

## THE ANTARCTIC TREATY SYSTEM

### I. INTRODUCTION

The key Antarctic Treaty System (ATS)<sup>1</sup> events of 2014 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 36th and 37th ATCMs. No Meeting of Experts was held between the ATCMs. 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 Subgroup on Acoustic Survey and Analysis Methods, were held during 2014. New Zealand was, as usual, an active participant across all the ATS current issues. Although the level of effort in relation to the Ross Sea MPA proposal (as measured by papers and meeting interventions) continued unabated in 2014, no substantive progress was made on MPA designation. Given the repeated failures within CCAMLR fora over the last several years to reach consensus on designation of *any* further MPAs, the prognosis for success in the near-term remains bleak.

### II. 1959 ANTARCTIC TREATY<sup>3</sup>

The 37th ATCM<sup>4</sup> was convened in Brasilia, Brazil from 28 April - 7 May 2014.<sup>5</sup> ATCMs are rotated around the Consultative Parties, in a rough alphabetical sequence (in English). For the fifth successive year, all 16 of the legally-binding Measures<sup>6</sup> adopted related to Protected Areas or Historic Sites

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

4 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).

5 Antarctic Treaty Secretariat *Final Report of the Thirty-Seventh Consultative Meeting* (Brasilia, 2014).

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

and Monuments.<sup>7</sup> Three administrative Decisions were adopted, relating to: Measures on Operational Matters designated as no longer current; Secretariat Report, Programme and Budget; and Multi-Year Strategic Work Plan for the Antarctic Treaty Consultative Meeting.

Continuing a practice first noted in the 2010 Year in Review,<sup>8</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>9</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). New Zealand's Don MacKay again chaired the Working Group on Tourism and Non-governmental Activities.

The issue of Marine Protected Area designation, which has been so problematical over recent years,<sup>10</sup> is formally assigned to CCAMLR (see below). However, the Russian Federation tabled a Working Paper (WP) at the ATCM which reprised their views on the acceptable rationales for, and history of, the MPA debate.<sup>11</sup> Interestingly, the Russian Federation appeared to propose discussing MPAs in the ATCM and not just within CCAMLR fora. In the ensuing discussion (under Agenda Item 5: Operation of the Antarctic Treaty System: General Matters),<sup>12</sup> whilst it was conceded that the ATCM could protect marine areas through their designation as Antarctic Specially Protected Areas and Antarctic Specially Managed Areas, CCAMLR had established the legal framework for designations in the CCAMLR area. The role of both fora was thereby reaffirmed, but plainly the tone of the discussion reflected the fact that the majority of states which wish to see MPAs designated believe this responsibility falls primarily to CCAMLR.

New Zealand's contribution to tabled meeting papers was lighter than in recent years, largely because it was involved in just three WPs, and these all tabled with other states. One paper was tabled by New Zealand, Australia, Belgium, Norway and SCAR;<sup>13</sup> another by Australia, New Zealand, Norway, United Kingdom and the United States;<sup>14</sup> and the third by France, United Kingdom, Chile, Finland, Netherlands, New Zealand and South

7 Compared to 21 in 2013, 11 in 2012, 12 in 2011 and 15 in 2010.

8 A D Hemmings "Year in Review: The Antarctic Treaty System" (2010) 8 NZYIL 238.

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" (2013) 11 NZYIL 274-276.

11 WP 20 "Marine Protected Areas in the Antarctic Treaty System".

12 Antarctic Treaty Secretariat *Final Report of the Thirty-Seventh Consultative Meeting* (Brasilia, 2014) at [45]-[51].

13 WP 10 "Antarctic Environments Portal Progress Report".

14 WP 17 "Advancing Recommendations for the CEP Tourism Study".

Africa.<sup>15</sup> New Zealand was involved in the tabling of five Information Papers (IP): one by Australia, New Zealand, Norway, United Kingdom and the United States;<sup>16</sup> one by the United Kingdom, New Zealand and the United States;<sup>17</sup> one by New Zealand, SCAR, the United Kingdom and the United States;<sup>18</sup> one by New Zealand and the United States;<sup>19</sup> and another by New Zealand alone.<sup>20</sup> Three Background Papers (BP) were tabled by New Zealand alone.<sup>21</sup> With ATCM papers, the first named state(s) generally led the process and drafted the paper, with co-sponsors listed in alphabetical order thereafter. Thus, New Zealand led one of the three WPs and three IPs, in addition to its BPs.

