

NEW ZEALAND POLICY ON THE ROSS DEPENDENCY

There is in this country at the moment a growing interest in the problems of Antarctic travel and exploration. It would be a good thing if a similar interest were taken in the political and legal problems raised by Antarctica.

(Braybrooke, 1956)

INTRODUCTION

New Zealand policy on the Ross Dependency has changed over the years. There have been few dramatic shifts, but over time, changes in emphasis are evident. From reluctant beginnings in 1923 through to assertive leadership in 1999, New Zealand's involvement in Antarctica has had direction from government policy.

The themes of New Zealand policy that I have highlighted in this report show New Zealand's changing outlook, and the changing place of the Ross Dependency in New Zealand. Within each theme, there are both consistent elements, and divergences.

In this report, the terms Ross Dependency and Antarctica will be used extensively. The Ross Dependency is that part of Antarctica claimed by New Zealand. Antarctica or the Antarctic, is the whole continent or region. New Zealand laws primarily relate to activities in the Ross Dependency, but sometimes also to activities by New Zealanders in other parts of Antarctica. New Zealand policy relates both to the Ross Dependency and should happen there, and to the whole Antarctic region.

HISTORICAL BACKGROUND

New Zealand's involvement with Antarctica begins with climatic and ecosystem links to the region. Our first human links were through the early explorers of the Southern Ocean, most of whom stopped in New Zealand for provisions and preparation prior to heading south. Our first political links were through an Order in Council under the British Settlements Act of 1887 that came into force in 1923. This Order in Council vested described the area of the Ross Dependency, named it, and vested its administration in the Governor of New Zealand. Since 1923, New Zealand has had a claim to a portion of Antarctica, and interests there.

The following table gives a chronology of the key events in New Zealand's political relationship with Antarctica.

Date	Event	Reference
1819-20	First landings on the Antarctic continent	
1841	JC Ross in Antarctica	Auck Law Soc
1908	British claim	
1913	British govt licence for whaling in Ross Sea (later transferred to NZ)	Auburn
1917	British claim clarified/refined	Myhre
1923	NZ claim (British Order-in-Council)	Myhre
1923	NZ Regulations	Wong
1926	Ross Dependency Whaling Regulations	Wong
1929	Ross Dependency Whaling Regulations	Wong
1930	NZ stopped enforcing whaling licences	Auburn
1933	Australian claim (British Order-In-Council)	Myhre
1946	Peter Fraser (NZ PM) suggests an international regime for Antarctica	White Paper
1957-58	International Geophysical Year	
1956?	McMurdo Station established	
1957	Scott Base established	
1958	Logistics agreement between NZ & US Antarctic Program	AJHR
1959	Antarctic Treaty discussions and signature	
1960	<i>Antarctica Act</i> (Crimes Act)	Wong
1961 (Oct)	5 th Meeting of SCAR in Wellington	EAR, 1961
1961	Entry into force of the Antarctic Treaty	

1975	NZ proposes a World Park for Antarctica at the ATCM	NZFAR, 1988
1977	<i>Citizenship Act</i>	Wong
1977	<i>Territorial Sea and Exclusive Economic Zone Act</i>	Wong
1980	CCAMLR	
1981	<i>Antarctic Marine Living Resources Act</i>	Wong
1980s	Nuclear Free NZ/ANZUS dispute	
?	AHT management of historic huts agreed in Ant Treaty discussions	
1987	<i>Immigration Act</i>	Wong
1987	<i>New Zealand Nuclear Free Zone Disarmament and Arms Control Act</i>	Wong
1988	CRANMA agreed after a long debate	
Late 1980s	Collapse of CRANMA agreement	
1990	Protected Areas (Prohibition on Mining) Bill	NZPD
1991	Madrid Protocol on Environmental Protection	
1994	<i>Antarctica (Environmental Protection) Act</i>	Wong
1996	<i>New Zealand Antarctic Institute Act</i>	
1998/99	Toothfish licences in the Ross Sea under CCAMLR	NZFATR, 1999
1999	Ministerial on Ice	

NEW ZEALAND LAW

Despite the official position that the Ross Dependency is an integral part of New Zealand, and has been since 1923, remarkably little New Zealand law applies there.

It seems that New Zealand law only applies in the Ross Dependency if the definition of New Zealand in the act specifically includes it. There are also some acts that specifically relate to Antarctica.

