

The way to the Antarctic Treaty: System of rules in times of global conflict[†]

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Review Article

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Abstract

In 1940, a PhD was published in Germany about the claiming behaviour of several countries and the whaling industry in Antarctica. It shows already at this time that a need for regulation on that issue was required. The intertwined relationships between the claiming nations demanded an overarching framework where these complex issues could be managed. This paper elaborates on the state of the claiming parties before the 1940s and will demonstrate that the development for a comprehensive regulation was the only way to avoid a global conflict. The doctoral thesis from 1940 will be the focal point of the discussion.

Introduction

A German PhD thesis from 1940 provides an intriguing entrée into a fascinating period of Antarctic history and politics. Its title and content were considered sufficiently interesting that the US Antarctic Projects Office put it in their publication entitled “National Interests in Antarctica” (United States, 1959). The thesis was entitled “The territorial status of Antarctica in the law” (Die territorialen Rechtsverhältnisse der Antarktis) (Baare-Schmidt, 1940). However, the relevance of the thesis has to be understood in the context of the start of World War II and the political-economic context of Antarctica, including commercial whaling and ongoing territorial claims in the Antarctic. The negotiators gathering in Washington in October 1959 were preoccupied with the following question: how is the territorial status of Antarctica going to be managed in the present and future?

Germany was in a critical state after World War I as it relied on whale oil, mainly from Norway, to meet the demand to produce margarine, soap and also glycerine. Germany was banned of having sovereign power over colonies, specified in the Versailles Treaty 1919, and had been excluded for the next 15 years from exploring Antarctic waters (Szalánczi, 2013, p. 132). Whaling and doing science in the Antarctic was now out of reach for Germany, but it had its share of Antarctic exploration from the early days on. In 1873–1874, the first German whaling expedition went down to the Antarctic Peninsula under Eduard Dallmann. During the Heroic Era, Erich von Drygalski (1901–1903) and Wilhelm Filchner (1911–1912) led scientific expeditions in the Antarctic. A hidden agenda next to the science was, however, the finding of whaling grounds. In 1938, the *Schwabenland* expedition was on its way south. Its agenda was to secure whaling grounds in the Antarctic and combine this with science. Helmuth Wohltat, Councillor of State, was also chief of the emerging German whaling industry and together with his superior, Herman Göring, they designed the *Four Year Plan* which had a clear focus on whale oil in relation of upcoming war efforts (Lüdecke & Summerhayes, 2012, pp. 9–21).

When the *Schwabenland* expedition arrived in the Antarctic, the Norwegian had already laid a claim in the area the Germans favoured, the so-called “Antarctic Sector” (Norwegian Sovereignty in the Antarctic, 1940, p. 84). The Norwegians were very active in the south with whaling; however, there were also attempts in exploring the inland of the Antarctic continent, mainly with planes. German lawyers followed up the Norwegian claim and highly critical comments dominated the discussion (Reeves, 1939, pp. 519–521; Schmitz & Friede, 1939, pp. 244–258).

Under these historical circumstances, Hans-Georg Baare-Schmidt (1913–2010) published his doctoral thesis “Die Territorialen Rechtsverhältnisse in der Antarktis” in 1940 (Baare-Schmidt, 1940). He was a jurist for international law reflecting and arguing on the claiming processes in the Antarctic. To this day, the thesis is only available in German. However, it does not read like the more usual German theses of the time, reflecting that Baare-Schmidt was studying not only in Germany but also in the USA. However, even while disagreeing with claiming processes commonly used by nations in the first half of the 20th century, he uses those same arguments to justify possible German claims on the southern continent. His thesis covers the territorial claims of the countries involved at that time: UK, France, Norway, Germany, USA,

Argentina and Japan. All these countries had a strong economic interest, with the exception of Argentina, in one significant commercial area: industrial whaling.

Whaling as driver of Antarctic activity

Whaling was a strong economic factor. Britain, for example, laid a claim already in 1908 because of the whaling business (60°S latitude and between 20°W and 80°W). The British issued licences especially to Norwegian whalers. However, they themselves went further away from the dedicated areas to surpass their defined fishing quota, thus avoiding the licence fees. This was made possible using factory ships, which came into use after the mid-1920s. Chaser boats, equipped with harpoon guns, killed the whales and towed them back to the factory ship where the whales were then processed. This sort of fishing is called pelagic whaling (open sea whaling). Together with shore whaling stations like that in South Georgia, it had an effect on the populations, especially sperm whale, humpback whale, fin whale and blue whale (Ainley, 2010; Basberg, 2004, pp. 28–39; Isachsen, 1929). To sustain the whaling industry, attempts to regulate whaling quotas were already made in the 1930s, which lead to the International Whaling Commission in 1946 (International convention for the regulation of Whaling, 1946; <https://www.loc.gov/law/help/us-treaties/bevans/m-ust000004-0248.pdf>).

With intensified whaling, territorial ambitions in the Antarctic became more of an issue in the political and diplomatic landscape. Baare-Schmidt's thesis elaborates broadly on the Norwegian and British territorial claiming arguments. He illustrates whaling business especially with Carl Anton Larsen, the Norwegian captain, whaler and entrepreneur, who founded the whaling station "Compañía Argentina de Pesca Sociedad Anónima" in South Georgia in 1904 (Hart, 2001). It was a joint endeavour between Britain, Argentina and Norway. The British expanded their claim from the sub-Antarctic Islands (South Orkney Islands, South Georgia, South Shetland Islands and the Sandwich Islands) as far as the Antarctic Peninsula, all of which came under the administration of the Falkland Islands Dependency. The correspondence between South Georgia's whaling stations and the administration in Port Stanley shows that many regulations were in place and the industry was tightly managed. Each action to increase the hunting quota had to be confirmed by the Falkland Islands Dependency's administration (see SPRI, MS 1213/4/2; MS 1228/1–8; and MS 1228/30/7–9).