Probably New Zealand's most substantial contribution to the work of the Committee for Environmental Protection (CEP) in recent years has been around a project called the "Antarctic Environments Portal", which seeks to make "science-based information available to the Antarctic Treaty System's Committee for Environmental Protection (CEP) and all the Antarctic Treaty nations".<sup>22</sup> This is the latest development in a broader scheme of systematising the functioning of the CEP, which earlier developed a workplan and a prioritisation of agenda items. Working Paper 10 was the latest report on this project,<sup>23</sup> and formed the basis for the substantive discussions in both the CEP and the language in the ATCM Final Report. Whilst the initiative has, from inception, involved a number of other Parties and the Observer SCAR, New Zealand is recognised as a substantive leader of the project.<sup>24</sup> Accordingly, this WP was New Zealand's most important written contribution to the meeting. With these CEP developments in mind, Parties are now looking to develop a "Multi-year Strategic Work Plan" for the ATCM itself.<sup>25</sup>

15 WP 48 "Entry into force of Measure 4 (2004)". This Measure concerns "Insurance and Contingency Planning for Tourism and Non Governmental Activities in the Antarctic Treaty Area" but WP 48 notes that only 11 of the necessary 27 required Consultative Parties have approved it after a decade.

16 IP 12 "Developing a New Methodology to Analyse Site Sensitivities".

17 IP 25 "The 1912 Ascent of Mount Erebus by members of the Terra Nova Expedition, the location of additional campsites and further information on HSM 89".

18 IP 42 "Developing general guidelines for operating in geothermal environments".

19 IP 43 "McMurdo Dry Valleys ASMA Management Group Report".

20 IP 48 "The SV 'Infinity', Ross Sea, February 2014".

21 BP 11 "Initiation of a review of ASPA 104 Sabrina Island, Northern Ross Sea"; BP 12 "New Zealand Antarctic and Southern Ocean Science Directions and Priorities 2010-2020"; BP 14 "Antarctica New Zealand Membership of the International Union for Conservation of Nature (IUCN)".

22 Antarctic Environments Portal Homepage <[www.environments.aq](http://www.environments.aq)>.

23 WP 10 "Antarctic Environments Portal Progress Report".

24 Antarctic Treaty Secretariat *Final Report of the Thirty-Seventh Consultative Meeting* (Brasilia, 2014) at [93].

25 At [82]-[88]. See Decision 3 (2014) "Multi-Year Strategic Work Plan for the Antarctic Treaty Consultative Meeting, including two new priorities".

A further example of “unauthorised” yacht activity in the Antarctic Treaty area, noted in earlier reviews,<sup>26</sup> was reported by New Zealand.<sup>27</sup> The German flagged and skippered yacht *SV Infinity*,<sup>28</sup> which declared itself to be departing Auckland in January 2014 for Puerto Natales, in Chile, was subsequently reported at Cape Adare in the northern Ross Sea in March. The expedition had apparently submitted no advance notification or Environmental Impact Assessment to any competent authority (ie a Party) prior to its departure for Antarctica, as required. The expedition apparently also entered the Borchgrevink Hut Antarctic Specially Protected Area without the requisite permit. Whilst New Zealand reported that it would “be considering further options”,<sup>29</sup> one may presume that German authorities in the first instance will be examining this latest example of non-compliance with legal obligations.

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

The regular 2014 (33rd) Meeting of the Commission for the Conservation of Antarctic Marine Living Resources (Commission) was held at the CCAMLR Secretariat in Hobart, Tasmania, Australia from 20-31 October 2014.<sup>30</sup>

New Zealand submitted its annual notifications for exploratory fishing for Toothfish (*Dissostichus* spp) in the Convention Area, and also (unsuccessfully) proposed a later season start date,<sup>31</sup> to “improve the safe operation of fishing vessels in these fisheries and alleviate vessel crowding”.<sup>32</sup> New Zealand’s primary area of fisheries interest is the Ross Sea, divided between CCAMLR Statistical Subareas 88.1 and 88.2. In the former, the precautionary catch limit (PCL) for the 2014/15 season was set at 3,044 tonnes (identical to the previous season) across a maximum of three New Zealand, one Australian, one Japanese, three South Korean, one Norwegian, five Russian, one Spanish, two Ukrainian and two United Kingdom flagged vessels.<sup>33</sup> For Subarea 88.2, an appreciably higher PCL was set than for the previous season (619 tonnes compared to 390 tonnes) across a maximum of

26 A D Hemmings “Year in Review: The Antarctic Treaty System” (2013) 11 NZYIL 273.

27 IP 48 “The SV ‘Infinity’, Ross Sea, February 2014”.

28 Carrying 16 persons, all from states which are parties to the Antarctic Treaty and Madrid Protocol.

29 IP 48 “The SV ‘Infinity’, Ross Sea, February 2014” at [3].

30 CCAMLR Secretariat *Report of the Thirty-Third Meeting of the Commission* CCAMLR-XXXIII (Hobart, 2014).

31 New Zealand “Statistical Subareas 88.1 and 88.2 exploratory fisheries: season start date change” CCAMLR-XXXIII/22.

32 CCAMLR Secretariat *Report of the Thirty-Third Meeting of the Commission* CCAMLR-XXXII (Hobart, 2014) at [7.77].

33 CCAMLR *Conservation Measure 41-09 (2014) Limits on the exploratory fishery for Dissostichus spp. In Statistical Subarea 88.1 in the 2014/15 season.*

three New Zealand, one Australian, three South Korean, one Norwegian, five Russian, one Spanish, two Ukrainian and two United Kingdom flagged vessels.<sup>34</sup>

