Amendment or Modification of Annex II and the Implications for Further Annex Review
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Information Paper
Submitted by ASOC\textsuperscript{1} to ATCM XXX
(CEP Agenda Item 8; ATCM Agenda Item 5)

1. Introduction

This Information Paper reviews the significance of, and relationship between, components of Annex II amendment or modification. Drawing on the experience of the review of Annex II, we consider what the protracted process of review of just one annex may say about our capacity to review the other annexes, and make some suggestions for improved \textit{modus operandi}.

The \textit{Protocol on Environmental Protection to the Antarctic Treaty} was designed as a framework convention that would allow both the addition of further annexes as necessary and the amendment or modification of existing annexes to take account of technical advances and best practice. Each of the five annexes currently in force, and Annex VI which is not yet in force, accordingly include an article entitled “Amendment or Modification”.

At ATCM XXIV in 2001, ten years after the adoption of the Protocol, CEP IV agreed to conduct a rolling review of the annexes, commencing with Annex II. Annex II was selected as the first annex to be reviewed in part because consideration of the category “Specially Protected Species” (a concept embedded in Annex II and with the list of current taxa forming \textit{modus operandi}) was already underway.

A proposal for a review of Specially Protected Species was introduced by the UK in 1999\textsuperscript{2}. At ATCM XXIII, Resolution 2 (1999) was adopted and discussion of the issue at subsequent meetings encouraged. From SATCM XII in 2000 open-ended intersessional contact groups operated, reporting to ATCM XXIV in 2001\textsuperscript{3}, and ATCM XXV in 2002\textsuperscript{4}. Thereafter consideration of Specially Protected Species was taken into the wider Annex II review underway within the CEP.

The CEP conducted its discussion of Annex II through its annual meetings and intersessional contact groups. The final intersessional contact group report was tabled at ATCM XXVII in 2004\textsuperscript{5}. At ATCM XXVII, the CEP concluded its work on Annex II revision, and attached its heavily square-bracketed Annex text as Appendix 9 to the Report of CEP VII\textsuperscript{6}. For the last three years, the question of Annex II has been in a sort of limbo, somewhere down the agenda of the Legal and Institutional Working Group\textsuperscript{7}.

At ATCM XXIX in 2006, the ATCM agreed to remove fur seals from the list of Specially Protected Species\textsuperscript{8} and asked SCAR to undertake a review of the status of southern giant petrels with a view to adding this species to the list of Specially Protected Species\textsuperscript{9}. However, ATCM XXIX made no further progress on (indeed did not even substantially discuss) the general review of Annex II. It seemed to be generally understood by Parties that giving effect to Measure 4 (2006) Specially Protected Species: Fur Seals would require the conclusion of the Annex II review.

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\textsuperscript{2} XXIII ATCM/WP24.
\textsuperscript{3} XXIV ATCM/WP5.
\textsuperscript{4} XXV ATCM/WP8.
\textsuperscript{5} XXVII ATCM/WP17.
\textsuperscript{8} Measure 4 (2006) Specially Protected Species: Fur Seals.
2. The Annex II Package

ASOC believes that there are three essential components to the Annex II review and any subsequent amendment or modification of this Annex:

- Reaching agreement on updating and strengthening the main body of the Annex to reflect modern environmental management practice, scientific insights, and the declaratory position of Antarctic Treaty Consultative Parties in relation to protection of the Antarctic environment and dependent and associated ecosystems;

- Reaching agreement to any delisting of presently designated Specially Protected Species in Appendix A to the Annex on the basis of robust scientific evidence, and with confidence that such delisting will not expose the taxa to increased risk, or be taken as a green light for commercial exploitation; and

- Reaching agreement on the addition to the list of Specially Protected Species in Appendix A to the Annex of those taxa for which reasonable and scientifically based concerns about status exist.

At the start of ATCM XXX in New Delhi, only the second of these three components appears to have been resolved.

