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Information Paper submitted by ASOC

INTRODUCTION

In a series of Information Papers tabled since the XXIV ATCM in 2001\(^1\), ASOC has sought to demonstrate the need for regulation of commercial tourism within the Antarctic Treaty Area by Consultative Parties, through the Antarctic Treaty Consultative Meeting. The concern with Antarctic tourism is predicated upon the now substantial numbers of tourists and associated staff entering the area each year\(^2\), the steep and accelerating annual rate of increase\(^3\), rapid diversification of the tourist industry\(^4\), and indications of profound structural change within it.

Although ASOC sees tourism as a legitimate activity in the Antarctic Treaty Area, we see its legitimacy as contingent, and fear its development poses significant threats to environmental, legal and geopolitical norms and values in Antarctica, unless brought under reasonable legal regulation by Antarctic Treaty Consultative Parties acting collectively.

Appreciable progress has been made since 2001. The regulation of Antarctic Tourism is now accepted as a legitimate matter for discussion at ATCMs, a dedicated Working Group has been established under an eminent chairman, considered Working and Information Papers have been tabled, and useful work has continued through intersessional contact groups. Clearly, a number, perhaps a majority, of Consultative Parties now see a need for regulation. Some useful thinking about the modalities of an accreditation scheme has been revealed in recent discussions, including particularly in the Intersessional Contact Group on Accreditation. We see continuing consideration of site-specific guidelines and efforts to improve the collection and management of tourism data. Elsewhere, the particular issues posed by land-based tourism developments are beginning to be considered.

This is all very positive. But some important facets of tourism, which need to be built into any regulatory structure, have not yet been given substantive treatment. These include some discussion of the overall levels of tourism activity that the ATCM sees as acceptable and consistent with other Antarctic values. One may systematise and improve at the margins, but if the overall scale and scope of the activity continue to grow unabated, reductions in individual activity effects may still be entirely swamped by absolute growth. Secondly, might there be types of tourism activity, which are in their nature particularly problematical in Antarctica, and might therefore justify particular constraint, discouragement or prohibition?

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\(^1\) A full list of ASOC ATCM and ATME papers, and copies of the papers themselves, are available at: [http://www.asoc.org/what_tourism.htm](http://www.asoc.org/what_tourism.htm)

\(^2\) Drawing on IAATO data, a figure of 44,266 has been calculated for the 2003/04 season. See Murray & Jobour, 2004.

\(^3\) ‘Independent expeditions and Antarctic tourism policy’. *Polar Record* 40, at 314.


The facet that this paper seeks to examine is that of the risks Antarctic tourism may pose to the stability of the Antarctic Treaty System as a result of some legal uncertainties. If these are realised, and the ATS is unable to anticipate and head them off, this could pose the severe risk of the international discord, which the Antarctic Treaty seeks to avoid, and which Parties’ restraint in the area seems directed to avoiding.

Whilst some legal issues have been raised by particular Parties, a substantive discussion of these has not yet occurred. Since one of the difficulties here may be that such discussion touches on positions on sovereignty, there may be some advantages to some comments on these matters being made by a non state entity, such as ASOC, which cannot itself have a stake in particular sovereignty positions.

WHY ARE THESE ISSUES SIGNIFICANT?

1. They may introduce uncertainties and complexities which may be structurally and operationally difficult for the ATS to manage;

2. They exacerbate sovereignty positions, hitherto contained by Article IV of the Antarctic Treaty and may become tools for unhelpful contention between Parties;

3. To the extent that they prove difficult to manage, they are likely to undermine effective implementation of existing obligations, including environmental obligations necessary for the comprehensive protection of the Antarctic environment and its dependent and associated ecosystems, and the primacy of science and scientific research in Antarctica;

4. These issues will clearly affect the subsequent development of the ATS and its standards and norms in relation to Antarctic values and uses;

5. Although these issues manifest themselves in the context of tourism, some at least are generic issues associated with the relational shift between governmental and non-governmental activities in the area. Thus, they are likely to recur in other contexts if not resolved; and

