The Antarctic Treaty: Toward a New Partnership

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INTRODUCTION

The Antarctic Treaty was adopted in 1959 to deal with a geopolitical vacuum around the southern continent that was a source of tension and conflict. It was also inspired by the success of the scientific cooperation under the International Geophysical Year, 1957–1958. The treaty created the conditions for Antarctica to become a continent for peaceful international scientific cooperation. In terms of its original purposes, the treaty has been a tremendous success. Even at times of considerable tension in regions close to Antarctica, the treaty regime of disarmament and peaceful cooperation in Antarctica has been maintained without interruption.

In addition, on the basis of the treaty a legal regime for the protection of the Antarctic environment was built up, which is now enshrined in the Protocol on Environmental Protection to the Antarctic Treaty (Environment Protocol) of 1991 and its six annexes. This regime is still being developed further through the measures of the Antarctic Treaty Consultative Meeting (ATCM).[1]

As an active participant in the ATCM from 1997 to 2004 and then as its senior official at the head of the Antarctic Treaty Secretariat from 2004 to 2009, I am proud to have made a contribution to its work. At the same time, my experience with the ATCM has also given me concerns about its ability to meet the challenges that are facing it in the twenty-first century.

In this chapter I will argue that although the Antarctic Treaty Parties and the ATCM established a comprehensive regulatory system to manage Antarctica, they have never shown much interest in the practical questions of ensuring its implementation or even its maintenance as a clear and consistent set of regulations. To put it in another way, the regulatory regime has outstripped the capacity of the parties to implement it. Without aiming at a systematic treatment, I will discuss some reasons for this gap between theory and practice, one of which is the resistance of the parties and the ATCM to institutional development. In a time of increasing pressure on the Antarctic environment resulting from technological and economic development, the regime needs to be strengthened; I believe this could be done, however, without changing the basic features of the Antarctic Treaty System.

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BACKGROUND

When the Antarctic Treaty was adopted 50 years ago, Antarctica was a remote, dangerous place, where survival was only ensured by heroic efforts and mutual cooperation against the continuous threat of a hostile environment. No wonder that a lot of the early measures of the ATCM concerned mutual cooperation between stations!

Fifty years later, Antarctica can be reached by regular air connections from three continents. Scientists on the stations are connected to the Internet and can pick up the phone and call their loved ones. Antarctica is a regular stop for the worldwide cruise industry, and tens of thousands of tourists visit it every year. Furthermore, the main business before the ATCM is no longer concerned with demilitarization, but rather protection of the Antarctic environment against the consequences of mankind's increasing access to the continent.

The evolution of the Antarctic Treaty from a geopolitical agreement to prevent conflict over Antarctica into the core of a regulatory system managing Antarctica started from the beginning of the Antarctic Treaty. The first ATCM, held in Canberra in 1962, adopted Recommendation I-VIII, "General Rules of Conduct for Preservation and Conservation of Living Resources in Antarctica," and a more comprehensive set of rules was outlined in the Agreed Measures for the Conservation of Antarctic Fauna and Flora (adopted with Recommendation III-VIII, Brussels, 1964). Conservation activities on a global scale were only just beginning at that time, of course, so the ATCM was acting in the spirit of the times. More measures were added regularly, and the Protocol on Environmental Protection to the Antarctic Treaty (Madrid, 1991) organized all of this into a single scheme, bringing much of Antarctic conservation into line with developments outside.

The administration and implementation of a comprehensive regulatory regime for Antarctica was, however, not foreseen in the procedures of Article IX, and with the conclusion of the Environment Protocol in 1991 it became clear that some adaptations would have to be made to the functioning of the Antarctic Treaty system.

