An Overview on the Legal Framework on Antarctic Specially Protected Species and Its Application

In support of WP 24

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***Summary***

This IP provides supporting information for WP 24 *An Overview on the Legal Framework on Antarctic Specially Protected Species and Its Application*, submitted by the Delegation of China to the ATCM and the CEP meeting.

***Background***

As per Annex II to the Protocol on Environmental Protection to the Antarctic Treaty (hereinafter as “the Protocol”), Antarctic Specially Protected Species (hereinafter as “ASPS”) are a category of species that require special protection in comparison with other native Antarctic fauna and flora (Article 3 (4), Annex II). The ASPS was first devised in the 1964 Agreed Measures for the Conservation of the Antarctic Flora and Fauna (the *Agreed Measures*) and then incorporated in 1991 into Annex II to the Protocol. Since then, the *Guidelines for CEP Consideration of Proposals for New and Revised Designations of Antarctic Specially Protected Species under Annex II of the Protocol* (hereinafter as “the *Guidelines”*) was adopted in 2005, de-designation of Fur Seals and Ross Seals and designation of Southern Giant Petrel were considered from 2005 to 2007, and Annex II to the Protocol was revised in 2009. These discussion and practices offer precious opportunities to test the application of the rules. Some general agreements have been reached and are worth highlighting for the current discussion on Emperor Penguins.

**1. The evolution of the legal framework on ASPS**

The mechanism of ASPS was built on under the umbrella of Annex II to the Protocol. In 1999, the CEP noted its work on intersessional consideration of ASPS had shown that improvements could be made to the Annexes of the Protocol, and decided to conduct a rolling review the Annexes, starting at CEP V in 2002 with Annex II (paragraph 6, CEP II Report).Based on the consideration of CEP II/WP 24 *Specially Protected Species in Antarctica* presented by the UK in 1999, CEP III/WP 17 *Considerations about the protection of native Antarctic flora and fauna* presented by Argentina in 2000, and XII SATCM/WP18 *Specially Protected Species* presented by SCAR, **the CEP noted that Article 8 of Annex II of the Protocol requires Parties to keep under continual review measures for the conservation of Antarctic flora and fauna**, that Article 3 of Annex II needs clarification in relation to the nature of the special protection afforded by designation as an Antarctic Protected Species (paragraph 57, CEP III Report), and agreed established a ICG to analyse the candidate species, criteria and mechanism that could be used in the designation of ASPS (paragraph 58, CEP III Report) led by Argentina.

In 2002, after six rounds of discussions in 2 inter-sessional periods, Argentina presented the Final Report (ATCM XXV/WP38) to the CEP with the findings of the ICG and 10 recommendations (paragraph 39, CEP V Report,). The ICG agreed to support the use of IUCN criteria as a basis for assessing the need for special protection in the Antarctic continent, while if gaps existed in the IUCN criteria, specific Antarctic criteria may need to be developed (page 3, ATCM XXV/WP38). The specific criteria of “*Vulnerable*” or higher within the IUCN Red List scheme was recommended for designating Antarctic ASPS. The ICG also recognized that species facing different level of threat (vulnerable, endangered, or critically endangered) are likely to require different measures of management or protection (page 4, ATCM XXV/WP38), and identified 3 general elements that are key to different options of management/conservation: 1) identify causes of decline and possible measures to reverse such declines; 2) increased restrictions on taking or harmful interference as the level of endangerment increases; 3) more intensive review of the ASPS status as the level of endangerment increases (page 6, ATCM XXV/WP38).

The CEP agreed that the findings of the group provided a sound basis for resolving the matter (paragraph 40, CEP V Report), and that the IUCN Red List should be used as the basis for SCAR’s assessment of the status of species in Antarctica (paragraph 43, CEP V Report). The ATCM adopted Resolution 1 (2002) requesting SCAR to review the current status of all species which occur in Antarctic Treaty Area in a stepwise approach, taking into account that the CEP has noted the need to assess the status of native species to justify designation as ASPS, on the basis of IUCN criteria used to evaluate designation as at least Vulnerable in the IUCN Red List Scheme.