6. Identification of potential problems allows the ATCM to respond to them before they become critical.

SOME KEY LEGAL ISSUES

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\(^3\) See the section ‘Antarctica’s singular context’ in ASOC, Antarctic Tourism, XXIV ATCM IP 40, and Regulating Antarctic Tourism, XXV ATCM IP 83.
Jurisdiction in relation to tourism operations

The historic model of Antarctic activity organisation was that those organising and conducting an activity, and the vessels and aircraft employed, were usually associated with a particular Antarctic Treaty state, which was usually a Consultative Party. A single state generally had a real connection to all substantive facets of the activity, and its jurisdiction over participants was unlikely to be contested. Although not the only sort of activity to depart from this model, commercial tourism in particular presents a very different picture.

The activity may be deemed to be organised in a particular place for the purposes of EIA, but the operational and marketing locations may be entirely different, and the vessel, helicopter, crew, expedition staff, passengers and insurers come from other (and differing) places. These component parts of the overall activity (a particular “expedition”) may also be located across different classes of states: Consultative Parties, other Contracting Parties and Non Parties.

There is an inherent complexity here, quite different from the historic model. It is arguable that this can be managed in relation to advance notification and EIA (although we have yet to see how Parties and the CEP deal with really complex relationships), but one might be less sanguine in relation to other matters, and particularly in situations of misadventure and in relation to criminal or civil law actions.

Potentially significant jurisdictional issues include:

1. The implications of ownership or effective control of (say) an aircraft, following an accident, passing from an ATS obligation compliant operator, to an insurance entity for whom these obligations are less clear, and possibly based in another state; and

2. The implications of an alleged crime (or civil action) involving a citizen of state X and a citizen of state Y ashore in Antarctica, where there is neither an accepted territorial or flag-state to exercise jurisdiction (and where there may also be an assertion of jurisdiction across a sovereignty position)?

Since the Antarctic has now moved beyond a situation where the overwhelming majority of persons are deployed on national programmes, or subject to clear exchange arrangements between Consultative Parties, there may be a case for now attempting some practical resolution of jurisdictional issues put on hold since the adoption of the Antarctic Treaty.

Property rights

On one line of legal argument, private property rights depend on the presence of a territorial sovereign for actuation. Since Article IV of the Antarctic Treaty prevents the formation of such territorial sovereignty rights, private property rights cannot exist in Antarctica. Even in the unclaimed sector of Antarctica, therefore, the area is not truly res nullius, in the sense that it can be subject to individual appropriation by private parties.
An obvious risk is that a tourism operator may seek some kind of access or title to existing infrastructure, or the right to build infrastructure, from the claimant state in that area. One claimant state is already reported as saying that under its domestic legislation an existing facility could be leased or granted as a concession to a tour operator and ASOC is aware of an assertion that a landowner in a different claimant state has argued that there was no impediment to him building a hotel in Antarctica if he wished to do so. Potentially, claimant states may find themselves on the horns of a dilemma.

It would seem a useful first step for Parties, particularly those which are claimants, to examine whether under their domestic law, one of their citizens or entities can in fact acquire property rights in the area of interest/activity of their state. ASOC would hope that in the event that a Party discovered that this was presently possible, it would amend its legislation to close off this possibility, at the minimum for the lifetime of the Antarctic Treaty.

Is the Moon setting a precedent?

Whatever the present legal position, the Antarctic Treaty does not appear to be as clear in its prohibition of private property rights as the Outer Space Treaty or Moon Treaty, and it may therefore be wise to bear in mind that, notwithstanding these treaties, large numbers of entities now purport to sell real estate on the Moon. The financial transactions are real enough, whatever the present basis of title, and the political and legal consequences of such sales at some point in the future in relation to supposed property rights are, to say the least, interesting.

Hitherto, direct “sale” of real estate in Antarctica does not appear to have been attempted, and although Moon sales appear to involve both private individuals and corporations, there is no evidence that tourism companies (or indeed any other sorts of corporations) have yet openly expressed interest in doing so in Antarctica. The question is rather whether a similar pattern of “real estate” interest could be initiated in Antarctica?