Some steps were, in fact, taken. In the first place, in the Environment Protocol the Committee on Environmental Protection (CEP) was established. If one could say that the institution of the CEP represents the first step toward institutionalization taken by the ATCM (the CEP has a Chair and Vice-Chairs who are elected for specified terms, unlike their counterparts in the ATCM who are appointed at each meeting only for that meeting), one would have to add that it was a very cautious one. The CEP does not have any powers of its own; its only function is to "provide advice and formulate recommendations to the Parties in connection with the implementation of this Protocol, including the operation of its Annexes, for consideration at Antarctic Treaty Consultative Meetings."[2]

The second change was to amend the procedures for dealing with measures adopted by the ATCM. According to the provisions of Article IX, measures adopted by the ATCM "become effective when approved by all [Consultative Parties] entitled to participate in the meetings held to consider those measures," a process that even in the early days took years and became ever more time-consuming with the increase in the number of parties. This process was too cumbersome to deal with the measures necessary to put into effect the Environment Protocol, and so in the annexes of the protocol provision was made for the automatic entry into effect of certain types of measures. A few years later, at the 19th ATCM in Seoul in 1995 the Consultative Parties made a more general change and decided to reserve the application of this provision only to texts containing provisions intended to be legally binding, to be called from then on Measures with a capital *M*. The other types of measures adopted by the ATCM, divided into Decisions (dealing with internal organizational matters) and Resolutions (containing hortatory texts), are not subject to this procedure and consequently enter into force immediately.[3]

The third step was the decision in principle taken at the 17th ATCM in Venice in 1992 to set up a permanent secretariat of the treaty. The ATCM had been meeting for 30 years without feeling the need for any permanent institution, and initiatives for a secretariat had been routinely dismissed until that time, but the establishment of a comprehensive system of environmental regulations made such a situation untenable. The fact that the ATCM occupied itself for 12 years, from 1992 to 2004, deciding where to locate its secretariat may indicate a certain lack of urgency.[4]

These changes were necessary and could be regarded as the first steps toward an effective regime. A brief look at some features of the present situation, however, will make clear that much progress still has to be made.

THE CURRENT SITUATION

The Approval Process

If the process for reaching unanimous agreement on a recommendation appears tortuous, then at least it benefits from undivided attention of all those attending the ATCM. Once agreement has been reached and the delegates return

home, the Antarctic appears to go to the bottom of the attention pile, and often, very little national action is taken to implement the items agreed. As mentioned before, with the increase in the number of Antarctic Treaty Parties to the Antarctic Treaty the time spent on completion of the approval process according to Article IX, paragraph 4, has increased greatly; indeed, one might say to a ludicrous extent. Some recommendations of the 1990s, such as Recommendation XVIII-1 (Venice, 1992), which established the basic guidelines for tourism in Antarctica, have not yet become effective almost 20 years after they were adopted.[5]

To take a more recent example, the 27th ATCM (Capetown, 2004) adopted Measure 4 (2004), "Insurance and Contingency Planning for Tourism and Non Governmental Activities in the Antarctic Treaty Area." This measure provides that Antarctic Treaty Parties must require operators "organising or conducting tourist or other non-governmental activities in the Antarctic Treaty Area" to have "appropriate contingency plans and sufficient arrangements for health and safety, search and rescue (SAR), and medical care and evacuation" in place before the start of any activity, together with insurance covering the costs.

These safety issues have received much attention from the ATCM in recent years. At a special seminar by the International Hydrographic Organization during the 31st ATCM in Kyiv in 2008, the National Hydrographer of the United Kingdom, Rear Admiral Ian Moncrief, stated that the question was not *if* a serious accident would occur with a tourist ship in Antarctic waters, but when. And yet, up to now, the ATCM has no specific legal basis in its own measures for the regulation of tourist vessels in the Antarctic Treaty area. Nevertheless, despite frequent expressions of concern in the ATCM, in the five years after adoption of the Measure 4 only 9 of the necessary 28 Consultative Parties have gotten around to approving it.[6]

A similar case is that of Annex VI of the Environment Protocol, which introduces the principle that operators should under some circumstances be liable for the consequences of environmental emergencies caused by them. It took 12 years to negotiate and even then contains far less substance than many originally envisaged, and at the current pace it will take at least that long to be approved and enter into force. At the time of writing, five years after its adoption, it had been approved by only four Antarctic Treaty Parties.

Which Measures Are in Effect?

