

# Antarctic Treaty: Past, Present and Future

**Richard Rowe**

It is an honour to address this conference today on the Antarctic Treaty: Past, Present and Future, in Hobart the "Gateway to Antarctica".

At the outset I would like to thank the University of Tasmania's Institute for Antarctic and Southern Ocean Studies (IASOS) for the convening of this Conference and to Dr Julia Jabour-Green, in particular, for bringing it into reality. The Conference is a tribute to the role which IASOS plays in Australia's Antarctic activities and in supporting the Treaty system.

It is particularly pleasing that representatives of Antarctic Treaty parties are able to be present today, as well as representatives of the Commission for the Conservation of Antarctic Marine Living Resources. This international presence demonstrates the degree of international interest in Antarctica, but also the fact that the story of Antarctica is a story of international cooperation. It is this international cooperation on which I would like to focus today.

As the Legal Adviser in the Department of Foreign Affairs and Trade, I, and my colleagues in the Department's Legal Branch have responsibility for the oversight of many different international treaties, on a wide range of subject matters. Amongst these, the Antarctic Treaty holds a particular fascination, not only because it provides a unique model of international cooperation concerning the most pristine and wild continent on earth, but also because of the long history of Australian involvement in Antarctica.

## **PAST**

Australia's role in the past can be traced back to the heroic age of Antarctic exploration early in the 20<sup>th</sup> century. Most will be aware of the early Australian adventurers who ventured into what then was truly the unknown. Although there were many, probably the most familiar name is that of Douglas Mawson. While much has been written about the initial expeditions which Mawson led into the interior of the Continent, perhaps less is known about Mawson's role in Antarctic aviation.

I owe a debt here to the Tasmanian author, Tim Bowden, in quoting from his excellent history of the involvement of Australia in Antarctica, entitled *The Silence Calling*<sup>1</sup>. On 13 January 1930 Sir Douglas Mawson read the following proclamation while the Union Jack was raised on what was named Proclamation Island off Enderby Land:

*In the name of His Majesty King George the Fifth, King of Great Britain, Ireland, the British Dominions beyond the Seas...I have it in command from His Majesty King George the Fifth to assert the sovereign rights of his Majesty over British Land discoveries met with in Antarctica...*

Twelve days later (25 January 1930) Mawson repeated a recitation of the proclamation while in the cockpit of a Gypsy Moth bi-plane piloted by Stuart Campbell flying over the Antarctic continent. As Mawson recited the proclamation, Campbell threw a weighted Union Jack onto the ice. Australia formally proclaimed the Australian Antarctic Territory a few years later, in 1933 on the basis of this and more substantive acts. Clearly, different States have different views on the question of sovereignty in Antarctica, and that is an issue to which I will return later. However I did want to mention this story because I think it demonstrates the adaptability to a unique environment which has marked Australia's involvement, and that of many other countries, in Antarctica.

However it would be a mistake to see Australian involvement in Antarctica in terms of individual Australian explorers and adventurers, or later, expeditioners with the Australian national program. Australia's involvement runs deeper and broader than that. Australia's involvement in Antarctica extends to the primary school classrooms, where children learn about Antarctica, and develop a fascination for it. Antarctica forms part of the nation's consciousness. Antarctica also has a direct impact on our day to day life in this adjacent continent - in our weather systems, our climate, and the geology of the Australian continent. Certainly, living in Hobart, one is acutely aware on windy winter nights that the next stop to the south is Antarctica.

After the "heroic age" came the age of Government sponsored expeditions. The first Australian National Antarctic Research Expedition (ANARE) took place in 1947. At this time responsibility for Australian activities in Antarctica and the first ANARE expeditions was that of the Department of Foreign Affairs and Trade's (DFAT) predecessor, the Department of External Affairs. In fact, in the foyer of the DFAT building in Canberra (the R G Casey Building), in a display launched this week to mark the centenary of the Department as well as of Federation and the Australian Public Service, there is a great photo of then

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<sup>1</sup> T. Bowden, *The Silence Calling: Australians in Antarctica 1947-97*. St Leonards: Allen & Unwin, 1997.

Foreign Minister R G Casey standing on an oil drum beside a ship addressing the members of the 1954 Australian National Antarctic Research Expedition before their departure. That tradition of close Ministerial interest in Antarctica has continued - Senator Robert Hill, as Minister for the Environment and Heritage, made two trips to Antarctica between 1996 and 2001.