In 2005, The *Proposal to List a Species as a Specially Protected Species under Annex II* (ATCM XXVIII/WP034) submitted by SCAR to ATCM/CEP proposed that the IUCN internationally agreed criteria for endangerment should be used for the selection of species to be considered for special protection. and that species assessed to be in the Critically Endangered, Endangered and Vulnerable categories should be considered as at high risk of extinction within three generations and therefore suitable for designation as ASPS; species considered Near Threatened should be considered for monitoring initiatives (Recommendations b-d, ATCM XXVIII/WP34). The SCAR paper also proposed that a recommendation to the ATCM for designation of ASPS would initiate the development of an Action Plan for the species (Recommendation e, ATCM XXVIII/WP34). To ensure that proposals for ASPS are handled in a consistent manner, the CEP developed the *Guidelines* (paragraph 122, CEP VIII Report), which was then endorsed by ATCM (paragraph 82, ATCM XXVIII Report).

In 2002, Argentina presented another important working paper (ATCM XXV/WP7) *Annex II： Reasons for a Review*, identifying issues of Annex II needed to be addressed, e.g. what Antarctic species are protected? from what (human activities/actions that might become a threat) is it protected? How (what mechanism) is it protected? The CEP then decided to establish an ICG in 2002 to advance the review of Annex II to the Protocol, and agreed in its review of Annex II it would take into account the final report and recommendations in ATCM XXV/WP8 of the ICG on ASPS. After years of intensive review, negotiation and practices, including on the ASPS, the ATCM finally adopted an amendment of Annex II to the Protocol in the form of Measure 16 (2009). The new version of Annex II includes a more detailed rules and procedure for the designation and implementation of ASPS, which entered into effect on December 8, 2016.

**2. Legal Framework on ASPS**

*1) Legal Framework provided for in Annex II of the Protocol*

Article 3 of Annex II Conservation of Antarctic Fauna and Flora to the Protocol on Environmental Protection to the Antarctic Treaty provided for the legal framework for the designation and implementation of ASPS.

Pursuant to Annex II to the Protocol, taking or harmful interference with native fauna and flora shall be prohibited, except in accordance with a permit issued by an appropriate national authority and under a limited number of circumstances (Article 3 (1-3), Annex II).

Annex II allows for the designation of Antarctic Specially Protected Species (Article 3 (4), Annex II). *A permit shall not be issued to take an ASPS unless it is for a compelling scientific purpose and will not jeopardise the survival or recovery of that species or local population* (Article 3(8)). Furthermore, the use of lethal techniques on Specially Protected Species shall only be permitted where there is no suitable alternative technique (Article 3 (9), Annex II). All taking of native mammals and birds shall be done in the manner that involves the least degree of pain and suffering practicable.

Annex II also provides for the criteria and procedure for the designation of ASPS. *The designation of a species as an ASPS shall be undertaken according to* *agreed procedures and criteria adopted by* the ATCM (Article 3 (5), Annex II). The CEP shall review and provide advice on the criteria for proposing native mammals, birds, plants or invertebrates for designation as an ASPS (Article 3 (6), Annex II). Any Party, the CEP, SCAR or CCAMLR may propose for designation by submitting a proposal with justification to the ATCM (Article 3 (7), Annex II). Proposals for the designation of a species as an ASPS shall be forwarded to the CEP, SCAR and, for native mammals and birds, the CCAMLR, and as appropriate, ACAP and other organisations. *In formulating its advice to the ATCM on whether a species should be designated as an ASPS, the CEP shall take into account any comments provided by the SCAR, and, for native mammals and birds, the CCAMLR,* and as appropriate, the ACAP and other organisations (Article 3 (10), Annex II). Each Party shall make publicly available information on prohibited activities and ASPS to all those persons present in or intending to enter the Antarctic Treaty Area with a view to ensuring that such persons understand and observe the provisions of this Annex (Article 5, Annex II).

