

10-1-1989

Evaluating the Antarctic Minerals Convention: The Decisionmaking System

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Recommended Citation

Bernard H. Oxman, *Evaluating the Antarctic Minerals Convention: The Decisionmaking System*, 21 U. Miami Inter-Am. L. Rev. 17 (1989)
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EVALUATING THE ANTARCTIC MINERALS CONVENTION: THE DECISION-MAKING SYSTEM†

BERNARD H. OXMAN*

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† This article was originally prepared as a study for the Congress of the United States, Office of Technology Assessment, to which the University of Miami Inter-American Law Review is grateful for their permission to reprint this revision of the study.

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I. INTRODUCTION: THE ANTARCTICA TREATY SYSTEM AND CURRENT ISSUES

The purpose of this article is to analyze the decision-making system set forth in the Convention on the Regulation of Antarctica Mineral Resources¹ (the "Convention"), and certain related issues, in order to contribute to the evaluation of the Convention, particularly from the perspective of the United States. Any complete evaluation of the Convention must include an analysis of factors external to the Convention itself, the objectives the Convention purports to achieve, the reasons behind its negotiation at this time, and any alternatives to the Convention.

Since the conclusion of the Antarctic Treaty (the "Treaty") in 1959,² relations between states regarding Antarctica have been relatively tranquil.³ States have maintained this tranquility despite the existence of fundamental legal and political differences regarding the status of Antarctica and the rights of states and private

1. Convention on the Regulation of Antarctic Mineral Resource Activities, *opened for signature* Nov. 25, 1988, 27 I.L.M. 859 [hereinafter Convention].

2. Antarctic Treaty, Dec. 1, 1959, 12 U.S.T. 794, T.I.A.S. No. 4780, 402 U.N.T.S. 71.

3. See Negroponte, *The Success of the Antarctic Treaty*, DEP'T ST. BULL., June 1987, at 29.

parties to use and regulate this area.⁴

When entering into any discussion of the Antarctic Treaty system, one must bear in mind three basic political facts about Antarctica. First, seven foreign states have made territorial claims that, taken together, cover most of Antarctica; some of these claims overlap.⁵ Second, the United States, the Soviet Union, and other non-claimants do not recognize these claims, and assert a right, subject to their treaty obligations, for themselves and their nationals to conduct activities anywhere in Antarctica without the consent or control of a foreign government.⁶ Finally, the United States and the Soviet Union believe that they each have a basis for making a claim over Antarctica.⁷

These facts give rise to three potential sources of conflict: disputes between existing or future territorial claimants with overlapping claims; disputes between territorial claimants and states that do not recognize the claims; and disputes between rival powers for strategic superiority in Antarctica.

The Antarctic Treaty attempts to minimize existing sources of conflict, avoid new sources of conflict, and provide a framework for cooperation in the common interest of states. The treaty achieves these objectives by essentially demilitarizing Antarctica,⁸ opening all Antarctic areas and stations to inspection,⁹ providing for freedom of scientific research,¹⁰ prohibiting new territorial claims or enlargements of existing claims,¹¹ and establishing a system for consultation and regulation of activities by concerned states for scientific, environmental, and other purposes.¹² The Treaty does not, however, resolve the underlying differences regarding territo-

4. For general discussions of these differences, see Bilder, *The Present Legal and Political Situation in Antarctica*, in *THE NEW NATIONALISM AND THE USE OF COMMON SPACES* (J. Charney ed. 1982); *The International Legal Regime for Antarctica*, 19 CORNELL INT'L L.J. 155 (1986).

5. See G. TRIGGS, *THE ANTARCTIC TREATY REGIME* 51 (1987). Argentina, Australia, Chile, France, New Zealand, Norway, and the United Kingdom are the states laying claim to parts of Antarctica. The claims of Argentina, Chile, and the United Kingdom overlap. Part of Antarctica is unclaimed. For a discussion of these competing claims, see also Burton, *New Stresses on the Antarctic Treaty: Toward International Legal Institutions Governing Antarctic Resources*, 65 VA. L. REV. 421, 458-72 (1979).

6. G. TRIGGS, *supra* note 5, at 53.

7. *Id.*

8. Antarctic Treaty, *supra* note 2, art. I.

9. *Id.* art. VII.

