

# THE ANTARCTIC TREATY CONSULTATIVE MEETINGS AS A FORUM OF LAW-MAKING

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## Introduction

This chapter reviews the leading institution of Antarctic governance: the Antarctic Treaty consultative meetings (ATCMs). We will consider how it was created and its normative capacity, and function, together with some specific characteristics of its work.

Law-making can be defined as “the process of making or enacting a positive law in written form, according to some type of formal procedure.”<sup>1</sup> According to this definition, finding at least three law-making processes related to Antarctic issues is possible. Two belong to international law and one to domestic law, although it is partially the result of what has been agreed internationally.

The first of these law-making processes is the negotiation, adoption and entry into force of international treaties about Antarctic matters. The second is the negotiation, adoption and entry into force of the international agreements adopted in the two main Antarctic meetings established by these treaties. The last is the domestic enactment of laws, bylaws and other regulations by different countries with Antarctic interests and activities, including the reception in their national legislation of the international treaties and agreements they have adopted.

We will focus mainly on the second law-making process, especially what happens at the ATCMs. However, it is crucial to keep in mind this more complex and comprehensive understanding. In particular, to consider the enactment of Antarctic domestic regulation, which usually does not receive enough attention.

In a fascinating evolution during the last seven decades,<sup>2</sup> the parties of the Antarctic Treaty<sup>3</sup> have developed the Antarctic Treaty System (ATS). This international regime is integrated by “the Antarctic Treaty, the measures in effect under that Treaty, its associated separate international instruments in force and the measures in effect under those instruments.”<sup>4</sup> More specifically, it is constituted

1 *Black's Law Dictionary*, Bryan Garner, Editor-in-Chief (St. Paul, MN: West Group, 2000), 730 (meaning of *legislation*, 1).

2 Luis Valentín Ferrada, “Evolución del Sistema del Tratado Antártico: Desde su génesis geoestratégica a sus preocupaciones ambientalistas,” *Revista de Derecho (Universidad San Sebastián)* 18 (2012): 131–51, <https://dialnet.unirioja.es/servlet/articulo?codigo=4450090>.

3 Adopted in Washington, DC, December 1, 1959, Entered into force June 23, 1961. Text in: 402 UNTS 71.

4 Article 1.e of the Madrid Protocol.

by the Antarctic Treaty, the Convention for the Conservation of Antarctic Seals (CCAS),<sup>5</sup> the Convention for the Conservation of Antarctic Marine Living Resources (CAMLR Convention),<sup>6</sup> the Protocol on Environmental Protection to the Antarctic Treaty (Madrid Protocol or Environmental Protocol),<sup>7</sup> the annexes and appendixes to these conventions and the numerous recommendations, measures, decisions and resolutions adopted at the ATCMs and conservation measures and resolutions adopted at the meetings of the Commission for the Conservation of Antarctic Marine Living Resources (CAMLR Commission or CCAMLR). The idea that this group of international agreements is a “system” was proposed for the first time in the 1970s.<sup>8</sup> These regulations constitute a peculiar international regime that functions as a restricted “co-empire” or “co-domain” (Article IV of the Antarctic Treaty prevents the Antarctic from being proposed as a common heritage of humanity) and in distinctive mode respect to other areas of concurrent sovereignty.<sup>9</sup>

Even though Article VI defines the area located south of latitude 60°S as the Antarctic Treaty area of application, some elements of the ATS explicitly extend north of that line. Article I.1 of the CAMLR Convention up to the Antarctic Convergence,<sup>10</sup> and Article 2 of the Madrid Protocol protecting “the Antarctic environment and its associated and dependant ecosystems,” which is not adequately reducible to a conventional limit (although it is necessary to consider that the operational dispositions are applied in general only south to parallel 60°S).

### **The Article IX of the Antarctic Treaty**

The main objective of the Antarctic Treaty was in 1959 and still is today ensuring that the sixth continent and its surrounding seas shall be used for peaceful purposes only.<sup>11</sup> However, this aim needs to be operationalised. The more common way in which the States act to fulfil their international obligations is by exerting their sovereign powers. However, in Antarctica, the exercise of sovereignty is a very complex issue for political, legal and factual reasons. There were different positions among the 12 Antarctic Treaty’s signatories in 1959, and they have maintained and been deepened over time among the 56 current contracting parties. Article IV of the Treaty seeks to suspend any controversy about sovereignty in Antarctica, but it does not solve the point. In this context, finding a particular way of governance was necessary. It was the ATCM, established by Article IX of the Treaty.

Under Article IX.1,

[r]epresentatives of the Contracting Parties named in the preamble to the present Treaty shall meet at the City of Canberra within two months after the date of entry into force of the Treaty, and thereafter at suitable intervals and places, for the purpose of exchanging information, consulting together on matters of common interest pertaining to Antarctica, and

5 Adopted in London, June 1, 1972, Entered into force March 11, 1978, Text in: 1080 UNTS 175.

6 Adopted in Canberra, May 20, 1980. Entered into force April 7, 1982. Text in: 1329 UNTS 47.

7 Adopted in Madrid, October 4, 1991. Entered into force January 14, 1998. Text in: 2941 UNTS 9.

8 Roberto Guyer, “The Antarctic System,” *Recueil des Cours* 139 (1973): 149–226.

9 Jorge Berguño, “El Tratado Antártico como Régimen Internacional,” *Diplomacia* 120 (2009): 23–34.

10 The Antarctic Convergence, or Polar Front, delimits a maritime area around the continent that differs from the rest of the oceans by strictly natural factors, such as salinity, ocean currents and temperature changes, which does not match a specific parallel. Article I.4 of the CAMLR Convention delimited it by a line connecting the following points along parallels and meridians: 50°S, 0°; 50°S, 30°E; 45°S, 30°E; 45°S, 80°E; 55°S, 80°E; 55°S, 150°E; 60°S, 150°E; 60°S, 50°W; 50°S, 50°W; 50°S, 0°.

11 Antarctic Treaty, Article I.

formulating and considering, and recommending to their Governments, measures in furtherance of the principles and objectives of the Treaty.

Watts highlights that the Treaty did not give a particular designation to the meeting convened under this article.<sup>12</sup> The name finally used, Antarctic Treaty *consultative meeting*, has an essentially political meaning. It highlights its *consultative* nature as the opposite of an *administrative* one, one of the points discussed at the 1959 Washington Conference. The meeting has to make recommendations and not propose and consider administrative measures.<sup>13</sup> Its name was finally established in the “Rules of Procedure” adopted in the I ATCM in 1961.<sup>14</sup> These rules have been updated several times, according to the evolution of the ATS and changes in the ATCM.<sup>15</sup> The current version of the rules was adopted in 2016.<sup>16</sup>

The meetings were held every two years from 1961 to 1994 and have been celebrated annually since then (except in 2020, when it was suspended because of the COVID-19 pandemic). In addition to the regular ATCMs, several special Antarctic Treaty consultative meetings (SATCMs) and meetings of experts on some issues have been realised.<sup>17</sup>

The consultative parties decided at the XVI ATCM (Bonn, 1991), the week after the Madrid Protocol was adopted at the XI-4 SATCM (Madrid, 1991), that

in view of the increasing range and complexity of the issues coming before Consultative Meetings and in view of the need to adopt procedures to give effect to the Protocol on Environmental Protection to the Antarctic Treaty, it would be necessary that Consultative Meetings should in future be held annually.<sup>18</sup>

One of the aspects that made this change necessary was the creation of the Committee for Environmental Protection (CEP), established in Articles 11 and 12 of the Protocol. Its 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, and to perform such other functions as may be referred to it by the Antarctic Treaty Consultative Meetings.<sup>19</sup>

During the time taken for the Protocol’s entry into force, from 1991 to 1998, the consultative parties held several conversations at the ATCMs about the future operation of the CEP. Among other issues, they agreed that “[t]he meetings of the CEP should be held in the same location as,

12 Arthur Watts, *International Law and the Antarctic Treaty System* (Cambridge: Grotius Publications, 1992), 12–13.

13 Óscar Pinochet de la Barra, *Medio siglo de recuerdos antárticos. Memorias* (Santiago: Editorial Universitaria, 1994), 109.