Many will be aware that, as important as national expeditions such as Australia's were for building momentum for the negotiation of the Antarctic Treaty, it was a concerted period of international scientific cooperation that provided the real impetus for the Treaty negotiations. The International Geophysical Year of 1957, and the flurry of scientific activity in Antarctica which was done under that banner, in effect created the political impetus for States to consider a regime for Antarctica. The foundation of the Antarctica Treaty *is* international scientific cooperation. This remains the driving force of the Antarctic Treaty System.

To return to RG Casey, whom we left standing on oil drums at the dockside. As Australia's Foreign Minister during negotiations for the Antarctic Treaty in the late 1950s, Casey was uniquely placed to make a contribution. As the State with the largest claim to Antarctic Territory, Australia's cooperation was essential. Article IV was the compromise reached between States such as Australia which asserted sovereignty in Antarctica and those which did not - it provides, in effect, for the status quo at that time (1961, the date of the Treaty's entry into force) to hold.

That is, claimant states such as Australia are permitted to continue in the view that they have sovereignty; other states can continue in the view that no states have sovereignty. This is fascinating from an international law perspective - basically, Article IV effectively strips state practice in Antarctica of any constitutive effect in international law. This unique solution has held to this day.

Dr Robert Hall, of the School of Government at the University of Tasmania, will be looking at the role that RG Casey played in the negotiation of the Antarctic Treaty. However, I might take this opportunity to mention briefly one area - a vital one - in which Casey had an influence in the Treaty negotiations - the banning of nuclear tests in Antarctica. Casey insisted that Australia would not accept a Treaty without a provision on nuclear tests, thus forcing the inclusion of Article V, which has been observed since.

Australia not only played an important role in constructing the international legal regime governing Antarctica - it has played a key role in defending that regime from outside attack. States outside the Antarctic Treaty had called for the United Nations to become involved in Antarctic issues as early as 1956, when India sought a role for the UN in Antarctic affairs.

However, it was during the early 1980s that a concerted attempt was made

in the United Nations to attack and dismantle the Antarctic Treaty System. In 1982, the Malaysian Prime Minister, Dr Mahathir, argued that the Antarctic Treaty was a "neo-colonial document which does not reflect the true feeling of the members of the United Nations." Malaysia sought UN endorsement of the notion that Antarctica was the "common heritage of mankind", in much the same way as had been accepted for the deep-sea bed by the Third United Nations Conference on the Law of the Sea.

At issue was the question of access to mineral resources in Antarctica. Australia led the Antarctic Treaty parties in responding to the UN debate on the "Question of Antarctica". Australia's Permanent Representative to the United Nations in New York at the time, Richard Woolcott, coordinated the preparation of draft statements on behalf of Treaty Parties and delivered them on behalf of the group over a number of consecutive General Assemblies.

I quote from his speech to the First Committee of the UN at the Forty Second General Assembly, on 18 November 1987, on behalf of all Antarctic Treaty parties, which again emphasises the centrality of international cooperation:

*[The Antarctic Treaty system has demonstrated] its capacity for flexibility and its ability to respond to changing circumstances. It has shown itself open to evolution in its procedures, open to dialogue, open to co-operation with other relevant international organisations. ...in twenty-seven years of operation, the Treaty has been meeting the objectives set for it. It has ensured the complete denuclearisation and demilitarisation of Antarctica, it has promoted scientific research and environmental protection, it has kept the continent free from international discord and it has done valuable work in the preservation and conservation of living resources in the Antarctic. This is a remarkable achievement, given the heterogeneous and diverse nature of the Contracting Parties.*

It is in large part due to Richard Woolcott's work through the United Nations that the legitimacy of the Antarctic Treaty System was so resolutely and effectively defended at that time. We are therefore very honoured to have Richard Woolcott, one of Australia's most distinguished diplomats, with us today to give the Keynote Address, in which, I am sure, he will provide his views - an insider's insight - on this episode among others.

A key step in enhancing the legitimacy of the Antarctic Treaty System was increasing the participation of, and cooperation with, States which had not previously had a strong involvement in the Treaty system. Antarctic Treaty Consultative Meetings (ATCMs) were opened to non-consultative parties (those parties with a lesser degree of involvement in Antarctic activities, which do not participate in decision-making at ATCMs). Antarctic Treaty Consultative Parties

(ATCPs) agreed to change the criteria for consultative party status. No longer is there a requirement to have an autonomous research program which basically required as a precondition the building of stations in Antarctica. Rather, States could rely on cooperative scientific activities as the basis for consultative party status. The growth in ATCPs during the 1980s and 1990s, including States such as China, Brazil and India, is directly related to these initiatives. These moves to broaden the number and diversity of Treaty parties and consultative parties, now 45, weakened the criticism within the UN that the ATS was unrepresentative.

