by both countries aimed at avoiding prejudicing their respective international legal positions. The Canadian government had adopted a cautious and gradualist strategy, avoiding internecine battles with its American allies over controversial legal issues like the sector principle. It was an approach that allowed the country to perfect its terrestrial sovereignty in the postwar period through U.S. recognition. At the same time, although the U.S. officially adhered to the Hughes Doctrine and avoided an undermining declaratory stance, they applied it selectively and in the process began to separate the unified legal environment of the polar regions.

8.4 The End of Canada's Terrestrial Sovereignty Concerns

Canadian legal appraisals prepared in the late 1940s, stressed that Canada's title to the Arctic islands had achieved near "universal recognition." E.R. Hopkins posited that Canada could base its claims on the effective occupation and control that it had achieved throughout the Archipelago, concluding that Canada could use discovery, geographical dependency, contiguity, prescription and the sector principle as backup legal arguments. Unlike the legal advisers in the Foreign Office who stressed a permanent physical presence on the ground, Hopkins argued that international legal developments made it "possible for a state to exercise effective control over a polar territory without establishing a local authority within the limits of this territory. Thus, control may be exercised, exceptionally, from a point located either in the temperate zone or in another polar territory" – exactly what Charles Cheney Hyde argued in 1933. In Hopkins' view, sovereignty meant control, specifically of the means of access into the Archipelago, which Canada had exercised since the start of the twentieth century. Vincent MacDonald, the dean of the Dalhousie Law School commissioned to study Canada's sovereignty by the government, agreed. He concluded "that Canada has made so many displays of

sovereignty, in so many respects, in so many places, for so long a period, and with so little challenge, as to establish its title to the whole of the Canadian Arctic region by effective occupation in conformity with international law.”⁷⁰

In early 1948, William Eric Beckett explained to Canada’s representative on the Polar Committee that “no one would dispute” Canada’s sovereignty. Still, he argued that Canada should continue to develop and use the Arctic.⁷¹ Ottawa agreed. Through the Advisory Committee on Northern Development, officials attempted to control and coordinate activities in the Arctic, while improving Canada’s capabilities in the region. The ACND promoted the “government policy of Canadianization” designed to keep “the Canadian Arctic Canadian.” The policy’s goal was for Canada to develop its own capabilities (such as the construction of new icebreakers for service in Arctic waters and air transport by RCAF) and end its dependence on the Americans for transportation and communications to isolated stations.⁷²

Despite American recognition, and increased Canadian Arctic capabilities, lack of clarity on the rules and requirements of polar territorial acquisition remained a significant concern. In 1954, for instance, K.J. Burbridge from External Affairs’ Legal Division asserted that that Canadian sovereignty over Arctic areas “remains to be perfected by the continuous and actual exercise of state activity in this region. In time, this will be sufficient to confer an absolute title in international law.”⁷³ Evidence of the continued concern expressed by Canadian officials has led some historians to conclude that Ottawa

⁷⁰ E.R. Hopkins, Legal Adviser for External Affairs, Legal Aspects of Sovereignty in the Canadian Arctic, 22 January 1949, LAC, RG 2, Vol. 122, File A-25; and Vincent C. Macdonald, Canadian Sovereignty in the Arctic, March 1950, DHH, File 122.3M2.009 (D248).

⁷¹ Beckett raised the hypothetical situation of a base being established by some foreign country of its own accord on Canadian Arctic soil. In that event, Beckett advised that Ottawa must take immediate action to prevent the trespasser “from acquiring any squatters’ rights. Occupation of the base and control of the surrounding region would not justify the trespasser in making territorial claims, but the fact of occupation over a period of years might well have a considerable bearing on the settlement of a dispute referred to the Permanent Court of International Justice.” Mr. Percival Molson to the High Commissioner for Canada, London, 16 January 1948, LAC, RG 25, Vol. 3843, File 9092-A-40, pt. 1. See also Trevor Lloyd to Arthur Blanchette, Room 137 East Block, 2 February 1948, LAC, RG 25, Vol. 3843, File 9091-40, pt. 2.

⁷² Minutes of Second Meeting of Advisory Committee on Northern Development, 1 June 1948, *DCER*, Vol. 14, 1523; extract from Minutes of Meeting of Advisory Committee on Northern Development, 10 March 1949, *DCER*, Vol. 15, 1949; and Grant, *Sovereignty or Security?*, 227

⁷³ K.J. Burbridge, Legal Division to Acting Undersecretary, External Affairs, 23 February 1954, LAC, RG 25, File 9057-40, pt. 4.

relocated Inuit from Inukjuak in Northern Quebec to Craig Harbour and Resolute solely to provide a permanent human presence and bolster Canada's title.⁷⁴

External Affairs concluded that Canada's title in the Archipelago still required the legal justification that the sector principle provided. The department doubted that the theory could "by itself be a sufficient legal root of title," but noted it offered practical value "by affording a convenient geographical area within which our intention to exercise sovereignty over territory is evident to all and the actual display of Canadian sovereignty increasingly effective." The sector principle operated "to give Canada the benefit of the rule that effective occupation need not be felt in every nook and cranny of the territories claimed."⁷⁵ Accordingly, Canadian officials viewed the Antarctic as a testing ground for the requirements of polar sovereignty, particularly the sector principle.⁷⁶ Although Canada had no claims in the Antarctic, its officials studied the region knowing that the resolution of disputes between Britain, Argentina and Chile might produce an "authoritative legal opinion" on the validity of sector claims.⁷⁷

While Canada's bureaucrats kept a watchful eye on the southern pole, during the 1950s, Washington and Ottawa further entrenched their Arctic defense cooperation relationship. The U.S. recognized Canada's sovereignty every time it sought permission

⁷⁴ The High Arctic relocations have been well documented in previous studies, most of which were written to encourage the federal government to apologize to and compensate the relocated Inuit. See, for example, Zebedee Nungak, "Exiles in the High Arctic," *Arctic Circle* (September/October 1990): 36-43; Alan R. Marcus, "Out in the cold: Canada's experimental Inuit relocation to Grise Fiord and Resolute Bay," *Polar Record* 27, no. 163 (1991): 285-96; Canadian Arctic Resources Committee, "Their Garden of Eden": Sovereignty and Suffering in Canada's High Arctic," *Northern Perspectives* 19, no. 1 (1991): 3-29; Alan R. Marcus, *Out in the cold: The legacy of Canada's Inuit relocation experiment in the High Arctic* (Copenhagen: International Work Group on Indigenous Affairs, 1992); Frank Tester and Peter Kulchyski, *Tammarniit (Mistakes): Inuit Relocation in the Eastern Arctic, 1939-63* (Vancouver: UBC Press, 1994); René Dussault and George Erasmus, *The High Arctic Relocation: A Report on the 1953-55 Relocation* (Ottawa: Royal Commission on Aboriginal Peoples, 1994); Alan R. Marcus, *Relocating Eden: The image and politics of Inuit exile in the Canadian Arctic* (Hanover, NH: University Press of New England, 1995); and most recently, Melanie McGrath, *The long exile: A true story of deception and survival amongst the Inuit of the Canadian Arctic* (London: Fourth Estate, 2006). For critical responses, see F. Ross Gibson, "No reason to apologize to the natives," *Arctic Circle* (September/October 1991): 8; Doug Wilkinson, "The paradox of the Inuit relocates," *Arctic Circle* (summer 1993): 32-33; and Gerard Kenney, *Arctic Smoke & Mirrors* (Prescott, ON: Voyageur Publishing, 1994).

⁷⁵ External Affairs, The Sector Theory and Floating Ice Islands in the Arctic, 30 August 1954, LAC, RG 25, Vol. 4253, File 9057-40, pt. 4FP.

⁷⁶ See Peter Beck, "Through Arctic Eyes: Canada and Antarctica, 1945-62," *Arctic* 48, no. 2 (1995): 136-146.

⁷⁷ J.S. Nutt, Legal Division, to American Division, "Request by the U.K for Canadian Views on Future of U.K Policy in the Antarctic," 7 September 1954, LAC, RG 25, Vol. 4252, File 9057-40.

for a new defence project in the northern islands and then followed Canadian rules and regulations. U.S. legal appraisals continued to reiterate the different approaches that Canada and the U.S. took towards polar sovereignty, especially concerning the sector principle and the requirements of effective occupation. Some American officials continued to question whether Canada had done enough to occupy parts of the Archipelago, as indicated in a May 1955 report from the U.S. Embassy in Washington: “Canadian claims in the area which have heretofore been weak because the islands are almost unoccupied and other countries might have claims on the basis of earlier exploration.”⁷⁸ Nonetheless, American officials accepted that following Ottawa’s established parameters for continental defence projects meant the U.S. implicitly acknowledged Canada’s sovereignty over all the islands of the Arctic Archipelago.⁷⁹ They understood that the bilateral relationship in the Arctic had changed significantly since the controversy over the MacMillan expedition in 1925. By the mid-1950s, the U.S. sought Canadian “authorization for every move we make on known lands in the northern archipelago, and we have long since all but foresworn any rights that might have devolved to us by reason of the early explorations.”⁸⁰

In 1955, the final agreement between Canada and the U.S. to construct the Distant Early Warning (DEW) Line, the Arctic radar chain that provided advanced warning of a transpolar Soviet bomber attack, further showcased American acceptance and recognition of Canadian sovereignty that Washington had given since early 1947. The development finally alleviated Ottawa’s residual concerns about Canada’s terrestrial sovereignty over the islands of the Arctic Archipelago.⁸¹ During diplomatic negotiations leading up to the DEW Line agreement, the United States again quietly acceded to Canadians demands without providing public recognition of the sector principle. The list of conditions in the

⁷⁸ Jean R. Tartter, Third Secretary of Embassy to the Department of State, Canadian Territorial Claims in the Arctic, 3 May 1955, NARA, RG 59, CDF 1955-59, Box 2777, File 702.022, Oct. 1959, Antarctic.

⁷⁹ Department of State, Policy Statement: Polar Regions, 1 July 1951, NARA, RG 59, CDF 1950-54, Box 3066, File 702.022/7-151; Foreign Service Despatch, U.S. Embassy, Ottawa, to the Department of State, Washington, Canadian Sovereignty in the Arctic Archipelago by Jean R. Tartter, Third Secretary, 10 March 1955, NARA, RG 59, CDF 1955-59, Box 2777, File 702.022, Oct. 1959, Antarctic; J.M. Nugent, Possible U.S. Claim to Portion of Ellesmere Islands: Presentation of Peary’s Flag to National Geographic Society, 2 May 1955, NARA, RG 59, Entry 5298, Lot 69D302, Box 1, File 1.1.

⁸⁰ Canadian Sovereignty in the Arctic, 15 August 1956, NARA, RG 59, entry 5298, lot 69D302, box 1.

⁸¹ Exchange of Notes between Canada and the United States of America Governing the Establishment of a Distant Early Warning System in Canadian Territory, 5 May 1955, Canada Treaty Series 1955, No. 8.

bilateral treaty “read like a litany of Canadian sovereignty sensitivities and desire for control,” historian Alexander Herd notes.⁸² With the conclusion of the DEW Line agreement in 1955, the federal government’s primary *de jure* sovereignty concerns shifted from the mainland and archipelagic islands to the water (ice) between and around the islands.

8.5 The Poles Diverge

On 27 December 1946, as Canadian and American diplomats finished the negotiations that secured Canada’s Arctic sovereignty, U.S. Under Secretary of State Dean Acheson announced that America recognized no claims in the Antarctic, and reserved all rights it had acquired in the region. Given that Britain, New Zealand, and Australia claimed three-quarters of the Antarctic between themselves, the Americans knew the British Empire would “bleed over” their actions and worried about the reaction of their closest ally. Nevertheless, they decided it was necessary to “disabuse our British friends of any belief we consider Antarctica British.”⁸³ For too long the U.S. had played the “ostrich sticking its head in the sand” as other states tried to take control of the region.⁸⁴

With Operation Highjump, a massive wave of American activity descended upon the Antarctic. The operation consisted of twelve naval ships, an aircraft carrier, 4700 men and 33 aircraft – by far the largest expedition ever to the region. Although the operation’s primary objective was to test personnel and equipment in polar conditions, Washington also used the massive venture to bolster’s America’s territorial rights throughout the Antarctic. In January 1947, the Americans set up Little America IV at the Bay of Whales,

⁸² Alexander W.G. Herd, “As Practicable: Canada-United States Continental Air Defense Cooperation 1953–1954” (M.A. thesis: Kansas State University, 2005), 86. Canadian strategist R.J. Sutherland explained that his country “secured what the United States had up to that time assiduously endeavoured to avoid, namely, an explicit recognition of Canadian [terrestrial] claims to the exercise of sovereignty in the Far North.” R.J. Sutherland, “The Strategic Significance of the Canadian Arctic,” in *The Arctic Frontier*, ed. R. St. J. Macdonald (Toronto: University of Toronto Press, 1966), 271.

⁸³ Ellis Briggs to Hickerson, 13 November 1946, NARA, RG 59, CDF 1945-49, Box 4073, File 800.014, Antarctic/11-1247.

⁸⁴ Brief For Use in Conference with State Department Representatives Relative to Ulterior Mission and Objectives of Naval Expedition to Antarctica, Office of the Judge Advocate General of the Navy, 21 November 1946, NARA, RG 59, CDF 1945-49, Box 4073, File 800.014 Antarctic, 11-2246. Frank G. Klotz has characterized the U.S. polar policy in the first half of the twentieth century one of “benign neglect.” Frank G. Klotz, *America on the Ice: Antarctic Policy Issues* (Washington: National Defence University Press, 1990), 18.

in the Ross Dependency. From an ice strip, large DC-4 transport planes conducted an extensive aerial mapping program. Another group sailed along the coast of the AAT and Dronning Maud Land, and conducted additional aerial mapping inland. Meanwhile, an additional part of the operation sailed in the waters off Marie Byrd Land and Ellsworth Land. The Americans took thousands of aerial photographs and periodically dropped claims sheets that read, “We have discovered and investigated the following land and seas areas...And thereby claim this territory in the name of the United States of America.” Inclement weather cut short the Americans’ plan to circle the entire continent; in February 1947 the ships headed home.⁸⁵

As Operation Highjump fanned out across the south polar region, a private American expedition led by Finn Ronne established a base at the old USASE site in Marguerite Bay, next to the FIDS station established the previous year.⁸⁶ British officials took a “dark view” of Ronne, describing him as a “plausible rogue whom they know to have deposited claims papers during his previous visits to Antarctica.”⁸⁷ Tension at the shared site grew when Ronne raised the stars and stripes.⁸⁸ Problems continued when the Americans discovered the British still used the American toilet at the old USASE base; Jennie Darlington (one of two women on the expedition), noted “arguments over the ‘facilities’ took time to resolve. Despite having their own hutments the British still maintained a territorial toehold on the American-built camp. The Anglo-American toilet became a major issue.”⁸⁹ Foreign Office legal adviser William Eric Beckett urged that the British and Americans must get along; the success of Britain’s polar program was

⁸⁵ Lisle Abbot Rose, *Assault on Eternity: Richard E. Byrd and the Exploration of Antarctic, 1946-1947* (Annapolis: Naval Institute Press, 1980). See also Day, *Antarctica: A Biography*, 397.

⁸⁶ Ronne had some funding from the U.S. military to test polar equipment. See Day, *Antarctica: A Biography*, 404-406.

⁸⁷ Note from P.J. Stirling, 17 January 1947, NA, FO 371/61285. While Ronne maintained that his was a private expedition with no interest in territorial claims, Brian Roberts remained suspicious. “I know Ronne well – he is plausible, a delightful companion, but quite unscrupulous, and his standards of honesty are not the same as ours.” If Ronne went to Marguerite Bay, Roberts concluded that he was “mentally incapable of not making political capital out of it. If we allow him to get away with this against our stated wishes it is, in my view, tacit admission that we do not feel on strong enough ground to uphold our claims or maintain British sovereignty.” At the same time, Roberts admitted the problems of “taking a firm line with the Americans.” Brian Roberts to Mr. J.V. Perowne, 31/12/46, SPRI, MS 1278; ER Roberts, Brian – Correspondence and Papers, 1946-1948.

⁸⁸ Washington to Foreign Office, 19 March 1947, NA, FO 371/61291; and R.H. Hadow to South American Department, Foreign Office, 20 March 1947, NA, FO 371/61291.

⁸⁹ Beck, *International Politics of Antarctica*, 38.

“dependent on avoiding serious controversy with the Americans.”⁹⁰ In the end, the British and American teams worked out their toilet disagreement, and worked together on geographic and scientific activities as they overwintered at Marguerite Bay.⁹¹

As the British and Americans worked together on the Antarctic Peninsula, Chile sent three naval vessels into Antarctic waters, and established a permanent station on Greenwich Island in the South Shetlands it called Soberania Base (Sovereignty). Three Argentinean naval ships also ventured south and constructed Melchior Base on Gamma Island.⁹² Americans, Chileans, Argentineans and British all overwintered in the FID between 1947 and 1948.

The American recognition of Canada’s sovereignty settled the last potential source of a large-scale terrestrial territorial dispute in the Arctic. In sharp contrast, the Americans refused to recognize any claims in the Antarctic, and the region devolved into what the press labeled a new “polar race” for territory.⁹³ The legal trajectories of the Arctic and Antarctic diverged. Although many legal scholars, state officials and members of the public continued to argue that two regions suffered from the same legal problem and required a bi-polar solution,⁹⁴ it was becoming apparent that terrestrial claims in the

⁹⁰ Note, W.E. Beckett, 3 October 1946, SPRI, MS 1278; ER Roberts, Brian – Correspondence and Papers, 1946-1948

⁹¹ Day, *Antarctica: A Biography*, 395-396. See Finn Ronne, *Antarctic Conquest: The Story of the Ronne Expedition* (New York: Putnam, 1949).

⁹² Brian Roberts, Comparative Chronological Summary of British, Argentine and Chilean Activities in Connection With Claims to the Falkland Islands Dependencies, 1947-1952, 17 December 1952, NA, FO 371/103162; and Day, *Antarctica: A Biography*, 391.

⁹³ “Antarctica: Polar Race,” *Newsweek*, 2 December 1946.