This Information Paper speaks to the significance of, and relationship between, these components of Annex II Amendment or Modification. They form, in ASOC’s estimation, a “package” which need to be resolved together, once, not least because to do so otherwise is to require Parties to begin amendments to their domestic implementing legislation (whether Acts or subsidiary Regulations), administrative practice, and instructions to their various domestic responsible authorities, only to have to revisit these a short time later. This would seem unreasonably burdensome.

ASOC believes it is both necessary and feasible for Parties to conclude their work on Annex II at ATCM XXX. We cast our expectations realistically, in light of the tone and tenor of the discussions in the CEP and ATCM. It is quite clear that we shall not see the sort of changes to Annex II that ASOC hoped for, but we do not here revisit those issues. It is however reasonable to expect some substantive improvement in the Annex after six years of consideration and a rather longer period of experience of its use. In the unfortunate event that the package cannot be completed in New Delhi, ASOC believes that the entire package should be carried over to ATCM XXXI, rather than be adopted in pieces.

3. The Main Body of Annex II

The thrust and language of Annex II was very largely carried over from the 1964 Agreed Measures for the Conservation of Antarctic Flora and Fauna. This means that as a central instrument of modern Antarctic environmental management this Annex is now rather old, and imbued with the thinking of the early 1960s rather than the thinking of the early 2000s. It is in principle unlikely that we could not now do better, and the discussion in the CEP since the start of this decade confirms as much. The way we now conceive life forms and ecological relationships, and our knowledge of what normally gets to Antarctica is different from 45 years ago, and the Annex should be updated to reflect this. We are now vastly more concerned about the introduction of exotic organisms into the Antarctica, and the Annex should reflect this.

ASOC would like to see the Annex extend to a wider range of taxa than it does currently, but it has been clear that a number of states will not countenance marine taxa, microbes, most invertebrates or (horror of horrors) cetaceans being afforded any protection by this Annex. This opposition has not been based on a contested scientific case for particular species, but in judgements about the legal basis for coverage of groups of animals and the political acceptability of coverage, particularly for taxa that are subject to commercial exploitation. ASOC regrets this, but sees little evidence that Parties’ attitudes will change in the near-term.

4. Delisting of Fur Seals

ASOC’s concern about the delisting of fur seals Arctocephalus gazella and A. tropicalis has been that the scientific case for doing so is robust, that it is not just the particular idée fixe of a small group or a Trojan Horse for another agenda such as active management or so-called rational use. We have also been concerned that the lifting of Specially Protected Species listing, however justified on objective scientific grounds, not be
seen as a green light for a resumption of commercial sealing activity, nor a precedent to be deployed in support of other marine mammal exploitation.

Measure 4 (2006) provides a good balance between the confidence that special protection can now be lifted and a commitment to ensure ongoing protection for fur seals. ASOC believes that some way has to be found to reflect the language of this Measure in the instrument (presumably another Measure) that the ATCM uses to adopt the revised Annex II package. This is necessary to provide confidence in the wider public community that what we are seeing is not a diminution of protection for a significant marine mammal in the Antarctic Treaty Area.

5. Listing of Southern Giant Petrels and Macaroni Penguins

For the past decade, discussions of the category of Specially Protected Species have often paired delisting of fur seals with the case for listing southern giant petrels *Macronectes giganteus*. This albatross sized petrel with a patchy circumpolar distribution has been known to be vulnerable to human disturbance for a long time, with reports of human-induced nest abandonment dating from before IGY. Recent consideration of its listing appears to have stalled because of the finding that the Falklands/Malvinas population (outside the Antarctic Treaty Area) is approximately twice the size previously assumed, and like other populations north of the Antarctic Treaty Area in good shape. Accordingly, the global status of the species has been set at “Near Threatened”.

The substantive points however are that populations of southern giant petrels in the Antarctic Treaty Area are either declining or only weakly stable; and that there is no evidence for significant movement of southern giant petrels between the subantarctic and Antarctic areas. Thus, the happy situation of Falkland/Malvinas giant petrels does not materially improve the regional status of Antarctic southern giant petrels, which is assessed as “Critically Endangered”.

