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Designation of Marine Protected Areas within the Antarctic Treaty Area

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Information Paper Submitted by ASOC[1] to ATCM XXXI
(ATCM Agenda Item 5)

Summary

This Information Paper calls on the ATCM to breathe new life into the Marine Protected Area debate within the Antarctic Treaty Area. It calls upon XXXI ATCM to reaffirm, via a Decision, its intention to create a representative and coherent network of MPAs as ASPAs and ASMAs. A representative series of MPAs should be in place by 2012, and at least 30% of the marine area of the Antarctic Treaty Area should be placed within MPAs by 2018.

1. Introduction

The Antarctic protected areas system has its roots in the 1964 Agreed Measures,[2] and thus attention to area protection was amongst the earliest demonstrations of the Antarctic Treaty's concern for environmental protection.[3] Indeed, this early creation of a protected areas system placed the Antarctic Treaty in the vanguard of area protection globally.[4] Subsequent development of this system was seen, and with the negotiation of the Protocol, an updated approach was codified in Annex V – Area Protection and Management – adopted through Recommendation XVI-10 in 1991.

Amongst the significant developments found in Annex V was the capacity to designate "any area, *including any marine area*" (emphasis added) as an Antarctic Specially Protected Area (ASPA) or an Antarctic Specially Managed Area (ASMA). This was seen as a positive development both within and outside the Antarctic Treaty System, since although small marine areas had been included in pre-Protocol protected areas, these were all tiny, coastal, and essentially appendages to terrestrial areas. The legal status of these marine areas was uncertain. The new arrangements promised more.

As a result of the different mechanisms whereby the Protocol and its first four annexes and this fifth annex were adopted, Annex V did not enter into force until 24 May 2002. However, as with other elements of the Protocol, thinking, discussion and some provisional application of the new obligations were evident in ATCM, TEWG[5] and (post entry into force of the Protocol and Annexes I-IV in 1998) the CEP until the Annex actually came into force.

The capacity to designate any marine area was agreed in 1991 and formed part of the assumed new environmental management regime over the ensuing decade, and became legally possible in 2002. Yet we have, to date, seen few marine areas designated. A few small coastal sites, all terrestrially focussed, which include limited marine areas have been designated,[6] but we have seen little that would really correspond to the large marine protected areas we are now beginning to see elsewhere in the world, let alone demonstrate

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[1] Lead Authors: Alan D. Hemmings and Lyn Goldsworthy

[2] Agreed Measures for the Conservation of Antarctic Fauna and Flora – Recommendation III-VIII (1964) at Article VIII and Annex B.

[3] See chronology in Cohen, H.K. (ed) *Handbook of the Antarctic Treaty System*, Ninth Edition, Department of State (2002) from page 555.

[4] Goldsworthy, L. and Hemmings, A.D. 'The Antarctic Protected Area Approach', in *Share Resources: Issues of Governance*, IUCN (In Press).

[5] Transitional Environmental Working Group – the precursor of the CEP.

[6] This continuation of the historic model of small coastal protected areas is obvious – see the distribution and location of ASPAs and ASMAs at http://v3.ats.aq/e/ep_protected_aspamap.htm and http://v3.ats.aq/e/ep_protected_asmamap.htm (21.4.08).

Antarctic leadership in the development of marine protected areas. For all practical purposes, the new area protection system has not generally advanced (us) from the pre-Protocol situation of only small marine areas, appended to areas designated for their terrestrial values.

This paper argues that this is unfortunate; that Antarctic Treaty Consultative Parties (ATCPs) have not in fact delivered on the promise of the Protocol, and that 17 years after the adoption of the Protocol, and closing on the 50th Anniversary of the adoption of the Antarctic Treaty, in the face of real and substantial pressures on the Antarctic marine environment there is urgency to rectify this.[7]

It is *always* difficult to gain agreement to designating protected areas anywhere, and it is especially difficult to gain agreement to protecting marine areas, given historic assumptions that the seas are endlessly resilient and beyond our capacity to damage or exhaust – assumptions we now know to be false. But nowhere can it be easier to designate MPAs than Antarctica. If, in the Antarctic Treaty Area, we cannot designate marine protected areas, then we are in strife indeed. If this is occurring because responsibility for actually designating areas is confused (i.e. because it is split between two institutions: the ATCM and CAMLR Commission) then that administrative impediment needs to be resolved. If it is occurring because the states assembled here lack the political will, then this must change.

