

THE ANTARCTIC TREATY SYSTEM

I. INTRODUCTION

The key Antarctic Treaty System (ATS)¹ events of 2012 were the two annual diplomatic meetings, the Antarctic Treaty Consultative Meeting (ATCM) and the Meeting of the Commission for the Conservation of Antarctic Marine Living Resources (Commission). These diplomatic meetings include the main sessions of the advisory bodies, the Committee for Environmental Protection (CEP) and the Scientific Committee for the Conservation of Antarctic Marine Living Resources (SC-CAMLR), established under the relevant international instruments.² Although reports were received from three Intersessional Contact Groups operating between the 34th and 35th ATCMs,³ these groups operated through electronic communications and no Meeting of Experts was held in 2012.⁴ Five intersessional meetings of Working Groups of SC-CAMLR were held during 2012.⁵ Domestic New Zealand legislative activity included enactment of implementing legislation for *Annex VI of the Madrid Protocol on Liability Arising from Environmental Emergencies*. New Zealand also signed an Antarctic cooperation agreement with South Korea.

New Zealand was, as usual, an actively engaged state within the fora of the ATS, participating across all focal areas. Marine activities, including particularly harvesting in the Ross Sea and the difficulties evident in achieving first a common position with the United States in relation to a Marine Protected Area there and then in seeking to build consensus around its designation (a project that has so far been unsuccessful) occupied its diplomatic attention, including that of Ministers and high officials during 2012.

- 1 “‘Antarctic Treaty system’ means the Antarctic Treaty, the measures in effect under that Treaty, its associated separate international instruments in force and the measures in effect under those instruments”: Protocol on Environmental Protection to the Antarctic Treaty [Madrid Protocol] (opened for signature 4 October 1991, entered into force 14 January 1998), art 1.
- 2 Madrid Protocol, arts 11 and 12; Convention for the Conservation of Antarctic Marine Living Resources (CCAMLR) (opened for signature 5 May 1980, entered into force 7 April 1982), arts XIV and XV respectively.
- 3 Netherlands provided Working Paper 27 rev.1 “Outstanding Questions on Antarctic Tourism”; Argentina provided Working Paper 46 “Supervision of Antarctic Tourism”; and the Secretariat provided Secretariat Paper 9 “Review of ATCM Recommendations on Operational Matters” at the Thirty-Fifth Antarctic Treaty Consultative Meeting (Hobart, Australia).
- 4 Antarctic Treaty Secretariat *Final Report of the Thirty-fifth Consultative Meeting* (Hobart, 2012).
- 5 Ecosystem Monitoring and Management; Statistics, Assessments and Modelling; Marine Protected Areas; fish Stock Assessment; Incidental Mortality Associated with Fishing. CCAMLR Secretariat *Report of the Thirtieth Meeting of the Scientific Committee* (Hobart, 2012).

II. 1959 ANTARCTIC TREATY⁶

The 35th ATCM⁷ was convened in Hobart, Australia from 11-20 June 2012. The practice has been to hold the main CCAMLR meetings (see below) in Hobart because that is where its secretariat is based. ATCMs, in contrast are rotated around the Consultative Parties, in a rough alphabetical sequence (in English). Australia hosted the first ATCM in 1961 and the twelfth in 1983, both in Canberra. This was the first ATCM to be held over just eight days, rather than the previous ten days, following agreement at the 33rd ATCM in 2010.⁸ As in the previous two years, all 11 of the legally-binding Measures⁹ adopted related to Protected Areas or Historic Sites and Monuments. Four administrative Decisions (Measures no longer current; Secretariat Reports, Programmes and Budgets; The Development of a Multi-Year Strategic Work Plan for the ATCM; and Electronic Information Exchange System) and 11 hortatory Resolutions were adopted (up from six in 2011 and seven in 2010) on Strengthening Support for the Protocol; Cooperation on Questions relating to the Exercise of Jurisdiction in the Antarctic Treaty Area; Improving Cooperation in Antarctica; Site Guidelines for Visitors; Visitor Guidelines for a particular island; Antarctic Conservation Biogeographic Regions; Vessel Safety in the Antarctic Treaty Area; Improved Coordination of Maritime, Aeronautical and Land-Based Search and Rescue; Assessment of Land-Based Expeditionary Activities; Yachting Guidelines; and Checklist for Visitor's In-field Activities.