Consequently, ASOC strongly supports the recommendation from the Antarctic seabird research community, including SCAR, for southern giant petrels to be added to the Specially Protected Species list.

A similar case appears to exist for the Antarctic Treaty Area Macaroni penguins *Eudyptes chrysolophus*, although the population of penguins is more geographically-restricted than the giant petrel. Macaroni penguins are, within the Antarctic Treaty Area, confined to the South Orkneys, South Shetlands and northern Antarctic Peninsula. This population is classed as regionally “Vulnerable”.

Again, ASOC supports the recommendation from SCAR and others that Macaroni penguins be added to the Specially Protected Species list.

The prime justification for adding these two species to the list in Annex II is objective risk. These taxa are at risk and the status of Specially Protected Species and the Action Plans that their listing will stimulate may offer significant additional protections, not least through the raising of the profile of their situation.

A second consideration is of a more presentational nature. Were the Antarctic Treaty Consultative Meeting to only amend the list of Specially Protected Species by delisting fur seals, a more negative impression of Parties interests might be engendered than is actually the case. A combination of listing with delisting would suggest a dynamic engagement by Parties in the light of the actual threats and risks currently occurring in the area.

6. The Process of Review

It has taken far too long to conclude the review of Annex II. Up to ATCM XXX, we have been discussing the general Annex II questions for six years, and the question of Specially Protected Species for eight years, without conclusion. To put this in context, it took two years to negotiate the Protocol and seven for it to enter into force. And we have not yet concluded. The timeline for completing the review and any amendment or modification of the other four annexes in force, if anything like the Annex II timeline is likely, is not encouraging – indeed, for the CEP which will necessarily carry the technical load, it will be a dispiriting prospect.

Clearly there was some confusion about just how far the CEP could go in recommending changes to the Annex. Article 12.1.b of the Protocol requires it to give advice on “the need to update, strengthen or
otherwise improve such measures”. The trouble is, this duty does not come with any guidance on just when this advice strays over the arbitrary border between best technical practice and unwelcome renegotiation of a politico-legal text. Rather than see the CEP provide scientific, technical and environmental advice (or in reality, several views on what constitutes best practice – since the CEP is not bound to only report a consensus position) which the ATCM might find disagreeable on other criteria, we saw some ATCPs take up the sorts of policy debates normally found only in the ATCM itself within the CEP. Some of us rather unkindly characterised this as converting the CEP into the ATCM in drag.

The effect of this has been to reduce the scope of CEP discussions in a legitimate area of concern for it, with carry-over implications for the overall effectiveness of environmental protection based upon the advice of the CEP. This is most regrettable.

The lesson here seems to be that it is both unhelpful and unproductive to task the CEP with annex review if the ATCM or particular ATCPs are unlikely to consider seriously the advice they receive. What it might do instead is ask the CEP to tell it which parts of an annex no longer represent best-practice, or are otherwise outdated, and the best new approaches to address the issues. The process of review and amendment or modification, and the actual drafting of changes to the annex should then occur elsewhere – perhaps in the Legal and Institutional Working Group, or a working group set up for the purpose. A defined short time period needs to be specified for each annex review, and we suggest two years.

7. Recommendations

- ATCM XXX should conclude the modification and amendment of the Annex II main text and both deletions and additions to the Specially Protected Species list at Appendix A as a complete package to which Parties then give domestic effect in a single action;
  - Modification and amendment of the main text should include the very limited changes to the main body of the Annex which ATCPs seem able to agree, including updating our concepts of life forms and ecological relationships, and measures directed towards managing exotic organism risks;
  - Fur seals should be removed from the Specially Protected Species list at Appendix A, but with a reiteration of the rationale and protections laid out in Measure 4 (2006);
  - The Antarctic regional populations of southern giant petrel and Macaroni penguin should be added to the Specially Protected Species list at Appendix A;
- The ATCM reassess its approach to review and possible modification and amendment of other annexes in light of its experience with Annex II, so that the CEP advises on technical criteria relevant to its mandate and the Legal and Institutional Working Group, or another working group set up for the purposes, conducts the annex reworking.