

CONSULTATIVE STATUS UNDER THE ANTARCTIC TREATY

Pavel Sladký

Abstract: The year 2009 marked the 50th anniversary of the signing of the Antarctic Treaty. This international agreement divides the Contracting Parties into Consultative Parties and non-Consultative Parties. Author called Consultative Parties as a sort of gentlemen's club – he find formal and factual requirements for obtaining consultative status under the Antarctic Treaty. The formal conditions are as follows: State has to be a Contracting Party of the Antarctic Treaty and has to demonstrate its interest in Antarctica by conducting substantive scientific research activities. State needs to ratify, accept, approve or accede to the Madrid Protocol. The factual requirements for obtaining consultative status are as follows: Participation in the activities of the Scientific Committee on Antarctic Research, participation in the Convention on the Conservation of Antarctic Marine Living Resources and the existence of functioning mechanism for internal coordination of activities pertaining to the Antarctic. Author interpreted also the ATCM Decision 2 (1997) regulating the process of obtaining the consultative status.

Resumé: V r. 2009 jsme si připomněli 50 let od podpisu Smlouvy o Antarktidě. Tato dohoda dělí smluvní strany na konzultativní a nekonzultativní. V některé české literatuře jsou konzultativní strany nazývány jako státy s kvalifikovaným členstvím ve Smlouvě o Antarktidě. Autor považuje konzultativní strany za gentlemanský klub, ve kterém platí určitá formální i faktická pravidla pro získání členství. Mezi nepsané podmínky pro získání konzultativního statusu lze zařadit účast na činnosti Vědeckého výboru pro výzkum Antarktidy (SCAR), přistoupení k Úmluvě o zachování antarktických mořských živých zdrojů a fungující vnitrostátní mechanismus pro koordinaci aktivit týkajících se Antarktidy. Autor interpretuje mimo jiné rozhodnutí ATCM č. 2 (1997), které upravuje proceduru získání kvalifikovaného členství ve Smlouvě o Antarktidě.

Key words: Antarctic Treaty System, consultative status.

On the author: JUDr. Pavel Sladký, Ph.D., studied law and jurisprudence at the Faculty of Law, Palacky University in Olomouc (Mgr., 2002), and at the Faculty of Law, Charles University in Prague (JUDr., Ph.D., 2007). He entered the Ministry of Foreign Affairs of the Czech Rep. in 2004. He worked in the MFA International Law Department (2004 – 2008) and represented the Czech Rep. f.e. at the ATCMs and UN COPUOS meetings. He served as Legal Advisor of the Czech Permanent Mission to the UN in New York during the 60th session of the UN GA and at the Permanent Mission to the UN, OSCE and other organizations in Vienna during the Czech Presidency in the EU Council in 2009. Since 2009 Advisor of the Director-General for the MFA Legal Section, since 2010 Consul at the Czech Embassy in Austria.

Introduction

The year 2009 marked the 50th anniversary of the signing of the Antarctic Treaty. This is the only known document that generally regulates the international legal regime with regard to a specific continent. The Antarctic Treaty is all the more valuable as its content had been negotiated in the middle of the Cold War. Moreover, overlapping territorial sovereignty claims in Antarctica threatened to lead to armed conflict. To illustrate this point, let us consider the application of the United Kingdom of Great Britain and Northern Ireland to the International Court of Justice (The United Kingdom of Great Britain and Northern Ireland requested the Court to recognize the validity of its sovereignty and to declare that the sovereignty aspirations of Argentina and Chile, as well as their encroachments in those territories, are contrary to international law¹).

Nevertheless, rules were ultimately agreed that Antarctica shall be used for peaceful purposes only (Antarctic Treaty, Art. I), that the Contracting Parties shall exchange information and scientific personnel (Art. III and VII), that any nuclear explosions and the disposal of radioactive waste material shall be prohibited (Art. V), that in order to promote the objectives of the provisions of the present Treaty, the Consultative Parties shall have the right to designate observers and to carry out inspections (Art. VII). Stepping outside the box by freezing the claims to territorial sovereignty addressed the problem of overlapping claims (Art IV).

The Antarctic Treaty formed the basis for a complex of norms of international law, the Antarctic Treaty system, which has developed over the last 50 years. It was defined as late as 1991 in the Madrid Protocol of that year. According to Article 1, letter e), thereof, the Antarctic Treaty system consists of the Antarctic Treaty, encompasses the measures in effect under that Treaty, its associated separate international instruments in force and the measures in effect under those instruments.