10. *Id.* art. II.

11. *Id.* art. IV(2).

12. *Id.* art. IX.

rial claims, but rather sidesteps the problem.

Apart from inspection for purposes of verifying compliance,¹³ perhaps the only use of Antarctica expressly permitted by the Treaty is scientific research.¹⁴ Any time a state contemplates a use not provided for in the Treaty, it raises a question of the power to authorize and regulate that use. This question, in turn, re-opens the underlying problem posed by the territorial claims: claimants assert the right to control all activities in the claimed areas (except as otherwise agreed), while states that do not recognize the claims assert a right for themselves and their nationals to conduct any activity in Antarctica without foreign interference (except as otherwise agreed).

This problem arose some years ago in connection with fishing off Antarctica. Increased interest in commercial exploitation of Antarctic marine living resources¹⁵ and recognition of the right of a state to regulate fishing within 200 miles of its land territory¹⁶ created a need to agree on a system of regulation not only for conservation purposes but also to avoid a dispute over the territorial claims that could threaten the stability of the Antarctic Treaty system. By bringing together the territorial claimants and the states interested in fishing and conservation in a single regulatory system, the Convention on the Conservation of Antarctic Marine Living Resources,¹⁷ like the Antarctic Treaty, side-stepped the problem posed by conflicting positions regarding territorial claims.

The question of extracting hydrocarbons and minerals from Antarctica poses some of the same issues. There are significant differences, however. Existing technical and economic data indicate that Antarctic hydrocarbons and hard minerals, both on land and in the adjacent continental shelf, cannot be extracted, transported, and delivered to market at competitive prices, absent one or more additional factors such as substantial increases in prices, an unusually large and valuable deposit, or sizable government subsidies.¹⁸

13. *Id.* art. VII.

14. *Id.* art. II.

15. See Mitchell, *Undermining Antarctica: A Part to Regulate Mineral Exploitation in Antarctica Threatens that Unique Environment*, *TECH. REV.*, Feb.-Mar., 1988, at 48, 52.

16. See Orrego Vicuña, *The Law of the Sea and the Antarctic Treaty System: New Approaches to Offshore Jurisdiction*, in *THE ANTARCTIC LEGAL REGIME* 97, 99 (C. Joyner & S. Chopra eds. 1988).

17. Convention on the Conservation of Antarctic Marine Living Resources, May 20, 1980, art. III, 33 U.S.T. 3476, T.I.A.S. No. 10240.

18. See Dugger, *Exploiting Antarctic Mineral Resources—Technology, Economics and*

If an imminent market for Antarctic minerals is improbable, one might argue that there is no immediate need for a regulatory system for mining to protect either the investor or the environment. In the absence of such a market, perhaps the United States need not worry that an interest in minerals could stimulate political and legal disputes that might disrupt the stability of the Antarctic Treaty system. However, one should bear in mind that this is not entirely the case.

Commercial prospecting does not necessarily require the sizable investments demanded by intensive exploration and mining. Indeed, there is reason to believe that oil and hard-minerals companies have some interest in increasing their understanding of Antarctica's resource potential in the near future.¹⁹ Although commercial prospecting does not normally require a legal system for protecting investments in a particular site, it raises fundamental questions concerning the legal right to prospect and environmental regulation. In theory, any territorial claimant might regard its existing mining laws as applying to all of its territory, including its Antarctic territory. Yet if these claimants attempted to exclude or regulate foreign prospecting based on their territorial claims, they would provoke a dispute over the legal status of Antarctica.²⁰ Similarly, if a non-claimant attempted to authorize or support prospecting by its nationals in a claimed area, a dispute would also erupt.²¹ Either type of dispute would threaten the stability of the Antarctic Treaty system.

Especially where mineral resources are involved, the possibility of a disruptive dispute triggered by prospecting is significant. The ultimate object of mining is the physical removal of nonrenewable natural resources that claimant governments may even regard as state property.²² Mining also may entail significant alteration and risk of degradation of the claimed area.²³ Thus one might expect the territorial claimants to be more sensitive about activities

the Environment, 33 U. MIAMI L. REV. 315, 339 (1978).