*2) the agreed procedures and criteria contained in the Guidelines*

In 2005, the CEP adopted the *Guidelines* (Annex 8, CEP VIII Report), which provide that proposals for new designations of species as ASPS should include scientific justification and a draft Action Plan using the attached template as a guideline, to the extent possible with available data and knowledge (paragraph 1, the *Guidelines*).

On receipt of a proposal, the CEP should invite SCAR to assess the status of the species, using the most up-to-date IUCN criteria to assess the risk of extinction of the species (paragraphs 2 and 3, the *Guidelines*). *If SCAR’s assessment determines that the species is at significant risk of extinction (e.g., the conservation status is determined to be “vulnerable” or higher), then the CEP should recommend ASPS designation to the ATCM* and *initiate a process to finalise the Action Plan for the species*, in accordance with the guideline (paragraph 4(a), the *Guidelines*).

*The CEP should determine whether other authorities or organisations have a role in protective action and should consult accordingly*. For species of interest to CCAMLR or ACAP, *the CEP should forward the proposal and the draft Action Plan, and any advice from SCAR, to CCAMLR or ACAP for advice on practical measures* to provide special protection. The Action Plan should be finalised taking account of advice from any authority or organisation as appropriate and reported to the next meeting.

The *guidelines* provide useful informationconcerning the proposed assessment process for species proposed for designation, revision or de-listing as an ASPS. The guidelines also contain a *Guideline template of an Action Plan for a species proposed for designation as an Antarctic Specially Protected Species*, which provides useful guidance for the preparation of an Action Plan. The template presents a mechanism to provide special protection to ASPS consisting of a guiding overall goal, several specific objectives and actions, which mainly focus on downgrade of the threatened status/degree of endangerment by quantifying, reducing and managing threats, targeted research and monitoring of populations, review and revise the Action plan every 5 years, etc.

*3) inconsistency between Annex II and the Guidelines*

There is some inconsistency between the Guidelines adopted in 2005 and the new version of Annex II amended in 2009 and entered into effect in 2016. For example, Annex II to the Protocol requires that the designation of a species as an ASPS shall be undertaken according to agreed procedures and criteria adopted by the ATCM, e.g. the *Guidelines*. Proposals for designation of native mammals and birds as ASPS shall be forwarded to the CCAMLR, and as appropriate, the ACAP, and the CEP shall take into account the comments provided by the SCAR, and the CCAMLR, ACAP *in formulating its advice to the ATCM on whether a species should be designated as an ASPS*. While the *Guidelines* require the CEP to forward the proposal and the draft Action Plan, and any advice from SCAR, to CCAMLR or ACAP for advice *only on practical measures to provide special protection*. Although it is clear that the Annex II will prevail on such matters, the existence of inconsistency will still cause problems in its application. Therefore, review and harmonization are needed to avoid conflict before any future designation.

**3. Practices on the Antarctic ASPS**

The ATCM had considered the status of several species drawing upon the recommendations from the CEP as well as scientific advices from SCAR, since the adoption of the *Guidelines* in 2005. As a result, the ATCM de-listed Antarctic Fur Seals (genus *Arctocephalus*) by adoption of Measure 4 (2006), maintained the status of Ross Seals (*Ommatophoca rossii*) as ASPS, and adopted Resolution 4 (2007) and Resolution 2 (2007) with respect to continuation of the research and review of the status of the Southern Giant Petrel. Such practices provided valuable precedents and experiences for the future consideration of ASPS status.

*1) The application of IUCN criteria in the designation of ASPS*

SCAR has emphasized the application of 4 critical characteristics for assessment of the degree of threat or endangerment for all species it proposed with the use of IUCN Red List criteria, in accordance with the assessment process outlined for listing or de-listing species in the *Guideline* (Annex 8 of the Report of CEPVIII): (a) how large is the population and is it, either globally or regionally, increasing or decreasing? (b) is the geographic spread increasing or decreasing? (c) is the breading population sufficient to ensure breading success each year? (d) are there any known threats to the stability of the population? (paragraphs 12-15, ATCM XXIX/WP39; paragraphs 15-19 ATCM XXIX/WP38; paragraphs 9-14, ATCMXXX/WP27)

