IS A NUCLEAR-FREE ANZUS POSSIBLE?

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In July 1984, the people of New Zealand sanctioned, in a general election, the policy of the Labour Party that New Zealand should become nuclear-free. For a country which possesses no nuclear weapons, no nuclear-powered ships and no peaceful nuclear power plants such a policy might have seemed innocuous, even uncontroversial. Instead, it has proved to be one of the most momentous foreign policy decisions in the history of the nation. Its importance stems from the fact that the Labour Government's decision has placed New Zealand on a collision course with a highly valued and powerful ally. The United States has treated as a betrayal New Zealand's refusal to allow its ships to visit this country's ports if those ships are nuclear-powered or nuclear-armed. At the time of writing, the second half of 1985, the Americans are stating bluntly that if New Zealand persists with its anti-nuclear policy, the United States will review its obligations under the ANZUS defence alliance.[1] New Zealand, after persistent reiteration of the non-negotiable nature of its anti-nuclear stand, is preparing legislation to make the country nuclear-free and became one of the first signatories of the Rarotonga South Pacific Nuclear-Free Zone Treaty 1985, yet at the same time emphasises that it wishes to ensure the survival of the ANZUS Treaty.

It is the purpose of the present article to examine from the perspective of International Law the nature of the dispute between New Zealand and the United States. The ANZUS Treaty will be examined historically. Then certain of its Articles will be analysed legally. This examination and analysis will then be tested against current International Law and conclusions will be drawn.

I. ANZUS: THE HISTORICAL CONTEXT

The ANZUS Security Treaty has been the cornerstone of New Zealand's foreign policy since it was signed just seven days before the conclusion of the post-war peace treaty with Japan.[2] But although the Treaty set up a formal defence alliance in the South Pacific among the United States, Australia and New Zealand, it has frequently been described as being merely declaratory of a pre-existing de facto relationship among the three signatories.[3] The Treaty did not institute a general or comprehensive system of security in the Pacific, comparable to the North Atlantic Treaty, and it did not contain any automatic commitments to go to war.[4] The Americans were unenthusiastic about the Treaty until the eleventh hour and, indeed, New Zealand's approach to such an alliance at the end of the Second World War was also negative. Official New Zealand policy in 1944 was to oppose regional security pacts, favouring rather a world security system. The Prime Minister, Peter Fraser, feared that this country was too small to make itself

[1] A typical press report is to be found in *The Press*, Christchurch, 23 September 1985, p.8.
[2] The ANZUS treaty was signed by the United States of America, Australia and New Zealand on 1 September 1951 and came into force on 29 April 1952
[3] See Starke, *The ANZUS Treaty Alliance* (1965), p.1.
[4] See Article IV.

heard effectively in a regional security arrangement.[5] This view was not shared by the Australians, however, and from the time of the San Francisco Conference onwards, that country was in constant negotiation with the United States concerning a security pact in which it was envisaged that New Zealand would be the third partner. The Americans were markedly reluctant, apparently simply assuming an identification of interests among the three countries.[6]

The United States, like New Zealand, seemed to prefer the concept of the United Nations security system. But almost from its inception the key organ in this system, the Security Council, was hampered by the use of the veto. Thus, the concept of regional self-defence arrangements in conformity with the United Nations Charter became prominent once more. On 11 June 1948, the United States Senate adopted the Vandenberg Resolution which was clearly intended to pave the way for what was to become NATO, but also had implications for the Pacific. The Resolution approved in principle the development of regional arrangements for self-defence in conformity with the United Nations Charter and made it a matter of state policy for the United States to be associated with any such arrangements which affected its national security and were grounded in "continuous and effective self-help and mutual aid".[7]

NATO came into being on 4 April 1949 and Australia renewed its efforts to engage the United States in a Pacific pact but the Americans were still unyielding, the Secretary of State, Dean Acheson, stating that the United States would confine its regional defence arrangements to NATO.[8]

In December 1949, there was a change of government in Australia. The new Minister for External Affairs, Spender, became obsessed by the idea of a Pacific security treaty and managed to communicate some of his enthusiasm to his New Zealand counterpart, Doidge. On 25 June 1951, the Korean War broke out, threatening both Japan and American bases in the North Pacific. Australia and New Zealand responded promptly. A Pacific treaty now became negotiable.

In September 1950, Spender had talks in Washington with President Truman, and subsequently with Acheson, Harriman, Rusk and Dulles. On 8 and 9 February 1951, New Zealand Prime Minister Holland met Truman in Washington and emphasised New Zealand's security needs in the Pacific. Truman, it seems, was now convinced that a tripartite Pacific security pact would be worthwhile, but, despite his instructions, Dulles and Rusk were still reticent.[9]

From 14-18 February 1951, a tripartite conference of Spender, Dulles and Doidge took place in Canberra, ostensibly to deal with the terms of a Japanese peace treaty strongly desired by the Americans. Dulles probably had no definite instructions to conclude a tripartite pact at the same time but intensive discussions took place, and it has been asserted that the eventual treaty was substantially drafted during the Canberra Conference.[10]

On 1 March 1951, Dulles felt able to announce that the United States would look favourably on an alliance with Australia and New Zealand to

[5] See Starke, *op.cit.*, pp.13.
[6] *Ibid*, pp.15-18.
[7] Senate Resolution 239, 80th Congress, 2nd session.
[8] *Documents on International Affairs 1949-50*, pp.93-4.
[9] See Starke, *op.cit.*, pp.38-9.
[10] *Ibid.*, p.40.

