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ARTICLE

Participation in the Antarctic Treaty

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ABSTRACT
Participation in the Antarctic Treaty and its main decision-making body – the Antarctic Treaty Consultative Meeting (ATCM) – has been highly sensitive from the outset, in particular due to the fundamental issue of Antarctic territorial sovereignty and the ATCM's decision-making by unanimity. Broader participation means enhanced applicability of the Antarctic Treaty and acts adopted by the ATCM, but does not necessarily improve effectiveness because each new participant obtains a *de facto* right to veto. There are multiple reasons why States want to participate in the Antarctic Treaty and other key instruments of the Antarctic Treaty System, including reasons related to the issue of Antarctic territorial sovereignty and the ability to engage in activities such as scientific research, tourism and exploitation of resources. The objective of this article is to analyse the grounds and requirements for participation in the Antarctic Treaty, their genesis during the negotiations on the Antarctic Treaty, and their subsequent operationalisation and application in practice.

KEYWORDS
Antarctica; territorial sovereignty; decision-making; research

Introduction

The adoption of the Antarctic Treaty[1] was in many ways a unique accomplishment in diplomacy and inter-State cooperation. At the time of its signature in 1959, during the midst of the Cold War, delegations managed to adopt, among other things, an innovative agreement to disagree on the question of territorial sovereignty over the enormous Antarctic continent and a prohibition of all military activities[2]; thereby averting the risk of armed conflict. In light of the issues covered by the negotiations, it is difficult to overstate the significance of the ability to participate in those negotiations.

As this article will show, participation in the Antarctic Treaty and its main decision-making body – the Antarctic Treaty Consultative Meeting (ATCM) – has been highly sensitive from the outset, in particular due to the issue of Antarctic territorial sovereignty and the ATCM's decision-making by unanimity.[3] Broader participation means the Treaty and acts adopted by the ATCM become applicable to a larger group of States.

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[1]Antarctic Treaty, Washington D.C., 1 December 1959. In force 23 June 1961, 402 UNTS 71.
[2]Arts I(1) and IV. The geographical scope as stipulated in Art. VI extends, beyond the Antarctic continent, to 60° South latitude.
[3]Cf. Arts IX(1), (2) and (4) of the Antarctic Treaty, in conjunction with Rules 20 and 23 of the ATCM Rules of Procedure adopted at the 1st ATCM (1961) (annexed to the Report of the 1st ATCM (1961), which have since then been replaced by Rules 21 and 24 of the 2016 ATCM Rules of Procedure and ATCM Decision 1(1995).

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Such expanded applicability does not necessarily also improve effectiveness, however, as each new participant obtains a *de facto* right to veto. The more participants are also actually prepared to use this right, the more difficult it may become to adopt new regulations to govern human activities in Antarctica – and thereby to change the *status quo* on Antarctic regulation – or to sanction non-compliance with existing regulations.[4] Some Antarctic claimant States (see below) may have regarded – and also continue to regard – increased participation with concern for the reason that it necessarily meant/means an increase in the number of non-claimant States and thereby a relative decrease of the group of claimant States vis-à-vis the overall number of participants.

There are multiple reasons why States want to participate in the Antarctic Treaty and other key instruments of the Antarctic Treaty System (ATS)[5] – namely the CCAS,[6] the CAMLR Convention[7] and the Environmental Protocol[8] – as well as participate in decision-making by their principal bodies – namely the ATCM, the Meeting of Parties to the CCAS, CCAMLR[9] and the Committee for Environmental Protection (CEP). These reasons relate, among other things, to: (a) the fundamental issue of Antarctic territorial sovereignty; (b) the international prestige and stature often associated with participation in the Antarctic Treaty; (c) the ability to engage in activities such as scientific research, tourism, exploitation of resources, and associated activities (e.g., fishing-related activities such as provisioning of fuel and transhipment of catch); and (d) the ability to participate in decision-making and thereby influence the adoption and substance of individual decisions as well as the wider evolution of the ATS. As regards the latter, the interests of some participants could be mainly conservation-oriented and aimed at safeguarding the designation of Antarctica as 'a natural reserve, devoted to peace and science',[10] while other participants may mainly have utilisation-oriented interests.[11] Such diverging interests can in certain scenarios be seen as a conflict between so-called user States and non-user States.

The objective of this article is to analyse the grounds and requirements for participation in the Antarctic Treaty, their genesis during the negotiations on the Antarctic Treaty, and their subsequent operationalisation and application in practice. The analysis of this practice distinguishes three phases: from 1961 to 1977; from 1978 to 1994; and from 1995 until now. The trends, key features and broader context for each of these phases will be highlighted, and special attention will be paid to the possible reasons for

[4]For example the ability of Members of the Commission for the Conservation of Antarctic Living Resources (CCAMLR) to block proposals for the listing of their vessels on the Contracting Party IUU (illegal, unreported and unregulated) Vessel List pursuant to CCAMLR Conservation Measure (CM) 10–06 (2016). See the Report of the 39th (2020) Annual CCAMLR Meeting, at paras 3.4–3.19 in relation to the Russian-flagged vessel *Palmer*.

[5]As defined in Art. 1(e) of the Protocol on Environmental Protection to the Antarctic Treaty (Environmental Protocol) (Annexes I–IV, Madrid, 4 October 1991. In force 14 January 1998; Annex V (adopted as Recommendation XVI-10), Bonn, 17 October 1991. In force 24 May 2002; Annex VI (adopted as Measure 1 (2005)), Stockholm, 14 June 2005. Not in force. All texts available at www.ats.aq).

[6]Convention for the Conservation of Antarctic Seals, London, 1 June 1972. In force 11 March 1978, 1080 UNTS 176.

[7]Convention on the Conservation of Antarctic Marine Living Resources, Canberra, 20 May 1980. In force 7 April 1982, 1329 UNTS 47.

[8]See note 5.

[9]See note 4.

[10]Art. 2 of the Environmental Protocol.

[11]China is at present one of the most prominent examples in this regard. At the 40th (2017) ATCM held in Beijing, for instance, the host country initiated a special meeting, entitled 'Our Antarctica: Protection and Utilization', after the opening of the ATCM, even though it was not part of the formal ATCM agenda. See also the discussion on 'Safeguarding the Founding Fathers' Interests' in Molenaar, *Regional Fisheries Management Organizations*, 103–107.

the relatively low increase in participation during the third period as well as the recent rejections of the applications by Venezuela and Belarus. Some conclusions are included in the final section. A Table containing the current Contracting Parties to the Antarctic Treaty is included in the Annexe.

The negotiations on the Antarctic Treaty

The negotiations on the Antarctic Treaty took place in 1958–1959 and were initiated by the United States outside the auspices of an intergovernmental body. They were aimed above all at preventing the Antarctic from becoming 'the scene or object of international discord',[12] which in particular required finding a solution for the complex and multi-faceted issue of title to Antarctic territory.[13] Seven of the States that participated in the negotiations had made claims to title to Antarctic territory: Argentina, Australia, Chile, France, New Zealand, Norway and the United Kingdom.[14] These so-called Antarctic claimant States maintain their claims up until today. One Antarctic sector – Marie Byrd Land – has never been claimed. In particular due to the overlap between the claims of Argentina, Chile and the United Kingdom, there was no reciprocal recognition of all claims between all Antarctic claimant States. In addition, the Soviet Union and the United States did not recognise any claims and reserved the right to make their own claims. This is still the position of the Russian Federation and the United States at present.