⁹⁴ In the summer of 1947, for example, the Women’s International League for Peace and Freedom (WILPF) called for the uninhabited spaces of the Arctic and Antarctic to be placed under a United Nations trusteeship and governed as a possession of all mankind. In December 1947, the UN Trusteeship Council rejected the WILPF proposal. As she had during the war years, Emily Balch continued to play a pivotal role in these developments. She saw the polar regions as a “site for an experiment in internationalism” the world that new methods and form of international cooperation were possible. She wrote that it “would be sufficiently amusing if the penguin, that pleasing caricature of the professional diplomat, should yet be hailed as, together with the Polar bear, the inhabitant of the first world country.” Mercedes Moritz Randall, *Improper Bostonian: Emily Greene Balch* (New York: Twayne Publishers, 1964), 376-377. For more information see, Rip Bulkeley, “Polar Internationalism: Diplomacy and the International Geophysical Year,” in *National and Trans-National Agendas in Antarctic Research from the 1950s and Beyond. Proceedings of the 3rd Workshop of the SCAR Action Group on the History of Antarctic Research*, eds. Cornelia Lüdecke, Lynn Tipton-Everett and Lynn Lay (Columbus: Byrd Polar Research Center, 2012), 24-42. See also Jessup, “Sovereignty in Antarctica,” 117-119; Francis Sayre, “Legal Problems Arising from the United Nations Trusteeship System,” *American Journal of International Law* 42 (1948): 263-298; and Note by Brian Roberts, 14 November 1952, NA, FO 371/100885.

Arctic had been settled, while those in the Antarctic remained completely unsettled.⁹⁵ In late 1947, Samuel Whittemore Boggs, still the leading polar expert in the State Department, reflected on how different the legal situations in the Arctic and Antarctic had become since the end of the war. With his government's recognition of Canada's sovereignty over the Archipelago, Boggs concluded, "In the Arctic there is no known land over which sovereignty of some nation is not generally recognized." In the Antarctic, however, "vast areas are not even claimed, and none of the claims asserted to segments of the continent have been recognized by the United States or by more than two or three countries. Conflicting territorial claims are a potential source of difficulty only in the Antarctic."⁹⁶

8.6 The Americans and the Antarctic Problem

Scholars examining America's postwar Antarctic policy have established that Washington viewed the south polar region as an area of marginal strategic significance. Initially important as a cold weather training zone, its value decreased as U.S. activities in the Canadian Arctic and Greenland intensified.⁹⁷ The central American objectives in the Antarctic quickly became freedom of exploration and science, free access to develop resources, and the establishment of an orderly administration for the area.⁹⁸ Furthermore, as historian Jason Kendall Moore has observed, the State Department consistently viewed the situation in the Antarctic as an opportunity to enhance "America's global prestige by promoting harmonious settlement of claims." To accomplish these goals, the U.S. worked to manage "the conflicting polar aspirations of its allies while simultaneously attempting to prevent encroachment by potential enemies," particularly the Soviet Union.⁹⁹

⁹⁵ See, for example, René Dollot, "Le Droit International Des Espaces Polaires," *Recueil des cours* 75 (1949): 115-200. L.M. Gould, "Strategy and Politics in the Polar Areas," *Annals, American Academy of Political and Social Science* 255 (1948): 105-114. R.N. Rudmose Brown, "Political Claims in the Antarctic," *World Affairs* (1947): 393-401; and Gilbert Gidel, *Aspects Juridiques de la little Pour l'Antarctique* (Paris: Academic de Marine, 1948).

⁹⁶ S.W. Boggs to Mr. Gerig, 13 November 1947, NARA, RG 59, Entry 5245, Box 1, Folder 1, File Polar Regions – Frigid Zones.

⁹⁷ Klotz, *America on the Ice*, 21; and Christopher Joyner and E.R. Theis, *Eagle Over the Ice: The U.S. in the Antarctic* (Hanover: University Press of New England, 1997), 26-27.

⁹⁸ Jeffrey D. Myhre, *The Antarctic Treaty System: Politics, Law and Diplomacy* (Boulder: Westview Press, 1986), 27; Joyner and Theis, *Eagle Over the Ice*, 26-27.

⁹⁹ Jason Kendall Moore, "Tethered to an Iceberg: United States Policy toward the Antarctic, 1939-1949,"

Alongside these important factors, new archival research reveals that uncertainty over the requirements of polar sovereignty continued to play a key role in shaping postwar U.S. polar policy.¹⁰⁰ The State Department lamented the lack of “clear legal principles” for the “acquisition of uninhabitable territory.”¹⁰¹ The United States tried to ascertain an acceptable pattern or level of state occupation but failed to arrive at a clear set of guidelines to evaluate state sovereignty in the south polar region. In the Antarctic context, the State Department found it “doubtful whether continued activity on the part of individual countries will ever bring the situation to maturity for settlement on clear legal principles.”¹⁰² The tendency of international lawyers to champion self-interested legal interpretations that brought maximum benefit to their own nation only heightened this confusion.¹⁰³

In the first years after the war, American opinion remained divided about how to approach the legal uncertainty surrounding territorial claims in the Antarctic. For many, the Hughes Doctrine still held sway. Its supporters argued that the U.S. should continue to emphasize settlement and use as requirements for polar sovereignty. This group maintained rigorous standards and felt that the “token settlements” set up by the FIDS were insufficient.¹⁰⁴ Ironically, as the British and other claimants tried to meet the requirements of the Hughes Doctrine, other American officials argued that the State

Polar Record 35 no. 193 (1999): 125 and 130. See also Jason Kendell Moore, “A ‘Sort’ of Self-Denial: United States Policy Toward the Antarctic, 1950–59,” *Polar Record* 37 no. 200 (2001): 13–26.

¹⁰⁰ Mr. Bonbright, Europe Bureau to Mr. Matthews, G, 15 July 1952, NARA, RG 59, CDF 1950-54, Box 3066, File 702.022 / 7-1552, Antarctic. John D. Roscoe, Scientific Advisor, Memorandum to the OCB Antarctic Working Group, The Significance of Discovery in Relation to Sovereignty, 7 June 1956, NARA, RG 330, Entry (A1) 337, Box 1, File Group A/1956

¹⁰¹ See Department of State, Polar Regions: Policy and Information Statement, 1 July 1946, NARA, RG 59, CDF 1945-49, Box 4073, File 800.014 Antarctic 7-146; and OIR Report, No. 4296, Map Intelligence Division, Office of Intelligence Collection and Dissemination, State Department, History and Current Status if Claims in Antarctic, 3 October 1947, NARA, RG 59, CDF 1945-1949, Box 4074, File 800.014, Antarctic.

¹⁰² NOE and NWC, Antarctica, 7 September 1947, NARA, RG 59, CDF 1945-49, Box 4074, File 800.014, Antarctic/9-847; and NOE and NWC Memorandum to Hickerson, EUR, and James Wright, ARA, Antarctic Policy, 8 September 1947, NARA, RG 59, CDF 1945-49, File 800.014, Antarctic/9-847.

¹⁰³ Department of State, Polar Regions: Policy and Information Statement, 1 July 1946, NARA, RG 59, CDF 1945-49, Box 4073, File 800.014 Antarctic 7-146; and Report on the Arctic, Atlantic Division Air Transport Command, Headquarters, Atlantic-Division Air Transport Command, Report on the Arctic, July 1946, RG 319, Entry 82 (A1), Box 2975.

¹⁰⁴ OIR Report, 4436, Map Intelligence Division, Office of Intelligence Collection and Dissemination, State Department, “Basis for Possible U.S. Claims in Antarctica,” 12 September 1947, NARA, RG 59, CDF 1945-1949, Box 4074, File 800.014, Antarctic.

Department should resurrect the doctrine of constructive occupation proposed by Hugh Cumming in 1938 to claim territory. The department defined the doctrine as “a combination of exploration, repeated visits, and maintenance of semi-permanent stations, but rejects as inapplicable to polar regions the standard concept of occupation.”¹⁰⁵ Legal adviser Jack Tate noted that, “It is clear that the requirements of international law have not been framed with reference to polar regions, and that, if polar regions are to be subject to sovereignty, there must be an evolution of the law in the nature of a relaxation of the minimum requirements of effective occupation.” He drew upon the arguments of Charles Cheney Hyde to assert that regular aerial surveillance should constitute an acceptable form of state occupation in the Antarctic.¹⁰⁶ The lawyers from Office of the Judge Advocate General of the Navy concurred, urging Washington to justify a large scale Antarctic claim on the basis of the doctrine of constructive occupation. They noted, regardless of Washington’s policy of non-recognition, that Antarctic claimants would continue “building up a valid case for themselves” on the understanding that “the international law rule of effective occupation as embodying occupation by habitation is untenable for Polar regions and will eventually be relaxed and modified.”¹⁰⁷ Even as some officials urged Washington to reject the Hughes Doctrine, they stopped short of suggesting the U.S. adopt the sector principle in either polar region.¹⁰⁸

¹⁰⁵ OIR Report, 4436, Map Intelligence Division, Office of Intelligence Collection and Dissemination, State Department, “Basis for Possible U.S. Claims in Antarctica,” 12 September 1947, NARA, RG 59, CDF 1945-1949, Box 4074, File 800.014, Antarctic; OIR Report, No. 4296, Map Intelligence Division, Office of Intelligence Collection and Dissemination, State Department, History and Current Status of Claims in Antarctica, 3 October 1947, NARA, RG 59, CDF 1945-1949, Box 4074, File 800.014, Antarctic and Webb, NWC, to Mills, NWC, Summary of OIR Report No. 4436, Basis for Possible U.S. Claims in Antarctica, 26 September 1947, NARA, RG 59, CDF 1945-49, Box 4074, File 800.014, Antarctic/9-2647.

¹⁰⁶ Tate thought the declaration of territorial rights could be pivotal. “Such an announcement may effectively preserve the inchoate title of the discovering nation until the developments of science and of the arts of navigation and communication make some measure of occupation over such areas a practicable possibility.” Jack E. Tate (L) to Mr. Hickerson (EUR), Procedure and Steps to Assert Antarctic Claims, 28 June 1948, NARA, RG 59, CDF 1945-49, File 800.014, Antarctic/6-2848.

¹⁰⁷ The USN felt that an aggressively placed national claim to all the Antarctic territory the U.S. had a right to would be the best policy, “if we give due regard to the national interests and destiny and the United States.” Brief For Use in Conference with State Department Representatives Relative to Ulterior Mission and Objectives of Naval Expedition to Antarctica, Office of the Judge Advocate General of the Navy, 21 November 1946, NARA, RG 59, CDF 1945-49, Box 4073, File 800.014 Antarctic/11-2246.

¹⁰⁸ In April 1948, Secretary of Defence James Forrestal stressed that, “It is important that in the determination of our Antarctic policy, we should make certain that our possible future Arctic interests are in no [wise] weakened by any precedents established with respect to the Antarctic. Although no land has been discovered nearer to the North Pole than northern Greenland by any polar expedition nor by numerous

Beyond the Hughes Doctrine and constructive occupation, some State Department officials concluded that a legal settlement of the conflicting claims in the Antarctic was impossible, suggesting that the Antarctic should be governed under an international agreement, preferably through the United Nations.¹⁰⁹ This idea was adopted in an in-depth study of the Antarctic situation completed by the department in September 1947. The document cautioned against unnecessary efforts to claim sovereignty, arguing that any move by the U.S. to annex territory in the Antarctic would require “aggressive steps to strengthen the basis of American claims,” thereby leading to an unwarranted “race for the Antarctic.” The resulting instability would “not be in keeping with the American tradition of peaceful settlement of disputes.” Settling the claims using traditional applications of law would be “a lengthy and contentious process and highly uncertain as to outcome.” By establishing the Antarctic as a “common dominion” under the United Nations, however, the U.S. could broaden the area of international cooperation and strengthen the new organization. Under the administration of the U.N., the scientific investigations performed in the Antarctic could benefit “mankind in general.” In this scenario, competition would decrease, allowing for cooperation towards common goals in the south polar region.¹¹⁰ The suggestion to turn the Antarctic into a U.N. trusteeship is reflective of the new and complex postwar approach in the U.S. that, according to

recent Air Force polar flights, the possibility remains that there may be undiscovered land in the Arctic area. Such land, even if relatively small in size, could well be of great strategic importance.” James Forrestal, Secretary of Defence, to George C. Marshall, Secretary of State, 12 April 1948, NARA, RG 59, CDF 1945-49, Box 4075, File 800.014, Antarctic/4-1248.

¹⁰⁹ Samuel Boggs and Hall, State Department, Chilean Claims to Antarctica, 13 August 1946, NARA, RG 59, CDF 1945-49, Box 4073, File 800.014, Antarctic/8-1346; S.W. Boggs to Mr. Woodward, Mr. Briggs and Mr. Hall, “What the Antarctic is Worth in Relation to International Problems,” 2 June 1947, NARA, RG 59, CDF 1945-49, Box 4074, File 800.014, Antarctic / 6-247; Ellis Briggs, Office of American Republic Affairs, Issue of Conflicting International Claims to Antarctica Raised by Proposed Byrd Expedition, 15 November 1946, NARA, RG 59, CDF 1945-49, Box 4073, File 800.014, Antarctic/11-1546; Ellis C. Briggs to Braden, Hickerson and Acheson, Issue of Conflicting International Claims to Antarctica Raised by Proposed Byrd Expedition, NARA, RG 59, CDF 1945-49, Box 4073, File 800.014 / 11-1546, Antarctic; and Department of State, Polar Regions, Policy and Information Statement, 1 July 1946, NARA, RG 59, CDF 1945-49, Box 4073, File 800.014, Antarctic/70146.

¹¹⁰ NOE and NWC, Antarctica, 7 September 1947, NARA, RG 59, CDF 1945-49, Box 4074, File 800.014, Antarctic/9-847; and NOE and NWC Memorandum to Hickerson, EUR, and James Wright, Antarctic Policy, 8 September 1947, NARA, RG 59, CDF 1945-49, File 800.014, Antarctic/9-847. The suggestion to turn the Antarctic into a UN trusteeship is reflective of the new and complex postwar approach to U.S. that, according to historian Mark Mazower, “saw international institutions become a vital instrument for Washington in its pursuit of global power.” Mark Mazower, *Governing the World: The History of an Idea, 1815 to the Present* (New York: Penguin Books, 2013), 215.

historian Mark Mazower, “saw international institutions become a vital instrument for Washington in its pursuit of global power.”¹¹¹

In late 1947, the State Department suggested the Antarctic U.N. trusteeship to the British. In response, Britain highlighted the “Achilles Heel of the whole idea:” the Soviets would use the opening provided by the U.N. trusteeship to force their way into the Antarctic, based on the “historical right” created by Bellingshausen’s early exploratory efforts in the region.¹¹² The Americans returned with the suggestion for an eight-power condominium. State Department official G.H. Raynor stressed that a condominium “would certainly make it less likely that the problem would become international football, and would be more likely to retain authority and control in the hands of directly interested states.”¹¹³ The seven claimants and the U.S. could pool sovereignty, establish a Commission with full legislative and executive authority, which would cooperate with the U.N.¹¹⁴ The claimants were allies and Washington anticipated that the condominium would function well and not endanger U.S. interests.

In the lead up to the anticipated condominium agreement, the State Department made concrete plans to announce an American Antarctic claim. Their assertion would place the U.S. on equal footing with the other claimant states.¹¹⁵ Ignoring all sector claims on the continent, the U.S. formulated a claim to all of the territory explored, mapped and temporarily occupied by Americans – essentially justifying the U.S. claim with the doctrine of constructive occupation. As a result, the American claim featured sections of territory spread across the entire Antarctic. By upsetting the existing sectors and creating such a confusing legal situation the Americans could create a scenario where

¹¹¹ Mazower, *Governing the World*, 215.

¹¹² R.H. Hadow, British Embassy, Washington to CAE Shuckburgh, South American Department, Foreign Office, 24 December 1947, NA, FO 115/4322; Memorandum of Conversation Between Robert Hadow, Counselor, British Embassy and Benjamin Hulley, Acting Chief, Division of Northern European Affairs, 17 December 1947, NARA, RG 59, Box 4074, File 800.014, Antarctic/12-1747.

¹¹³ GH Raynor, EUR, to Green, NOE, 27 January 1948, NARA, RG 59, CDF 1945-49, Box 4075, File 800.014 Antarctic\1-2748.

¹¹⁴ Myhre, *The Antarctic Treaty System*, 27-28.

¹¹⁵ Myhre, *The Antarctic Treaty System*, 28-29.

alternative solutions would be welcomed. The State Department predicted that the claim would propel the other claimant states towards accepting its condominium proposal.¹¹⁶

As the Americans worked out the parameters of their claim, the Foreign Office became increasingly enamoured with the condominium proposal. It would give the British Commonwealth three votes out of eight, effectively excluded the Soviet Union, and could end Britain's worsening dispute with Chile and Argentina.¹¹⁷ The appeal of the condominium grew in the spring of 1948, after Chile, Argentina and the U.S. rejected Britain's proposal for round table talks on the status of the FID.¹¹⁸ The head of the Foreign Office's South American Department, C.A. Evelyn Shuckburgh, recognized that Chile and Argentine would keep pressing the FID, and argued that the U.S. had given London a welcome way out from the "humiliating position into which we are drifting over the Antarctic." Eventually, Shuckburgh insisted, the British would have to accept an international initiative to "get us out of the mess." Although the Colonial Office called the condominium solution a form of "appeasement," the Foreign Office suggested it was the best choice.¹¹⁹ William Eric Beckett agreed that any kind of international settlement on the Antarctic was worth almost any sacrifice of individual rights in the area.¹²⁰

By October 1948, however, the American condominium proposal had floundered. Showcasing the postwar emphasis that Canberra placed on distinctly Australian policies,¹²¹ the Australians argued that their title to the AAT was clear, "unchallenged"

¹¹⁶ The claim included sections of territory between 35°W to 135°W, 135°W to 140° E, and 140° E to 13° E, and excluded territory mapped and explored by other states. U.S. Territorial Claims in Antarctic, 1 August 1948, NARA, CDF, 1945-49, Box 4075, File 800.014, Antarctic/7-148.

¹¹⁷ C.A.E. Shuckburgh, South American Department, Foreign Office, to Secretary of State, Foreign Office, Territorial Claims in Antarctica, 11 March 1948, NA, FO 371/68238.

¹¹⁸ R.H. Hadow, British Embassy, Washington to C.A.E. Shuckburgh, 14 April 1948, NA, FO 371/68242.

¹¹⁹ C.A.E. Shuckburgh to Mr. McNeill, 6 July 1948, NA, FO 371/68248. In August 1948, Colonial Office official J.H. Martin complained that "the Foreign Office are prone to appeasement, and suggest that in preliminary discussion with them we should maintain the view that the area we should in the first instance endeavor to retain under U.K. control should be the larger area." J.M. Martin, Minute, 10 August 1948, NA, CO 537/3526. See also Draft: The Antarctic, 15 April 1948, NA, FO 371/68242; Memorandum by the Secretary of State for Foreign Affairs to Cabinet, The Antarctic, 21 June 1948, NA, CO 537/3526; and Cabinet Meeting, 21 June 1948, NA, CAB/129/28.