This continues a recent trend whereby the adoption of legally-binding commitments at ATCMs is, essentially, confined to the designation of (and management plans for) discrete sites under area-protection obligations. Such sites are likely to come forward each year, in the continuation of a process grounded in scientific, conservation and (later) environmental merits assessment which has its roots in Antarctic Treaty practice since the mid-1960s. However, functionally, the ATCM now addresses a much broader suite of issues (as the lists of Decisions and Resolutions show) but, as previously noted,¹⁰ these issues are now seemingly under-represented in the meeting's legally-binding outputs. Whether this is a passing phase or evidence of a longer-term structural realignment towards the "soft" end of the recommendations (ie exhortation rather than obligation) is an interesting

6 Antarctic Treaty (opened for signature 1 December 1959, entered into force 23 June 1961).

7 ATCMs address the full range of obligations under both the Antarctic Treaty and the Madrid Protocol, and the presently more limited reporting obligations under the Convention on the Conservation of Antarctic Seals (opened for signature 1 June 1972, entered into force 11 March 1978).

8 Antarctic Treaty Secretariat *Final Report of the Thirty-third Consultative Meeting* (Punta del Este, 2010) at [537].

9 On Measures, Decisions and Resolutions generally, see Decision 1 (1995) <http://www.ats.aq/documents/keydocs/vol_2/vol2_3_Rules_of_Procedure_and_Admin_Decision1_e.pdf>.

10 Alan D Hemmings "Year in Review: The Antarctic Treaty System" (2011) 9 NZYIL 336.

question which may be worthy of further enquiry. However, and without being churlish, it is difficult to see any “big ticket” issues materially advanced at the Hobart ATCM.

New Zealand was involved in 11 Working Papers (WP), six of which it tabled alone, the rest with other Consultative Parties (and the Scientific Committee for Antarctic Research – SCAR), five Information Papers (IP) and two Background Papers (BP).¹¹ As one of only 31 entities (28 Consultative Parties and three Observers) mandated to table WPs, New Zealand continues to be a major contributor, with only three other states (Australia, Chile and the United States) equalling its involvement in 11 WPs,¹² and just one state (the United Kingdom) exceeding it with 16. Three New Zealand WPs (one with the United States) concerned Protected Areas in the Ross Sea region (the area claimed by New Zealand as the Ross Dependency). A fourth concerned the continuing saga of the Norwegian yacht “Berserk” noted last year,¹³ calling for action against repeat unauthorised expeditions “before these become a systemic threat to the Antarctic Treaty System”.¹⁴ A fifth WP “ATCM Response to CCAMLR Fishing Vessel Incidents” addressed ways in which the ATCM might support Parties which through their Maritime Rescue Coordination Centres have responsibilities in the Antarctic Treaty area. Two WPs (“Antarctic Conservation Biogeographic Regions”¹⁵ and “Concepts for Wilderness protection in Antarctica using tools in the Protocol”) were concerned with environmental management methodologies and on-going discussion within the Committee for Environmental Protection (CEP), and another concerned “Environmental aspects and impacts of tourism and non-governmental activities in Antarctica”.

- 11 All papers submitted to the meeting are available at the Antarctic Treaty Secretariat website <www.ats.aq>. A total of 64 Working Papers, 88 Information Papers, 17 Secretariat Papers and 42 Background Papers were tabled at the ATCM. The number of Information Papers appears to be declining with an increase in Secretariat and Background Papers. Working Papers are the basis for substantive discussion at the ATCM, and translated by the Secretariat into the four official treaty languages. Information Papers are not ordinarily translated unless so requested by Parties or the Chair of the Working Group considering it.
- 12 The 11 Working Papers (WP) involving New Zealand were: WP 19 “The proposed designation of an Antarctic Specially Protected Area (ASPA) for high altitude geothermal areas of the Ross Sea region”; WP 20 “Establishing a monitoring programme to assess changes in vegetation at two Antarctic Specially Protected Areas”; WP 22 “Environmental aspects and impacts of tourism and non-governmental activities in Antarctica”; WP 23 rev.1 “Antarctic conservation biogeographic regions”; WP 30 “The development of a multi-year strategic work plan for the Antarctic Treaty Consultative Meeting”; WP 38 (with the United States) “Developing protection for a geothermal area: Volcanic ice caves at Mount Erebus, Ross Island”; WP 47 “Prioritisation of issues in an ATCM multi-year strategic work plan”; WP 48 “Repeat unauthorised commercial expedition: Nilaya/Berserk”; WP 49 “ATCM responses to CCAMLR fishing vessel incidents”; WP 50 (with the Netherlands) “Concepts for wilderness protection in Antarctica using tools in the Protocol”; and WP 57 (with Australia and SCAR) “Antarctic environments portal”.
- 13 Hemmings, above n 10.
- 14 New Zealand introduced Working Paper 48 “Repeat unauthorised commercial expedition: Nilaya/Berserk” at the Thirty-Fifth Antarctic Treaty Consultative Meeting (Hobart, Australia).
- 15 Resolution 6 (2012), Antarctic Conservation Biogeographic Regions, was adopted by the Thirty-fifth Antarctic Consultative Meeting (Hobart, Australia).

