

## THE ANTARCTIC TREATY SYSTEM

### I. INTRODUCTION

The key Antarctic Treaty System (ATS)<sup>1</sup> events of 2013 were the two annual diplomatic meetings, the Antarctic Treaty Consultative Meeting and the Meeting of the Commission for the Conservation of Antarctic Marine Living Resources. 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.<sup>2</sup> Reports were received (as Working Papers – WPs) from a number of mandated and informal intersessional contact groups operating through electronic means between the 35th and 36th ATCMs, including one chaired by New Zealand.<sup>3</sup> No Meeting of Experts was held between the ATCMs, although a Workshop on the Development of a Multi-Year Strategic Work Plan for the ATCM was held on the first two days of the 36th ATCM. However, around the continuing vexed issue of Marine Protected Area (MPA) designation under CCAMLR, 2013 saw a ‘Second Special Meeting of the Commission’, and the ‘First Intersessional Meeting of the Scientific Committee’ of CCAMLR in Bremerhaven in July 2013. In addition, and following normal practice, three intersessional meetings of Working Groups of SC-CAMLR (Ecosystem Monitoring and Management; Statistics, Assessments and Modelling; and Fish Stock Assessment) and a meeting of the CCAMLR Scheme of International Scientific Observation Review Panel, were held during 2013. New Zealand was, again, actively engaged across all the ATS current issues. The ongoing project of securing agreement within CCAMLR to a Ross Sea MPA was a major focus.

- 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 Intersessional Contact Group on Information Exchange and the Environmental Aspects and Impacts of Tourism. New Zealand’s report on the group was tabled as Working Paper 33 “Report of the Intersessional Contact Group on Information Exchange and the Environmental Aspects and Impacts of Tourism”.

## II. 1959 ANTARCTIC TREATY<sup>4</sup>

The 36th ATCM<sup>5</sup> was convened in Brussels, Belgium from 20-29 May 2013.<sup>6</sup> ATCMs are rotated around the Consultative Parties, in a rough alphabetical sequence (in English). As in the previous three years, all of the legally-binding Measures<sup>7</sup> adopted (21, substantially more than in recent years<sup>8</sup>) related to Protected Areas or Historic Sites and Monuments. Seven administrative Decisions were adopted: Recognition of the Czech Republic as a Consultative Party, Reappointment of the Executive Secretary, Renewal of the Secretariat external auditor contract, Secretariat Report Programme and Budget, Multi-year workplan for the ATCM, Information Exchange on Tourism and Non-governmental activities, and Additional availability of information on lists of Observers of the Consultative Parties through the Secretariat. Six hortatory Resolutions were adopted on: Air Safety in Antarctica, Antarctic Clean-Up Manual, Site Guidelines for Visitors, Improved Collaboration on Search and Rescue in Antarctica, International Collaboration on cultural projects about Antarctica, and Biological Prospecting in Antarctica.

Continuing a practice first noted in the 2011 Year-in-Review,<sup>9</sup> adoption of legally-binding commitments at ATCMs is now confined to the designation of (and management plans for) discrete sites under area-protection obligations, despite the ATCM formally addressing a broader suite of issues.<sup>10</sup> The ATCM conducted its work through the usual meeting of the Committee for Environmental Protection, and four Working Groups (Legal and Institutional Affairs; Tourism and Non-governmental Activities; Operational Matters; and a Special Working Group on Search and Rescue). Don Mackay of New Zealand again chaired the Tourism and Non-governmental Activities Group.

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

5 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).

6 Antarctic Treaty Secretariat *Final Report of the Thirty-Sixth Consultative Meeting* (Hobart, 2013).

7 On Measures, Decisions and Resolutions generally, see Decision 1 (1995).

8 Compared to 11 in 2012, 12 in 2011, and 15 in 2010.

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

10 A D Hemmings "Year in Review: The Antarctic Treaty System" (2012) 10 NZYIL 237.

New Zealand was involved in eight Working Papers (WP), six of which it tabled alone,<sup>11</sup> one with the United Kingdom and United States,<sup>12</sup> and another with Australia, Belgium, Norway and the Scientific Committee for Antarctic Research (SCAR);<sup>13</sup> five Information Papers (IP), three of which it tabled alone,<sup>14</sup> one with the United States and Italy,<sup>15</sup> and one with Chile;<sup>16</sup> and three Background Papers (BP): two tabled alone,<sup>17</sup> and one tabled with the United States.<sup>18</sup> As one of only 31 entities (28 Consultative Parties and three Observers)<sup>19</sup> mandated to table WPs, New Zealand continues to be a major contributor (eight of 67) to the corpus of papers forming the substantive heart of ATCM discussion.<sup>20</sup>