Laws of the Ross Dependency are:

- 1923 Order in Council
- 1923 Regulations
- 1926 & 1929 Whaling Regulations

New Zealand Statutes applicable to the Ross Dependency are:

- Antarctica Act 1960 (applies the Crimes Act to Antarctica)
- Citizenship Act 1977/Immigration Act 1987
- Territorial Sea and Exclusive Economic Zone Act 1977
- Marine Pollution/Marine Mammals Acts
- Antarctic Marine Living Resources Act 1981
- New Zealand Nuclear Free Zone Disarmament and Arms Control Act 1987
- Antarctica (Environmental Protection) Act 1994

(Wong, 2000)

The Antarctica New Zealand Statutory Compliance Manual shows that most law relevant to Antarctica New Zealand's activities is only 'best practice' in Antarctica itself. The report states that the following laws require statutory compliance in Antarctica:

- Immigration Act 1987
- Antarctic Marine Living Resources Act 1981
- Antarctica (Environmental Protection) Act 1994
- Maritime Transport Act 1974
- Marine Mammals Protection Act 1978
- Resource Management Act 1994

"Best Practice" laws include such major statutes as:

- Building Act 1991
- Privacy Act 1993
- Dangerous Goods Act 1974
- Health and Safety in Employment Act 1992

(Chapman Tripp, 1998)

A major issue for the application of laws in Antarctica is that of enforcement. New Zealand has ensured that roles such as Justice of the Peace and coroner have been filled, but there is realistically little means of enforcing New Zealand law.

NEW ZEALAND POLICY

Introduction

New Zealand policy in the Ross Dependency has covered many different aspects, from commercial activity to sovereignty and many others. It has only been possible in this review to track development of New Zealand policy under several themes. It is more appropriate to consider policy in a topical than a chronological approach as there are many issues being discussed at any one time.

New Zealand policy has not been static. It would be totally false to suggest that New Zealand decided her position on Antarctic issues, and has remained consistent in her pronouncements. Instead New Zealand policy has changed to reflect government priorities, public opinion and the Antarctic political context. Policy has exhibited an adaptability to changing circumstances.

Sovereignty to stewardship

New Zealand has had a complex relationship to its sovereignty in the Antarctic. New Zealand was a reluctant claimant in the 1920s, has also asserted sovereignty in many different ways, been willing to give up her sovereignty, and moved more to a stewardship role.

New Zealand officials were slightly confused by the offer of the Ross Dependency by Britain (Beeby, 1972, Logan, 1979), but a 1923 Order in Council by the British Government confirmed New Zealand sovereignty over the Ross Dependency. This was followed by a long period of virtual inactivity. *'The Ross Dependency formed only a very minor part of New Zealand external commitments over much of this period [1920-60]. While it remained a continuing responsibility, it suffered from neglect.'* (Logan, 1979) The only substantial measures taken between 1923 and the beginnings of the IGY period were regulations on whaling in the Ross Sea and protests on aspects of the activities of other countries in the region.

The planning for the IGY and TAE ignited New Zealand's involvement on the ground in Antarctica. The New Zealand Antarctic Society had been lobbying for government supported activity in the Dependency for some years, but it did not happen until the IGY. Indeed, it

seems that New Zealand was waiting to be asked to get involved. The Royal Society IGY programme initially *'did not provide for any research in the Antarctic because it was not at that time considered that New Zealand would have facilities for such work. The Rome Conference of last October, however, invited New Zealand to set up a scientific station in the vicinity of Ross Island in the western part of the Ross Dependency, and detailed the observations to be carried out in the area.'* (EAR, 1955c) (my emphasis)

Once New Zealand was involved on the ground, statements about her sovereignty of the Ross Dependency were not equivocal (except in context). A strong statement of New Zealand's "sound claim" was made at the opening to the Washington Conference, where the Antarctic Treaty was negotiated, but it was intertwined with the suggestion that it would willingly be given up.

The New Zealand Government... would be prepared to consider the relinquishment of national rights and claims in Antarctica if such a step towards the establishment of a wider regime were generally agreed. This does not mean that New Zealand is in any sense doubtful about the validity of its title to the Ross Dependency, or is unwilling to maintain its responsibilities for the administration of that area.

