# SUSPENSION OF TREATY RELATIONSHIP: THE ANZUS ALLIANCE

Christine M. Chinkin*

## I. INTRODUCTION

When states enter into an agreement, they may be formalising a relationship that already existed between them. They will then be shaping in formal terms their preexistent expectations for the sharing of values prescribed by the agreement, rather than establishing an entirely new relationship. An agreement provides a legal environment for what already existed in fact; the anticipation is that it will strengthen and confirm that relationship. This expectation may be furthered by a commitment to permanency in the agreement. However, the expectation of permanency, coupled with a belief that the underlying relationship is sound, may result in the agreement itself being imprecisely worded and seem more like a political commitment rather than a legal one.

In these circumstances, the termination or suspension of the original agreement by one or more of the parties against the desires of some or all of the other parties is likely to provoke feelings of frustration and dismay. These feelings will be shared by those parties which did not desire this outcome (which include even the parties which actually terminated or suspended the agreement) as well as third parties which had formulated policies and exercised various options assuming the agreement would continue to be applicable. The termination or suspension of any public agreement is also likely to spawn further claims relating to other situations. The interdependence of relationships means that a single agreement rarely sits and operates alone. Many subsequent developments, both in formal treaty terms and in informal understandings will be made less predictable by the termination. All those affected (even peripherally) will have to reassess their options for future behaviour.

A decision to terminate or suspend an agreement may be explained by the parties' original expectations not coinciding as closely as they had thought, a situation that might have been con-

* Lecturer in Law, University of Sydney.

cealed by a preexisting relationship. Alternatively, there may have been a subsequent divergence of interests leading to changed expectations about the values to be derived from performance of the agreement. In either case, the outcome should lead to a reappraisal of the norms of international law that govern the conclusion and termination of agreements. This reappraisal will help ascertain whether the respective elites anticipated or desired this outcome, or whether renegotiation and amendment of the agreement had been favoured. A reappraisal is warranted all the more where the relevant treaty provided for mutual military cooperation within a regional security arrangement, and where the changed expectations were not caused by unpredictable or violent change of the elite[1] in one of the parties or by a fundamental change in the form of government, but by as a consequence of normal democratic processes.

The above comments refer to the suspension of the Pacific Security Treaty[2] among the United States, Australia, and New Zealand. The dispute that culminated in the suspension of the treaty centered around the refusal by New Zealand to allow access to its ports or airfields by nuclear powered or armed ships or aircraft[3], in accordance with the anti-nuclear policy of its Labour government. The United States has long maintained a "neither confirm nor deny policy" that it has refused to compromise. It asserts that the ANZUS Treaty provides for a right of access for all its ships and aircraft. In the face of failed attempts at compromise, the United States abrogated the treaty as between itself and New Zealand. This dispute serves as an incident[4] to assess the current state of international law norms relating to the suspension and termination of treaties. The incident has a political significance beyond that of the immediate relationships between the three parties, for ANZUS is one of the surviving security arrangements entered into by the United States as part of its post World War II global security framework.[5] The outcome of the crisis in ANZUS carries implica-

1. For a discussion of the revolutionary change of government in Cuba in 1959 and its subsequent expulsion from the OAS, see Sohn, *Expulsion or Forced Withdrawal from an International Organization*, 77 HARV. L. REV. 1381 (1964).

2. ANZUS Treaty, Apr. 29, 1952, United States-Australia-New Zealand, 3 U.S.T. 3420, T.I.A.S. No. 2493, 131 U.N.T.S. 83.

3. A number of articles have been written about the dispute. *See, e.g.*, McLachlan, *ANZUS: The Treaty Reappraised*, 1985 N.Z.L.J. 27; Hewison, *Withdrawal from ANZUS*, 1986 N.Z.L.J. 87; Comment, *The South Pacific Nuclear Weapon-Free Zone, The Law of the Sea, and the ANZUS Alliance: An Exploration of Conflicts, A Step Toward World Peace*, 16 CAL. W. INT'L L.J. 138 (1986); Note, *The Incompatibility of ANZUS and a Nuclear-Free New Zealand*, 26 VA. J. INT'L L. 455 (1986).

4. For the use of "incidents" as a means of monitoring norms of international law, see Reisman, *International Incidents: Introduction to a New Genre in the Study of International Law*, 10 YALE J. INT'L L. 1 (1984).

5. These regional arrangements include the North Atlantic Treaty Organization established in the North Atlantic Treaty, Apr. 4, 1949, 63 Stat. 2241, T.I.A.S. No. 1964,

tions about the United States' expectations under such treaties for its other allies, both in the Asian-Pacific region and elsewhere, notably Europe. This perspective was well understood by New Zealand Prime Minister David Lange, when he stated that "[T]his reaction by the United States can be understood only in terms of Washington's desire to make a point to other larger and more powerful allies in the Pacific and Western Europe."[6]

The readiness of the United States to abrogate this agreement with a long-term ally which is no longer conforming to its expectations, rather than to work for a compromise renegotiation of the treaty, may be regarded as notice from that country of the behaviour that it feels entitled to demand from its allies, and as an indication that the value of agreements such as ANZUS rests in their role as forming as part of the global nuclear deterrent. The United States has demonstrated that it is prepared to abandon the treaty relationship if this deterrent is not sustained. These wider implications of the incident were indicated in the words of George Shultz, then the United States Secretary of State: "It would be a tragedy for New Zealand's policy to spread."[7] While this statement was made in the Asian-Pacific context, where the members of the Western alliance are becoming concerned about the spread of Soviet influence and the growth of its naval power,[8] there is little doubt that the United States is also aware of the potential impact of New Zealand's actions in Europe, particularly in those countries where anti-nuclear policies are gaining ground.[9] The incident presents a crisis

---

34 U.N.T.S. 243 [hereinafter NATO]. ANZUS itself is seen as part of a package of regional security arrangements in the Pacific. The other treaties are: Treaty of Peace with Japan, Sept. 8, 1951, United States-Japan, 3 U.S.T. 3169, T.I.A.S. 2490, 136 U.N.T.S. 45; Mutual Defence Assistance Agreement, Mar. 8, 1954, United States-Japan, 5 U.S.T. 661, T.I.A.S. No. 2957, 232 U.N.T.S. 169; Mutual Defence Treaty, Aug. 30, 1951, U.S. and the Philippines, 3 U.S.T. 3947, T.I.A.S. No. 2529. To John Foster Dulles, United States Secretary of State, ANZUS was "one of a group of interdependent treaties designed to ensure the safety of a particular security zone in the Pacific - the offshore island chain from the Aleutians, swinging south from Japan, the Ryukyus, the Philippines, Australia and New Zealand," J. STARKE, THE ANZUS TREATY ALLIANCE 69 (1965).

6. Prime Minister David Lange in a speech in Los Angeles to "The New Zealand Connection" (Feb. 26, 1985) [hereinafter Los Angeles speech], *reprinted in* 35 N.Z. FOREIGN AFF. REV., Jan.-Mar. 1985, at 3, 5. Mr. Lange resigned as Prime Minister on August 7, 1989. He was succeeded by Mr. Geoffrey Palmer who was previously Deputy Prime Minister, Attorney General, Minister for the Environment, and Minister of Justice. For story on Lange's resignation, see Sydney Morning Herald, Aug. 8, 1989, p. 1, col. 2.

7. Then United States Secretary of State, George Shultz, at the press conference when he announced the United States' abrogation of ANZUS; *quoted in* Wilenz, *A Cruise through the Islands*, Time, July 7, 1986, at 38. This occurred in Manila while Shultz was on a five nation tour of the Pacific region.

8. The Soviet Pacific Fleet has grown considerably in recent years. *See* Comment, *supra* note 3, at 138.

9. That these fears may be justified is demonstrated by the announcement by the

situation for the state of the Western alliance and is illustrative of the tensions that can exist between the formal terms of a security treaty and the expectations it has generated in the parties to it.

The focus of this article's analysis will be on the terms of the ANZUS Treaty, the New Zealand Government's actions leading to the incident, and the relevant parties' responses. A discussion of the ANZUS Treaty and the outcome of the incident cannot be limited and the outcome of the incident cannot be limited to the tripartite relationship which is its formal character. The norms of international law relating to the termination and suspension of treaties will be appraised in the context of the abrogation of this treaty, which is significant to the security interests of the United States.

### A. Background to the Incident[10]

The Pacific Security Treaty extended American arrangements into the Pacific arena and formalised the military cooperation between the three countries that had commenced during the Second World War.[11] The alliance therefore represented the expectations of a continued relationship, now enshrined in treaty form. Starke, however, feels that the theory of formalisation is an insufficient explanation of the United States' willingness to join ANZUS, as it fails to account for several important provisions in the treaty and cannot be reconciled with the reasons given for the acceptance of the treaty by the principal American negotiator, John Foster Dul-

---

Government of Iceland that nuclear powered or armed vessels are unwelcome in its ports. Iceland is, of course, a NATO member. *See* Note, *Port Visits by Nuclear Armed Naval Vessels, Recent State Practice*, 35 INT'L & COMP. L.Q. 730, 735 (1986). The Note also refers to a 1984 Resolution of the Greenland Parliament declaring Greenland to be a "denuclearized zone." *Id.* at 735 n. 30. More recently the Danish Government introduced a resolution aimed at tightening a ban on nuclear weapons on board warships visiting Danish ports. The move was criticized by United States Defense Secretary, Mr. Frank Carlucci. THE AUSTRALIAN, May 3, 1988, at 6, col. 2. However, elections in Denmark on May 10, 1988 led to increases in the seats held by the Conservatives and thus more support for NATO.

10. The background to the incident is the ANZUS Treaty itself. Detailed works on the treaty include: J. STARKE, *supra* note 5, and its very full and useful bibliography, *id.* at 295-300. *See also* J. MOORE, THE AMERICAN ALLIANCE; AUSTRALIA, NEW ZEALAND AND THE UNITED STATES: 1940-1970 (1970); T. REESE, AUSTRALIA, NEW ZEALAND AND THE UNITED STATES (1969); and Ball, *The ANZUS Connection*, in ARMS, DISARMAMENT AND NEW ZEALAND (T.J. Hearn ed. 1983). A very good summary of the background to the incident is to be found in R. THAKUR, IN DEFENCE OF NEW ZEALAND: FOREIGN POLICY CHOICES IN THE NUCLEAR AGE (New Zealand Institute of International Affairs Pamphlet No. 46, 1984).

11. This formalisation was stressed by Mr. T.C. Webb of New Zealand at the first ANZUS Council meeting in 1952. He said New Zealand was satisfied with ANZUS not "because it expresses anything new in the relationship of our three countries but because it gives formal recognition to the realities of that relationship." R. THAKUR, *supra* note 10, at 56 (citing McKinnon, *From ANZUS to SEATO*, 1 NEW ZEALAND IN WORLD AFFAIRS 95 (1977)).

les.[12] ANZUS represented a major development in the foreign policies of Australia and New Zealand as they turned for their security protection away from the United Kingdom and towards the United States. This change was made necessary by the inability of the United Kingdom to continue in the role of protector, which had become apparent during the Second World War and had been symbolised by Japan's capture of Singapore in February 1942.

The purpose of the treaty was "to strengthen the fabric of peace in the Pacific area"[13] and to "co-ordinate their efforts for collective defence for the preservation of peace and security" in that region. It was adopted as a collective self-defence arrangement under article 51 of the Charter of the United Nations.[14] The treaty was concluded against the backdrop of the Communist victory in China and the proclamation of the People's Republic of China on October 1st 1949; the outbreak of the Korean War in 1950, which demonstrated the military threat posed by Communist China, and; the Japanese peace settlement treaty.[15]

While Australia and New Zealand had earlier favoured a Pacific security treaty, they had been unable to negotiate one with the United States[16] (which had not sought or desired a regional security pact in the Pacific) until this series of events changed Washington's attitude. Even then, the parties may have held differing expectations as to the primary purpose of the treaty. "While Australia and New Zealand in 1951 viewed ANZUS as protection against a remilitarised Japan, the United States entered into a complex of treaties in the Pacific as part of its global policy of containment of Sino-Soviet communism."[17] The realities of the differences in power and in global position and influence between the parties made these different perspectives inevitable.

Under ANZUS the parties entered into a number of commit-

12. J. STARKE, *supra* note 5, at 69.

13. Preamble to the ANZUS Treaty, *supra* note 2, ¶ 1. The expression "Pacific Area" is repeated throughout the Preamble but is nowhere defined in the Treaty. This is one example of the lack of precision in the Treaty that will be referred to below and also signifies the parties' desire not to delimit their area of interest. J. STARKE, *supra* note 5, at 48-49.

14. United Nations Charter, article 51 states: "Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a member of the United Nations . . . ."