The Antarctic Treaty divides the Contracting Parties into *Consultative Parties* and *non-Consultative Parties*. The first signatory states to the Antarctic Treaty² secured their leading role for deciding the rules for Antarctica by setting up a sort of gentlemen's club. According to Article VII of the Antarctic Treaty, the Consultative Parties may designate observers for any inspection. These observers then have complete freedom of access at any time to all places in Antarctica. Under Article IX, the representatives of the Consultative Parties shall meet regularly in order to exchange information, to mutually consult issues pertaining to Antarctica, and also in order to formulate, consider and recommend to their governments measures in furtherance of the principles and objectives of the Antarctic Treaty. Those regular meetings of the Consultative Parties became known as the Antarctic Treaty Consultative Meetings

¹ See: www.icj-cij.org.

² I.e., the participants in research in Antarctica during the International Geophysical Year (1957 – 1958) were: Argentina, Australia, Belgium, Chile, France, Japan, New Zealand, Norway, South Africa, Soviet Union, United Kingdom, and USA.

(ATCM). Over a period of 50 years, the consultative parties have made the ATCMs into the main deciding body of the Antarctic Treaty system.³

1. Formal requirements for obtaining consultative status under the Antarctic Treaty

Already in 1959, the gentlemen's club was intended to be further expanded to include other parties. The Antarctic Treaty set the basic conditions for obtaining consultative status in its Article IX. Such a State has to be a Contracting Party of the Antarctic Treaty⁴ and has to demonstrate its interest in Antarctica by conducting substantial scientific research activities. As an example of such substantial research activity, the Antarctic Treaty cites the establishment of a scientific station in Antarctica or sending a scientific expedition thereto.

The first decision to admit a new Consultative Party was taken in 1977, when the Consultative Parties of that time concluded that Poland had met the conditions for being granted consultative status. It became apparent that it was necessary to adopt detailed rules specifying Article IX of the Antarctic Treaty. Some of the Consultative Parties insisted that it was necessary to require the acceding state to make a declaration of intent to approve the Recommendations adopted by the Antarctic Treaty Consultative Meeting and subsequently approved by all the Consultative Parties. The First Special Antarctic Treaty Consultative Meeting was held to decide whether Poland had fulfilled the conditions. The original Consultative Parties deemed the decision to admit a new consultative party to be of such significance that they were unable to decide on it within the regular ATCM.

The following Special Antarctic Treaty Consultative Meetings decided on the accession of additional Consultative Parties: The Federal Republic of Germany (1981, 3rd SATCM), Brasil and India (1983, 5th SATCM), the People's Republic of China and Uruguay (1985, 6th SATCM), the German Democratic Republic and Italy (1987, 7th SATCM), Spain and Sweden (1988, 8th SATCM), Finland, Peru and Republic of Korea (1989, 9th SATCM), Ecuador and the Netherlands (1990, 10th SATCM).

By the beginning of the 1990s, the number of the Consultative Parties had doubled in comparison with 1959. Finally there was a consensus among the international community on the need to adopt even more detailed rules for the conditions for granting consultative status and for the proceedings on the application for consultative status under the Antarctic Treaty.

One of those detailed rules was set in the Madrid Protocol in 1991 (Protocol on Environmental Protection to the Antarctic Treaty) which in its Article 22, paragraph 4,

³ The Czech Scientific Society was provided with detailed information on the functions and objectives of the ATCM in an article titled: The Entities of the Antarctic Treaty System and the Participation of the Czech Republic, *Právník* 11/2006, pp. 1318-1338.

⁴ According to Article XIII of the Antarctic Treaty, the Antarctic Treaty shall be open for accession by any State which is a member of the United Nations, or by any other State which may be invited to accede to the Treaty with the consent of all the Contracting Parties.

stated another condition for obtaining consultative status: The Consultative Parties shall not act upon a notification regarding the entitlement of a Contracting Party to the Antarctic Treaty to appoint representatives to participate in Antarctic Treaty Consultative Meetings in accordance with Article IX (2) of the Antarctic Treaty unless that Contracting Party has first ratified, accepted, approved or acceded to the Madrid Protocol.

Further detailed rules were adopted as ATCM Decision 2 (1997) during the XXI ATCM. This ATCM Decision 2 (1997) is important as concerns the scientific scope of consultative status. The acceding state shall provide information concerning its activities in the Antarctic, in particular the content and objectives of its scientific programme. The Consultative Parties may urge such a state to make a declaration of intent to approve the Recommendations adopted at the ATCM and subsequently approved by all the Consultative Parties. They may also invite the acceding state to consider approval of the other Recommendations.