New Zealand's claim to the Ross Dependency is firmly grounded upon a substantial record of early British exploration in Antarctica, beginning with the great voyage of discovery of Captain Cook in the southern oceans. It was Cook who first used New Zealand's essential base and staging facilities; and during nearly two centuries since then many other Antarctic explorers have met their staging needs in New Zealand. The area over which New Zealand claims jurisdiction was the scene of intensive exploratory work by Sir James Clark Ross between 1839 and 1843 and by the expeditions of Scott, Shackleton, and other British parties at the beginning of the present century.

Since jurisdiction of the Ross Dependency was formally transferred to New Zealand by the United Kingdom in 1923, legal title has been supported by

administrative Acts to regulate whaling and other activities in the territory, and in more recent years by further exploratory and scientific expeditions. This is a brief record of the basis of the New Zealand Claim, which we are confident will stand the closest scrutiny.' (EAR, 1959b)

Commentators suggest that countries such as New Zealand and Australia sought the internationalisation of Antarctica because they felt *'it would bring relief from the embarrassment of having to do what they could to protect claims to sovereignty which neither of the great powers recognised'* (Beeby, 1972). Indeed, New Zealand Government briefing papers for the Washington Conference state that the US treaty proposal had the potential to *'free New Zealand from the need to carry on activities in the Ross Dependency solely for the purpose of supporting her claim, and should protect her against claims by other nations base on the activities of their nationals in the Ross Dependency.'* (Dept. External Affairs memo dated 1 Oct 1959 PM208/5/1 (Prep for Washington Conference))

Despite the hope that the provisions of the Antarctic Treaty would allow sovereignty issues to be put to one side, New Zealand has continued to assert her sovereignty over the Ross Dependency. As recently as 1989 a government report stated that Antarctica is significant to New Zealand because *'the Ross Dependency is constitutionally part of New Zealand'* (White Paper, 1989). In recent Government publications such as the State of the Environment Report, the area is more and more referred to as the Ross Sea Region (NZFATR, 1998) and New Zealand's approach one of stewardship rather than sovereign control. *'Wise stewardship is at the heart of New Zealand's approach to Antarctica. This is summed up in our national goal for the Ross Dependency and Antarctica: the conservation of the intrinsic values of Antarctica and the Southern Ocean for the benefit of the world community and for present and future generations of New Zealanders.'* (NZFATR, 1997)

Internationalisation/UN

In the years preceding the Antarctic Treaty, New Zealand Prime Ministers made strong statements advocating the internationalisation of Antarctica, ideally under UN control, or with strong links to UN bodies (White Paper, 1989). New Zealand wanted to ensure that Antarctica was open to all nations, and not just held by a few. At the opening of the Washington Conference the New Zealand delegate could state that *'New Zealand has, in recent years, advocated international action to ensure the future use of Antarctica for the welfare of all nations'* and also that *'New Zealand would ... envisage the establishment of an organic relationship between such an Antarctic regime and the United Nations'*. (EAR, 1959b)

It was not only government and officials who supported the UN management idea. In an article in the literary journal *Landfall* in 1956, E. K. Braybrooke stated that *'the placing of the Antarctic under some form of United Nations control appears to be the only practicable alternative to the present régime.'* (Braybrooke, 1956)

Peace

New Zealand has been very consistent in its policy that Antarctica should be a place free of weapons (nuclear or otherwise), demilitarised, acting as a zone of peace.

As early as 1954, New Zealand expressed concern at rumours the Americans intended to let off an H-bomb as part of their Antarctic programme (EAR, 1954). In the lead up to the Antarctic Treaty, New Zealand stated its hope that the Antarctic *'should be spared from the evils of power politics, the cold war, and associated potential hostilities'* (EAR, 1959a). On conclusion of the Treaty, New Zealand's Prime Minister stated that *'the major achievement ... is that it will ensure the permanent demilitarisation of Antarctica, and prevent its use for warlike purposes or preparations'* (EAR, 1959c).

In fact, international commentators note New Zealand's consistent line on peace, *'The New Zealand government has been a tireless advocate of linking southern hemispheric nuclear free zones'* (Dodds, 1997). Along with widespread public support of peace measures by New

Zealanders on philosophical grounds, there has been a motive of self-interest in promoting Antarctic peace. The Antarctic Treaty has given New Zealand *'an effective guarantee that, to our south, peace and security are assured'* (White Paper, 1989).