The New Zealand papers largely cluster into thematic groups around protected and historic areas, tourism, environmental management and search and rescue. Within the “environmental management” cluster, New Zealand’s tabling of two papers (WP 35 and IP 39) on wilderness values

- 11 WP 27 “Repair or Remediation of Environmental Damage: Report of the CEP Intersessional Contact Group”; WP 29 “Revision of Management Plans for Antarctic Specially Protected Area No 154 Botany Bay, Cape Geology, Victoria Land”; WP 30 “Revision of Management Plan for Antarctic Specially Protected Area No 156 Lewis Bay, Mount Erebus, Ross Island” (this is the crash site of Air New Zealand Flight 901); WP 33 “Report of the Intersessional Contact Group on Information Exchange and the Environmental Aspects and Impacts of Tourism”; WP 34 “SAR-WG: Lessons learned from Search and Rescue Incidents in the Ross Sea Region”; and WP 35 “Possible guidance material to assist Parties to take account of Wilderness Values when undertaking Environmental Impact Assessments”. These papers are available at <[www.ats.aq/devAS/ats\\_meetings\\_documents.aspx?lang=e](http://www.ats.aq/devAS/ats_meetings_documents.aspx?lang=e)>.
- 12 WP 62 “New Historic Sites and Monuments: Mount Erebus camp sites used by a contingent of the Terra Nova Expedition in December 1912”.
- 13 WP 28 “Antarctic Environments Portal Progress Report”.
- 14 IP 13 “Antarctic Treaty System Information Exchange Requirements for Tourism and Non-Governmental Activities”.
- 15 IP 23 “SAR-WG: Summary of the International Search and Rescue Activities Associated with an Aircraft incident in the Queen Alexandra Range, Antarctica” (which reports on the fatal loss of an aircraft supporting the Italian programme).
- 16 IP 92 “SAR-WG: Agreement between the Chilean Maritime Authorities and Maritime New Zealand for Maritime Search and Rescue Coordination Services”.
- 17 BP 1 “Antarctic Heritage Trust Conservation Update 2013”; BP 2 “Assessing the vulnerability of Antarctic soils to trampling”.
- 18 BP 10 “Update on Developing Protection for a Geothermal Area: Volcanic Ice Caves at Mount Erebus, Ross Island”.
- 19 In accordance with Decision 1, adopted at this ATCM, the Czech Republic, which became the 29th Consultative Party, will first attend an ATCM in this capacity in 2014.
- 20 All papers submitted to the meeting are available at the Antarctic Treaty Secretariat website <[www.ats.aq/devAS/ats\\_meetings\\_documents.aspx?lang=e](http://www.ats.aq/devAS/ats_meetings_documents.aspx?lang=e)>. A total of 67 Working Papers, 111 Information Papers, 18 Secretariat papers and 23 Background Papers were tabled at the ATCM. The rise in the number of Information papers (up from 88 in 2012) reverses the decline which the previous Year in Review suggested might be due to the increasing numbers of Secretariat and Background Papers. The increase in Information papers over 2012 is matched by a decline in Background papers from the 42 last year. 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.

is particularly notable, given concerns that the formal commitment to wilderness in the Madrid Protocol may still be poorly operationalised in practice.<sup>21</sup>