The non-recognition of Antarctic territorial claims can in part be attributed to the evolving international law on the acquisition of title to territory. By the end of the 19th Century, discovery merely provided an inchoate title that needed to be perfected by effective occupation demonstrated by continuous and peaceful display of State authority.[15] In view of Antarctica's remoteness, harsh climate and lack of population, there was considerable uncertainty on the level and types of State authority that would be required to perfect an inchoate title.[16] As engagement in scientific research was the principal human activity in Antarctica – especially during the so-called Heroic Age of Antarctic Exploration (1897–1922) – it is quite understandable that some States viewed engaging in research as a display of State authority relevant for the perfection of title to territory.[17] On the other hand, the exceptional circumstances in Antarctica are also likely to have contributed to the position that Antarctica had remained *res nullius* (nobody's property) in its entirety and/or is entitled to some sort of international status (e.g. *res communis* (common property)).

[12]Preamble to the Antarctic Treaty, 2nd para.
[13]See Rothwell, *The Polar Regions*, 51–71.
[14]Germany conducted various Antarctic expeditions in the early 20th Century and was preparing to make a claim for *Neu Schwabenland* in 1938–1939, prompting Norway to claim Queen Maud Land in 1939 (cf. Lüdecke and Summerhayes, *The Third Reich in Antarctica*, 83–84). Uruguay's instrument of accession to the Antarctic Treaty contains a declaration by which Uruguay asserted a 'special, direct and substantial interest' in Antarctica and reserved 'its rights in Antarctica in accordance with international law' (available at www.state.gov/antarctic-treaty/). See also Brazil's application for ATCP status (Report of SATCM 6 (1985), p. 2) and Auburn, *Antarctic Law and Politics*, 59–60.
[15]Island of Palmas Arbitration (the Netherlands v. the United States of America), Judgement of 4 April 1928; 2 *Reports of International Arbitral Awards* 829.
[16]See, *inter alia*, the discussion by Auburn, *Antarctic Law and Politics*, 5–47.
[17]Ibid., 2, 88, 91.

A decade before the 1958–1959 negotiations, the United States had initiated the first multilateral process to agree on the status of Antarctic territory. Participation in this process consisted of the seven Antarctic claimant States and the United States. The various United States proposals envisaged the internationalisation of Antarctica – by means of placing Antarctica under a United Nations (UN) Trusteeship, establishing a condominium, or otherwise – and the promotion of scientific research, the latter of which would build the confidence needed to agree on the former.[18] In 1950, however, the Soviet Union declared that it had a right to participate in the negotiations based on its historic presence in Antarctica and that it would not accept any agreement without its involvement.[19] This and the Korean War, which had started in 1950 and would last three years, eventually led to the failure of the negotiations.

The convening of the 1958–1959 negotiations was motivated in part for the same reasons as the earlier negotiations. Among the additional reasons were the desire to pre-empt new territorial claims as well as India's attempts to place the 'Question of Antarctica' on the agenda of the UN General Assembly (UNGA).[20] Moreover, scientific research had obtained a much more prominent role compared to the earlier negotiations. By early 1954, the planning and coordination of the Antarctic Program of the 1957–1958 International Geophysical Year (IGY) had started. In 1957, the International Council of Scientific Unions (ICSU) recommended that an Antarctic body be established under its auspices – the Special Committee on Antarctic Research (SCAR); later renamed Scientific Committee on Antarctic Research – and that each of the 12 States actively engaged in scientific research at the time would nominate a delegate.[21] These 12 States were the seven Antarctic claimant States, the two States with a basis for a claim – the Soviet Union and the United States – and Belgium, Japan and South Africa. SCAR had its first meeting in February 1958, three months before the United States extended invitations for the 1958–1959 negotiations.

The United States' decision to only invite the 11 other SCAR Members to participate in the 1958–1959 negotiations implied that actual engagement in Antarctic research was the only ground for invitation that all participants had in common. This necessarily excluded States with very different interests in Antarctica, for instance India – which may have regarded Antarctica as *res nullius* and presumably preferred to have it established as *res communis* – or States that had engaged in substantial Antarctic research in the past. The issue of participation was hotly debated during the 60 preparatory meetings held between June 1958 and October 1959, with some favourable to wider participation. India's participation was specifically advocated – presumably at any rate by New Zealand, which preferred the UN Trusteeship option – but others felt that this would lead the Soviet Union to insist on participation by one or more of its satellite States, thereby enabling block-voting. In April 1959, Poland had in fact requested to be invited to participate in the negotiations. It is in this regard also worth noting that, in response to an earlier Polish request for SCAR membership, SCAR decided that this would be granted following the establishment of a year-round Polish station in Antarctica.[22]

[18]See Hanessian, *The Antarctic Treaty 1959*, 437–434.
[19]Ibid., 446.
[20]Ibid., 451–452 and Rothwell, *The Polar Regions*, 68.
[21]Based on information provided at www.scar.org/about/history, accessed on 20 August 2021.
[22]Hanessian, *The Antarctic Treaty 1959*, 461–463.

The discussions on participation during the preparatory stage of the negotiations on the Antarctic Treaty eventually did not lead to broader participation in the diplomatic 'Conference on Antarctica', which began on 15 October 1959 and successfully concluded with the adoption the Antarctic Treaty on 1 December 1959.[23] The Final Act of the Conference on Antarctica notes that participation in the negotiations was based on participation in the Antarctic Program of the 1957–1958 IGY. Discussion on the arrangements on participation in the Treaty eventually laid down in Articles IX(2) and XIII(1) already commenced during the preparatory stage of the negotiations. They can be presumed to largely mirror the discussions on participation in the negotiations as such, with some advocating wide participation and others opposing this. The United Kingdom is reported to have advocated early on for wide accession to the Treaty but limited participation in the Treaty's institutional arrangements. This approach eventually prevailed, even though the negotiation on Article XIII(1) was especially contentious.[24]

The Antarctic Treaty's provisions on participation

As of 20 August 2021 there were 54 contracting parties to the Antarctic Treaty (see the Annexe). These can be divided into three groups of participants. The first group consists of the 12 States that participated in the 1958–1959 negotiations. These 12 so-called Signatory States automatically became Antarctic Treaty Consultative Parties (ATCPs) upon the treaty's entry into force following formal adherence by all of them. ATCP status – or: Consultative Party status – entitles Contracting Parties to participate in decision-making in ATCMs.[25]

The 42 non-Signatory States which have become party to the Antarctic Treaty by accession can be divided in two groups. One of these consists of the 17 Acceding States that have subsequently become ATCPs, and can thereby also participate in decision-making in ATCMs. The other group consists of the remaining 25 Acceding States that do not have ATCP status – also called Non-Consultative Parties (NCPs) – which are cannot participate in decision-making in ATCMs. NCPs are not required to make a financial contribution to the budget of the Antarctic Treaty Secretariat.[26]

Article XIII(1) of the Antarctic Treaty stipulates that it is open for accession by any State that is either a Member of the UN or that is unanimously invited by the ATCPs. Accession is therefore only open to States and not to non-State entities like the European Union (EU). This is a notable difference with the CAMLR Convention and CCAMLR, which are open to the EU.[27] The requirement of UN Membership formed a significant restriction on accession during the Cold War,[28] but not since then. Invitations to accede for non-UN Members were made to the Republic of Korea (ROK), the Democratic

[23]Final Act of the Conference on Antarctica (available at www.ats.aq).
[24]Hanessian, *The Antarctic Treaty 1959*, 456, 463 and 467.
[25]See note 3.
[26]See note 88 infra and accompanying text.
[27]Cf. Arts VII(2)(c) and XXIX(2) of the CAMLR Convention.
[28]See the critical observations on this by Romania and the German Democratic Republic (GDR) in their instruments of accession (available at www.state.gov/antarctic-treaty/).