¹²⁰ W.E. Beckett, Minute, 13 October 1948, NA, FO 371/68255. The British decided to try and retain rights to South Georgia, Deception Island and King George Island, which it viewed as essential for the control of the Drake Passage. Cabinet Meeting, 21 June 1948, NA, CAB/129/28.

¹²¹ Christopher Waters, "Australia, the British Empire and the Second World War," *War & Society* 19, no. 1 (2001): 100. See also David Day, *The Great Betrayal: Britain, Australia and the Onset of the Pacific War*,

and widely recognized, and stated that they had no interest in the American proposal.¹²² New Zealand insisted the Antarctic be fully internationalized under the UN, and also rejected the condominium.¹²³ After the negative reaction of its Commonwealth partners, the British felt obliged to oppose the plan. France and Norway both explained to Washington that they too had no desire to sacrifice their territorial rights, while Chile and Argentina dismissed the idea as “unacceptable.” In March 1949, State Department officials dropped the condominium idea.¹²⁴

Even though the American plan for a condominium failed, 1948 was nonetheless “a turning-point in the international politics of the region.” Claimant states became aware of the possibility of an American claim and prepared for increased pressure from Washington to internationalize the Antarctic.¹²⁵ Soon Washington decided to support a Chilean proposal for a standstill agreement in the south polar region. Julio Escudero Guzmán, a member of the Chilean Antarctic Commission who had worked on the legal basis of Chile’s claim, suggested that claimant states simply freeze the unresolved issue of territorial claims for five years, during which states could embrace scientific cooperation under a joint coordinating committee, facilitating the free movement of all expeditions and the exchange of information. New bases and expeditions would have no bearing on existing or future claims.¹²⁶ Escudero’s plan was motivated, in part, by self-interest, because the Chileans realized they could not compete with Argentina or Britain in the Antarctic.¹²⁷

1939-42 (Sydney: Angus & Robertson, 1988); and David Day, *Reluctant Nation: Australia and the Allied Defeat of Japan, 1942-45* (Melbourne: Oxford University Press Australia, 1992).

¹²² First Secretary, Australian Embassy and Caspar Green, NOE, 17 August 1948, NARA, CDF, 1945-49, Box 4076, File 800.014, Antarctic/8-1748; External Affairs, Canberra to Australian Embassy, Washington D.C., 11 March 1948, NAA, A3300/808; P.J. Stirling, Minute, 15 March 1948, NA, FO 371/68237. See also Robert Hall and Marie Kawaja, “Australia and the Negotiation of the Antarctic Treaty,” in *Australia and the Antarctic Treaty System: 50 Years of Influence*, eds. Marcus Howard and Tom Griffiths (Sydney: University of New South Wales Press, 2011), 70.

¹²³ U.K. High Commissioner in New Zealand to Commonwealth Relations Office, 23 July 1948, NA, FO 371/68249.

¹²⁴ Bulkeley, “Polar Internationalism,” 37.

¹²⁵ Dodds, *Pink Ice*, 81.

¹²⁶ Bulkeley, “Polar Internationalism,” 38. See also Marie Jacobsson, “Building the International Legal Framework for Antarctica,” in *Science Diplomacy: Antarctic, Science, and the Governance of International Spaces*, eds. Paul Arthur Berman, Michael Land, David Walton and Oran Young (Washington: Smithsonian Institution Scholarly Press, 2011), 1-16.

¹²⁷ Jason Kendall Moore, “Maritime Rivalry, Political Intervention and the Race to Antarctica: U.S.-

In September 1949, the Americans handed the British their new draft plan based on the Chilean proposal.¹²⁸ Shuckburgh was less supportive of the new idea, which he thought combined all the dangers of the present status quo with the difficulties of internationalization. He maintained that nothing would be gained by a “policy of postponement.”¹²⁹ Still, the British thought the proposal offered a potential way out of the ongoing dispute over the FID,¹³⁰ and the best alternative to the use of force.¹³¹ New Zealand, however, retained its belief that the UN should be involved in any resolution for the Antarctic, and the Australians refused to be lumped into an agreement with other claimant states. Canberra told London that, “by associating themselves with Government whose claims are in dispute, Australian claims would ultimately be weakened.”¹³² Lack of support for the plan and the outbreak of the Korean War diverted American attention, and the initiative lost steam.

The arrival of the Soviet Union on the Antarctic scene changed the diplomatic context significantly. On 9 June 1950, the Soviet government told the U.S. and the claimant states that Thaddeus von Bellingshausen had been the first to discover large parts of the Antarctic during his 1819-1821 voyage. The Russians held historic rights to the region, and argued that they had to be included in discussions about its future.¹³³ The

Chilean Relations, 1939-1949,” *Journal of Latin American Studies* 33, no. 4 (2001): 734.

¹²⁸ British Embassy, Washington, to Foreign Office, 15 September 1949, NA, FO 371/74757.

¹²⁹ C.A.E. Shuckburgh to J.E. Leche, 26 October 1948, NA, FO 371/68255.

¹³⁰ P.A. Carter, Minute, 11 January 1951, NA, CO 537/6206; and AH Reed, Commonwealth Relations Office to Keith Waller, Australia House and Sir Cecil Day, 23 April 1951, NA, FO 371/90435. Some officials dealt with the proposal less seriously. Colonial Office official J. Bennett noted that the note was “this year’s revival of what seems to be becoming a hardy annual – the attempt by what I think are only junior officials in the State Department to ‘solve the Antarctic question’ on a basis of internationalization.” J. Bennett, Minute, 10 November 1950, NA, CO 537/6206.

¹³¹ The British told Canberra that the agreement offered a “breathing space during which questions of sovereignty could be put on one side, and an atmosphere gradually created which would favour their ultimate, dispassionate consideration.” N. Pritchard, CRO to B. Cockram, Canberra, 20 February 1952, NA, FO 371/97377.

¹³² Foreign Office to Barbara Salt, 2 November 1951, NA, CO 537/7248; P.G. Law, Officer in Charge, Antarctic Division to the Secretary, Department of External Affairs, 29 June 1950, NAA: A1838, 1495/3/2/1 Part 1; and Commonwealth Relations Office to R. Cecil, Foreign Office, 22 October 1951, NA, FO 371/90435. An angry William Eric Beckett was annoyed by the Australian response. “We must see that the great slogan of Commonwealth solidarity is not something which always works only one way.” W.E. Beckett, Minute, 30 November 1951, NA, FO 371/90435.

¹³³ Soviet interest in the Antarctic had slowly grown after the war with the dispatch of a whaling fleet there in 1946. See Irina Gan, “‘The First Practical Soviet Steps Towards Getting a Foothold in the Antarctic’: the Soviet Antarctic Whaling Flotilla Slava,” *Polar Record* 47, no. 240 (2011): 21-29; and Peter Toma, “Soviet

State Department worried that any territorial claim it might make in the Antarctic would be met by a Soviet counterclaim.¹³⁴ Although the State Department toyed with making a unilateral claim in 1952, it concluded that the U.S. had little to gain by such a move and doubted it could legally support such an annexation.¹³⁵ As the U.S. stood on the sidelines, the department admitted that the other claimant countries were tenaciously “perfecting their Antarctic claims, whittling away the potential area claimable by the United States.”¹³⁶

In 1954, the approach of the International Geophysical Year (1956-1957),¹³⁷ promised to bring international scientific activity to the Antarctic on an unprecedented scale. It was during this period that the Eisenhower administration determined that the U.S. had more to gain from access to the whole continent than from making a territorial claim of dubious legal value that would irritate and alienate some of America’s key allies.¹³⁸ Though Washington based this decision primarily on alliance politics, the region’s limited strategic value, and a desire to operate freely around the entire Antarctic, legal uncertainty about the requirements of polar sovereignty continued to impact

Attitude Towards the Acquisition of Territorial Sovereignty in the Antarctic,” *The American Journal of International Law* 50, no. 3, (1956): 611-629.

¹³⁴ Moore, “A ‘sort’ of self-denial,” 14.

¹³⁵ The legal uncertainty continued to be a major issue in American policy-making. According to one State Department official, “There exists considerable doubt whether the United States has a valid claim to full sovereignty in the areas described –international law on the acquisition of sovereignty in the Polar Regions being far from settled.” Bonbright, Europe Bureau to Mr. Matthews, G, 15 July 1952, NARA, RG 59, CDF 1950-54, Box 3066, File 702.022 / 7-1552, Antarctic; Position Paper on U.S. Antarctic Policies, 1 July 1952, NARA, RG 59, CDF 1950-54, Box 3066, File 702.022/7-1552; Memorandum of Conversation between Boggs, Saucerman,(OIR) Barall, Dearborn, (OSA) Miss Whiteman (Legal), Hillaker (EUR), Ronhovde (BNA), US Claim in Antarctica, 11 January 1952, NARA, RG 59, CDF 1950-54, Box 3066, File 702.022/1-1152; and Bonbright to Acting Secretary, 15 September 1953, NARA, RG 59, CDF 1950-54, Box 3066, File 702.022/9-1553.

¹³⁶ A.C. McKinley, Chief of Naval Operations, Recommendation from the Technical Assistant to the Chief of Naval Operation for Polar Projects regarding construction of maps from the available Antarctic aerial photography, 19 November 1953, NARA, RG 59, CDF 1950-54, Box 3066, File 702.022/6-1253.

¹³⁷ Conceived of by a group of prominent scientists in 1950, the IGY was sponsored by the International Council of Scientific Unions and was meant to promote simultaneous scientific observations in all parts of the world to shed new light on problems of geophysics, like the origin of cosmic rays, and the laws governing global weather patterns and the aurora. See Roger D. Launius, James Rodger Fleming and David DeVorkin, eds., *Globalizing Polar Science: Reconsidering the Social and Intellectual Implications of the International Polar and Geophysical Years* (New York: Palgrave Macmillan, 2010); Dian Olson Belanger, *Deep Freeze: The United States, the International Geophysical Year, and the Origins of Antarctica’s Age of Science* (Boulder: University of Colorado Press, 2006); and Walter Sullivian, *Assault on the Unknown: The International Geophysical Year* (New York: McGraw Hill Book Company, 1961).

¹³⁸ Joyner and Theis, *Eagle Over the Ice*, 26-28. Belanger, *Deep Freeze*.

American policy-making. In the lead-up to the 1954 decision, the National Security Council concluded that, “Delineation of a U.S. claim to full sovereignty, even if we could identify our major interests at this time, might prove to be an abortive effort because of the lack of internationally agreed rules for acquiring sovereignty in the Antarctic.” Additionally, an American annexation would represent “a sharp break with our past policy of refusing to recognize claims to sovereignty when not accompanied by occupation.”¹³⁹ Instead, the U.S. would pursue an “orderly progress toward a solution of the territorial problem of Antarctica.”¹⁴⁰ While there would be setbacks, policy changes, and more proposed claims along the way, after 1955 the U.S. moved steadily down the path towards the Antarctic Treaty of 1959.

8.7 The Undecipherable Formula for Polar Sovereignty

In the midst of the American proposals for trusteeships and condominiums during the late 1940s and early 1950s, the Antarctic claimant states continued to strengthen their territorial claims. Although arguments based on contiguity and the sector principle continued, every state tried to create a physical presence, and demonstrate use and development within their claims. No state wanted to risk being seen as the dog in the manger.

In January 1950, the French established a permanent research base at Pointe Géologie, on a small island off the coast of Adélie Land, primarily to study Emperor Penguins. In 1955, the French renamed their territory *Terres Australes et Antarctiques Françaises*, and placed it under the control of the Colonial Ministry in Paris.¹⁴¹ Operation Highjump particularly concerned the Norwegians, who noted that the American flights covered extensive parts of Dronning Maud Land. Norway responded with the Norwegian-British-Swedish Antarctic Expedition, the first south polar venture involving

¹³⁹ Report to the National Security Council by the National Security Council Planning Board, Draft Statement of Policy Proposed by the National Security Council, 28 June 1954, *Foreign Relations of the United States, 1952-1954*, vol. 1, pt. 2, General: Economic and Political Matters, Document 301. National Intelligence Survey on Antarctica (NIS 69), Chapter V: Political, January 1956, NARA, RG 330, Entry (A1), Box 1, File National Intelligence Survey, Antarctica, Political; and

¹⁴⁰ Beck, *International Politics*, 41.

¹⁴¹ John Hanessian Jr., “National Interests in Antarctica,” in *Antarctica*, ed. Trevor Hatherton (London: Methuen & Co., 1965), 16-17; and Griffiths, *Slicing the Silence*, 227.

an international team of scientists. For two seasons the parties carried out air surveys of Dronning Maud Land and glaciological, geological and meteorological research. Historian Peder Roberts has explained that Britain engaged in an expedition outside the FID so that the world would see it as a cooperative Antarctic state, in contrast to their escalating dispute with Chile and Argentina. The Norwegians, however, utilized the expedition and its work to show their effective exercise of sovereignty over Dronning Maud Land.¹⁴²

In the postwar years, the Australian government assumed full responsibility for Antarctic exploration, researching and financing all activities.¹⁴³ After Operation Highjump, Canberra resurrected its plan from 1939 for a permanent Antarctic base. The Australians viewed the AAT as a potential source of valuable minerals, whaling and fishing grounds, meteorological information and scientific research, and they wanted to secure their sovereignty over the territory.¹⁴⁴ Although the Australians established an Executive Planning Committee and the Australian National Antarctic Research Expedition in May 1947, the absence of a ship capable of establishing and supplying a base in the AAT delayed its plans for seven years.¹⁴⁵

The Australians continued to participate in the Polar Committee and received a steady stream of British legal appraisals insisting on physical occupancy and use. At one meeting in 1947, William Eric Beckett pronounced that the AAT might be regarded “as land which has been forfeited because they have not been occupied effectively.”¹⁴⁶ During the long wait for an Australian Antarctic base, some Australian External Affairs officials questioned the necessity of a continuous physical presence in the Antarctic. Australian legal appraisals stressed how little had been necessary to sustain state title in

¹⁴² Roberts, *The European Antarctic*, 117-140.

¹⁴³ Dodds, *Geopolitics in Antarctica*, 87.

¹⁴⁴ H.V. Evatt, Minister of External Affairs, Progress of the Executive Planning Committee to the end of July 1947, NAA, A2700/1275D. Australian External Affairs officer JDL Hood stressed to Canberra that, “You will recall Beckett’s advice that no time should be lost in formulating tentative plans to anticipate light turning red.” 570. J.D.L. Hood, External Affairs Officer, London, to Department of External Affairs, 12 March 1947, W.J. Hudson and Wendy Way, eds., *Australia and the Postwar World: Documents 1947* (Australia: Australian Government Publishing Services, 1995), 876-877.

¹⁴⁵ H.V. Evatt, Minister of External Affairs, Progress of the Executive Planning Committee to the end of July 1947, NAA, A2700/1275D.

¹⁴⁶ T.G. Glasheen, Second Secretary, London, to Department of External Affairs, 14 March 1947, in Hudson and Way, *Australia and the Postwar World: Documents 1947*, 877-879.

the *Eastern Greenland* and *Clipperton Island* cases, noting that a sustained display of official interest had been sufficient. They critiqued the opinions coming out of the Foreign Office for “veering towards the views held by the State Department” bemoaning that “recent British practice based largely on these opinions has gone even further than the effective control posited by [Charles Cheney] Hyde as a condition of the occupation of polar areas.”¹⁴⁷ In 1947, the Australians asked if state control in the Antarctic could be effectively “maintained by means of aerial flights” as Hyde had proposed in his 1933 article.¹⁴⁸ Canberra also placed a great deal of faith in the “lack of opposition by other nations” to its claim, which “has generally been accepted as recognition and acceptance” of Australia’s sovereignty. Furthermore, this tacit acquiescence from the international community was augmented by “express recognition” from Britain, New Zealand, France and Norway.¹⁴⁹

Nevertheless, as the Australians engaged in more independent studies of territorial claims in the polar regions¹⁵⁰ and realized that the “non-British world” did not “accept the view that incontestable British title exists” to the AAT,¹⁵¹ they increasingly agreed with William Eric Beckett’s call for continuity of effective physical possession.¹⁵² Thus, when the Australians decided to claim the Heard and Macquarie Islands in the Subantarctic in 1947-1948 (discovered by Britain in 1833, but used extensively by American sealers and whalers),¹⁵³ they concluded that the islands were open, “to any other country to establish a legally valid claim by open, peaceful and continuous occupation.” The leader of the expedition to the islands had orders to make formal claims, and “initiate a program of

¹⁴⁷ Annex: History of Heard and McDonald Islands, NAA, A1068/A47/26/11.

¹⁴⁸ Polar Committee Meeting, 13 March 1947, LAC, RG 25, Vol. 3843, File 9091-40, pt. 2.

¹⁴⁹ P.G. Law, Officer in Charge, Antarctic Division to the Secretary, Department of External Affairs, 29 June 1950, NAA, A1838, 1495/3/2/1 Part 1.

¹⁵⁰ C.T. Moodie to Mr. Noel Deschamps, 13 February 1948, NAA, A1838, 1495/3/2/1 Part 1.

¹⁵¹ P.G. Law, Memorandum for the Secretary, Department of External Affairs, Australian Claims in Antarctica, 5 February 1952, NAA, A1838, 1495/3/2/1 Part 1.

¹⁵² Royal Australian Air Force, Airfields in the South Indian Ocean, 1947, NAA, A1196, 13/501/93; and Memorandum for the Secretary, Department of Air, 27 March 1947, NAA, A1196, 13/501/93.