the effect that the United States would regard any attack upon either country as endangering its own peace and security.[11]

On 18 April 1951, President Truman stated:

> The governments of Australia and New Zealand, in connection with the re-establishment of peace with Japan, have suggested an arrangement between them and the United States, pursuant to Articles 51 and 52 of the United Nations Charter which would make clear that in the event of an armed attack upon any one of them in the Pacific, each of the three would act to meet the common danger in accordance with its constitutional processes; and which would establish consultation to strengthen security on the basis of continuous and effective self-help and mutual aid.[12]

This statement was warmly welcomed by Australia and New Zealand. Doidge commented at once:

> So far as New Zealand is concerned, an arrangement of this nature would be of immense significance. It would provide a guarantee which would liberate us from the nightmare of a resurgence of Japanese militarism. It would give to the people of New Zealand an assurance of the support of the Power primarily responsible for maintaining peace in the area against any renewed threat in the Pacific.[13]

On 12 July 1951, the draft treaty was initialled in Washington[14] and on 13 July, the text was published in Washington, Canberra, Wellington and London. A similar pre-publication occurred before the formal signing of the NATO Treaty. It had the general purpose of allowing familiarisation and discussion before the signing of a definitive document. With ANZUS there were two additional aims. First, the Americans hoped the Treaty would become a model for a similar pact with the Philippines. Second, New Zealand and Australia thought it might help win public support for what many saw as too permissive a peace treaty with Japan.[15]

The Treaty was formally signed in San Francisco on 1 September 1951.[16] It was embodied in a White Paper in New Zealand and tabled in Parliament, where it was debated in October 1951.[17] On 29 April 1952, the three Parties deposited instruments of ratification with the Australian Government and the Treaty entered into force.

II. Why the Parties Entered ANZUS

It has frequently been suggested that the ANZUS Alliance was the price that Australia and New Zealand exacted from the United States for their acquiescence in a Japanese peace treaty with no restrictions on rearmament. Starke, however, has asserted that the Treaty had a wider significance and was born of communist imperialism in the Pacific.[18] Certainly, Australia at least seems to have had concerns extending beyond a fear of renewed Japanese aggression.[19] Spender felt an urgent need for permanent consultative machinery

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[11] *New York Times*, 2 Mirs, pp.237-8. cf. ANZUS Treaty, Articles II and IV and the Vandenberg Resolution, *loc. cit.* fn. 7., supra.

[12] (1951) 22 Current Notes on International Affairs, pp. 237. cf. ANZUS Treaty, Articles II and IV and the Vandenberg Resolution, *loc. cit.* fn. 7., supra

[13] Full text (1951) 1 Ext. Aff. Rev. No 2, p.2.

[14] See (1951) 1 Ext. Aff. Rev. No. 5, pp.9-10.

[15] See statement by Doidge in the House of Representatives, 13 July 1951, (1951) 1 Ext. Aff. Rev. No. 5, p.7.

[16] See (1951) 1 Ext. Aff. Rev. No. 7, pp.2-6.

[17] See (1951) 295 N.Z.P.D., pp.193-9.

[18] See Starke, *op.cit.*, p.64.

[19] *Ibid*, pp.65.

in the Pacific. If Pacific security was guaranteed, Australia could better fulfil its defence obligations elsewhere. Alliance with the United States would entitle Australia's voice to be heard in NATO and would, more importantly, give its government access to American political and strategic thinking at the highest level. Also, as the wars in Korea and Vietnam were to demonstrate, Australia felt itself to be vulnerable to communist advances in South-East Asia.

New Zealand seems to have shared these views to some extent. In his speech from the Throne in 1952, the Governor-General remarked:

> . . . this Treaty, far from hindering, will reinforce New Zealand's capacity to pursue the other main objects of her external policy — namely, the well-being of the British Commonwealth and the effectiveness of the United Nations as the world's greatest hope for peace.[20]

Nevertheless, there is compelling evidence that, for New Zealand, the Japanese threat was a weighty factor. In his speech to the House of Representatives after the initialling of the ANZUS Treaty, Doidge had said:

> The conclusion of a Treaty of this kind was discussed in connection with the Japanese Peace Settlement in which New Zealand's primary concern is to guard against any resurgence of Japanese militarism. We could not contemplate with equanimity a situation in which Japan might be enabled to embark again on policies of aggression which could bring disaster to our people . . . We therefore sought a mutual aid agreement with the United States which would give to New Zealand the guarantee of security we desired.[21]

Only three weeks earlier, Doidge had stated:

> . . . in my talks with Mr Dulles I emphasised that New Zealand would regard a guarantee of her security against aggression in the Pacific, and particularly from a possible resurgency of Japanese militarism, as essential if the peace treaty was to include no explicit restriction over Japan's ability to rearm.[22]

Starke interprets Doidge's words less than literally:

> Although using language which implied a contract between the parties concerned, Doidge was really endeavouring to describe their attitudes rather than the terms of a definite bargain between them.[23]

Starke's view is questionable, however, in the light of a speech made to the House of Representatives by Doidge's successor as Minister of External Affairs, Webb:

> I may emphasise that at all consultations, we placed primary emphasis on security. Neither Australia nor New Zealand has forgotten that, in the first phase of the Pacific War, Japan came within striking distance of our shores . . . We have put a lot of trust in Japan's plighted word and we hope and believe that that trust will not be misplaced, but if we are mistaken, we have the comforting assurance that the strong right arm of the United States . . . is ready to come to our aid.[24]

Thus it seems clear that New Zealand's desire for a Pacific pact, while undoubtedly according in substance with Australia's view, involved some difference in emphasis. Although New Zealand may not have had many cards to play, it seems that it was trying to strike a clear bargain with the United States over the Japanese Peace Treaty.