People's Republic of Korea (DPRK) and Switzerland.[29] The issue of statehood arose for both of the Korean States, as not all ATCPs recognised them as independent States at the time.[30]

Article XIII(1) contains no substantive ground or requirement for accession. This means it is open to user States and non-user States alike. In view of the ground and requirements for obtaining ATCP status (see below), a possible ground for accession could have been a State's interest in Antarctica.[31] Admittedly, however, this would not have had any practical significance, as accession by UN Members is not subject to assessment or approval. All they need to do is deposit their instrument of accession with the Depositary and, on the date of deposit, they become Acceding States.[32]

Article IX(2) of the Antarctic Treaty stipulates that ATCP status is only available for Acceding States and only:

> during such time as that Contracting Party demonstrates 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.

This provision contains a single ground for obtaining ATCP status – namely 'interest in Antarctica' – and several requirements linked thereto. Compliance with the ground can only be demonstrated by conducting scientific research. Such research must be conducted in Antarctica ('there') and must be 'substantial'. The use of the words 'such as' implies that 'the establishment of a scientific station or the despatch of a scientific expedition' are merely two examples that provide guidance on the interpretation and operationalisation of these requirements and thereby on the necessary minimum level of scientific research. This means that these requirements can also be met in other ways.

Whereas Article IX(2) requires Acceding States applying for ATCP status to 'demonstrate' having met the requirements, it says nothing about any assessment as to whether such requirements have in fact been complied with. Procedural aspects are also entirely absent and no one – neither the Signatory States nor all ATCPs – is provided with a mandate to assess compliance with the requirements or to approve or dismiss requests for ATCP status. As will be shown in the next section, however, such authority has in fact been asserted and exercised by the ATCPs.

The ground and requirements for obtaining ATCP status laid down in Article IX(2) are presumably largely equivalent to the ground for the invitation to participate in the 1958–1959 negotiations. There is nevertheless potential for them to be operationalised and applied in a manner that amounts to discrimination (unjustifiable differentiation) against and between applicant States. If so, this would impede the ability of Acceding States to exercise their entitlement to obtain ATCP status, and would challenge the 'openness' of the Antarctic Treaty, with repercussions for its legitimacy and effectiveness.[33] However, no provision in the Antarctic Treaty prohibits discrimination and no overarching prohibition appears to be applicable either. The risk of discrimination is considerable due to the fact that the assessment of compliance with the ground and requirements for ATCP status has

[29]Barrett, *International Governance of the Antarctic*, 458.
[30]Watts, *International Law and the Antarctic Treaty System*, 20.
[31]See in this regard the approach pursued by the CAMLR Convention, as reflected in Arts VII(2)(b) and XXIX(1).
[32]Art. XIII(3) and (5) of the Antarctic Treaty.
[33]See Stokke and Vidas, *Governing the Antarctic*.

in practice been treated as a matter of substance rather than procedure, and is thereby subject to decision-making by unanimity. This also enables each ATCP to use its *de facto* veto for reasons that should not be part of the assessment.

Decision-making by unanimity and various features of Article IX(2) create differentiation – and possibly even discrimination – between Signatory States, other ATCPs and Acceding States seeking ATCP status. This is to a significant extent caused by the circumstance that assessment of compliance with the ground and requirements for ATCP status is a one-off procedure; at least for successful applicants. Moreover, the Antarctic Treaty does not require ATCPs to maintain an agreed minimum level of scientific research. Therefore, once a State has obtained ATCP status, decision-making by unanimity shields it from having this status suspended or withdrawn. Even though the phrase 'during such time' in Article IX(2) could be seen as envisaging a procedure to suspend or withdraw ATCP status, such a procedure has never been adopted. This is also highly unlikely ever to occur, due once again to decision-making by unanimity and the fact that the wording in Article IX(2) suggests that Signatory States are exempt. The latter is unlikely to be acceptable to other ATCPs.

Whereas differentiation or discrimination can arise in the context of compliance assessment, it can also occur through the operationalisation of the ground and requirements for ATCP status. For instance if this is done in a way that ensures that applicants have to comply with requirements that are more stringent than those that Signatory States or other ATCPs had to meet earlier. This is examined in the next section.

Participation in the Antarctic Treaty since its entry into force

From 1961 to 1977

The Antarctic Treaty entered into force on 23 June 1961, following the deposit of the instruments of ratification by Argentina, Australia and Chile on that day. The Treaty not only entered into force for the nine other Signatory States but also for Poland and Czechoslovakia, which had deposited their instruments of accession already on 8 and 14 June 1961 respectively. Poland also became the first Acceding State to obtain ATCP status, but this took until 1977. In the period of 17 years between 1961 and 1977, five other States acceded.[34]

Poland is reported to be the first Acceding State to formally apply for ATCP status.[35] It did so by means of a *Note Verbale* dated 2 March 1977 sent to all Contracting Parties, informing them that it had complied with Article IX(2) of the Antarctic Treaty on 26 February 1977, the date of the establishment of its Arctowksi Station.[36] Apparently, Poland thereby abandoned its earlier position that it had obtained ATCP status in 1976 on the basis of its 1975–1976 scientific research expedition relating to krill, and that ATCPs – then: the Signatory States – had no assessment or approval role under Article IX (2) whatsoever.[37]

[34]Denmark (1965); the Netherlands (1967); Romania (1971); Germany (GDR) (1974); and Brazil (1975). See also the Annexe.

[35]Pannatier, *Acquisition of Consultative Status*, 124.

[36]Auburn, *Antarctic Law and Politics*, 151.

[37]Ibid., 148 and 151.

Interest in ATCP status already existed before 1976–1977, however. Prior to the 4th (1966) ATCM, for instance, the Netherlands seems to have inquired if the requirements in Article IX(2) could be met through participation in joint expeditions. The Signatory States apparently responded affirmatively, while specifying that no more than three States could participate.[38] In the end, no such joint expedition involving the Netherlands materialised during that time. In light of the requirements for SCAR Membership stipulated in 1959, it seems somewhat questionable if the Signatory States would really have been prepared to accept such lenient requirements for obtaining ATCP status as early as the mid-1960s. The Netherlands did in fact become the first Acceding State to obtain ATCP status without having first established – or even intending to establish – a permanent scientific station; but this took until 1991.

As set out below, Poland's 1977 application eventually led to the adoption of a procedure on obtaining ATCP status. The absence of such a procedure prior thereto as well as the inability of NCPs to attend ATCMs,[39] may well have discouraged other applications. It is also possible that there were other formal or informal applications and that Signatory States decided to ignore or dismiss these without recording this in the Reports of ATCMs, Special ATCMs (SATCMs) or other publicly available documentation, in order to avoid criticism on the lack of openness, transparency and legitimacy of the Antarctic Treaty.[40]

Poland's application of 2 March 1977 was submitted during the preparations for the 9th (1977) ATCM. During the first preparatory meeting in March 1977, the Signatory States could not agree on how to deal with the application.[41] This led them to convene the SATCM 1 in July 1977, which adopted a procedure on obtaining ATCP status, and approved Poland's application (see below). It is worth noting that the efforts of the preparatory meetings on the agenda item 'Antarctic marine living resources' eventually led to the establishment of the SATCM 2 with a mandate to elaborate a draft for what eventually became the CAMLR Convention.[42] In view of Poland's krill expedition in 1975–1976 and its intention to engage in large-scale krill fishing, the Signatory States were keen to ensure that the envisaged CAMLR Convention would also apply to Poland. This is likely to have contributed significantly to the success of Poland's application for ATCP status.