2. Pressures on the marine environment within the Antarctic Treaty Area

Human activity within the Antarctic Treaty Area, one of the few relatively pristine environments left on the planet, has substantially increased and diversified since even the adoption of the Protocol. Nowhere is this more obvious than in the Antarctic marine environment. Other parts of this meeting will consider facets of this, including risks of marine pollution, search and rescue, regulation of tourism and non governmental activity, and regular and IPY-related science and associated support activity. New commercial interests such as biological prospecting can also be expected in the Antarctic marine environment. At CCAMLR, increasing and also diversifying marine harvesting is attended to. The general pattern, and reality, of increasing human activity is surely not in dispute.

Examples of particular pressures are now emerging. Evidence has recently been provided for a decline in Antarctic toothfish and associated predators in the southern Ross Sea, based upon one of the longest term research data series available.[8] Pressures from tourism activity in the Antarctic Peninsula in particular have already stimulated the development of terrestrial site specific guidelines for some of the most visited sites.[9] And of course, there is a substantial and accelerating body of evidence, often acquired in the Antarctic Treaty Area, of in-area consequences of global climate change.[10] Synergisms will also arise between various direct pressures, including fishing, and climate change effects such as reduced sea-ice and their consequences for, *inter alia*, krill standing stocks.The CEP's establishment, from this meeting, of a sub-agenda item 'Climate Change' reflects this.

From this it is reasonable to conclude that a truly precautionary management regime is necessary and the full toolkit of environmental management mechanisms provided by the Protocol needs to be made available and applied. That includes a capacity to place marine areas within protected areas categories, including fully-protected marine reserves.

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[7] Earlier ASOC papers on MPAs include: ASOC 'Achieving a network of marine protected areas in the CCAMLR area', CCAMLR-XXV/BG/30 (2006); ASOC 'A system of comprehensive marine protection – some policy considerations', CCAMLR-XXVI/BG/27 (2007); ASOC 'Marine protected areas – steps forward for the ATCM', XXX ATCM IP 87 (2007). See also, at this meeting ASOC 'Area protection: time for action', XXXI ATCM IP 57 (2008).

[8] DeVries, A.L., Ainley, D.G. and Ballard, G. 'Decline of the Antarctic toothfish and its predators in McMurdo Sound and the Southern Ross Sea, and recommendations for restoration', WG-EMM 08/xx (2008). Cited with permission of the authors.

[9] http://www.ats.aq/e/ats_other_siteguidelines.htm (20.4.08).

[10] See ASOC 'Impacts of climate change on Antarctic ecosystems', XXXI ATCM IP 56 (2008) and ASOC 'The Antarctic and climate change', XXX ATCM IP 82 Rev 1 (2007) and references therein.

3. The International Context

Marine protected areas are at the cutting edge of both protected areas development and efforts to secure more effective management of the global marine environment. The value of, and commitments to, MPAs have been seen in a range of high level international fora over the past decade, *inter alia* the UN General Assembly, the World Summit on Sustainable Development, the Convention on Biological Diversity, various regional fora, and the World Conservation Union.[11] The World Parks Congress called for a global system of effectively managed and representative networks of MPAs to be developed by 2012. Strictly protected areas would form the basis of such a network, and the Congress recommended that at least 20-30% of the world's seas and oceans should be fully protected.

Within the greater Antarctic region, but outside the Antarctic Treaty Area, a number of ATCPs have designated MPAs around their subantarctic islands. Thus Australia has designated the 160,000 km^2 Macquarie Island Marine Park and the 65,000 km^2 Heard Island and McDonald Islands Marine Reserve;[12] New Zealand has a small marine reserve off the Auckland Islands but is developing marine reserves around all five of its subantarctic island groups;[13] France has designated marine reserves around its Crozet, Kerguelen, Amsterdam and St Paul island groups;[14] and South Africa has proposed an MPA around its Prince Edward Islands group[15]. In the case of these states, the actual or proposed areas are substantial. Australia and New Zealand have also achieved World Heritage status for these islands and territorial seas, and South Africa has submitted an application for the Prince Edward Group. Other states with subantarctic islands may also have plans for MPAs. Overall, the picture in the subantarctic is encouraging. It makes a stark contrast with the feeble MPA development seen in the Antarctic Treaty Area.