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[20] (1952) 297 N.Z.P.D., p.3.
[21] (1951) 1 Ext. Aff. Rev. No.5, p.7.
[22] (1951) 1 Ext. Aff. Rev. No.1, p.3.
[23] Starke, *op.cit.*, pp.66.
[24] (1951) 295 N.Z.P.D., pp.195. (extracts).

It remains to ask why did the United States enter ANZUS when it had initially been so reluctant? Not infrequently American spokesmen characterised the Treaty as a mere formalisation of existing de facto relationships between the United States and Australia and New Zealand.[25] This is borne out to some extent by the declaratory language of the Fourth Recital to the Treaty, which starts: "Desiring to declare publicly and formally their sense of unity . . ." But this fails to account for several important provisions in the Treaty which imposed new obligations on the Parties.[26]

Dulles saw the ANZUS Treaty as complementing the United States — Philippines Defence Treaty and the United States-Japan Security Treaty. Taken together, these pacts protected the Western rim of the Pacific and provided peace and security in the area.[27] This was, in effect, a westward extension of the Monroe Doctrine. Like Australia, the United States was apprehensive about Communist designs. Dulles saw a threat of encirclement of Japan and, faced with the Sino-Soviet Treaty of Friendship, Alliance and Mutual Assistance (1950), wished to extend American defence lines. In 1949, the Soviet Union exploded its first nuclear device. Unilateral nuclear deterrence now became mutual, and the United States needed strategic air bases. Australia and New Zealand were perceived in this context as potentially useful friendly countries on the periphery of Communist expansion in South-East Asia. Starke concludes:

> . . . if one of America's most important reasons for signing ANZUS was that the alliance played a necessary part in her global cold war strategy, then ANZUS could not be considered as having only a 'defensive' purpose, using the word 'defensive' in its strict sense. Clearly **the United States intended that, if at some future time this should become necessary, ANZUS, as in the case of NATO, would be adapted to serve a deterrant aim by assisting in the deterrant** effect of American strategic retaliatory forces.[28]

Australia has slipped into this deterrent role with relative ease.[29] New Zealand has always resisted it, and never more strongly than at the time of writing. The question of the relationship between ANZUS and the nuclear deterrent will be dealt with more fully later in this paper.

III. Interpretation of the ANZUS Treaty

The ANZUS Treaty was expressly modelled on the North Atlantic Treaty and, indeed, repeats almost verbatim some of its precursor's Articles. Nevertheless, it is a narrower instrument because it is only tripartite and because it was intended to be only one component in a network of treaties desired by the United States. It is a short document, composed of a Preamble and eleven relatively brief Articles, and it is silent upon many points which might be expected to have been specified. It is, by nature, a regional treaty for collective and self-defence and, as such, falls within the ambit of Article

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[25] See Starke, *op.cit.*, p.68.

[26] E.g. Article II obliges the maintenance and development of an individual and collective capacity for self-defence; Article III obliges consultation whenever, in the opinion of any Party, a threat exists; Articles IV and V contemplate action to meet the common danger when armed attack takes place; Article VII establishes a Council.

[27] See *American Foreign Policy 1950-55*, Vol.1, p.882.

[28] Starke, *op. cit.*, p.73.

[29] As early as the first meeting of the ANZUS Council on 4 August 1952, the Australian representative, Casey, referred to the alliance as a "permanent association designed to deter war from whatever quarter it may threaten and to resist attack, whoever may be the aggressor." See Starke, *op.cit.*, p.77.

51 of the United Nations Charter. However, it does not seem to establish a regional organisation within the meaning of Chapter VIII of the Charter, and subsequent State practice supports this interpretation. The Australian Minister for External Affairs, Casey, described it as being "solely concerned with the security of the Parties"[30]; and the final recital of the Preamble to the Treaty anticipates "the development of a more comprehensive system of regional security in the Pacific area."

Casey also remarked that the Treaty "is not drafted in the precise and detailed language of lawyers. The good faith of the parties is not in question."[31] It can be asserted, therefore, that it was not the intention of the Parties to confine their relations to matters covered by the instrument. This being so, it may be asked whether the usual strict methods of treaty interpretation can be applied to the ANZUS instrument. [32] Certainly the International Court of Justice has ruled that the task of interpreting a treaty is legal, not political,[33] and it is submitted that ANZUS should be construed in this way.

The nature of the Treaty is that it is a pact of alliance. Oppenheim says of such treaties:

> . . . many alliances have been concluded without . . . precise definition, and, consequently, disputes have arisen later between the parties as to the *casus foederis* . . . it is generally for the State concerned to decide, in good faith and with a sense of legal obligation, whether a *casus foederis* has arisen and whether it is bound to render assistance . . .[34]

Further, the Treaty sets up machinery for peacetime consultation among the Parties. The instrument should therefore be interpreted in a way which will enable that machinery to function most effectively.[35]

Finally, as Starke points out,[36] "inasmuch as it was the intention of ANZUS to impinge as little as possible upon the sovereignty of the parties,[37] prima facie in case of ambiguity, limitations of sovereignty in the provisions of the Treaty should be restrictively construed."