14 I ATCM (Canberra, 1961), “Rules of Procedure,” Final Report, 14–15, [https://documents.ats.aq/ATCM1/fr/ATCM1\\_fr001\\_e.pdf](https://documents.ats.aq/ATCM1/fr/ATCM1_fr001_e.pdf).

15 María Luisa Carvallo, “Las Reuniones Consultivas: El *sui generis* Poder Legislativo de la Antártica,” *Diplomacia* 120 (2009): 49–50.

16 Decision 2 (2016), [www.ats.aq/devAS/Meetings/Measure/632](http://www.ats.aq/devAS/Meetings/Measure/632).

17 Antarctic Treaty Secretariat, “List of Meetings,” accessed ~~October 20, 2022~~, [www.ats.aq/devAS/Meetings?lang=e](http://www.ats.aq/devAS/Meetings?lang=e).

18 XVI ATCM (Bonn, 1991), Final Report, 36, para. 134, [https://documents.ats.aq/ATCM16/fr/ATCM16\\_fr001\\_e.pdf](https://documents.ats.aq/ATCM16/fr/ATCM16_fr001_e.pdf).

19 Madrid Protocol, Article 12.1.

and immediately before, the annual ATCM.”<sup>20</sup> This idea was later developed when the ATCM took several decisions concerning the prior arrangement for implementing Article 12 of the Protocol and establishing the CEP. The consultative parties declared that they were conscious that the Protocol’s entry into force would have significant implications for the conduct of ATCM. In 1994, they agreed on creating a Transitional Environmental Working Group in the ATCM, which would be responsible for the environmental topics pending the Protocol’s entry into force.<sup>21</sup> It met for the first time in the XIX ATCM (Seoul, 1995), where the parties also discussed some aspects of its operation. Most delegations considered that the working group should have the same essential functions as the CEP.<sup>22</sup>

When the Madrid Protocol entered into force, the ATCM adopted specific rules of procedure for the CEP.<sup>23</sup> They have been updated several times. The current version was adopted in 2011.<sup>24</sup>

Currently, the CEP and the ATCM meet each year at the same time and place for a little more than a week. However, the CEP meeting starts and finishes a few days earlier than the ATCM one. This difference is necessary because the ATCM must approve the CEP Final Report and all the environmental measures it recommends. In this sense, it is crucial to remember that the decision-making body is the ATCM and that the CEP’s function is only to provide advice and formulate recommendations on environmental matters.<sup>25</sup> Despite that, it is very uncommon for the ATCM to make changes to the CEP proposals. The consultative parties usually adopt the measures, decisions or resolutions with the exact wording proposed by the CEP.

### Participation

The right to participate in the ATCMs’ decision-making processes is ruled by Articles IX.1 and IX.2 of the Antarctic Treaty. The first stated that the 12 original States Parties would meet regularly at the summits that later would be called ATCM. They are, *per se*, entitled to participate. The second rule is related to the States that have acceded to the treaty. Up to now (March 2023), they are a total of 44 States in addition to the original 12 parties. Here it is possible to distinguish between consultative and non-consultative States, depending if they are or are not entitled to participate in the ATCM decision-making processes.

Any of these States must fulfil two conditions to be considered consultative party. First, it has to demonstrate “its interest in Antarctica by conducting substantial scientific research activity there, such as the establishment of a scientific station or the despatch of a scientific expedition.” It has been highlighted that this requirement only applies to the acceding consultative parties

20 XVII ATCM (Venice, 1992), Final Report, 19, para. 35, [https://documents.ats.aq/ATCM17/fr/ATCM17\\_fr001\\_e.pdf](https://documents.ats.aq/ATCM17/fr/ATCM17_fr001_e.pdf).

21 XVIII ATCM (Kyoto, 1994), Final Report, 11–12, paras. 40–42, [https://documents.ats.aq/ATCM18/fr/ATCM18\\_fr001\\_e.pdf](https://documents.ats.aq/ATCM18/fr/ATCM18_fr001_e.pdf).

22 XIX ATCM (Seoul, 1995), Final Report, 11–12, paras. 41–47, [https://documents.ats.aq/ATCM19/fr/ATCM19\\_fr001\\_e.pdf](https://documents.ats.aq/ATCM19/fr/ATCM19_fr001_e.pdf).

23 Decision 2 (1998), [www.ats.aq/devAS/Meetings/Measure/252](http://www.ats.aq/devAS/Meetings/Measure/252).

24 Decision 2 (2011), [www.ats.aq/devAS/Meetings/Measure/492](http://www.ats.aq/devAS/Meetings/Measure/492).

25 Olav Orheim, Anthony Press and Neil Gilbert, “Managing the Antarctic Environment: The Evolving Role of the Committee for Environmental Protection,” in *Science Diplomacy: Antarctica, Science, and the Governance of International Spaces*, eds. Paul Arthur Berkman, Michael A. Lang, David W. H. Walton and Oran R. Young (Washington, DC: Smithsonian Institution Scholarly Press, 2011), 220, <https://doi.org/10.5479/si.9781935623069.209>.

but not the original ones.<sup>26</sup> On the other hand, although the Antarctic Treaty itself states this condition, some authors have contended that given the current environmental fragility of Antarctica, this interest could be better shown in other ways. There is also the case of the Netherlands, which obtained its consultative status in 1990 without having constructed any permanent infrastructure.<sup>27</sup>

The second condition is a political one: the recognition of the consultative party's status has to be considered and approved by the current consultative States. The ATCM has developed a particular procedure for that.<sup>28</sup>

Currently, of the 56 Antarctic Treaty parties, 29 are consultative parties.<sup>29</sup> They represent the most varied cultural worlds and their political, economic, social and legal systems have a great asymmetry. This diversity implies significant complexities to the ATCM operation, especially considering how the collective decisions are agreed upon.<sup>30</sup>

Although the CEP meetings are held together with the ATCMs, the criteria for participation in both fora differ. In the CEP, there is no distinction between categories of States. All the Environmental Protocol's parties are entitled to be CEP members and appoint a representative. Experts and advisors with suitable scientific, environmental or technical competence may accompany the representatives.<sup>31</sup>

The ATCMs – and in general, the ATS meetings – are essentially inter-State fora. However, they have broad participation. Only the consultative States are part of the decision-making processes. Nevertheless, the non-consultative Parties, observers and experts, including international organisations, trade organisations and NGOs, have also been allowed to attend the meeting.<sup>32</sup> They have the right to intervene and present documents and exert a significant influence on the whole political process.<sup>33</sup>

Of course, not all the parties have the same influence in the Antarctic governance. Indeed, the “G7 + 2” (the claimants plus the United States and Russia) are the most relevant countries in almost any area of Antarctic activity. This more significant influence is given in some cases because of its geographical situation closer to Antarctica (i.e. Chile, Argentina, Australia and New Zealand). However, it is provided mainly for their Antarctic scientific publications, the number of policy

<sup>26</sup> Watts, *International Law*, 17.