But perhaps the starkest contrast is between the Antarctic Treaty Area and the marine environment around the Pacific developing state of Kiribati. On 28 January 2008 Kiribati announced that the Phoenix Islands Protected Area would be expanded to 410,500 km^2, making it the worlds largest marine protected area.[16] If one of the poorest states in the world, at the heart of the Pacific, with its vastly greater challenges, can designate such an MPA, it begs the question why the Antarctic Treaty Consultative Parties and the ATCM have so far been unable to create any considerable MPAs, let alone something of this size, despite being committed "to the comprehensive protection of the Antarctic environment and dependent and associated ecosystems".[17]

4. The Coupling to CCAMLR

Because of the obvious juridical overlap between the Protocol and CCAMLR, the designation of a marine area requires the approval of CCAMLR:

> 2. Having regard to the provisions of Articles 4 and 5 of the Protocol, no marine area shall be designated as an Antarctic Specially Protected Area or an Antarctic Specially Managed Area without the prior approval of the Commission for the Conservation of Antarctic Marine Living Resources
>
> (Article 6, Annex V, Protocol).

The modalities of engagement between the two bodies were established four years before Annex V came into force through Decision 4 (1998) – Marine Protected Areas:

> MARINE PROTECTED AREAS
> The Representatives,
> Noting the requirements in Annex V, Article 6, paragraphs 1 and 2, of the Protocol on Environment Protection

[11] Sources in ASOC 'Marine protected areas – steps forward for the ATCM', XXX ATCM IP 87 (2007) and ASOC 'A system of comprehensive marine protection – some policy considerations', CCAMLR-XXVI/BG/27 (2007).
[12] See Kriwoken, L.K. and Holmes, N. 'Emerging issues of Australia's Sub-Antarctic Islands: Macquarie Island and Heard Island and McDonald Islands' in Kriwoken, L.K., Jabour, J. and Hemmings, A.D. *Looking South: Australia's Antarctic agenda*, Federation Press (2007).
[13] http://www.doc.govt.nz/templates/MultiPageDocumentTOC.aspx?id=44812 (20.4.08).
[14] http://www.taaf.fr/spip/spip.php?article115 (21.4.08).
[15] http://soer.deat.gov.za/themes.aspx?m=252 (19.4.08).
[16] http://www.phoenixislands.org/index.php (21.4.08).
[17] Protocol, Article 2.

> to the Antarctic Treaty (the Protocol) that the views of the Commission of the Convention on the Conservation of Antarctic Marine Living Resources (CCAMLR) must be sought on proposals for Antarctic Specially Protected Areas which contain marine areas;
> Recalling the adoption at ATCM XXI of a draft text on marine areas;
> Noting also the endorsement by CCAMLR at its XVIth Meeting of that draft text;
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> Decide:
> 1. To adopt the following:
> For the purposes of implementation of Article 6(2) of the Environmental Protocol, draft management plans which require the approval of CCAMLR are those which include marine areas
> - in which there is actual harvesting or potential capability for harvesting of marine living resources which might be affected by site designation, or
> - for which there are provisions specified in a draft management plan which might prevent or restrict CCAMLR-related activities;
> 2. That the sites listed in the appendix to this Decision meet the above criteria;
> 3. Proposals for designations of Antarctic Specially Protected Areas or Antarctic Specially Managed Areas which might have implications for CCAMLR Ecosystem Monitoring Programme (CEMP). Sites shall be submitted to CCAMLR for its consideration before any decision is taken on the proposals;
> 4. That the above procedures should be followed pending entry into force of Annex V.