In the light of these general comments, and of the *travaux préparatoires* outlined in the previous sections of this paper, it is now proposed to examine those provisions of the ANZUS Treaty which appear directly relevant to the present dispute between New Zealand and the United States.

In the first recital in the Preamble to the Treaty, the Parties reaffirm:

> . . . their faith in the purposes and principles of the Charter of the United Nations and their desire to live in peace with all peoples and all Governments, and to strengthen the fabric of peace in the Pacific Area.

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[30] See R.G. Casey, *Friends and Neighbours*, Michigan State College Press (1955), p.66.

[31] *Ibid.*

[32] A similar problem arose in relation to the United Nations Charter. See Schachter (1951) 40 Yale L.J. 193; Feller (1951) 51 Columbia L.R. 538; "Pollux" (1946) B.Y.B.I.L. 69.

[33] See *Conditions of Admission of a State to Membership in the United Nations Case*, I.C.J. Reports 1948, p.57,61; and *Certain Expenses of the United Nations Case*, I.C.J. Reports 1962, p.151,155.

[34] Oppenheim *International Law* 8th ed., Vol.1., p.964.

[35] See Lauterpacht (1949) B.Y.B.I.L. 67-75; a.

[36] Starke, *op.cit.*, p.88.

[37] Casey wrote that the Treaty "contains no elaborate provisions for putting it into effect which might have the effect of impinging upon the sovereignty of the parties"; Casey, *loc.cit.* fn.30, supra. See also *Wimbledon Case*, Pub. P.C.I.J., Series A, No 1, (1923) 24; *Upper Savoy Case*, Pub. P.C.I.J., Series A/B, No.46 (1932) 167; *Advisory Opinion on the Frontier between Turkey and Iraq*, Pub. P.C.I.J., Series B, No.12 (1925); Lauterpacht (1949) B.Y.B.I.L. 56-67; Oppenheim, Vol.1, p.953.

In order to achieve this aim, it seems clear that the Parties must be able to consult on all matters which promote or impair the peace in the Pacific, even though no threat or actual attack may exist. The fourth recital reinforces this. It reads:

> Desiring to declare publicly and formally their sense of unity, so that no potential aggressor could be under the illusion that any of them stand alone in the Pacific Area.

These two recitals bear out the contention that consultation is not confined to the machinery established by the Treaty. That this is the New Zealand point of view was made clear by the New Zealand High Commissioner to Australia in March 1985 when he stated:

> It remains the shared objective of the three allies to co-operate, as the Treaty puts it, to 'strengthen the fabric of peace in the Pacific area' . . . [T]he New Zealand Government was disappointed that it was found necessary to postpone the proposed meeting of the ANZUS Council; but there are other ways in which the dialogue will be pursued.[38]

The principal provisions under which "the dialogue will be pursued" are Articles II and III of the Treaty. Article III reads:

> The Parties will consult together whenever in the opinion of any of them the territorial integrity, political independence or security of any of the Parties is threatened in the Pacific.

The Article created a right and a duty to consult in the circumstances it contemplates. Of that Article the United States Senate Foreign Relations Committee said that consultation should not be sought unless the United Nations could not deal with the situation and that, in any event, it should not be used in situations concerning other friendly States.[39] If this is the true interpretation, *a fortiori*, the Article should not be available in relations with Treaty Parties. This covers, of course, only obligatory consultation. Voluntary consultation remains a sovereign right of any willing State. To the extent that ANZUS is a formal expression of a de facto relationship, it might be expected that such consultation would be facilitated in disputes between Parties.

Starke analyses the word "consults" in the context of Article III as being capable of four meanings.[40] First, it covers "an interchange of information or views." Secondly, it embraces "collective discussion with a view to making a decision, or determining a policy in which all parties would concur." Thirdly, it may involve "the disclosure by one party to the others of national policies formed; or of national intentions fixed." Fourthly, it includes "the consideration of military plans, in conjunction with the advice of the staffs of the Parties." If the strict interpretation suggested by the Senate Foreign Relations Committee is accepted, then none of these meanings has any particular relevance to the nuclear ships dispute. If, however, a looser interpretation is adopted, the third meaning in particular becomes relevant. New Zealand has clearly formed the opinion that its security is threatened by the presence of nuclear weapons in its territory. The Prime Minister has stated:

> New Zealand cannot . . . be defended by nuclear weapons. We do not wish to be defended

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[38] Speech by Mr Graham Ansell to the Canberra Branch of the Institute of International Affairs, 6 March 1985: (1985) 35 N.Z. Foreign Affairs Review, No.1, pp.47 & 50.

[39] See *American Foreign Policy* 1950-55, Vol.1., p.834.

[40] Starke, *op.cit.*, p.112.

by nuclear weapons. The United States and many of the allies of the United States carry the burden of knowing that the deterrent which defends them will also destroy them and all the rest of us if it is ever used.[41]

This looser interpretation of the Article appears justified in the light of New Zealand's stated reasons for desiring a Pacific security pact in the first place.[42] Weight is added to this view by Starke when he prophesies:

> The expression 'security' is capable of being construed in a very broad manner. In the sense in which it is used in Article III, however, it refers narrowly only to the 'individual' or 'subjective' security of a State, which could include a feeling of national safety or freedom from external danger . . . To what extent the expression . . could embrace sanitary or navigational (sea or air) security is a debatable question, but one which may need to be faced in the future, particularly having regard to the hazards of nuclear technology.[43]

It seems that the time for facing this question has now arrived and that New Zealand may well be exercising its right and duty under Article III to communicate its answer to the United States and Australia.

