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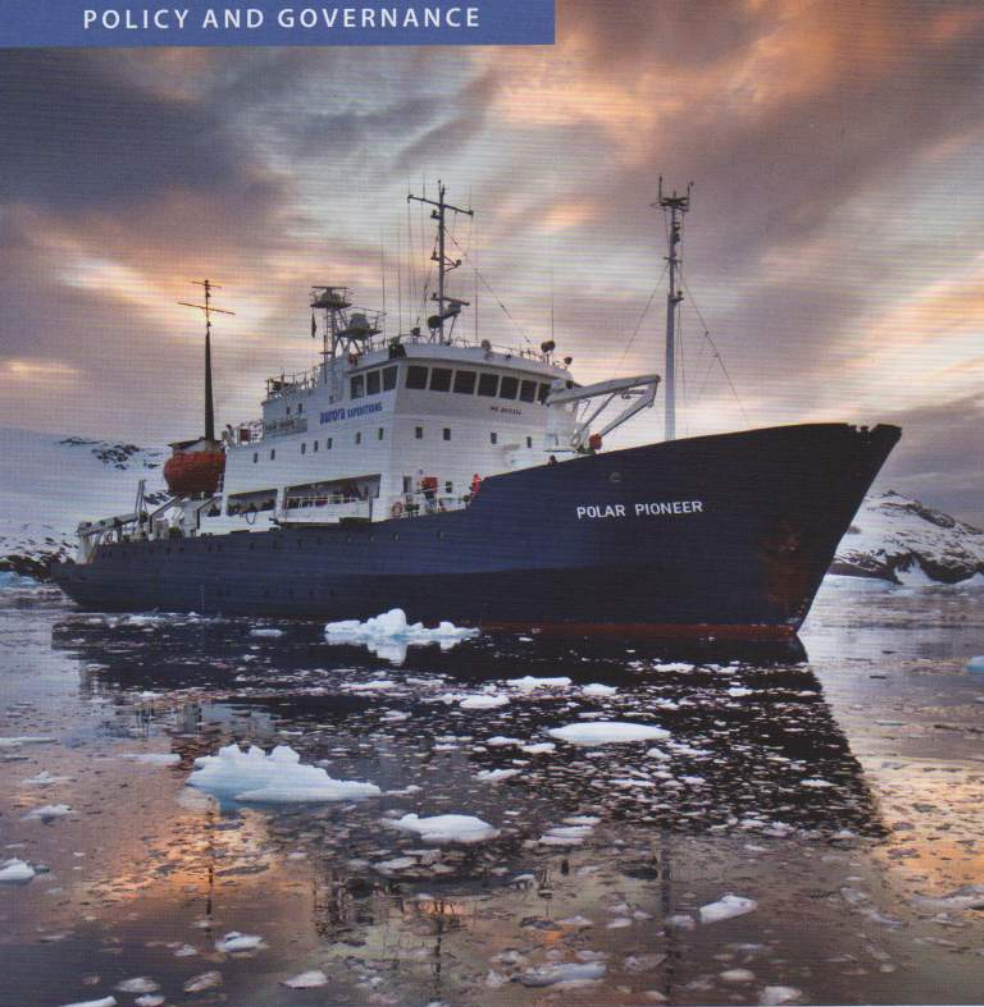
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Regulating Human
Activity in Antarctica



Responsibility for Regulating Human Activity in Antarctica

By Alan D. Hemmings and Neil Gilbert

From adoption of the Antarctic Treaty in 1959, through the agreement of additional treaties, leading to what we now call the Antarctic Treaty System (ATS), a key issue has been: Who is responsible?

For the first few decades the answer was straightforward. Responsibility for ensuring compliance with ATS obligations, including meeting reporting and information sharing requirements, resided with individual governments. Not only were Nation States (such as New Zealand)

the entities which had agreed the obligations, they were also the entities that actually conducted human activity in Antarctica. Activities were almost entirely conducted by government agencies, generally through national Antarctic programmes which, if they did not operate absolutely everything down there, subcontracted to either their militaries, or a commercial contractor. The State was where the buck stopped.

Fast forward to the present, and the picture is far more complex. Whilst State activity continues

(for example, in New Zealand's case, this is mostly scientific research carried out by State agencies and universities with management and operational support provided by Antarctica New Zealand, and/or the New Zealand Defence Force), a growing number of activities also occur outside the government sector. This generally falls into three areas: tourism, fishing and environmental NGO activity. Further, whereas State activity in the past generally involved just one's own State, the increasing cost, complexity and spread of even traditional Antarctic science activities may now see multiple States being involved in the same activity. And, to add more complexity, a contemporary Antarctic activity may involve States, a non-governmental entity and ships or aircraft that are not registered in any Antarctic Treaty Party.