¹⁵³ As Tim Bowden has revealed, the Australians believed that Heard Island was a strategic point. The island rested 4000 km from southwest of western Australia and 1500 km from the Antarctic coastline. Tim Bowden, *The Silence Calling: Australians in Antarctica, 1977-1997* (St. Leonards: Allen and Unwin, 1997), 22.

activity that will evidence continuous and effective Australian occupation.”¹⁵⁴ Upon becoming head of the Antarctic Division at External Affairs in June 1950, Phillip Law drew up plans for a permanent station in the AAT, from which to “implement a long term scientific programme.”¹⁵⁵ In a speech to the Royal Empire Society in June 1949, Law announced, “One thing, however, is certain: No nation can hope to rope off a section of the earth as its property unless it sustains its claims by actively occupying a portion of that area and carrying out useful work there.”¹⁵⁶ Australia, Law argued, claimed roughly half the continent, and the International Court of Justice would never recognize its claim if it failed to occupy and develop the AAT.¹⁵⁷

Even when Canberra accepted Law’s plan for a permanent base, he needed to convince many who “thought putting a hut down there with some men was occupation and that was all you needed to do for your claims,” of the necessity of an excellent scientific program. He referenced the territorial dispute in the FID, noting that Britain’s main advantage arose from performing better science.¹⁵⁸ Law crafted an extensive scientific plan for the personnel of the proposed base, including meteorology, cartography, survey, geology and biology, and aerial mapping.¹⁵⁹ In November 1953, the Executive Planning Committee highlighted that these scientific efforts represented the “practical exercise of sovereignty.”¹⁶⁰

As the Australians searched for a suitable ship to assist in the establishment of an Antarctic base, they released new editions of their leading Antarctic map to provide

¹⁵⁴ Department of External Affairs, Canberra, Australian Antarctic Territory, NAA, A1068/A47/26/11; and Annex: History of Heard and McDonald Islands, NAA, A1068/A47/26/11.

¹⁵⁵ Draft Submission to Cabinet, 1950, NAA, A1838, 1495/4 PART 1.

¹⁵⁶ Philip Law, Speech to the Royal Empire Society Draft, 14 June 1949, NAA, A1838, 1495/3/2/1 Part 1. See also Klaus Dodds and Alan D. Hemmings, “Frontier Vigilantism?: Australia and Contemporary Representations of Australian Antarctic Territory,” *Australian Journal of Politics and History* 55, no. 4 (2009): 518.

¹⁵⁷ Appendix B, Reasons for the Establishment of an Antarctic Station, NAA, A1838, 1495/4 PART 1.

¹⁵⁸ Law also understood the complicated relationship between science, the law and moral justifications for Antarctic work. A permanent Australian base was essential from a legal perspective, but Law understood that science played a valuable legal and moral role. As he explained in an interview, “No one likes to come out and say, ‘Oh, politically we’re colonialists, we want to go out and grab another bit of empire.’ So you say, ‘Well, we’re going down for scientific purposes.’” Bowden, *The Silence Calling*, 75.

¹⁵⁹ Phillip Law, *Antarctic Odyssey* (Richmond: Heinemann, 1983), 16.

¹⁶⁰ Executive Planning Committee Paper, Draft Cabinet Submission, November 1953, NAA, A10299/A8.

evidence of the “strength” of Australia’s claim.¹⁶¹ Minister of External Affairs Richard Casey also became the primary proponent of a long-range survey flight to the AAT, as a demonstration aimed at “fortifying Australian claims to sovereignty.” Casey felt his presence would add even more power and legitimacy to the flight. Speaking to Canada’s High Commissioner at a party in Canberra, Australian External Affairs officials relayed that they “were horrified at the Minister’s ‘madcap’ scheme and were doing their best to throw cold water on it.”¹⁶² Given that the flight would have no safety net if anything went wrong while over the AAT, Canberra cancelled the plan.¹⁶³

Finally in early 1953, the Australian government secured the *Kista Dan*, a ship capable of supporting the construction and resupply of the proposed Antarctic base.¹⁶⁴ Law chose Horseshoe Bay, Mac. Robertson Land, the scene of much American activity during Operation Highjump, as the site for the base. Although visited by Douglas Mawson in 1930, Law argued that the American flights had “overrun the Australian work, and if Australia’s claim to its Antarctic territory were to stand up, the original reconnaissance of Mawson’s...expedition would have to be consolidated.”¹⁶⁵ Given that the AAT was about to have its first permanent human presence, the Australian government decided to create a body of law to govern relations between personnel at the base and machinery for the appointment of magistrates, coroners and other government representatives. The Australian Antarctic Territory Act 1954 applied the laws of the Australian Capital Territory to the AAT. The act gave the Governor General power to make ordinances for the peace, order and good government of the region, to control the exploitation of mineral resources, and for the preservation of wildlife, as well as

¹⁶¹ Day, *Antarctica: A Biography*, 386-387.

¹⁶² High Commissioner for Canada, Canberra to the Secretary of State for External Affairs, “Proposed Survey Flight to Australian Antarctic Territory,” 25 October 1951, LAC, RG 25, Vol. 3843, File 9091-40 pt. 1.

¹⁶³ The pilot of the flight, Captain Bill Taylor, responded, “All this bother, in your absence, about the small problem of preparing the aircraft for the Antarctic flights makes one wonder, Dick, whether Australia as a whole is yet mature enough to be entrusted with such responsibility for the British Commonwealth as this vast and potentially valuable territory in Antarctica to which we have somewhat shaky claim; a claim already being assailed with varying degrees of international politeness by other nations who are now beginning to recognise that value.” Captain Bill Taylor to Richard Casey, 23 May 1952, NAA, A10299/A4.

¹⁶⁴ The *Kista Dan* was built for travel between Denmark and Greenland, had two large holds capable of housing airplanes, room for 24 passengers and an experienced crew. The trade off for the government was closing down the Heard Island base for the continental base. Bowden, *The Silence Calling*, 102.

¹⁶⁵ Phillip Law, *Antarctic Odyssey* (Richmond: Heinemann, 1983), 13-14.

authorization to appoint the necessary officials.¹⁶⁶ Australian External Affairs suggested that “this is the type of immediate exercise of sovereign power which seems to help most in confirming title to terra nullius.”¹⁶⁷ Canberra hoped that the laws, a permanent base and science would cement Australia’s title to the AAT.

In January 1954 the *Kista Dan* sailed into Horseshoe Bay and by early February Mawson Station had been commissioned. By 1955 the base had nineteen buildings in operation, and represented the most elaborate scientific effort in the Antarctic to date. Canberra considered the cosmic ray studies program the most impressive – the project’s instrumentation included two large meson telescopes encased in concrete piers weighing four tons and screened with one ton of lead.¹⁶⁸ From the base, the overwintering parties spread out along the coast of the AAT and explored inland.¹⁶⁹

Law always envisioned Mawson Station as the first toehold on the continent, from which the Australians would expand their occupation and scientific activities into the AAT’s still largely unknown interior.¹⁷⁰ Many Australian officials, however, continued to put their faith in the sector principle and the “view that the power in effective control of the coast is to be regarded as controlling the hinterland.”¹⁷¹ Casey explained to his Canadian counterpart, Secretary of State Lester Pearson in 1955, that “The Australians stood firmly on the Sector Principle which gave them a great slice of this part of the world, but, for pretty obvious reasons, they had never been able to persuade the

¹⁶⁶ Donald Rothwell and Andrew Jackson, “Sovereignty,” in *Australia and the Antarctic Treaty System: 50 Years of Influence*, eds. Marcus Howard and Tom Griffiths (Sydney: University of New South Wales Press, 2011), 53; and Gillian Triggs, *International Law and Australian Sovereignty in Antarctica*, (Sydney: Legal Books, 1986), 111-114, 252-253.

¹⁶⁷ J.H. Brook, Secretary, Department of External Affairs, to the Secretary, Attorney-General’s Department, 24 November 1954, NAA, A1838, 1495/3/2/2 PART 1; Memo of Conversation Between A.H. Brody, Legal and Treaty Division and Clark, Attorney-General’s Department, 22 July 1959, NAA, A1838, 1495/3/2/2 PART 3.

¹⁶⁸ R.A. Swan, *Australia in the Antarctic* (Melbourne: Melbourne University Press, 1961), 278.

¹⁶⁹ By 1955, plans were in motion for a Royal Australian Air Force aerial mapping program in the AAT. A.H. Tange, Discussion with P.G. Law, 16 May 1956, NAA, A1838, 1495/3/2/1 Part 1. See also Bowden, *The Silence Calling*, 148-151.

¹⁷⁰ No matter how good the science at Mawson Station was, Law was adamant that Australia exercise its sovereignty through the sector. J.K. Waller to Philip Law, 5 January 1955, NAA, A1838, 1495/3/2/1 Part 1.

¹⁷¹ R.G. Casey, Minister for External Affairs, to Cabinet, “Antarctic: Position Regarding Claims,” NAA, A4926, 1039, Antarctic - position regarding claims - Decision 1214.

Americans to accept this theory.”¹⁷² On several occasions in the 1950s, Canberra tried to convince the Americans to recognize the AAT and make a sector claim of their own.¹⁷³ Australian External Affairs argued that, “international law is what international agreement makes it,” and hoped that a treaty would enshrine the sector principle as the foundation of an Antarctic legal regime.¹⁷⁴ If the dispute between Britain, Chile and Argentina ever went to arbitration or the ICJ, Canberra hoped that the judgment might enshrine the sector principle as a legitimate way to partition the Antarctic.¹⁷⁵ To the Australians, any formula for polar sovereignty had to include the sector principle.

The Australians were relieved that they had avoided the kind of open territorial dispute that Britain faced in the FID. The competition in the region steadily intensified after 1947, as all three countries strengthened their legal positions.¹⁷⁶ By 1948, the British had seven stations and thirty-nine men overwintering in the FID, the Argentineans had three bases and twenty-five men, and the Chileans counted two and thirteen men. That summer, over a dozen ships from the three states operated in the southern waters. A tripartite naval declaration signed between the three countries, which established that no warships would be sent south of 60°S save for “routine movements such as have been customary for a number of years,” alleviated some of the tension in the region. Noting the important role the naval agreement played in deescalating tensions, the states renewed it every year until 1959.¹⁷⁷

The Antarctic dispute was important to both Chile and Argentina, and particularly so for the latter’s Perón government, which casted itself as the principled opponent of

¹⁷² T. Carter, Under-Secretary of State for External Affairs, to The Deputy Minister, Department of Northern Affairs, 29 September 1955, “Extract from Memorandum of Mr. Pearson’s Discussion with Mr. Casey on 9 September 1955,” LAC, RG 25, Vol. 6510, File 9057-40 pt 6-1.

¹⁷³ Exchange of Views on the Antarctic, Meeting with U.K. Officials at Foreign Office, 1 October 1955, NAA, A1838, 1495/3/2/1 Part 1; External Affairs to Australian Embassy, Washington, 17 January 1956, NAA, A1838, 1495/3/2/1 Part 1; and Record of Conversation Between Dulles, U.S. Secretary of State, Robertson, U.S. Assistant Secretary of State, Mr. Peterson, U.S. Charge d’Affaires, Mr. Reinhardt, Counsellor of State Department, Mr. Casey, Minister for External Affairs, Mr. Tange, Secretary, Department of External Affairs, 13 March 1957, NAA, A1838, 1495/3/2/1 PART 3.

¹⁷⁴ Solicitor’s Office, 16 August 1957, NAA, A432/1953/3228 Pt. 1; and Australian Antarctic Territory – Legal Basis of Australia’s Sovereignty, NAA, A432/1953/3228 Pt. 1.

¹⁷⁵ Watt, Australian High Commissioner’s Office, to Moodie 19 September 1953, NAA, A5954/ 2311/2, Antarctic File 2.

¹⁷⁶ Howkins, “Frozen Empires.”

¹⁷⁷ Dodds, *Pink Ice*, 76-80.

British imperialism.¹⁷⁸ In March 1948, the two South American countries signed a mutual agreement pledging to act together to protect and defend their legal rights in the Antarctic.¹⁷⁹ Even as both states started to actively occupy parts of their Antarctic territory, they continued to lean on geological and geographical arguments, the sector principle, as well as their historical rights and the doctrine of *uti possidetis juris*.¹⁸⁰ In the early postwar years, both countries repeatedly called for a discussion of the Antarctic situation at a multilateral conference in either Buenos Aires or Santiago, where they could possess a stronger and united voice as they negotiated the political and legal status of the Antarctic.¹⁸¹

In general, however, Argentina's Antarctic strategy focused on quickly expanding the number of bases, overwintering personnel and aircraft operating in its polar territory. In the early 1950s, President Perón promised to "saturate" Argentina's Antarctic claim with state activity.¹⁸² By 1954, the Argentineans ran eight bases with a winter presence of sixty-eight, who utilized mechanized vehicles to extend their presence. That summer, they sent seven support ships, six aircraft and three helicopters into their sector. In comparison, Britain had six bases, thirty-eight surveyors overwintering, one ship and no aircraft whatsoever.¹⁸³ In 1954-1955, Argentina expanded its footprint using its brand

¹⁷⁸ Howkins, "Frozen Empires," 234.

¹⁷⁹ Meanwhile, they continued to work towards a mutually acceptable boundary for their polar frontiers. Howkins, "Frozen Empires," 161-162.

¹⁸⁰ Juan Bramuglia to R. Leeper, Argentine Claims to the Falklands, 15 February 1947, NA, FO 371/61290; Argentina Memorandum Setting Out the Grounds for the Argentine Claims to the Falkland (Malvinas) Islands and Antarctic Territories, 21 April 1948, Document AR21041948A, in Bush, *Antarctica and International Law* 2, 665-668; Argentine Note to the United Kingdom Protesting at British Action to Remove Argentine Personnel and Buildings from Deception Island, South Shetland Islands, 20 February 1953, Document AR20021953, Bush, *Antarctica and International Law* 1, 698-701; Speech Concerning the Grounds of Chile's Claim to Antarctica Delivered to the Senate by the Minister of Foreign Affairs, 21 January 1947, Document CH210110947 in Bush, *Antarctica and International Law* 2, 334-367; Speech of the Chilean President at the Inauguration of the Bernardo O'Higgins Military Base, 18 February 1948, Document CH18021948, in Bush, *Antarctica and International Law* 2, 379-380; Chilean Note to the United Kingdom Rejecting the British Note of Protest at the Establishment of a Chilean Base on Penguin Island, Paradise Harbour, 17 May 1951, Document CH17051951, in Bush, *Antarctica and International Law* 2, 388-392. Oscar Pinochet de la Barra, *La Antártida Chilena* (Santiago: Imprenta universitaria, 1948).

¹⁸¹ Canadian Ambassador, Argentina, to L.B. Pearson, Secretary of State for External Affairs, 25 February 1948 Re: Special Bulletin No. 1, from the Embassy of Argentina, Ottawa, addressed to Secretary of State for External Affairs, "Argentine Sovereignty in the Antarctic." LAC, RG 25, Vol. 3843, File 9091-40 pt. 1. See also Howkins, "Frozen Empires," 233.

¹⁸² Memorandum by the Secretary of State for Foreign Affairs and the Secretary of State for the Colonies, 28 July 1954, NA, CAB 129/70.

¹⁸³ Draft Cabinet Paper, July 1954, NA, CO 1024/132.

new icebreaker, *General San Martín* (built in West Germany),¹⁸⁴ to push into the Weddell Sea (to the east of the Antarctic Peninsula), where they built Base Belgrano, roughly 800 miles from the South Pole.¹⁸⁵ The British lamented that the Belgrano Base was “beyond our present reach,” and noted that the Argentineans were “well equipped for survey and exploration work, and it is clear that they intend increasingly to strike out from their bases into the unexplored land mass.”¹⁸⁶ In terms of sheer physical presence, the Argentineans led the way by the mid-1950s.

Chile quickly realized that it could not keep pace in the race. As a result, Howkins explains, the Chileans “withdrew, to some extent, from direct participation in the struggle for scientific supremacy.”¹⁸⁷ Beyond promoting an international solution through Escudero’s standstill proposal, they utilized unique legal argumentation. Chile responded to British protests with the statement, “da valor de actos de mera tolerancia” (“has passed over in the spirit of tolerance”). The British embassy in Santiago had no idea what it meant. A local lawyer explained that Chileans used the expression when, for instance, a person poached on the preserves of another with permission. Through the statement, the Chileans called the British intruders, who were simply being tolerated for the time.¹⁸⁸ The statement was akin to the permissions Britain and the Commonwealth countries had historically sent to the U.S. when American expeditions intruded into their polar territories. Unable to conduct a great deal of polar science in the early 1950s, the

¹⁸⁴ As Argentina expanded its efforts in the Antarctic it tried to secure polar equipment, training, aircraft and an icebreaker from Canada. The Foreign Office and Commonwealth Relations Office asked Ottawa to adopt a policy of “negative cooperation” towards these requests. The British asked their Canadian counterparts to find excuses for not meeting the Argentinean requests. M.J. Anstee, FO, to M.E. Allen, CRO, 19 April 1951, NA, FO 371/90440; and P.A. Carter to M.E. Allen, 11 April 1951, NA, FO 371/90440. Canada proved increasingly reticent to alienate Argentina by refusing its requests. When it provided polar training to Argentinean pilots and proved hesitant to provide material aid for Britain’s efforts in the FID, the British grew annoyed. CRO official, D.M. Cleary, angrily wrote, “The impression left on our minds is that the Canadians are unduly sensitive to Argentine feelings and pay insufficient regard to the strength of our own claims in the Antarctic. If so, this is hardly what one would expect of an ‘old’ Commonwealth Government and we should be glad to receive your appreciation of the situation.” D.M. Cleary, Commonwealth Relations Office, to Neil Pritchard, Office of the High Commissioner, 8 August 1955, NA, DO 35/7088.

¹⁸⁵ Howkins, “Frozen Empires,” 221.

¹⁸⁶ Memorandum by the Secretary of State for Foreign Affairs, Antarctica, 9 February 1955, NA, CAB/129/73.

¹⁸⁷ Howkins, “Frozen Empires,” 38.

¹⁸⁸ Chancery, Santiago, Chile to South American Department, Foreign Office, 11 March 1947, NA, FO 371/61290.

Chileans started to pronounce “discovery and the scientific expeditions carried out in the Antarctic do not and cannot constitute any title over this region.” Chile’s geographic proximity and geological connection through the Andes represented a far stronger claim to title, Santiago argued. Science could never create rights “in a region which forms part of the national territory of another State and over which Chile exercises, and has exercised, full sovereignty.”¹⁸⁹

New archival research highlights the extent that British strategy was influenced by Foreign Office legal appraisals in face of the growing South American challenge. In the summer of 1947, as foreign activity in the region started to increase, British Cabinet accepted a Foreign Office suggestion that London reach an agreement with Chile and Argentina to settle the dispute at the ICJ.¹⁹⁰ At this point, the legal advisers believed Britain would win the case on its historic record of state activity, and because Chile and Argentina had not yet matched British efforts at administration and physical occupation. The Foreign Office hoped the ICJ would determine the legal requirements for territorial acquisition in the Antarctic more generally, providing the claimant states with a firm legal foundation from which to support their claims.¹⁹¹ Some officials worried that an ICJ decision might only recognize British sovereignty over the areas actually occupied by its FIDS stations and where it had historically posted magistrates (such as Deception Island), “leaving open for international scramble hinterland areas.”¹⁹² Another contingent thought that the ICJ would agree that the purpose of international law was stability, and realize that anything other than exclusive British sovereignty to the whole FID sector would add fuel to the race for polar territory, fostering instability in the Antarctic.