<sup>27</sup> Andrew D. Gray and Kevin A. Hughes, “Demonstration of ‘Substantial Research Activity’ to Acquire Consultative Status under the Antarctic Treaty,” *Polar Research* 35, no. 1 (2016), <https://doi.org/10.3402/polar.v35.34061>.

<sup>28</sup> See Decision 2 (2017), [www.ats.aq/devAS/Meetings/Measure?lang=e&id=653](http://www.ats.aq/devAS/Meetings/Measure?lang=e&id=653).

<sup>29</sup> Antarctic Treaty Secretariat, “Parties,” accessed October 20, 2022, [www.ats.aq/devAS/Parties?lang=e](http://www.ats.aq/devAS/Parties?lang=e).

<sup>30</sup> Luis Valentín Ferrada, “Five factors That Will Decide the Future of Antarctica,” *The Polar Journal* 8, no. 1 (2018): 87, <https://doi.org/10.1080/2154896X.2018.1468623>.

<sup>31</sup> Madrid Protocol, Article 11.2; Decision 2 (2011), Rule 3.

<sup>32</sup> Under Rules 2 and 31 of the ATCM Rules of Procedure (2016), the representatives of the CAMLR Commission, the Council of Managers of National Antarctic Programs (COMNAP) and the Scientific Committee on Antarctic Research (SCAR) are invited to the ATCM as observers. In addition, under Rule 39 and Rule 42 of the Rules of Procedure (2016), the following experts have been invited to one or more ATCMs in recent years: the Antarctic and Southern Ocean Coalition (ASOC), the International Association of Antarctica Tour Operators (IAATO), the International Group of Protection and Indemnity Clubs (IGP&I Clubs), the International Hydrographic Organization (IHO), the International Maritime Organisation (IMO), the International Oil Pollution Compensation Funds (IOPC Funds), the International Panel on Climate Change (IPCC), the International Union for Conservation of Nature (IUCN), the Secretariat of the Agreement on the Conservation of Albatrosses and Petrels (ACAP), the United Nations Environment Programme (UNEP) and the World Meteorological Organization (WMO).

<sup>33</sup> Ferrada, “Five Factors That,” 90.

papers submitted to the ATCMs, CEP and CAMLR Commission meetings or the number of stations run or scientists and personnel deployed in Antarctica.<sup>34</sup>

### **Antarctic Treaty Consultative Meetings as an International Forum**

When the parties negotiated the Antarctic Treaty, they kept the power to agree among themselves without any intermediation. This was in two senses. First, they did not create an international organisation to manage these matters. Instead, they only established the ATCM as a forum to meet and discuss the topics of common interest related to Antarctica, especially those issues listed in Article IX. In the terminology used by international relations, the parties set up an “international regime” as defined by Krasner and applied to the governance of the sixth continent by Oxman,<sup>35</sup> Berguño<sup>36</sup> and others. Mearsheimer and other authors have given it the category of “international institution,” because it is a set of rules or statements that forbids, requires or permits particular actions, stipulating how the States should cooperate and compete.<sup>37</sup> It is also possible to describe what the Antarctic Treaty has created as something similar to an “autonomous institutional arrangement,” as Churchill and Ulfstein have defined them.

These institutional arrangements usually comprise a conference or meeting of the parties (COP, MOP) with decision-making powers, a secretariat, and one or more specialist subsidiary bodies. Such arrangements, because of their ad hoc nature, are not intergovernmental organizations (IGOs) in the traditional sense. On the other hand, as the creatures of treaties, such conferences and meetings of the parties, with their secretariats and subsidiary bodies, add up to more than just diplomatic conferences.<sup>38</sup>

Nevertheless, it should be noted that because of the distinction between consultative and non-consultative States, the ATCM cannot be considered a meeting of the contracting parties. It should also be highlighted that the situation of the ATCM differs from the CAMLR Commission (CCAMLR) which is an international organisation.<sup>39</sup>

The second sense in which States keep for themselves the power to reach agreements in Antarctic matters is that ATCM only makes “recommendations.” Analysing Article IX.1, considering that

34 Prabir G. Dastidar, “National and Institutional Productivity and Collaboration in Antarctic Science: An Analysis of 25 Years of Journal Publications (1980–2004),” *Polar Research* 26, no. 2 (2007): 175–80, <https://doi.org/10.1111/j.1751-8369.2007.00017.x>; John R. Dudeney and David W.H. Walton, “Leadership in Politics and Science within the Antarctic Treaty,” *Polar Research* 31 (2012), <https://doi.org/10.3402/polar.v31i0.11075>; Rodolfo A. Sánchez, “A Brief Analysis of Countries’ Patterns of Participation in the Antarctic Treaty Consultative Meetings (1998–2011): Towards Leveling the Playing Field?” *Polar Record* 52, no. 6 (2016): 686–97, <https://doi.org/10.1017/S0032247416000073>.

35 Bernard H. Oxman, “The Antarctic Regime: An Introduction,” *University of Miami Law Review. A Symposium: Antarctic Resources: A New International Challenge* 33, no. 2 (1978): 285–97.

36 Berguño, “El Tratado Antártico como,” 23–34.

37 Lisa L. Martin and Beth A. Simmons, “International Organizations and Institutions,” in *Handbook of International Relations*, eds. W. Carlsnaes, T. Risse, and B. A. Simmons (London: Sage, 2013), 328.

38 Robin R. Churchill and Geir Ulfstein, “Autonomous Institutional Arrangements in Multilateral Environmental Agreements: A Little-Noticed Phenomenon in International Law,” *American Journal of International Law* 94, no. 4 (2000): 623. Although the authors consider the case of the Antarctic Treaty (656–657), they finally conclude that it is somewhat similar to an autonomous institutional arrangement but is not one of them (658). Regardless, they published their paper before the establishment of the Antarctic Treaty Secretariat in 2004, and this situation could change their conclusion. I would like to thank Gustavo Ramirez-Buchheister our conversation on these topics.

39 CAMLR Convention, Articles VII to XIII.



the representatives shall meet to “recommending to their Governments, measures” and bearing in mind the historical context in which this was stipulated, it seems possible to conclude that the drafters did not intend the ATCMs to be inter-State political meetings, as indeed they are. It is possible to assume that negotiators thought that ATCMs would rather be meetings of experts on Antarctic issues who would act on behalf of their countries but without exercising the legal representation of their States in terms of Article 7.2.c of the Vienna Convention on the Law of Treaties.<sup>40</sup> In other words, they would not bind their States. Instead, they would be technical representatives who would recommend how to proceed, recommendations that the States would implement outside the margins of the ATCM if they accepted them.

