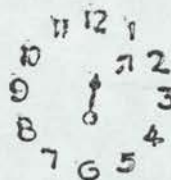


30 APR 1982

Dr Heap, SAmD, K 303



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ANTARCTIC TREATY: EFFECT OF A STATE OF WAR WITH ARGENTINA

1. The rules of customary international law regarding the effect of a formal state of war upon multilateral treaties are not settled or clear. Nevertheless, assuming that the UK and Argentina were in a state of war and the other parties to the Antarctic Treaty stayed out of the war the legal considerations tend to the following conclusions:

- a. As between each of the belligerents and the other (neutral) parties to the Antarctic Treaty the Treaty would not be terminated and would remain in force;
- b. As between the United Kingdom and Argentina, the Antarctic Treaty would similarly not be terminated and would in principle remain in force, but the application and operation of certain of its provisions would probably have to be regarded as suspended. This suspension would almost certainly apply to bilateral relations between the UK and Argentina under the Treaty which were inconsistent with the existence of a state of war between them (eg the sending of observers); it might apply to the Treaty as a whole, although this is perhaps unlikely and there would be strong arguments available to suggest that at least those parts of the Treaty which carry with them elements of a special and quasi-permanent status or regime for the Antarctic (eg peaceful use, sovereignty freeze) would continue to apply even between the belligerent States;
- c. In giving effect to the Antarctic Treaty the other parties, in their dealings under the Treaty with the United Kingdom and Argentina, would have to take account of their obligations as neutrals so far as those duties might be relevant.

2. Applying these broad conclusions, especially that in (b), to particular activities will depend on the circumstances of each case.

3. I think that the general legal approach should start from the proposition that as a result of a state of war BAT, being British Territory, is affected by the various consequences of a state of war: eg. Argentina and BAT become, as regards each other, enemy territory. (I leave aside the anomalous situation created by the Argentine claim to Antarctic Territory, which we do not accept, but which is wholly comprised in the area we regard as BAT); trading with the enemy laws apply; and rules relating to the status of enemy aliens apply. In any particular case we shall need to consider, on the

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basis of the particular circumstances, what the "state of war" consequences would be, and then whether those consequences are affected by a still-operative provision of the Antarctic Treaty. The considerations in paragraph 1 (b) above would give us considerable latitude in assessing whether particular treaty provisions are still operative, and would probably give us quite a lot of room in which to take a generous view of the matter if, as I expect, that is what we would wish to do.

4. Even if there is room for argument about the continued application between the UK and Argentina of such basic provisions of the Antarctic Treaty as Article 1, prohibiting measures of a military nature, these provisions would still be binding in relations with the neutral parties to the Treaty, so that Argentina would still be in breach of legal obligations under the Antarctic Treaty to those States if Argentina were to take military action in the Treaty area.

5. If Argentina chooses to go to extreme lengths, Argentina might try to terminate its participation in the Antarctic Treaty. This would require separate legal consideration, depending on the arguments advanced by Argentina to justify such action. There is no provision in the Antarctic Treaty allowing for unilateral termination of participation in present circumstances.

6. Assuming that it is our desired policy that the Antarctic Treaty should remain in force to the greatest extent possible, the general legal position is perhaps too uncertain for us safely to rely on it. Accordingly, a surer way of establishing the result we want would be to take specific action to that end. A Note to the US Government, as the Depositary Government, in the terms of the draft attached to your minute would be appropriate. I would just add that I am not aware of any precedent for taking such action: usually these matters seem to be left on one side, and then tidied up at the end of the war. But this does not constitute a compelling legal reason for not taking the proposed action now.

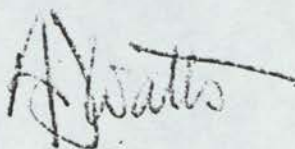
7. The draft Note says nothing about any possible suspension of some of the Treaty's provisions so far as concerns practical dealings at the bilateral UK - Argentina level. Our options are left open. However, the general impression created by saying that the Treaty "continues in force" will probably be that we intend it to be operational in practice as well as just technically in force. This is presumably the impression we wish to give. It would put the onus on Argentina for any disruption of the Antarctic Treaty system.

8. A state of war would, of course, have effects on other multilateral treaties to which the UK and Argentina are parties. We would not wish action taken in relation to the Antarctic Treaty

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to be regarded as necessarily applying also to all other treaty relations. To enable us to go ahead with action on the Antarctic Treaty without waiting for decisions to be taken about other treaties, the "without prejudice" clause in the draft Note seems to me necessary. The reason for dealing straight away with the Antarctic Treaty, but not others, is of course that the relationship between the Antarctic Treaty and the area of hostilities is exceedingly close, and the position needs to be clarified without delay.

9. While, as you suggest, a Note to the US Government would be called for (as procedurally simpler than bilateral Notes from us to each of the other parties), there would be nothing to stop us also sending bilateral Notes if that was thought desirable, perhaps in the interests of speed of communication. In legal terms, however, a Note for circulation as a UN document would be an optional extra, dictated primarily by political and presentational reasons.



A D Watts
Deputy Legal Adviser

30 April 1982

cc:

Mr Fearn, SAmD, W 117
Mr Weston, Defence Dept, W 117
Mr Mallaby, Planning Staff, W 11