15. J. STARKE, *supra* note 5, at 1-75.

16. For this background see Note, *supra* note 3, at 456-69.

17. R. THAKUR, *supra* note 10, at 43. In Australia and New Zealand the influence of public opinion against a "soft" Japanese peace settlement cannot be ignored and ANZUS was a counter-balance to this. *See* J. STARKE, *supra* note 5, at 68. The other treaties referred to are the Treaty of Peace with Japan, *supra* note 5, the Mutual Defence Assistance Agreement, *supra* note 5, and the Mutual Defence Treaty, *supra* note 5.

ments, but each is limited and imprecisely defined.[18] In brief, all the parties would maintain and develop individual and collective capacity to resist armed attack by means of continuous self-help and mutual aid,[19] consult together when, in the opinion of one, the territorial integrity, political independence or security of any one of them was threatened in the Pacific,[20] and, most importantly "[e]ach 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 it would act to meet the common danger in accordance with its constitutional processes."[21] This article does not intend to analyse the terms of the treaty in full, but some comments relevant to the immediate incident should be made. First, the ANZUS Treaty, unlike NATO, has no amendment, withdrawal or termination clause. On the contrary, it is specifically stated to remain in force indefinitely,[22] although parties may cease to be members of the Council upon giving the requisite notice. It is clear that the intention of permanency was deliberately framed, and it is a major difference between ANZUS and NATO.[23] Thakur argues that the treaty is founded on the presumption that an armed attack on one signatory is dangerous to the security of all the others: "The basis for ANZUS would therefore disappear when this presumption is no longer valid and the duration of the treaty is accordingly left indefinite.[24] In the absence of any termination provision, any act of termination or suspension must be assessed in terms of general prescription."[25]

---

18. "The Anzus commitments of Articles 1-4 are remarkable for the vagueness of responses required from treaty partners if the casus foederis occurs," R. THAKUR, *supra* note 10, at 34. For a full analysis of the treaty provisions see J. STARKE, *supra* note 5, at 76-160.

19. ANZUS Treaty, *supra* note 2, art. II, 3 U.S.T. 3421, 3422, T.I.A.S. No. 2493, at 1.

20. *Id.* at art. III, 3 U.S.T. 3421, 3423, T.I.A.S. No. 2493, at 3.

21. *Id.* at art. IV, 3 U.S.T. 3421, 3423, T.I.A.S. No. 2493, at 3.

22. Article X states: "This Treaty shall remain in force indefinitely." 3 U.S.T. 3421, 3424, T.I.A.S. No. 2493, at 4. The article continues that "Any party may cease to be a member of the Council . . . ." A clear distinction is thus drawn between membership of the alliance and of the Council which is the institutional body provided for by article VII, 3 U.S.T. 3421, 3423, T.I.A.S. No. 2493, at 3.

23. J. STARKE, *supra* note 5, at 46.

24. R. THAKUR, *supra* note 10, at 38.

25. The Vienna Convention on the Law of Treaties, May 23, 1969, U.N. Doc. A/Conf. 39/27 (1969), *reprinted in* 8 I.L.M. 679 [hereinafter Vienna Convention]. Articles 54-64 cover termination and suspension of treaties. Admittedly the United States is not a party to the Convention and by article 4 of the Vienna Convention itself, it does not apply to treaties entered into prior to its coming into force. Since the ANZUS treaty came into force in 1952 and the Vienna Convention in 1980, the former is excluded by the terms of the Vienna Convention. Its provisions relating to breach (Article 60) and fundamental change of circumstances (Article 62) have been held by the International Court of Justice to "be considered as a codification of existing customary law." Fisheries Jurisdiction (U.K. v. Ice.), 1974 I.C.J. 3, 18 (Judgment of July 25); Legal Conse-

Secondly, there is no formal guarantee in the text of the treaty that an armed attack in the Pacific area on any of the parties will be met by military action in collective response. The treaty undertaking is less than the similar commitment in NATO, where the use of force is a listed optional (although not obligatory) response to an armed attack.[26] It is clear that military action can be encompassed within the terms of ANZUS, but it is by no means guaranteed. The expectation of one of the parties of likely assistance was indicated by the Australian Minister for Foreign Affairs, Bill Hayden, when he asserted that

> [I]ts security commitment would be activated if we suffered armed attack. The responses available to our ANZUS allies would be considerable and powerful. It could be diplomatic action, political or economic sanctions, supply of military equipment or logistic support. And, as any number of U.S. officials are on record as confirming, response could include direct military support.[27]

Hayden, however, stopped well short of suggesting that military assistance from the United States is assured, a reality also recognised by New Zealand.[28] The awareness that ANZUS provides no automatic or absolute legal guarantee of military support from the United States is an important factor when considering the incident. New Zealand does not believe that ANZUS guaranteed its security, a belief that has a new dimension in the nuclear context. The New Zealand government has asserted that it has no desire for the United States to use nuclear power in its protection, although this could fall within the terms of article IV.[29] In short, ANZUS

---

quences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), 1971 I.C.J. 16, 47 (Advisory Opinion of June 21).

26. NATO Treaty, *supra* note 5, art. V states:

> "The parties agree that an armed attack against one or more of them in Europe or North America shall be considered an attack against them all; and consequently they agree that, if such an armed attack occurs, each of them in exercise of the right of individual or collective self-defence . . . will assist the party . . . by taking forthwith, . . . such action as it deems necessary, including the use of armed force, to restore and maintain the security of the North Atlantic area."

27. Speech by Bill Hayden, Minister for Foreign Affairs, to the Rotary Club of Brisbane Mid-City (Feb. 21, 1986).

28. "The inevitable difficulty with such a broadly-expressed agreement [article 4] is that the parties to it are free to interpret the agreement in accordance with their own perception of their individual interest. What New Zealand wanted from the United States was an unconditional guarantee of military assistance." Speech by David Lange, Prime Minister of New Zealand, to Otago University Foreign Policy School, (May 17, 1985) [hereinafter Otago speech], *quoted in* 35 N.Z. FOREIGN AFF. REV., Apr.-June 1985, at 10-11.

29. "We do not ask the United States to defend New Zealand with nuclear weapons." Address by David Lange to the Canterbury Labour Regional Council, Christchurch, (Sept. 27, 1985) [hereinafter Canterbury speech], *quoted in* 35 N.Z. FOREIGN

serves as a warning signal to potential aggressors that the United States may regard the Pacific region as within its area of concern and that its range of possible responses to aggression in the area (including military responses) must be weighed.

This has led to labelling ANZUS as a "deterrent" treaty, justifying interpreting it in such a way as to give credence to this characterisation.[30] Starke, however, points out that while the United States regarded ANZUS as capable of "serving their global strategy of deterrence," the parties "insisted that the role assigned to it was purely defensive."[31] This appears to be another area of differing assumptions as to the basic nature of the treaty.

A striking characteristic of ANZUS is the imbalance between the parties. This is most obvious when considering the practicalities of the commitments under article IV. It is also crucial when considering the various claims throughout the incident.

An important textual point about the treaty is that there is no direct reference to nuclear power, or, in particular, to nuclear powered or armed vessels. Although the treaty was concluded at the commencement of the nuclear age,[32] it can be argued that it was framed as a conventional military alliance,[33] even though that characterisation is not now accepted by the United States. In any event, that ANZUS does not directly address the divergence of opinion as to the relevance of the treaty to the nuclear realities raises the question of how it should be interpreted. It has been characterised as "a broad constitutional document"[34] that was never intended to be subject to precise legal analysis and thus is open to a broad interpretation reflecting changed circumstances in the global political situation. The ANZUS Treaty is declaratory in style (in conformity with formalising an existing relationship), and many phrases can be described as politically worded rather than as defining certain legal concepts. The assumption was one of continuing sharing of values within the relationship and of a continued mutuality of interests which made precise legal formulation unnecessary. A similar situation occurred in the litigation between

---

AFF. REV., July-Aug. 1985, at 34. This approach is consistent with New Zealand's anti-nuclear policy.

30. For a discussion on ANZUS as a deterrence treaty see Note, *supra* note 3, at 464-66.

31. J. STARKE, *supra* note 5, at 228.

32. The exploding of an atomic device by the Soviet Union in 1949, following from the use by the United States of atomic weapons at the end of World War II shows that atomic warfare was a possibility at the time ANZUS was concluded.

33. "Unlike NATO, the ANZUS Alliance has in the past been regarded by the Treaty partners as a conventional alliance, not a nuclear alliance." Los Angeles speech, *supra* note 6, at 5.

34. J. STARKE, *supra* note 5, at 76.

Nicaragua and the United States,[35] where Nicaragua accused the United States of violating the terms of the Treaty of Friendship, Commerce and Navigation between itself and the United States. Countries must address the dilemma presented between the securing of political alliances in treaty form and the possibility of their subsequent subjection to judicial interpretation.

The crux of the present incident between the United States and New Zealand is the impact of the current divergence of interests on the interpretation of a treaty of alliance. Should the treaty be liberally interpreted so as to apply to the present nuclear context, or should it be confined through a strict textual analysis to the specified duties in a conventional military situation? Alternatively, should the text of the treaty prevail in preference to the practices and assumptions of the parties that have emerged since the conclusion of the treaty? On the one hand, the treaty is the only formal expression of those expectations, on the other, practices by all parties in the intervening years cannot be easily dismissed.

The military environment is not the only background feature that has dramatically changed since 1951. The regional involvement of the parties has also shifted, giving rise to changed perceptions of the respective parties' interests in the area. These changes are well known and complex, the United States has been first embroiled in and then retreated from the Southeast Asian region, while in 1979 it formally recognised the People's Republic of China. Australia and New Zealand have increasingly accepted that their futures are tied to those of other countries within the Pacific region.[36] ANZUS is not, and never has been, Australia's and New Zealand's only defence commitment; while their other defence commitments were first related to either their membership in the British Commonwealth or to their willingness to enter into other security relationships with the United States,[37] in the 1970's Australia and New

35. Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14, 125 (Judgment of June 27).

36. In THE DEFENCE QUESTION (New Zealand Government Discussion Paper Issued as Background to the Public Submissions on Future New Zealand Strategic and Security Interests)(1985) the key elements in New Zealand government policy included a statement that "New Zealand's security is indissolubly linked to the stability of the South Pacific" and that the government "intended to forge greater self reliance in . . . defence policy" (Id. at 4). The NEW ZEALAND WHITE PAPER ON DEFENCE, published in February 1987 focuses on New Zealand's role in the South Pacific region. In the words of Mr. David Lange, "It's time to put New Zealand's interests first in the context of the South Pacific region." Sydney Morning Herald, Feb. 27, 1987, at 5, col. 2.

37. The Preamble to the ANZUS Treaty recognizes that "Australia and New Zealand as members of the British Commonwealth of the Nations have military obligations outside as well as within the Pacific Area." The conclusion of ANZUS was the first time Australia and New Zealand had made a formal defence commitment separate from the United Kingdom, and as such its significance to them cannot be overestimated. Both joined SEATO, the South East Asia Collective Defence Treaty, Sept. 8, 1954, 209

Zealand had to formulate their responses to changed United States' expectations as enunciated in the Guam doctrine.[38] In that doctrine the United States made it clear that it expected its allies to make appropriate regional defence efforts on their own behalf and initiative, and that they could not and should not rely solely on the United States for their defence.[39] New Zealand changed its security perceptions at least partly in response to this and directed more attention towards the South Pacific region. But now, the divergence of opinion between New Zealand and the United States has emerged as to what strategy constituted the most appropriate defensive stance for this region, one which has not traditionally been central to the United States' thinking.

One point of difference of opinion with respect to this area is the viability and desirability of the creation of a nuclear free zone in the Pacific. Implementing such a zone was not a new proposal in the 1980's, but previously, any such proposal was rejected by Australia, partly because it considered it incompatible with its ANZUS obligations and, therefore, a threat to the alliance.[40] In 1983, however, Australia itself took the initiative which led to the conclusion of the South Pacific Nuclear Free Zone Treaty.[41]

---

U.N.T.S. 28, and they also joined Singapore, Malaysia, and the United Kingdom in the Five Power Defence Pact, Apr. 16, 1971, for the defence of Singapore and Malaysia. *See generally,* Exchange(s) of Letters Constituting an Agreement Relating to the Five Power Defence Arrangements for Malaysia and Singapore, Dec. 1, 1985, New Zealand-Malaysia, Dec. 1, 1971, 885 U.N.T.S. 147, New Zealand-Singapore, Dec. 1, 1971, 885 U.N.T.S. 171.

38. The Guam Doctrine was announced at Guam on July 25, 1969. It was amplified in subsequent United States foreign policy statements. *See* Harper, *The American Alliance in the 1970's*, in AUSTRALIA IN THE NEW WORLD ORDER 1 (1976).

39. New Zealand's government has asserted that its security concerns changed direction during the 1970's at least partly as a result of the United States' stated policy. "Then during the 1970's it became clear that the U.S. expected its allies to make appropriate regional defence efforts on their own behalf and the focus of New Zealand's military effort accordingly shifted to the South Pacific." Otago Speech, *supra* note 28, at 11.

40. In 1963 the ANZUS Council members "opposed the denuclearisation of Asia and the South West Pacific area." Prime Minister Menzies of Australia was most firmly resistant to any such proposal, precisely because "this would preclude the use of the nuclear deterrent by the United States in defence of Australia." J. STARKE, *supra* note 5, at 230. The Labour government of New Zealand again promoted the concept from 1972 to 1975 but again it was not acted upon. Lange, *New Zealand's Security Policy*, 63 FOREIGN AFF. 1009 (1985).

41. The South Pacific Nuclear Free Zone Treaty was opened for signature at the South Pacific forum on August 6, 1985 (Hiroshima Day). It was immediately signed by eight countries: Australia, New Zealand, Fiji, Tuvalu, Niue, Cook Islands, Western Samoa and Kiribati. Papua New Guinea signed on September 16. For the text see 24 I.L.M. 1440, 1451-54 (1985). The treaty came into force on December 11, 1986. "For Australia, the initiator of the treaty, it demonstrated a commitment to reducing the spread of nuclear weapons. For New Zealand, the treaty reflected deep-seated opposition to nuclear activities of all kinds." 35 N.Z. FOREIGN AFF. REV., July-Sept. 1985, at 4. *See also* Note, *In Furtherance of a Nuclear Free Zone Precedent: The South Pacific Nuclear Free Zone Treaty*, 4 B.U. INT'L L.J. 387 (1986).