19. See 38 U.N. GAOR C.1 (42d mtg.) at 15, U.N. Doc. A/C.1/38/PV.42 (1983).

20. See *U.S. Antarctic Policy: Hearing Before the Subcomm. on Oceans & International Environment of the Senate Committee on Foreign Relations*, 94th Cong., 1st Sess. 1 (1975) (statement of Claiborne Pell, Chairman).

21. See Shapley, *Antarctica: World Hunger for Oil Spurs Security Council Review*, 184 Sci. 776 (1974).

22. See 38 U.N. GAOR C.1 (44th Mtg.) at 21, U.N. Doc. A/C.1/38/PV.44 (1983) [hereinafter 44th Mtg].

23. Mitchell, *supra* note 15, at 55.

preparatory to mining than many other activities. The possibility of a dispute over prospecting could be enhanced by the temptation to characterize or camouflage prospecting as scientific research permitted under the Antarctic Treaty.

Unless one side or the other abandons its basic political and legal position, consensus among the territorial claimants and other concerned states is essentially the only way to avoid a situation in which prospecting or other mining activities trigger an international dispute that destabilizes the Antarctic Treaty system.

Agreement on a moratorium, or even a permanent ban, on mining activities is the simplest option. It has considerable appeal to some environmentalists, including the popular oceanographer, Jacques-Yves Cousteau.²⁴ To the extent, however, that one regards a moratorium or permanent ban as either undesirable, or unlikely to be accepted by each of the states whose agreement is important, or unstable in the long run,²⁵ one is faced with the challenge of reaching agreement on the conditions under which prospecting or other mining activities may occur. The new Antarctic Minerals Convention²⁶ seeks to resolve the matter by expressly permitting prospecting activities with strict environmental limitations, and establishing rigorous political procedures and substantive conditions for lifting what amounts to a legally binding moratorium on exploration and development.

In addition to these considerations, members of the United Nations General Assembly have expressed an interest in the possibility of global negotiation over Antarctic mineral resources.²⁷ This very idea presents a challenge to the underlying premise of the Antarctic Treaty system, namely, limiting active participation in regulation to states with substantial interests and activities in Ant-

24. See Cousteau, *Mining Interests' Greedy Eyes Focus on Pristine Antarctica*, Miami Herald, Oct. 8, 1989, at 3C, col. 3.

25. If interests change, treaties can be denounced, amended, or replaced. Symbols apart, the precise difference between a treaty that allows no development and one that establishes rigorous conditions for a collective political decision to permit development is that the former is incompatible with a perceived change in interest, and thus risks a complete collapse with no regulation if important states perceive such a change in interest. Even the most ideologically committed authors of national constitutions nevertheless allow for flexibility and change in response to new developments and ideas. We must distinguish between protecting the future from the present and protecting the future from itself. Unless undertaken with great wisdom and sophistication, the latter exercise can easily descend into arrogance and futility.

26. See Convention, *supra* note 1.

27. See 44th Mtg., *supra* note 22, at 20.

arctica.²⁸ This challenge, at least potentially, endangers the stability achieved by the Antarctic Treaty system. To some degree, the decision to complete the Convention now, within the framework of the Antarctic Treaty system, was intended to forestall efforts to deal with the question in the United Nations or some other global forum.

The maintenance of political tranquility must, therefore, be viewed as a primary, although not exclusive, reason for the negotiation of the Convention. Absent some significant legal and political resistance to the territorial claims in Antarctica, it is unlikely that states will ever reach agreement on direct international regulation (or even prohibition) of mining for environmental or any other purposes. From this perspective, disputes over the territorial claims present not only a challenge but, to some observers, an opportunity to develop methods of international cooperation that can have a positive effect on international relations generally.

II. UNITED STATES INTERESTS

For purposes of analysis, United States interests affected by the Convention on the Regulation of Antarctic Mineral Resources can be divided into four general categories: economic interests; environmental interests; research and information interests; and political and strategic interests. Inevitably there is some tension between and among the different interests involved. Indeed, one can expect the Convention, like a domestic statute, to reflect judgments about the appropriate balance between conflicting domestic interests and the relative priority accorded to those interests. Also one can expect the Convention to include judgments about the appropriate balance between the interests of the United States and foreign states involved in the negotiation, and the relative priority accorded to those interests.