The other Article in the ANZUS Treaty which contains, by implication, a heavy element of consultation is Article II. It states:

> In order more effectively to achieve the objective of this Treaty the Parties separately and jointly by means of continuous and effective self-help and mutual aid will maintain and develop their individual and collective capacity to resist armed attack.[44]

This Article incorporates as a binding provision the essence of the Vandenberg Resolution of the United States Senate.[45] The working of the Article shows the obligations of the Parties to be both individual and collective. They are to maintain and develop their own defences and assist the other Parties in developing theirs. Casey was clear that the Article

> . . . obviously does not impose a specific level of armaments on the Parties. But just as obviously, we have accepted an unequivocal commitment to maintain adequate defence forces.[46]

This means, as Starke puts it, that:

> No party is bound to make any specific contribution to the defence capacity of any other party, at any particular time or over any given period of time. Not only is there no specific obligation as to the timing, but none also as to the nature and the extent of the assistance to be furnished to other parties.[47]

This interpretation appears to conform with the current view of the New Zealand Government. The Prime Minister has said publicly:

> We do not ask, we do not expect the United States to come to New Zealand's assistance with nuclear weapons or to present American nuclear capability as a deterrent to an attacker . . . Unlike NATO, the ANZUS alliance has in the past been regarded by the Treaty Partners as a conventional alliance, not a nuclear alliance. The Treaty does not oblige New Zealand to accept nuclear weapons.[48]

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[41] See Address of 22 February 1985 by Prime Minister Lange to a seminar on disarmament and security in Wellington. Ministry of Foreign Affairs Information Bulletin, No.11, March 1985, p.4.

[42] See, e.g , Doidge's statement, *loc.cit.* fn.24, supra.

[43] Starke, *op.cit.*, p.115.

[44] Similar provisions are to be found in the North Atlantic Treaty (Article 3), the U.S.-Philippines Treaty (Article II) and the S.E.A.T.O Treaty (Article II).

[45] See text, *infra*, and fn.7.supra

[46] See Casey, *op.cit.*, p.67.

[47] Starke, *op.cit.*, p.103.

[48] See (1985) 35 N Z. Foreign Affairs Review, No. 1, pp.3-7. See also Mr Lange's address

Thus New Zealand does not see as part of its obligations under the Treaty a duty to accept American nuclear weapons on its soil and it does not expect the United States to include such weapons in its duty to maintain and develop a collective defence capacity with New Zealand. The term "mutual aid", as used in Article II, is broad in scope. It covers what a Party can reasonably be expected to contribute. This might include standardisation of weapons systems, integration of armed forces and the availability of military and other facilities. It would be stretching the term too far to say that it includes the compulsory acceptance against its will by one Party of the weaponry of another Party, particularly when that weaponry is of a type which the first Party categorically renounces and rejects.[49]

In circumstances such as these Article II clearly implies consultation of a type which is beyond that strictly required by Article III. The New Zealand High Commissioner to Australia expressed the spirit of this consultation when he said:

> . . . in taking the position it did on the entry of nuclear-powered and nuclear-armed ships . . . the New Zealand Government saw its actions as entirely compatible with the provisions of the ANZUS Treaty, to which it remains fully committed.
>
> We regret that others have seen the decision in a different light; and that the American response has been to impose substantial restrictions on tripartite defence co-operation with Australia and New Zealand. The purpose of the Treaty is scarcely served if the effectiveness of New Zealand's defence forces is deliberately eroded. Notwithstanding current tensions, we in New Zealand will be aiming in discussion with our Treaty Partners to restore trilateral co-operation as soon as possible.[50]

The implication is that it is not New Zealand's initial action, but rather the American response to it, that is in breach of the spirit, and possibly the letter, of Article II.

If consultation is provided for by Article III and implied in Article II, it is at the heart of Article VII:

> The Parties hereby establish a Council, consisting of their Foreign Ministers or their Deputies, to consider matters concerning the implementation of this Treaty. The Council should be so organised as to be able to meet at any time.

Casey has commented that "Article VII does not lay down hard and fast arrangements but leaves considerable scope to the three Parties to concert their affairs in the light of experience. Much depends, of course, on the will to co-operate of the governments concerned."[51] Starke remarks that the Council "has become almost as important as the Treaty itself."[52] Nevertheless, the Council probably only has advisory powers since there is no veto, no special voting procedure and no supranational jurisdiction. As a result, its recommendations must be unanimous and this requirement is probably sufficient to account for the postponement of the meeting due to be held in Canberra in July 1985. In the absence of any possibility of agreement on the nuclear ships issue, the Americans felt that a Council Meeting would be futile.

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to the United Nations Conference on Disarmament, Geneva, 5 March 1985; Ministry of Foreign Affairs Information Bulletin, No 11, March 1985, pp.10-14.

[49] Note that Norway, a member of N.A.T.O., denies bases to foreign military forces as long as the country is not attacked or under the threat of attack. See (1949) 20 Current Notes on International Affairs, p.441

[50] (1985) 35 N.Z. Foreign Affairs Review, No. 1, p.50

[51] Casey, *op.cit.*, pp.70-1.