As noted, SATCM 1 adopted two decisions: (I) a procedure on applying for ATCP status; and (II) approval of Poland's application.[43] Two components of the procedure are especially noteworthy: the Signatory States' assertion of a mandate to assess applications for ATCP status, and the need for applications to be approved by unanimity.[44] As no trace of these components can be found in Article IX(2), this raises the question as to whether the procedure should be regarded as an implementation or operationalisation of Article IX(2), or amounts rather to treaty modification or amendment, which should have been addressed by recourse to the requirements for modification and amendment laid down in Article XII.

[38]Ibid., 151–152. See also the discussion of various (proposed) expeditions by non-parties on p. 116.
[39]This took until 12th (1983) ATCM (see note 59 infra and accompanying text).
[40]Stokke and Vidas, *Governing the Antarctic.*
[41]Auburn, *Antarctic Law and Politics*, 148.
[42]ATCM Recommendation IX-2 (1977), at III.
[43]Report of SATCM 1 (1977).
[44]Paras. (2) and (4) of SATCM 1 Decision I (1977).

In support of their asserted mandate to assess and approve applications for ATCP status, the Signatory States invoked 'the obligation placed upon them by Article X'.[45] This provision stipulates:

> Each of the Contracting Parties undertakes to exert appropriate efforts, consistent with the Charter of the United Nations, to the end that no one engages in any activity in Antarctica contrary to the principles or purposes of the present Treaty.

Additional concern for the consistency of SATCM 1 Decisions I and II with the Antarctic Treaty arises at first sight from the fact that the competence claimed by relying on Article X is much broader than assessing compliance with the requirements of Article IX(2). Decision II indicates that the Signatory States assert competence to ascertain 'in accordance with Article X' whether or not the activities of Poland in Antarctica are 'in accordance with the principles and purposes of the Treaty'. This last aspect is a clear reference to the Treaty's core elements, and in particular its agreement to disagree on the issue of Antarctic sovereignty as laid down in Article IV, rather than designating Antarctica as *res communis* or some other type of global commons. These core elements are undoubtedly an indispensable part of the context of Article IX(2) as well as the Treaty's object and purpose.[46] It is therefore submitted that ATCPs have the competence to assess and approve applications for ATCP status pursuant to Article IX(2).[47] This is based on a combination of 'implied powers'[48] and 'subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation' within the meaning of Article 31(3)(b) of the VCLT.[49] In order to avoid similar ambiguities, all of the subsequent treaties of the ATS grant the existing parties or members an explicit mandate to assess and approve applications for accession or Membership.[50]

The two decisions adopted by SATCM 1 were not laid down in formal Recommendations – which would have required subsequent ratification by all Signatory States – but in Decisions *avant-la-lettre* based on Rule 20 of the ATCM Rules of Procedure then in force, which became effective immediately.[51] The procedure on applying for ATCP status as well as the granting of ATCP status to Poland were thereby in essence categorised as internal organisational matters.[52] Subsequent revisions of the procedure and approvals of ATCP status brought no change in this regard.

The procedure on applying for ATCP status is initiated through a request by the applicant, supported by 'information concerning its activities in the Antarctic, in particular the content and objectives of its scientific programme'[53]; which has become known as the

[45] SATCM 1 Decision I (1977), para. 2. See also the 3rd preambular para.
[46] Cf. Art. 31(1) of the Vienna Convention on the Law of Treaties (VCLT; Vienna, 23 May 1969. In force 27 January 1980, 1155 UNTS 331).
[47] For a different view see Watts, *International Law and the Antarctic Treaty System*, 15–16.
[48] See Blokker, *International Organizations or Institutions, Implied Powers*.
[49] See note 46. See also the International Law Commission's 2018 'Draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties' (available at https://legal.un.org/ilc/).
[50] See Art. 12 of the CCAS (invitation by consensus), Art. VII(2)(d) of the CAMLR Convention (approval by consensus) and Art. 18(2)(4) of the CRAMRA (approval by consensus). Arts 11(2) and 22(1) and (2) of the Environmental Protocol entitle all parties to the Antarctic Treaty to become party to the Protocol and thereby automatically Member of the CEP, without being subjected to approval.
[51] Auburn, *Antarctic Law and Politics*, 149.
[52] ATCM Decision 1 (1995), para. (2)(a).
[53] SATCM 1 Decision I (1977), para. 1.

'dossier of information'.[54] Subsequently, ATCPs: (a) 'shall examine' this information; (b) 'may conduct any appropriate enquiries (including the exercising of their right of inspection in accordance with Article VII of the Treaty)'; and (c) 'may urge' the applicant 'to make a declaration of intent to approve' ATCM Recommendations in force and 'may invite' the applicant 'to consider approval of the other Recommendations'.[55]

Element (c) was included in light of the Antarctic Treaty's rather unique arrangement on participation, where States can become contracting party to the Treaty, and be bound to the obligations it contains, but not at the same time also be bound to the legally binding decisions that have been adopted by the Treaty's main decision-making body and have subsequently entered into force. Element (c) is intended to ensure that new ATCPs become bound by ATCM Recommendations to a similar extent as existing ATCPs; and thereby seeks to achieve equal treatment and a level playing field between new and existing ATCPs in terms of their obligations. As the envisaged declaration is merely a political commitment and not a legally binding obligation, however, the success of this approach depends entirely on the willingness of the new ATCPs.

It is noteworthy that SATCM 1 Decision I does not stipulate that establishing a permanent scientific station is a minimum requirement for obtaining ATCP status. Its last preambular paragraph merely repeats the relevant wording of Article IX(2) of the Treaty; namely 'its interest [. . .] expedition'. Nevertheless, SATCM 1 Decision II on Poland's application notes that Poland 'established a permanent scientific station' and 'thereby demonstrates its interest in Antarctica in accordance with' Article IX(2). Moreover, the practice on applications for ATCP status until 1990 discussed in the next subsection confirms that the establishment of a scientific station was in fact a minimum requirement. This means that until 1990, the ATCPs implemented Article IX(2) in a manner that was not supported by its text. However, in light of the understandable desire to have equal treatment and a level playing field between new and existing ATCPs, this may still have been justifiable as 'subsequent practice' within the meaning of Article 31(3)(b) of the VCLT.

Even though neither the text of Polish application nor its accompanying dossier of information is publicly available, SATCM 1 Decision II notes that Poland 'made known its approval' of all ATCM Recommendations adopted until then, also those that had not yet come into force. Moreover, the assessment procedure included an inspection of the Arctowksi Station.