Resolution 8 (2012): Improved Coordination of Maritime, Aeronautical and Land-Based Search and Rescue,<sup>22</sup> adopted at the previous ATCM, and intersessional discussion around this theme, led to the creation of a Special Working Group on Search and Rescue which took responsibility for the substantial ATCM Agenda Item 10: “Safety and Operations in Antarctica, including Search and Rescue”. A total of 35 papers of various types were tabled for this agenda item. New Zealand tabled four papers: WP 34, IP 14, IP 23 and IP 92. New Zealand reported, inter alia, that 18 SAR incidents had occurred in the period 2004–2013, of which 17 were maritime-related and one aviation-related. The “most common SAR response was for medical evacuations of injured/sick crew or other personnel”.<sup>23</sup> The ATCM adopted Resolution 1 (2013): Air Safety in Antarctica, which made eight substantive technical recommendations.<sup>24</sup> Clearly, the Search and Rescue discussion in Brussels was a major focus of the ATCM, and the Resolution 1 recommendations amongst its key outcomes. Yet, as a Resolution, these are all hortatory. If state parties act upon them this may very well be immaterial, but even so it may suggest a return to the modus operandi of earlier days, before Decision 1 (1995), when outcomes of ATCMs were cast as “Recommendations”, and there could be a degree of ambiguity around what level of obligation any particular Recommendation imposed on a Consultative Party.<sup>25</sup>

A codicil to “unauthorised” yacht activity discussions at recent ATCMs: Issues around the apparently unauthorised 2011 Antarctic expedition of the Norwegian yacht *Berserk*, including its loss in the Ross Sea, attracted the attention of New Zealand and Norway at the 34th ATCM.<sup>26</sup> The master of the *Berserk*, Jarle Andhøy, subsequently conducted a further apparently unauthorised Antarctic expedition in the *Nilaya*, in 2012. New Zealand Working Paper 48 at the 35th ATCM called for action against such repeat unauthorised expeditions.<sup>27</sup> Norwegian authorities subsequently brought action against Andhøy for failing to meet Norwegian domestic legal obligations mediated by the Norwegian Polar Institute, in relation to compliance with the Madrid Protocol. In June 2014 Judge Unni Sandbukt of the Nord-Troms District Court handed down a fine of 45,000 Krone (NZD 8,550).<sup>28</sup>

21 See for example K Bastmeijer “Intergenerational Equity and the Antarctic Treaty System: Continued Efforts to prevent ‘Mastery’” (2011) 3 *The Yearbook of Polar Law* 635.

22 Resolution 8 (2012) <[www.ats.aq/devAS/info\\_measures\\_report.aspx?id=522&lang=e](http://www.ats.aq/devAS/info_measures_report.aspx?id=522&lang=e)>.

23 Working Paper 34, above n 11.

24 Resolution 1 (2013) <[www.ats.aq/devAS/info\\_measures\\_report.aspx?id=554&lang=e](http://www.ats.aq/devAS/info_measures_report.aspx?id=554&lang=e)>.

25 See for example F M Auburn *Antarctic Law and Politics* (London, Hurst, 1982) at 165–170.

26 A D Hemmings “Year in Review: The Antarctic Treaty System” (2011) 9 *NZYIL* 337–338.

27 A D Hemmings “Year in Review: The Antarctic Treaty System” (2012) 10 *NZYIL* 239.

28 See Pia Tøhaug “Andhøy convicted of unlawful race: I want to appeal” *NRK*, (Norway, 23 June 2014) available in Norwegian at <[www.nrk.no/nordnytt/andhoy-domt-i-nord-troms-tingrett-1.11793183](http://www.nrk.no/nordnytt/andhoy-domt-i-nord-troms-tingrett-1.11793183)>.

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

As reported in the previous Year in Review,<sup>29</sup> the failure to reach consensus on MPA designation at the 31st Meeting of the Commission for the Conservation of Antarctic Marine Living Resources (Commission) resulted in a decision to hold a special meeting (only the second ever convened) of the Commission in Bremerhaven in July 2013. A special meeting of the Scientific Committee (the first ever held) was also convened, immediately prior to the special Commission session. The meetings were tasked by the 31st Commission as follows:

- (i) the Special Meeting of the Commission will consider MPA issues and make decisions, if possible, on the joint New Zealand and USA MPA proposal on the Ross Sea region and the joint Australia, France and EU MPA proposal on East Antarctica.
- (ii) the meeting of the Scientific Committee will review and advise the Commission on the science already considered by the Scientific Committee and any additional available science relevant to assist the Commission's deliberations on the proposals, in accordance with CM 91-04.<sup>30</sup>