Pursuant to ATCM Decision 2 (1997), the decisions on granting consultative status are made by the regular Antarctic Treaty Consultative Meetings. Bulgaria was admitted by ATCM Decision 1 (1998), Ukraine by ATCM Decision 2 (2005). These two abovementioned ATCM decisions confirm the fulfilment of the formal requirements for obtaining consultative status by Bulgaria and Ukraine respectively. Both of the states are Contracting Parties of the Antarctic Treaty and the Madrid Protocol; they demonstrated their interest in the Antarctic by conducting substantial scientific research there and have informed about their scientific programmes; they notified their intent to approve the Recommendations adopted at the earlier ATCMs and their activities are in accordance with the principles and purposes of the Antarctic Treaty.

During the XXVIII ATCM in Stockholm, ATCM Decision 4 (2005) was adopted, resembling ATCM Decision 2 (1997). The new Decision emphasizes the fulfilment of Article 22, paragraph 4, of the Madrid Protocol, including whether the acceding state has approved all Annexes to the Madrid Protocol that have become effective.

2. Factual requirements for obtaining consultative status under the Antarctic Treaty

Gentlemen's clubs do not regulate their membership solely by formal conditions; apart from them, they also have unwritten conditions which the applicants for membership have to meet. These are conditions *sine qua non*. Membership is not to be granted without their fulfilment.

In my opinion, this also applies as regards the group of Consultative Parties. Although this is not a written requirement, it may be inferred that the Consultative Parties additionally meet requirements which are not imposed on them by any document regulating the status of Consultative Parties to the Antarctic Treaty. Those are the following: participation in the activities of the Scientific Committee on Antarctic Research (SCAR), participation in the Convention on the Conservation of Antarctic Marine Living Resources (CCAMLR), and the existence of a functioning

mechanism for the internal coordination of activities pertaining to the Antarctic. These three imperatives make international cooperation in the Antarctic possible and further promote such cooperation.

2.a) The contribution of the activities of the Scientific Committee on Antarctic Research

The Scientific Committee on Antarctic Research (SCAR) is a committee of the International Council for Science and is charged with the initiation, promotion and co-ordination of scientific research in Antarctica. It is a unique, international, interdisciplinary, non-governmental organization which can draw on the experience and expertise of an international mix of scientists.

The first meeting of **SCAR** was held at the Hague from 3 to 6 February 1958. In the past half century, SCAR has established itself as a recognized scientific body. The international community is aware of the need for the existence of an international non-governmental institution specialized in research in Antarctica. Even the Articles of the Madrid Protocol refer to the expert opinions of SCAR.

According to Article 10, paragraph 2, of the Madrid Protocol, the ATCMs shall draw fully upon the advice of the Committee for Environmental Protection as well as upon the advice of SCAR in defining the general policy for the comprehensive protection of the Antarctic environment and dependent and associated ecosystems. This is also valid for adopting Measures under Article IX of the Antarctic Treaty for the implementation of the Madrid Protocol.

According to the Article 11, paragraph 4, of the Madrid Protocol, the Committee for Environmental Protection shall invite the president of SCAR to participate as an observer at its sessions. Under Article 12, paragraph 2, the Committee for Environmental Protection shall, in carrying out its functions, consult with SCAR, where appropriate.

That the role of SCAR is specified in the Madrid Protocol is all the more remarkable when one takes into account that from a legal point of view, SCAR is defined as a Company Limited by Guarantee, registered as a Charity in the United Kingdom of Great Britain and Northern Ireland.⁵

Presently, the members of SCAR are representatives of national scientific academies or research councils from States which significantly participate in Antarctic research. No State wishing to influence the development of the Antarctic Treaty System as a consultative party should be without a representative at SCAR.

2.b) Participation in the Convention on the Conservation of Antarctic Marine Living Resources

The Convention on the Conservation of Antarctic Marine Living Resources was concluded in 1980 in Canberra, Australia. It was established mainly in response to concerns that an increase in krill catches in the Southern Ocean could have a serious

⁵ See: www.scar.org.

effect on populations of krill and their marine life; particularly on birds, seals and fish, which mainly depend on krill for food.⁶

According to Article 1, letter e), of the Madrid Protocol, the Convention on the Conservation of Antarctic Marine Living Resources forms part of the Antarctic Treaty system as a separate international instrument associated with the Antarctic Treaty. It is associated with the objectives and principles of the Convention – the conservation of Antarctic marine living resources (populations of fin fish, molluscs, crustaceans and all other species of living organisms, including birds, found south of the Antarctic Convergence).⁷

To give effect to the objective and principles of this Convention, the Contracting Parties establish and agree to maintain the Commission for the Conservation of Antarctic Marine Living Resources. The Commission facilitates, for example, research in Antarctica and comprehensive studies of Antarctic marine living resources and of the Antarctic marine ecosystem; compiles data on the status of and changes in population of Antarctic marine living resources and on factors affecting the distribution, abundance and productivity of harvested species and dependent or related species or populations; analyzes, disseminates and publishes the information obtained; identifies conservation needs and analyses the effectiveness of conservation measures.