From 1978 to 1994

In the period between 1978 and 1994, there were 25 States that acceded to the Treaty[56] and 14 Acceding States obtained ATCP status.[57] This is a striking difference with the preceding 17 years, during which only seven States acceded and one obtained ATCP status. During

[54] See para. (b) of the 2017 Guidelines, note 91 infra.
[55] Ibid., para. 2.
[56] 1978: Bulgaria; 1979: Germany (FRG); 1980: Uruguay; 1981: Papua New Guinea, Italy and Peru; 1982: Spain; 1983: China and India; 1984: Hungary, Sweden, Finland and Cuba; 1986: Korea (ROK); 1987: Greece, Korea (DPRK), Austria and Ecuador; 1988: Canada; 1989: Colombia; 1990: Switzerland; 1991: Guatemala; 1992: Ukraine; and 1993: the Czech and Slovak Republics (following the dissolution of Czechoslovakia).
[57] SATCM 3 (1981): Germany (FRG); SATCM 5 (1983): India and Brazil; SATCM 6 (1985): China and Uruguay; SATCM 7 (1987): Germany (GDR) and Italy; SATCM 8 (1988): Spain and Sweden; SATCM 9 (1989): Korea (ROK), Peru and Finland; and SATCM 10 (1990): Ecuador and the Netherlands.

this second 17-year period, several States acceded and subsequently obtained ATCP status within a very short timeframe. For the Federal Republic of Germany (FRG) and China this period was around two years. The shortest period was for India, which acceded on 19 August 1983 and obtained ATCP status within a month, on 12 September 1983. So far, the Netherlands has the longest timespan between accession (1967) and obtaining ATCP status (1990); namely 23 years. The unification of Germany on 3 October 1990 brought the total number of new ATCPs during this period back to 13.

The wave of accessions from 1978 onwards is likely to be attributable to the 1977 decisions on Poland's Consultative Status and the procedure on applying for ATCP status, as well as the subsequent actual admission of new ATCPs. Criticism on the lack of openness, transparency and legitimacy of the Treaty gradually eased, in particular after earlier critics such as India and China acceded and obtained ATCP status. Furthermore, outsiders' concerns on the equitable sharing of Antarctic marine living resources eventually proved unfounded in view of the essentially open-access character of CCAMLR.[58]

A further ease in criticism was achieved by inviting all Acceding States to participate in the 12th (1983) ATCM[59] and to formalise this for subsequent ATCMs.[60] In 1984, the negotiations on the CRAMRA[61] were opened to Acceding States as well.[62] A similar approach was followed for the negotiations within SATCM 11 on the Environmental Protocol, which began in 1990.[63] This was different for the seven SATCMs convened between 1981 and 1990 (SATCMs 3 and 5–10)[64] to consider applications for ATCP status. Such meetings were closed to Acceding States[65] except for the applicants, who were able to participate; presumable only in part and in order to present their application and to respond to any questions that might be raised.[66]

It must be noted that, from their commencement in 1982, the negotiations on the CRAMRA were criticised for their lack of legitimacy, and treated with suspicion by a group of developing States.[67] This was mainly caused by the fact that the conclusion of the negotiations on the UNCLOS[68] in that same year did not lead to the treaty's adoption by consensus, which was in its turn mainly due to the refusal of many developed States to accept the treaty's regime for deep seabed mining; including the rights of non-user States therein. In response, of developing States, led by Malaysia, managed to put the 'Question of Antarctica' on the agenda of the UNGA in 1983.[69]

[58]Barnes, *The Emerging Convention*, 240, 248 and 265 argues that ATCPs had an interest in ensuring the acceptability of the CAMLR Convention for the reason that this would smoothen the negotiations on CRAMRA (Convention on the Regulation of Antarctic Mineral Resource Activities, Wellington, 2 June 1988. Not in force, text included in the Report of SATCM 4).
[59]Report of the 12th (1983) ATCM, paras 1 and 38–42.
[60]ATCM Recommendation XIII-15 (1985) and Rules 27–30 of the 2016 ATCM Rules of Procedure.
[61]See note 58.
[62]Report of SATCM 4, para. 5.
[63]See, *inter alia*, the Interim Report of SATCM 11, Viña del Mar, 1990, para. 2.
[64]See note 57.
[65]Report of the 12th (1983) ATCM, paras 39–40.
[66]This was at any rate the case for SATCM 10 (see the Report of the 10th (1990) SATCM, 9, 14–15). See also Barrett, *International Governance of the Antarctic*, 477–478.
[67]See *inter alia* Vidas, *The Antarctic Treaty System and the Law of the Sea*, 74–75.
[68]United Nations Convention on the Law of the Sea, Montego Bay, 10 December 1982. In force 16 November 1994, 1833 UNTS 396.
[69]A/RES/38/77, of 15 December 1983. See also Joyner, *Antarctica and the Indian Ocean States*, 48–49.

From 1989 onwards, support for involvement of the UNGA gradually lessened as the legitimacy of the ATS improved. That year Australia and France announced they would not sign the CRAMRA, and New Zealand subsequently indicated that it would not ratify. This set the ATCPs on a course towards the adoption of the Environmental Protocol in 1991, whose key feature is the moratorium on mineral resource activities.[70] Participation in ATCMs was then further broadened to include key non-governmental organisations such as the Antarctic and Southern Ocean Coalition and the International Association of Antarctic Tour Operators. In 1994, the UNGA resolution on the 'Question of Antarctica' was for the first time passed by consensus, and acknowledged the merits of the ATS in the governance of Antarctica.[71]

During the period 1978–1994, the requirements for, and procedure on, ATCP status were further operationalised and developed by the 1987 Guidelines on Notification with respect to Consultative Status (1987 Guidelines)[72] and Article 22(4) of the Environmental Protocol. The 1987 Guidelines complement the procedure laid down in SATCM 1 Decision I and relate exclusively to the dossier of information, which was suggested to consist of the following:

> (a) A complete description of its past scientific programmes and activities in Antarctica, including published results or studies;
> (b) A complete description of its ongoing and planned scientific programmes and activities in Antarctica, including how they relate to long-term scientific objectives; and
> (c) A complete description of the planning, management and execution of its scientific programmes and activities in Antarctica, including identification of the governmental and non-governmental institutions involved.

It is striking that these guidelines make no reference to independent research stations or expeditions, even though these were then still applied as minimum requirements.

Article 22(4) of the Environmental Protocol stipulates that – once the Protocol has entered into force following formal adherence by all States that were ATCPs on the date of the Protocol's adoption[73] – applications for ATCP status will not be considered unless the applicant has become a party to the Protocol. This new requirement is fundamentally different from the political commitment on the approval of ATCM Recommendations that applicants for ATCP status were expected to make pursuant to paragraph 2 of SATCM 1 Decision I. This new approach is, arguably, justified by the understandable desire to ensure equal treatment and a level playing field between new and existing ATCPs in terms of their obligations. It is also worth noting that, due to the range and detail of the environmental issues covered by the Protocol, the obligations by which Acceding States become bound are very substantial, and also require implementation through the adoption of national laws and regulations.[74] The new requirement came into effect on 14 January 1998 and was first applied when Bulgaria was granted ATCP status later in 1998.

[70]See Art. 7 in conjunction with Arts 24 and 25(5) of the Protocol.
[71]A/RES/49/80, of 15 December 1994. Subsequent UNGA resolutions on the issue would continue to be adopted without a vote. The last resolution was tabled in 2005.
[72]Included in the Report of 14th (1987) ATCM, para. 49.
[73]Art. 23(1) of the Environmental Protocol.
[74]Ibid., Art. 13(1).

The Reports of SATCMs 3 and 5–10 shed light on the actual application of the procedural and substantive requirements for obtaining ATCP status between 1978–1994. Only the Report of SATCM 3 (1981) on Germany (FRG) is 'complete': it includes not only a summary of the assessment and a decision on the application, but also Germany's application (notification) and its dossier of information. Whereas the Reports on SATCM 5 (1983: India and Brazil) and SATCM 6 (1985: China and Uruguay) contain summaries, decisions and applications, all other reports only contain summaries and decisions.