Lack of a permanent secretariat meant that until 2004 each party hosting an ATCM had the entire responsibility for assembling the documentation for the meeting, collecting the documents submitted to it, and drawing up and distributing its report. Under such circumstances, in which every year a new team had to start from scratch organizing the meeting, it is not surprising that the legislative record of the ATCM, consisting of several hundreds of measures, is full of discontinuities, gaps, and duplications. This situation has not been helped by the fact that the rapid turnover of delegates in most national delegations has ensured a weak collective memory of what has gone before. When adopting a new measure, the ATCM did not, until recently, necessarily indicate which earlier measures were invalidated or replaced. After 50 years, this means that the question of which measures are currently in effect and applicable to any particular issue does not have a clear and unambiguous answer.

This issue was first raised some 20 years ago, when some Antarctic Treaty Parties that had recently acceded to the Antarctic Treaty were trying to find out which previous measures they would have to approve in order to meet their obligations. The matter has been discussed on and off since then, but progress has been very slow. After many years of discussion, the 25th ATCM in Warsaw adopted a decision declaring 24 previous recommendations "spent." Despite the establishment in the meantime of the Antarctic Treaty Secretariat, no further progress was made until 2007, when a further 13 former measures were declared "no longer current." Even with the Secretariat now doing the analytical work preparing these decisions, nothing has happened at the next two meetings. Considering that possibly up to half of the 400 odd measures on the books are actually out of date, this is slow progress indeed![7]

Implementation Problems

Because of the nature of the Antarctic Treaty itself, especially Article IV on the sovereignty claims over parts of Antarctica, implementation of the Antarctic Treaty regime has always been a complicated question. Possible solutions, such as a condominium or full internationalization, had been discussed before, but by 1959 the Antarctic Treaty Parties had come to the conclusion that these were not viable options. Instead, they chose a supremely pragmatic approach, basically setting the claims aside without providing any definitive solution to the sovereignty issue and concentrating on practical cooperation to let the scientists get on with their research.

The compromise represented by the Antarctic Treaty has worked marvelously well. Its legal basis, however, is weak, as the status of the area it is dealing with is not

settled in the treaty, and attempts at a more precise definition of that status usually run into opposition from the Treaty Parties, especially those with sovereignty claims. The result is that implementation of the environmental regime, which is comprehensive in its aims, has to be left entirely to the national governments of the Antarctic Treaty Parties, with all their different legal and institutional systems.

A tourist ship cruising through the Antarctic Treaty area and calling at various stations will encounter a different situation in each one. In one place it will be greeted by officials of one Antarctic Treaty Party who act almost as if they are the territorial authority exercising port state control and in another by officials of another Party who are mostly concerned with minimizing interruption of their station's research activities.

A system like this, which does not have an international organization for its implementation but, instead, relies on the purely national efforts of the participating countries, needs strong provisions on transparency and information sharing. Thanks to the wisdom of its framers, the Treaty actually provides a solid foundation in these areas. Article VII of the Antarctic Treaty establishes that "all areas of Antarctica, including all stations, installations and equipment within those areas, and all ships and aircraft at points of discharging or embarking cargoes or personnel in Antarctica, shall be open at all times to inspection" by the observers designated by the Antarctic Treaty Parties. At the same time, the Parties are required to inform each other beforehand of, among others things, "all expeditions to and within Antarctica, on the part of its ships or nationals, and all expeditions to Antarctica organized in or proceeding from its territory; all stations in Antarctica occupied by its nationals." Article VII was the foundation for a system of information exchange covering many aspects of all activities, whether official or nonofficial, on Antarctica, and with the adoption of the Environment Protocol the basic operational information about expeditions, stations, ships, aircraft, and personnel was expanded to include many kinds of environmental information, such as environmental impact assessments, permits to visit protected areas, permits to take fauna and flora, waste management plans, etc.