One of the most important functions of the Commission for the Conservation of Antarctic Marine Living Resources is to formulate, adopt and revise conservation measures on the basis of the best scientific evidence available.⁸ Under the Article 1, letter e), these conservation measures are a part of the Antarctic Treaty system. It may be assumed that a state that is interested in Antarctic research is making an effort to participate in formulating and adopting such legal instruments. Within this legislative process, the exchange of information on the results of activities in the Antarctic and in the seas of the Antarctic Convergence takes place. At the same time, tension can surely be expected as specific interests are asserted by each participant in the discussion.

The Commission for the Conservation of Antarctic Marine Living Resources implements the system of observation and inspection established under Article XXIV of the Convention, which was established in order to promote the objective and ensure observance of the provisions of the Convention. The results of such observations and inspections are a welcome source of information about the activities taking place in Antarctic territory.

States interested in membership in the gentlemen's club of Consultative Parties must not ignore the importance of the Convention on the Conservation of Antarctic Marine Resources and the Commission for the Conservation of Antarctic Marine Resources. Of the 28 current consultative parties, only one party is not concurrently also a Contracting Party to this Convention – Ecuador.

⁶ See: www.ccamlr.org.

⁷ Convention on the Conservation of Antarctic Marine Living Resources, Art. I, par. 2.

⁸ For detailed information see the Convention on the Conservation of Antarctic Marine Living Resources, Art. IX par. 1 a) – h).

2.c) The existence of a functioning mechanism for the internal coordination of Antarctic activities

The Consultative Parties to the Antarctic Treaty usually have in place a very detailed system for the internal coordination of their activities in Antarctica. The polar region is an area where the interests and competences of ministries of foreign affairs, environment, education and research do meet. States generally establish a nationwide body that manages the scientific activity of the said state and its citizens in Antarctica

To illustrate this point, let us look at the United Kingdom of Great Britain and Northern Ireland. For over 60 years, the British Antarctic Survey (BAS) has undertaken the majority of Britain's scientific research on and around the Antarctic continent.⁹ BAS employs over 400 staff and supports three stations in the Antarctic and two stations on South Georgia. The Antarctic operations and science programmes are executed and managed from BAS, based in Cambridge.

Similarly, in Brasil, the National Commission for Antarctic Affairs (Comissao Nacional para Assuntos Antártico – CONANTAR) was established by Presidential Decree No. 1791 on 15 January 1996. CONANTAR associates representatives from various ministries and defines national policy on Antarctica. Logistical support is provided by the naval ministry.

The Chilean government established the Chilean Antarctic Institute (Instituto Antártico Chileno – INACH) in 1963, a body that is a part of the organisational structure of the Ministry of Foreign Affairs. Its mission is to plan and coordinate the scientific and technological activities of Chilean state bodies and private organizations, undertaken after a prior authorization from the Ministry of Foreign Affairs.¹⁰ Since 2003 the seat of INACH has been a port in Southern Chile, Puntas Arenas.

More than 25 years ago, the Alfred Wegener Institute for Polar and Oceanic Research (Alfred-Wegener-Institut für Polar- und Meeresforschung – AWI) was established in Germany to deal with research in the Antarctic, Arctic and sea areas. This comprehensive approach is justified by scientific and economic reasons. From a scientific point of view it is possible to compare research from both poles, on land and sea. This economical approach results in lower costs due to the sharing of logistical support in remote areas.

As noted above, the consultative parties use national bodies to coordinate the activities conducted in the Antarctic. These bodies, originating from different states, mutually cooperate and coordinate their research.

Establishing such a national body is not a condition for obtaining consultative status with regard to the Antarctic Treaty. However, the necessary quality of research in Antarctica may only be achieved by the appropriate personnel having the necessary technical background. It would be difficult to compare the research conducted by individuals to the research of national research institutions. It is a necessity for a State

⁹ See: www.antarctica.ac.uk.

¹⁰ See: www.inach.cl.

wishing to be a member of the abovementioned exclusive gentlemen's club to have a functioning mechanism for the coordination of research activities in the Antarctic.