International co-operation

The first international agreement on Antarctic co-operation New Zealand made was with the USA, and signed in 1958. The US agreement formalised the good co-operation that was already in place by the time of the IGY, essentially a forerunner of the co-operation clauses in the Treaty. New Zealand now has co-operative relationships with a total of 13 different nations (as of January 1999).

Due to the proximity of Scott Base and McMurdo Station, *'close liaison between the United States and New Zealand in the Antarctic was most desirable from the earliest stages'* (EAR, 1955d). The bilateral agreement between the US and New Zealand on *'provision of facilities in New Zealand for United States Antarctic Expedition'*, gives the US certain rights and exemptions in New Zealand for their Antarctic Programme, and promises that they will give New Zealand logistic support for Antarctic operations (Exchange of Notes, 1958). Although originally for work in 1959, the agreement was extended and remains in force (Exchange of Notes, 1958, 1960). It is still true that *'The Antarctic Treaty calls for cooperation among scientists in Antarctica, and perhaps the most successful cooperative programme between national expeditions is that being carried out by New Zealand and the United States'* (EAR, 1964).

New Zealand has repeatedly thanked the US for its assistance, often suggesting that we couldn't have done our work without their assistance (EAR, 1958b and EAR, 1958c). Some commentators suggest that this close relationship between the countries casts doubt on New Zealand sovereignty (Myhre, 1986).

New Zealand has similar co-operative agreements with Germany, Japan, Sweden, Italy, Chile, France, Switzerland, South Africa, Argentina, The Netherlands, Uruguay and China (NZ Govt,

1999). These agreements were signed in the 1980s and 90s, but have not been as significant as the US-New Zealand co-operation.

Pragmatism

New Zealand's Antarctic policy has had a strongly pragmatic streak. From doing nothing in the Ross Dependency when it was not required, to jumping on the IGY bandwagon with US assistance, to developing rules for mining when we didn't want to see it happen, New Zealand has taken some easy routes.

In the 1930s, the extent of New Zealand's administration seemed to be restricted to protests about what other nations could do in our territory (Braybrooke, 1956). As late as 1949, the New Zealand Government had little desire to do anything in the Ross Dependency, citing cost as the primary impediment (EAR, 1951). Things began to change in the 1950s. The weight of the international scientific community behind the IGY and that of the general public behind the TAE essentially pushed New Zealand into Antarctica. *'Public enthusiasm, combined with the Government's commitment to maintain its territorial responsibilities, lead to the final establishment of a New Zealand presence'* (Logan, 1979).

The Government approved the TAE in stages; first in principle (EAR, 1955a); then to the point of giving it £50,000 and setting up Ross Sea Committee to organise the base and New Zealand's participation (EAR, 1955b). Later, the Government decided it *'would now accept responsibility for providing logistic support for the New Zealand party in the Expedition'* including Navy support to establish the base and purchase of a ship suitable for use there. Other purchases and government departments ended up supporting it as well. The cost impediment to work in the Ross Dependency had been removed: *'these decisions would involve considerable expenditure by the Govt, said Mr Holyoake. In view of the national importance of the Expedition, however – it was the first full-scale one which New Zealand had sent to the Ross Dependency – the public would agree that this was well worth while.'* (EAR, 1956a). In the end, the purchase of the HMNZS Endeavour, aircraft and radio equipment

brought the total cost to the Government to nearly £250,000 (EAR, 1956b), but it provided a solid base for the TAE and IGY work.

Although already discussed (above), New Zealand also exhibited pragmatism in its willingness to give up a passionate desire to get rid of sovereignty claims in the Antarctic, and go for a lesser solution. In 1959, before the Treaty was signed, we stated that

the New Zealand Government believes that the only final solution to territorial disputes and rivalries may eventually prove to be an agreement to relinquish national rights and claims in respect of Antarctica.
Since this is clearly not possible at the present time, the New Zealand delegation would for its part accept a simple arrangement to "freeze" the existing legal status quo. (EAR, 1959b)

The New Zealand Prime Minister was clearly saddened by the final outcome in the Treaty, which he saw as a less imaginative solution, but New Zealand had agreed. (EAR, 1959c)

Environmental protection

The other important example of New Zealand pragmatism was in the minerals debate of the 1970s and 1980s. The government's policy on Antarctic minerals is one of the few dramatic shifts evident in New Zealand Antarctic policy. New Zealand was one of the first countries to raise the issue of mineral resources in Antarctica (Thomson, 1991), and became the driving force behind the minerals debate that developed CRAMRA between 1982 and 1988.