One of those attending what is considered the first preparatory meeting for what would become the Antarctic Treaty, held in 1955, recalled that the Chilean and Argentine delegations were the only ones of a diplomatic nature.<sup>41</sup> In fact, the meeting was led by the French geographer Georges Leclavère, who was to be the chairman of the Scientific Committee on Antarctic Research (SCAR) between 1958 and 1963, when the Antarctic Treaty was negotiated, signed and entered into force<sup>42</sup> – also attended renowned Antarctic scientists, such as the New Zealander Edmund Hillary,<sup>43</sup> the American Laurence Gould (chairman of SCAR between 1963 and 1970),<sup>44</sup> the British Vivian Fuch<sup>45</sup> and the French polar explorer Paul-Emile Victor.<sup>46</sup>

The view of Antarctic issues as mainly technical and scientific matters changed at the 1959 Washington Conference. As the head of the Chilean Delegation recalled, the importance given to the attempt to agree on a treaty on Antarctica was demonstrated, among others, “by the care taken by many of the participating governments to choose as heads and members of their delegations personalities of the highest standing from their respective countries.” Indeed, Australia, New Zealand and South Africa were represented by their respective Foreign Ministers, the Soviet Union by the Deputy Foreign Minister and the other States by prominent diplomats and jurists.<sup>47</sup> Notwithstanding, the idea that those attending the ATCMs would only be “technical representatives” seems to have remained.

From the 1st to the 6th ATCM (1961–1970), the meetings’ final reports do not give an account of the discussions held. They only contain the “recommendations” agreed upon by the “representatives.” From the 7th to the 10th ATCM (1972–1979), the discussions are detailed in the report. However, they are mainly described under the formula “the Meeting considered that . . .,” “the Working Group noted that . . .” or “the Representatives agreed on. . . .” In the cases where an opinion is individualised, it is stated that “the Representative of (such and such a country) stated that. . . .” From the 11th ATCM (1981) onwards, reference began to be made to “the Delegation of (such and such country). . . .” Finally, it evolved into the current formulation, “(such and such

40 Vienna, May 22, 1969. Entered into force January 27, 1980. Text in: 1155 UNTS 331.

41 Óscar Pinochet de la Barra, “Evolución político-jurídica del problema antártico,” *Estudios Internacionales* 14, no. 55 (1981): 382–83; Pinochet, *Medio siglo de recuerdos*, 80–84. About the 1955 meeting, see Paul-Emile Victor, *El hombre a la conquista de los Polos* (Barcelona: Ediciones Destino, 1965), 330–32.

42 His biography in Gordon de Q. Robin, “Obituaries (Georges R. Leclavère),” *Polar Record* 31, no. 176 (1995): 86–87.

43 His biography in Ian R. Stone, “Obituaries (Edmund Hillary),” *Polar Record* 45, no. 232 (2009): 92–94.

44 His biography in Gordon de Q. Robin, “Obituaries (Laurence McKinley Gould),” *Polar Record* 32, no. 180 (1996): 81–82. Also in Eric Hillemann, *A Beacon So Bright: The Life of Laurence McKinley Gould* (Northfield, MN: Carleton College, 2012).

45 His biography in Bernard Stonehouse, “Obituaries (Vivian Fuch),” *Polar Record* 36, no. 199 (2000): 364–65.

46 His biography in Bertrand C. Imbert, “Obituaries (Paul-Emile Victor),” *Polar Record* 31, no. 179 (1995): 440–41.

47 Marcial Mora, “El Tratado Antártico,” *Anales de la Universidad de Chile*, 4th serie, 124 (1961): 179; it is also published in *Revista Tribuna Internacional* 8, no. 16 (2019), <https://doi.org/10.5354/0719-482X.2019.55852>.

country) expressed the view that . . .” or “(such and such country) presented a document on . . .” In this way, perhaps inadvertently, the ATCM’s final reports gradually show how States, as subjects of international law, are replacing their “representatives” as the protagonists of such meetings.<sup>48</sup>

To date, the ATCM bring together a diverse group of people, most of them State officials but coming from different areas. There are diplomats and scientists, people in charge of environmental issues or responsible for administrative, operational and logistical tasks of the Antarctic activities (many of them from the armed forces of their countries), as well as observers from other international regimes and even from some NGOs. However, as discussed, not all of them have the same participation in the ATCMs’ decision-making process.

### **The Decision-Making Process**

The decision-making process of the ATCM (CEP included) can be explained in four steps or phases, as Figure 22.1 shows.

The first step, which could be called the planning phase, takes place at least one year before the ATCM in which a particular decision will be taken. It adopts two forms: the ATCM Preliminary Agenda and the ATCM Multi-Year Work Plan.

Initially, a preparatory meeting was held a couple of months before the respective ATCM to negotiate and adopt the Preliminary Agenda. This situation changed in 1991 when the consultative parties decided that since ATCMs would be annual once the Environmental Protocol (Madrid Protocol) entered into force, such preparatory meetings were no longer necessary.<sup>49</sup> Since then, at the end of each ATCM, the Preliminary Agenda for the next ATCM is negotiated and adopted.

The Multi-Year Work Plan has been successfully used for the CEP meetings since 2007.<sup>50</sup> This good result led the consultative parties to consider its use in ATCM. The discussion about this topic was initiated in 2009.<sup>51</sup> In 2012, the consultative parties decided to develop a Multi-Year Strategic Plan for the ATCM, and a set of principles was established.<sup>52</sup> Finally, in 2013, the first of these plans was adopted.<sup>53</sup> It has been renewed every year since then. The strategic plan in force was adopted at the ATCM in 2022.<sup>54</sup>

The effectiveness of this work of planning the decision-making process in the ATCMs is somewhat diminished by what we might designate as the second phase, which occurs a few months before the ATCM. Indeed, nothing obliges the consultative parties to be bound by the Preliminary Agenda or the Multi-Year Strategic Plan when preparing for their participation in the next ATCM. Ultimately, these documents guide the work of the ATCM, but the parties are always free to push the discussion in the direction they want, according to their contingent situation or interests. The way to promote discussion at the ATCM is to submit documents to be analysed and discussed by

48 Antarctic Treaty Secretariat, “List of Meetings,” [www.ats.aq/devAS/Meetings?lang=e](http://www.ats.aq/devAS/Meetings?lang=e).

49 ATCM XVI (Bonn, 1991), Final Report, 36, para. 136, [https://documents.ats.aq/ATCM16/fr/ATCM16\\_fr001\\_e.pdf](https://documents.ats.aq/ATCM16/fr/ATCM16_fr001_e.pdf).

50 The idea of a Multi-Year Work Plan for the CEP was developed in 2006, ATCM XXIX – CEP IX (Edinburgh, 2006), CEP Report, par. 9, [https://documents.ats.aq/ATCM29/fr/ATCM29\\_fr001\\_e.pdf](https://documents.ats.aq/ATCM29/fr/ATCM29_fr001_e.pdf). The first Multi-year Work Plan for the CEP was approved in 2007, ATCM XXX – CEP X (New Delhi, 2007), Final Report, 27, para. 83, [https://documents.ats.aq/ATCM30/fr/ATCM30\\_fr001\\_e.pdf](https://documents.ats.aq/ATCM30/fr/ATCM30_fr001_e.pdf).