The reports reveal not only a gradual easing of requirements but also other differences between applications accepted as compliant. The ease in the requirements is, *inter alia*, reflected in the fact that formal inspections were discontinued after the application by Germany (FRG) in 1981,[75] and that – as early as 1983 – ATCP status was granted to Brazil and India even though they merely had 'firm plans' for establishing a scientific station in the coming season, and Brazil's station would have 'the capacity to be expanded into a permanent station'.[76] By granting ATCP status to the Netherlands in 1990, the requirement to establish a (permanent) scientific station or to conduct an independent national expedition was discontinued entirely.[77] This decision brought the application of Article IX(2) of the Treaty back in line with its text.

This change was mainly motivated by an acknowledgement of the environmental impacts of scientific stations and the need to focus on the research as such, instead of on the infrastructure, its ownership, and the research being conducted independently rather than cooperatively.[78] An obvious advantage – for the applicant – was that this significantly lowered the costs of obtaining ATCP status. A disadvantage of this change is that, compared to focusing mainly on the establishment of a research station, objective verification of compliance has become more difficult,[79] and is thereby more likely to lead to more differentiation and possibly even discrimination.

As already noted, the practice on the application of the requirements for ATCP status reflected in the Reports of SATCMs 3 and 5–10 also reveals other differences between applications accepted as compliant. This relates in particular to the wording used by the applicants on the approval of ATCM Recommendations. Whereas most applicants closely followed the wording used in SATCM 1 Decision I,[80] some used wording that can be interpreted as a weaker commitment and giving the applicants a wider margin of discretion.[81] As all declarations are merely political commitments, however, even the most strongly worded commitment ultimately depends entirely on the willingness of the applicants. This is different if the applicant approves ATCM Recommendations in force even before the application was submitted or processed by the ATCPs; as in the case of Poland.

The period 1978–1994 also saw rejections of applications for ATCP status.[82] This concerns the applications by Ecuador and the Netherlands assessed by SATCM 9 (1989). It has been reported that, even though concerns existed with the strength of both

[75]Report of the 3rd (1981) SATCM, 8 which suggests that Argentina conducted an inspection.
[76]Report of the 5th (1983) SATCM, 3–4.
[77]Report of the 10th (1990) SATCM, 2–3.
[78]Barrett, *International Governance of the Antarctic*, 470–471; Bos, *Consultative Status under the Antarctic Treaty*, 340.
[79]Pannatier, *Acquisition of Consultative Status*, 126.
[80]Germany (FRG), Brazil, Germany (GDR), Sweden, Peru, Korea (ROK) and Finland.
[81]This concerns China, India, Uruguay and the Netherlands.
[82]At least rejections recorded in publicly available documents.

applications, the United States' insistence that Ecuador's application be rejected led Chile to veto the Netherlands' application.[83] It was therefore agreed by consensus 'that consideration of both of these cases be deferred to permit assessment of additional activities to be carried out by Ecuador and the Netherlands'.[84] Following these additional activities, revised applications by Ecuador and the Netherlands were approved one year later.[85]

From 1995 until now

During the 27 years from 1995 until the present, three Acceding States obtained ATCP status[86] and 12 other States acceded to the Treaty.[87] These numbers are significantly lower than those in the shorter period between 1978 and 1994. Malaysia's accession in 2011 brought an end to its fierce criticism of the ATS since the early 1980s. Two of the 12 new Acceding States – Belarus and Venezuela – applied for ATCP status, but without success (see below).

Since 1995, the requirements for, and procedure on, ATCP status were further operationalised by Decisions 2 (1997), 4 (2005) and 2 (2017). Mention must also be made of the establishment of the Antarctic Treaty Secretariat in 2003 by means of Measure 1 (2003). As this requires all ATCPs to make an annual financial contribution to the budget of the Secretariat,[88] this also became part of the considerations of Acceding States with an interest in obtaining ATCP status. It is submitted that, rather than a new requirement for obtaining ATCP status, this is best seen as a consequence of obtaining ATCP status.

Decision 2 (1997) replaced paragraphs 1–5 of SATCM 1 Decision I with an identical number of paragraphs, while keeping its Preamble, and leaving the 1987 Guidelines unchanged. The amendments concerned only paragraphs 3 and 4, and were mostly procedural in nature. Applications for ATCP status would from then on be dealt with by regular ATCMs instead of convening SATCMs. In practice, however, the procedure takes largely place in Heads of Delegation meetings, where applicants are given the opportunity to present their application and respond to any questions that might be raised; consistent with earlier practice.[89] In case an application is successful, this will be recorded in an ATCM Decision. Finally, paragraph 4 also anticipated the entry into force of the Environmental Protocol and thereby the implicit requirement – laid down in Article 22(4) of the Protocol – for applicants to accede to the Protocol. These new requirements were applicable to the successful requests for ATCP status by Bulgaria and Ukraine, which led to Decisions 1 (1998) and 2 (2005) respectively. Instead of a summary of the scientific research and activities of the applicants, the decisions only contain an identical, concise clause confirming the adequacy of the science.

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[83]Abbink, *Antarctic Policymaking & Science*, 217.
[84]Report of the 9th (1989) SATCM.
[85]Report of the 10th (1990) SATCM.
[86]Bulgaria (Decision 1 (1998)), Ukraine (Decision 2 (2005)) and the Czech Republic (Decision 1 (2013)).
[87]1996: Turkey; 1999: Venezuela; 2001: Estonia; 2006: Belarus; 2008: Monaco; 2010: Portugal; 2011: Malaysia; 2012: Pakistan; 2015: Kazakhstan, Mongolia and Iceland; and 2019: Slovenia.
[88]See Decision 1 (2003). See also the discussion on mandatory financial contributions by NCPs in the Report of the 38th (2015) ATCM, paras 72–74.
[89]As confirmed by a Dutch government official on 9 April 2011. See also note 66 and accompanying text. This practice is similar to the practice within CCAMLR on requests for CCAMLR Membership.

Decision 4 (2005) replaced SATCM 1 Decision I and Decision 2 (1997) entirely, but did not affect the 1987 Guidelines. It was mainly triggered by the adoption and entry into force of Annex V to the Environmental Protocol, and the perceived ambiguity as to whether Articles 9(1) and (2) and 22(4) of the Protocol also require Acceding States to become party to new Annexes.[90] To confirm this, the phrase 'including whether the acceding state has approved all Annexes to the Protocol that have become effective' was included in paragraph 4 of Decision 4 (2005).[91] Other amendments in Decision 4 (2005) relate mainly to terminology and acronyms, and the inclusion of 'and Measures', in light of their legally binding nature.[92]

These new requirements were applicable to the Czech Republic's successful request for ATCP status in 2013, and Venezuela's first unsuccessful request in 2016. Like the Decisions on Bulgaria and Ukraine, Decision 1 (2013) on the Czech Republic only has a standard clause on the adequacy of science.[93] Venezuela's 2016 application – as well as its 2018 application – seems to have failed mainly due to opposition by South American ATCPs; based not so much on the adequacy of science but on the continuously deteriorating domestic situation in Venezuela at the time.[94] Other contributing factors may have been that Venezuela perhaps did not submit a full dossier of information,[95] and a possible lack of clarity on what was expected of applicants, in particular those that may not have consulted ATCPs and others on this beforehand. The latter concerns led to the establishment of the Intersessional Contact Group (ICG) on Criteria for Consultative Status, with a mandate to review Decision 4 (2005) and the 1987 Guidelines, and recommend any changes thereto where necessary. The ICG reported back to the 40th (2017) ATCM with a proposal[96] for what eventually became Decision 2 (2017); but only with many amendments to the original proposal.