A. *Economic Interests*

As yet, it is unclear when extraction of Antarctic oil and gas or other mineral resources will prove attractive to investors. The answer will depend in large measure on prices for the particular commodity, alternative sources of supply, and the value of a given re-

28. See Oxman, *Antarctica and the New Law of the Sea*, 19 CORNELL INT'L L.J. 211, 213 (1986).

source deposit in comparison to the substantial investments required and risks posed by an extremely harsh and remote physical environment.

The United States shares with other consumers and importers of hydrocarbons and minerals²⁹ an interest in assuring that Antarctic resources are available for extraction in response to market forces in order to meet world demand at minimum prices. It may be argued that the very availability of this alternative source of supply is useful, even if it is never utilized. Mere availability could deter attempts to raise existing source prices to the point where development of Antarctic resources becomes economically attractive, or at least deter embargoes or other trade policies that could persuade a consumer nation to subsidize development of those resources.

The United States also has an economic (as well as political and strategic) interest in the diversity and security of its sources of supply of important commodities in order to avoid concentrated dependence on foreign sources that may be subject to political or military disruption or manipulation.³⁰ This interest generally points in the same direction as the consumer interest, although it may introduce a preference for greater involvement by American or allied companies. On the other hand, some domestic miners could be expected to argue that security of supply is best assured by encouraging investment in the United States rather than diverting capital to Antarctica. Alternatively, it might be argued that it is preferable to use less secure supplies first, and keep more secure supplies in reserve.

In addition, the United States has an interest in maximizing the opportunities for productive economic activity by its nationals. This interest would be advanced if the extraction and processing of Antarctic mineral resources generates jobs for American employees as well as direct or indirect revenues through the utilization of American products and services. Domestic producers of a commodity might, however, argue that the development of foreign sources of supply might prejudice this interest.

The United States also has an interest in minimizing the costs

29. See U.N. DEP'T OF INT'L ECONOMIC & SOCIAL AFFAIRS, 1986 ENERGY STATISTIC YEAR-BOOK, at 158, U.N. Doc. ST/ESA/STAT/SER/J/30, U.N. Sales No. E/F.88.XVII.3 (1988) for a listing of other consumers and importers of hydrocarbons and minerals.

30. See, e.g., *U.S. Self-Sufficiency Keyed to Offshore Speed Up*, 72 OIL & GAS J. 50 (1974).

of administering any system of governance for Antarctic mineral development. To the extent that these costs are not passed on to miners, the U.S. taxpayer will bear a percentage of the costs. If the costs are passed on to miners, the decrease in profitability may discourage investment.

In general, these economic interests suggest that the United States should pursue the following objectives with respect to the system governing Antarctic mineral resources:

1) facilitate investment in response to market forces by establishing necessary ground rules, ensuring predictability and security of investment, and otherwise minimizing the restraints on investors;

2) minimize the influence of governments or organizations hostile to consumer interests over the system of governance and the resources;

3) maximize the opportunity for investment by American companies; and

4) minimize the cost of the system of governance.

B. Environmental Interests

The Antarctic environment is unique, fragile, and largely unspoiled. Its ice comprises most of the world's fresh water.³¹ It supports wildlife in coastal areas and at sea.³² Marine mammals and birds migrate to the Antarctic from great distances and hunt for food. Increasing numbers of commercial fishermen are now joining them.³³

The possibility of drilling and mining in Antarctica implicates many environmental values. Preserving for present and future generations a vast wilderness on an increasingly settled and developed planet has aesthetic, scientific, and moral value in and of itself. Mineral development brings with it infrastructure and habitation that have unavoidable impacts on the environment.³⁴ Some mining techniques could alter the landscape for long periods.³⁵ A signifi-

31. D. SHAPLEY, *THE SEVENTH CONTINENT ANTARCTICA IN THE RESOURCE AGE* 1 (1978).

32. E. ORREGO VICUÑA, *ANTARCTIC RESOURCES POLICY* 26-43 (1983).

33. *Id.* at 4, 21.

34. See CENTER FOR OCEAN MANAGEMENT STUDIES, *ANTARCTIC POLITICS AND MARINE RESOURCES: CRITICAL CHOICES FOR THE 1980's*, at 205 (1984) [hereinafter *ANTARCTIC POLITICS*].