The watershed in the ongoing debate throughout the 1970s and 80s on the legitimacy of the Antarctic Treaty System was the decision to ban mineral exploration in Antarctica, and the development of the Madrid Protocol on Environmental Protection to the Antarctic Treaty - related developments in which Australia had a crucial role.

There was recognition among Treaty Parties in the 1970s of the potential for mineral exploitation in Antarctica and that a regime should be created in advance to regulate such activities. As previously, Treaty Parties decided to cooperate to come up with a mutually acceptable regime. That regime, the Convention for the Regulation of Antarctic Mineral Resources Activities (CRAMRA - the Minerals Convention) was negotiated over the period 1982-1988 under the chairmanship and guidance of the legendary New Zealand diplomat and international lawyer, the late Chris Beeby. The Convention was finalised in June 1988 in Wellington.

The Convention established a number of institutions to assess, authorise and regulate possible mineral activities. Protection of the Antarctic environment was a key consideration for such regulation.

However, once the Convention had been adopted, real concerns emerged within Australia about the effectiveness of the regime, and the impact which mining could have on the Antarctic environment.

On 22 May 1989, then Prime Minister Bob Hawke announced that Australia would not sign the Minerals Convention. In effect, Australia pulled the plug on the Convention - a text which had been painstakingly negotiated over many years by 20 states, and adopted by consensus.

At the time Prime Minister Hawke stated:

*I am aware that our decision has caused considerable anxiety amongst those Antarctic Treaty members who believed that the coming into force of the Minerals Convention was not just a correct outcome but a foregone conclusion. Australia...is not challenging the Treaty System, or the consensus principle that underpins its operation. But we are challenging Treaty members to accept that times have changed since the 1970s.... One of the greatest legacies*

*our generation can leave the future may be one of the simplest: one continent unspoilt, a testament to our own recognition that in other corners of the world we have already gone too far.*

Australia proposed a mining ban and development of a comprehensive environmental protection annex. Public support from France followed almost immediately.

Australia's decision was heavily influenced by domestic political considerations. A concerted campaign by environmental NGOs domestically had created the necessary momentum for the Government to take this step. Over 12,000 pieces of correspondence were sent to the Australian Minister for the Environment in favour of the mining ban in a twelve month period. Add to this two major oil spills in pristine areas in the first few months of 1989 - the *Exxon Valdez* in Alaska and the *Bahai Paraiso* in the Antarctic peninsula area - and the timing was right.

However, Australia's decision was not initially well-received internationally. At first sight, this would seem to be an example of a lack of cooperation with Treaty Parties. Certainly it was a difficult period for all concerned. However, a general culture of cooperation and consensus does not preclude disagreements - at times strong disagreements - between parties. Where that culture of cooperation does come into its own is in the search for solutions to such disagreements. The fact that Treaty parties were able to accept this decision by one of their number, to respond, and to agree to an alternative regime in just two years, is a testament to the robustness of the Antarctic Treaty System, the general goodwill between Treaty Parties, and a common commitment to find mutually acceptable solutions.

## **THE MADRID PROTOCOL**

Australia's alternative to the Minerals Convention was a framework for the comprehensive protection of the Antarctic Environment. A joint paper with France set out the components of what was to become the Madrid Protocol on Environmental Protection. All of these components were found in the final Protocol. The Australian framework, and eventual Protocol, provided for comprehensive protection of the Antarctic Environment, and included some novel concepts.

The Protocol designated Antarctica as a natural reserve; provided, through the Committee on Environmental Protection, for multilateral environmental impact assessments for activities likely to have a significant impact; and provided annexes on waste management, conservation of flora and fauna, and marine pollution.

By 1991, the Protocol on Environmental Protection to the Antarctic Treaty had been negotiated and was adopted. This was remarkable, in that this was achieved so soon after the adoption of the Minerals Convention.

With the Protocol the principle of international cooperation was extended. No longer was such cooperation focused on scientific endeavour or logistical aspects of working in Antarctica. International cooperation on environmental protection was now enshrined as part of the Antarctic Treaty System. With the establishment of the Committee on Environmental Protection, this cooperation was institutionalised. Antarctic Treaty Consultative Parties were even more interdependent than before.