Decision 2 (2017) replaces Decision 4 (2005) and the 1987 Guidelines in their entirety, and has the 2017 Guidelines[97] annexed thereto. Compared to Decision 4 (2005), the Preamble of Decision 2 (2017) is shorter but its operative text is largely the same. Also, both the Preamble and the operative text contain many editorial changes. The main new element[98] is included in paragraph 1, which stipulates that an application must be submitted 'no later than 210 days prior' the ATCM at which it is to be considered. This is apparently not really a new element per se, but a codification of existing practice.[99]

Compared to the succinct 1987 Guidelines, the 2017 Guidelines are far more extensive and can therefore not be reproduced in full here. The 2017 Guidelines are aimed at clarifying the requirements for obtaining ATCP status, which is mainly

[90]See Report of the 28th (2005) ATCM, para. 36.
[91]This position is also reflected in three new preambular paragraphs. The new phrase was not retained in the operative part of Decision 2 (2017), but its content is still reflected in one preambular paragraph and in para. (i) of the annexed 'Guidelines on the procedure to be followed with respect to Consultative Party status' (2017 Guidelines).
[92]See para. 2. Arguably, this amendment should – in view of Decision 1 (1995) – have already been incorporated in Decision 2 (1997).
[93]Report of the 39th (2016) ATCM, paras 92–98.
[94]Information provided by a Dutch government official on 9 April 2021.
[95]The Report of the 39th (2016) ATCM, para. 332, seems to imply this.
[96]Included in the Attachment to doc. ATCM 40, WP 3, 6 April 2017.
[97]See note 91.
[98]Ibid. for other changes.
[99]Cf. doc. ATCM 40, WP 3, 6 April 2017, 4 ('it was understood').

done by codifying the existing practice on their application.[100] This enhances transparency and facilitates equal treatment between applicants. The main feature of the existing practice is that – ever since ATCP status was accorded to the Netherlands in 1990 – establishing a scientific station is not required. This is reflected in paragraph (d) which cites the phrase 'during [. . .] expedition' of Article IX(2) of the Treaty, while adding that 'these examples are non-exhaustive'.[101]

The substantive core of the 2017 Guidelines is mainly laid down in paragraphs (e)-(h), which cover different components of science and offer various examples:

> (e) 'a description of all scientific programmes and activities performed in or on Antarctica during the last ten years'. Several of the examples offered (e.g. publications 'that scored well in a science citation index') are aimed at facilitating assessment in quantitative and qualitative terms. Paragraph (l) also notes that full membership of SCAR and participation in 'SCAR related scientific activities will be considered an important indicator of involvement in Antarctic science';
> (f) 'all information that points to sustained contributions to science';
> (g) 'a description of all the planning, management and execution of its scientific programmes and logistical support activities in Antarctica'. Paragraph (l) also notes that full membership of the Council of Managers of National Antarctic Programs (COMNAP) will be considered a positive indicator in this regard; and
> (h) 'details about its ability and willingness to promote international cooperation'.

As argued above, the 2017 Guidelines are above all a matter of codification. Some of this can also be regarded as 'subsequent practice' within the meaning of Article 31(3)(b) of the VCLT.[102] One example in this regard are the words 'in or on Antarctica' in paragraph (e), which seem to imply that science does not have to be performed physically in Antarctica in order to be relevant.[103] This marks a departure from the restrictive term 'there' in Article IX(2) of the Antarctic Treaty, and recognises the enormous evolution that has occurred in science since the Treaty's adoption in 1959.

Decision 2 (2017) and the 2017 Guidelines were applicable to Venezuela's second unsuccessful request for ATCP status in 2018.[104] The fact that Venezuela did not participate in the 42nd (2019) and 43rd (2021) ATCMs may indicate that it no longer pursues ATCP status for the time being. Belarus applied for ATCP status prior to the 43rd (2021) ATCM, which was held virtually.[105] Quite extraordinarily, the Belarusian application was not discussed at all.[106] This seems directly linked to the 2020 Belarusian presidential election – which many States regard as having been fraudulent – and the forced landing of Ryanair Flight 4978 at Minsk on 23 May 2021 to arrest opposition

[100]See the Report of the 40th (2017) ATCM, para. 92, which notes that the 2017 Guidelines 'did not attempt to generate new requirements' for future applicants.
[101]The ICG's proposal (note 96) had a dedicated preambular paragraph on this. See also para. (k) of the 2017 Guidelines.
[102]See notes 46 and 49 and accompanying text.
[103]Otherwise, the 2017 Guidelines consistently use 'in Antarctica'. See also the words 'in the field or in laboratories' under para. (h).
[104]Report of the 41st (2018) ATCM, paras 32–34.
[105]Doc. ATCM 42, IP 5, 13 April 2021.
[106]Information provided by a Dutch government official on 18 August 2021.

activist and journalist Roman Protasevich. Belarus may apply once again in the future. Other Acceding States with an interest in obtaining ATCP status appear to be Canada, Pakistan, Portugal and Turkey.[107]

Conclusions

The Antarctic Treaty was negotiated as a stand-alone instrument, outside the auspices of an existing intergovernmental body. This gave the States involved in the negotiations (the Signatory States) a wide margin of discretion in determining the Treaty's arrangements on participation. They opted for a rather unique arrangement, whereby Acceding States are not automatically also full participants (i.e. ATCPs) in the Treaty's main decision-making body (the ATCM).[108] For the basic ground and requirement for obtaining ATCP status, the Signatory States chose interest in Antarctica, demonstrated by engagement in scientific research. This corresponds with the only ground for invitation in the negotiations that the Signatory States had in common, and also has linkages with Antarctica's history of discovery and exploitation as well as the international law on acquisition of title to territory.

Following the Treaty's entry into force in 1961, the ground and requirements for obtaining ATCP status laid down in Article IX(2) were operationalised and applied by the Consultative Parties. Most importantly, in 1977 they asserted a mandate to assess and approve applications for ATCP status. This can, arguably, be justified by a combination of 'implied powers' and 'subsequent practice' within the meaning of Article 31(3)(b) of the VCLT. By contrast, stipulating the establishment of a permanent research station as a minimum requirement for ATCP status was not in line with the wording of Article IX (2). In light of the understandable desire to have equal treatment and a level playing field between new and existing ATCPs, however, it may still have been justifiable as 'subsequent practice'. The 1990 decision to approve the Netherlands' application for ATCP status without a permanent research station brought the application of Article IX(2) back in line with its text.

Whereas this 1990 decision – and various other minor decisions[109] – amounted to an easing of the requirements for ATCP status, the adoption of the Environmental Protocol in 1991 added a significant new requirement in its Article 22(4): becoming a party to the Protocol. This was fundamentally different from the political commitment on the approval of ATCM Recommendations that applicants for ATCP status were expected to make pursuant to SATCM 1 Decision I. The new approach is, arguably, nevertheless justified by the desire to ensure equal treatment and a level playing field between new and existing ATCPs in terms of their obligations. Due to the range and detail of the environmental issues covered by the Protocol, the obligations by which Acceding States become bound are very substantial, and also require implementation through the adoption of national laws and regulations.