35. *Id.*

cant oil spill from a rig or tanker could destroy many creatures and despoil significant areas for a long time given the slow rate of decomposition in frigid climates.³⁶ The risks of accident in such a harsh climate are high.³⁷ Although much remains to be learned about the relationship of the Antarctic environment to the global environment,³⁸ we do know that substantial melting of Antarctic ice would submerge coastal areas around the world.³⁹

The interest in preserving the wilderness suggests that there should not be any development undertaken at all in the areas sought to be maintained. If all of Antarctica were to be so preserved, that might end the matter, at least in theory.⁴⁰ If only part of Antarctica is to be preserved as wilderness in which no mining may occur at any time under any circumstances, then a mechanism for selecting such areas is needed, and in the remaining areas the interest in avoiding significant environmental degradation suggests the need for a careful study of potential environmental impacts before activities are permitted. In addition, before any development is undertaken, substantial assurances of sound environmental practices by miners, as well as the capacity to avoid pollution and minimize its effects, are necessary.

At the same time, however, the environmental effects on other parts of the world of restricting mining in Antarctica must be taken into account. It is conceivable that diverting investment to alternative sources of supply could pose more immediate and perhaps more serious environmental problems in some cases. Whatever the substantive merits of a deliberate effort to control demand by imposing legal and political restraints on new sources of supply, the willingness of the public to support that strategy once its effects are perceived is open to doubt.

In general, and subject to the foregoing caveats, these environmental interests suggest that the United States should promote the following objectives with respect to the system governing Antarctic mineral resources:

- 1) maximize the control of environmentally sensitive govern-

36. Dugger, *supra* note 18, at 332.

37. See F. AUBURN, *ANTARCTIC LAW AND POLITICS* 251 (1982).

38. *ANTARCTIC POLITICS*, *supra* note 34.

39. See Zumberge, *Potential Mineral Resource Availability and Possible Environmental Problems in Antarctica*, in *THE NEW NATIONALISM AND THE USE OF COMMON SPACES* 117 (J. Charney ed. 1982).

40. See *supra* note 25.

ments and organizations over the decision to proceed with mining and the conduct of mining;

2) maximize the incentives to observe sound environmental practices;

3) maximize research and the disclosure of data about Antarctica; and

4) avoid direct or indirect incentives (such as the absence of taxes or royalties) that might make Antarctica more attractive for investment than other parts of the world.

C. Research and Information Interests

Because of its unique location and characteristics, and because it is largely unspoiled by man, Antarctica is a unique laboratory for scientific research. The information gained directly and indirectly from scientific research and other activities conducted there can greatly enhance our knowledge not only about Antarctica, but also about natural processes and phenomena generally. The quest for knowledge is an end in itself. Moreover, experience demonstrates that new knowledge, no matter how remote from practical use it seems at the time, may well become the basis for significant practical developments in the future.

Placing minimum restrictions on scientific research and encouraging the public release of data and information collected by scientists, miners, and others maximizes the availability of knowledge. At the same time, precluding or restricting human activity that might significantly alter the environment, including the activity of scientists, maximizes the unique value of Antarctica as a pristine natural laboratory.

In general, these interests parallel and reinforce the United States' environmental interests. They also suggest that the United States should pursue the following objectives with respect to the system governing Antarctic mineral resources:

1) minimize regulatory controls and interference with scientific research except as research activities might themselves impair scientific, environmental, and perhaps other important values in Antarctica;

2) maximize controls on mining activity in areas of scientific interest; and

3) maximize the incentives for disclosing data and information

about Antarctica.

D. Political and Strategic Interests

The system established by the Antarctic Treaty serves United States interests in stability,⁴¹ access to all of Antarctica now and in the future,⁴² participation in the regulation of Antarctic activities for environmental and other purposes,⁴³ and avoidance of conflict with the Soviet Union and others and the attendant expense such conflict might entail.

The greatest potential challenge to the system derives from the territorial claims. It would be naive to expect that the territorial claimants would accept significant United States participation in the governance of Antarctica if they thought perfection of their territorial claims could be achieved at an acceptable price. Indeed, Argentina and Chile are particularly subject to strong nationalistic pressures on the issue.⁴⁴

The challenge for United States policy is to discourage perceptions abroad that its opposition to the foreign territorial claims, and its position that it has a basis for a claim itself, is weakening or, as a legal matter, has been compromised.⁴⁵ The consequences of gradually encouraging expectations of success among the territorial claimants is an ultimate choice between direct confrontation or abandonment of our position.