Baare-Schmidt writes very forcefully about the Norwegian claims. At this point, he relies mainly on an article that was published very soon after the Norwegian government made its claim of Dronning Maud Land (Schmitz & Friede, 1939). The article illustrates the cause of a diplomatic problem between Germany and Norway. However, Baare-Schmidt sees in the New Zealand claim (1923) and the Australian one (1933) that these were, as Commonwealth countries, an extension of British and wider imperial designs and that was also the conclusion of the Norwegians (Lüdecke & Summerhayes, 2012, pp. 23–37).

Baare-Schmidt argues that claiming territory on the grounds of reaching a place for the first time and claiming it for your country, or the fact that there was permanent occupation, as it was practised in colonial times, should not apply in the Antarctic. Interestingly, he uses these same arguments when manifesting rights to justify Germany's claim for a slice of the Antarctic. His opening argument in chapter four is that Johan Reinhold Forster and Georg Forster,

the two German naturalists, were with James Cook in the Antarctic Region in 1772–1775. (Baare-Schmidt, 1940, p. 68ff) He elaborates further, that in the 19th century Carl Friedrich Gauß was leading in the development of the theory of the Earth's magnetism and calculated the North and South Magnetic Poles. Baare-Schmidt continues to bring even Alexander von Humboldt with his work in geography into his chain of arguments. He argues that great naval nations such as the USA, Britain and France could not have performed their expeditions in the Southern Ocean without the scientific findings of Gauß and Humboldt. Baare-Schmidt goes even further; the term "Polarforschung" ("polar research") was created by Georg von Neumayer in the 1880s, as well as carried by August Petermann, the publisher of the "Petermanns Geographische Mitteilungen", one of the leading geographical publications of its time. He stresses also the explorer and captain of the North, Carl Weyprecht, who was also the founder of the International Polar Year 1882–1883 and continues to explain the expedition of Eduard Dallmann, a whaler and explorer, who charted great parts of the Antarctic Peninsula and islands in 1873–1874. Dallmann later published his findings and that was not usual practice given the competition in the whaling business. However, over time, commercial knowledge went hand in hand with scientific and cartographic activities; some of which was inevitably sensitive given the value of the whaling industry. For more hard evidence, Baare-Schmidt goes a step further towards the German successes in the Southern Ocean such as the *Meteor* expedition of 1927–1928. To complete the picture, the *Schwabenland* expedition is consequently a continuation of German involvement in the Southern hemisphere. Following his statements on German Antarctic expeditions and their discoveries and contribution to research and science, one may get the impression that Germany was entitled to claim the entire continent.

Baare-Schmidt also discusses the rights of the USA in his thesis. He acknowledges the achievements of Charles Wilkes in the 1840s and consequently of Lincoln Ellsworth and Admiral Richard E. Byrd, but he stresses the fact that the USA laid no claims on the Antarctic. A statement from the US Secretary of State, Charles Evans Hughes, is quoted in length but denies the legitimacy of claiming by right of discovery: "It is the opinion of this Department that the discovery of lands unknown to civilisation, even when coupled with a formal taking of possession, does not support a valid claim of sovereignty unless the discovery is followed by an actual settlement of the discovered country" (Baare-Schmidt, 1940, p. 76). That is for Baare-Schmidt a good reason against the Norwegian claims, ignoring the fact that Germany did not claim any parts of the Antarctic until the *Schwabenland* expedition.

In his thesis, Baare-Schmidt argues that under a conservative interpretation of international law, no claimant country has occupied the Antarctic continent effectively (due to the extreme climate) and subsequently no nation has gained sovereign rights. "This fact led international lawyers to propose on various occasions either to put the Antarctic under joint international administration or to treat it as *res communis*" (Baare-Schmidt, 1940, p. 93). He further discusses future possibilities that the Antarctic could be under the sovereignty of single nations. Human existence, using new technical developments, in extreme weather conditions in Canada, for example, have also shown that economic usability could be achieved. This, he decides, could be the way to secure an effective occupation of the Antarctic Regions. As he notes, "To sort out the differences between the literature of international law, the practical conditions of the

Antarctic and the claims of various powers, an international regime appears to be desirable between the states that can show a legitimate interest in questions concerning the Antarctic” (1940, p. 94). A young German PhD candidate at the beginning of World War II anticipated, in other words, the need for a form of collective governance that bears a striking resemblance to the 1959 Antarctic Treaty.

Conclusion

How much influence this 1940 thesis had is hard to trace; tracing the influence of ideas on political and policy-relevant practice is never straightforward. Baare-Schmidt was serving in the war and worked later as a solicitor. His doctoral work, published in German, found a place in the bibliography compiled by Professor Robert D. Hayton of Hunter College, New York, in 1959. Hayton was working on behalf of Admiral George Dufek, the US Antarctic Projects Officer. Hayton drew attention to Baare-Schmidt’s position against the sector principle, which was practised by some other claiming nations at the time. In specialised literature, he appears only few times in footnotes or references (Delbrück & Wolfrum, 2002, p. 479). In hindsight of the actual developments, Baare-Schmidt’s thesis may be seen as a future-orientated attempt to gain a peaceful use of Antarctic resources. This is especially significant considering that he published his doctoral thesis in 1940 when he could not have foreseen these future developments. However, he was able to witness international collaboration in the Antarctic – he died in 2010.

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