¹⁸⁹ Chilean Note to the United Kingdom Rejecting the British Note of Protest at the Establishment of a Chilean Base on Penguin Island, Paradise Harbour, 17 May 1951, Document CH17051951, in Bush, *Antarctica and International Law* 2, 388-392.

¹⁹⁰ Draft Cabinet Paper on Antarctic Policy, 1 July 1947, NA, FO 371/61296.

¹⁹¹ Ernest Bevin to Leche, Santiago, Conversation with the Chilean Ambassador, 28 February 1948, NA, FO 371/68235.

¹⁹² Clark, U.S. Embassy, London, UK-Antarctica, 14 August 1947, NARA, RG 59, CDF 1945-49, Box 4074, File 800.014, Antarctic/8-1447.

To bring the dispute to the ICJ, however, the British needed the approval of Chile and Argentina in a special agreement.¹⁹³ In December 1947, London sent its proposals for adjudication to Santiago and Chile. Hoping to place pressure on Argentina, the British note included a statement by the Argentinean delegation to the UN in September 1947, which argued that “we must strive for all the States Members of the United Nations to give up a little more of their sovereignty by accepting arbitration as a compulsory method of settling disputes... We believe that we have preached by example, for this peace-loving attitude has always been the policy of Argentina in international affairs.” Nevertheless, Argentina and Chile rejected the British plan arguing that they held “irrefutable” titles to their Antarctic territories. Neither country would submit their national sovereignty for judgment by the ICJ.¹⁹⁴ The British repeated their offer to bring the dispute to the ICJ in 1948, 1951 and 1953, receiving the same negative reply each time.¹⁹⁵

Without a decision by the ICJ, the British found another way to have their judicial defence heard by the larger legal community. The Foreign Office legal advisers handed Humphrey Waldock, Chichele Professor of Public International Law at Oxford, their Antarctic legal assessments in 1947. Beckett defended the decision, noting that because the work of the Foreign Office so often fell within the sphere of international law, it had an “established tradition” of giving the “principal professors of International Law” confidential material so that the British standpoint could “appear in the books.” The

¹⁹³ Neither country had signed the optional clause of the ICJ, which gave the court jurisdiction to settle any dispute that might arise between participating states. In theory, any State that signs the optional clause is entitled to bring one or more states in the group before the court. Honore M. Catudal, “Procedure for Accepting the Optional Clause of the Statute of the International Court of Justice,” *The American Journal of International Law* 40, no. 3 (1946): 634-637.

¹⁹⁴ British Ambassador, Santiago to Chilean Foreign Minister, 17 December 1947, Document CH17121947, in Bush, *Antarctica and International Law* 2, 371-373; British Note to Argentina Protesting Argentine Activities Within the Falkland Islands Dependencies, Document AR17121947 in Bush, *Antarctica and International Law* 1, 642-643 (includes translated UN Statement, 19 September 1947); Chilean Note to the United Kingdom Concerning British Bases in the Chilean Antarctic Territory, Document CH18121947, in Bush, *Antarctica and International Law* 2, 373-379; and Argentine Note to the United Kingdom Rejecting British Protests at the Establishment of Argentine Stations on Gamma and Deception Islands and Declining to Submit the Dispute to the ICJ, Document AR28011948, in Bush, *Antarctica and International Law* 1, 649-658.

¹⁹⁵ The South Americans insisted they would not submit their national sovereignty to the ICJ and cited their mistrust of the court, arguing it offered no “offered “no guarantees at all to smaller powers.” Leche, Santiago, Chile to Foreign Office, 3 March 1948, Washington to Foreign Office, 3 March 1948, NA, FO 371/68237; and Chilean Note Verbale to the United Kingdom Protesting at British Actions to Remove a Chilean Building from Deception Island, 20 February 1953, Document CH200221953, in Bush, *Antarctica and International Law* 2, 394-396.

Foreign Office had no “objection to the writer, if he thinks fits, adopting purely as his own arguments” those made by the legal advisers.¹⁹⁶ Using government material, Waldock wrote an article on the FID dispute. His conclusions, Beckett noted, were a “little more optimistic” than that reached by the Foreign Office. In a published article, Beckett explained, an “English Professor will naturally not...in a case of doubt weight the scales against his own country.”¹⁹⁷

Waldock’s paper in the *British Yearbook on International Law* attacked Chilean and Argentinean arguments about proximity, stating that, “international law had decisively rejected geographical doctrines as distinct legal roots of title.” While Foreign Office assessments emphasized the need for a permanent physical occupation of the FID, Waldock insisted that polar sovereignty did not require settlement or use. He argued that sovereignty stemmed from a state’s peaceful display of its control over an area, which only had to be present “*as and when occasion demands.*”¹⁹⁸ Britain had clearly displayed this control over Graham Land, South Georgia, the South Shetlands, South Orkneys, and South Sandwich Islands since the beginning of the twentieth century through licenses, leases, concessions, and the presence of magistrates and customs officers. Waldock admitted that the presence of these state representatives had been “seasonal or occasional,” but attributed it to seasonal or occasional human activity in the region.¹⁹⁹ Britain had definitively established its sovereignty over these territories by the 1920s, and the Chilean and Argentinean activities in them amounted to an illegal attempt to usurp this valid title.

Waldock conceded that Britain had not sufficiently established ownership over the largely unknown polar hinterland beyond the Antarctic Peninsula. Previously, the sector principle offered the British a tool to justify its claim to this interior land, but, unlike some of his peers in the 1930s, Waldock believed that it was “scarcely possible to

¹⁹⁶ W.E. Beckett, 8 February 1951, NA, FO 371/90443.

¹⁹⁷ W.E.B. Beckett, Minute, 19 May 1950, NA, FO 371/81131.

¹⁹⁸ He argued that sovereignty “is effective activity by the state either internally within the territory or externally in relations with other states which is the foundation of a title by occupation, not settlement and exploitation.” C.H.M. Waldock, “Disputed Sovereignty in the Falkland Islands Dependencies,” *British Yearbook on International Law* 25 (1948): 316-317 and 335-336.

¹⁹⁹ Waldock, “Disputed Sovereignty in the Falkland Islands Dependencies,” 346-353.

regard state practice as sufficiently certain and general to establish [the theory] as a new rule of international law.”²⁰⁰ Still, like the Australians, he thought that “in the desolate, uninhabited areas of the South Pole,” the ICJ might rule that sectors provided a “convenient method of defining the extent of the area covered by an effective occupation of any part of the coast of the Antarctic mainland.”²⁰¹

Alongside Waldock’s article, British diplomats advanced their country’s legal position far more than they had before the war. They consistently criticized Chilean and Argentinean arguments about geographic proximity and geological connection.²⁰² Trying to win the support of other states, the British likened a claim based on geographic proximity to Pakistan annexing the moon because they had the highest mountain in the world, or the country with the deepest mines claiming the earth’s core.²⁰³ The geological connection between South America and the Antarctica was as “absurd” as Spain claiming North Africa or Norway claiming Scotland.²⁰⁴ Britain countered American criticism of the minimal British occupation efforts in the FID by arguing that the Gobi Desert, Himalayas, and Rocky Mountains were also not “effectively administered unless through a few chosen key-points which dominated the whole, for the use and convenience of man.”²⁰⁵

To preserve its position, present its legal case and attack the arguments used by its competitors, Britain dispatched a steady stream of protests to Buenos Aires and Santiago. These protests increased after the 1953 *Minquiers and Ecrehos* case²⁰⁶ – a territorial dispute between France and Britain over the uninhabited islets and rocks between the

²⁰⁰ Waldock, “Disputed Sovereignty in the Falkland Islands Dependencies,” 339.

²⁰¹ Waldock, “Disputed Sovereignty in the Falkland Islands Dependencies,” 335.

²⁰² Senor Juan Bramuglia to Sir. R. Leeper, 15 February 1947, NA, FO 371/61290.

²⁰³ British Legation, Ciudad Trujillo, Dominican Republic to South American Department, 12 April 1948, NA, FO 371/68242.

²⁰⁴ Brian Roberts, Minute, 11 June 1948, NA, FO 371/68245.

²⁰⁵ R.H. Hadow, British Embassy, Washington to CAE Shuckburgh, South American Department, Foreign Office, 24 December 1947, NA, FO 115/4322.

²⁰⁶ The dispute had medieval roots and the legal cases crafted by France and England focused on these historical evidence. The decision also emphasized the need for effective state control and provision of the functions of government. G.G. Fitzmaurice, *Antarctica*, 15 March 1954, NAA, A1209, 1957/4937, *Argentine and Chilean claims over Antarctic Territory – Policy*. For more on the impact of the *Minquiers and Ecrehos* case on the Antarctic dispute, see NA, DO 35/7089, *Implications in Antarctic dispute of ruling by International Court of Justice in case of Minquiers and Ecrehos islets; ownership in dispute between UK and France*.

British Channel Island of Jersey and the coast of France – emphasized “the importance of leaving no act unprotested which can be represented by a competing Power as implying sovereignty over a disputed territory.” London became more astute at protesting every new base, light beacon and navigation aid established by Chile and Argentina, as well as every chart, map, and postage stamp the two states released.²⁰⁷ The Foreign Office even considered protesting the annual Christmas card from the Argentinean Hydrographer to his British counterpart, which included a map of Argentina with the Antarctic attached. In the end, the British ruled it was a personal greeting that did not demand an official response.²⁰⁸

As London filed its protests, internal policy discussions attempted to determine the best methods to preserve Britain’s claim to the FID. With a government that rarely invested substantial amounts into the annual FIDS budget and refused to expel the Argentineans and Chileans through force, the Foreign Office tried to determine the legal value of each activity carried out by the FIDS in the Antarctic.²⁰⁹ In short, the Foreign Office worked harder than ever to figure out the formula for achieving polar sovereignty. To assist in the process, the British collected legal studies from the Commonwealth countries and information on the approaches and opinions of the other polar claimant states.²¹⁰

²⁰⁷ Note, Foreign Office, March 1954, NA, FO 371/103167. See also G.G. Fitzmaurice, *Antarctica*, 15 March 1954, NAA, A1209, 1957/4937, *Argentine and Chilean claims over Antarctic Territory – Policy*. For more information on the impact of the case, see NA, DO 35/7089, *Implications in Antarctic dispute of ruling by International Court of Justice in case of Minquiers and Ecrehous islets; ownership in dispute between UK and France*.

²⁰⁸ M.L. Cahill, 9 March 1954, NA, FO 371/108772.

²⁰⁹ C.A.E. Shuckburgh to Secretary of the Admiralty, 3 November 1947, NA, FO 371/61300. Beckett recognized that without the use of force to expel the South Americans, “there is nothing we can do to maintain our title unimpaired in these territories.” W.B. Beckett, *Minute*, 5 May 1949, NA, FO 371/74757; and W.E. Beckett, *Minute*, 14 July 1949, NA, FO 371/74757. The Royal Navy grew tired of sending its ships into the dangerous ice covered waters. Persistent fears that they might get caught in the ice or run into other trouble, and require assistance from Argentinean or Chilean naval units also discouraged. Admiralty to J.S. Bennet, Colonial Office, 13 June 1949, NA, FO 371/74752. There was a suggestion to arm the *John Biscoe*, the research vessel supporting the FIDS. To arm a research vessel would be to invite adverse reaction and “lend colour to the view that Falkland Islands Dependencies Survey is a kind of piratical exercise,” concluded J.S. Bennett. J.S. Bennett to GCB Dodds, Admiralty, 28 June 1949, NA, FO 371/74752. See Howkins, “Frozen Empires,” 188.

²¹⁰ *Transmission of Law Officers’ Opinion on the Falkland Islands Dependencies to the Dominion Governments*, 21 May 1947, NA, FO 371/61293; *Polar Committee: Copy of a Statement on the Chilean Antarctic Claim Made by the Chilean Minister of Foreign Affairs before the Chilean Senate on 22 January*

In London, legal advisers and Antarctic experts stressed the need for “practical use,”²¹¹ and discussed the judicial impact of surveys and maps,²¹² a permanent meteorological service,²¹³ expeditions,²¹⁴ the re-establishment of a whaling station at Deception Island, and other commercial activity that would serve to make Britain “not appear [the] dog-in-the-manger.”²¹⁵ London continued to emphasize meteorology as one of the most important proofs that it was exercising sovereignty. In support, the British installed a weather forecasting service in Port Stanley, Falkland Islands to analyze and report on the data coming from the FIDS stations.²¹⁶ Brian Roberts argued for automatic weather stations to bolster this network and provide physical evidence of Britain’s will to occupy the territory.²¹⁷ By the late 1940s, Roberts believed that the most “genuine administrative activities” carried out in the FID were meteorological observations, topographical surveying, geological exploration, the investigation of natural resources and, last, other forms of scientific research.²¹⁸

By 1950, the Foreign and Colonial Offices began to debate the legal value of patrolling and surveying away from the FIDS bases. By this point, the Colonial Office wanted to make the maximum withdrawal possible consistent with political essentials, and reduce its FIDS operation to four “static” bases focused on meteorology. The Colonial Office determined sledge journeys had little legal value, and refused to consider

1947, 24 March 1947, LAC, RG 25, Vol. 3843, File 9091-40, pt. 1; Minute, P.J. Stirling, 25 March 1947, NA, FO 371/61290; and Sir Edward Appleton, Department of Scientific and Industrial Research to Neville Butler, Foreign Office, 5 March 1947, NA, FO 371/61290. Both the Canadian and Australian embassies in Buenos Aires and Santiago forwarded Britain information. Chancery, Australian Legation, Santiago, Chile to Australian Embassy, Washington, 25 April 1947, NAA, A3300, 541A; and Warwick Chipman, Canadian Ambassador, Buenos Aires to The Secretary of State for External Affairs, 8 January 1947, LAC, RG 25, Vol. 3843, File 9091-40, pt. 1.

²¹¹ C.A.E. Shuckburgh, Minute, 26 February 1948, NA, FO 371/68238.

²¹² Minutes of the First Meeting of the FID Scientific Committee, 12 May 1948, NA, FO 371/68249.

²¹³ Proposals by the Governor for the Re-Organization of the Meteorological Set Up in the Dependencies, 31 May 1948, NA, FO 371/69249.

²¹⁴ Frank Debenham, Proposed Expedition to Ross Sea, 15 July 1948, NA, FO 371/68248.

²¹⁵ AE Shuckburgh to Sir Noel Charles, 12 October 1948, NA, FO 371/68255.

²¹⁶ Brian Roberts, Comparative Chronological Summary of British, Argentine and Chilean Activities in Connection With Claims to the Falkland Islands Dependencies, 1947-1952, 17 December 1952, NA, FO 371/103162.

²¹⁷ Brian Roberts, Minute, 27 July 1950, NA, FO 371/81131.

²¹⁸ Roberts to Stirling, Mapping of the Falkland Islands Dependencies, 19 February 1948, NA, FO 371/68235.

the impact that aircraft might have on bolstering a state's control over a region.²¹⁹ The Foreign Office insisted that seasonal visits by ships or temporary expeditions could never replace on the ground occupation.²²⁰ A handful of men sitting at the FIDS bases meant nothing. Sledging journeys allowed the FIDS to "patrol areas and thus to increase our title to them."²²¹ Beckett strongly supported the need for sledging patrols. He referenced the Canadian government, which had "widely spaced" meteorological stations and police posts often hundreds of miles apart. Every year the RCMP carried out sledge journeys as widely as possible, "ensuring that their administration covers the whole area and not only the immediate vicinity of the occupied posts."²²² The Foreign Office believed that a minimum of six bases needed to be maintained and advised that new stations be placed close to previous activity to build up continuity of possession.²²³ The bases should also be located away from isolated islands and, if not on the mainland, close to it, where the most land was accessible for patrolling. Additionally, the sites had to be close to where valuable scientific work could be conducted, "since the amount of useful work achieved in a territory constitutes a factor in assessing a claim to sovereignty over that territory."²²⁴ With the Argentineans and Chileans increasing their presence in the Antarctic, British Cabinet approved more funding for FIDS in March 1951.²²⁵

The Foreign Office pushed the FIDS to increase their mapping activities to provide visible and public proof "that we have not merely sat at our bases recording

²¹⁹ J.S. Bennett to P.J. Stirling, FIDS Programme for Season 1949/50, 6 May 1949, NA, FO 371/74763. They argued that the British position was already untenable. "It must further be recognised that the reduction of our activity in Graham Land has already reached, if not passed, the minimum necessary for asserting in aggregate a claim to the general area of Graham Land over and above a claim to the site and immediate neighbourhood of each base." Arthur Creech-Jones, Colonial Office to Hector McNeil, Foreign Office, Scale of Operations of the FIDS, 17 January 1950, NA, FO 371/81131. When the Colonial Office released its plan to reduce the FIDS to four static bases, the Foreign Office replied that such a "half and half policy, such as the Colonial Office now propose, makes the worst of both worlds." They thought the government should take all the steps necessary to maintain Britain's title, or withdraw completely. R. Cecil, Minute, 23 January 1950, NA, FO 371/81131. See also Brian Roberts, Comparative Chronological Summary of British, Argentine and Chilean Activities in Connection With Claims to the Falkland Islands Dependencies, 1947-1952, 17 December 1952, NA, FO 371/103162.

²²⁰ Interdepartmental Discussion on Antarctic Programme, 1949-50, 12 May 1949, NA, FO 371/74763.

²²¹ Margaret Anstee, Minute, 17 May 1950, NA, FO 371/81131.

²²² Brian Roberts, Minute, 27 July 1950, NA, FO 371/81131.

²²³ R. Cecil to P.A. Carter, Colonial Office, 23 August 1950, NA, FO 371/81131; and M.J. Anstee, Minute, 21 September 1950, NA, FO 371/81131.

²²⁴ Robert Cecil, FO, to J.S. Bennett, CO, 8 September 1951, NA, CO 537/7433.

²²⁵ J. Bennet, Minute, 7 March 1951, NA, CO 537/7433; and Secretary of State for the Colonies to Sir Miles Clifford, Falkland Islands, 21 March 1951, NA, CO 537/7433.