The broadening interest in Antarctica generated by the possible existence of valuable minerals has posed another threat to the system's stability. This has manifested itself in increased attention to Antarctica in the United Nations General Assembly.⁴⁶

The key to the success of the Antarctic system has been limiting the participation in regulatory decisions to states that conduct activities there,⁴⁷ thus avoiding a dilution of influence by either the territorial claimants or the non-claimants principally involved in Antarctica. Once the decision-making group becomes too large,

41. ANTARCTIC POLITICS, *supra* note 34, at 28.

42. Antarctic Treaty, *supra* note 2, art. VII.

43. *Id.* art. IX ("agreed measures" provision).

44. See Alexander, *Legal Aspects: Exploitation of Antarctic Resources-A Recommended Approach to the Antarctic Resource Problem*, 33 U. MIAMI L. REV. 371, 377 (1978).

45. F. AUBURN, *supra* note 37, at 55, 65.

46. See Alexander, *supra* note 44, at 398.

47. See F. AUBURN, *supra* note 37, at 123.

unanimity is hard to achieve, while certain qualified majorities could be achieved even without the participation of states with significant types of interests.

Although real, this threat can be exaggerated. The reason is that most, if not all, states with significant interests in Antarctica,⁴⁸ including the territorial claimants, share our interests in avoiding a global decision-making system that does not adequately account for the particular stakes involved for certain states. Indeed, U.S. over-reaction to this threat could convince the territorial claimants that the United States would rather add credence to their claims than deal with the United Nations General Assembly.

It may also be argued that United States political interests are engaged by the fact that the Convention could be used as a precedent for other matters.⁴⁹ This argument might be true with respect to regulation of other activities in Antarctica itself. It is open to question, however, whether the Convention would serve as a useful precedent for international negotiations in other areas, largely because of the special situation posed by the conflicting positions regarding territorial claims, the remoteness of Antarctica from most of the world's other land masses, the influence of existing elements of the Antarctic Treaty System, and the harsh, fragile, and largely pristine environment.

The political and strategic interests set out above suggest the following objectives for the United States regarding the system governing Antarctic mineral resources:

- 1) maximize United States influence with respect to decisions concerning any part of Antarctica;
- 2) maximize the influence of states substantially affected by the decisions being taken;
- 3) avoid steps that could raise the expectations of the territorial claimants regarding special influence over their claimed areas; and
- 4) discourage demands for a global regulatory system.

III. RELATIONSHIP BETWEEN TEXT AND DECISION-MAKING POWER

The constituent instrument of an international organization

48. See Antarctic Treaty, *supra* note 2, art. IX.

49. G. TRIGGS, *supra* note 5, at 46.

normally seeks to protect underlying interests by detailing the powers of the organization, particularly its decision-making organs. A variety of techniques are used, usually in combination with each other. They include specific enumeration of decision-making powers, specific criteria and conditions for the exercise of those powers, and specific limitations and prohibitions regarding the exercise of those powers.

The text of the constituent instrument should be the starting point for an examination of the acceptability of any decision-making process. A provision for a decision by majority vote in a particular organ on a specific matter might be acceptable, but may be wholly unacceptable in a different organ or on a different matter.

The more difficult question in relying on the text in the area of institutional decision-making relates to the predictability that textual limitations will function as restraints on decision-makers. Words carved in stone can become elastic in the hands of lawyers, diplomats, and politicians.

Four factors are probably of principal significance in predicting the restraining impact of textual limitations:

1) Clarity of the Text. The clearer the textual limitation, the more difficult it is to evade. Precision and detail can be expected to vary from issue to issue and are not always desirable in a constituent instrument of an organization expected to function for a significant period of time.

2) Reliability of the Decision-makers. In the abstract, reliable decision-makers are ones who seriously attempt in good faith to remain within their textual mandate. In a more immediate sense, for the United States, reliable decision-makers are those who would likely agree with, or at least not strongly oppose, the United States' interpretation of the mandate.⁵⁰

3) Importance of the Issue. On one level, the more important the issue, the greater the temptation to veer from the text. However, where the issue is of great importance to a minority or even one state and may even affect its future cooperation or participation in the system, the majority may become very cautious. "Salamislicing" on issues of moderate importance may be a greater risk than catastrophic evasion of the textual mandate in the face of

50. See U.S. POLICY IN INTERNATIONAL INSTITUTIONS 160 (S. Finger & J. Harbert eds. 1982).

a strong objection. This tendency is particularly true if the dissenting state is important to the system and has the legal right and practical ability to withdraw or react in a significant way.