A further paper directed to the CEP was entitled “Antarctic Environments Portal”. The ATCM’s Multi-Year Strategic Work Plan was the subject of two WPs, one on its “development” in a WP involving eight other states, and, in a New Zealand only paper, on “Prioritisation of Issues”.

All five New Zealand IPs were essentially companion pieces to its WPs: on CCAMLR fishing vessel incidents, on search and rescue incidents, on Antarctic conservation, on wilderness protection, and on prioritisation of ATCM issues.¹⁶ The two BPs were on “Energy efficiency and carbon reduction” and an update on conservation by the Antarctic Heritage Trust.

Taken as a whole, the New Zealand papers reflect not only an objectively strong commitment (in absolute and relative contributions to the totality of ATCM papers, and in ranging across key current Antarctic issues), but some emerging and generic trends. These include increasing systemisation of discussions and agenda items. The ATCM (and within the ATCM, around particularly environmental themes, the CEP) has moved to a more strategic approach. Discussions are now prioritised and multi-year. This is driven, in part, by the scale and diversity of the issues and agenda items, in part by the challenge of having the right people and skills available on delegations at the meeting (which is obviously easier if there is some predictability to, and forewarning of, issues), and in part by limits on time (and the last has become even more acute with the reduction in length of the ATCM). The benefits of this development include a greater focus and depth. There may be less of a lottery about what issues get substantive discussion. On the negative side of the ledger, at least potentially, is a drift towards ever greater focus on issues which lend themselves to technical resolution. That partly arises through the inevitable requirement for consensus on what issues will be prioritised, which may often be easier around “scientific” or “technical” matters, rather than more overtly “policy” and “political choice” sorts of issues. The prominence of protected areas in the legally-binding Measures adopted in recent years may reflect this.

Whilst concluded on a bilateral basis, outside Antarctic Treaty System fora, New Zealand and the Republic of Korea (South Korea) concluded an agreement on Antarctic cooperation in 2012 ranging across the Antarctic Treaty, Madrid Protocol and CCAMLR.¹⁷ It commits the Parties to consultations between Foreign Ministers across Antarctic marine living resources, political, scientific and environmental issues, and to logistical and scientific cooperation.

16 The 5 New Zealand Information Papers (IP) were: IP 16 “Prioritisation of ATCM issues: Illustrative table”; IP 17 “Search and rescue incidents in the 2011/12 season. FV Sparta and FV Jeong Woo 2”; IP 33 “Environmental aspects and impacts of tourism and non-governmental activities in Antarctica”; IP 35 (with SCAR and IUCN) “Antarctic conservation for the 21st Century: Background, progress and future directions”; and IP 60 (with the Netherlands) “Further information about wilderness protection in Antarctica and use of tools in the Protocol”.

17 Agreement between the Government of New Zealand and the Government of the Republic of Korea on Antarctic Cooperation, signed in Auckland 17 August 2012.

III. 1980 CONVENTION ON THE CONSERVATION OF ANTARCTIC MARINE LIVING RESOURCES (CCAMLR)

The 31st Meeting of the Commission for the Conservation of Antarctic Marine Living Resources (Commission) was held at the CCAMLR Secretariat in Hobart, Tasmania, Australia from 23 October to 1 November 2012.¹⁸