There is obviously no requirement that either the sellers or buyers be domiciled in an Antarctic Treaty state, but even allowing that both parties to an arrangement are, one would have to entertain the possibility that similar politically powerful lobbies of sellers and owners to those anticipated for the Moon could arise in the Antarctic context seeking subsequently to give legal effect to earlier actions. This is, after all, precisely what has happened elsewhere on colonisation frontiers around the world. Legal recognition seems often to follow after the fact.

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6 See paragraph 37 in Norway, Chairmain’s Report from Antarctic Treaty Meeting of Experts on Tourism and Non-governmental Activities in Antarctica, XXVII ATCM WP 4.
7 See Article 2, Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies, 1967.
8 See Article 4, Agreement Governing the Activities of States on the Moon and Other Celestial Bodies, 1979.
9 See, eg: http://www.planetaryinvestments.com/
10 See transcript of the Australian Broadcasting Corporation’s ‘Four Corners’ Programme on the exploitation of space, The High Frontier, broadcast 2 May 2005, Reporte Ticky Fullerton: “REPORTER: Celestial real estate has already taken off. This agent is selling the moon for $59 an acre and claims to have 2,000,000 property owners. There's no law to stop this, but there's also no law to enforce moon claims. US ESTATE AGENT: In 10 years we'll have 40,000,000 property owners on the moon. I guarantee you they will have a voice, and they will yell and scream and let these people know that they don't appreciate the fact that they're on private property.” http://www.abc.net.au/4corners/content/2005/s1355604.htm
And it is already seemingly the case that at a practical level, land-based tourist facilities such as that at Patriot Hills are generally treated by Parties in a similar way to national programme facilities.

Hitherto, Parties concerned with the property rights issue have been primarily concerned with the potential basis provided by “permanent” facilities ashore in Antarctica. This is a natural focus, but unless the very act of deeming a facility non permanent has significant legal implications, the difficulty may be in arriving at a meaningful conception of “permanent” in the Antarctic context. A large proportion of even national programme facilities away from main stations are seasonally abandoned, and partially collapsed, closed down or removed. This is also the situation at the Patriot Hills tourism facility. But if the same sites are used year on year over many years, and most of the gear is left on site, does this really mean these are not “permanent” facilities? Permanent facilities in the sense that one might understand the term elsewhere would seem likely to be in the minority in Antarctica. In Antarctica, perhaps permanence has more to do with persistence than continuous occupation.

**Usufructuary rights**

Usufructuary or “use-rights” are a sort of property right, but one that rests on usage rather than continuing occupation. New Zealand in particular has identified this as an issue warranting examination, and it has been given salience in relation to the tourism industry through IAATO’s periodic reference to long use of particular sites by the industry and its belief that these users should not be excluded by ATCPs, and perhaps by loose assertions of “jurisdiction”.

If usufructuary rights are indeed a species of property right, they would again depend on some form of national assertion of territorial sovereignty, or some grant of authority from the relevant condominium sovereign of the Antarctic (presumably, the ATCM). On this reading, no amount of consistent usage would itself create a prescriptive easement on behalf of private entities operating in the Antarctic Treaty Area. Similarly, no amount of consistent conduct asserting territorial sovereignty by a State would have effect against Article IV of the Antarctic Treaty. Further, since non-State actors cannot presently make customary international law, they cannot readily challenge the Antarctic Treaty on this. *Ergo*, private tourism companies should not be able to unilaterally assert use rights to particular sites – whether these are landing sites, particular visitation sites, historic huts or others.

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13 See pages 1 & 18 in IAATO, *Overview Summarizing the Terms of Reference*, ATME Paper 12.
However, this picture may change if the ATCPs, through the ATCM, grant some sort of recognition of tourism use-rights to particular operators, or an association or other body acting on their collective behalf. Were such to be sanctioned by the ATCM through a Measure or similar recommendation, ASOC believes that a profound challenge to the historic functioning of the Antarctic Treaty System would be before us.

**Protected Areas Management Plans**

The foregoing suggests particular care may be necessary in the drafting of management plans for ASPAs and ASMAs. An interesting difference in approach is reflected in recent ASMA practice. The Management Plan for ASMA No. 2\(^{14}\) adopted at XXVII ATCM is clearly cast in terms of safeguarding the values of environment, science and wilderness. Tourism is treated as an activity, and situated in the context of the primacy of these values. There is no reference to IAATOA at all in the management plan.