[52] Starke, *op.cit*, p.153.

This postponement raises obvious questions relating to withdrawal from the Treaty. While Article VII does not say the Council must meet, such meetings are implicit in the notion of a consultative body. Without them, a vital element of the whole alliance is lacking.

The question of withdrawal is covered by Article X, which states:

> This Treaty shall remain in force indefinitely. Any Party may cease to be a member of the Council established by Article VII one year after notice has been given to the Government of Australia, which will inform the Governments of the other Parties of the deposit of such notice.

This is an unusual provision because, although it allows the Parties to withdraw from the Council after giving the prescribed notice, the Treaty itself continues indefinitely. Furthermore, it contains no provisions for review or revision.[53] Thus, Articles which can stand independently of the Council form a permanent unalterable doctrine of the three allies. No other Pacific security or defence treaty lacks a denunciation provision in this way. The reasoning behind this lack was explained by Dulles in 1952:

> The Treaty, as such, like the Monroe Doctrine, has no fixed duration because the essence of the Treaty is recognition of a fact of presumable indefinite duration, namely, the fact that an armed attack upon one of the Parties would be dangerous to the others. If this ever ceased to be the fact, then the basis for the Treaty would disappear and the Treaty itself could be terminated.[54]

So far none of the Parties has indicated that this prerequisite for termination has been fulfilled. It is thus of importance to determine whether there exist in International Law any other grounds for withdrawal from a Treaty of indefinite duration.

IV. Withdrawal From the ANZUS Alliance.

Customary international law concerning disputes over treaties has, to a very large extent, been codified in the Vienna Convention on the Law of Treaties 1969. Although the Convention did not enter into force until January 1980 and its provisions are not retrospective, it can nevertheless be said to be, for the most part, a reliable guide to the customary law in this area. Certainly, some of the Convention's Articles exhibit a measure of progressive development of the law, but that does not appear to be the case with any of the provisions relevant to this topic.[55]

Article 56 of the Vienna Convention deals with denunciation of or withdrawal from a treaty containing no provision regarding termination, denunciation or withdrawal. A party may only withdraw from such a treaty if it is established that the parties intended to admit such a possibility or if such a right may be implied by the nature of the Treaty. Some members of the International Law Commission, which drafted the Vienna Convention, took the view that, in treaties of alliance, such as ANZUS, a right of denunciation or withdrawal should be implied after reasonable notice. The majority, however, were of the opinion that the nature of the treaty was not critical. Rather, whether such a right exists is a question of fact, to

[53] But review, revision or amendment would always be possible with the unanimous consent of the Parties Subsequent State practice can also have the practical effect of altering a Treaty

[54] See *American Foreign Policy 1950-55*, Vol.I, p.882.

[55] See I. M. Sinclair *The Vienna Convention on the Law of Treaties* 1973. Sinclair discusses those Articles which exemplify progressive development but does not mention in this context Articles 56, 60 or 62

be determined by reference to all the circumstances of the case.[56] Obvious questions which would have to be asked include: what were the intentions of the parties? and would unilateral withdrawal be inconsistent with the character of the Treaty?

In the case of ANZUS, the answer to the first question seems to have been provided by Dulles.[57] Only if a Party defected to the extent that it ceased to be a member of the Western Alliance would it be possible to say that the Parties must have intended termination in such circumstances. In contrast, the New Zealand Prime Minister has stated that ANZUS is

> . . . valuable as a conventional alliance. New Zealand remains willing and able to contribute to conventional defence relationships. That contribution has been substantial in the past and will not willingly be diminished in the future.[58]

In concert with remarks made by New Zealand's representatives during negotiations and at the signature and ratification of ANZUS, this statement indicates that it has never been New Zealand's intention to distance itself from the kind of alliance envisaged by Dulles.

As far as the second question is concerned, given that the ANZUS Treaty represents essentially an extension of the Monroe Doctrine, it seems that it would be hard for the United States to contemplate unilateral withdrawal without inconsistency, for this would be tantamount to saying that New Zealand was no longer of relevance to American spheres of influence, an unlikely conclusion in view of this country's proximity to Australia and Antarctica and the wide spectrum of its relationship with the United States in non-military fields of activity. Thus, short of a drastic realignment of New Zealand's alliances, it is not easy to imagine circumstances which would justify unilateral withdrawal.

The next provision of the Vienna Convention which may be relevant is Article 60, which deals with the termination or suspension of the operation of a treaty as a consequence of a material breach. The term "material breach" is defined in paragraph 3 as including "the violation of a provision essential to the accomplishment of the object or purpose of the treaty." The International Law Commision's commentary elaborated:

> But other provisions considered by a party to be essential to the effective execution of the Treaty may have been very material in inducing it to enter into the Treaty at all, even though these provisions may be of an ancillary character.[59]

The main purposes of the ANZUS Treaty are expressed in Articles II, III and IV. Articles II and III have already been dealt with. Article IV, in its material part, reads:

> Each Party recognises that an armed attack in the Pacific Area on any of the Parties would be dangerous to its own peace and safety and declares that it would act to meet the common danger in accordance with its constitutional processes. .

Obviously, an infringement of this Article, such as a refusal to set constitutional processes in action when an attack took place, would constitute a material breach; as would a refusal to consult under Article III, or an

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[56] See "Commentaries on Draft Articles" (1967) 61 A.J.I.L., 263–463, (Draft Article 53.) See also Sinclair, *op.cit.*, p.102.