This treaty includes three protocols; the first can be ratified by nuclear weapon countries with metropolitan territories within the zone (United States, Britain and France) while the second and third are open to those three countries, plus the Soviet Union and the People's Republic of China. The effect of ratifying these protocols is that the nuclear countries would agree not to use or threaten to use any nuclear explosive devices in the zone and would not test any nuclear devices within the zone. The treaty expressly preserves the freedoms of the high seas under international law and allows each party to make its own decisions with respect to visits by nuclear powered or armed vessels. New Zealand did not attempt to impose its policies upon the other states in the Pacific region through the treaty, which would have further provoked United States anger. Despite this awareness of the United States' position and hopes that freedom of individual choice on the question of port access would be regarded favourably by the United States, the United States (along with the United Kingdom and France) has not become a party to any of the protocols; the Soviet Union and the People's Republic of China have signed protocols two and three.[42]

The United States' decision to remain aloof is apparently influenced by fears that the treaty may create a dangerous precedent which will influence other elements of the Western Alliance, notably Scandinavian, but it has disappointed both Wellington and Canberra.[43] Comment in both countries has referred to the propaganda victory thus scored by the Soviet Union in the Pacific region at a time when the United States is becoming increasingly concerned about Soviet activities there,[44] and there is general fear of destabilisation in the area.

A consequence of the changed military and geopolitical scene is that the parties' expectations of ANZUS no longer necessarily coincide, even if they did in 1951, which is also debatable. The underlying question of the incident is whether ANZUS should be interpreted as a conventional military security agreement or whether it must be construed as part of the United States global deterrent system. Only if it can legitimately be seen as the latter will it con-

42. McIntosh, *The Pacific Nuclear Not-So-Free Zone*, Guardian Weekly, Apr. 19, 1987, at 8, col 4. The Soviet Union ratified the South Pacific Nuclear Free Zone Treaty on January 29, 1988, received by the South Pacific Bureau for Economic Cooperation, April 21, 1988. News Release, Minister for Foreign Affairs and Trade, May 26, 1988.

43. Sydney Morning Herald, Feb. 6, 1987, at 3, cols 1-2 reports a speech by Mr. Hayden, Minister for Foreign Affairs, in which he was critical of the United States' stance and quotes Mr. David Lange that "New Zealand deeply regrets that the interests of the South Pacific region do not appear to have been given more weight by the U.S. government in reaching its present position."

44. This has been suggested as a reason why the United States should also sign the Protocols. "It provides the Soviets with a propaganda bonanza in the South Pacific." Democratic Rep., Mr. Stephen Solarz, *quoted in* McIntosh, *supra* note 42, at 9.

tinue to have great significance for the United States and, apparently, the United States has been prepared to sacrifice the tripartite nature of the alliance in order to assert this interpretation of the agreement.

### B. The Incident

The incident itself arose over conflicting claims regarding obligations accepted by the parties under the treaty. These claims relate to the access to New Zealand ports of nuclear powered or armed vessels. The United States has a policy of refusing to deny or confirm whether its visiting warships are either so powered or armed. The United States also regards visits by its ships to Australia and New Zealand as a right conferred by the ANZUS Treaty which is essential to that treaty's effectiveness.[45] New Zealand, under its Labour Government, denies access to its ports to any ship that is not confirmed as nuclear free.

Although the present incident erupted in 1984, this is not the first time that New Zealand's anti-nuclear stance has caused tension between itself and the United States, and neither has this always been in the limited context of port access. The incident did not arise suddenly without warning or indication of the respective claims.

In 1963, for example, the New Zealand government formally decided not to permit the storage, testing or manufacture of nuclear weapons on New Zealand soil.[46] In 1969, the government of Prime Minister Holyoake objected to the entry of United States nuclear powered warships into New Zealand because of the lack of any American legislation providing for compensation in the event of an accident.[47] The immediate incident has not arisen unexpectedly, or in a way that the parties could not have predicted. Indeed the situation is one that has been previously faced by the ANZUS parties. Prime Minister Lange has described the New Zealand popular awareness of the nuclear threat as growing in response to the French tests in the South Pacific region during the early 1970's. These tests led to New Zealand's (along with Australia's) filing an application before the International Court of Justice, seeking a dec-

45. Mr. Paul Wolowitz, United States Assistant Secretary of State for East Asian and Pacific Affairs described the ship visits as going to the "heart of the alliance" and their prohibition as "greatly diminishing" the military co-operation with New Zealand. Cited by Mr. Norrish, Secretary of Foreign Affairs, to the Davonport Rotary Club (Feb. 25, 1985), 35 N.Z. FOREIGN AFF. REV., Jan.-Mar. 1985, 26, at 30.

46. Discussed by Mr. Graham Ansell, New Zealand High Commissioner to Australia, N.Z. FOREIGN AFF. REV., Jan.-Mar. 1985, at 48. Mr. Lange stated that New Zealand has never permitted storing of nuclear weapons on its territory. Lange, *supra* note 40.

47. Discussed by McLachlan, *supra* note 3, at 278.

laration that the tests were contrary to international law.[48] The same Labour government of that time also banned port visits between 1972 and 1975. However in the 1980's, the National government, under Robert Muldoon, accepted the necessity for U.S. ships to make port visits and was of the opinion that the ANZUS treaty formed part of the overall fabric of nuclear deterrence.[49] In 1982 Muldoon concluded a Memorandum of Understanding on Logistic Support[50] with the United States with the aim of ensuring New Zealand an uninterrupted supply of various U.S. weapon systems and other logistic support. The Memorandum set forth the policies and guidelines for the mutual provision of logistic support. New Zealand agreed to provide any defence articles or services the United States might seek including the refitting and maintenance of United States ships, aircraft and equipment in New Zealand. This provision (paragraph sixteen of the Memorandum) was subject to the laws and regulations of New Zealand. This arrangement was concluded between the two states in the expectation that it would be complied with, although Memorandum of Understanding are not regarded as formal treaty arrangements. The arrangement provided for the future sharing of military commitments and thus gave the United States legitimate grounds for expecting that New Zealand would act accordingly. There are provisions for the monitoring of the arrangement and for its implementation.[51] The agreement was to remain in force for five years and could then be renewed by mutual consent. Paragraph 21 allows for termination by either party on not less than 180 days notice.

Lange has acknowledged that such commitments had made New Zealand "part of the global projection of American nuclear power"[52] and recognised that that encompassed the importance of New Zealand to the United States. However, on other occasions, he

48. Nuclear Tests Cases, (Austl. v. Fr.) 1974 I.C.J. 253 (Judgment of Dec. 20), (N.Z. v. Fr.) 1974 I.C.J. Rep. 457 (Judgment of Dec. 20).

49. "In 1983 the last National Party Minister of Foreign Affairs told a foreign policy seminar that it was vital for New Zealanders to understand "why New Zealand's defence, in the last resort, must be the nuclear umbrella provided by the United States under the ANZUS treaty." Canterbury speech, *supra* note 29, at 32. However, this Foreign Minister also accepted that this did not make New Zealand a nuclear country and on other occasions asserted that "ANZUS is not a nuclear alliance." Lange, *supra* note 40.

50. Memorandum of Understanding Between the United States and New Zealand, May 13 and June 21, 1982. T.I.A.S. 10,542. *See* R. THAKUR, *supra* note 10, at 39.

51. Paragraph 17 provides that the United States and New Zealand will establish joint machinery for the regular review of equipment, plans and programs and Paragraph 18 provides that review meetings will be held at least once a year and that there will be a central point of contact for implementation.

52. "Our importance lies in the fact that New Zealand has to some extent in the past been part of the global projection of American nuclear power which underpins the deterrence strategy." Canterbury speech, *supra* note 29, at 32.

has asserted that the ANZUS alliance has always been regarded as a conventional military alliance and not a nuclear one.[53]

Also in 1983, the Australian Labour government under the newly elected Bob Hawke reviewed the position of ANZUS in Australia. This led to a full reappraisal of the alliance at the thirty-second ANZUS Council meeting, which concluded that ANZUS remained a valuable alliance, with the Council available as a forum for the exchange of views and the clarification of government positions,[54] again boosting the assumption that the relationship would continue.

In 1984, a General Election was called in New Zealand. The Labour Party's election manifesto included the commitment to make New Zealand a nuclear free zone. In July 1984, the Labour government came to power. It is important to realise that the nuclear issue formed part of the government's election mandate; it is not an arbitrary or quixotic action by an undemocratic government. The 1984 ANZUS Council (the thirty-third, and as events have turned out, the last for the foreseeable future) was held immediately after the election but before the new government had assumed power. This meeting confirmed "the necessity of access to allied aircraft and ships to the effectiveness of the alliance".[55] At a joint press conference subsequently held by the Australian Foreign Minister Bill Hayden and then United States Secretary of State George Shultz, the latter asserted that there was little in ANZUS that would need renegotiation despite the change in New Zealand's government.

Indeed, for a while there seemed little need for renegotiation. Air and sea exercises between the ANZUS States and Malaysia, Singapore, and the United Kingdom took place as scheduled before the confrontation between the United States and New Zealand occurred. Throughout the final months of 1984 the New Zealand government reiterated that its policy was anti-nuclear, not anti-American or anti-ANZUS. Lange visited the United States to pres-

53. *See supra* note 33. It is noticeable that the Canterbury speech was made to a New Zealand audience while this one was to an American one.

54. The ANZUS Council was established under Article VII of the treaty. *See* J. STARKE, *supra* note 5, at 151-155. The thirty first ANZUS Council meeting had recognised the importance of access of United States' ships to the ports of its treaty partners as a critical factor in its efforts to carry out its responsibilities under the treaty. *31st ANZUS Council Meeting Communique*, 53 AUSTL. FOREIGN AFF. REC. 399 (1982). This was reiterated in 1983 at the thirty second Council meeting, after the review of ANZUS by the Australian Labour Government, 54 AUSTL. FOREIGN AFF. REC. 512 (1983).

55. The Thirty-third Council meeting was held in Wellington on July 16, 1984. The election had been held on July 14. 55 AUSTL. FOREIGN AFF. REC. 484 (1984). Thus, the ANZUS Council meetings of 1982, 1983 and 1984 all reconfirmed the importance of the access of United States' ships to ANZUS parties' ports.

ent his government's policy and to seek a way to reconcile the two governments' opposing views. However, he always made it clear that the policy itself was not open to negotiation. Although it had been hoped that a solution would be found before the 1985 Council meeting, in late January 1985, the matter moved to a climax. New Zealand refused access to its ports to the U.S destroyer Buchanan, although its presence in the region was due to participation in ANZUS military exercises. This was done as the government could not satisfy itself that it was not nuclear armed. The United States retaliated in February by reducing defence and intelligence cooperation with New Zealand and withdrawing from a planned maritime exercise, Sea Eagle.[56]

This process continued throughout 1985 with the undeclared United States strategy appearing to be to curtail its long established defence relationship with New Zealand, until the latter's government reversed its position or a new government was elected. The 1985 Council meeting was cancelled. There were calls in the United States Congress to take economic measures against New Zealand but the Reagan Administration refused to do this. The New Zealand Prime Minister and his Deputy traveled extensively in America and Europe to explain the New Zealand position and to continue an attempt at compromise. None appeared possible, and, in December 1985, the government presented to the New Zealand Parliament the text of the New Zealand Nuclear Free Zone, Disarmament and Arms Control Bill, the bill that when passed gave legal effect within New Zealand to its government's policy. It had been anticipated that the bill would be promulgated during August 1986, but this did not take place, apparently because of pressure upon Parliamentary time. The bill eventually became law on June 4th, 1987.

The Act establishes a nuclear free zone within New Zealand to promote and encourage an active and effective contribution by that country to the essential process of disarmament and arms control".[57] Its provisions that are most relevant to the present incident are section 4, which establishes the New Zealand nuclear free zone,[58] and section 9, covering the entry of vessels into New Zealand internal waters and conferring responsibility upon the Prime Minister to grant approval for such entry. Although the Prime

56. On Feb. 5, 1985, the ANZUS maritime exercise Sea Eagle was cancelled after the withdrawal of the United States. 56 AUSTL. FOREIGN AFF. REC. 131 (1985).

57. The Act is entitled "An Act to Establish in New Zealand a Nuclear Free Zone, to Promote and Encourage as Active and Affective Contribution by New Zealand to the Essential Process of Disarmament and International Arms Control." For the text, see 1986 AUSTL. INT'L L. NEWS 122.

58. Under section 4, the nuclear free zone comprises the land, territory, and inland waters of New Zealand, internal waters, territorial sea and all the relevant airspace.

Minister is to have regard to all relevant advice and information, including that relating to New Zealand's security and strategic interests,[59] approval can only be granted "if he is satisfied that the warships will not be carrying any nuclear device upon their entry into the internal waters of New Zealand." This phraseology was an attempt to make the legislation acceptable to the United States, for the responsibility is not imposed upon the captain of a warship, which would have led to the automatic exclusion of the warships from any country with a "refuse to deny or confirm policy." "The anti-nuclear legislation was carefully drafted to ensure that it is not automatically made operational by the neither confirm not deny policy regarding the presence of nuclear weapons on United States ships."[60] Section 11 absolutely prohibits the entry of any ship which is wholly or partially propelled by nuclear power. Section 10 does the same for aircraft.