In this new world of complexity working out who is responsible for ensuring compliance with legal obligations, for approving activities and for providing the requisite reporting and sharing of information among the Antarctic Treaty States, can sometimes be a challenge.

Part of the difficulty lies in the fact that the source of the obligation in relation to reporting is laid out in the Antarctic Treaty, drafted in the late 1950s when only States were operators in Antarctica. Under Article VII, paragraph 5, States are required to inform other States by "notice in advance, of

(a) all expeditions to and within Antarctica, on the part of its nationals, and all expeditions to Antarctica organised in or proceeding from its territory;

(b) all stations in Antarctica occupied by its nationals; and

(c) any military personnel or equipment intended to be introduced by it into Antarctica."

Polar Pioneer, ice-strengthened Aurora Expeditions vessel, Cierva Cove, Antarctic Peninsula. Photo courtesy of Colin Monteath/Hedgehoghouse.com.

Practice, over ensuing years, became that States advised each other of their various national Antarctic programme expeditions – though this did not and does not include whaling (which is left to the International Whaling Commission) or fishing (which is left to the Commission for the Conservation of Antarctic Marine Living Resources).

In 1991, the Parties adopted the Protocol on Environmental Protection to the Antarctic Treaty (Madrid Protocol). This added additional duties, most significant of which was the requirement to undertake an Environmental Impact Assessment (EIA) prior to conducting activities in Antarctica. The Protocol's Article 3 provides that activities "be planned and conducted on the basis of information sufficient to allow prior assessments of, and informed judgements about, their possible impacts". These judgements should "take full account of ... the cumulative impacts of the activity, both by itself and in combination with other activities in the Antarctic Treaty area [and] whether the activity will detrimentally affect any other activity in the Antarctic Treaty area." The activities to which these environmental duties attached were cast broadly as those "pursuant to scientific research programmes, tourism and all other governmental and non-governmental", including "associated logistic support activities". But they were qualified as being the activities for which advance notice was required under Article VII (5) of the Antarctic Treaty.

Herein lies the problem. All this works very nicely if you are a national Antarctic programme (for example, Antarctica New Zealand).

We know where national programmes are based, they tend not to move, they have long life and it is clear which state is responsible for them.

Tourism and non-governmental activities are explicitly included in the coverage of the Madrid Protocol – and thus must comply with its EIA requirements – and current practice is that these activities are included in a Party's advance notification documentation issued under Article VII (5) of the Treaty. For a nationally based tourism company this is a fairly straightforward process. If you are based in New Zealand, you have EIA and other obligations under New Zealand law; New Zealand will assess your EIA and impose conditions if necessary; and New Zealand will report on you to the other Antarctic Treaty Parties.

It may become more complicated if you have a helicopter, or use a ship, registered outside New Zealand, or if you are running an expedition to another part of Antarctica for which your final departure point is another country.

In such cases, it becomes less clear as to who is responsible for ensuring advance notification, prior EIA, and other duties are actually complied with. Is it still New Zealand (because this is where our putative travel company is based)? It could be, given that New Zealand law extends to any expedition which is organised in New Zealand. It could also be the state to which the ship is flagged that is responsible (but only if that state is a party to the Antarctic Treaty/Madrid Protocol). It could also be the State from which the vessel makes its final departure for Antarctica (again provided the State is a Party to the Treaty and the Madrid Protocol).

In the 2014/15 season New Zealand approved two cruises

to the Ross Sea region by a Cyprus-registered vessel that was chartered by a Dutch tour operator on the basis that the cruises departed from Bluff (even though the second cruise ended up in Chile).

There have been recent examples where responsibilities for assessing and approving NGO activities have been *shared* across a number of states. The challenges are whether shared responsibility can be sorted out and in a timely enough manner that (a) the necessary information can be assembled and reviewed, and (b) notice provided to the ATS, *before* the expedition in question actually hits the Antarctic? If the expedition is aboard a private yacht, the issue may be whether anybody knows anything about it before it arrives in Antarctica.

All of this can begin to look like a lawyers' picnic. It is therefore timely and welcome that the Parties will hold a special session at the forthcoming Antarctic Treaty Consultative Meeting (Sofia, Bulgaria, 1 to 10 June) on this very issue. The session, which will involve experts from authorising agencies in many Antarctic Treaty States, will take a hard look at the issues encountered when assessing activities involving participants from multiple nations and/or multiple organizations as well as issues involved in handling activities where various elements of the activity are assessed by different national authorities. What is increasingly important in this more complex world, is that the Parties to the Antarctic Treaty and the Madrid Protocol engage in high levels of cooperation to ensure that obligations are being met, and ultimately that the Antarctic environment is appropriately protected. †