New Zealand, as previously, submitted a notification for exploratory fishing for Toothfish (*Dissostichus* spp.) in the Convention Area.¹⁹ New Zealand's primary area of fisheries interest is of course the Ross Sea, divided between CCAMLR Statistical Subareas 88.1 and 88.2. In the former, the precautionary catch limit (PCL) for the 2012/13 season was (as in 2011) set at 3,282 tonnes across a maximum of four New Zealand, one Japanese, six South Korean, one Norwegian, six Russian, one Spanish, three Ukrainian and two United Kingdom flagged vessels.²⁰ For Subarea 88.2, a PCL (again as in 2011) of 530 tonnes was set across a maximum of four New Zealand, six South Korean, one Norwegian, six Russian, one Spanish, three Ukrainian and two United Kingdom flagged vessels.²¹ Note that whilst the catch limit for both Subareas was identical to that set for the 2011/12 season, this year, the number of vessels authorised in each increased, from 18 to 24 in Subarea 88.1, and from 18 to 23 in 88.2. Some concern was expressed by members about previously reported incidents of non-compliance by South Korean-flagged vessels. New Zealand also noted the increase in South Korean vessels (up from four in 88.1 and three in 88.2 the previous year to six in each) in particular, wondering whether it was "in the spirit of the call for restraint by CCAMLR-XXX in the context of discussions about capacity",²² an interesting development in light of the agreement recently signed with South Korea.

Discussion of the various proposals for large Marine Protected Areas (MPAs) in CCAMLR waters continued at the 31st meeting of CCAMLR. Indeed, the question of MPAs, and whether the Commission would be able to reach consensus on designating any further areas (one area, south of the South Orkney Islands, having been designated in 2009).²³ Proposals existed for MPAs in three areas: (i) in the Ross Sea Region (two proposals);²⁴

18 CCAMLR Secretariat *Report of the Thirty-first Meeting of the Commission* (Hobart, 2012).

19 CCAMLR, Working Group on Fish Stock Assessment, "Notifications of New Zealand's intention to conduct exploratory longline fisheries for *Dissostichus* spp., CCAMLR-XXXI/21 Rev. 1 (Adopted at thirty-first meeting of the Commission, Hobart, 2012).

20 CCAMLR, Working Group on Fish Stock Assessment, Conservation Measure 41-09 (2012) "Limits on the exploratory fishery for *Dissostichus* spp. In Statistical Subarea 88.1 in the 2012/13 season" (Adopted at thirty-first meeting of the Commission, Hobart, 2012).

21 CCAMLR, Working Group on Fish Stock Assessment, "Conservation Measure 41-10 (2012) Limits on the exploratory fishery for *Dissostichus* spp. In Statistical Subarea 88.2 in the 2012/13 season" (Adopted at thirty-first meeting of the Commission, Hobart, 2012).

22 *Report of the Thirty-first Meeting of the Commission*, above n 18, at [7.39].

23 Conservation Measure 91-03 (2009) Protection of the South Orkney Islands southern shelf <<http://www.ccamlr.org/sites/drupal.ccamlr.org/files//91-03.pdf>>.

24 CCAMLR, Introduced by New Zealand and United States of America "A proposal for the establishment of a Ross Sea region Marine Protected Area" CCAMLR-XXXI/16 Rev. 1 (Thirty-first meeting of the Commission, Hobart, 2012); CCAMLR, Introduced by United

(ii) off East Antarctica (a single proposal);²⁵ and (iii) around the Amundsen-Bellinghousen-Weddell sea margins (a single proposal).²⁶ A detailed examination of these MPA proposals and the complex negotiations around each is not possible in this review. The report language relating to discussions on this matter takes up over 19 of the 61 pages of the substantive Report of the Commission. However, the discussion in Hobart in 2012 failed to achieve consensus on the designation of any MPAs. The Commission appears to have been split between two substantial camps. Whilst a numerical majority appeared supportive of designating one or more of these areas, a key group of fishing states (China, Japan, South Korea, Russia and Ukraine) are, as yet, not persuaded of the case, and since the Commission makes decisions by consensus, this is plainly compelling opposition. The inability to reach consensus on either a designation, or substantive progress towards designation, of an MPA was widely reported internationally (as statements by participants in Hobart and in general and specialised media) as a failure of CCAMLR *per se*, and to that extent may have harmed CCAMLR's reputation more widely than just in relation to the MPA question, at least in the short term. In the hope that further discussion might be helpful, and some progress might still be achievable in relation to these MPA proposals, the meeting agreed to a proposal from New Zealand that a Special Meeting of the Commission be held before the next ordinary meeting.²⁷ That Special Meeting is to be held in Germany in July 2013.

The only other papers tabled by New Zealand were four Background Papers: three Observer reports,²⁸ and a paper on implementation of Conservation Measure 31-02 (2007) General Measure for the closure of all fisheries.²⁹

States of America "A proposal for the Ross Sea region Marine Protected Area" CCAMLR-XXXI/40 (Thirty-first meeting of the Commission, Hobart, 2012).