Despite visits from representatives of the United States Congress to New Zealand in an attempt to resolve the differences between the governments,[61] the split between the two countries eventually came on June 27, 1986. During his five nation tour of the Pacific region, then Secretary of State George Shultz announced that New Zealand's actions had effectively abrogated the ANZUS alliance and that, accordingly, the United States was suspending its security obligations to New Zealand under the ANZUS Treaty until corrective measures were made.[62] New Zealand Prime Minister Lange, accepted that there was no further point in attempting to resolve the dispute, but maintained that New Zealand would not leave ANZUS. The ANZUS Treaty was thereby reduced to a bilateral relationship between the United States and Australia.[63]

---

59. Section 9 is crucial to the incident. It reads:

> (1) When the Prime Minister is considering whether to grant approval to the entry of foreign warships into the internal waters of New Zealand, the Prime Minister shall have regard to all relevant information and advice that may be available to the Prime Minister including information and advice concerning the strategic and security interests of New Zealand.
>
> (2) The Prime Minister may only grant approval for the entry into the internal waters of New Zealand by foreign warships if the Prime Minister is satisfied that the warships will not be carrying any nuclear explosive device upon their entry into the internal waters of New Zealand.

60. THE DEFENCE QUESTION, *supra* note 36, at 11.

61. Eleven members of the House of Representatives Armed Services Committee led by Representative Sam Stratton, Representative Stephen Solarz, Chairman of the House Foreign Affairs Committee and Congressional delegation led by Senator David Boren all visited New Zealand in early 1986 to discuss the dispute. 36 N.Z. FOREIGN AFF. REV., Jan.-March 1986, at 14.

62. 36 N.Z. FOREIGN AFF. REV., Apr.-June 1986, at 7; Wilenz, *A Cruise Through the Islands*, Time, July 7, 1986, at 38.

63. However, on April 25, 1989 Mr. Lange indicated that New Zealand might not continue in the military alliance. In a speech at Yale University he suprised Australian and American officials by announcing that he was considering a formal withdrawl by

In examining the context of this incident[64] several factors must be stressed. The actual incident can be seen as a crisis for the United States in its relations with its allies and as a testing area for the basis of any future collaboration. The three parties have vastly disparate resources available to them and the power differential is immense; factors which also characterise the United States' relations with all its other allies. At present, while the three ANZUS states share the fundamental community value of maintenance and promotion of world peace and stability, their expectations as to how this may best be achieved differ. The controversy between New Zealand and the United States is essentially a bilateral dispute set within a tripartite relationship so that the expectations of the third party, Australia, are significant. While other countries are interested in its outcome, the dispute is not likely to expand to involve other parties. Third parties recognise their lack of status under the terms of the treaty and, further, may not want to be seen as to be expressly "taking sides". The incident is thus contained, especially as the United States has not instituted any economic measures against New Zealand.

## II. LEGAL EFFECT OF THE ANZUS TREATY

The first relevant question is whether the ANZUS Treaty is a legally binding treaty which creates legal rights and obligations between the parties, or whether it is no more than a political alliance in treaty form but constituting a non-legal or "gentleman's agreement." [65] Such an agreement has been characterised as "soft law"[66] and many include "norms of various degrees of cogency, persuasiveness and consensus . . . but do not create enforceable rights and duties."[67] To create a legally binding treaty the parties must intend to establish legal relations and not merely to formulate expectations of cooperation and guidelines for standards of mutually appropriate behaviour. The Vienna Convention defines treaties in terms of an agreement "governed by international law"[68] and does not specify that the agreement contain legal right and obligations. There is no

---

New Zealand from the ANZUS military alliance. FACTS ON FILE, Jan.-June 1989, p. 336, col. A I.

64. A. DAVID, THE STRATEGY OF TREATY TERMINATION 58 (1975) stresses the need to look at the context of any treaty termination.

65. Terminology used by Bothe, *Legal and Non-Legal Norms-A Meaningful Distinction in International Relations*, 11 NETH. Y.B. INT'L L. 65 (1980).

66. For the vast literature on "soft law" see, e.g., Gruchalla-Wesierski, *A Framework for Understand "Soft Law"*, 30 MCGILL L.J. 37 (1984); Tammes, *Soft Law*, in ESSAYS OF INTERNATIONAL AND COMPARATIVE LAW IN HONOUR OF JUDGE ERADES (1983), and other works referred to therein.

67. Baxter, *International Law in "Her Infinite Variety,"* 29 INT'L & COMP. L.Q. 549 (1980).

68. Vienna Convention, *supra* note 25, art. 2(1)(a).

required form. The treaty form can be used for both binding and nonbinding agreements. This definition does not assist in determining when a legally binding treaty has been concluded. It has been suggested that an appropriate test is whether "the parties are making some serious promises or undertakings"[69] which are intended to be acted and relied upon by the parties. The language of the treaty may indicate whether the parties did in fact have such intentions. Expressions such as to assist "by such action as it deems necessary"[70] suggests the lack of any intention, as does the omission of any enforcement measures. It has been concluded on this basis that NATO is not a legal agreement, and it has been suggested that "political treaties" form a distinct category of "soft law." "If a State refuses to come to the aid of another under the terms of an alliance, nothing can force it to. . . . Similarly if a state changes its policy and leaves the alliance, only political or economic arguments can bring about a reversal of the state's position."[71] On this argument, ANZUS would be a political treaty as such, not subject to the rules of treaty law as laid down in the Vienna Convention. As already stated, its provisions are imprecisely worded and give a considerable amount of discretion to the parties: the Pacific area is nowhere defined, and the parties only declare they will act to meet the common danger. The only specified obligation is to consult and even this obligation arises only in subjectively determined circumstances. A non-legal agreement can be terminated at will.

However, balanced against this view is the commitment to permanency included in the treaty, although this, too, can be seen as a political expression. The parties have discussed the crisis in ANZUS in terms of suspension or termination of security obligations under the treaty and have employed treaty language. This article will follow the approach and analyse the incident in terms of treaty law. However, it may be that the conclusion will be in favour of viewing such an agreement as "soft law" and inherently unsuited to treaty analysis.

### A. Claims of the Parties

#### 1. United States Claims

The United States claimed that it abrogated the treaty with respect to New Zealand. There can be no question as to whether the

69. Widdows, *What Is an Agreement in International Law?*, 50 BRIT. Y.B. INT'L L. 117 (1979).

70. NATO Treaty, *supra* note 5, article 5. Fawcett concludes NATO is not a legally binding agreement for "[a]n obligation cannot properly be called a legal obligation unless its existence and extent are determinable judicially." Fawcett, *The Legal Character of International Agreements*, 30 BRIT. Y.B. INT'L. L. 381, 392 (1953).

71. Baxter, *supra* note 67, at 550-51.

treaty itself has terminated since both Australia and the United States assert that they are still bound by it.[72] Neither the United States nor New Zealand have denounced the treaty; indeed both have evidenced a desire for its continued effectiveness. Until the abrogation of the treaty, the United States was earnestly making demands for performance and was pursuing strategies to coerce performance. It was not until it seemed that these demands and strategies were unsuccessful that the unilateral action of suspension was taken. It seems accurate to regard the action as suspension, as there appears to be an assumption that a change of government or government policy could restore the relationship.[73] In 1984, at the time of the election of the Labour government, then Secretary of State Schultz did refer to the possibility of renegotiation of the treaty, although he did not think that there was much that actually needed modification. The Labour government has repeatedly stressed that its nuclear policies are not open to negotiation and, at least in public, this idea was abandoned. Thus, at this point there do not seem to be claims for amendment of the treaty.

The United States' claims must center around the situations whereby one party can legally suspend the operation of a treaty with respect to another party. The United States has not specified any legal grounds for its action, so the claims discussed are necessarily implicit and are raised as ones that might support its actions under international law. It is the reactions to these implicit claims that must be assessed to determine the state of the norms of international law with respect to treaty suspension.

There is no termination or suspension clause in ANZUS so that all claims must be analysed under general prescription.[74] The appropriate rules have been fully analysed elsewhere[75]; this article will survey the possible claims and some of the arguments that support them. The analysis will not attempt to determine the legality of the protagonists' behaviour in terms of international prescription, but rather to determine the status of the underlying norms in current international law.

The implicit claim of the United States relates to treaty interpretation, and is a demand for performance in conformity with the expectations it feels are embodied in the terms of the agreement. It

72. Vienna Convention, *supra* note 25, article 55 states that a multilateral treaty does not terminate by reason only of the fact that the number of parties falls below the number necessary for its entry in force. ANZUS came into force on the deposit of the instruments of ratification. ANZUS Treaty, art. IX, 3 U.S.T. 3421, 3424, T.I.A.S. No. 2493, at 4.

73. Then Secretary of State Schultz announced the abrogation of the treaty until "corrective measures were made." *See* 36 N.Z. FOREIGN AFF. REV., Jan.-March 1986, at 14.

74. These mainly rest upon the Vienna Convention, *supra* note 25.

75. McLachlan, *supra* note 3; Note, *supra* note 3.

resists what has been called "unilateral reinterpretation of the treaty by New Zealand."[76] As stated, nowhere does the ANZUS treaty give a specific right of access to the ships of one party to the ports of another party. The question, therefore, is whether this right can be read into the treaty or whether it can only be made by reference to subsequent practice of the parties since the conclusion of the treaty, which remains independent of the treaty. States have sovereignty over their internal waters,[77] so this assertion is one of waiver of sovereignty. It could be argued that the bestowal of such a right must be made explicitly, and that waiver of sovereignty cannot be lightly assumed; however, entry into a security treaty involves other derogations from sovereignty and the overriding goal must be to make the treaty regime effective. Such a treaty should not be given a narrow literal meaning but one that supports the objects of the alliance as identified by the parties both through the text of the treaty and their subsequent behaviour.

Inevitably, the United States' allegation that failure to allow access to its ships constitutes nonperformance of the ANZUS Treaty entails a polarisation of views as to the preferred approach to treaty interpretation.[78] New Zealand, the party allegedly failing to perform the treaty, will find its arguments best supported by a strict textual approach which rests upon a literal wording of the text. By contrast, the United States asserting its right of abrogation, must favour a purpose-oriented approach that looks to the spirit, aims and purposes of the treaty, as evidenced by the text and its social and political context.

Ironically, a similar argument was used by Nicaragua in its case against the United States[79] with respect to the treaty of Friendship, Navigation and Commerce between the two countries. Its first claim under that treaty was not with respect to breach of any particular provision, but rather that the United States' conduct had deprived the treaty of its object and purpose and emptied it of any real content. This claim was based on a duty on countries which are parties to a treaty not to impede the due performance of the treaty. Hence, here the United States can claim that New Zealand has

76. "The United States considers that New Zealand has unilaterally reinterpreted its obligations under the ANZUS treaty and for that reason it has 'suspended military cooperation between the two countries.' " Speech by Bryce Harland, New Zealand Permanent Representative to the United Nations, to the Washington Chamber of Commerce, Apr. 23, 1985. 35 N.Z. FOREIGN AFF. REV., Apr.-June 1985, at 27.

77. Geneva Convention on the Territorial Sea and Contiguous Zone, April 29, 1958, 516 U.N.T.S. 20, arts. 1, 2(1). United Nations Convention on the Law of the Sea, Oct. 7, 1982, UN Doc. A/Conf.62/122, *reprinted in* 21 I.L.M. 1261 (1982).

78. *See* Chinkin, *Nonperformance of International Agreements*, 17 TEX. INT'L L.J. 387 (1982).

79. Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14, 125 (Judgment of June 27).

made the ANZUS treaty ineffective and thus deprived it of any meaning. The Court held that certain acts of the United States did fall into this category,[80] and thus upheld the possibility of such claims. This claim rests upon the object and purpose of the ANZUS treaty, which will be considered below.

Since the ANZUS treaty has no article providing for port access, any implied claim of breach of a particular provision must rest upon article 2. Article 2 obliges the parties to "maintain and develop their individual and collective capacity to resist armed attack" through effective "self help and mutual aide". No precise means of doing this are specified; it is a political alliance that is formed with political obligations ensuing. The legal obligation is to work together in good faith to achieve the political objective. However, there is emphasis on joint action through the concepts of mutual aid and collective self-defence. It is not up to one country to act alone or to decide singly what path to pursue to achieve the purposes of the treaty; and the overriding obligation of good faith during the performance process means that each party must act genuinely to promote these goals.[81]

Article 2 must be interpreted in accordance with the "ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose."[82] The context includes the preamble[83] of the treaty, which also specifies the object and purpose of the alliance: to "strengthen the fabric of peace in the Pacific area." The parties are under a duty to interpret the treaty in good faith.[84] Where the wording of the treaty is such that no precise undertakings are made, and where the parties genuinely hold opposing opinions as how best to achieve its objects, the good faith requirements of both performance and interpretation should at least ensure that they cooperate to attempt to reconcile their differences, and not proceed rapidly to abrogation.

Much has been written about the interpretation to be give to article 2.[85] Under article 31(3)(a) of the Vienna Convention of the

80. "[B]ut it does consider that there are certain activities of the United States which are such as to undermine the whole spirit of a bilateral agreement directed to sponsoring friendship between the two States parties to it." *Id.*, at 128.

81. Article 26 of the Vienna Convention, *supra* note 25, states that "[e]very Treaty in force is binding upon the parties to it and must be performed by them in good faith." Starke states that "the principle of good faith of parties to an alliance requires that each ally should make at least an honest judgment as to what it can and should do to develop and maintain its own capacity to resist attack, and to help others." J. STARKE, *supra* note 5, at 103.

82. Vienna Convention, *supra* note 25, at article 31(1).

83. *Id.* art. 31(2).

84. *Id.* art. 31(1).