By contrast, in the draft Management Plan for the proposed Deception Island ASMA\(^{15}\), tourism is cast in more significant terms. Again, tourism is an activity, but the objectives of management here include providing opportunity for visitors to experience the place – “visitors” here and elsewhere in the text seemingly meaning tourists in many instances. Indeed, the term and concept of “visitor” replaced a much greater use of “tourism” and “tourists” in earlier versions of the text of. Notwithstanding these changes, the use of “visitors” obscures the boundary between national programme staff and tourists, in a way not seen in the Dry Valleys ASMA. The draft Management Plan for the Deception ASMA includes several specific references to IAATOA, including in relation to information exchange. Does this document therefore begin to offer recognition of tourism interests in a way that may become problematical?

Noting that the Deception ASMA is still in its developmental phase, and the text merely a draft, there may be wisdom in avoiding entrenchment of particular tourism entities in the management plan – and thus avoiding any risk of either establishing some sense of rights or entitlement, or creating a new departure point for their establishment in subsequent plans - and following the approach used in the Dry Valleys ASMA. There may, in any case, be advantages in consistency of approach across ASMAs. An alternative approach that could be followed is to introduce a standard disclaimer in all ASMA and ASPA management plans, along the lines of:

“Nothing in this document should be construed as a recognition or grant of use-rights or any other property rights to zones within the Antarctic Treaty area, as such would be in violation of the terms of the Antarctic Treaty.”

**Management of Historic Huts**


\(^{15}\) Argentina, Chile, Norway, Spain, United Kingdom, United States, *Deception Island Antarctic Specially Managed Area (ASMA) Management Package*, XXVII ATCM WP 13.
Since historic huts and other sites are protected through the protected areas system of the Protocol, the previous comments could also attach to their management plans. But the immediate issue here may be instead the initially informal arrangements between those who actually maintain and manage the huts, and the tourism companies who bring most of the visitors. Notwithstanding that the management plans for the huts are agreed between States, in some cases the practical work is carried out by autonomous or semi-autonomous entities.

Since hut maintenance is expensive, and history one of the attractants for Antarctic tourism, a relationship has grown up between management entities and the tourism industry. “Voluntary” contributions towards the costs of hut maintenance, assessed on the basis of the number of tourists coming through the doors, raise the possibility over time of a client/provider dependence relationship developing. Given the uncertain legal ownership of the facilities and the jurisdictional complexities of sovereignty positions, is there a possibility that over time a de facto quasi property rights/access rights relationship could develop? A disclaimer of the sort mooted above might give some insulation against such a possibility developing too far.

RECOMMENDATIONS

ASOC hopes that the considerations above are addressed by Parties in Stockholm. Our concerns are genuine, and, we believe, consistent with remarks made by a number of ATCPs over the last several years. These are matters with a significant capacity to impact on the preservation of Antarctica’s environment, scientific values and geopolitical stability.

ASOC suggests the following responses be considered by ATCM XXVIII:

That ATCPs -

1. Seek to resolve some of the problematical jurisdictional uncertainties now that human activity in the Antarctic Treaty Area is no longer confined to national programmes;

2. Ensure that their domestic legislation does not allow the acquisition of private property rights in the Antarctic Treaty area, at least for the duration of the Antarctic Treaty;

3. Agree that they will not lease out, transfer or grant title to existing or any future Antarctic stations to tourism entities;

4. Reiterate their understanding that Article IV of the 1959 Antarctic Treaty precludes private property rights in the Antarctic Treaty Area;
5. Avoid specific reference to Antarctic tourism companies, associations or groupings (including IAATO) in substantive ATCM documents, such as Protected Areas system management plans;

6. Add specific disclaimers in relation to property or other use rights to ATCM documents such as management plans, particularly where these involve the management of tourism activities; and

7. Ensure that operational maintenance and management of historic huts does not become dependent on financial or other support from Antarctic tourism.