4) Legal Review. The domestic law of many countries subjects administrative agencies (and some legislatures) to judicial review on the question of whether their actions are consistent with their statutory or constitutional mandate. The same power can be accorded an international court or arbitral tribunal with respect to an international organization.⁵¹ The extent of the review and the reliability of the judges or arbitrators then become significant factors in predicting adherence to textual limitations on decision-making powers.

The first three of the aforementioned factors will be analyzed in connection with each decision-making organ. With respect to the fourth factor, the Convention contains a system for compulsory arbitration or adjudication of certain disputes between the states party.⁵² This system could prove useful when a state party may be violating the Convention, for example, by failure to fulfill its duty to supervise its operators for compliance with environmental requirements. In addition, the Convention contemplates the establishment of an arbitral mechanism⁵³ pursuant to which operators or miners can challenge certain decisions by a Regulatory Committee regarding their management schemes and permits.⁵⁴

A central difficulty is that the Convention text places significant constraints on the jurisdiction of any tribunal to review the exercise of discretion by an organ established by the Convention.⁵⁵ It is unclear how broadly a tribunal will interpret these constraints. They could be construed in a manner consistent with the traditions of many countries regarding judicial review of administrative agencies—that it is up to the reviewing tribunal to decide whether the organ had the power under the Convention to act or refrain from acting as it did,⁵⁶ but that it is not the function of the tribunal to substitute its judgment for that of the relevant political or administrative organ.⁵⁷ It is also possible for the constraints to

51. See J. MERRILLS, *INTERNATIONAL DISPUTE SETTLEMENT* 88 (1984).

52. Convention, *supra* note 1, art. 56(1)(b).

53. *Id.* arts. 56(1)(b),(3),(5), 57(3)(b).

54. See *id.* art. 57(2).

55. See *id.* art. 57(5).

56. See *id.* art. 57.

57. *Id.* art. 57(5).

be interpreted to require a tribunal to give complete deference to any decision of an organ that can be characterized as "discretionary."⁵⁸

This problem suggests the possible wisdom of including an interpretative statement, in any instrument of ratification, to the effect that the constraints on the jurisdiction of a tribunal to review the exercise of discretion by an organ established by the Convention do not preclude it from determining whether that organ had the power to decide as it did under the Convention, whether the decision violated a substantive or procedural provision of the Convention, or whether that organ otherwise exceeded or abused its powers.

IV. MEMBERSHIP AND VOTING ARRANGEMENTS IN DECISION-MAKING ORGANS

One can analyze objectives concerning membership and voting arrangements in international organizations with decision-making power from three different perspectives: legitimacy, efficiency, and influence. Like substantive interests, these organizational objectives conflict with each other to some degree and raise questions of accommodation and priorities.

A. *Legitimacy*

The question of the perceived legitimacy of any Antarctic minerals regime bears on two particular United States interests. The first interest is the economic and political objective of stability, which suggests that all states with a direct interest in the governance of Antarctic minerals activities—states that might have the capacity and will to disrupt any system they found objectionable—should be encouraged to participate in the system or, at the very least, to acquiesce in its operation.

The second interest, related to stability, is the political objective of protecting the existing Antarctic Treaty system and, in particular, discouraging challenges to the system in the U.N. General Assembly or other international fora. This interest suggests the need to accommodate the desires of states with less than substantial interests to participate in the system to a degree sufficient to

58. *Id.*

dissuade such states from attempting to undermine the legitimacy of the system.

B. Efficiency

Organizational arrangements that run efficiently would serve a variety of United States interests.⁵⁹ An efficient organization in the context of an Antarctic minerals regime is one that concentrates closely on its principal functions and the substantial interests involved and avoids political and ideological matters peripheral to those functions.⁶⁰ Generally speaking, the smaller and more directly interested the decision-making group, the more efficiently it will operate, even where the direct interests conflict. The Commission,⁶¹ and more especially the Regulatory Committee system of the Convention,⁶² are designed in part to reflect this interest in efficiency.