85. J. STARKE, *supra* note 5, at 102; Note, *supra* note 3, at 469-72. Attention is focused upon the requirements of "mutual aid" and comparison is drawn with article 3 of the NATO treaty, *supra* note 5. Both writers conclude that "mutual aid" requires

Law of Treaties, the parties shall also take into account "any subsequent agreement between the parties regarding the interpretation of the treaty or its application by the parties." There have been many such agreements entered into by all three parties subsequent to ANZUS. However, these have generally been bilateral arrangements providing for more precise commitments than ANZUS itself.[86] The first question is whether all the bilateral agreements can be regarded as being "subsequent agreements between the parties," a difference that seems significant within a tripartite relationship. In a deliberately limited alliance,[87] it might be expected that any subsequent agreement that is intended to apply the original agreement should include all three parties; a separate bilateral arrangement suggests that the two parties in question were prepared to undertake additional mutual obligations, albeit within the framework of the alliance treaty. There has been a divergence of opinion as to whether the bilateral arrangements between Australia and the United States are totally independent of ANZUS, or whether they provide authoritative interpretations of the parties' expectations under ANZUS.[88] What is indisputable, however, is that the parties do not necessarily have the same mutual commitments; the tripartite relationship has already been reshaped by a series of bilateral agreements so that any two parties may have different obligations *inter se* than either one of them has with respect to the other. Bilateralism within ANZUS has long been accepted; what is different with the present position is that ANZUS itself is now only applicable bilaterally.

However, it is not only Australia that has concluded bilateral

---

that military facilities be made available, "even in the absence of a threat or armed attack." J. STARKE, *supra* note 5, at 106.

86. For bilateral agreements between the United States and Australia, see McLachlan, *supra* note 3, at 277. McLachlan, citing Ball, *supra* note 10, notes that "[a]lthough there is no public figure available, the number of agreements between the three ANZUS countries must come to many dozen - including both bilateral and tripartite agreements, as well as agreements with fourth and/or fifth parties." The Note, *supra* note 3, discusses the bilateral agreements between the United States and New Zealand. Note, *supra* note 3, at 468 n.74. Where the alliance treaty is so imprecise it is inevitable that the detailed working out of the relationship should be through subsequent agreements. Many Australian agreements with United States relate to the establishment of United States bases in Australia, notably those at Pine Gap and Nurrungar and the naval communications center at North West Cape. However, the United States' "profile in New Zealand is very low indeed," McLachlan, *supra* note 3, at 277.

87. The treaty makes no provision for any other parties and the first Council made a decision not to allow other governments to associate in its work. J. STARKE, *supra* note 5, at 174.

88. McLachlan rejects Starke's view that the bilateral arrangements transformed ANZUS into one involving an element of nuclear deterrence, and argues that these developments fall outside the scope of the treaty. McLachlan, *supra* note 3, at 277. The Note, *supra* note 3, rejects this view and argues that they constitute subsequent practice demonstrating the parties' intentions as to the treaty. Note, *supra* note 3, at 467-68.

agreements with the United States, New Zealand has done likewise, the most recent of which was the 1982 Memorandum of Understanding entered into by the then government of New Zealand. Change of government or government policy is not a justification for breach of an agreement, for any other principle would excessively threaten the stability of relationships promoted by the entering into of treaty arrangements. But did this Memorandum add obligations to those already incurred by ANZUS, or was it an understanding as to those commitments already undertaken? Since the Memorandum contains a termination clause, it appears that it must have done more that reiterate the ANZUS position. The parties undertook new security obligations that they recognised they might wish to relieve themselves of at some future date. The termination clause could not have been intended to terminate the obligations under the main treaty, which would be the only interpretation if there were no new obligations. The use of a Memorandum of Understanding is an accepted "soft law" form. Admittedly, New Zealand has acted contrary to this Memorandum. It has either breached it or has terminated it in accordance with its terms. It could be argued that within the bilateral agreement, announcement of a conflicting government policy constitutes notice of termination.[89] Seven months elapsed between the election of the Labour government and the barring of the USS Buchanan from New Zealand's ports, which is more than the requisite notice under the Memorandum. In any case, even if New Zealand is deemed in breach of this agreement, it need not necessarily follow that it has also breached ANZUS.

Subsequent practice of the parties is also relevant in interpreting a treaty,[90] although this must be distinguished from subsequent practice to amend a treaty.[91] The practice within ANZUS has been to conclude additional agreements where clarification has been needed, or where specific undertakings have been made. Daughton argues that the subsequent practice[92] has been to allow port access and thus no additional agreement on this precise issue has ever been thought necessary; practice demonstrates the parties regard it as

89. *But see*, Vienna Convention, *supra* note 25, article 67 which states that termination, withdrawal from or suspension of a treaty done in accordance with its terms "shall be carried out through an instrument communicated to the other parties." The United States is not a party to the Vienna Convention and Memoranda of Understanding are almost certainly not subject to the Vienna Convention, but this rule appears practicable to avoid claims of termination in the absence of any communication and to provide clarity where there is a termination clause.

90. Vienna Convention, *supra* note 25, article 31(3)(b).

91. A provision allowing for amendment of a treaty by subsequent practice was rejected at Vienna. I. BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 623-30 (1979).

92. Note, *supra* note 3, at 467-68.

part of ANZUS. However, as has been seen, subsequent practice has not been so neatly consistent. There have been other occasions when access has been denied, although the prohibitions were then protested by the United States which was not prepared to allow lack of access to become the accepted treaty interpretation through acquiescence.

ANZUS is not merely a tripartite treaty; it also has an institutional aspect. The treaty provides for the ANZUS Council, which meets annually and which serves as a forum for the discussion of matters arising directly under the treaty and other matters of concern. However, ANZUS has none of the elaborate institutional trappings of other organisations. It has no permanent staff, secretariat or headquarters. There are no ANZUS standing forces. The Council meets in the respective capitals of its members and comprises their Foreign Ministers or Deputies. There are no formalities that must be observed at these meetings. It is hard to describe ANZUS as an international organisation rather than as an alliance between governments.[93] Thus, the treaty is not so much a constitutional document setting out the powers of a separate legal entity as a statement of undertakings by the countries' parties. While the Council has implied powers to enable it to function effectively, such as the implied power to consult on matters far outside the Pacific region (for example, the Soviet intervention in Afghanistan)[94] it is not organic in character and thus has no power of binding decision making. However, there would be no reason why the parties' representatives at Council meetings should not discuss any matter they regard as appropriate and, equally, there is nothing to prevent their making binding commitments that they intend to be regarded as such during Council meetings.

Where an organisation has an international legal personality, separate from that of its members, and is functioning independently, then its constituent document can be legitimately interpreted so as to promote the objects of the organisation even against the wishes of some of its members.[95] ANZUS has not achieved this level of separateness from its members. The communiques issued after Council meetings are in the names of the governments, and the treaty constitutes a tripartite relationship, not an institution. However, the communiques are agreed to by the governments, and are

93. "[T]he Council does not have the organic character of a body such as the Security Council of the United Nations. . . . The Council has no supra-national powers." J. STARKE, *supra* note 5, at 154.

94. For example, the 1983 Council meeting like many others, included discussions on many matters outside the Pacific region, including UNCLOS, Kampuchea and the Middle East. 54 AUSTL. FOREIGN AFF. REC. 512 (1983).

95. Certain Expenses of the United Nations Case, 1962 I.C.J. 151 (Advisory Opinion of July 20).

therefore relevant to the treaty's interpretation. Article 31 of the Vienna Convention allows any "subsequent agreement" to be utilised in interpretation, not merely formal treaties. Thus, without having to determine whether these communiques are treaties, they are agreements as to the parties' opinion on the operation of the treaty. This represents a harder claim for New Zealand to respond to: the Council has reaffirmed the need for ANZUS, and in its last three meetings stressed the "necessity of access for allied ships and aircraft." Such statements do represent agreement as to the application of the treaty, and unequivocally support access.

The United States' action constitutes an implicit claim that its interpretation of the ANZUS treaty to mean that the mutual development of collective capacity to resist armed attack implies a right of access for its warships, must be accepted as the correct interpretation. Any refusal to do so and to act contrary to it constitutes a legitimate basis for its suspension of the treaty. One party to a treaty has no right unilaterally to terminate or suspend it with respect to another party, in the absence of an express provision, or unless the right can be implied from the nature of the treaty of the parties' intentions.[96] These exceptions do not apply in the face of the express provision of permanency in the ANZUS Treaty.[97]

The United States has not made explicit the basis for its act of suspension but there are only two grounds for suspension of a valid treaty contained within the Vienna Convention,[98] material breach by a party,[99] and *rebus sic stantibus*.[100] The claim of material breach rests upon the behaviour of one party contrary to the treaty which gives rise to the claim in other parties that they can exercise the option of suspension or termination of the treaty. The claim of *rebus sic stantibus*, on the other hand, normally rests upon some external change in circumstances[101] that has overwhelmingly trans-

96. Vienna Convention, *supra* note 25, article 56. *See* Widdows, *The Unilateral Denunciation of Treaties Containing No Denunciation Clause*, 53 BRIT. Y.B. INT'L L. 83 (1982).

97. ANZUS Treaty, *supra* note 2, article X states, "The treaty shall remain in force indefinitely."

98. This is discounting article 61 of the Vienna Convention, *supra* note 25, which allows for suspension or termination for supervening impossibility of performance.

99. *Id.*, art. 60.

100. *Id.*, art. 62.

101. The Note, *supra* note 3, discusses whether action by one of the parties can constitute fundamental change of circumstances. Article 62 of the Vienna Convention, *supra* note 25, does not refer to such a possibility and, as the author of the Note admits, most situations where the claim has been made have involved situations where the change is external to the treaty relationship. The Note discusses a single case where the claim was based on unilateral action by a party and concludes that the doctrine justifies the United States suspending the treaty and requesting renegotiation. Note, *supra* note 3, at 480-81. However, the United States' major claim is that the treaty as it stands supports the right of access, not that it wants the treaty renegotiated.

formed the obligations owed under the treaty. There are therefore quite distinct claims. Both are objective, but are subject to subjective formulation. The existence of the alleged altered circumstance of the material breach should, however, be capable of objective determination.

Under article 62 of the Vienna Convention, fundamental change of circumstances can be invoked as a basis for termination of, or withdrawal from a treaty, or for suspending its operation. It does not, however, state that its operation can be suspended with respect to some parties, but not others. In this respect, article 62 differs from article 60 on material breach, which specifies that a party specially affected by a breach can invoke the breach as a ground for its suspension between itself and the breaching party. This textual difference between the articles suggests that no right to suspend the operation with respect to only one party can be inferred under article 62. However, the basis for a claim of *rebus sic stantibus* is that an essential basis for the entry into force of the treaty has changed and that the obligations under the treaty have been radically transformed so that it is unfair to continue to demand performance. If this increased burden falls solely on one party, then that party should be able to invoke the provision with respect to another party with whom performance has been so changed.

During the lifetime of a treaty, parties will constantly keep their own and the other parties' performance under surveillance so as to assess the costs of that performance in monetary, social and political terms. If those costs become substantially different from those anticipated, then the party affected may well consider a claim of changed circumstance. The changed circumstances in this incident could be said to be the development of the United States' global nuclear deterrent policy. However, this was not unforseen in 1951 and further, could be used by New Zealand against the United States as the basis for a claim that its obligations are now radically different in that it has to allow access to nuclear powered or armed vessels. New Zealand, however, is not making any claim for termination of suspension of the treaty on this ground or any other, The United States might claim that the change of New Zealand government policy constitutes the fundamental change of circumstances; the obligation of provision of mutual aid means that the United States (along with the other parties) must act to develop its capacity for collective self-defence, an obligation made more onerous for it alone by the lack of port access. Whether it can be said to have "increased the burden of the obligations to be executed to the extent of rendering the performance something essentially different from that originally undertaken"[102] is more uncertain given the contin-

102. Fisheries Jurisdiction (U.K. v. Ice.), 1974 I.C.J. 3, 21 (Judgment of July 25).

ued availability of Australian ports for nuclear vessels, the few port visits to New Zealand that have in fact been made over the years,[103] and the continued availability of New Zealand ports for conventionally armed of powered vessels. It seems that on balance the restrictive requirements of article 62 have not been satisfied.

It might be that a more appropriate claim for the United States would have been that the advent of the nuclear age and the corresponding superpower tension has so transformed the global situation since 1951 that there has been a change of circumstances that supports an implied right to amend the treaty so that it provides for access of nuclear powered or armed vessels. Amendment is not within the ambit of the *rebus* doctrine although it has been suggested that it would make it a more useful and flexible principle if it were.[104] Again, the United States has not claimed the need for amendment; its claim is that the treaty already provides for its preferred interpretation, and must be performed. The United States originally claimed performance, not amendment or termination; suspension only ensued when performance was not forthcoming from New Zealand. In any case, amendment of a treaty is subject to the unanimity rule, and would have to be achieved through negotiation. This would be unlikely to be successful at this point.

An alternative analysis is to accept that political treaties, especially those establishing alliances, are of necessity especially amenable to claims of *rebus sic stantibus* and that change of policy by one of the parties constitutes this ground. This necessitates classifying political treaties as a distinct class of treaty, an approach not favoured by the Vienna Convention and likely to cause problems of definition, but one which might accord better with reality.[105]

The alternative basis for suspension of a treaty is material breach. This claim would be that New Zealand's actions have amounted to a material breach of ANZUS, which raises the right in the United States to exercise various options in response, including the right to suspend the operation of the treaty between itself and the breaching party. Article 60(2)(b) of the Vienna Convention entitles "a party specially affected by the breach to invoke it as a ground for suspending the operation of the treaty . . . in relations between itself and the defaulting State."

---

103. "With only four U.S. naval ships visiting New Zealand in 1981 and two in 1982 that would make a pretty thin relationship." New Zealand High Commissioner to Australia in Canberra, March 6, 1985. 35 N.Z. FOREIGN AFF. REV., Jan.-Mar. 1985, at 47-49. *See also* R. THAKUR, *supra* note 10, at 73, where the author concluded that New Zealand's withdrawal would cause only minimal damage to the political and strategic interests of the United States in the South Pacific.