Access to this kind of information is a precondition for any kind of management system, so one of the first priorities of the Antarctic Treaty Secretariat, after its establishment in 2004, was the development of a central database to collect all the many kinds of information exchanged under this system, as had been decided at the 24th ATCM in St. Petersburg.[8] After three years of development work, at the 31st ATCM in Kyiv the ATCM instructed the Secretariat to put the Electronic Information Exchange System into operation.[9]

Unfortunately, the observance of Article VII by the Antarctic Treaty Parties is inadequate, both with regard to inspection and with regard to information exchange. Of course, Article VII does not require Parties to carry out inspections. Considering the importance of inspection activities, however, it is disappointing that more than half of all Consultative Parties have never engaged in any inspections at all and some long-occupied stations have never been visited by an inspection team.

Much more serious is the failure of the Antarctic Treaty Parties to fulfill their obligation to report on their activities. The mandatory information exchange requirements are clearly laid down in the treaty, the Environmental Protocol, and the subsequent measures adopted by the ATCM, but many parties are in breach of these rules year after year. With an electronic system now in operation, compliance has become much easier, and so the number of Antarctic Treaty Parties providing information is growing, but it still is far from satisfactory. To give an example, at the time of writing, when the 2009/2010 Antarctic season is already over, only 16 of the 28 Consultative Parties had provided their preseason information![10]

An important reason for the various failings to maintain and implement the regime is a lack of human and financial resources. Except for a small number of the major Antarctic Treaty Parties, most Treaty countries do not have adequate personnel or expertise, either at headquarters or in the field, for a credible implementation of the regulatory regime they have legally instituted. The personnel in the field are fully occupied keeping their stations going, and the human resources devoted to Antarctica at home are very limited. Most Consultative Parties have only one or two officials in their capitals occupied with Antarctic Treaty matters and often on a part-time basis at that. It's all they can do to prepare adequately for the annual ATCM.

The ATCM

The inheritor and guardian of a glorious tradition of cooperation and comradeship with regard to Antarctica, the ATCM is a unique forum and is, by far, the most harmonious and constructive international diplomatic circle that I have ever encountered in my career. To some extent, however, it is the victim of its own success. Speakers in the ATCM often refer in a self-congratulatory manner to the Antarctic tradition and the contribution it has made to maintaining Antarctica as a continent of "peace, scientific cooperation and environmental protection." It is a

tradition to be proud of. At the same time, the ATCM is also an intensely conservative and complacent group where agreements are negotiated in a confidential, clubby atmosphere, far away from the public and the media, and where change is usually resisted.

The ATCM functions on the basis of Article IX of the Treaty, which determines who may take part in the meetings: representatives of the original 12 signatories and of those parties that conduct "substantial scientific research activity" on Antarctica, together called the Consultative Parties. According to Article IX, the meetings are held for the purpose of "exchanging information, consulting together on matters of common interest pertaining to Antarctica, and formulating and considering, and recommending to their Governments, measures in furtherance of the principles and objectives of the Treaty."

Even after 50 years, this is still a faithful description of the work of the ATCM. The trouble is that the entire context in which the meeting takes place has changed out of all recognition. The first ATCM, held in Canberra in 1962, united representatives of the 12 original signatories and scientists, including veterans of the IGY. Now, the ATCM is held yearly and includes representatives of more than 40 Antarctic Treaty Parties, both Consultative and Nonconsultative, international organizations, and scientific and other nongovernmental organizations.

Not only has the ATCM grown, but the issues facing it and the environment in which it operates have changed. Besides being a diplomatic conference to negotiate new measures, the ATCM is also a forum bringing together the governments responsible for the de facto administration of an entire continent.

Questions relating to the effectiveness of this administration, however, are rarely discussed. It is characteristic for the ATCM that it is happy to hold long discussions on the precise interpretation of certain provisions relating to environmental impact assessments—the terms "a minor or transitory impact" come to mind—but one would look in vain for any attempt to compare the application of environmental impact assessments (EIAs) in practice between different countries as this would have potentially embarrassing political consequences, exposing some Antarctic Treaty Parties as grossly negligent in the way they approach this activity. The ATCM functions like a continuous diplomatic conference, ever negotiating new refinements of the original agreements. Avoiding the sensitivities of the Parties, and of various groups of the Parties—countries with claims, countries with a "basis of claim,"[11] countries that don't recognize any claims—is the all-important objective. Questions relating to the current status and the consistency of the body of legislation created by the ATCM do not have a great priority, let alone questions relating to its implementation and effectiveness.