## **PRESENT**

Before we look to the future, it is time to consider the present, and to ask - so how does the Treaty look 40 years on?

From the Australian government's perspective, the Antarctic Treaty looks more robust than some might think. The Treaty, and the System to which it is central, should be seen not as a fragile compromise of competing interests, but rather as a robust framework for action in Antarctica.

From a foreign policy perspective, Article IV has worked. True to the preamble of the Treaty, Antarctica has not been the scene of discord. The commitment to peace and science has held.

Closely related to this is the assessment that the Antarctic Treaty System is flexible and capable of evolving to meet the challenges as they arise. Although perhaps most dramatically demonstrated by the mining debate and the subsequent development of the Madrid Protocol, many other instances support this view - the decision by ATCPs to enable broader participation and the development of the Convention on the Conservation of Antarctic Marine Living Resources.

The theme of international cooperation has permeated the activities of Antarctic Treaty parties, and interactions between parties. The Australian Antarctic Division has and continues to play an immensely significant role for Australia in this regard. This cooperation is not only happening at the formal level - in international meetings or pre-planned joint activities in Antarctica - but also at the informal level. For instance, I am aware that from time to time Australian expeditioners at Davis Station have flown across to the nearby Russian Progress station in helicopters, landed unannounced, and invited Russian expeditioners back to Davis to share in traditional Australian Christmas meals.

From the perspective of the Australian Government, these informal

contacts and cooperation are as important as the formalised cooperative activities worked out in capitals.

Antarctic cooperation is at its strongest in the area of scientific research. Not only has the Antarctic become a place dedicated to science, it has become a backdrop for international scientific cooperation. The obligations under the Treaty to exchange scientific information has proved invaluable not only to Australian scientists, but to scientists of all Antarctic Treaty parties. Scientific activity in Antarctica is relevant to a remarkable range of areas - global climate change, atmospheric systems, meteorology, human impacts, protection of the marine environment, and ecosystem management.

One example of the centrality of science that I would like to refer to is the area of Antarctic marine living resources. The Convention on the Conservation of Antarctic Marine Living Resources - another key part of the Antarctic Treaty System - is unique. Its scope of application is defined by an ecological boundary - the Antarctic Convergence which separates Antarctic waters from more temperate waters. This was the first multilateral environment agreement to define its scope by reference to an ecological boundary. The Convention takes an ecosystem approach to the management of marine living resources, rather than commit the mistakes of many fisheries regimes that focus only on target stocks. It has institutionalised the precautionary approach. In fact, the design of the CCAMLR regime indicates that lawyers actually listened to the scientists, and the scientists obviously spoke in a way that the lawyers could understand - there is a message there!

Evidence of the international cooperation which underpins CCAMLR, which is headquartered in Hobart, is the fact that the Commission has been operating for 20 years on the basis of consensus decision-making. Unlike in other fora involving international fisheries, the consensus principle has *not* hamstrung the Commission's effective operations.

A key threat to the work of CCAMLR in recent years has been illegal, unreported and unregulated, or IUU, fishing. Estimates are that such fishing has exceeded the amount of fish taken by CCAMLR members in accordance with CCAMLR conservation measures. Not only does this result in massive depletion of target fish stocks particularly the Toothfish - it is also responsible for virtually all of the estimated 70,000 albatrosses killed on long lines each year in waters around Antarctica.

In 1999 CCAMLR adopted a Catch Documentation Scheme for Toothfish species, which came into effect on 7 May 2000. The scheme - essentially a WTO-consistent trade-related measure addressing a major international environmental problem - was an initiative in which Australia was pleased to play a major role. However its adoption was, and its long term success is, dependent on effective international cooperation between CCAMLR members -

at the level of lawyers and policy makers devising the scheme, and officials implementing the scheme.

The CCAMLR experience in combating IUU fishing should also be seen in a global context. CCAMLR was the first body to coin the term "IUU fishing". Basically, CCAMLR was instrumental in putting this issue on the international agenda. The international cooperation which underpins CCAMLR meant that that organisation was uniquely placed to take steps to combat IUU fishing. Some of the steps taken by CCAMLR have now been included in the International Plan of Action to Prevent, Eliminate and Deter Illegal, Unreported and Unregulated Fishing, an international plan agreed under FAO auspices in Rome in February this year.

An excellent example of both the Australian government's resolve to combat IUU fishing, and the importance of international cooperation in protecting marine resources, was the recent apprehension by Australia of the *South Tomi* - which received extensive media coverage.