SCAR also reiterated the following scientific perspective in the designation of ASPS in its proposal to list the Southern Giant Petrel (paragraph 9-11, ATCM XXIX/WP38), echoing to its previous general proposal (paragraphs 9-1, ATCM XXVIII/WP34,) and the findings of the ICG on ASPS on the use of IUCN criteria to designate ASPS (page 4, ATCM XXV/WP38): (a) it is considered appropriate on conservation grounds to be able to designate species in all three threatened categories (Critically Endangered, Endangered and Vulnerable) as ASPS, and to establish monitoring schemes for those species evaluated as Near Threatened in order to provide early warning of possible worsening conservation status; (b) The ASPS category should be applied for the whole Antarctic population of any species. The species not endangered at a global level but show regional decreases within the Antarctic, may be protected by practical local means instead of designation as an ASPS; (c) Designating ASPS in cases where not enough information is available (the precautionary approach applied for Data Deficient species) is not considered appropriate, such concern for these species should initially trigger new efforts to obtain the necessary information on the distribution, abundance, and where possible, trends in extent and population, upon which an informed judgement can be based through the application of the IUCN criteria. The regular review of all Antarctic bird species will provide a timely indication of which species are in need of urgent study.

*2) the de-listing of Antarctic Fur Seals (genus Arctocephalus)*

All Antarctic Fur Seals was designated as ASPS because they had been previous hunted almost to extinction in accordance with *the Agreed Measures for the Conservation of the Antarctic Flora and Fauna* in 1966, and be automatically incorporated into the list of ASPS in Annex II to the Protocol (paragraphs 2-3, ATCM XXVIII/WP33). After the *Guidelines* was adopted in 2005, SCAR presented to the ATCM the *Proposal to De-list Antarctic Fur Seals as Specially Protected Species* (ATCMXXIX/WP39), noted Fur Seals are not on the IUCN Red List, recommended that Special Protection for a species is normally used as a temporary designation to allow for special measures for the recovery of the population under threat, and proposed to remove them from the list of ASPS under Annex II to the Protocol on the basis of population estimates, the continuing upward trend for the population, the continuing extension of the geographical area inhabited and the lack of any threats to the stability of the populations. SCAR provided an estimated sizes and trends of Antarctic and Sub-Antarctic Fur Seal population on the basis of each main habitat sites, and analyzed the threat to the fur seals as following:

*(for Antarctic Fur Seal) There are no identifiable threats to the species vitality although changes in krill availability linked to ENSO have been observed to cause significant pup mortality in occasional years. Commercial fishing activities have recorded mortalities of fur seals in nets of less than 10 per annum and there are occasional cases reported of entanglement in marine debris, which may lead to death. Changes in the marine ecosystem linked to global climate change may force foraging and breeding changes in the next 100 years but these cannot yet be predicted. (for sub-Antarctic Fur Seal) There are no significant threats to this top predator. Very small numbers may die by entanglement in fishing nets or in marine debris but insufficient to have any effect of the population growth* (Appendix A and Appendix B, ATCM XXIX/WP39)*.*

The CEP considered that the scientific advice outlined in WP39 was comprehensive, consistent with the *Guidelines* adopted at CEP VIII, and sufficient to inform a decision to propose delisting (paragraph 143, Report of CEP VIX). The ATCM decided to de-list fur seals (Measure 4 (2006)), recognizing that fur seals would continue to receive the comprehensive general protection afforded to all seal species under the Protocol, and that they would not be exposed to any potential threat of commercial exploitation in the future as a result of their delisting (paragraph 85, ATCM XXIX Report).