In 1987, New Zealand had a buck both ways. We did not support mining in Antarctica, but we were the prime mover in developing rules for mining. The Prime Minister stated that

under the Kirk Labour Government, New Zealand took the view that Antarctica should be proclaimed a world park. As in national parks in New Zealand, this would mean no mineral mining activity would be permitted
This proposition was found to simply be a non-starter. The other treaty partners...were just not prepared at that time to cast aside the possibility that...Antarctic mineral resources might be exploited... This posture meant it

became necessary to enter negotiations to develop a regime which would govern possible minerals exploitation. (NZFAR, 1987a)

Two years later, a government White Paper said that the minerals convention (only a year old) *'fell short of the Government's preference for securing an absolute prohibition on mining in Antarctica'*, but the Government felt that any mining would have to face extraordinarily heavy constraints (NZ Govt, 1989). The next year, the Opposition criticised the Government's about face in walking away from CRAMRA, and introducing legislation to ban mining in the Ross Dependency (NZ Govt, 1990). International media also noted the turn-around, suggesting it was due to election year pressures and the non-ratification of other countries (Ewing, 1990).

The Protected Areas (Prohibition on Mining) Bill was introduced by the Labour Government in September 1990. This would have made it an offence *'to mine for any mineral in ... the Ross Dependency, and for any New Zealand resident to mine for minerals in Antarctica'*. (NZ Govt, 1990). This clearly shows the intent of the government. The record of the debate shows that the Opposition was in favour of the bill, and suggests that they also felt strongly about banning mining in Antarctica. The bill never made it into law because it was overtaken by the moratorium on mining in the Madrid Protocol. The Protocol was ratified by New Zealand in the *Antarctica (Environmental Protection) Act 1994*.

New Zealand has not always suggested that Antarctica be free of exploitation (EAR, 1957), but has generally been ahead of the crowd. Our proposals for a World Park in 1975 came years ahead of the Australian and French statements that scuttled CRAMRA (Thomson, 1991). By 1987, New Zealand was developing an environmental protection theme, stating that its top priority for the ATCM *'was to secure a commitment from all ATCPs to adopt environmental impact procedures'* and a *'second major concern was to encourage the adoption of higher standards for waste management in Antarctica'* (NZFAR, 1987b).

Government statements on Antarctica in the last few years have been strongly focussed on environmental issues such as overfishing and environmental protection (NZFATR, 1997 and

NZFATR, 1998). This was also a major feature of New Zealand speeches at the Ministerial on Ice (Higham & Scott, 1999).

Commerce/tourism

The first acts of administration that New Zealand made in the Ross Dependency were to do with regulating whaling, and receiving licence fees in the 1920s and 30s (Braybrooke, 1956). Until tourist activity began in the Ross Sea region in the late 1960s, there was no other commercial activity.

New Zealand responded early to the idea of tourism, producing a set of guidelines for visitors to Scott Base that were taken up by the US and later by the ATS (Thomson, 1991). These guidelines stated that tourist parties must comply with the Antarctic Treaty, and stay out of certain areas (Antarctic, 1968). Some regulation of tourism activity has developed, with tourist ships departing from New Zealand required to carry an observer to ensure Environmental Protection legislation is complied with.

In 1959, New Zealand's policy on open access to Antarctica stated that 'Antarctica should be open to all who desire to carry on peaceful, scientific, and economic pursuits' (EAR, 1958a). In contrast, in 1989 the Government's paper on the Antarctic Environment stated that *'this Government proceeds from an assumption that protection of Antarctica can best be accomplished if commercial interests in the region can be minimised'* (White Paper, 1989). This opinion, and statements on environmental protection are apparently contradicted by the presence of New Zealand regulated ships in the Ross Sea under CCAMLR permits (NZFATR, 1999).

CONCLUSION

New Zealand policy will no doubt continue to evolve, largely in a responsive way. It may be responsive to public opinion, perceived crises, influential nations, the desire to put ourselves forward on the global stage and the Antarctic Treaty.

It seems likely that New Zealand policy will continue to run in the tracks of the Antarctic Treaty System – using it as a forum for debate of issues, rather than running outside it. New Zealand has not been the one to question the system, but to work within it.

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