‘politico-meteorological’ observations.” British maps had to be better than the Argentineans and Chileans.²²⁶ Roberts advocated for an extensive aerial survey of the FIDS. Although Britain could claim more ground patrols than any other country, he wondered if arbitration might compare these efforts unfavorably with the aerial flights and surveys of the Argentineans.²²⁷ The Foreign Office stressed that the Antarctic Place Names Committee should insert British names on as many geographical features as possible.²²⁸ Unfortunately, a lack of funds impaired efforts to turn FIDS surveys into accurate maps for public consumption, leading one official to lament, “It is absurd for all the cost and trouble to have taken in producing this material without our being able to put it in the shop window and demonstrate to other countries in the tangible form of maps, how much we have done.”²²⁹

Although in 1946 the Foreign Office advised that British activities should be as widespread as possible, by the early 1950s legal adviser Gerald Fitzmaurice believed that Britain’s strategy of “keeping up a general claim to the area as a whole...was not and probably never could be, sufficient for that purpose in the face of the competing claims.”²³⁰ Too many officials in the Colonial Office believed that Britain had title to its whole sector, “treating it as an indivisible whole and inferring that occupation of a part of it is an occupation of the whole as an entity.” The legal advisers considered this opinion a “highly dubious claim” that placed too much faith in arguments of contiguity.²³¹ In short, Fitzmaurice argued that the belief in a sector claim actually hurt Britain’s position. The best strategy, the legal advisers insisted, would concentrate Britain’s limited resources on the intense development of valuable points, ensuring sovereignty over limited areas with

²²⁶ Roberts to Stirling, Mapping of the Falkland Islands Dependencies, 19 February 1948, NA, FO 371/68235.

²²⁷ Brian Roberts, Comparative Chronological Summary of British, Argentine and Chilean Activities in Connection With Claims to the Falkland Islands Dependencies, 1947-1952, 17 December 1952, NA, FO 371/103162.

²²⁸ Dodds, *Pink Ice*, 26-29.

²²⁹ Memorandum prepared by Henry Hankey (Foreign Office), 30 April 1959, quoted in Dodds, “The Great Game in Antarctic,” 55-56.

²³⁰ Polar Committee, 27 March 1954, SPRI, MS 1281/1; ER [Trans-Antarctic Expedition].

²³¹ Memorandum by the Acting Secretary of State for Foreign Affairs and the Secretary of State for the Colonies, 4 July 1953, NA, CAB 129/61; and Note, T.W. Garvey, 24 January 1953, NA, FO 371/103163.

bases, patrols, mapping and scientific research.²³² Most Foreign Office officials started to envision Britain's claim to the FID as pockets of sovereignty, emanating from the FIDS bases and extending only to areas actively patrolled, rather than a sector.

To its great annoyance, as the Foreign Office argued for a concentration of activities, the Colonial Office supported the Commonwealth Trans-Antarctic Expedition, "a proposal for the biggest dispersal of British effort over the whole continent ever planned."²³³ The plan's supporters hoped the expedition would become the first party to complete the overland crossing of the Antarctic. The Colonial and Commonwealth Relations Offices presented the venture as a clear sign of Britain's presence in the Antarctic, something "imaginative, adventurous Elizabethan,"²³⁴ that would boost British "prestige," and "provide a valuable demonstration of the Commonwealth solidarity in the Antarctic."²³⁵ Foreign Office legal advisers believed the idea a legally meaningless venture that absorbed precious resources better used to bolster Britain's position in the FID.²³⁶ The project enjoyed lukewarm support from Australia and outright rejection by Canada,²³⁷ but it actually led New Zealand to construct a support base for the expedition

²³² Polar Committee, 27 March 1954, SPRI, MS 1281/1; ER [Trans-Antarctic Expedition]; WE Beckett, Minute, 26 March 1949, NA, FO 371/74763; and J.S. Bennett to P.J. Stirling, FIDS Programme for Season 1949/50, 6 May 1949, NA, FO 371/74763. Beckett pushed for a more extensive occupation and airstrip on Deception Island, which he considered the key area in the whole dispute. W.E. Beckett, Minute, 18 February 1948, NA, FO 371/68233.

²³³ Polar Committee, Brian Roberts, 27 March 1954, SPRI, MS 1281/1; ER [Trans-Antarctic Expedition].

²³⁴ IFS Vincent to Peter Wilkinson, 14 June 1955, SPRI, MS 1281/1; ER [Trans-Antarctic Expedition].

²³⁵ Robin Ross, Office of the High Commissioner for the U.K. to Mr. E.A Cote, 19 August 1954, LAC, RG 25, Vol. 4765, File 50070-40, pt.3.

²³⁶ Note on Future United Kingdom Policy in the Antarctic, LAC, RG 25, Vol. 4765, File 50070-40, pt.3; Polar Committee, T.W. Garvey, 15 September 1953, SPRI, MS 1281/1; ER [Trans-Antarctic Expedition]; and Brian Roberts, British Policy in the Antarctic, 13 January 1955, NA, FO 371/113971. Brian Roberts argued that it was a "romantic adventure," and the British should not "pretend it is science." "We have bitten off very much more than we can chew in the Falkland Island Dependencies, and to me it would seem very strange if at this time we divert any of our limited Antarctic potential to other projects." Note, Brian Roberts 13/5/54, SPRI, MS 1281/1; ER [Trans-Antarctic Expedition].

²³⁷ The Australians explained to Brian Roberts that, "We cannot refuse outright to cooperate when asked by the U.K. to do so through high level political channels, but we hope this project will die." Note, Brian Roberts, 10/11/54, SPRI, MS 1281/1; ER [Trans-Antarctic Expedition]. Canadian official E.A. Cote actually told Britain's High Commissioner that, "even for Commonwealth solidarity we would not trudge the wastes of Antarctica! If they wanted to buy some huskies or something of that sort, I am sure we could do what we could." Robin Ross, Office of the High Commissioner for the U.K. to Mr. E.A Cote, 19 August 1954, LAC, RG 25, Vol. 4765, File 50070-40, pt.3.

in the Ross Dependency (Scott Base, which is still in operation today).²³⁸ The expedition finished its historic crossing in 1958, travelling 3,473 km.²³⁹

As internal debates within the British government over its Antarctic strategy escalated, so to did the tension in the FID. In 1952, the occupants of an Argentinean base at Hope Bay fired their weapons over the heads of a British party trying to re-establish the FIDS station there.²⁴⁰ In 1953, trouble erupted on Deception Island, where a permanent British base had been located since 1943, and an Argentinean base since 1947. The Argentines erected another hut just a few hundred metres from the British and Chile also built a new base nearby. Britain, the Colonial Office argued, could not display “supine acquiescence in what is, in effect, aggression in Deception Island.”²⁴¹ After both states ignored another British protest and a proposal to take the case to the ICJ, Gerald Fitzmaurice explained that Britain could use force, just as if a party of Russians had landed on the Scilly Isles, off the coast of Cornwall, England.²⁴² On 15 February, HMS *Snipe* arrived bearing Falkland Islands Governor Colin Campbell, two police officers and 15 marines. They arrested two Argentines from the new base, and then dismantled it and the unoccupied Chilean hut. Argentines protested in the streets of Buenos Aires.²⁴³

Most British officials recognized that the show of force accomplished little, save for irritating the South Americans and making Britain look like the aggressor. Morgan Man, head of the American Department at the Foreign Office reflected that, “We taught both Argentina and Chile a lesson in 1953 but the effect only lasted one season and in

²³⁸ Klaus Dodds, “The Great Trek: New Zealand and the British/Commonwealth 1955-58 Trans-Antarctic Expedition,” *Journal of Imperial and Commonwealth History* 33 (2005): 93-114.

²³⁹ See, Sir Vivian Fuchs and Sir Edmund Hillary, *The Crossing of Antarctica: The Commonwealth Trans-Antarctic Expedition 1955-58* (London: Cassell, 1958).

²⁴⁰ Fuchs, *Of Ice and Men*, 164-166.

²⁴¹ Memorandum by the Secretary of State for the Colonies, 30 January 1953, NA, CAB/129/58.

²⁴² Even though Deception Island existed in a remote part of the world, the British had to view them as “just as much British territory over which we have sovereignty as the Channel Islands.” The Argentine-Chilean incursion could be viewed as an “a kind of act of aggression, or, alternatively, as an illegal entry by unauthorized aliens lacking the necessary permits.” Gerald Fitzmaurice, Legal Position Concerning the Latest Argentine-Chilean Incursion in the FID, 5 February 1953, NA, FO 371/103150. The British used these arguments to defend their actions to the Americans, who asked them if they might put at least the Chilean hut back up. M.F. Young, 9 April 1953, NA, FO 371/103157; and Foreign Office to Washington, 10 February 1953, NA, FO 371/103150.

²⁴³ In the House of Commons British Foreign Secretary Anthony Eden joked that the two Argentines had been “expelled not as invaders but as illegal immigrants.” Day, *Antarctica: A Biography*, 453.

1954-55 Argentina proceeded to set up a new base” and the Chileans returned to Deception Island.²⁴⁴ Force was not the answer. Britain’s Antarctic strategy cost great sums of money, caused friction, and created the “possibility of humiliation at the hands of two minor Powers in a distant quarter of the globe,” for uncertain sovereignty gains.²⁴⁵ In the end, Chile and Argentina’s geographic location ensured a far better position to operate in the region than Britain. Their activities would only grow more extensive, as evidenced by Argentina’s purchase of its icebreaker in 1954. The Foreign Office decided that the best recourse would be to try and force Chile and Argentina to accept a reference to the ICJ²⁴⁶ hoping a judicial decision would finally clarify the general requirements of polar sovereignty. Furthermore, in turning to the world court, Britain expected to countermand the bad publicity that resulted from its use of force in the FID and regain the superior moral position. As the British prepared their case and tried to convince Buenos Aires and Santiago to go to the ICJ, they expanded ground survey operations and finally began an aerial mapping program to determine the exact areas that Britain should demand if the court recommended that the three states divide the FID.

Scholars have discussed Britain’s 1955 offer to take the FID dispute to the ICJ, but have not emphasized the great importance that the Foreign Office legal advisers attached to the action.²⁴⁷ Even if Argentina and Chile again rejected Britain’s proposal, Fitzmaurice – the strongest proponent of the action – convinced the government to make a *unilateral application* to the world court. He believed that this application represented “short of the drastic use of force, the only effective thing we can do now to stop the gradual whittling away of our position in the Antarctic.”²⁴⁸ In a unilateral application,

²⁴⁴ Note, Morgan Man, 30 September 1955, NA, FO 371/113976.

²⁴⁵ Memorandum by the Acting Secretary of State for Foreign Affairs and the Secretary of State for the Colonies, 4 July 1953, NA, CAB 129/61; and Note, T.W. Garvey, 24 January 1953, NA, FO 371/103163.

²⁴⁶ R.E. Barclay to Sir John Martin, Colonial Office, 6 March 1953, NA, FO 371/103163.

²⁴⁷ For a detailed summary of the actual case the British submitted, along with Chilean and Argentinean reactions, see Howkins, “Frozen Empires,” 229-240.

²⁴⁸ Gerald Fitzmaurice, 6 April 1955, NA, FO 371/113972; Secretary of State, Antarctica, 13 April 1955, NA, FO 371/113972. Fitzmaurice suggested that Britain could take the dispute to the UN Security Council. The Security Council would likely rule that the dispute called for a legal settlement, and instruct the parties to take the matter to the ICJ, which the all sides involved would be hard-pressed to ignore. In the end, the option was considered too dangerous, for Britain would “find that many of the members of the Council were basically out of sympathy with us.” G.G. Fitzmaurice, 17 February 1953, NA, FO 371/103163; and United Kingdom Delegation to the United Nations, New York to Anthony Eden, 7 April 1953, NA, FO 371/103163.

Britain could place a statement of their legal position on record. Furthermore, Fitzmaurice thought Britain might force the Chileans and Argentines to issue corresponding statements presenting their legal cases. If worded incorrectly or carelessly, the ICJ judges might argue that these submissions represented voluntarily acceptance of the court's jurisdiction.²⁴⁹ With a little luck, Britain might still get its day in court, where Fitzmaurice firmly believed it had a chance to win much of the territory it wanted.

Even if the application never led to a court hearing, Fitzmaurice thought it would set the critical date for the dispute, which he believed was of the utmost importance. An expert on the theory of the critical date, Fitzmaurice had argued, during the *Minquiers and Ecrehos* case, "whatever was the position at the date determined to be the critical date, such is still the position now. Whatever were the rights of the Parties then, those are still the rights of the Parties now. If one of them then had sovereignty, it has it now... If neither had it, then neither has it now." Time stopped with the date, and "nothing that happens afterwards can operate to change the situation as it then existed."²⁵⁰ In territorial disputes, the whole case could turn on the establishment of the critical date, and it represented one of the most important decisions made by a tribunal. Although the date was usually accepted as the point when both sides actually submitted the case to adjudication, it could also be when the challenging country first made its claim, when the dispute clearly crystallized, or when one party first proposed a settlement through negotiations, mediation or judicial means.²⁵¹ A critical date could protect states from other governments that refused offers to adjudicate a dispute, only to improve their

²⁴⁹ Britain had issued a unilateral application to the ICJ in the Corfu Channel case, even though Albania had not signed the optional clause or come to a special agreement with London to take their dispute to the court. Nevertheless, when Albania sent the ICJ a letter stating its position, which seemed to indicate acceptance of the court's jurisdiction (even though Albania objected to this point), the ICJ ruled that Albania had voluntarily submitted to the court's authority. G.G. Fitzmaurice, 17 April 1953, NA, FO 371/103163. See Note, DHN Johnson, 18 April 1953, NA, FO 371/103163; and Anonymous, "The Corfu Channel Case: The International Court of Justice Bids for Expanded Jurisdiction," *The Yale Law Journal* 58, no. 1 (1948): 187-194.

²⁵⁰ Gerald Fitzmaurice, "The Law and Procedure of the International Court of Justice, 1951-1954," *British Yearbook of International Law* 32 (1955-1956): 20-21.

²⁵¹ So important was the critical date, concluded Fitzmaurice, it had "already become an important and subtle tool of the pleader's art." Fitzmaurice, "The Law and Procedure of the International Court of Justice, 1951-1954," 34.

position until they could win a legal decision – which is what Fitzmaurice accused Argentina and Chile of doing.²⁵²

In Fitzmaurice's eyes, Britain could either dramatically increase its level of activity in the FID, in a competition with the Argentinians he did not think his country could win, or it could try to establish the dispute's critical date. The critical date had the power to freeze the dispute in time or, preferably, turn the clock back to an earlier moment when the British were clearly in the lead. From the time Britain submitted its application in March 1955, Fitzmaurice felt certain that if the dispute ever actually went before arbitration or the ICJ in the future, the latest the critical date would be set was 1955. He believed a court or judge would likely set the date at 1947, when London first proposed a judicial settlement. If set before the Second World War, however, Fitzmaurice suggested that the British could avoid the more onerous additional requirements that the legal advisers insisted had been brought on by time, competition and the impact of Huber's theory of intertemporal law. Thus, in the application, crafted with the assistance of Humphrey Waldock, Fitzmaurice aimed for earlier critical dates. For the British-Chilean dispute he argued for 1940, when Santiago first officially asserted its rights to a polar sector. He believed 1925 constituted the critical date for the British-Argentine dispute over the South Orkneys, when Buenos Aires first told London it considered the archipelago national territory. Finally, Fitzmaurice set the critical date for the broader dispute over the FID at 1937, when Argentina informed the Foreign Office that it had rights in the area.²⁵³ If Britain could set these as the critical dates, nothing any of the

²⁵² There was some worry that the Argentinians might respond with a counter-claim in respect to the Falkland Islands. The British, however, had never indicated a willingness to refer the Falkland Islands to the court. "It is indeed excluded by the terms of our optional clause signature, which confines our acceptance of the court's compulsory jurisdiction not only to the disputes arising after 1930, but to facts and situations also arising after that date." To put the matter beyond doubt, Fitzmaurice included a footnote that there was no connection between the two cases, the "grounds of title" totally different. Note, Foreign Office, 8 March 1955, NA, FO 371/113972; and Note, R.L. Speaight, 7 March 1955, NA, FO 371/113972.

²⁵³ There was some worry that the Argentinians might respond with a counter-claim in respect to the Falkland Islands. The British, however, had never indicated a willingness to refer the Falkland Islands to the court. "It is indeed excluded by the terms of our optional clause signature, which confines our acceptance of the court's compulsory jurisdiction not only to the disputes arising after 1930, but to facts and situations also arising after that date." To put the matter beyond doubt, Fitzmaurice included a footnote that there was no connection between the two cases, the "grounds of title" totally different. Note, Foreign Office, 8 March 1955, NA, FO 371/113972; and Note, R.L. Speaight, 7 March 1955, NA, FO 371/113972.

states did afterwards would matter, and the frantic postwar efforts at physical occupation would be rendered meaningless.

The British application to the ICJ copied Waldock's earlier argument that Britain had enjoyed the "long-standing and peaceful exercise of sovereignty over the territories concerned" well before the critical date of the first dispute in 1925. As such, it focused extensively on the early period of Britain's activity in the FID. In addition, the British highlighted their efforts in specific locations, such as Deception Island and Signy Island, rather than trying to defend the sector claim as a whole (they basically ignored the polar hinterland beyond Graham Land). The application argued that the first discoveries of South Georgia, the South Sandwich Islands, the South Orkneys, the South Shetlands and Graham Land had all been by British nationals. When whaling increased at the turn of the twentieth century, the "renewed activity called for a corresponding exercise of State authority," which Britain had provided through licenses, and the presence of magistrates and customs officers as and when required. In 1925, the Discovery Committee began operations in the FID, adding its surveys and scientific research to Britain's state activity in the region. In the meantime, neither Buenos Aires nor Santiago had protested Britain's Letters Patent. While Britain had responded to increased activity in the sector by providing an appropriate level of control, Chile and Argentina had done nothing. The subsequent actions of both states reflected governments "seeking gradually to manoeuvre another State out of its possession and rights," which represented an illegal "policy of usurpation."²⁵⁴ The application laid out the postwar activities of the FIDS as well, but its focus was clearly on establishing that Britain had created a definitive title in the first decades of the century.