Thereafter, any proposed area with a marine component entered a double process, consideration within both the CEP and CCAMLR Scientific Committee. In 2005, three years after Annex V came into force, an updating of the guidance provided in Decision 4 (1998) was adopted as Decision 9 (2004) – Marine Protected Areas and Other Areas of Interest to CCAMLR:

> MARINE PROTECTED AREAS AND OTHER AREAS OF INTEREST TO CCAMLR
> The Representatives,
> Noting the requirements in Article 6(1) & 6(2) of Annex V to the Protocol of Environmental Protection to the Antarctic Treaty that the prior approval of the Commission of the Convention on the Conservation of Antarctic Marine Living Resources (CCAMLR) must be obtained on proposal for Antarctic Specially Protected Areas or Antarctic Specially Managed Areas which contain marine areas;
> Recalling that ATCM XXI agreed to transmit a draft text addressing criteria for Marine Areas to CCAMLR for its consideration;
> Recalling also the endorsement of that draft text by CCAMLR at its XVIth Meeting, and its adoption as Decision 4 (1998) of ATCM XXII;
> Noting that Decision 4 (1998) set out procedures to be followed pending the entry into force of the Annex V, which is now in force;
> Desiring to adopt updated procedures;
>
> Decide:
> 1) That for the purpose of the implementation of Article 6.2 of the Environmental Protocol, draft management plans that contain marine areas which require a prior approval of CCAMLR are those:
> a) in which there is actual harvesting or potential capability of harvesting of marine living resources which might be affected by site designation; or
> b) for which there are provisions specified in a draft management plan which might prevent or restrict CCAMLR related activities.
> 2) That proposals for designations of Antarctic Specially Protected Areas or Antarctic Specially Managed Areas which meet the criteria of Paragraph 1 above shall be submitted to CCAMLR for its consideration before any decision is taken on the proposal relating to marine areas.
> 3) Furthermore that any other proposed designations which might have implications for CCAMLR Ecosystem Monitoring Programme (CEMP) sites shall also be submitted to CCAMLR for its consideration.
> 4) That this decision shall replace Decision 4 (1998), which shall cease to be operative.

The interesting qualification in both Decisions on draft management plans to situations where there "is actual harvesting or potential capability for harvesting …" has, in practice, been interpreted very strictly, and essentially if any part of the proposed area is wet, CCAMLR looks at it.

Within CCAMLR and its subgroups the prime consideration is the effect of the proposed area on marine harvesting. Much useful scientific insight may be brought to bear, but this occurs in the context of CCAMLR's focus on harvesting and its casting of conservation as including "rational use".[18] This is clearly

[18] CCAMLR, Article II.2.

a very different set of reference points for considering an environmental management proposal from that obtaining under the Protocol.

5. The Practical Consequences

Some unsurprising consequences have followed. First, an area proposal including a marine element can take a long time to process, notwithstanding some subsequent efforts at smoothing the process and sending proposals to CCAMLR almost in parallel with CEP consideration. The slighter the risk the proposal poses for marine harvesting, the quicker it will progress. This may be exerting a powerful selection pressure on the sort of proposals that are submitted. It may also be a contributing factor in the seeming shift in preferences from ASPAs to ASMAs (i.e. from a category able to deliver strict marine reserves to one allowing only more permissive arrangements) when it comes to developing area management arrangements.

Second, states are able to block proposals in CCAMLR more easily than they can in the CEP or at the ATCM, where an MPA proposal would be a realisation of a legally mandated capacity under the Protocol that they have, after all, agreed to. In crude terms, there is a degree of internal regime shopping evident here.

Given the evident reluctance of states to progress proposals with substantial marine areas, exemplified by the failure of New Zealand's 1999 Balleny Islands ASPA proposal,[19] nobody now seems to think it worthwhile proposing large areas. Whereas the Balleny Islands proposal was for a globally significant MPA of several hundred thousand square kilometres around a biologically important archipelago, the largest marine areas which have subsequently been acceptable in ASPAs are much smaller areas. ASPA 161 - Terra Nova Bay includes a marine area of just 29.4 km^2, that for ASPA 153 – Eastern Dallman Bay is 580 km^2 and ASPA 152 – Western Bransfield Straight is 900 km^2.[20] Interestingly, the last is now actually slightly smaller than it was under its pre-Protocol designation as a Marine Site of Special Scientific Interest.[21] For several years the rationalisation of this was that by at least getting small areas, one was creating precedents - small areas today; larger areas tomorrow. But, this has not in fact been what has happened. The prospects for marine areas in ASPAs and ASMAs seem to have diminished further since the early part of the decade.