However, these meetings (the Scientific Committee over three days, the Commission over two days), whilst attracting high attendance levels from Members of the Commission and other Contracting Parties, and generating substantive reports,<sup>31</sup> did not result in any consensus on designating MPAs. Minister of Foreign Affairs, Murray McCully, joined others in describing this as "disappointing".<sup>32</sup>

The Russian Federation was again the principal objector. Aside from various quibbles around the size and duration of MPAs, and (seemingly) procedural issues, its core concerns, as reflected in its own statements reproduced in the report of the meeting, centred on its interpretation of Article IX of the CCAMLR Convention:<sup>33</sup>

[T]here is clearly confusion regarding the concepts of "marine protected area", "areas, regions or sub-regions closed for purposes of scientific study or conservation, including special areas for protection and scientific study", which the Commission is entitled to establish in accordance with Article IX of the Convention of 1980, and ASPAs and ASMAs, which CCAMLR is entitled to propose for designation by submitting a proposed management plan to the Antarctic Treaty Consultative Meeting.

29 A D Hemmings "Year in Review: The Antarctic Treaty System" (2012) 10 NZYIL 241-242.

30 CCAMLR Secretariat *Report of the Thirty-First Meeting of the Commission* CCAMLR-XXXI (Hobart, 2012) at [7.105].

31 CCAMLR Secretariat *Report of the First Intersessional Meeting of the Scientific Committee* SC-CAMLR-IM-I (Bremerhaven, Germany 11-13 July 2013); CCAMLR Secretariat *Report of the Second Special Meeting of the Commission* CCAMLR-SM-II (Bremerhaven, Germany, 15-16 July 2013).

32 Hon Murray McCully "No consensus at CCAMLR disappointing" (press release, 17 July 2013).

33 CCAMLR Secretariat *Report of the Second Special Meeting of the Commission* CCAMLR-SM-II (Bremerhaven, Germany, 15 and 16 July 2013) at [3.18].

The Ukraine was the only other substantive objector (although from a 2014 standpoint, the prospects of continued commonality between the Ukraine and the Russian Federation seem dim). Its difficulties included an idiosyncratic reading of the Law of the Sea Convention:<sup>34</sup>

The UN Convention on the Law of the Sea (ratified by Ukraine) provides the opportunity for establishing MPAs only within the coastal waters in the areas of jurisdiction of those countries. Therefore, at this stage we cannot see any legal possibility for establishing MPAs in the high seas of the World Ocean containing areas for which CCAMLR is responsible. This matter requires further consideration.

The regular 2013 (32nd) 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 2013.<sup>35</sup>

New Zealand submitted its annual notification for exploratory fishing for Toothfish (*Dissostichus* spp) in the Convention Area.<sup>36</sup> 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 2013/14 season was set at 3,044 tonnes (marginally lower than for the previous season) across a maximum of four New Zealand, one Japanese, four South Korean,<sup>37</sup> one Norwegian, six Russian, one Spanish, three Ukrainian and two United Kingdom flagged vessels.<sup>38</sup> For Subarea 88.2, an appreciably lower PCL was set than for the previous season (390 tonnes compared to 530 tonnes) was set across a maximum of four New Zealand, four South Korean,<sup>39</sup> one Norwegian, six Russian, one Spanish, three Ukrainian and two United Kingdom flagged vessels.<sup>40</sup>

The reduction in the number of South Korean vessels authorised to operate in subareas 88.1 and 88.2 is of note. New Zealand had, in 2012, raised some concerns about the increase in the number of Korean vessels in these subareas.<sup>41</sup> However, the Koreans withdrew their notification for two of their vessels in these subareas (and two vessels in two other subareas) only "during the meeting",<sup>42</sup> presumably in response to the discussion around catch limits in Subarea 88.2. The Scientific Committee had been unable to agree on management advice for the subarea, and provided instead three

34 At [3.26].

35 CCAMLR Secretariat *Report of the Thirty-Second Meeting of the Commission* CCAMLR-XXXII (Hobart, 2013).

36 New Zealand "Notifications of New Zealand's intention to conduct exploratory longline fisheries for *Dissostichus* spp. in 2013/14" CCAMLR-XXXII/14.