On 29 March 2001 an Australian civil surveillance vessel encountered the Togo registered *South Tomi* fishing illegally in Australia's EEZ around Heard Island and the McDonald Islands. Despite instructions from the Australian vessel to proceed to Fremantle, the *South Tomi* took off to the west. The Australia surveillance vessel undertook hot pursuit - only in the legal sense, given the temperature of the waters! That hot pursuit continued for 14 days, and covered over 6000 kms across the Southern and Indian Oceans. The *South Tomi* was eventually boarded and apprehended by Australian personnel, with South African assistance, 250 nautical miles south of Capetown, on 12 April. The vessel was taken back to Fremantle for prosecution.

This operation could not have succeeded without strong, effective and practical international cooperation from South Africa and France *en route*. This willingness and ability to cooperate derived from common objectives, a history of cooperation through CCAMLR, and personal contacts between key officials built up over time. The Australian government is interested in exploring ways to deepen and broaden such cooperation between States in surveillance and enforcement in the Southern oceans.

## **FUTURE**

So where to in the next 40 years?

There is the question of where Antarctic science might develop in the next 40 years, on which Professor Garth Paltridge will be speaking.

I am also conscious that Bill Bush will be addressing the question of politics and law in the next 40 years. Bill, an old friend and colleague, is

eminently qualified to do so having been Director of the Antarctic section in the Department of Foreign Affairs and Trade at the time of the decision to abandon the Minerals Convention and to pursue the Madrid Protocol. He certainly found himself at the intersection of politics and law at that time.

However I would like to signal from a DFAT perspective what some key issues in the years ahead might be.

Firstly, marine issues are likely to become an area of even greater focus. One of the key issues will be the establishment of marine protected areas. An international consensus is quietly building that the establishment of marine protected areas is a key component of effective strategies to protect and conserve marine ecosystems. However, Antarctic Treaty Parties have not yet successfully established such a marine protected area. This is complicated by a lack of clarity about the respective responsibilities of two components of the Antarctic Treaty System, the Antarctic Treaty Consultative Meeting and CCAMLR, in proposing, considering and establishing a marine protected area within the Treaty area. Australia believes it important that States cooperate on this issue, agree to a procedure for establishing such areas, and then get on with the establishment of such areas.

The interaction between the Antarctic Treaty System and another multilateral regime, the UN Convention on the Law of the Sea, will be another area of focus.

I would also like to mention another international law issue - liability for environmental harm. Article 16 of the Madrid Protocol requires ATCPs to come up with a comprehensive regime for liability for environmental damage in Antarctica. International liability regimes are not easy to establish. However, ATCPs have been working on this issue since 1992. While much work has been done, significant differences remain. Australia is seeking, as are the majority of other ATCPs, a comprehensive regime which would cover virtually all incidents of environmental damage in Antarctica, whether caused by government or non-government operators. Australia hopes that ATCPs can make some real progress towards such an annex.

The last issue I will mention as a future challenge returns to my theme of international cooperation. ATCPs have, over the past 40 years, achieved a great deal through cooperation. Even more remarkable is that they have achieved so much without a Secretariat to coordinate the work of Treaty parties, act as a central organising point, a record keeper and an institutional support for activities under the Antarctic Treaty. However, the time has come for such a Secretariat to be established. As our work becomes ever more complex, and exchange of information obligations more onerous, a Secretariat is essential. Following the decision at ATCM XXIV at St Petersburg in July, 2001, the Australian Government is working towards the early establishment and

functioning of the Secretariat.

## **CONCLUSION**

Twenty years ago, Ralph Harry, a Tasmanian and Graduate of the University of Tasmania, who was a member of the Department of External Affairs (as it was called then), had a strong involvement in Antarctic and Law of the Sea issues, wrote a paper on Antarctica and the Law of the Sea while a Visiting Fellow in the Department of Political Science at the University of Tasmania. He concluded that the compact of the Antarctic Treaty has for nearly 20 years kept the Antarctic a zone of peace, an area of friendly scientific cooperation, in which the unique environment is being rigorously protected. 20 years on we could draw the same conclusion. But we must not be complacent.

The Australian Government sees the Antarctic Treaty System as robust, flexible, and capable of evolving to meet the challenges ahead. Fundamental to this is the spirit of cooperation which underpins the System. The Australian Government is committed to continuing to play a key role in working with the Treaty parties to ensure that the Treaty System becomes even more robust in the future.