One of the most sensitive points in this continuing diplomatic negotiation is the question of institutional development. Especially to some of the Antarctic Treaty Parties that maintain a claim or a "basis of claim" of sovereignty to parts of Antarctica, the development of any institutions is very easily seen as a threat to the power of national administrations. Of course, the chance that any national claim will ever be recognized by the rest of the world is practically zero, so the claims being protected are largely theoretical in nature and mostly relevant only to the domestic politics of the nations concerned. At the same time, they do make the development of the Antarctic Treaty System in the direction of an effective and efficient cooperative system of governance much more complicated.

In the view of some Parties, the ATCM is nothing more than a diplomatic conference, and so it has no continuing existence between its meetings. Nevertheless, the CEP (admittedly only an advisory body to the ATCM) has a Chair and Vice-Chairs who are elected according to formal procedures for definite periods. When a proposal was made at the 31st ATCM in Kyiv in 2008 to amend the Rules of Procedure and provide for the election of the chairs of the working groups of the ATCM for periods of two years, it was rejected, as some delegates considered this would "limit flexibility."[12] The traditional system, in which the chairs of the working groups magically emerge from the meeting of the heads of delegation the day before the start of the ATCM, was retained.

An even more serious "problem" for some parties is the existence of the Antarctic Treaty Secretariat, which is a definite institution, incorporated according to the laws of Argentina, with physical premises, employees, and a budget. When the instruments establishing the secretariat were negotiated, Antarctic Treaty Parties worried about the Secretariat as a potential rival to their own authority peppered the texts with clauses to the effect that the Secretariat does not have an independent existence but only functions as an instrument of the ATCM. Thus, Article 1 of Measure 1 (2003), the measure establishing the Secretariat, does not actually specify its purpose or function, but merely states, "The Secretariat shall constitute an organ of the ATCM. As such it shall be subordinated to the ATCM"; similar phrases are repeated frequently in the measure. The only trouble is, What is the ATCM? If it is purely a diplomatic conference existing only two weeks every year, how can it possibly exercise the oversight described in the Secretariat instruments?

TOWARD A NEW PARTNERSHIP

In the preceding passages I have sketched some ways in which the Antarctic Treaty, the Environmental Protocol, and the measures of the ATCM, considered as the de facto regulatory regime to manage Antarctica, fall short in practice. At the same time, technological and economic development brings an ever-increasing involvement of the rest of the world with Antarctica, especially in the form of visitors by sea and by air. The demand for access to Antarctica for all kinds of purposes will continue to grow for a long time to come. Also, changes in the global climate system pose a growing threat to the survival of the Antarctic ecosystems.

A new partnership between the Antarctic Treaty Parties is needed to deal with these challenges and to preserve Antarctica as the world's largest natural reserve, unspoiled by the humankind. Such a partnership would focus on joint, rather than purely national, implementation of the regulatory regime established through the ATCM.

Although a basic support structure now exists in the form of the Antarctic Treaty Secretariat, setting up an effective, up-to-date management system for Antarctica will need an increase in manpower and resources, both in national capitals and in the field. There is no need for any elaborate new legal or institutional development. What is needed, however, is a change of thinking, moving away from a narrow focus on the execution of purely national programs to a joint administration of Antarctica.

Also, as the basic approach will continue to be that of national implementation of all Antarctic regulation, the Antarctic Treaty Parties should urgently consider working out cooperative agreements, including open-ended coordination arrangements in the field, to minimize the gaps that inevitably will occur.

