



Flags of the Antarctic Treaty System members fly at the South Pole, Antarctica. Source: Sean M Smith / Shutterstock.com.

The Antarctic Treaty System in 2021

Important Anniversaries but Challenges for Consensus Decision-Making

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INTRODUCTION

2021 marked several major Antarctic anniversaries: the Antarctic Treaty System (ATS) celebrated the 60th anniversary of the entry into force of the 1959

Antarctic Treaty, the 30th anniversary of the adoption of the 1991 Madrid Protocol, and the 40th meeting of the Commission for the Conservation of Antarctic Marine Living Resources (CCAMLR).

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The ATS is the fundamental legal and institutional framework governing the Antarctic region. Founded on the goals of international cooperation and peaceful use, it has facilitated the conservation of Antarctic marine living species, including seals, and the comprehensive protection of the Antarctic environment and dependent and associated ecosystems.

The ATS seeks to achieve its goals through decision-making based on the best available science that is consistent with the provisions of the Environmental Protocol and CAMLR Convention. Consensus decision-making is at the heart of the ATS. This does not mean that all governments must agree but relies on the absence of formal objection. Consensus reflects a fundamental tenet of the Antarctic Treaty: to find common ground in the spirit of cooperation, and a willingness to approach each issue is the best way to uphold the purposes and objectives of a regime designed to prevent "international discord."

Throughout its history, Antarctica has not been free from internal or external geopolitical tensions—indeed, it was intense Cold War rivalry and disputes over sovereignty that gave rise to the Treaty in the first place. The continued success of



The flag of the Antarctic Treaty System. Source: a_b_t / Shutterstock.com.

the ATS relies on the ability of its member states to manage such geopolitical tensions peacefully, seeking consensus in the main Antarctic forums, the Antarctic Treaty Consultative Meetings (ATCMs), and meetings of the CCAMLR.

Given that 2021 was a year of important Antarctic anniversaries, it is timely to assess some current aspects of the way the ATS is operating and the extent to which it is successfully managing both enduring and emerging geopolitical tensions.

ATS MEETINGS IN 2021

As was the case for many international treaty conferences, there were logistical challenges in holding the usual face-to-face meetings of the ATCM and CCAMLR in 2020 and 2021. The 2020 ATCM was cancelled due to COVID-19. Considering public health restrictions on international travel, the 2021 ATCM and the 2020 and 2021 CCAMLR meetings were held by videoconference, entailing logistical and other challenges. While these meetings were generally effective and approached with goodwill by most countries, there were significant challenges. To name a few: complications with internet connections and effective simultaneous interpretation in the four official languages (Spanish, French, English, and Russian), loss of the usual informal problem-solving discussions at the margins of meetings, reduced overall working time for the meetings, and accommodations for the participants' different time zones.

Each year, the Consultative Parties to the Antarctic Treaty meet at the ATCMs "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" (Article IX of the Antarctic Treaty). In addition, since the entry into force of the Environment Protocol in 1998, the Committee for Environmental Protection (CEP) has met concurrently with the ATCM to address matters relating to environmental protection and management and provide advice to the ATCM. Antarctic Treaty Parties, experts, representatives of civil society, and international observers participate in both the ATCM and CEP meetings.

France hosted the forty-third ATCM and the twenty-third CEP Meeting virtually from 14 to 24 June 2021. On the occasion of the anniversaries of the Antarctic Treaty and the Madrid Protocol, the ATCM adopted the Paris Declaration. This Declaration, among other things, reaffirmed:

- the Consultative Parties' commitment to the principles and objectives of the Antarctic Treaty
- their commitment to preserve the Antarctic environment and dependent and associated ecosystems
- their commitment to work together to better understand changes in the Antarctic climate and implement actions consistent with the objectives of the UNFCCC 2015 Paris Climate Change Agreement

The Consultative Parties also adopted a Resolution that reaffirmed the need to consider the implications of climate change in the management of human activities in Antarctica. This provided an important response to the Intergovernmental Panel on Climate Change's landmark Special Report on the Ocean and the Cryosphere in a Changing Climate, but arguably could have gone further in highlighting the central importance of Antarctica in the Earth system.¹ Further, the ATCM adopted concrete tools for improving knowledge of, and respect for, the rules aimed at reconciling environmental protection with tourist and non-governmental activities in Antarctica,

including consideration of inspection reports (a key mechanism for verifying compliance with the Treaty and Environmental Protocol).

For its part, the CEP meeting prepared revised general guidelines for visitors to the Antarctic and presented its recommendations concerning the conservation of flora and fauna, the consequences of climate change on the environment, and environmental impact assessments of activities conducted in Antarctica. The CEP also revised the management plans for 17 existing Antarctic Specially Protected Areas (ASPAs), and supported the designation of three new ASPAs and two new Historic Sites and Monuments in Antarctica.