37 Compared to six South Korean vessels in the previous season.

38 CCAMLR *Conservation Measure 41-09 (2013) Limits on the exploratory fishery for Dissostichus spp. In Statistical Subarea 88.1 in the 2013/14 season.*

39 As in Subarea 88.1, down from the six Korean vessels in the previous season.

40 CCAMLR *Conservation Measure 41-10 (2013) Limits on the exploratory fishery for Dissostichus spp. In Statistical Subarea 88.2 in the 2013/14 season.*

41 A D Hemmings "Year in Review: The Antarctic Treaty System" (2012) 10 NZYIL 241.

42 CCAMLR Secretariat *Report of the Thirty-Second Meeting of the Commission* above n 35, at [7.85].

options for the Commission to choose between. After substantial debate, and movement by Russia from its initial preference for the highest catch limit option (530 tonnes), the Commission adopted the Scientific Committee's second option (390 tonnes).<sup>43</sup>

Given the failure of the Special Meeting of the Commission in Bremerhaven to reach consensus of any designation, the MPA debate was resumed in Hobart in both an MPA Working Group chaired by Uruguay and in the full Commission. Three of the five New Zealand papers tabled at the Meeting of the Commission related to the Ross Sea proposal, and each of these three were jointly tabled with the United States.<sup>44</sup> The Ross Sea MPA proposal was "substantially revised" after the Bremerhaven meeting, supposedly to respond to the difficulties evident there.<sup>45</sup> However, as in Bremerhaven, the principal objector was the Russian Federation, and consensus could not be reached on either the Ross Sea or East Antarctica proposals. Notwithstanding the diplomatic niceties, for example the United States statement that it had "found the comments on the Ross Sea Region MPA proposal provided by many Members to be both insightful and useful in thinking about how to progress the MPA toward consensus",<sup>46</sup> it is difficult to see that any material progress was really achieved. A number of Commission Members signalled their disappointment with the outcome, and support for the proposals. Presumably the debate will continue at the Thirty-Third Meeting of the Commission in 2014. Nobody seems to have proposed any further intersessional meetings. In light of the situation around the Ukraine as of mid-2014, and the concomittant deterioration in relations between the Russian Federation and many other states which are also involved in CCAMLR, it is difficult to be sanguine about the prospects for diplomatic exchanges on Antarctic MPAs in the meantime. It must be a reasonable conclusion that, whilst the existing MPA proposals will remain on the table, there is no realistic prospect of further MPAs being designated in the immediate future.

The only other paper tabled by New Zealand was its CCAMLR Observer report from the meeting of the Agreement for the Conservation of Albatrosses and Petrels.<sup>47</sup>

43 At [5.38]-[5.44].

44 New Zealand and United States of America "A proposal for the establishment of a Ross Sea region Marine Protected Area" CCAMLR-XXXII/27; New Zealand and United States of America "Reporting, review and period of designation in the Ross Sea Region MPA proposal" CCAMLR-XXXII/BG/38 Rev 1; and New Zealand and United States of America "Ross Sea Region Marine Protected Area: Explanation of objectives supporting component areas" CCAMLR-XXXII/BG/40 Rev 1.

45 New Zealand comments in CCAMLR Secretariat *Report of the Thirty-Second Meeting of the Commission*, above n 35, at [7.46].

46 At [7.35].

47 New Zealand "Observer's report from the Seventh Advisory Committee Meeting, and Associated Working Groups, of the Agreement for the Conservation of Albatrosses and Petrels: CCAMLR Observer" CCAMLR-XXXII/BG/24.

#### IV. NEW ZEALAND LEGISLATIVE ACTIVITY

No substantive legislative activity relating to Antarctica occurred during 2013. The Antarctica (Environmental Protection: Liability Annex) Amendment Act 2012,<sup>48</sup> has not yet entered into force.

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48 See A D Hemmings “Year in Review: The Antarctic Treaty System” (2012) 10 NZYIL 243.