3. Process of obtaining consultative status under the Antarctic Treaty

The process of obtaining consultative status is described by ATCM Decision 2 (1977). The more recent ATCM Decision 4 (2005) completes the description of this process, making it more detailed. I will therefore focus on the more recent decision.

An acceding state wishing to appoint Representatives to the ATCM as a consultative party shall notify the Depositary Government of the Antarctic Treaty of such intent and shall provide information concerning its activities in Antarctica, in particular of the content and objectives of its scientific programme.

The Depositary Government should forthwith communicate the foregoing notification and information for evaluation to all other Consultative Parties, which shall examine the information about such activities supplied by such acceding state. The Consultative Parties may conduct any appropriate enquiries¹¹ and may, through the Depositary Government, urge such a state to make a declaration of intent to approve the Recommendation and Measures adopted at ATCM in pursuance of the Antarctic Treaty and subsequently approved by all the Contracting Parties whose Representatives were entitled to participate in those meetings. The Consultative Parties may, through the Depositary Government, invite the acceding state to consider the approval of the other Recommendations and Measures.

The Government which is to host the next ATCM shall, in the context of its preparation of the Provisional Agenda for the ATCM, include an appropriate item in the Provisional Agenda for consideration of the notification of an acceding state.

The ATCM shall determine, on the basis of all information available to it,¹² whether to acknowledge that the acceding state in question has met the requirements of Art. IX, paragraph 2, of the Antarctic Treaty and of Art. 22, paragraph 4, of the Madrid Protocol, including whether the acceding state has approved all Annexes to the Madrid Protocol that have become effective. If agreed by the Representatives of all (!) the Consultative Parties, such acknowledgement shall be recorded in a Decision of the ATCM and shall be notified by the host Government to the acceding state.

The abovementioned procedure may be modified only by a unanimous decision of Consultative Parties.

4. Conclusion

This paper focuses on one specific gentlemen's club. This is the most serious expression of the group of Consultative Parties interested in the protection and preservation of the environment, scientific research, international cooperation, and,

¹¹ Including the exercising of their right of inspection in accordance with Art. VII of the Antarctic Treaty.

¹² Such all-available information constitutes precisely the information referred-to above as the factual requirements for obtaining consultative status – see Chapter 2. a) – c) of this paper.

finally, interested in Antarctica. I aimed to show that members of the gentlemen's club, i.e., the Consultative Parties, are the main leaders of the Antarctic Treaty system. It is their task to designate observers and take advantage of the right to conduct inspections anytime in all areas of Antarctica. Above all, they participate at ATCMs and actively take part in the creation and further development of the rules of conduct specified by the Antarctic Treaty system. In 1959, this gentlemen's club only had 12 members, and it took almost 20 years for another member to be admitted. By 2010, the number had risen to 28.¹³

This paper also examines the topic of obtaining consultative status with regard to the Antarctic Treaty. To achieve such status, specific formal conditions stipulated in the Antarctic Treaty, the Madrid Protocol and certain other instruments of the Antarctic Treaty system have to be met. In practice we can see that certain additional unwritten requirements also exist. Prior to the application for consultative status, such requirements include membership in SCAR, being a Contracting Party to CCAMLR and having a working mechanism for the internal coordination of the applicant country's activities, and those of its citizens and bodies, in Antarctica.

The fulfilment of the abovementioned conditions creates the filtering process that restricts decision-making on the Antarctic Treaty system only to those states that conduct activities in Antarctica and perform research there. It is not desirable to allow access to states that wish to conduct political debates on global topics solely in order to influence the Antarctic Treaty system. Some states may view such exclusion as discriminatory and may attempt to invoke arguments concerning equality between states, the principle of equal geographical representation when decisions are made on matters of global context, etc.

Nonetheless, I consider it an appropriate approach to restrict decision-making only to those states that merit it. Only those states that meet the stringent conditions and succeed in the difficult approval process deserve the right to decide on an environment as fragile as the Antarctic most definitely is. Notwithstanding the potential political incorrectness of such an approach.

¹³ The first 12 (original) signatory states of the Antarctic Treaty were: Argentina, Australia, Belgium, Chile, France, Japan, New Zealand, Norway, South Africa, Soviet Union, United Kingdom, and USA. Over the last 30 years, consultative status has been granted to: Poland (1977), The Federal Republic of Germany (1981), Brasil and India (1983), the People's Republic of China and Uruguay (1985), the German Democratic Republic and Italy (1987), Spain and Sweden (1988), Finland, Peru and Republic of Korea (1989), Ecuador and the Netherlands (1990), Bulgaria (1998), Ukraine (2005).