Despite all this successful work by the CEP, some important concerns were raised during the meeting. Many Antarctic Treaty parties expressed disappointment at the actions of one Party (China) that "challenged both the spirit and practice of decision-making by consensus."² The meeting report reflects some examples of the bases for these concerns, including:

1. The introduction of objections to high priority issues during the meeting, rather than during earlier intersessional work, as is customary to allow time for the presentation of views and to make progress towards consensus;
2. Withholding consensus pending agreement on unrelated matters;
3. Focusing on matters of legal interpretation outside the purview of the CEP; and
4. A lack of willingness to consider compromise where there was general agreement by most other parties.

Many parties argued that due to these issues the CEP had been unable to fully respond to some



Chinese icebreaker Xuelong traverses sea ice in the Southern Ocean. Source: "Xue Long in the ice" by Natalie Tapson / Flickr. com (CC BY-NC-SA 2.0).

requests made to it by the ATCM, including high priority issues such as the revision and implementation of the Climate Change Response Work Program, and advice on measures that could be taken by the Treaty Parties to support the objectives of the Ross Sea region MPA. They therefore cautioned that this approach could undermine the CEP's ability to provide objective advice and apolitical guidance to the ATCM in the long-term. The relatively new phenomenon of so-called 'legal' argument and objection being raised in the CEP also reflects a worrying tendency of some Parties to insert lawyers and diplomats into the deliberations of expert groups such as the CEP (and the Scientific Committee-CCAMLR—see below).

The other key Antarctic forum is the annual meeting of CCAMLR. The objective of the 1980 Convention on the Conservation of Antarctic Marine Living Resources (CAMLR Convention) is the conservation of Antarctic marine living resources. "Conservation" may include (but is not limited to) rational use of such resources, including harvesting. Harvesting of Antarctic marine living resources is subject to specific principles of

conservation outlined in Article II (3) of the CAMLR Convention. Based on the best available scientific advice from the Scientific Committee, CCAMLR decides on a set of management arrangements, known as Conservation Measures, to provide the legal framework governing the use of marine living resources in the Antarctic.

The 40th meeting of the CCAMLR was hosted virtually by the CCAMLR Secretariat in Hobart from 18 to 29 October 2021. This was the second year in a row the meeting took place online. Both meetings were significantly time-constrained (i.e., compared to the time that would otherwise be available for negotiations in an in-person meeting) leading to two Members (Russia and China) insisting on a limitation of those discussions to issues requiring decision at this meeting. Thus, while important decisions were made to enable continuing active fisheries, once more discussions on three proposals for the establishment of Marine Protected Areas in the Southern Ocean did not progress. Furthermore, just one week out from the UN Climate Change Conference (COP26), the Commission was unable to agree to update

their hortatory 2009 Resolution 30/XXVIII, urging increased consideration of climate change impacts to better inform CCAMLR management decisions.

While it is unsurprising that it was not possible to reach consensus on matters that have proven challenging even in face-to-face meetings (such as proposals for new MPAs and action on climate change), what was surprising in 2021 was the lack of agreement on a new catch limit for the established fishery for Patagonian toothfish in waters surrounding the South Georgia Islands (CCAMLR Subarea 48.3), due to the actions of Russia.³ This followed the Russian blocking of the exploratory fishery in Division 58.4.1 for the fourth consecutive year.

Many members voiced their concerns and agreed that Russia's action in blocking consensus in these fisheries was contrary to the best scientific evidence provided by the Scientific Committee (SC-

CAMLR). Moreover, the United Kingdom argued that Russia's blocking of consensus for Subarea 48.3 was politically motivated, and arguably inconsistent with their obligations under Article IX of the CAMLR Convention (i.e., functions of the Commission).⁴ This marked the first time in CCAMLR's 40-year history that fishing had been completely blocked in an established fishery—in this case through failure to agree on annual catch limits under Conservation Measure 31-01 (Regulation of fishing around South Georgia), the result being Conservation Measure 41-02 (Limits on the fishery for *Dissostichus eleginoides* in Statistical Subarea 48.3) lapsing at the end of the 2020/21 season. Many members also noted that Russia's actions deviated from the customary consensus decision-making framework of CCAMLR, and thus directly challenged the very foundations of the ATS. Moreover, they argued that Russia's actions had no regard for—and indeed seemed to deliberately provoke—highly sensitive



Ship and king penguin breeding colony on the coast of a South Georgia island. Source: Katiekk / Shutterstock.com.

issues for a number of Members, particularly including a longstanding sovereignty dispute between Argentina and the United Kingdom over those territories in Statistical Subarea 48.3.

IS THE ANTARCTIC CONSENSUS BREAKING DOWN?