Fitzmaurice and Waldock had crafted a detailed case, but would never get the chance to argue it in court. In January 1955, Argentina and Chile rejected Britain's overtures to take the dispute to the ICJ. Britain proceeded to file its unilateral application in May. Fitzmaurice's hopes that the Chileans and Argentineans might mistakenly submit to the authority of the ICJ were dashed when both states issued detailed statements on

²⁵⁴ International Court of Justice, *Antarctica cases (United Kingdom v. Argentina; United Kingdom v. Chile)*.

why they refused to accept the court's jurisdiction. They repeated their arguments that the Antarctic constituted an "integral part" of their national territories, which could not be subjected to adjudication.²⁵⁵ In the spring of 1956, the ICJ removed the unilateral application from its list. There would be no legal settlement of the FID dispute, and no judicial ruling on the requirements of territorial acquisition in the Antarctic. The ICJ would not help decipher the formula for polar sovereignty. Although disappointed, Fitzmaurice remained convinced that the application had set the critical date for the FID dispute at May 1955 or earlier.

8.8 Towards the Antarctic Treaty

Britain's failed unilateral application to the ICJ represents a pivotal moment in the political and legal development of the Antarctic. Without a definitive judgment on the validity of the sector principle, the doctrine of contiguity, or the standards of effective occupation in polar territory, states could continue interpreting and using these concepts as they saw fit. No clear formula for polar sovereignty materialized and the Antarctic remained an anomalous legal space crowded with different principles and opposing justifications. The legal and territorial status of the Antarctic remained even more uncertain than it had been at the beginning of the century. The path from 1955 to the Antarctic Treaty was not a straight one, and many other factors played a significant role in bringing states to the negotiating table in 1959. Nevertheless, the agreement never would have happened if the ICJ established a clearer formula for polar sovereignty, providing states with a stronger and more certain legal foundation from which to defend their claims. In the end, the legal uncertainty of the Antarctic became the cornerstone of the Antarctic Treaty.

²⁵⁵ Furthermore, the area in question had been included in the zone of security created by the Treaty of Reciprocal Assistance at Rio de Janeiro in 1947, so both states insisted that they could not engage in any proceedings with extra-continental country as a result. Chilean Note to the United Kingdom Giving Reasons for Rejecting the British Proposals to Submit the Dispute Over Antarctica to Judicial Settlement, Document CH04051955, in Bush, *Antarctica and International Law* 2, 398-401; and Argentine Note to the United Kingdom Protesting at British Action to Remove Argentine Personnel and Buildings from Deception Island, South Shetland Islands, 20 February 1953, Document AR20021953, Bush, *Antarctica and International Law* 1, 698-701.

After the the failure of Britain's ICJ strategy, a feeling grew amongst officials in London that a key turning point had been reached in the Antarctic.²⁵⁶ Most officials recognized that the application to the ICJ had represented Britain's best chance to secure its sovereignty in the Antarctic. With that hope now gone, most agreed with Brian Roberts' succinct assessment that, "Since we cannot secure a legal settlement and we are not prepared to use force, we should now plan for a political settlement."²⁵⁷ Meanwhile, in Washington, the Eisenhower administration continued to emphasize the benefits that the U.S. would enjoy by free access to the entire Antarctic, rather than a territorial claim, and renewed its efforts to bring a political settlement to the territorial problems in the south polar region.

Since 1924, the U.S. and Britain had embraced polar opposite polar policies, viewing the legal and territorial status of the Antarctic from fundamentally different perspectives. By 1955, however, the two states had arrived at the same conclusion and increasingly worked together to bring a political solution to the territorial problems in the Antarctic. Together, Britain and the U.S. – the past and present architects of the polar legal landscape – would guide the region towards the Antarctic Treaty.

²⁵⁶ Note, Morgan Man, 27 July 1955, NA, FO 371/113975. Although some officials argued that Britain's attempt to bring the dispute to the ICJ justified it to use force to expel the Argentineans and Chileans, most agreed that the time had long passed for such action. "Swashbuckling is not so popular as it was, at least among the more responsible nations," admitted Colonial Office official M.A. Willis, "and the result of aggressive action on our part in the Antarctic at the present time when we are on better terms with the world, and with the I.G.Y. programme already in its initial stage, might be a deterioration in our national prestige." Note by M.A. Willis, Colonial Office, 5 September 1955, NA, CO 1024/136.

²⁵⁷ Brian Roberts, United Kingdom Policy in the Antarctic, 28 October 1955, NA, FO 371/113976. Vincent responded that "many of the ideas put down on paper by Dr. Roberts have been in our minds for some time." Note, IFS Vincent, 8 November 1955, NA, FO 371/113976.

Conclusion

I think that we must, at all costs, adhere rigidly to the view that there is no analogy whatever between the Arctic and the Antarctic...Apart from the geographical difference there is a very important legal difference. There are no international disputes whatever as to sovereignty over the land areas in the north. So far as one can see there is no probability that there will be any conflicting claims. In this situation any thought of applying an international regime of any sort, or even if discussing the situation, would only create uncertainty where no uncertainty now exists.

Robert Gordon Robertson, Canadian Deputy Minister of Northern Affairs and National Resources, 5 October 1955.¹

The International Geophysical Year ran for 18 months between July 1957 and December 1958 and saw twelve states – Argentina, Australia, Belgium, Britain, Chile, France, Japan, Norway, South Africa, the Soviet Union and the United States – establish over fifty research stations throughout the Antarctic.² Each of the claimant countries constructed new bases within their territorial claims and invested considerable resources in scientific research and construction projects. The centerpieces of the Soviet effort, Mirny Station on the Eastern Antarctic coast and Vostok Station at the Pole of Inaccessibility, were both located in the Australian Antarctic Territory – to the great annoyance of Canberra, which feared the bases might be used for hostile purposes after the IGY.³ For their part, the Americans established stations across various territorial claims on the continent. The quintessential physical manifestation of this strategy was the American Amundsen-Scott South Pole Base, which by virtue of its polar location gave

¹ R.G. Robertson, Deputy Minister of Northern Affairs and National Resources to Jules Leger, 5 October 1955, LAC, RG 25, vol. 6510, file 9057-40 pt. 6.1.

² See Roger D. Launius, James Rodger Fleming and David DeVorkin, eds., *Globalizing Polar Science: Reconsidering the International Polar and Geophysical Years* (New York: Palgrave Macmillan, 2010); Dian Olson Belanger, *Deep Freeze: The United States, the International Geophysical Year, and the Origins of Antarctica's Age of Science* (Boulder: University of Colorado Press, 2006); and Walter Sullivian, *Assault on the Unknown: The International Geophysical Year* (New York: McGraw Hill Book Company, 1961)

³ David Day, *Antarctica: A Biography* (Oxford: Oxford University Press, 2013), 470-479.

the U.S. a permanent foothold in each of the Antarctic sectors.⁴

“Although it is somewhat naive to interpret the IGY and the Antarctic Treaty as cause and effect – the treaty’s origins prove rather more complex and wide-ranging – the two events were inter-connected,” historian Peter Beck aptly concludes.⁵ The research bases and the scientific research that they facilitated ushered the Antarctic into its new role as a global laboratory. The international goodwill and cooperation that stemmed from IGY’s scientific activities fostered the negotiations that culminated in the creation of a continent dedicated to peace and science. As Adrian Howkins has successfully argued, however, the results of the scientific research mattered almost as much as the scientific cooperation, for they offered concrete proof to state officials that (at least for the time being) the Antarctic was not a polar El Dorado ready for exploitation.⁶ Finally, as this dissertation has demonstrated, the Antarctic’s continued status as an anomalous legal space in which the formula for polar sovereignty remained undecipherable also brought states to the negotiating table.

Beginning in August 1957, officials from the U.S., Australia, Britain and New Zealand met periodically to discuss the political future of the south polar region.⁷ Initial discussions resurrected proposals for a condominium and a United Nations trusteeship, but in February 1958 Washington began to promote a multilateral treaty involving the countries with special interests in the region, including the Soviet Union. While Britain and New Zealand supported the proposal, Australia bitterly opposed any solution that denigrated its territorial sovereignty and involved the Soviets, who had established a strong presence in the AAT. Nevertheless, Canberra bowed to pressure from Washington and London and supported the State Department’s April 1958 invitation to the eleven other IGY countries to discuss their views on scientific cooperation, demilitarization, and the freezing of claims. After fourteen months of preliminary negotiations that often became mired in disagreements over how to deal with sovereignty and territorial claims,

⁴ Frank G. Klotz, *America on the Ice: Antarctic Policy Issues* (Washington: National Defence University Press, 1990), 29.

⁵ Peter Beck, *The International Politics of Antarctica* (London: Croom Helm, 1986), 53.

⁶ Adrian John Howkins, “Frozen Empires: A History of the Antarctic Sovereignty Dispute Between Britain, Argentina, and Chile, 1939-1959” (Ph.D. dissertation: University of Texas at Austin, 2008), 302.

⁷ Howkins, “Frozen Empires,” 309.

the twelve states finally convened an official conference in Washington in October 1959. On 1 December, the seven claimant states and five non-claimants signed the Antarctic Treaty.⁸

The Antarctic Treaty continued the freedom of scientific cooperation and investigation that characterized the IGY. It also demilitarized the region and imposed a ban on nuclear explosions and the disposal of radioactive waste. Article IV, which effectively froze all territorial rights and claims in the Antarctic, lies at the heart of the agreement. Nothing in the treaty can be interpreted as a renunciation of asserted rights or claims, or as a recognition or non-recognition of these rights or claims. Furthermore, no activities conducted while the treaty is in force can serve as the basis for asserting, supporting or rejecting a claim, or create any new territorial rights. Finally, no new claims or extensions of existing ones are permitted while the treaty is in force.⁹ As a result, Marie Byrd Land – along with the Bir Tawil Triangle between Egypt and the Sudan – constitutes the last unclaimed land on earth.

As the Antarctic Treaty negotiations unfolded throughout 1958 and 1959, Canadian officials paid close attention, worried that one of the participating states would try to generalize that all uninhabited “polar areas are properly international areas over which no one country or group of countries should expect to maintain effective legal sovereignty, or that polar areas, because of their frigid characteristics, cannot be considered as coming within accepted concepts of sovereignty.”¹⁰ Ottawa insisted that there were no analogies to be drawn between the legal situations in the Arctic and Antarctic. Terrestrial territorial claims were settled in the North and unsettled in the South. Although the publicity surrounding the Antarctic Treaty inspired the press to suggest a similar Arctic agreement, no serious proposals ever developed, and Canada’s

⁸ For the purposes of the treaty, the Antarctic is defined as all the land and ice shelves south of 60°S latitude. Paul Arthur Berkman, “President Eisenhower, the Antarctic Treaty and the Origin of International Spaces,” in *Science Diplomacy: Antarctic, Science, and the Governance of International Spaces*, eds. Paul Arthur Berman, Michael Land, David Walton and Oran Young (Washington: Smithsonian Institution Scholarly Press, 2011), 17-27. For more on the origins and development of the Antarctic Treaty, see part one of this collection, *Science as a Tool of Diplomacy*.

⁹ On the Antarctic Treaty, see, for example, Gillian Triggs, ed., *The Antarctic Treaty Regime: Law, Environment and Resources* (Cambridge: Cambridge University Press, 1987).

¹⁰ Mr. Cleveland to G.E. Hardy, Antarctica, 11 June 1959, LAC, RG 25, Vol. 4766, File 50070-40 pt. 7

fears went unrealized.¹¹

The creation of the Antarctic Treaty highlighted how fundamentally the legal and political paths of the two polar regions had diverged since 1947. Regardless of these different routes, both regions arrived at the same destination in 1959: legal stability. While the terrestrial claims had been fixed in the Arctic and frozen in the Antarctic, both scenarios brought significant clarity and consistency to regions that had been beset in legal uncertainty since the beginning of the twentieth century.

This dissertation has shown that sustained legal uncertainty represents the most important and prevalent force shaping the international legal history of the polar regions. When states began to seriously consider acquiring polar land at the turn of the century, the territorial and legal status of both the Arctic and Antarctic remained unknown. State officials and international lawyers struggled to determine who owned what territory, and how to apply international law to the unique and harsh polar environment. The body of rules and practices on territorial acquisition were murky, vague and open to interpretation, hampering lawyer's efforts to determine the requirements of polar sovereignty. Even after international legal decisions in important cases such as *Palmas Island*, *Clipperton Island* and *Eastern Greenland* clarified the requirements of territorial acquisition in the 1920s and 1930s, practitioners at the time believed the judicial nature of polar sovereignty remained ambiguous. This lack of clarity on the rules and the difficulties of applying them to the unique polar environment defined the legal development of the polar regions in the decades leading up to the Antarctic Treaty.

In their attempt to impart clarity upon the uncertainty, state officials and international lawyers constructed a transnational web of ideas, best practices, arguments, and innovations. These experts visualized the legal space of the polar regions as a bi-polar nexus of connections, intersections and networks. They understood that legal concepts often evolved and took on new meanings as they flowed between the poles and

¹¹ See, for example, Suggested Reply to a Possible Question in the House Regarding Article by Clement Attlee in *Maclean's Magazine*, 11 April 1959; and Y. Beaulne, Latin Division to Legal Division, 8 September 1961, LAC, RG 25, Vol. 4768, File 50070-4 pt. 9.

across the borders of the polar claimants. They realized that legal developments and state practice in one region had a dramatic impact on the other. State officials and legal scholars created a bi-polar legal landscape filled with competing visions of polar sovereignty, crafted out of a wide array of legal opinions and principles.

In the legal uncertainty that surrounded territorial claims in the polar regions, official appraisals and the opinions of private international lawyers often guided state decision-making, decided internal debates, and created policy. Rather than operate in the context of decided strategies, legal advisers often pushed the agenda in state decision-making concerning the Arctic and Antarctic. International legal scholars played a pivotal role in providing states with new ideas and justifications, and often defended the positions of their respective nation. Through their legal advice and assessments, state officials and legal scholars such as the Americans Charles Cheney Hyde and Samuel Whittemore Boggs, the Canadians James White and Hume Wrong, and the British Cecil Hurst, William Eric Beckett and Gerald Fitzmaurice left a profound mark on the legal, political and human history of the polar regions. Their opinions explain, for example, the Canadian government's decision to establish remote police posts on uninhabited islands, how permanent human inhabitation came to the Antarctic, why states so actively pursued and supported polar science, and the reasons behind Britain's unilateral application to the International Court of Justice.

The legal arguments crafted by these officials and experts mattered to the polar claimants, all of whom struggled to display a sufficient level of settlement, control, or government activity that would clearly indicate their ownership of austere, uninhabited polar spaces. Legal arguments and justifications provided a cheap and useful tool for polar claimants to support their claims to territory in which they had minimal physical presence, and provided state officials with the means to influence other governments into recognition.

The ongoing legal uncertainty that marked the polar regions forced state legal experts and international lawyers to decide how far they could push the boundaries of international law to defend state claims. Many treated the law as a flexible and elastic

tool they could adapt to unique polar conditions, and employed creative legal argumentation to defend territorial titles. They breathed life into ideas such as the doctrine of contiguity and relaxed definitions of effective occupation. British and Commonwealth officials utilized the sector principle, which they articulated and argued as a convenient solution to a problem that traditional international law could not solve. In sharp contrast, the U.S. responded to the legal uncertainty in the Arctic and Antarctic by crafting the Hughes Doctrine, thus entrenching itself in the traditional and accepted rules used for the acquisition of territory in the temperate zones.

As states tried to guide the polar regions on a path towards legal stability and certainty, Britain and the U.S. left the deepest marks in the bi-polar legal landscape, highlighting the role that powerful states play in the creation and shaping of law. Britain and the Commonwealth attempted to guide the Arctic and Antarctic down the road to legal stability and certainty through the sector principle. They located the origins of the principle in treaty law, arguments of contiguity and a novel conception of the doctrine of effective occupation, which insisted that a state required only a modicum of control over the points of access and coastline of a polar hinterland. British legal advisers argued that this control could be achieved through occasional visits by state officials, administrative acts, legislation, and in the Canadian case a thin line of occupied police posts. As Britain, New Zealand, Canada, Australia, the Soviet Union, France, and possibly Norway asserted sector claims in the interwar years, many state officials and legal scholars found it possible that the polar regions were heading towards a legal regime based on the sector principle. Beginning in the 1930s, however, this pathway encountered an insurmountable obstacle: the United States and the Hughes Doctrine.

Through its enunciation and support of the Hughes Doctrine, the U.S. substantively influenced the legal development of the polar regions, even though Washington's selective application of the principle was often constrained by political considerations. Careful appraisal of the archival record suggests that, between 1924 and 1959 – and even when the State Department flirted with the lesser requirements of constructive occupation – the U.S. carefully maintained the Hughes Doctrine as a defensive legal strategy, thus protecting American rights and possible interests in the

polar regions while avoiding the political fallout of official territorial disputes. Accordingly, this dissertation's careful reconstruction of the historical record confirms the enduring relationship between international law and politics.

The Hughes Doctrine's emphasis on physical settlement and use gradually changed the legal trajectory of the polar regions. By the middle of the Second World War, the U.S. legal position, mixed with technological developments and increased international competition, led state officials and legal advisers in Britain, the Commonwealth, and the other polar claimants to believe in the necessity of permanent occupancy and use to secure title to polar territory. Legal appraisals and state practice in the polar regions reflected this changing conception of polar sovereignty. In the most dramatic reflection of this changing legal context, by the early 1950s the Foreign Office legal advisers began viewing their claim in the FID not as a sector, but as pockets of sovereignty emanating from the area covered by their bases and patrols, and supported by their scientific research.

State appraisals of the evolving legal situations in the Arctic and Antarctic and the changing requirements of polar sovereignty illustrate how officials came to grips with the perceived impact that the passage of time had on territorial claims. State officials were forced to deal with the central tension in the relationship between time and the law: "how to adjust in creative and timely fashion, the legal order of yesterday to the new societal conditions and demands of today and the emerging tomorrow."¹² Judge Huber's intertemporal theory significantly influenced state legal assessments, particularly those prepared by the international lawyers in the Foreign Office. His important distinction between the creation of a right and the maintenance of a right stressed the malleability of law in concept and practice. No state title could be considered perfected for all time, particularly if a country had exercised control and administrative functions inconsistently. Time brought new ideas about the law and technological improvements that opened up the polar regions to human activity like never before, changing legal expectations and requirements. Thus, it was more than just the contemporary requirements of effective

¹² Edward McWhinney, "The Time Dimension in International Law: Historical Relativism and Intertemporal Law," in *Essays in International Law in Honour of Judge Manfred Lachs*, ed. J. Makarczyk (The Hague: Martinus Nijhoff, 1984), 182.

occupation that confused state officials, but what those requirements might become in the future.