51 ATCM XXXII – CEP XII, Baltimore, 2009, 79, para. 322, [https://documents.ats.aq/ATCM32/fr/ATCM32\\_fr001\\_e.pdf](https://documents.ats.aq/ATCM32/fr/ATCM32_fr001_e.pdf).

52 Decision 3 (2012), [www.ats.aq/devAS/Meetings/Measure/513](http://www.ats.aq/devAS/Meetings/Measure/513).

53 Decision 5 (2013), [www.ats.aq/devAS/Meetings/Measure/551](http://www.ats.aq/devAS/Meetings/Measure/551).

54 Decision 3 (2022), [www.ats.aq/devAS/Meetings/Measure/771](http://www.ats.aq/devAS/Meetings/Measure/771).



# ATCM decision-making

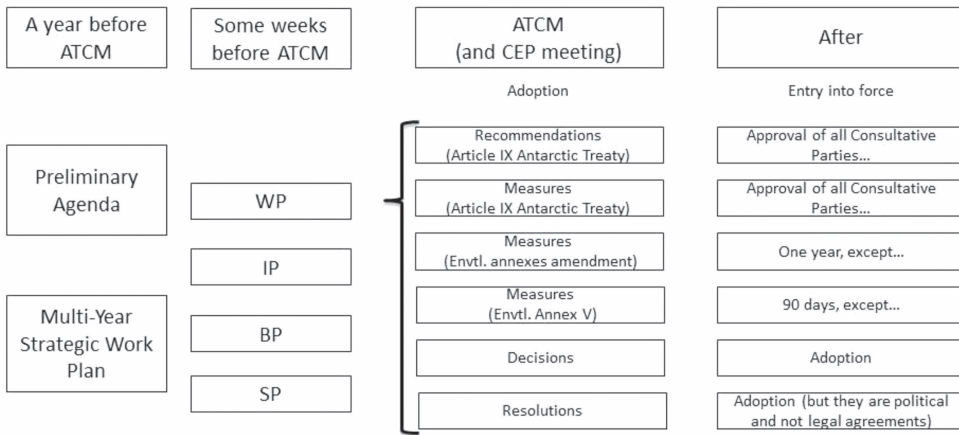


Figure 22.1 ATCM decision-making process (figure made by the author).

the meeting. Moreover, each consultative party can submit (alone or with other parties) the documents that it decided on. Therefore, what effectively determines the work and the discussions of each ATCM is the number and purpose of the papers submitted, regardless of what the Preliminary Agenda or the Multiannual Strategic Plan say.

Concerning the Preliminary Agenda, this does not affect it to any great extent, as it only makes a very general mention of the most common topics dealt with in the ATCM. It is almost unchanged from one ATCM to the next. The situation of the Multi-Year Strategic Plan is more complex, as it considers a higher level of detail and, in addition, it orders the issues to be addressed in each ATCM several years in advance. This is possible in the work of the CEP and has worked well, mainly because management plans for the Antarctic specially protected areas (ASPAs) and Antarctic specially managed areas (ASMAs) must be reviewed at least every five years.<sup>55</sup> In this way, when designating such an area or establishing or renewing its management plan, it is immediately possible to foresee how many more years ahead it will be necessary to review its status. However, this is not the case for the matters that do not relate to Annex V of the Environmental Protocol. The result of this is that the Multi-Year Strategic Plan is not (or at least has not been) very useful to guide the work of the ATCMs, or it does so only in a very secondary way.

Thus, the ATCM decision-making process' second phase is the submission of documents to be considered at the ATCMs or the CEP meetings. There are four types of documents. They are the ones that give rise to discussions and, eventually, serve as a basis for decision-making.

First are the working papers (WPs) submitted by consultative parties or by the observers – that is, CAMLR Commission, the SCAR and the Council of Managers of National Antarctic Programs (COMNAP). These documents are about issues that must be discussed at the ATCM and that it has to take action about the proposal. Second are the secretariat papers (SPs)

<sup>55</sup> Madrid Protocol, Annex V, Article 6.3.

prepared by the Secretariat according to a mandate established at an ATCM, or which would, in the view of the Antarctic Treaty executive secretary, help inform the ATCM or assist in its operation. Third, there are the information papers (IPs). They could be papers submitted by consultative parties or observers that provide information in support of a WP or that are relevant to discussions at an ATCM, or documents submitted by non-consultative parties that are relevant to discussions at an ATCM, or papers submitted by experts invited to the ATCM that are relevant to discussions at a meeting. Finally, the background papers (BPs) submitted by any participant will not be introduced in an ATCM but are presented to provide information formally.<sup>56</sup>

The most important of these papers are the WPs since they will impulse the ATCM decision-making process. The SPs are also essential in the administrative operation of the Secretariat and the ATCM. The IPs are also relevant because they complement the WPs and represent the sort of document that a broader group of ATCM participants can present.

The third phase is the law-making process itself at the ATCM. The meeting is organised in some plenary sessions and different working groups. During several days the documents presented, especially the WPs, are discussed and various agreements are adopted by consensus. The ATCM Final Act and the CEP Final Act reflect the content of these negotiations. In parallel, the draft version of the instruments that contain the agreements is written. They are approved together with the Final Act on the last day of the meeting. This stage is very closely related to the fourth phase concerning the entry into force of the measures agreed.

From 1961 to 1994, the provisions adopted at ATCMs were called recommendations. To be legally binding, they had to be approved<sup>57</sup> by all the consultative parties whose representatives were entitled to participate in the meetings to consider those measures.<sup>58</sup> This process could take many years. As a former Antarctic Treaty executive secretary has said,

If the process for reaching unanimous agreement on a recommendation appears tortuous, then at least it benefits from the 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.<sup>59</sup>

Indeed, it never entered into effect and was withdrawn in 2017.<sup>60</sup>

56 Antarctic Treaty Secretariat, "Revised Rules of Procedure for the Antarctic Treaty Consultative Meeting," Rules 48–51, [https://documents.ats.aq/keydocs/vol\\_2/Rules\\_atcm\\_e.pdf](https://documents.ats.aq/keydocs/vol_2/Rules_atcm_e.pdf); adopted by Decision 2 (2016).