Possible elements of such a new approach might be the following:

- The assignment of informative, monitoring, and administrative functions related to the Antarctic regulatory regime to government personnel active in Antarctica. In some cases, dedicated personnel might be needed; in other cases these functions could be carried out by existing program personnel.
- Conclusion of flexible, open-ended liaison and coordination arrangements between the parties on a regional basis, on the model of the arrangements made for the administration of Antarctic Specially Managed Areas, to make sure all areas are covered for monitoring and implementation purposes.
- Strengthening the Electronic Information Exchange System so that it can provide, through the existing information exchange requirements, real-time information concerning permits, EIAs, contingency plans, etc., directly to government personnel in Antarctica tasked with implementing the management regime.
- Establishment of periodic monitoring and reporting systems on the state of the Antarctic environment as a whole and the successes and failures of the regulatory system.
- Adoption by the ATCM of provisions for the automatic entry into effect of Measures as a rule, maintaining, of course, exceptions in case any party would object within a certain period.
- Greater efforts by the Consultative Parties to deal with the national approval procedures of Measures adopted by the ATCM in a timely manner. Revision and updating by the ATCM of its body of legislation adopted by the ATCM and an active policy of publication and outreach with regard to the Antarctic Treaty System.
- Establishment by the ATCM of standing committees to oversee the work of the secretariat, monitor the implementation of the regulatory regime, and deal with emergencies.
- Allowing the establishment of standing committees of the CEP (as the Convention on the Conservation of Antarctic Marine Living Resources [CCAMLR] has) that can meet and report without simultaneous translation.

These are just examples of actions the Antarctic Treaty Parties might take. The Antarctic Treaty system has been a great success for 50 years, but it would be a mistake to take it for granted and to let it drift along and possibly lose relevance to the fast-developing situation of the Antarctic. Instead, by adopting a more active approach and taking a few modest institutional steps the Treaty Parties have a marvelous opportunity to show the world that its last remaining true wilderness can be managed on behalf of mankind by the countries active in Antarctica in a pragmatic and efficient way.

NOTES

1. The measures of the ATCM were previously called recommendations, as they are recommended to the governments of the Antarctic Treaty Parties and, according to Article IX, paragraph 4, only enter into effect after their approval by all parties concerned. In 1995 this procedure was amended; since then, the measures subject to the Article

IX, paragraph 4, procedure are called Measures with a capital *M*. In this article, measures without capitalization will refer to all categories. Aside from the Treaty, the Protocol, and the measures of the ATCM, the Antarctic Treaty System also includes other agreements (Convention on the Conservation of Antarctic [CCAS] and CCAMLR) and measures adopted by the CCAMLR Commission; to simplify the argument, I will not treat these agreements here.

2. Environment Protocol, Article 12.

3. Decision 1 (1995).

4. See my article, "Notes on the Past, Present and Future of the Antarctic Treaty Secretariat," *Diplomacia* 120 (2009): 35–43

5. Consultative Parties are not obliged, of course, to approve Measures, even if they have participated in their adoption at the ATCM. There are precedents for a party to come to the conclusion, after the adoption of a Measure, that circumstances had occurred that prevented them from approving it. In such cases they will usually inform the other parties at subsequent ATCMs of these circumstances. This is not the case with Recommendation XVIII-1, however, which has never encountered any opposition from any party.

6. Details on the approval process can be found in the Antarctic Treaty Database on the Antarctic Treaty Secretariat Web site (http://www.ats.aq).

7. See J. Huber, "Notes on the ATCM Recommendations and Their Approval Process," in *The Antarctic Legal System and Environmental Issues,* ed. G. Tamburelli, (Milan: Giuffrè Editore, 2006), pp. 17–31.

8. Resolution 6 (2001).

9. Decision 5 (2008).

10. Information Exchange section of the Antarctic Treaty Secretariat Web site.

11. Article IV of the treaty safeguards the position of both the seven countries that have asserted claims of sovereignty (Argentina, Australia, Chile, France, New Zealand, Norway, and the United Kingdom) and the countries that have asserted a "basis of claim" (Russia and the United States).

12. ATCM XXXI (Kyiv, 2008) WP1 "Proposal by Australia, the United Kingdom and Norway to Amend Rule 11 of the Rules of Procedure of the ATCM"; Final Report, paragraph 35.