Officials understood that recognition was the strongest defence against Huber's theory of intertemporal law and the general legal uncertainty in the polar regions. States had to determine whether to aggressively seek international recognition and risk inspiring official foreign rejection – as Denmark did for its sovereignty over Greenland between 1915 and 1921 – or quietly strengthen their position and hope that in time other states would consider it unchallengeable – the route pursued by Canada. Although the passage of time could potentially bring new requirements and expectations for the acquisition of territory, it could also bring silence from other would-be claimants or competitors. If the latter, a state could argue that other governments had tacitly acquiesced to their claims. No matter how a state achieved recognition, in the anomalous legal space of the polar regions it remained the only dependable and sure tool with which to cut the “Gordian knot” of polar sovereignty.

As this dissertation reveals, Cold War exigencies led the Americans to forgo the Hughes Doctrine and recognize Canada's Arctic sovereignty during continental defence negotiations in 1946 and 1947. With America's recognition of Canada's title, the last major potential terrestrial sovereignty dispute in the Arctic was resolved and the region finally arrived at legal stability. In the south polar region, however, the U.S. continued its policy of non-recognition. Consequently, legal and political instability actually increased in the postwar years, particularly in the Falkland Islands Dependencies where Britain, Chile and Argentina squared off in a race to physically occupy territory. Britain's attempts to achieve legal certainty and stability by referring the conflict to the International Court of Justice failed. With the failure of Britain's unilateral application and the non-recognition of all claims by the U.S. and later the Soviet Union, legal uncertainty continued to characterize the Antarctic.

In a sense, while recognition of claims finally brought the Arctic to legal stability, non-recognition of claims achieved a similar result for the Antarctic. The tangle of claims and rights, the disputes and the uncertainty that non-recognition inspired in the Antarctic

eventually drove states towards the legal stability offered by a multilateral treaty that could freeze these problems in time. With the signing of the Antarctic Treaty in 1959, both polar regions arrived at legal stability.

Nevertheless, legal stability is fragile. In the decades since 1959, both the Arctic and Antarctic fell back into legal uncertainty. In the Arctic, disputes over maritime domain, continental shelves, and the Northwest Passage intensified after the 1950s. Although the Law of the Sea has managed this uncertainty, instability remains. In the Antarctic, legal uncertainty about terrestrial territorial claims lies dormant, just under the surface of the treaty. Indeed, the assertion and maintenance of territorial sovereignty is as much an issue today as in the pre-treaty years.¹³ As legal scholar Donald Rothwell observes, “sovereignty was and still remains one of the principal reasons for human endeavour in Antarctica.”¹⁴ Claimant states continue to support bases and scientific research programs in their sectors to maintain their sovereign rights through permanent presence and use. The motto of Argentina’s Esperanza Base captures the sentiment best: “Permanence: An Act of Sacrifice” (“Permanencia, un acto de sacrificio”). Peter Beck has explained that the treaty keeps “the lid closed upon a veritable Pandora’s box of difficulties,” but warns that “its collapse might re-activate the sovereignty problem.”¹⁵

The Antarctic Treaty System expires in 2048, when legal uncertainty may once again engulf the Antarctic. Should states scramble to entrench their sovereignty, the history of each state’s territorial claim, as well as the historic development of polar sovereignty more generally, will once again be integral to international recognition. Indeed, as legal scholar Ian Brownlie notes, “In one sense at least law is history, and the lawyer’s appreciation of the meaning of rules relating to acquisition of territory, and of the manner of their application in particular cases, will be rendered more keen by a knowledge of the historical development of the law.”¹⁶ As nations continue to grasp for

¹³ Donald Rothwell, *The Polar Regions and the Development of International Law* (Cambridge: Cambridge University Press, 1996), 78.

¹⁴ Donald Rothwell, “Sovereignty and the Antarctic Treaty,” *Polar Record* 40, no. 1 (2010): 17.

¹⁵ Peter Beck, “The Antarctic Resource Conventions Implemented: Consequences for the Sovereignty Issue,” in *The Antarctic Treaty System in World Politics*, eds. Arnfinn Jøregensen-Dahl and Willy Østrend (London: MacMillan Academic and Professional Ltd., 1991), 230.

¹⁶ Ian Brownlie, *Principles of Public International Law*, 7th Edition (Oxford: Oxford University Press, 2008), 124.

the ends of the earth, they will return to the history of polar sovereignty in their search for clarity amidst the uncertainty.

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Eyre, Kenneth Charles. "Custos Borealis: The Military in the Canadian North." Ph.D. dissertation: King's College University of London, 1981.

Herd, Alexander W. G. "As Practicable: Canada-United States Continental Air Defense Cooperation 1953–1954." Master's thesis: Kansas State University, 2005.

Howkins, Adrian. "Frozen Empires: A History of the Antarctic Sovereignty Dispute Between Britain, Argentina and Chile, 1939-1959." Ph.D. dissertation: The University of Texas, May 2008.

Kawaja, Marie. "The Politics and Diplomacy of the Australian Antarctic: 1901-1945." Ph.D. dissertation: Australian National University, 2010.

Kikkert, Peter. "Pragmatism and Cooperation: Canadian-American Defence Activities in the Arctic, 1945-1951." Master's thesis: University of Waterloo, 2009.

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Thorliefsson, Thorlief T. "Norway 'Must Really Drop their Absurd Claims Such as That to the Otto Sverdrup Islands.' Bi-Polar International Diplomacy: the Sverdrup Islands Question, 1902-1930." Master's thesis: Simon Fraser University, 2006.

Cirriculum Vitae

Name: Peter Kikkert

Education:

Ph.D. candidate
2009-present Department of History, University of Western Ontario
Dissertation - *Grasping for the Ends of the Earth: Framing and Contesting Polar Sovereignty, 1900-1955*

Master of Arts
2008-2009 Department of History, University of Waterloo, July 2009
Thesis: *Pragmatism and Cooperation: Canadian-American Defence Activities in the Arctic, 1945-1951*

Bachelor of Arts
2004-2008 Honours History, University of Waterloo, April 2008

Academic Appointments:

2012-2014 Instructor, Bachelor of Education Program, Aurora College/University of Saskatchewan, Fort Smith, Northwest Territories

Courses Taught:

History 152, Post-Confederation Canada
History 380, History of the Canadian North
History 192, The World Wars
Native Studies 195.261, Aboriginal Intellectual and Cultural Traditions
Native Studies 195.262, Aboriginal Narratives of Historical Memory
Native Studies 440.211, First Peoples of the NWT
Native Studies 440.128, Aboriginal Peoples and Contemporary Society
Circumpolar Studies 800.100, Introduction to the Circumpolar World
Circumpolar Studies 800.321, Peoples and Cultures I

Field Camps

Co-Organizer of Fall, Winter and Spring Culture Camps, 2012-2014

Employment History (General):

2009-2012 Teaching Assistant
Department of History, University of Western Ontario

2011-2012 Research Assistant

Professor Michelle Hamilton, University of Western Ontario

- 2008-09 Balsillie Fellow
Centre for International Governance Innovation, Waterloo, Ontario
- 2007-08 Research Assistant
Professor Whitney Lackenbauer, St. Jerome's University, Waterloo
- 2007 Teaching Assistant
Professor Stephen Bednarski, St. Jerome's University, Waterloo

Publications:

Books

Peter Kikkert and Whitney Lackenbauer, eds. *The Canadian Forces and Arctic Sovereignty: Debating Roles, Interests, and Requirements, 1968-1974*. Waterloo: Laurier Centre for Military Strategic and Disarmament Studies / WLU Press, 2010. x, 378 pp.

Editor. *Legal Appraisals of Canada's Arctic Sovereignty: Key Documents, 1904-58*. Documents on Canadian Arctic Sovereignty and Security (DCASS) No. 2. Calgary and Waterloo: Centre for Military and Strategic Studies/Centre on Foreign Policy and Federalism, 2014. xlv, 337 pp. (With P. Whitney Lackenbauer.) E-book available online at <http://cmss.ucalgary.ca/sites/cmss.ucalgary.ca/files/dcassv2.pdf>.

Peer Reviewed Articles

“Archipelagic Analogs? Indonesian Baselines, Canadian Arctic Sovereignty, and the Framing of Mental Maps, 1957-62.” *International Journal of Canadian Studies* 50 (December 2014): 227-52. (With P. Whitney Lackenbauer)

“The Disappointing Arctic: Will More Shipping Dreams Be Shattered on the Ice?” *Journal of Maritime Law and Commerce*, Vol. 43, No. 4 (October 2012): 539-552.

“Promoting National Interests and Fostering Cooperation: Canada and the Development of a Polar Code.” *Journal of Maritime Law and Commerce*, Vol. 43, No. 3 (July 2012): 319-334.

“Kurt Meyer and Canadian Memory: Villain and Monster, Hero and Victim or worse – a German?” *Canadian Military History*, Vol. 21, No. 2 (Spring 2012): 33-44.

“Setting an Arctic Course: Task Force 80 and Canadian Control in the Arctic.” *Northern Mariner*, Vol. XXI (October 2011): 327-358. (With Whitney Lackenbauer)

“Rising Above the Rhetoric: Northern Voices and the Strengthening of Canada’s Capacity to Maintain a Stable Circumpolar World.” *Northern Review* 33 (Spring 2011): 29-45.

“The Polaris Incident: “Going to the Mat” with the Americans.” *Journal of Military and Strategic Studies* 11/3 (Spring 2009): 1-29. Available online at <http://www.jmss.org/jmss/index.php/jmss/issue/view/11>.

Book Chapters

“The Dog in the Manger – and Letting Sleeping Dogs Lie: The United States, Canada and the Sector Principle, 1924-1955.” *The Arctic Ocean: Essays in Honour of Donat Pharand*. Edited by Suzanne Lalonde and Ted McDorman. Leiden: Brill, 2014. 216-239. (With P. Whitney Lackenbauer.)

“Constructing a Role: The Royal Canadian Air Force in the Arctic, 1945-1953.” In *De-Icing Required! The Canadian Air Force’s Experience in the Arctic*, ed. W.A. March. *Sic Itur Ad Astra: Canadian Aerospace Power Studies Series vol.4*. Trenton: Canadian Forces Air Warfare Centre, 2012.

“Sovereignty and Security: The Department of External Affairs, the United States, and Arctic Sovereignty, 1945-68.” In *Serving the National Interest*, ed. Greg Donaghy and Michael Stevenson. Calgary: University of Calgary Press, 2011. 101-20. (With Whitney Lackenbauer). E-book available at <http://uofcpress.com/books/9781552385388>.

“1946: The Year Canada Chose Its Path in the Arctic.” In *Calgary Papers on Military and Strategic Studies: Canadian Arctic Sovereignty and Security Historical Perspectives*. Edited by Whitney Lackenbauer. Calgary: Centre for Military and Strategic Studies, 2010. 69-110. E-book at <http://cpmss.synergiesprairies.ca/cpmss/index.php/cpmss>.

“Building on ‘Shifting Sands’: The Canadian Armed Forces, Sovereignty and the Arctic, 1968-1972,” In *Calgary Papers on Military and Strategic Studies: Canadian Arctic Sovereignty and Security Historical Perspectives*. Edited by Whitney Lackenbauer. Calgary: Centre for Military and Strategic Studies, 2010. 283-308. (With Whitney Lackenbauer). E-book at <http://cpmss.synergiesprairies.ca/cpmss/index.php/cpmss>.

Academic Presentations:

“An ‘Anomalous Legal Space’: Sovereignty, the Polar Regions and the International Legal Landscape.” Paper presented at Understanding Arctic Sovereignty and Security: A Generative Workshop, St. Jerome’s University, 8 June 2015.

“Hardly what one would expect of an ‘old’ Commonwealth Government.” Canada, the Commonwealth and Antarctic Sovereignty.” Paper presented at the Annual Meeting of the Canadian Historical Association, Ottawa, Ontario, 1 June 2015.

“No Room for 'Dogs in the Manger': Science and State Sovereignty Strategies in the Arctic and Antarctic, 1920-1960.” Paper presented at the SSHA Conference, Toronto, Ontario, Canada, 6 November 2014.

“The Army’s Arctic Operations: Lessons Learned and Contemporary Operations.” Paper presented at the 23rd Military History Colloquium, London, Ontario, 4 May 2012.

“‘A Bright Light in the North’: Father J.M. Mouchet and the Territorial Experimental Ski Training Program.” Paper presented at the 18th Annual Tri-U Graduate History Conference, Waterloo, Ontario, 3 March 2012.

“1946: The Year Canada Chose its Path in the Arctic.” Paper presented at the 18th Annual Tri-U Graduate History Conference, Waterloo, Ontario, 3 March 2012.

“Winning as a Community: The Territorial Experimental Ski Training Program.” Paper presented at the University of Western Ontario History Graduate Conference, London, Ontario, 22 March 2011.

“The Disappointing Arctic: Are Current Shipping Dreams Once Again on Thin Ice?” Invited Paper presented at the Graduate Student Conference on Canada and the Circumpolar World, University of Saskatchewan, Saskatoon, Saskatchewan, 17 March 2011.

“Constructing a Role: The Royal Canadian Air Force in the Arctic, 1945-1953.” Invited Paper presented at De-icing Required: The Historical Dimension of the Canadian Air Force’s Experience in the Arctic, 16th Annual Air Force Historical Workshop, Montreal, Quebec, 1-2 June, 2010.

“The Way Forward: Listening to Northern Voices in a Rapidly Changing Circumpolar World.” Invited Paper presented at the State of the Arctic Conference, Miami, Florida, 16-19 March 2010.

“Sharing Whiskey and Flying the Flag: The Role of the Canadian Navy in the Arctic since the Second World War.” Invited Paper presented at the Fifth Military Studies Conference, Windsor, Ontario, 5-6 February 2010.

“Rising Above the Rhetoric: Northern Voices and the Strengthening of Canada’s Capacity to Maintain a Stable Circumpolar World.” Invited Paper presented at the Graduate Student Conference on Canada and the Circumpolar World, University of Saskatchewan, Saskatoon, Saskatchewan, March 2009.

“Sovereignty and Security: The Department of External Affairs, the United States, and Arctic Sovereignty, 1945-68.” Invited paper presented at the Department of Foreign

Affairs and International Trade/Centre for Military and Strategic Studies Conference
“Serving the National Interest,” Calgary, Alberta, January 2009 (with Whitney Lackenbauer).

“Kurt Meyer in the Eyes of the Canadian People: Victim and Hero, Villain and Monster, or worse - a German?” Paper presented at the Tri-University History Conference, Waterloo, Ontario, 15 November 2008.

Academic Awards:

- 2009-12 Social Sciences and Humanities Research Council of Canada (SSHRC), J. Armand Bombardier Canada Graduate Scholarship
- 2011 Department of Foreign Affairs and International Trade (DFAIT) and University of the Arctic Graduate Student Fellowship
- 2010 State of the Arctic Student Scholarship, U.S. Department of Energy
- 2010 Department of Foreign Affairs and International Trade (DFAIT) and University of the Arctic Graduate Student Fellowship
- 2009-10 Western Graduate Research Scholarship, University of Western Ontario
- 2009 Department of Foreign Affairs and International Trade (DFAIT) and University of the Arctic Graduate Student Fellowship
- 2008-09 Balsillie Master’s Fellowship
- 2008-09 President’s Graduate Scholarship, University of Waterloo
- 2008-09 SSHRC, J. Armand Bombardier Canada Graduate Scholarship
- 2008 Dan Watt Scholarship
- 2008-09 UW/Faculty Arts Graduate Scholarship, University of Waterloo
- 2008-09 Arts Graduate Experience Award, University of Waterloo
- 2008 Faculty of Arts Award for Distinguished Academic Achievement
- 2008 Shortlisted for the Betty G. Headley Senior Essay Award, St. Jerome’s University
- 2007-08 Queen Elizabeth Aiming for the Top Scholarship

- 2007-08 David E. Wright Scholarship, University of Waterloo
- 2007-08 Faculty of Arts Upper-Year Scholarship, University of Waterloo
- 2007 Elliot T. Grasset Award
- 2006-07 Queen Elizabeth Aiming for the Top Scholarship
- 2006-07 David E. Wright Scholarship, University of Waterloo
- 2005-06 Queen Elizabeth Aiming for the Top Scholarship
- 2004-08 University of Waterloo Dean's Honours List
- 2005-06 Arts Alumni Entrance Scholarship, University of Waterloo
- 2004-05 Queen Elizabeth Aiming for the Top Scholarship
- 2004-05 Arts Alumni Entrance Scholarship, University of Waterloo

Service Awards:

- 2014 President's Recognition for Service, Aurora College
- 2014 Community Volunteer Award, Aurora College

Invited Events, Workshops, and Seminars:

Participant. Indigenizing Psychology Symposium: Education and Healing, 22-23 May 2014, Aurora College, Yellowknife Campus.

Participant. Training exercise with the Cambridge Bay Ranger Patrol, Nunavut, August 2012.

Participant. Igloo Building Winter Camp, Cambridge Bay, February 2012.

Participant in training exercise with the Cambridge Bay Ranger Patrol, Nunavut, September 2011.

Observer. Operation Nanook, Resolute Bay, Nunavut, 20-22 August 2011.

Observer. Commander Joint Task Force North February Outreach Trip, 7-11 February 2011.

Participant. Department of National Defence (Security and Defence Forum), FSE – Canada’s Strategic North, Iqaluit, Nunavut, 1-5 November 2009.

Participant. Canadian Forces College – Laurier Centre for Military Strategic and Disarmament Studies, Arctic Sovereignty and Security Symposium, 15-16 October 2009.

Participant. Young Leaders’ Summit on Northern Climate Change Inuvik, Northwest Territories, 17-20 August 2009.

Service:

Professional

- 2013 Organizer, Aurora College’s NWT Youth Symposium, Thebacha Campus, Aurora College, Fort Smith
- 2012-14 Ethics Committee, Aurora College
- 2012-14 The Weekly Writer’s Workshop, Aurora College, Fort Smith, NWT
- 2010-11 History Representative to the GTA Union
- 2010-11 Co-Organizer, 1st Annual University of Western Ontario Graduate History Conference

Community Outreach

Keynote Speaker, “How Canada Remembers the World Wars,” Remembrance Day Ceremony, Aurora College, Fort Smith, NWT, 11 November 2013.

Keynote Speaker, “Remembering the Canadian Soldier,” Remembrance Day Dinner, Royal Canadian Legion, Exeter, Ontario, Canada, 11 November 2011.

Keynote Speaker, “The Canadians in Holland,” Victory in Europe Day Commemoration, Royal Canadian Legion, Exeter, Ontario, Canada, 5 May 2010.