57 See Vienna Convention on the Law of Treaties (1969), Article 2.b.

58 Antarctic Treaty, Article IX.4.

59 Johannes Huber, "The Antarctic Treaty: Toward a New Partnership," in *Science Diplomacy: Antarctica, Science, and the Governance of International Spaces*, eds. Paul Arthur Berkman, Michael A. Lang, David W. H. Walton, and Oran R. Young (Washington, DC: Smithsonian Institution Scholarly Press, 2011), 90–91. <https://doi.org/10.5479/si.9781935623069.89>

60 Decision 3 (2017), [www.ats.aq/devAS/Meetings/Measure/654](http://www.ats.aq/devAS/Meetings/Measure/654).

In 1995, a distinction was made between

1. “measures,” which contains provisions intended to be legally binding and with the exact approval requirement of Article IX.4 of the Antarctic Treaty;
2. “decisions,” ATCMs’ internal regulations and provisions about the Antarctic Treaty Secretariat operation; and
3. “resolutions,” or exhortatory texts.<sup>61</sup>

The Madrid Protocol (or Environmental Protocol) stipulated that amendments or modifications to its annexes were to be agreed upon by a measure.<sup>62</sup> However, all the current annexes established a “tacit approval” procedure. That means that, unless the measure specifies otherwise, such amendments or modifications will come automatically into force and shall be deemed to have been approved and shall become effective one year after its adoption unless a party informs that it wishes an extension of that period or that it is unable to approve the measure.<sup>63</sup>

In 2002, Annex V of the Protocol entered into force. It also provided a “tacit approval” procedure for the measures about management plans for the ASPAs and ASMAs, or the designation of historic sites and monuments (HSMs). Unless the measure specifies otherwise, it will enter automatically into force and shall be deemed to have been approved 90 days after its adoption, except if a party informs that it wishes for an extension of that period or that it cannot approve the measure.<sup>64</sup>

It is essential to remember that the binding effect of different measures is the same; they only differ in how they enter into force. The consultative parties must incorporate the recommendations and measures in their domestic legal orders and implement them domestically to guarantee their fulfilment by the people under their national jurisdictions. The diversity of legal systems involved and the large number of provisions adopted from 1961 have led to a complex approval process and a sometimes-ineffective practical application.

Decisions are also legally binding provisions, but their scope is restricted to the function of ATCMs, including the operation of the Antarctic Treaty Secretariat. That means that although the consultative parties have to fulfil what they have agreed through them (for example, their contributions to the budget), their incorporation in their domestic legal orders is unnecessary. Decisions will enter into force from their adoption.

Finally, resolutions can be relevant from a political point of view, but they are not legal norms. They are exhortatory texts or political agreements. So they do not “entry into force” since this is a condition or status of the legal provisions. They will be current since their adoption.

### **Recommendations and Measures**

The ATS has been successful in the peaceful co-administration of the southernmost continent. Indeed, having maintained peace in the Antarctic in absolute terms, the Antarctic Treaty must be considered “one of the most successful multilateral agreements negotiated in the entire twentieth

61 Decision 1 (1995), [www.ats.aq/devAS/Meetings/Measure/221](http://www.ats.aq/devAS/Meetings/Measure/221).

62 Madrid Protocol, Article 9.3.

63 Madrid Protocol, Annex I, Article 8; Annex II, Article 9; Annex III, Article 13; Annex IV, Article 15; Annex V, Article 12; and Annex VI (not in force), Article 13.

64 Madrid Protocol, Annex V, Articles 6.1 and 8.2.

century.”<sup>65</sup> It has also made significant achievements in regulating the exploitation of resources and in environmental protection. However, although no one predicts its collapse, there is evidence of instability and tension within and beyond this international regime.<sup>66</sup>

One of the causes, and at the same time consequences, of this instability and tension in the ATS is a relative paralysis of the regulatory capacities of the ATCMs, coupled with low participation in intersessional working groups. The increasing heterogeneity among the Antarctic Treaties consultative States has produced difficulty in reaching agreements between parties with interests and visions that are often too far apart. According to Hemmings, “Formally, everything is as before, but for the first time since the beginning of this regime in the 1950s, several decades have passed without substantive legal instruments being developed within the ATS. Meanwhile, human activity continues to intensify.”<sup>67</sup> It can be said that this assertion is not entirely accurate, since Annex VI on Liability Arising from Environmental Emergencies was adopted in 2005 after a long negotiation. But 18 years later, it is still not in force and only 20 of 28 States that have to approve it for its entry into force have done it. So, the problem is still there. It is also possible to argue that this lack of new norms reflects the system’s flexibility to allow parties to continue to work together without the need to innovate. Alternatively, in the same sense, it is possible to justify that there is enough scope under “consensus” to avoid more contentious issues becoming disputes. However, it is evident that in environmental protection and other areas of Antarctic activities, it is necessary to develop new and broader legal instruments (for example, on liability or about tourism or commercial bioprospecting), which has not been possible.<sup>68</sup>

From 1961 to 2022, more than 750 provisions have been agreed upon at the ATCMs. Not all of them are currently in force, nor are they legally binding. But it is a considerable number of collective decisions, each of which had to be negotiated and agreed upon. From this general perspective, the ATCM has been very successful as a political and legal forum. Nevertheless, this conclusion is not so clear if the different sorts of legally binding provisions are analysed – that is, the old recommendations (1961–1994), the measures about general matters (1995–2022), the measures about annexes to the Environmental Protocol (Madrid Protocol) amendment (1998–2022) and the measures about ASPA or ASMA management plans and HSM designations (2002–2022). From this point of view, it is possible to assert that the change made in 1995, replacing the old recommendations with measures, decisions and resolutions, was motivated by the drastic fall in the capacity to agree on specific matters.<sup>69</sup> However, the new categories failed to revive the decision-making process. In fact, of the 24 measures adopted under the rules of Article IX.4 of the Antarctic Treaty from 1995 to date, only one is in force, three adopted more than a decade ago have not yet achieved the required number of approvals and the other 20 have been declared lapsed without ever having entered into force. The change only occurred in 2002, when Annex V of the Environmental Protocol entered into force. As has been seen, the measures on the approval of management plans and designation of HSM automatically enter into force by the time limit lapse (if the time limit is not interrupted).

65 Christopher Joyner, “Potential Challenges to the Antarctic Treaty,” in *Science Diplomacy. Antarctica, Science, and the Governance of International Spaces*, eds. Paul Arthur Berkman, Michael A. Lang, David W. H. Walton and Oran R. Young (Washington, DC: Smithsonian Institution Scholarly Press, 2011), 101. <https://doi.org/10.5479/si.9781935623069.97>.

66 Klaus Dodds and Alan D. Hemmings, “Britain and the British Antarctic Territory in the Wider Geopolitics of the Antarctic and the Southern Ocean,” *International Affairs* 89, no. 6 (2013): 1432, [www.jstor.org/stable/24538450](http://www.jstor.org/stable/24538450).

67 Hemmings, “Antarctic Politics,” 509–10.

68 Ferrada, “Five Factors That,” 88–90.

69 *Ibid.*, 89.

Accordingly, it could be argued that those measures have only entered into force because of their particular procedure.

It is not so clear whether unanimity or consensus was initially required to adopt any agreement in the ATCM, mainly because these words were not expressly employed. However, today it is considered that consensus is sufficient.<sup>70</sup> This understanding is partly supported by the CEP Rules of Procedures, which explicitly establish the consensus rule.<sup>71</sup> A no longer current provision about the ATCM Multi-Year Work Plans from 2015 also referred to consensus,<sup>72</sup> but the following decisions have not mentioned it.<sup>73</sup> The difference between unanimity and consensus is very tenuous but has significant practical consequences. Adopting a decision unanimously means that all the consultative parties present at the meeting expressed their approval; adopting a decision by consensus implies that no one objects, so silence is equivalent to approval.

In any event, it is essential to distinguish between the process of adopting a decision at the ATCM and the process of its entry into force. Indeed, as explained earlier, the old recommendations and the measures adopted according to Article IX.4 of the Antarctic Treaty required the explicit approval of all the consultative parties whose representatives were entitled to participate in the ATCM where they were adopted. That means they require unanimity. The tacit approval of the other kind of measures is equivalent to the consensus requirement. Figure 22.2 shows a summary of this issue.