104. Wheeler, *Towards the Peaceful Modification of Treaties: the Panama Canal Proposals*, 21 STAN. L. REV. 938 (1969).

105. *See* Baxter, *supra* note 67, at 550.

Since Australia has no nuclear capacity, it is not directly affected by New Zealand's ban, so the United States can regard itself as a party specially affected by this action. However, does New Zealand's behaviour constitute a material breach? A treaty can be said to be breached when the behaviour of one party deviates so far from the legitimate expectations of all the parties under the treaty that the other parties must have available various courses of action in response, including those of termination or suspension. The Vienna Convention contains a twofold definition of material breach. First, article 60(3) provides that any repudiation of the agreement constitutes material breach and, second, that "violation of a provision essential to the accomplishment of the object or purpose" of the agreement does likewise.

New Zealand has not formally repudiated the treaty; it continues to assert its commitment to ANZUS and to the Western Alliance.[106] Has it violated a provision "essential to the accomplishment of the object or purpose of the treaty?" The objects of the ANZUS treaty have already been discussed. As Starke points out,[107] the objects were very much more limited than those of NATO, so much so that the conclusion of SEATO was deemed necessary in 1954. The question is whether the object can be seen as forming part of the global security network of the United States in the nuclear age, or whether it was to form a limited military security pact in the Pacific region.

Assuming that the United States' interpretation is accepted, it can be argued that lack of access to ports jeopardises fulfillment of that object, since the effectiveness of the security network is greatly impeded by the restraints on shipping,[108] although there remain the factual reservations above. A claim of breach could be made with respect to the overall objects of the treaty, or with respect to a particular provision, here article 2 with its requirement of mutual aid.

Another question is which actions of New Zealand are actually deemed to be a material breach? Is it the expression of policy, as represented in the passing of legislation, or is it the exclusion of

106. "New Zealanders have not rejected the United States any more that they rejected ANZUS." Los Angeles speech, *supra* note 6, at 5. See also THE DEFENCE QUESTION, *supra* note 36, at 11, where it is stated that "support for the alliance has been strong" which is consistent with government policy "of continued support for the alliance."

107. J. STARKE, *supra* note 5, at 76-161. Starke compares obligations under ANZUS and NATO on an article-by-article basis.

108. "Without access to ports and the surface ship deployments that access supports, we cannot maintain the naval presence in the Pacific that helps to deter war and preserve the peace. And we can't go around advertising which of those ships has nuclear weapons aboard,. . ." Note, *supra* note 3, at 475, *citing* Paul D. Wolowitz (U.S. Assistant Secretary for East Asian and Pacific Affairs), *The Pacific Region of Promise and Challenge*, 85 DEP'T ST. BULL., Apr. 1985, at 37-38.

particular vessels, such as the USS Buchanan? While the incident intensified when that ship was actually refused entry, the policy itself can also be deemed to be contrary to the treaty. An ally's policy has immediate impact upon the United States' planning for deployment of its capabilities and expectations of support, even before any implementation of that policy. Alternatively, the announcement of policy could be viewed as a warning of a forthcoming breach, giving the other parties the opportunity to try to avert that outcome.[109] The United States abrogated the security obligations some time after the exclusion of the USS Buchanan and before the New Zealand proposed legislation became law.

The incident has been presented as a bilateral one within a tripartite relationship. However, Australia supported the United States and has also suspended the ANZUS treaty with respect to New Zealand, and has assured the United States that any military information it receives from the United States in reliance on ANZUS will not be forwarded to New Zealand under any bilateral agreement.[110] Thus, Australia also must justify its position, which need not necessarily coincide with that of the United States. A notable difference is that Australia has no nuclear capability, and will face no restrictions on its access to New Zealand's ports. It is hard to assert that its obligations under the treaty have in any way been transformed, unless it now has a greater number of visits from United States ships to fill the gap caused by the effective closure of New Zealand's ports to the United States. It is not a party "specially affected" by any material breach so that its response must fall within article 60(2)(a) of the Vienna Convention.[111]

The whole thrust of the Vienna Convention provisions on termination and suspension is to make these responses difficult to uphold and thus to preserve the integrity of treaty relationships. This supports the policy of the orderly and predictable arrangement for

109. McNair discusses the Panama Canal Tolls dispute where proposed United States legislation was treated by the United Kingdom as an indication of potential breach of the Hay-Pauncefote Treaty. In that case diplomatic urging led to withdrawal of the legislation and performance of the treaty. A. MCNAIR, THE LAW OF TREATIES 547-49 (1961). A difference between that incident and the present (apart from outcome) is that the world community had an interest in maintaining the proper functioning of the Panama Canal and the passage of shipping. The ANZUS treaty does not create a regime in which other states have rights, and in a polarized world is seen as a political alliance.

110. Mr. Hawke, Australian Prime Minister, in Parliament, February 27, 1984, said that Australia would adhere scrupulously to the principle of not handing on intelligence it received from the United States to New Zealand. 56 AUSTL. FOREIGN AFF. REC. 117 (1986).

111. Vienna Convention, *supra* note 25, article 60(2) states: "A material breach of a multilateral treaty by one of the parties entitles: (a) The other parties by unanimous agreement to suspend the operation of the treaty. . .or to terminate it either: (i) In the relations between themselves and the defaulting State, or (ii) As between all parties."

the shaping and sharing of values through the conclusion and performance of treaties. Precipitous treaty termination upsets expectations and creates uncertainty and instability in an area that had been thought to be subject to order. However, termination or suspension has to be permitted in extreme circumstances, for if it were not, countries would either not enter into treaty commitments at all, or would resort to unilateral action whenever they felt it expedient to do so. The Vienna Convention had to strike a balance between these two extremes; the result is articles 60-62. However, countries also have the option of entering into non-legal agreements. These have the advantage of promoting common policies and providing stability while allowing the flexibility of informal withdrawal. A factor that emerges forcibly from the above discussion is the lack of any facility for an objective authoritative interpretation of the treaty. It seems that the expectations of a continuing alliance were so strong that the prospect of the need for interpretation by a third party decision maker were never addressed. Both parties to the incident are under the general obligation to settle disputes peacefully,[112] and the Vienna Convention contains provisions setting out the procedures to be followed in the event of a claim of termination, withdrawal or suspension.[113] However, these procedures have been criticised and cannot be said to be customary international law.[114] There is no obligation on the parties to follow them, although a good faith attempt to resolve their differences might have persuaded the parties to take some such steps. Again, subjectivity and lack of third party interpretative procedures are often given as characteristics of non-legal agreements. This omission may be further evidence that the parties did not intend any claims to be susceptible to third party decision making. If a third party decision had been favoured in 1984, when the Labour government was elected, both states had acceptances of the compulsory jurisdiction of the International Court of Justice under article 36(2) of the Statute of the Court.[115] The Court's jurisdiction extends to legal disputes concerning "the interpretation of a treaty,"[116] so the dispute could have been submitted to the Court. Without considering the appropriateness of such a course of action, or whether jurisdiction would have been excluded by the terms of either parties' reservations, this inci-

112. U.N. Charter, arts. 2(3), 33.

113. Vienna Convention, *supra* note 25, arts. 65-66.

114. A. DAVID, *supra* note 63, at 159-312; Briggs, *Procedures for Establishing the Invalidity or Termination of Treaties under the International Law Commission's 1966 Draft Articles on the Law of Treaties*", 61 AM. J. INT'L L. 976 (1976).

115. The United States declaration was made on Aug. 26, 1946. New Zealand made a new declaration on Sept. 22, 1977. *See* 36 I.C.J.Y.B. at 92 for the United States' declaration, at 81 for New Zealand's (1981-82).

116. Statute of the International Court of Justice, as annexed to the Charter of the United Nations, 59 Stat. 1055, T.S. No. 993, article 36(2)(a).

dent coincided with the process of the Nicaragua litigation[117] and the subsequent withdrawal of the Unites States' declaration.[118] At a time when the United States was disillusioned with the Court's actions, it would not have been conceivable that it would have utilised it in this context.

The motives for the United States' response to New Zealand's actions are also unspecified. The United States may have hoped to persuade New Zealand to perform the treaty by depriving New Zealand of resources to which it had previously had access because of the alliance. This is especially true in the period between the barring of entry of the USS Buchanan and the abrogation of the treaty. Deprivation of military aid and intelligence resources could have been directed at making New Zealand aware of the costs of nonperformance on the United States' terms, and thus constitute an attempt to avoid the step of formal abrogation. This motivation would see the actions as persuasive (or possibly coercive) rather than as retaliatory. They could also be viewed as retaliation for New Zealand's alleged breach of the treaty.

The Vienna Convention does not include retaliation as a viable response to material breach, although some writers have done so.[119] Damrosch considers retaliation a justifiable course of action while proceedings are pending, so that the injured party is not forced to be inactive during this possibly lengthy process.[120] There were no formal proceedings during this incident, but the sequence of events suggests that the United States saw suspension as a final step after earlier retaliatory action directed at changing the New Zealand position had failed.

### 2. New Zealand's Claims

New Zealand's claims have been largely dealt with simultaneously with those of the United States, so there are only a few additional points. Throughout, New Zealand's claims have also been implicit, although its government has been active in presenting its

117. Nicaragua commenced proceedings in the case of Military and Paramilitary Activities in and against Nicaragua in April 1984, three months before the election of the Lange government and the commencement of the incident. 1984 I.C.J. 392 (Judgment of November 26).

118. Statement of the United States, *Withdrawal from the Proceedings Initiated by Nicaragua in the International Court of Justice*, Jan. 18, 1985, *reprinted in* 24 I.L.M. 246 (1985). The statement was followed up by the withdrawal of the United States' declaration under article 36(2) of the Statute of the International Court of Justice, *supra* note 116.

119. G. SCHWARZENBURGER, MANUAL OF INTERNATIONAL LAW 168-69 (5th ed. 1967).

120. Damrosch, *Retaliation or Arbitration - or Both? The 1978 United States-France Aviation Dispute*, 74 AM. J. INT'L L. 785 (1980).

case before a number of international audiences.[121] The government asserts that it has acted in conformity with its ANZUS obligations and that therefore it has not committed any breach of the treaty. It argues that since 1951 it has consistently performed all its obligations, and that the treaty does not require it to allow entrance to ships whose presence contravenes its domestic policies. New Zealand adamantly rejects any suggestion that its role within ANZUS has been passive and that it is now refusing to perform one of the limited number of positive obligations required of it. Suggestions that it is hoping for a "free ride" by pursuing its anti-nuclear policies while relying on the United States for security are resented, as its government points that it has become more self sufficient in defence. New Zealand is also hurt by insinuations that provision of port facilities is all it has done in the past in performance of the treaty.[122]

The Lange Government acknowledges that nuclear ships have in the past been allowed into New Zealand, but asserts that must now cease. While it continues with its claim that the treaty does not require it to admit nuclear weapons into New Zealand[123] it has also been stated that the treaty and the underlying relationship might require alteration.[124] This seems more like a claim for renegotiation and amendment.

New Zealand therefore relies upon a restrictive, textual interpretation of the treaty that does not incorporate implied obligations, and which does not provide for change in the nature of security requirements over a period of time. Such a restrictive interpretation might be anticipated from a party which is accused of nonperformance since a strict textual interpretation demonstrates that the demands of the other party were not encompassed by the treaty. It might have been anticipated that a treaty with limited participation, such as ANZUS, would have been more precisely drafted, for there

121. In the early months of 1985, for example, David Lange presented his government's views on New Zealand's anti-nuclear policy in the United States, the United Kingdom and Switzerland. 35 N.Z. FOREIGN AFF. REV., Jan.-Mar. 1985, at 3. These points were reiterated by the Lange government to Mr. Geoffrey Howe, the British Foreign Secretary, during his visit to New Zealand in May 1987. Mr. Howe's criticism of the anti-nuclear stance led to the British High Commissioner in Wellington being summoned to Mr. Lange to explain remarks which were interpreted as constituting interference in New Zealand's internal affairs. Sydney Morning Herald, May 7, 1987, at 7, col. 5.

122. "New Zealanders have been astounded to read . . . claims in the United States media that providing port access to United States naval vessels is all we do for ANZUS. That is simply not true." Los Angeles speech, *supra* note 6, at 6.

123. "There is nothing in the ANZUS Treaty which requires New Zealand to accept nuclear weaponry." THE DEFENCE QUESTION, *supra* note 36, at 11.

124. "The defence relationship between New Zealand and the United States must be altered as New Zealand pursues its own national interests." THE DEFENCE QUESTION, *supra* note 36, at 12.

was no need for textual compromise to encourage wide adherence to it. Any such expectation is counterbalanced by the nature of the treaty as a continuing alliance where it could be anticipated that the parties would be deliberately imprecise to allow for flexibility within the terms of the alliance on the assumption that the parties' expectations would continue to coincide. Implicit in this position is a claim that a treaty cannot be suspended against a party that is performing its obligations.