[107]Based in part on information provided by a Dutch government official on 9 April 2021 and on Barrett, *International Governance of the Antarctic*, 469.

[108]Other examples are the CAMLR Convention and the CRAMA; see note 50. Some similarities also exist with the arrangements on participation by Cooperation Non-Contracting Parties in regional fisheries management organisations (see Molenaar, *Participation in Regional Fisheries Management Organizations*, 127–128).

[109]See notes 75 and 103 and accompanying text.

Decision 2 (2017) and the annexed 2017 Guidelines represent the most recent step in the evolution of the operationalisation of Article IX(2). The 2017 Guidelines are aimed at clarifying the requirements for obtaining ATCP status, which is mainly done by codifying the existing practice on their application. This enhances transparency and facilitates equal treatment between applicants. Concerns on transparency and equal treatment nevertheless remain. Applications for ATCP status are principally dealt with in Heads of Delegation meetings and decision-making by unanimity enables each ATCP to use its *de facto* veto for reasons that should not be part of the assessment. This is not just a hypothetical possibility but has in fact occurred on several occasions.[110] It is in this light also easy to understand why, in case an application is dismissed, there is no practice or requirement to provide the applicant with a written motivation for the dismissal. However, all these are, admittedly, very common practices on the admission of new participants to international bodies where an approval role exists.[111]

Concerns on equal treatment do not just exist between applicants, but also between existing ATCPs and applicants as well as between ATCPs. This is caused by the absence of any periodic assessment of the engagement in science by existing ATCPs, even though the phrase ‘during such time’ in Article IX(2) seems to envisage this. This is nevertheless highly unlikely ever to occur, due once again to decision-making by unanimity and the fact that the wording in Article IX(2) suggests that Signatory States are exempt. The latter is unlikely to be acceptable to other ATCPs.

The paper’s analysis of the operationalisation and application of the ground and requirements for obtaining ATCP status distinguishes between three periods. In the first period of 17 years between 1961 and 1977, seven States acceded; one of which (Poland) obtained ATCP status. The subsequent 17 years between 1978 and 1994 witnessed 25 new Acceding States and 13 new ATCPs, several of which had acceded during the same period. The remaining 27 years from 1995 until now saw 12 new Acceding States and (only) three new ATCPs. Two of these 12 new Acceding States – Belarus and Venezuela – applied for ATCP status, but without success.

It is generally accepted that the very modest increase in participation in the Antarctic Treaty during the first period was caused by resistance among the Signatory States. Criticism on the lack of openness, transparency and legitimacy of the Signatory States, as well as pressure exerted by the use of fishing power, eventually led to the admission of Poland as an ATCP in 1977. As noted above, this subsequently culminated in a significant increase in participation in the second period. During the last period, however, the pace of participation slowed down considerably, despite the fact that establishing a permanent research station has not been required since 1990. It is submitted that there are various reasons for this. These include at any rate the extensive obligations brought about by becoming a party to the Environmental Protocol, and the high-level expertise, capacity and costs associated with developing an adequate Antarctic research programme and maintaining this for a sustained period; even without a (permanent) research station. In light of the extensive obligations, requirements and costs associated with obtaining

[110] See notes 83 and 94 and accompanying text.

[111] For an exception see Art. 24(3) of the Convention on the Conservation and Management of High Seas Fisheries Resources in the North Pacific Ocean (Tokyo, 24 February 2012. In force 19 July 2015; text available at www.npfc.int), which requires ‘any Contracting Party that does not join the consensus [on a decision to invite a non-party to accede to the Convention] shall present to the Commission in writing its reasons for not doing so’.

ATCP status, and the limited tangible benefits (e.g. access to mineral resources) that this brings, it is also understandable that many States take the view that the costs (far) outweigh the benefits. The current number of 29 ATCPs is in that perspective still a significant share of the almost 200 States in existence today. It may be that only a major change in the current status quo in the ATS – for instance on the exploitation of mineral resources – is able to trigger a new increase in participation.

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Annexe.

Contracting parties to the Antarctic Treaty (chronological order)[112.]

Contracting party	Date of consent to be bound (Ratification (no mark); Succession (s); Accession; (a) Acceptance (A))	Date of ATCP status
United Kingdom	31 May 1960	23 June 1961
South Africa	21 June 1960	23 June 1961
Belgium	26 July 1960	23 June 1961
Japan	4 August 1960	23 June 1961
United States	18 August 1960	23 June 1961
Norway	24 August 1960	23 June 1961
France	16 September 1960	23 June 1961
New Zealand	1 November 1960	23 June 1961
Russian Federation	2 November 1960	23 June 1961
Argentina	23 June 1961	23 June 1961
Australia	23 June 1961	23 June 1961
Chile	23 June 1961	23 June 1961
Poland	8 June 1961 (a)	29 July 1977
Germany[1]	5 February 1979 (a)	3 March 1981
India	19 August 1983 (a)	12 September 1983
Brazil	16 May 1975 (a)	27 September 1983
China	8 June 1983 (a)	7 October 1985
Uruguay	11 January 1980 (a)	7 October 1985
Italy	18 March 1981 (a)	5 October 1987
Spain	31 March 1982 (a)	21 September 1988
Sweden	24 April 1984 (a)	21 September 1988
Korea (ROK)	28 November 1986 (a)	9 October 1989
Peru	10 April 1981 (a)	9 October 1989
Finland	15 May 1984 (a)	20 October 1989
Ecuador	15 September 1987 (a)	19 November 1990
Netherlands	30 March 1967 (a)	19 November 1990
Bulgaria	11 September 1978 (a)	5 June 1998
Ukraine	28 October 1992 (a)	4 June 2004
Czech Republic[2]	1 January 1993 (s)	1 April 2014
Denmark	20 May 1965 (a)	–
Romania	15 September 1971 (a)	–
Papua New Guinea	16 March 1981 (s)	–
Hungary	27 January 1984 (a)	–
Cuba	16 August 1984 (a)	–
Greece	8 January 1987 (a)	–
Korea (DPRK)	21 January 1987 (a)	–
Austria	25 August 1987 (a)	–
Canada	4 May 1988 (a)	–
Colombia	31 January 1989 (a)	–

(*Continued*)

[112]Based on information available at https://www.ats.aq/devAS/Parties?lang=e and https://www.state.gov/antarctic-treaty/ as at 20 August 2021.

(Continued).

Contracting party	Date of consent to be bound (Ratification (no mark); Succession (s); Accession; (a) Acceptance (A))	Date of ATCP status
Switzerland	15 November 1990 (a)	–
Guatemala	31 July 1991 (a)	–
Slovak Republic[2]	1 January 1993 (s)	–
Turkey	24 January 1996 (a)	–
Venezuela	24 March 1999 (a)	–
Estonia	17 May 2001 (a)	–
Belarus	27 December 2006 (a)	–
Monaco	31 May 2008 (a)	–
Portugal	29 January 2010 (a)	–
Malaysia	31 October 2011 (a)	–
Pakistan	1 March 2012 (a)	–
Kazakhstan	27 January 2015 (a)	–
Mongolia	23 March 2015 (a)	–
Iceland	13 October 2015 (a)	–
Slovenia	22 April 2019 (a)	–

[1]The German Democratic Republic acceded on 19 November 1974 and obtained ATCP status on 5 October 1987.
[2]Succeeded from Czechoslovakia, which had acceded on 14 June 1962.