When a consensus is not reached, the final reports and procedural decisions can be taken for the majority. However, these voting cases are exceptional.<sup>74</sup> Because of that, it is often said that in the ATCM, the consultative parties do not have the right to *vote* but the right to *veto*. Of course, it is a play on words, but it is pretty accurate.

### The Legal Effects of the Wording of Recommendation and Measures

The fact that the States Parties' representatives meet to agree on recommendations rather than to make agreements on their behalf (as would generally be the case at any diplomatic conference) is reflected in the wording of the provisions adopted. Except for Recommendation 8 (1964) on Agreed Measures for the Conservation of Antarctic Flora and Fauna (no longer in force), which follows the format of an international agreement,<sup>75</sup> all the texts are worded in such a way that they only can be read as mere "recommendations."

70 Rule 23 of the Rules of Procedure adopted in 1961 said that the Recommendations "shall be approved by all of the representative present," which could be interpreted as requiring unanimity. Rule 24 of the current Rules of Procedure, adopted in 2016, says that without prejudice of the matters of procedure, decided by the majority, Measures, Decisions and Resolutions "shall be adopted by the Representatives of all Consultative Parties present." The change of the verb "approve" to "adopt" could be read as a change from unanimity to consensus.

71 Rules 13 and 14 of the CEP Revised Rules of Procedure (2011).

72 Decision 4 (2015), [www.ats.aq/devAS/Meetings/Measure/609](http://www.ats.aq/devAS/Meetings/Measure/609).

73 The current provision about ATCM Multi-Year Work Plan is Decision 3 (2022), [www.ats.aq/devAS/Meetings/Measure/771](http://www.ats.aq/devAS/Meetings/Measure/771).

74 Rules 15, 21, 25 and 53 (qualified majority) of the ATCM Rules of Procedure (2016) and Rule 14 of the CEP Revised Rules of Procedure (2011).

75 Alfred van der Essen, "La aplicación del Derecho del Mar en el continente Antártico," in *La Antártica y sus recursos. Problemas científicos, jurídicos y políticos*, 2nd ed., ed. Francisco Orrego Vicuña (Santiago: Instituto de Estudios Internacionales de la Universidad de Chile – Editorial Universitaria, 1997), 324–25.

<i>Agreement</i>	<i>Date</i>	<i>Adoption</i>	<i>Entry into Force</i>
Recommendations	1961–1994	Consensus	Unanimity
Measures (general rule)	1995 up to date	Consensus	Unanimity
Measures (amendment in the Protocol's annexes)	1998 up to date	Consensus	Consensus
Measures (management plans for ASPAs and ASMAs and designation of HSMs)	2002 up to date	Consensus	Consensus

Figure 22.2 ATCM decision-making requirements (figure made by the author).

All the old recommendations and current measures adopted at the ATCMs follow this scheme:

The Representatives,

Recalling [or noting or a similar verb], [followed by the norms of any of the ATS treaties, or previous provisions adopted, or studies, relevant facts, purposes, or other elements proper to the preamble of a legal provision],

Recommend to their governments that . . . [with a description of the measure or action recommended or urged to be taken].

This gives an essentially non-self-executing character to all measures adopted by the ATCMs.<sup>76</sup> It goes beyond the discussion of whether they are indeed legally binding. Some authors think they are not,<sup>77</sup> although others make a more refined distinction in this respect and consider that at least some of them undoubtedly create legal duties.<sup>78</sup> According to Article IX.4, the former recommendations and, since Decision 1 (1995), the measures should be considered binding instruments. However, their wording and the differences in the treatment given to them in the several domestic legal systems of the Antarctic Treaty parties require a series of clarifications. Their binding and legal nature as sources of international law should be understood within the framework of the broader discussion on the binding nature of resolutions reached in international regimes and international organisations. Beyond that, because of how they are drafted, and even considering recommendations and measures as binding rules, they are only compelling to the States as subjects of international law but cannot immediately affect persons under their jurisdiction. States must enact domestic legislation to enforce what has been agreed in the ATCMs against persons and entities under their control. In doing so, they must express what is decided in the ATCM in an appropriate language that compels, prohibits or permits specific conducts.

In this sense, it cannot be forgotten that Article X of the Antarctic Treaty, as well as Article 2.2 of the CCFA, Article XXI of the CAMLR Convention and Article 13.1 of the Protocol, enshrine the commitment of States to enact domestic regulations to ensure and reinforce compliance with the objectives of each of these treaties. It is, in fact, an obligation that follows from the good faith with which international agreements must be concluded. This duty means that States, as subjects of international law, must exercise their regulatory powers at the domestic level to comply with international agreements.

76 On *self-executing* and non-self-executing treaties and international agreements, see, among others, Jean-Marie Henck-aerts, "Self-Executing Treaties and the Impact of International Law on National Legal Systems: A Research Guide," *International Journal of Legal Information* 26, no. 1–3 (1998): 56–159, <https://doi.org/10.1017/S0731126500000494>; Antonio Remiro Brotons et al., *Derecho internacional. Curso general* (Valencia: Tirant Lo Blanch, 2010), 353–56.

77 Christopher C. Joyner, "Recommended Measures under the Antarctic Treaty: Hardening Compliance with Soft International Law," *Michigan Journal of International Law* 19, no. 2 (1998): 401–43.

78 Johannes Huber, "Notes on the ATCM Recommendations and Their Approval Process," in *The Antarctic Legal System and Environmental Issues*, ed. Gianfranco Tamburelli (Milán: Giuffrè Editore, 2006), 17–18.



There is a notorious difference between the wording (and application) of the ATCMs' recommendations and measures and those conservation measures adopted by the CCAMLR. This distinction, of course, is already evident in the constituent instruments of each of these regimes. While Article IX.1 of the Antarctic Treaty states that the representatives of the parties shall meet to "formulate, consider and recommend to their Governments measures," the tenth paragraph of the Preamble of the CAMLR Convention states that "it is desirable to establish an appropriate mechanism for recommending, promoting, deciding and coordinating measures," and Article IX.1.f says that one of the functions of the CCAMLR is to "formulate, adopt and review conservation measures." While the ATCMs formulate, consider and recommend, the CCAMLR adopts and decides. The conservation measures' wording is consistent with these different political and legal capacities.