As we can see from outcomes from the two main Antarctic forums, 2021 was not only a year marked by important anniversaries and reaffirmations of commitments to the ATS, but also by growing internal tensions about the tendency of some participants to act in a manner inconsistent with the spirit and practice of consensus.

Of course, 2021 is not the first time that there has been a failure to achieve consensus. There have been many past occasions where consensus has been difficult to establish, and even occasions where consensus has been lost after agreement had been reached. However, to this point, the practice has been to continue efforts to find the necessary consensus, including those Parties in the minority. This spirit of cooperative governance characterizes the ATS. The apparent absence of harmony on some important and high priority issues in 2021 leads the authors to be concerned that the system may face new challenges if the customary collaborative approach is not promptly restored.

Past experiences in the Antarctic Treaty have shown the difficulty of achieving consensus on key issues, such as the establishment of a Treaty Secretariat, development of rules relating to liability for environmental damage, and the decision on whether mineral resource exploitation should be allowed in the Antarctic Treaty area. Such issues, each divisive and frustrating at the time, were eventually resolved by commitment to consensus, open negotiations, and creative diplomacy—all

signals of the willingness to cooperate so that the system of governance be maintained ahead of the dogged pursuit of narrow national interest alone. Upon the 30th anniversary of the Treaty, the Parties thought it was possible that a disaffected Party might invoke the provisions to call for a review conference in 1991. A review was not called and, as it turned out, the process for re-establishing consensus around the environmental protocol became the de facto review of the Treaty. It is now a further 30 years since then, and the Treaty has matured and stabilized in that period.

What is most important now is that the Treaty Parties commit to maintaining and strengthening the Antarctic Treaty System, which promotes cooperative governance of the region. CCAMLR is directly linked to the Antarctic Treaty through the CAMLR Convention's Articles III, IV, and V. Notwithstanding this deep connection, CCAMLR is a separate institution with decision-making procedures and actions that are independent of the Antarctic Treaty Consultative Meeting. This 'separateness' is becoming more apparent. While CCAMLR Members can and have advanced their interests within ATS forums to both block and attempt to build consensus, there is a larger issue here: supporting the Antarctic Treaty System, which provides for their free access to Antarctica and a voice in the region's governance. To this end, using consensus to find agreement rather than create disagreement is paramount. The Antarctic region is best served by a harmonised approach to governance across the ATS agreements and forums.

LOOKING FORWARD

The ATS has successfully governed the Antarctic region for over sixty years and 2021 was a year of important anniversaries to celebrate. Despite internal and external geopolitical tensions



Photo of the Australian delegation during the 2021 CCAMLR meeting. Source: Sean McComish/AAD.

challenging Antarctic governance during the history of the ATS, the Antarctic Treaty parties have been able to find ways to uphold the ATS objectives and purposes in the past. By seeking consensus at the ATCMs and CCAMLR meetings, the ATS has been able to manage these differences peacefully, successfully, and cooperatively. Both the 2021 ATCM and CCAMLR meetings made progress on aspects of Antarctic governance and management, but also raised important concerns regarding adherence to the spirit of Antarctic consensus decision making, and divergence from customary practice.

As pointed out above, internal disagreement is not new to Antarctic governance, but current, persistent impasses on key matters and blocking consensus to pursue narrow national interests runs counter to the obligations of parties to the ATS and established norms. Is it time to consider that

all Parties to the Antarctic Treaty and the CAMLR Convention hold diplomatic discussions to map the path forward?

It is important for all ATS members to participate constructively in maintaining the spirit and practice of consensus, which has been the cornerstone of successful Antarctic governance over the past 60 years. It is extremely unlikely that an Antarctic Treaty System negotiated de novo in the 21st century would achieve the significant environmental, peace, and security protections that currently exist. It is therefore important to keep in mind what is at risk if mutual forbearance, tolerable compromise, and the commitment to cooperation were to be lost.

ENDNOTES

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2. *Final Report of the Forty-third Antarctic Treaty Consultative Meeting, Agenda Item 5: Report of the Committee for Environmental Protection, paragraph 24.* https://documents.ats.aq/ATCM43/fr/ATCM43_fr011_e.pdf
3. *See Report of the Fortieth meeting of CCAMLR, Agenda Item 6: Management of marine resources, paragraphs 6.19-6.36.* <https://www.ccamlr.org/en/system/files/e-cc-40-rep-prelim-v2.pdf>
4. *Ibid., paragraph 6.22. Claire Young suggested that by blocking consensus in Patagonian toothfish fisheries in Statistical Subarea 48.3, 'Russia's broader geopolitical ambitions are served by giving its adversary the United Kingdom another diplomatic headache'. See* <https://www.lowyinstitute.org/the-interpreter/opportunity-lost-australia-s-antarctic-aerodrome-cancelled>

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