[57] *Loc cit.* fn.54,supra.

[58] (1985) 35 N.Z. Foreign Affairs Review, No. 1, p.13.

[59] (1967) 61 A.J.I.L., 426 (Draft Article 57).

abandonment of any defensive capabilities such as are contemplated in Article II. However, it is far from clear that a refusal to be associated with nuclear weapons, while nevertheless being willing to observe the three Articles in question, would amount to a material breach. Certainly there is no indication in the *travaux préparatoires* dealt with earlier in this paper that the Americans intended and that New Zealand understood that compliance with Article II involved acceptance of the United States nuclear deterrent in New Zealand territory. New Zealand has consistently over four decades displayed an attitude to nuclear disarmament which would be wholly inconsistent with an acceptance of ANZUS as a nuclear alliance. The Prime Minister has recently stated:

> From New Zealand's perspective, ANZUS has always been an alliance resting on *conventional* defence co-operation.[60]

The attitude of successive New Zealand governments in nuclear arms control further supports this assertion. Nevertheless, the United States, because it will neither confirm nor deny that its ships are carrying nuclear weapons, might be expected to take the view that the Treaty cannot be effectively executed if New Zealand persists with its anti-nuclear policies. On a practical level, it would presumably be necessary for the Americans to show that they could not perform their duties under the Treaty without access to New Zealand ports, and that joint exercises on the high seas would not alleviate this problem. This might be hard to sustain in light of the Prime Minister's stated position that:

> The conventional forces of the United States — land, sea and air — are welcome at any time in New Zealand for exercises . . .[61]

The consequences of a material breach, if this could be shown, are essentially that the operation of the Treaty, at least vis-à-vis the defaulting state, is suspended or terminated.[62]

Should the United States be unable to establish a material breach on New Zealand's part, they may nevertheless attempt to argue a fundamental change of circumstances since the Treaty was concluded. Article 62 of the Vienna Convention embodies a controversial rule of International Law known as *rebus sic stantibus*. There is considerable evidence in customary international law of the existence of this rule, dealing with changed circumstances, but the International Court has never committed itself. The International Law Commission's commentary says that State practice shows:

> a wide acceptance of the view that a fundamental change of circumstances may justify a demand for the determination or revision of a treaty, but also shows a strong disposition to question the right of a party to denounce a Treaty unilaterally on this ground.[63]

The Commission decided that the rule, in a carefully circumscribed form, should find a place in the modern law of Treaties:

> A Treaty may remain in force for a long time and its stipulations come to place an undue burden or one of the Parties as a result of fundamental change of circumstances. Then, if the other Party were obdurate in opposing any change, the fact that International Law recognised no legal means of terminating or modifying the Treaty otherwise than through a further agreement between the same parties might impose a serious strain on the relations between the States

[60] Ministry of Foreign Affairs Information Bulletin No.11, March 1985, p.8.
[61] (1985) 35 N.Z. Foreign Affairs Review No.1., p.6.
[62] See the Vienna Convention, Article 60(2)(a), (b) and (c).
[63] (1967) 61 A.J.I.L., 430. (Draft Article 59).

concerned; and the dissatisfied State might ultimately be driven to take action outside the law. The number of cases calling for the application of the rule is likely to be comparatively small.[64]

Article 62 contains certain prerequisites to its invocation. First, there must be a change in the circumstances which existed at the time when the treaty was concluded. In the case of ANZUS the United States could possibly argue that nuclear proliferation since the early 1950s has meant that effective operation of the Treaty requires the presence of its nuclear deterrent. New Zealand might respond that this is a change of degree rather than a fundamental change of circumstances. At the time the Treaty was concluded, the United States was a nuclear power, yet it was never among the intentions of the Parties that the Treaty should have a nuclear component. The second prerequisite, that the change be fundamental, is also covered by this response. New Zealand might add that, since it is still willing to engage in conventional exercises on its territory and welcome conventional ships in its ports, the change in its policy vis-à-vis nuclear-powered and nuclear-armed vessels is less than fundamental in relation to the central provisions of the Treaty. The third prerequisite is that the existence of the circumstances alleged to have changed constituted an essential basis of the consent of the parties to be bound by the Treaty. Exactly what change might satisfy this test in relation to ANZUS is not immediately clear. The essential basis of consent at the time ANZUS was concluded was concisely put in the communiqué of the first ANZUS Council Meeting:

> We reaffirm that our Governments are dedicated to the strengthening and furtherance of friendly and peaceful relationships among nations in the Pacific area. In so doing, we emphasise that the purpose of the ANZUS Treaty is solely the defence of its members against aggression.[65]

Thus the essential basis of the consent of the Parties was the conviction that the three Parties should stand together in the event of an armed attack upon any of them in the Pacific. No one seems to have asserted that this should no longer be the case since the dominant fear of the Americans and to some extent Australians,[66] that an expansion of communism could only be halted by an extension of the Monroe Doctrine, does not seem to have abated since 1952. Article 62 links the final prerequisite to this last. The effect of the change must be radically to transform the extent of obligations still to be performed under the Treaty. Again, it is hard to see how the United States could claim that an anti-nuclear policy on the part of New Zealand, asserted solely on a territorial basis, could have the effect of radically transforming American obligations under ANZUS. At most it might oblige certain American ships to visit Australian ports for resupply and recreational purposes rather than calling in New Zealand. In relation to the underlying objectives of the Treaty and the intentions of the Parties, it does not appear that there would be any more than a minimal change in the obligations still to be performed by any Party under the Treaty.

