THE POLAR REGIONS AND INTERNATIONAL LAW

Since the close of hostilities and the lifting of the security black-out, the general public again enjoys access to information of a type formerly withheld regarding new developments in widely differing fields of activity. Among such must be counted recent happenings in the Arctic and Antarctic, and in the regions bordering thereon.

Early in the year it became known in London that the Soviet Government had, at a much earlier date, made a request to the Norwegian Government for military bases on Spitzbergen (Svalbard); that the United States had proposed to the Icelandic Government in the autumn of 1945 the negotiation of an agreement for the joint use by the U.S. and Iceland of military facilities in Iceland, which proposal had not been accepted by Iceland, which, however, accepted and ratified a year later a U.S. suggestion for an agreement giving limited rights to the U.S. to use Keflavik airfield.

At the time of writing, five missions or expeditions (British, U.S., Russian, Argentinian and Chilean) are reported active in the Antarctic. Further news will be eagerly awaited in all parts of the world as this new surge of man's enthusiasm to explore the uttermost limits of the globe on which he lives brings fresh discoveries and, maybe, great rewards. Whether uranium will be found is doubted, but at least there is whaling, and the interests of meteorology will be served.

Such activities and new discoveries may well bring new claims on the part of States to sovereign rights. Old claims may in turn be re-affirmed. ' What is the law? ' may well be a much asked question, and the answer to it the subject of much debate as the nations seek to order these last found regions of the world on a firm and lasting basis of international comity. Two legal concepts spring readily to the mind, the concept of the freedom of the seas and the concept of territorial sovereignty, the one generous and progressive, the other restrictive, inhibitory. How do these juridical concepts apply to the polar regions, for the most part a hybrid, neither sea nor land in the ordinary sense? For the strictly polar regions consist, in the north, of permanently frozen sea (in slow continual motion from the Bering Straits towards the Atlantic Ocean) and, in the south, of a land mass covered in the main with permanent ice. Between these polar regions, strictly so called, and the limits of the major continents there are areas of both land and sea, covered with firm ice throughout the winter, though, in the summer, this is sufficiently broken up by thaw to allow of navigation in several of the sea areas.

In considering the answer to the legal questions involved the suggestion is prompted that the concept of freedom of the seas should be made applicable to all such areas as are navigable for part at any rate of the year. But what of the other areas? Can they be subject to the territorial sovereignty of States in the usual way—even those areas which are not even ice-covered land, but merely permanently frozen sea, in one case in continual motion? Here, obviously, the solution is beset with considerable difficulties.

'Freedom of the seas', it might be said, derives more from the nature of the sea itself than from the nature of man, and that the seas (outside territorial waters) should be entirely free for all seems to be such a logical necessity as to require little or no explanation. 'Territorial sovereignty', on the other hand, is an expression connoting the whole complex of legal rights which a State exercises over the land (and the territorial waters and air-space) within its jurisdiction. How is it acquired? International lawyers have long recognised the following four methods: occupation, accession, cession, prescription, and of these, occupation has in practice been by far the commonest. Oppenheim (*International Law*, Vol. 1, 4th ed., p. 449), defines occupation as 'the act of appropriation by a State through which it intentionally acquires sovereignty over such territory as is at the time not under the sovereignty of another State'. Occupation must be 'effective' and not merely symbolic or fictitious.

How far can the doctrine of effective occupation be applied to the polar regions, to regions which are presumably incapable of permanent habitation in the ordinary sense (at least by settlers from more temperate climes)? Can any occupation, more than the merely fictitious, be claimed? And even if the doctrine of occupation can be applied to ice-covered land (at the South Pole), can it be so applied to frozen sea (at the North Pole), which moreover is not stationary? How are the areas over which sovereignty is claimed to be delimited? There exists, unfortunately, no complete unanimity of principle or practice to regulate these matters, though the solutions that have been adopted by States have provided a temporary *modus vivendi*.

To regularise sovereign claims in respect of the North Polar Regions, the 'sector' principle has been repeatedly invoked. As early as 1907, Senator Pascal Poirier, speaking at Ottawa in the Canadian Parliament, took a firm stand on this principle, declaring that in law the sovereignty over the ice regions of the north polar sea must be considered as belonging to those European and American States that bordered on the Arctic, and that Canada must consequently lay claim to all regions within the Canadian