### Antarctic Treaty Secretariat

Due to its nature (without the characteristics of an international organisation as such), for more than 40 years, the Antarctic Treaty lacked any permanent offices, archives, administrative units or similar facilities. The consultative parties hosted the ATCMs in turn and the host country organised the meeting and later published the final report and the measures adopted.<sup>79</sup> As Skully says, "The first feature of the Treaty that is striking from an institutional perspective is its lack of institutional provisions."<sup>80</sup>

Nevertheless, as the years went by and the number of consultative parties and other participants in the meetings grew, it was every time more complex to administrate the increasing amount of documentation.<sup>81</sup> From 1983 to 1992, it was discussed at the ATCMs the necessity of having permanent institutions to support its operation. However, it was not easy to reach a consensus on establishing a secretariat until the adoption of the Madrid Protocol (Environmental Protocol). At this moment, it was evident that it would be indispensable. Unfortunately, the agreement did not extend to its location. The two main proposed places were Buenos Aires and Washington, DC. The Argentinean candidacy seems to be part of the insertion of Latin America into the institutional framework of the ATS, receiving important support.<sup>82</sup> The United States emphasised, on the contrary, that the secretariat should be located in the depositary government capital – i.e. in Washington, DC. By 1993, almost all the consultative States supported the Buenos Aires option. However, it was impossible to reach the necessary consensus because of the determined resistance of the United Kingdom. This situation can be explained by longstanding differences between the two countries (the Falklands/Malvinas War of 1982 included) and the overlapping Argentinian, British and Chilean Antarctic territorial claims. The United Kingdom maintained its opposition until 2001, when after high-level bilateral contacts, Argentina announced that it had started a "comprehensive reorganisation" of its

79 Huber, "Notes on the ATCM," 18.

80 R. Tucker Scully, "Alternativas de cooperación e institucionalización en la Antártica: Perspectivas para la década de 1990," in *La Antártica y sus recursos. Problemas científicos, jurídicos y políticos*, 2nd ed., ed. Francisco Orrego Vicuña (Santiago: Editorial Universitaria, 1997), 384. It is also published in English as R. Tucker Scully, "Alternatives for Cooperation and Institutionalization in Antarctica: Outlook for the 1990s," in *Antarctic Resources Policy: Scientific, Legal and Political Issues*, ed. Francisco Orrego-Vicuña (Cambridge: Cambridge University Press, 1983), 281–96, <https://doi.org/10.1017/CBO9780511735462.021>.

81 Carvallo, "Las Reuniones Consultivas," 47.

82 The establishment of the Secretariat in Buenos Aires was also part of the development of the Argentinean Antarctic National Policy, see Miryam Colacrai, "La meta de la Secretaría del Tratado Antártico como 'Política de Estado' de la Argentina (1992–2001)," *Relaciones Internacionales* 13, no. 26 (2004): 57–68, <https://revistas.unlp.edu.ar/RRII-IRI/article/view/1568>.

national Antarctic Directorate, placing it under civilian leadership. The United Kingdom, on the other hand, announced its intention to intensify cooperation on Antarctic issues with Argentina and its “readiness to join a consensus on the location of the proposed Secretariat to the Antarctic Treaty.” The consent among the parties was reflected by Decision 1 (2001), and Measure 1 (2003) contains the Headquarters Agreement. On September 1, 2004, the Secretariat formally began its operations.<sup>83</sup>

However, from a strictly legal point of view, the Headquarters Agreement negotiated and adopted in 2003 had to wait some years to be signed after Measure 1 (2003) reached the necessary approvals to enter into force. In fact, on May 12, 2010, the minister of foreign affairs of the Republic of Argentina, Jorge Taiana, and the Chair of XXXIII ATCM (Punta del Este, 2010), Dr Roberto Puceiro, signed the agreement.<sup>84</sup>

The Secretariat’s budget is funded and approved by the consultative parties at the ATCM each year, while financial regulations govern its management.<sup>85</sup> There are also special regulations concerning the staff of the Secretariat.<sup>86</sup>

The mission of the Secretariat is to assist the ATCM and the CEP in performing their functions. According to Measure 1 (2003), and under the ATCM’s directions, the Secretariat carries out the following tasks: (1) supporting the annual ATCM and the meeting of the CEP; (2) facilitating the exchange of information between the parties required in the Treaty and the Environment Protocol; (3) collecting, storing, archiving and making available the documents of the ATCM; and (4) providing and disseminating information about the ATS and Antarctic activities.<sup>87</sup>

From 2004 up to now, the Antarctic Treaty Secretariat has been served by three executive secretaries, Johannes Huber from the Netherlands (2004–2009), Manfred Reinke from Germany (2009–2017) and Albert Lluberas from Uruguay (2017 up to date).

## Conclusion

The ATS is composed of a static part, represented by the international treaties that set its legal framework, and a dynamic part that has allowed it to adapt to new challenges. The ATCM has been the main forum that has made this evolution possible. From 1961 to 1994, meetings were held every two years and, after that, annually. The ATCM is not the only decision-making body within the ATS but is the most relevant one.

Article IX of the Antarctic Treaty created the ATCM as the forum through which the representatives of the consultative States will meet “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.”

83 Luis Valentín Ferrada, “Latin America and the Antarctic Treaty System as a Legal Regime,” *The Polar Journal* 9, no. 2 (2019): 288, <https://doi.org/10.1080/2154896X.2019.1685185>; Johannes Huber, “Notes on the Past, Present and Future of the Antarctic Treaty Secretariat,” *Diplomacia* 120 (2009): 35–39.

84 Measure 1 (2003), [www.ats.aq/devAS/Meetings/Measure/294](http://www.ats.aq/devAS/Meetings/Measure/294); ATCM XXXIII – XIII CEP (Punta del Este, 2010), Final Report, par. 11, [https://documents.ats.aq/ATCM33/fr/ATCM33\\_fr001\\_e.pdf](https://documents.ats.aq/ATCM33/fr/ATCM33_fr001_e.pdf); “Headquarters Agreement for the Secretariat of the Antarctic Treaty,” [https://documents.ats.aq/keydocs/vol\\_1/vol1\\_15\\_Secretariat\\_Headquarters\\_Agreement\\_e.pdf](https://documents.ats.aq/keydocs/vol_1/vol1_15_Secretariat_Headquarters_Agreement_e.pdf).

85 Decision 4 (2003), [https://documents.ats.aq/keydocs/vol\\_1/vol1\\_17\\_Secretariat\\_Financial\\_Regulations\\_e.pdf](https://documents.ats.aq/keydocs/vol_1/vol1_17_Secretariat_Financial_Regulations_e.pdf)

86 Decision 2 (2021), [www.ats.aq/devAS/Meetings/Measure/734](http://www.ats.aq/devAS/Meetings/Measure/734).

87 Antarctic Treaty Secretariat, “The Secretariat of the Antarctic Treaty,” [www.ats.aq/e/secretariat.html](http://www.ats.aq/e/secretariat.html).

This definition explains in part the successes of the ATCM but also its limitations. The same can be said of the consensus rule under which the ATCM operates. It forces durable political agreements to be reached but also makes it difficult to move forward on the most challenging issues. In addition, according to Article IX.4 of the Antarctic Treaty, for legally binding agreements adopted in the ATCM to enter into force, they must be approved unanimously by the consultative parties. Although there are exceptions to this rule in some environmental matters, this makes the process of entry into force of the agreements adopted very slow. It is crucial to find ways to overcome the weaknesses of this Antarctic governance decision-making system to maintain its legitimacy and meet the main challenges it faces. The creation and operation of the Antarctic Treaty Secretariat have been a step forward in this regard by supporting the functioning of the ATCMs. Nevertheless, it seems essential that the States show their willingness to continue developing this legal regime and that the academic community collaborate permanently in the search for the political and legal mechanisms to make this possible.

**Funding**

This work was funded by ANID–Millennium Science Initiative Program ICN2021\_002 (Chile) and by the FONDECYT Regular Project number 1221378 (2022–2026) (Chile).

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