*3) the maintenance of the status of Ross Seals as the ASPS*

The Ross Seals was designated as ASPS in 1966 because they appeared to be exceptionally rare and very little was known about them, and be then automatically incorporated into the list of ASPS in Annex II to the Protocol (paragraph 2-3, ATCM XXVIII/WP33). In 2007, SCAR presented ATCMXXX/WP27 *Current Status of the Ross Seal (Ommatophoca rossii): A Specially Protected Species under Annex II*, noted the Ross Seal was listed as Lower Risk, Least Concern on the IUCN Red List, and recommended its status as an ASPS unchanged but further information should be collect. SCAR accepted that a change in a species’ protection status should only take place where sufficient data are available on which to base such a decision, and considered that the de-listing should also only be considered where data on which to base such a decision are sufficient (paragraphs 8, 11 and 15, ATCMXXX/WP27). The CEP agreed that the status of Ross Seal remain as an ASPS. The species is now still categorized as Least Concern (LC) on the IUCN Red List based on the latest assessment in 2014 (IUCN Red List website).

*4) the consideration of Southern Giant Petrel*

In 2006, SCAR presented ATCM XXIX/WP38 *Proposal to List Southern Giant Petrel as a Specially Protected Species under Annex II*, noted that the Southern Giant Petrel was globally listed as Vulnerable on the Red List by Birdlife International, and recommended that Southern Giant Petrel be considered for designation as an ASPS. SCAR noted that such a listing requires the preparation of a Protection Action Plan in accordance with the Guideline, and that a similar management plan drawn up by Australia could be used as an initial basis for the development of a draft. SCAR analyzed the threat to the fur seals as following:

*A significant threat to Southern Giant Petrels is mortality via long-line fishing. 'Incidental catch (or by-catch) of seabirds during oceanic long-line fishing operations' is an increasingly important source of loss in many Southern Ocean bird populations. On some of their breeding islands, Southern Giant Petrels are threatened by predation from Feral Cats and Black Rats, and by habitat degradation from introduced Reindeer, Sheep and Rabbits. Human disturbance, both from tourism, science and logistic operations also results in breeding failure. Environmental changes potentially exacerbate the impact of threats to the Southern Giant Petrel. A recent southerly shift in the Antarctic Polar Frontal Zone has resulted in increased sea and air temperatures and may have altered up-welling patterns and hence marine prey availability* (Appendix 1, ATCM XXIX/WP38)*.*

The ATCM noted that the CEP is keeping under review of the status of Southern Giant Petrel, recognized that the species was globally listed as Vulnerable by the IUCN, recalled SCAR’s advice that the species meets the IUCN criteria for it to be listed as Critically Endangered in the Antarctic Treaty Area, noted the recent data on the species at South Orkney Island indicating a larger global population may prompt a reappraisal of the IUCN status category, and recalled that the CEP *Guidelines* adopted in 2005 provided for assessment of the status of species at a regional or local level, recommended that SCAR undertake a further review of the status of Southern Giant Petrel, and activities in Antarctic should be planned to avoid negative impacts on Southern Giant Petrel, in particular on the breading colonies (Resolution 4 (2006)).

In 2007, SCAR withdrawn its working paper, because the complexity over the scarcity of data, the lack of review of data that are available, and the inability of experts to reach consensus, meant that SCAR could not offer the CEP a clear, scientifically defensible statement about the status of the regional population of the Southern Giant Petrel (paragraph 235-237, CEP X Report). ATCM recalled again that the *Guidelines* adopted in 2005 provided for assessment of the status of species at a regional or local level, and further recognized that Southern Giant Petrel was down listed from *Vulnerable* to *Near Threatened* by IUCN, then Recommended that all parties are encouraged to make available existing scientific data and results to SCAR and to implement new research, and SCAR to complete a review as soon as practical in collaboration with other relevant bodies such as CCAMLR (Resolution 2 (2007)). The species has been further downgraded as Least Concern (LC) on the IUCN Red List in 2009, and maintained this status so far based on the latest assessment in 2018.

**4. Observations and recommendations:**

*1) Observations*

By reviewing the legal framework and examining the ATCM and the CEP practices, **the following observations** **on the practices, *inter alia*, are evident:**

(a) the conservation status of *Vulnerable* or higher using the most up-to-date IUCN criteria is a threshold for potential designation on which basis the ATCM and the CEP will consider to list or de-list a species as an Antarctic ASPS, e.g. proposal to de-list Fur Seals, proposal to list Southern Giant Petrel.