- 25 CCAMLR, Introduced by Australia, France and the European Union "Proposal for a conservation measure establishing a representative system of marine protected areas in the East Antarctica planning domain" CCAMLR-XXXI/36 (Thirty-first meeting of the Commission, Hobart, 2012).
- 26 CCAMLR, Introduced by the European Union "EU proposal for spatial protection of marine habitats and communities following ice shelf retreat or collapse in Subarea 88.3. Subarea 48.1 and Subarea 48.5" CCAMLR-XXXI/30 (Thirty-first meeting of the Commission, Hobart, 2012).
- 27 *Report of the Thirty-First Meeting of the Commission*, above n 16, at [7.105].
- 28 CCAMLR, New Zealand as observer, "Observer's report from the Eighty-first Meeting of the Official Forum Fisheries Committee" CCAMLR-XXXI/BG/24 (Thirty-first meeting of the Commission, Hobart, 2012); CCAMLR "New Zealand as observer, Observer's report from the Fourth Session of the Meeting of the Parties to the Agreement for the Conservation of Albatrosses and Petrels" CCAMLR-XXXI/BG/25 (Thirty-first meeting of the Commission, Hobart, 2012); CCAMLR, New Zealand as observer "Observer's report from the Eight Session of the Commission for the Management of Highly Migratory Fish Stocks in the Western and Central Pacific" (a Regional Fisheries Management Organization (RFMO) which abuts the CCAMLR boundary, and thus reaches as far south as 60° South in the South Pacific) CCAMLR-XXX/BG/42).
- 29 CCAMLR, Introduced by New Zealand "Implementation of Conservation Measure 31-03" CCAMLR-XXXI/BG/27 (Thirty-first meeting of the Commission, Hobart, 2012).

IV. NEW ZEALAND LEGISLATIVE ACTIVITY

The major outstanding domestic legislative activity in recent years has been the passage of New Zealand's implementing legislation for Annex VI of the Madrid Protocol, on "Liability Arising from Environmental Emergencies".³⁰ Annex VI was negotiated under the chairmanship of a senior New Zealand diplomat, Don MacKay, then Representative at the United Nations in New York.³¹ The progress of the Antarctica (Environmental Protection: Liability Annex) Amendment Bill 2009 (and more particularly the Minister of Foreign Affairs' advice on its anticipated passage in 2012) was reported in the previous Year in Review.³² Mr McCully's advice in May 2012 that "it is to be passed if possible this year" was confirmed by Second and Third Readings of the Bill on 4 December and Assent on 11 December 2012. The Antarctica (Environmental Protection: Liability Annex) Amendment Act 2012,³³ under its section 2, "comes into force on a date appointed by the Governor-General by Order in Council".

At the Hobart ATCM in June 2012 it was reported that six states had already ratified Annex VI.³⁴ Australia's implementing legislation received Assent soon after that ATCM, on 28 June 2012.³⁵ New Zealand appears to be the only other state to have completed its requisite legislation in 2012, and so the year ended with eight of the 28 ratifications by Consultative Parties that are necessary before Annex VI may enter into force.

New Zealand's major Madrid Protocol implementing legislation, the Antarctica (Environmental Protection) Act 1994,³⁶ was amended (in relation to s 27(3) "Respect for protected areas") by the Antarctica (Environmental Protection) Amendment Act 2012,³⁷ and (in relation to various Part 6 provisions dealing with Inspectors' powers) by the Search and Surveillance Act 2012.³⁸

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30 ATCM *Annex VI to the Protocol on Environmental Protection to the Antarctic Treaty* – "Liability Arising From Environmental Emergencies" adopted as Measure 1 (2005) at the Twenty-eighth ATCM (Stockholm, 2005). See Antarctic Treaty Secretariat *Final Report of the Twenty-eighth Consultative Meeting* (Stockholm, 2005).

31 Don MacKay was still engaged with Antarctic affairs in 2012, chairing the Working Group on Tourism and Non-governmental Activities at the Thirty-fifth ATCM.

32 Hemmings, above n 10.

33 Antarctica (Environmental Protection: Liability Annex) Amendment Act 2012.

34 Antarctic Treaty Secretariat *Final Report of the Thirty-fifth Consultative Meeting* (Hobart, 2012) at [142].

35 Antarctic Treaty (Environment Protection) Amendment Act 2012 (Australia).

36 Antarctica (Environmental Protection) Act 1994.

37 Antarctica (Environmental Protection: Liability Annex) Amendment Act 2012.

38 Search and Surveillance Act 2012, s 200.