6. Designating Marine Protected Areas in the Antarctic Treaty Area

ASOC takes it as axiomatic that Parties intended something when they adopted an instrument that provided a basis for designating marine areas as ASPAs and/or ASMAs. The generic obligations of the Protocol declare a commitment of Parties to environmental values and the utilization of a range of tools to secure those values. The Protected Areas system is one of the major tools, and in Annex V it is recognised that activities "shall be prohibited, restricted or managed in accordance with Management Plans adopted under the provisions of this Annex".[22] So, there are no surprises if particular protected areas (terrestrial or marine) impose constraints on some activities. If this wasn't necessary, we should not need Protected Areas. Further, MPAs have value in securing the scientific values and the value of the Antarctic Treaty Area for scientific research which are so central to the Antarctic Treaty System.

The international legal commitment to designate marine areas resides in the Protocol. No such clear cut area protection mechanism is evident in CCAMLR, although there is no reason why it cannot also designate MPAs via Conservation Measures, which are mandated for, *inter alia*, "the designation of the opening and closing of areas, regions or sub-regions for purposes of scientific study or conservation, including special areas for protection and scientific study".[23] But the immediate responsibility resides with the ATCM, where duties under the Antarctic Treaty and Protocol are given effect.

Giving CCAMLR a role in the realisation of its commitments is fine – up to a point. However, if the practice results in a *de facto* veto on the designation of MPAs, it must be time to revisit the issue. The ATCM is in

[19] Background provided in Burgess, J., Waterhouse, E., Hemmings, A.D. and Wilson, P. 'Declaration of Marine Protected Areas – the case of the Balleny Islands archipelago, Antarctica, in Beumer, J.P., Grant, A. and Smith, D.C. (eds) *Aquatic Protected Areas: What Works Best and How do we Know?* Australian Society of Fish Biology (2002).
[20] These three ASPAs were adopted through Measure 2 (2003).
[21] Adopted as Recommendation XVI-3 in 1991.
[22] Protocol, Annex V, Article 2.
[23] CCAMLR, Article IX.2(g).

many ways the parent of the ATS. It needs to ensure that its purposes and duties are not undermined by other parts of the system. The ATCM has prime responsibility for the area south of 60 degrees south latitude, and should ensure that it both deploys the management tools it has given itself, and justifies its claims to be acting in the interests of all mankind.[24]

A range of marine reserves and protected areas will be required to secure the marine ecosystems of the Antarctic Treaty Area. These will vary in scale from the familiar fringing coastal zones in otherwise terrestrially focussed protected areas, through larger coastal MPAs, MPAs around islands and archipelagos, to medium - very large open ocean areas. Choices between "strings" of MPAs, "corridors" or very large areas such as that seen around Kiribati should be made on the basis of need and circumstance. Some MPAs may require fixed boundaries; others may be designed to move with the values being protected, or in response to ecological (perhaps climate induced) changes. In the open ocean, MPAs need to address depth as well as aerial extent. This paper does not aim to address these important technical issues.

Some MPAs will need to be fully protected marine reserves where all extractive and destructive activities are prohibited while others may be more permissive. Annex V gives us, via ASPAs and ASMAs, categories able to reflect this range of needs. In a consensus statement on the benefits of marine reserves, the American Association for the Advancement of Science stated "full protection (which usually requires adequate enforcement and public involvement) is critical to achieve this full range of benefits. Marine protected areas do not provide the same benefits as marine reserves."[25]

ASOC believes it is imperative that the ATCM breathe new life into the MPA debate within the Antarctic Treaty Area. Repeating a point made earlier in the paper, whatever the difficulties, agreeing to place a significant part of the marine environment in MPAs will nowhere be easier than in Antarctica. A failure to do so will be a very severe indictment of the ATS as it closes on its 50th anniversary.

7. Action at XXXI ATCM

ASOC believes that this ATCM should:

- Reaffirm its clear intention to realise a representative and coherent network of MPAs within the Antarctic Treaty Area, through the designation of ASPAs and ASMAs under Annex V of the Protocol. This should take the form of a Decision.
- Resolve to ensure that a representative series of MPAs is established within the Antarctic Treaty Area by 2012.
- Resolve to place a substantial and representative part – at least 30% - of the total marine area inside the Antarctic Treaty Area within MPAs within a decade (i.e. by 2018).

[24] Antarctic Treaty, Preamble, First Recital.
[25] American Association for the Advancement of Science. Scientific Consensus Statement on Marine Reserves and Marine Protected Areas (2001).