The foregoing suggestions as to arguments which might be advanced by the United States and countered by New Zealand within the ambit of Article

[64] *Ibid*, 431.

[65] ANZUS Council, Honolulu, 4-6 August 1952 (1952) 2 Ext. Aff. Rev. No.9, p.11.

[66] In 1952, Australia clearly still feared Japan, but was also turning its eyes towards South-East Asia. The S.E.A.T.O. Treaty recognised this concern, and later Australia was insistent on prompt and escalating American involvement in Vietnam. See Michael Sexton, *War for the Asking* (1981).

62 are, of course, only speculative. Nor do they claim to be exhaustive. As long ago as 1963, New Zealand took a formal decision never to permit the storage, testing or manufacture of nuclear weapons on its territory.[67] The United States must be taken as having acquiesced in this policy. The fourth Labour government regards it as a logical extension of this long-standing policy to prohibit the presence of nuclear weapons on visiting ships. The above analysis of the possible effect of the termination and suspension provisions of the Vienna Convention suggests tentatively, as is appropriate in a situation which is yet to be resolved, that New Zealand's anti-nuclear policy is not sufficient, in itself, to provide a *legal* justification for an American denunciation of the Treaty. The United States is, of course, free to withdraw from the Council after the proper period of notice has elapsed. But it is the present writer's cautious opinion that the "permanent" nature of the other Articles of the ANZUS Treaty is, at present, not sufficiently threatened for an American withdrawal to be conducted in conformity with current international law.

V. ANZUS AND THE NUCLEAR DETERRENT

It seems appropriate to conclude this paper with a brief consideration of the role of the nuclear deterrent in ANZUS. If, as the Parties to the Treaty have repeatedly asserted, the ANZUS alliance represented one link in a chain designed to extend the Monroe Doctrine, it must follow that the Americans would have regarded it from the outset as being potentially capable of serving their global strategy of nuclear deterrence.[68] However, as has been noted above,[69] the Parties publicly insisted that the role of the Treaty was purely defensive.

Nevertheless, Starke cites Barwick as having stated in the House of Representatives on 30 October 1963 that:

> the American authorities made it clear to him that in the event of persistence in proposals for the denuclearisation of the Southern Hemisphere America would not only be opposed to this, but 'would have to rethink its relationship with us in ANZUS.'[70]

Earlier, in 1962, Barwick had said:

> Australia does not now provide base facilities for nuclear weapons of other countries; but we have not given an undertaking never to do so. So to do would, apart from all else, amount to a refusal to co-operate with our allies on some occasion of urgent need for them and for us.[71]

Certainly in the past, the American entitlement to use its nuclear deterrent by way of retaliatory response to an ANZUS *casus foederis* has not been disputed by Australia or New Zealand. Equally, it does not appear ever to have been argued that the Americans would be bound to do so. There is no reciprocity in this area. The United States might refrain from using nuclear weapons out of considerations relating exclusively to its own security. Conversely, alliance with the United States might expose Australia and New Zealand against their will to nuclear attack. Starke has commented, in terms which seem somewhat dated:

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[67] See (1985) 35 Foreign Affairs Review No.1, p.48.
[68] See Starke, *loc.cit.* fn.28, supra
[69] See ANZUS Council Communique, *loc.cit.* fn.65, supra.
[70] See Starke, *op.cit.*, p 230
[71] (1962) 33 Current Notes on International Affairs, No.7, p 44.

They have decided that they cannot contract out of such a hazard in an alliance with a country possessing dominant nuclear strength; they can hope inter alia that the processes of day to day consultation within the ANZUS framework will limit the incidence of the risk, and that an American decision will be taken with due regard for the wishes and support of allies. . . These are the only terms under which they can enjoy the bounty of the nuclear umbrella.[72]

New Zealand has now decided that it can and must contract out of the nuclear hazard. The Prime Minister has been unequivocal:

. . . New Zealand is not, and has never been, part of any nuclear strategy. No nuclear weapons have ever been based or stored in New Zealand. New Zealand has not assisted, and does not assist, in any system of strategic nuclear defence . . . New Zealand is not half-hearted in its course. When we exclude nuclear weapons from New Zealand, we exclude the possibility of a nuclear defence of New Zealand. We do not ask to be defended by the nuclear weapons we exclude and we do not ask any nuclear power to deter any enemy of New Zealand by the threatened use of nuclear weapons against that enemy.[73]

The lines are thus clearly drawn. Only time will tell whether New Zealand and the United States are on an irreversible collision course in terms of the ANZUS Treaty. It therefore seems appropriate to conclude with the words of a great international lawyer, Lord McNair; words which should be cautionary to all Parties in the ANZUS debate:

I do not think it is fully realised at present in regard to regional pacts, that they not only impose obligations upon the guarantors, but confer upon the guarantors a certain degree of control over the Parties who are guaranteed. It is the greatest mistake in the world to think that when State A has given a guarantee to State B, then State B thereupon has *carte blanche* in its foreign policy. The fact that one state has guaranteed another puts that guaranteeing State in a position to give advice of a very authoritarian character.[74]

[72] Starke, *op.cit.*, pp.231-232.
[73] (1985) 35 Foreign Affairs Review, No.1, pp.12-13.
[74] Lord McNair, *Collective Security* (1935) p.392.