New Zealand might have an implied claim that, even if the interpretation proffered by the United States is upheld and the treaty does give the United States a right of access to New Zealand's ports, a new peremptory norm of international law has emerged that must invalidate that right. Article 64 of the Vienna Convention provides for the termination of a treaty in the event of conflict with such a newly emergent norm.[125] Since New Zealand has never claimed the termination of the treaty, it would also have to assert that a right of access was severable from the rest of the treaty, leaving other obligations intact.[126] Alternatively, it might claim that emergence of a new peremptory norm justified it in amending the treaty so as to comply with that norm. Any claim of a newly emergent peremptory norm would center upon the growing body of international restraints upon the development and use of nuclear power. New Zealand might claim that there is such a norm prohibiting or limiting the passage of nuclear propelled or armed vessels through high seas or in other waters. New Zealand could point to the growing body of treaty law that restricts the use and passage of nuclear armaments[127] in support of this view. However, it would be unlikely to be able to substantiate such a claim. A peremptory norm is one "accepted and recognised by the international community of States as a whole as a norm from which no derogation is permitted."[128] Even in treaties to which New Zealand is a party and a major party, such as the South Pacific Nuclear Free Zone Treaty, high seas freedom of passage is upheld.[129] New Zealand accepted that it was for each country to decide its own policy with

125. Vienna Convention, *supra* note 25, article 64 states: "If a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates."

126. Article 44 of the Vienna Convention, *supra* note 25, allows for separability of treaty provisions so that a claim for termination or suspension on grounds relating to particular provisions need not cause the termination or suspension of the entire treaty.

127. Treaties and resolutions of international organizations on nuclear limitations are too numerous to mention here. For a summary of many of these, see J. STARKE, AN INTRODUCTION TO THE SCIENCE OF PEACE (1968) and the bibliography therein.

128. Vienna Convention, *supra* note 25, art. 53.

129. South Pacific Nuclear Free Zone Treaty, *supra* note 41, article 2 reserves the freedom of the seas and article 5(2) reserves to each party the right to decide for itself whether to allow visits to its ports by foreign ships and aircraft.

respect to port visitation. Thus, New Zealand itself was instrumental in concluding a treaty that would be a derogation of such a norm were it said to exist. Further, the United Nations Convention on the Law of the Sea does not impose any such restrictions.[130]

In a situation where New Zealand is a party to treaties which allow for passage of nuclear powered vessels, and in the light of state practice, especially that of the United States and the Soviet Union, it seems that a claim of such a right as customary international law would fail,[131] let alone any notion of emergent *jus cogens*.

### B. Expectations of the Parties

The assessment of the present status of the norms of the law on treaty termination and suspension will rest upon the reactions of the participants to these various possible claims. However, it is first proposed to examine briefly the expectations of the parties with regard to their claims.

#### 1. New Zealands Expectations

The United States and New Zealand are the major participants in the incident and therefore the expectations of their elites will be appraised. Attention must also be paid to the expectations of the New Zealand electorate. Creation of a nuclear free zone within New Zealand constituted a major electoral issue in the elections that brought the Labour government to power. New Zealanders wished to take some positive step in the anti-nuclear movement.[132] Opinion polls conducted in New Zealand after the 1984 election continued to show, however, that while New Zealanders supported its government on the nuclear issue, they did not wish to leave the ANZUS alliance.[133] It appears that their desire for a nuclear free policy did not denote support for the termination of the ANZUS treaty, and that there continued to be an awareness of the other benefits of the American alliance.[134] The electorate reconfirmed its

130. Article 23 of the United Nations Convention on the Law of the Sea (1982), *supra* note 77, requires nuclear powered ships and ships carrying nuclear substances to observe special measures when exercising their right of innocent passage through territorial seas.

131. The International Court of Justice stated that for a conventional rule to become a rule of general international law the participation must include those states "whose interests were specially affected." North Sea Continental Shelf Cases (W.Germany v. Den.; W.Germany v. Neth.), 1969 I.C.J. 3, 43 (Judgment of Feb. 20).

132. R. THAKUR, *supra* note 10, at 1-4.

133. "Public opinion polls show strong support for keeping New Zealand free of nuclear weapons." THE DEFENCE QUESTION, *supra* note 36, at 11. "In an opinion poll conducted 14 days ago, 78 percent of those polled said they were in favor of continued membership of ANZUS. Only 12 percent were against." Los Angeles speech, *supra* note 6, at 5.

134. The United States is New Zealand's third largest trading partner importing up

commitment to the Labour government in the elections in New Zealand held on August 15, 1987. The Lange government also did not take steps to terminate or suspend the treaty. It seems that what both the New Zealand government and population expected and desired was an understanding that its nuclear policy was compatible with its ANZUS obligations. This expectation was not entirely without reasonable grounds.

New Zealand has been careful not to encourage other countries to follow its lead and has attempted to contain the impact of its own decision. One manifestation of this is the omission of any restrictions on port access in the South Pacific Nuclear Free Zone Treaty and the respect for the principle of the freedom of the seas, which is also explicit in its own legislation.[135] New Zealand acknowledges its position to be unique and deliberately has not set itself up as a role model for other countries to follow. In particular, Lange has said that New Zealand's position is very different from that of European allies and accepts that it would be counter productive for the United States to cut off military cooperation with any other ally.[136] New Zealand has also resisted any moves by the Soviet Union to exploit the split in ANZUS. The Soviet Ambassador in Wellington was told that New Zealand's "government took great offense at misleading attempts by agencies inside the Soviet block to depict New Zealand's action as in any way supportive of nondemocratic interests."[137]

New Zealand was also aware that the United States has compromised with other countries which have restrictive nuclear policies. Norway and Denmark have been members of NATO since 1949, and yet have a policy of not allowing nuclear weapons on their soil in peacetime.[138] The United States was able to reach a compromise with Japan on the same issue, albeit only by Japan in effect turning a blind eye to United States policy and thus not forc-

---

to N.Z.$1,072 million of goods and exporting to New Zealand around N.Z.$1,227 million of goods. Los Angeles speech, *supra* note 6, at 6. Despite the ANZUS dispute this position was maintained in 1985. 36 N.Z. FOREIGN AFF. REV., Jan.-Mar. 1986, at 15.

135. Section 12 of the New Zealand Act preserves the international law rights of innocent passage through New Zealand territorial seas and transit passage through straits.

136. "New Zealand does not offer itself as an example to others. New Zealand's strategic circumstances are unique." Los Angeles speech, *supra* note 6, at 6. The reasons why New Zealand does not set itself up as an example to any other country are listed by Mr. Bryce Harland, New Zealand's permanent Representative to the United Nations in an address to the Washington Chamber of Commerce. *See* 35 N.Z. FOREIGN AFF. REV., Apr.-June 1985, at 28.

137. Lange, *supra* note 40, at 1040.

138. New Zealand has obviously had in mind the example of these Scandinavian countries. For example, they were referred to by Mr. O'Flynn, New Zealand Deputy Minister of Foreign Affairs, in a speech before Parliament, Nov. 28, 1984. 34 N.Z. FOREIGN AFF. REV., Oct.-Dec. 1984, at 13. *See also* R. THAKUR, *supra* note 10, at 118.

ing the issue, something New Zealand was not prepared to do.[139] New Zealand regarded its own legislation as having been drafted in a compromisory fashion.[140] In the light of these facts, New Zealand might have expected greater consideration. However, warning was given to New Zealand by the United States' cancellation of port visits to the People's Republic of China[141] rather than alter its refuse to confirm or deny policy, signifying a determination on its part not to concede on this point.

New Zealand may also have anticipated that the pressuring of a small ally by the United States and its cutting off of an ally might be adversely perceived by other small Western allies.[142] It may not have believed the United States would actually exercise the option of suspension as against an ally. Thus, through a combination of containment of its own policy to its unique position and a hope of raising some popular support, New Zealand may have anticipated acceptance of its stance. New Zealand recognises that its fundamental security interests lie in the Pacific region and accepts that it must increase its practical efforts in that region, through increased surveillance, participation in exercises, and offers of training assistance.[143] It regards this approach as both compatible with and required by the United States' enunciations of policy from the time of

139. At a press conference in Wellington, Mr. Solarz, Chairman of the Asia-Pacific subcommittee of the House Foreign Affairs Committee alluded to the fact that the United States had come to an arrangement with Japan, another country with a non-nuclear policy, showing that it has been possible "to square the circle." 36 N.Z. FOREIGN AFF. REV., Jan.-Mar. 1986, at 4. This has been achieved through a policy of "constructive ambiguity." Note, *supra* note 41, at 416. Earlier in the incident Mr. Lange evidently hoped there would not be a confrontation between his government and the United States: "In the meantime we have an assurance from the Secretary of State that the United States will not force that issue and I hope that by next year's [1985] ANZUS conference . . . a solution may be found." David Lange to the House of Representatives, New Zealand, in a debate on foreign affairs, Oct. 9, 1984. 34 N.Z. FOREIGN AFF. REV., Oct.-Dec. 1984, at 10. The hope of course was not realised.

140. THE DEFENCE QUESTION, *supra* note 36, at 11.

141. Port visits to the People's Republic of China were cancelled by the United States in May 1985. *See* Woodliffe, *Port Visits by Nuclear Armed Vessels: Recent State Practice*, 35 INT'L & COMP. L.Q. 730, 731 (1986).

142. "The American action itself worries other small countries, and could, if sustained, affect the alliance more than any action of New Zealand." Mr. Bryce Harland, New Zealand Permanent Representative to the United Nations, *supra* note 75, at 28. This view is partially echoed in O'Neill, LOS ANGELES TIMES, Feb. 17, 1985, § IV at 5, col. 4, *cited in* Note, *supra* note 41, at 415, where he argued that the United States had a great deal to lose by putting pressure on a small country.

143. A Cabinet paper on ANZUS prepared by the Ministry of Foreign Affairs stressed that the dispute with the United States meant that New Zealand must pursue a "more thorough going and increased commitment to safeguarding the security of the South Pacific." New Zealand has a determination to be self-reliant. Summary of Cabinet paper issued April 1, 1985, 35 N.Z. FOREIGN AFF. REV., Apr.-June 1985, at 38. These themes were reiterated in the NEW ZEALAND WHITE PAPER ON DEFENCE, *supra* note 36, issued after the severance of defence relationships with the United States. Sydney Morning Herald, Feb. 27, 1987, at 5, col. 2.

the Guam doctrine onwards. New Zealand wishes to be able to perform an active role within the South Pacific region, to determine its own security interests, and to have accepted an interpretation of ANZUS that provides for these. Unfortunately, the attitude of the Reagan administration was not to favour compromise in many aspects of international affairs, and this was the case in this incident.[144]

2. United States' Expectations

The United States apparently anticipated that New Zealand's government would respond to its claims as to the correct interpretation of ANZUS, especially when these were coupled with coercive measures.[145] It probably hoped that New Zealand would compromise on its domestic commitments to uphold its international obligations, as interpreted by the United States. In making this assumption, the United States may have had in mind Article 27 of the Vienna Convention, which makes a country's domestic policy no justification for violation of an international commitment.[146] The length of time that elapsed between the eruption of the incident (the refusal of access to the USS Buchanan) and its eventual outcome (the abrogation of the treaty) suggests that the United States did not want to suspend the alliance, and expected compromise. However, it felt that the compromise should come from New Zealand and was evidently concerned about the impact of any compromise by itself on its other allies. It may have expected that its status as senior member of the alliance would enable it to dictate its operation. Its expectations were supported by the 1982 Memorandum of Agreement, which was more explicit than the ANZUS Treaty and was a more recent reaffirmation of New Zealand's preparedness to admit nuclear powered and armed vessels. It relied upon the long-term commitment that ANZUS represented and may have been influenced by the fact that termination of the relationship was not desired in New Zealand. However, the United States may have un-

144. There were many examples of the Reagan administration's unwillingness to compromise its stance in many aspects of international affairs: the refusal to sign the 1982 United Nations Convention on the Law of the Sea; the withdrawal from UNESCO; the invasion of Grenada; the withdrawal of the compulsory acceptance of the jurisdiction of the International Court of Justice and the support of the Contras are just some examples.

145. "We have indicated that should New Zealand enact such legislation, we should be forced to review our treaty obligations to New Zealand under ANZUS alliance . . . we think the consequence of such review will be . . . the effective termination of our security co-operation and of our security obligations." Television interview with Paul Wolowitz, United States Assistant Secretary of State for East Asian and Pacific Affairs, (Dec. 4, 1985) *quoted in* 56 AUSTL. FOREIGN AFF. REC. 1201 (1985).

146. Vienna Convention, *supra* note 25, article 27 states that: "A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty."

derestimated the New Zealand government's determination with respect to its nuclear policy and anticipated a willingness to seek renegotiation or compromise. The Reagan Administration avoided attempts to develop the dispute into other areas of its relationship with New Zealand, despite some media and Congressional urging that it should do so. While it was prepared to put pressure on New Zealand, it was not ready to extend deliberately the incident beyond the operation of the military relationship, a position that was appreciated by the New Zealand government.

### C. Reaction from Other Participants

ANZUS is a tripartite treaty, and the reaction of one particular participant in the international community is more significant than any other country, i.e., Australia's reaction. As the third party to the alliance, Australia had much at stake in the resolution of the dispute, so its perspective on the norms governing treaty relationships in this incident is most significant.

In 1983, Australia elected a Labour Government which carried out a full review of the ANZUS treaty within Australia. The conclusion was that "ANZUS was fundamental to the country's security and to its foreign and defence policies."[147] Thus, New Zealand was aware that even if its Labour government was prepared to sacrifice ANZUS, Australia's was not. Relations with Australia are vital to New Zealand and there are many bilateral agreements and understandings between the two countries covering many other matters than defence. While New Zealand might have hoped for support in its claims from Australia, it would not have wanted to prejudice severely its relations with Australia. This attitude is shared by Australia, which recognises the strategic and economic bases of a close relationship would not be allowed to be adversely affected, whatever the differences of opinion between them.[148]

Australia, too, has had its difficulties with the issue of port access. Between 1971 and 1976, the United States and the United Kingdom were requested not to propose visits by nuclear-powered ships while feasibility studies were made of all Australian ports. In 1976, conditions of entry for each port were promulgated and visits were allowed.[149] In 1983, the current Hawke government refused access to a British aircraft carrier, the HMS Invincible, for refitting, on the basis of Britain's refuse to confirm or deny policy. However,

147. 54 AUSTL. FOREIGN AFF. REC. 512 (1983).