Apart from papers on the Ross Sea MPA proposal (below), New Zealand tabled five other papers in either the Commission or Scientific Committee: A report on monitoring, control and surveillance;<sup>35</sup> Findings of the New Zealand coroner on South Korean fishing vessel sinking;<sup>36</sup> On research catch limits;<sup>37</sup> potential for proposed bottom-fishing activities to have adverse ecosystem impact;<sup>38</sup> and an Observer's Report from the Scientific Committee of the International Whaling Commission.<sup>39</sup>

The 33rd Meeting of the Commission again considered the designation of MPAs without reaching consensus on the designation of any. New Zealand and the United States jointly tabled three papers relating to the proposed Ross Sea MPA.<sup>40</sup> The Scientific Committee considered, and reported to the Commission on, various technical aspects around "preparatory work for spatial planning" of MPAs.<sup>41</sup> The Commission itself discussed MPA designation under the item "Proposals for new conservation measures".<sup>42</sup> The positions of states remained unchanged, and although the major objector, the Russian Federation, itself tabled a remarkable seven papers on MPA designation,<sup>43</sup> these did not facilitate any actual progress on designating

34 CCAMLR *Conservation Measure 41-10 (2014) Limits on the exploratory fishery for Dissostichus spp. In Statistical Subarea 88.2 in the 2014/15 season.*

35 New Zealand "Monitoring, control and surveillance activities undertaken by New Zealand during 2013/14" CCAMLR-XXXIII/BG/12.

36 New Zealand "Findings of the New Zealand Coroner's Office on the incident of the sinking of the *Insung No. 1*" CCAMLR-XXXIII/BG/35.

37 New Zealand "Assignment of research catch limits for effort-limited research proposals in fisheries with pre-existing non-zero catch limits" SC-CAMLR-XXXIII/09.

38 New Zealand "Preliminary assessment of the potential for proposed bottom-fishing activities to have significant adverse impacts on vulnerable marine ecosystems" SC-CAMLR-XXXIII/BG/06.

39 New Zealand "Observer's Report for the 2014 Annual Meeting of the Scientific Committee of the International Whaling Commission (Bled, Slovenia, 12 to 24 May 2014)" SC-CAMLR-XXXIII/BG/22.

40 New Zealand and United States "A proposal for the establishment of a Ross Sea Region Marine Protected Area" CCAMLR-XXXIII/21; New Zealand and United States "Chronology of previously submitted scientific documents, and updated maps and analyses supporting MPA planning in the Ross Sea region" SC-CAMLR-XXXIII/BG/23 Rev. 1; New Zealand and United States "New research consistent with a proposed draft Research and Monitoring Plan for a Ross Sea region MPA" SC-CAMLR-XXXIII/BG/24.

41 CCAMLR Secretariat *Report of the Thirty-Third Meeting of the Commission* CCAMLR-XXXIII (Hobart, 2014) at [5.71]-[5.88].

42 At [7.47]-[7.76].

43 Russian Federation "Principal provisions of the Russian Federation regarding the proposal to establish an MPA in the Ross Sea" CCAMLR-XXXIII/26; Russian Federation "Marine Protected Areas in the Antarctic Treaty System" CCAMLR-XXXIII/BG/09; Russian Federation "The South Orkney Islands Southern Shelf Marine Protected Area – SOISS MPA" SC-CAMLR-XXXIII/01; Russian Federation "Designation of an MPA in East Antarctica" SC-CAMLR-XXXIII/02; Russian Federation "The designation of Marine Protected Areas (MPAs) in Antarctic waters" SC-CAMLR-XXXIII/BG/26; Russian Federation "Proposal by

the Ross Sea and East Antarctic MPA proposals. As noted in the previous review,<sup>44</sup> there is no realistic prospect of further MPAs being designated in the immediate future.

#### IV. NEW ZEALAND LEGISLATIVE ACTIVITY

No substantive legislative activity relating to Antarctica occurred during 2014. The Antarctica (Environmental Protection: Liability Annex) Amendment Act 2012,<sup>45</sup> has not yet entered into force. Under s 2 (Commencement) of the Act – “This Act comes into force on a date appointed by the Governor-General by Order in Council.” The trigger for this will be the attainment of the threshold 28 approvals by states which were Consultative Parties at the time the Annex was adopted in 2005, which is necessary for the Annex to enter into force. This is still some years away.

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the Russian Federation to open areas of special scientific interest in the CCAMLR Convention Area (Part 1, Ross Sea and East Antarctica) SC-CAMLR-XXXIII/BG/27; Russian Federation “MPAs in the area regulated by the Convention on the Conservation of Antarctic Marine Living Resources (background, plans and reality)” SC-CAMLR-XXXIII/BG/28.

44 A D Hemmings “Year in Review: The Antarctic Treaty System” (2013) 11 NZYIL 276.

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