sector. In 1909 Canada once more expressed this view, on the occasion of the U.S. North Pole expedition (Cook and Peary), as also at the time of the Danish expedition under Rasmussen, when Canada made express reservations regarding any occupation by third-party States of the islands lying to the north of her territory. In 1923 these views were upheld again by Canada when the U.S. *Shenandoah* was setting out for the North Pole. A few years later (April 15, 1926) Soviet Russia notified all States of a decree by which, in virtue of the 'sector' principle, she laid claim to all lands and islands lying in the Arctic north of her State territory and between the latter and the Pole. In 1935, article 8 of the Soviet Air Transport Law (August 7) mentioned a civilian air fleet specially allocated to the purpose of taking possession of the Arctic Regions belonging to the U.S.S.R. as well as the most northerly regions of the U.S.S.R. proper. Norway, on the other hand, appears to have fought a little shy of the 'sector' principle, or at least to have found it unnecessary, for the Svalbard Treaty of 1920 (signed by Great Britain, U.S.A., Denmark, France, Italy, Japan, Norway, the Netherlands and Sweden), recognised Norwegian sovereignty over Spitzbergen and Bear Island, reserving only certain hunting and fishing rights. In a note of February 16, 1924, the Soviet Government also recognised Norwegian sovereignty over Svalbard and Bear Island, and in 1935 adhered to the 1920 treaty without reservation.

The 'sector principle' did not, however, find government approval in the United States. Its views are reflected in the minute of the U.S. Navy Department, to the Secretary of State (Stimson), dated September 23, 1929, that the sector principle (*a*) 'Is an effort arbitrarily to divide up a large part of the world's area amongst several countries; (*b*) contains no justification for claiming sovereignty over large areas of the world's surface; (*c*) violates the long recognised custom of establishing sovereignty over territory by right of discovery; (*d*) is in effect a claim of sovereignty over high seas, which are universally recognised as free to all nations, and is a novel attempt to create artificially a closed sea and thereby infringes the rights of all nations to the free use of this area, and that therefore the Government should not enter into any such agreement as proposed'.[7]

In the South Polar Regions, an analogous sector principle, though not entirely similar to that applied in the Arctic, has been put into operation. The difference lies in this that the sectors do not, in the Antarctic, constitute triangles of which the side lines

[7] G. H. Hackworth, *Digest of International Law*; U.S. Government Printing Office, Washington, 1940.

converge on the Pole, and that in three cases at least (French, Norwegian and British territories) the sectors are not based on contiguous continental territory already held previously but on territories claimed by right of discovery or occupation, or both. French claims to Adélie Land are based ultimately on discovery of the land by Dumont d'Urville in 1840 (who, in fashion characteristic of his race, named it after his wife). A decree of November 21, 1924, placed the territory under the jurisdiction of the Colonial Government of Madagascar, together with St. Paul, Amsterdam, the Kerguelen Islands and Crozet Archipelago. A further decree of April 1, 1938, established the limits of the French Antarctic possessions designated as Adélie Land as ' the islands and territories situated to the south of the 60th parallel of south latitude and between the 136th and 142nd meridians of longitude east of Greenwich '. The U.S. Government, on receipt of this decree, advised the French Government that ' in the light of established principles of international law the U.S. Government cannot admit that sovereignty accrues from mere discovery '. Considerably earlier, in 1908, Great Britain invoked the sector principle in proclaiming by letters patent (re-affirmed in 1917) British sovereignty over the Falkland Dependencies (the Falkland Islands themselves having been originally ceded in 1771 by Spain to Britain, who occupied them permanently from 1833 onwards). In 1923 British sovereignty was proclaimed over the Ross sector, deriving from New Zealand, and the sector principle was invoked again in 1933, in right of Australia, to establish British sovereignty over Enderby Land, Kemp Land, Queen Mary Land, King George V Land and Oates Land. The Norwegian Government by Royal decree of January 14, 1939, placed under the sovereignty of Norway that part of the coast of the Antarctic continent which stretches from the boundary of the Falkland Islands Dependencies on the west (boundary of Coats Land), to the boundary of the Australian Antarctic Dependency on the east (longitude 45° east) with the territory situated within the said coast and with the adjacent waters. The Norwegian Ministry of Justice was authorised to take the necessary steps concerning the exercise of police authority in that region.

These examples show that, though not universally accepted, the sector principle and the contiguity theory, which stand out most clearly from the welter of conflicting ideas, have at least the merit of relative simplicity and for that reason, if for no other, may be commended.

New discoveries in the polar regions are unlikely of themselves to import any all-embracing modification into the present indistinct

legal position. It may be at some future date that the opening up of polar air routes on any large scale will necessitate a thorough regularisation of the law, though so long as sovereignty over territorial air-space continues to play the important part it at present plays in air law, such a regularisation might tend to confirm rather than modify the existing trends of international law as applied to the polar regions. Arrangements such as that providing for the reciprocal rights of free passage of their aircraft over their respective Antarctic territories, entered into by an exchange of notes in Paris on October 25, 1938, between the French Government and the Governments of the United Kingdom, the Commonwealth of Australia and New Zealand would then become more numerous.

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