148. Mr. Kim Beazley, Australian Minister of Defence said that the close relationship between Australia and New Zealand was based on their common heritage, military cooperation and strategic concerns in the Pacific. These could not be sacrificed, whatever the differences of opinion between them. Beazley, *After ANZUS: Australia's Future Security Arrangements,* 56 AUST. FOREIGN AFF. REC. 604, 606 (1985).

149. Senate Debate, Vol 5.113, Feb. 18, 1986 (Sen. Deb. 1986, 497-98).

Australia submitted to British and United States pressure to review its position; in 1984, the Australian Minister of Defence announced that Australian policy does not require allied forces to state whether their ships are carrying nuclear weapons and accepted the United States' and the United Kingdom's reasons for their policy. Further, the use of Australian drydock facilities would be assessed on the merits of individual cases, without the need for a declaration relating to the ship's armament. Thus the United States had achieved a major concession from the Australians and might have expected active support from Australia in putting pressure on New Zealand (as well as perhaps even hoping New Zealand would be influenced by this decision).

Australia, however, has not done this. It did refuse to give New Zealand active support and has not itself gone back on its 1984 position,[150] but it also has not interfered in New Zealand's domestic affairs. The Australian Government informed the New Zealand Government of its opinion of the proposed New Zealand legislation,[151] but would not concur with opposition demands within Australia to impose economic sanctions on New Zealand. It was thought that any such step would harden New Zealand's attitude and jeopardise the two countries' relationship.

Australia has been an active participant in the South Pacific forum and the initiator of the South Pacific Nuclear Free Zone Treaty, and is thus aligned with New Zealand in that arena. New Zealand's government has expressed gratitude for Australia's commitment to the continued pursuit of a bilateral relationship with New Zealand,[152] and for the arrangement of bilateral military exercises between the two countries. Australia has shown that it will not abandon New Zealand, but that it will also continue ANZUS as a bilateral arrangement. It regards the dispute between the United States and New Zealand as one that must be settled by those countries without Australia becoming a go-between.[153]

---

150. "The Government regards access to Australian ports for United States vessels as being essential to the effective functioning of ANZUS." Mr. Bob Hawke, Parliamentary Debates (Hansard), Vol. H. of R., February 27, 1985, *recorded in* 56 AUSTL. FOREIGN AFF. REC. 117 (1985).

151. "Our views, including our preference for New Zealand not to legislate in the terms proposed, have been clearly registered with the New Zealand Government." Mr. Bill Hayden, Australian Minister for Foreign Affairs in a news release, Dec. 10, 1985, *recorded in* 56 AUSTL. FOREIGN AFF. REC. 1204 (1985).

152. "We have been particularly heartened by the reaction of the Australian government to recent developments in the ANZUS relationship. We know that we differ on nuclear matters. Despite that, Australia has offered new avenues for cooperation and interaction in the defence field." Mr. O'Flynn, New Zealand Minister of Defence, 35 N.Z. FOREIGN AFF. REV., Apr.-June 1985, at 19.

153. Mr. Hawke has said that the dispute is a matter for the United State and New Zealand. Parliamentary Debates (Hansard), Vol. H. of R., February 27, 1985. Mr. Hawke visited Washington in early February 1985 to discuss the ANZUS crisis. In a

After the announcement by then Secretary of State Schultz of the abrogation of the treaty, Australia joined in a joint communique with Washington in which "both sides stressed the importance of the ANZUS Treaty and the continued cooperation on defence and other matters under the alliance."[154] Australia therefore reaffirmed the importance of ANZUS and associated itself with the suspension of the treaty and thus accepted that suspension was an appropriate step under the circumstances. Australia has impliedly accepted the United States' right to unilateral suspension of treaty performance in the face of actions incompatible with its expectations of the treaty. Members of the Australian government have made conflicting statements as to whether they regard ANZUS itself as requiring port access.[155] The Australian action in participating in the joint communique supports the United States' right to insist on its interpretation of the treaty and for the exercise of the option of suspension in face of its breach. Indeed, Australia's response goes further in its support of the United States. The treaty is also suspended as between itself and New Zealand. It has not taken the position that ANZUS remains effective as between itself and New Zealand, and that the only suspension has occurred between the United States and New Zealand.

Other participants in the international arena have made little public response to the incident, which is not surprising given the tripartite nature of the alliance. Third parties have no rights under the treaty,[156] and thus are not directly affected by the incident. In this instance, silence can probably be taken to imply acceptance for the United States' stance that it is entitled to suspend the treaty. Overt support has come from the United Kingdom. Members of the British government have told Lange that they did not support his views,[157] and the British Defence Chief, Sir John Fieldhouse,

---

letter to Mr. Lange, Mr. Hawke said that "[he] stressed that [he] has no wish to or intention to act in any way as an emissary." 56 AUSTL. FOREIGN AFF. REC. 51 (1985).

154. Text of the joint communique issued in San Francisco on August 12, 1985 following the Australian-United States talks on defence. The two sides also regretted the continuation of New Zealand's policies, agreed on the essential nature of port access and agreed that the rights and obligations between Australia and the United States under the treaty would continue undiminished. Sydney Morning Herald, Aug. 13, 1986, at 8, col. 7.

155. Mr. Hawke has said port access is essential, *supra* note 150, while Mr. Hayden has said that the provision of porting facilities for American naval vessels "are connected with" but not "directly consequent upon" Australia's being party to ANZUS. Address by Mr. Hayden to the Victoria Fabian Society, 56 AUSTL. FOREIGN AFF. REC. 392 (1985). The difference probably relates to the expectations engendered by the operation of the ANZUS relationship, rather than any attempt at legal analysis of the treaty commitments.

156. Vienna Convention, *supra* note 25, article 34.

157. Mr. David Lange at the internationally televised Oxford Union debate at Oxford University, March 1, 1985 referred to the fact that members of the British govern-

openly criticised New Zealand, saying that its policies could act to destabilise the Western Alliance. He also indicated that the port access policy could affect intelligence sharing between the United Kingdom and New Zealand, as well as occasional ship visits and joint exercises.[158] This reaction included no criticism of the United States for suspending a valid treaty relationship. Other support for the United States came from Lord Carrington on behalf of NATO,[159] and from the Conservative element of the European Parliament.[160]

The major concern of ASEAN and Pacific countries was that the dispute should not destabilise the region and create opportunities for Soviet expansionism. In a survey of regional attitudes, the Australian Foreign Affairs Record recorded that Singapore, the Philippines, Thailand and Japan feared the weakening of the Western Alliance which, in the words of a Bangkok newspaper, was "one of the reasons that East Asian countries all the way southward from South Korea are distancing themselves from Lange's policy and the deterioration of ANZUS."[161] Support for New Zealand's policies came from the People's Republic of China, the Soloman Islands and Vanuatu while Tonga hoped that the ban on New Zealand's ports would lead to more ships visiting itself. Fiji has, of course, been affected by internal disruption since 1987, but it appears its present government is not adverse to granting port access.[162]

It is noticeable that all these reactions rest upon strategic grounds, or upon attitudes towards the anti-nuclear policy. The reactions to the incident have not been formulated in legal terms,

---

ment had made it clear that they disagreed with him. 35 N.Z. FOREIGN AFF. REV., Jan.-Mar. 1985, at 11.

158. Sydney Morning Herald, Feb. 20, 1986, at 9, col. 8. *See also supra* note 121 for criticism by the British Foreign Secretary.

159. *Supra* note 157 , at 10.

160. A group of European Democrats put forward a resolution condemning the New Zealand Government's policy on nuclear ship visits and suggesting this could have serious consequences for New Zealand, especially in trade. The resolution was not pressed to the vote in the European Parliament. *Id.* at 53.

161. 56 AUSTL. FOREIGN AFF. REC. 401 (1985).

162. The left-leaning coalition government under Dr. Timoci Bavadra took power in Fiji after elections in April 1987 when it defeated the Alliance party of Ratu Sir Kamiese Mara who had been Prime Minister of Fiji since independence in 1970. Dr. Bavadra's government apparently favored a nonaligned foreign policy, including banning access to foreign warships not confirmed as nuclear free. It is believed the United States was making progress on this issue with Dr. Bavadra when he was deposed in a military coup by Lieutenant-Colonel Sitibeni Rabuka on May 14, 1987. This coup and the second coup on September 25, 1987 make events in Fiji uncertain and make fears of the destabilization of the Pacific area even stronger. These have been accentuated by unrest and riots in Vanuatu in May 1988. Even before 1987 there had been fluctuations with regard to warship access in Fiji for Ratu Mara reversed in 1983 a decision made in 1980 to ban access to warships that were not confirmed as nuclear free. 1986 AUST. INT'L L. NEWS 122.

again demonstrating that this is a political incident set within that framework of the terms of a treaty.

## III. ASSESSMENT OF THE NORMS IN INTERNATIONAL LAW

This incident does not demonstrate any support for an emergent norm that procedures should be followed before the unilateral termination or suspension of a treaty. Once the incident was presented to the United States it took its own steps, culminating in suspension of the treaty against New Zealand. These steps included none of the procedures proposed in articles 65 and 66 of the Vienna Convention, nor any similar measures, but instead were designed to put pressure on New Zealand. The United States did not make explicit its grounds for suspension and thus failed to strengthen the norms relating to suspension or termination of a treaty for material breach or for fundamental change of circumstances. Since, as has been seen, its possible claims for suspension for material breach can well be supported, its failure to make these explicit has weakened this ground of treaty termination or suspension. Instead, the United States demonstrated that where a treaty was of little use to its interests without application of a particular interpretation, it would simply abrogate it by unilateral action, despite prescriptions against this. Thus, a norm of international law against unilateral termination or suspension of a treaty except in the specified circumstances of material breach or fundamental change of circumstances has been eroded, as has any norm relating to objective determination of these claims. Stability of treaty relations and fulfillment of expectations within the area that might have been engendered by the ANZUS treaty were not significant for the United States compared with its desire for free movement and access of its vessels in pursuit of its global security programme. Any threat to these paramount values was of far greater significance than prescriptive attempts to regulate the law of treaties, and thus, the norms relating to the latter have been eroded. The lack of protest from other members of the world community signifies acceptance, which makes other treaty relationships less predictable.

At the same time, the incident offers no support for an emergent peremptory norm restricting passage of nuclear powered or armed vessels. Even New Zealand's South Pacific neighbors recognise this right of passage in their South Pacific Nuclear Free Zone Treaty, and New Zealand received little direct support from other countries. Only a peremptory norm can override a treaty obligation, so again, lack of support demonstrates that no such norm can be said to have been established.

The major conclusion to be drawn from the incident is that,

despite attempts to prescribe general rules governing treaty relationships, where there is great imbalance between the parties and where there is no desire for compromise, a treaty will be unilaterally terminated or suspended without regard to those treaty norms. Treaty relationships, even where they regulate a topic of global concern such as security alliances, are seen as concerning only the parties to the treaty so that other participants do not intervene either to uphold the norms governing them or to assist in their erosion. The world institutional bodies likewise have not intervened in the incident, which has remained limited in scope and participation. The incident gives no guidance on the dilemma that is faced when a government policy clashes with preexistent treaty relationships. The treaty acts as a restriction on development of government policy but, if there is no termination clause the new government has no alternative but to breach the treaty and be regarded as in violation of international commitments, or to abandon its favoured policy. While this may lead to appropriate caution in evolving domestic policies contrary to international commitments, it is normal in international life that new governments come to power with different policies from their predecessors. Promotion of the goal of the orderly sharing of values through treaties means that treaties must survive changes of government. However, this disguises the restrictions thereby placed upon successor governments. While renegotiation of the treaty is the preferred solution, the incident demonstrates that this is not always possible, even within a treaty relationship where consultation and communication is of the essence and constitutes a treaty obligation.

The erosion of traditional norms relating to expropriation[163] is one example of the possible outcome to this dilemma that confronts a government finding itself impeded or threatened by the predecessor's commitments. This incident shows that the same difficulties can occur even when the change of government has been peaceful, constitutional and non-revolutionary. An international response that unquestioningly supports the unqualified assertion of the values of the treaty concluded by a previous government (and in this incident of the stronger treaty partner) should not necessarily prevail. The incident demonstrates some of the same "difficult questions" raised by Professor Falk after the seizure of the United States embassy in Tehran[164] and concerns the problem of the peaceful change in international law without first being in violation of existing norms. In that incident, the New Zealand government faced aban-

163. *See* I. BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW, 531 *et seq.* (1979).

164. Similar questions were raised by Professor Falk with respect to the use of Embassy facilities and the Law of Diplomatic Immunity. Falk, *The Iran Hostage Crisis: Easy Answers and Hard Questions*, 74 AM. J. INT'L L. 411 (1980).

doning a policy contained within its electoral mandate, or being in breach of a long-term alliance, enshrined in a treaty. This is where the soft-law concept of non-legal agreements has its utility. The strength of such agreements lies in their public expression of mutually shared, continuing values, but as they are nonbinding, they can be terminated or suspended with no legal formalities. They can similarly be revived. Such an agreement combines predictability with flexibility. While international law has no clear technique for change, it needs to incorporate diverse modalities. "Soft-law" agreements are one such instrumentality that can be used where adherence to binding treaties can lead to erosion of the norms governing termination or suspension in the event that the parties wish to end the undertaking.