(b) being or not being listed as *Vulnerable* (or higher) in the IUCN Red List is a prerequisite but not a sufficient condition to list or de-list a species as ASPS. A species would not be automatically listed as an ASPS because it is been categorized as *Vulnerable* in the IUCN Red List (e.g. Southern Giant Petrel), or be de-listed because it has been categorized as *Lower Risk/Least Concern* (e.g. Ross Seal). The ATCM and the CEP decision-making and consultation process is independent from IUCN and will consider more scientific and management elements (e.g. both species above), as well as the interest of other organizations.

(c) the effects of long-term climate change have been considered in the threat analysis, but has not been considered a sufficient condition or determining elements to list or de-list a species (e.g. Fur Seals and the Southern Giant Petrel). In the past practices, only the observed population trends and the threats from human activities (e.g. commercial exploitation of Fur Seals) have been used as the determining condition for listing or de-listing species.

(d) Special Protection for a species is normally used as a temporary designation to allow for special measures for the recovery of the population under threat, once the species is no longer endangered or threatened the designation is removed (e.g. Fur Seals).

(e) the general protection already afforded by Annex II to the Protocol, and/or by other Annexes of the Protocol or international treaties, is a legitimate consideration for listing or de-listing ASPS.

(f) the ASPS category should be applied for the whole Antarctic population of any species, in which case a thorough assessment at the regional level (Antarctica) on sound scientific evidence is critical. Any change in a species’ protection status should only take place where sufficient data are available on which to base such a decision (e.g. Ross Seal); monitoring schemes should be established for those species evaluated as Near Threatened (e.g. Southern Giant Petrel), and new research efforts should be triggered for data deficient species, in order to provide early warning by obtaining necessary data and information.

(g) Species facing different level of threat (vulnerable, endangered, or critically endangered) are likely to require different measures for management or protection. To quantify and reduce threats, a potential action-focused Species’ Recovery Plan would better to consider the following elements: 1) identify causes of decline and possible measures to reverse such declines; 2) increased restrictions on taking or harmful interference as the level of endangerment increases; 3) more intensive review of the ASPS status as the level of endangerment increases.

*2) Recommendations:*

**It is recommended that the ATCM and the CEP:**

1) re-confirm the importance of designating ASPS in consistent with Annex II to the Protocol and the *Guidelines,* particularly the conservation status of *Vulnerable* or higher as the threshold for the consideration of the potential designation, and the procedure for consideration of ASPS proposals, including the consultation procedure with other related organizations:

2) align the future designation of ASPS with the previous the ATCM and the CEP practices, particularly on the application of criteria and approach on the basis of adequate scientific information;

3) encourage SCAR to assess the risk of extinction of the species that have the potential to be designated as ASPS, using the most up-to-date IUCN criteria in consistent with its previous practice;

4) review and harmonize the inconsistency between the *Guidelines* and the Annex II to the Protocol.

**Reference:**

Argentina, Annex II: Reasons for a Review, ATCM XXV/WP7, 2002.

Argentina, Final Report of the Inter-sessional Contact Group on Specially Protected Species in Antarctica, ATCM XXV /WP38, 2002.

SCAR, De-listing Antarctic Specially Protected Species, ATCM XXVIII/WP33, 2005.

SCAR, Proposal to List a Species as a Specially Protected Species under Annex II, ATCM XXVIII/WP34, 2005.

SCAR, Proposal to List Southern Giant Petrel as a Specially Protected Species under Annex II, ATCM XXIX/WP38, 2006.

SCAR, Proposal to De-list Antarctic Fur Seals as Specially Protected Species, ATCM XXIX/WP39, 2006.

SCAR, Current Status of the Ross Seal (*Ommatophoca rossii*): A Specially Protected Species under Annex II, ATCMXXX/WP27, 2007.

IUCN Red List website, at <www.iucnredlist.org/species/15269/45228952>, visited on April 5, 2022.