C. Influence

The key question involved in granting decision-making power to international organizations is whether and to what extent the resultant decisions will be consistent with United States substantive interests. In this regard, one must distinguish carefully between two different types of interests in decision-making, namely, negative and affirmative interests.

The negative interest is most frequently emphasized when analyzing the acceptability of decision-making procedures. The analytical question posed is: What is the probability that the United States will be able to block a decision contrary to its interests?

In some instances, the affirmative interest can be equally important. The analytical question posed is: What is the probability that the United States will be able to obtain a decision that is in its interests?

The decision-making systems of the Convention, like most voting systems in international organizations, proceed on the as-

59. See J. MYHRE, *THE ANTARCTIC TREATY SYSTEM: POLITICS, LAW, AND DIPLOMACY* 96 (1986).

60. See A. PARSONS, *ANTARCTICA: THE NEXT DECADE* 121 (1987).

61. Convention, *supra* note 1, art. 18.

62. *Id.* art. 29.

sumption that each state casts one vote.⁶³ They attempt to accommodate states with more substantial interests by using two basic techniques, often in combination. The first technique is to confine some or all decisions to organs with a small membership, thereby maximizing the affirmative and negative voting power of the small group of members, some of whom may be guaranteed permanent membership. This is true of the Commission⁶⁴ and especially of the Regulatory Committee system under the Convention.⁶⁵ The second technique is to maximize protection for negative interests by requiring more than a simple majority for some or all decisions, running the gamut from a two-thirds majority to a consensus, and possibly including requisite concurrent votes of certain states or groups of states. Under the Convention, the Commission system uses three-fourths majorities and consensus.⁶⁶ The Regulatory Committee system utilizes two-thirds majorities and concurrent majorities of its constituent groups.⁶⁷

There is an unavoidable trade-off in this system. The more one seeks to enhance one's own blocking power, the more one is compelled to grant similar power to at least some other states, thereby making an affirmative decision more difficult.⁶⁸ It is of course possible to convert negative power into affirmative power by insisting on approval of one's affirmative agenda as a prerequisite for allowing approval of someone else's affirmative agenda. The difficulty is that every state or group of states with negative power can play the same game.

The question of influence relates not only to the direct voting power of the United States, but also to the voting power of states likely to share or accommodate those interests. Where underlying

63. Weighted voting, in which each state is given a different number of votes in accordance with a formula designed to reflect relative interest or contribution, is used in some commodity arrangements and funding institutions. See J. GOLD, *VOTING AND DECISIONS* 18 (1972).

64. See Convention, *supra* note 1, art. 18(2).

65. *Id.* art. 29(2).

66. *Id.* art. 22(1)-(3).

67. *Id.* art. 32(1)-(4).

68. The voting system in the U.N. Security Council amply demonstrates the virtues and problems of negative voting power. According a veto to each of the five permanent members tends to assure adequate support from the major powers for decisions with important international security implications and serves to protect each of them and their allies from adverse decisions. At the same time, however, the veto power can substantially limit the responsiveness of the Council to situations in which affirmative decisions are deemed useful by the United States or other member states. See generally U.N. CHARTER, June 26, 1945, art. 27, 59 Stat. 1035, 3 Bevans 1153.

interests are complex, it is sometimes difficult to identify those states with certainty. Some governments with which the United States has very good bilateral relations attach considerable importance to their relations with Third World leaders or other voting blocs in international organizations that frequently oppose the United States on economic and political issues. Some major industrial states and U.S. political and military allies are territorial claimants in Antarctica.⁶⁹ At least juridically, the Soviet Union's approach to Antarctica is similar to ours, yet its behavior in decision-making fora could be influenced by the general state of our relations and divergent political or economic interests.

On a more subtle level, advocates of a particular United States interest in Antarctica might be content to moderate the influence of the United States against the contingency that a future United States administration might not accord adequate priority to that particular interest. For instance, some environmentalists might believe that United States interests are well served by a system that maximizes the negative influence of any state over a decision to proceed with mining, even if the United States representative were supporting the decision. Similarly, some market-oriented economists might believe that United States interests are well served by a system that minimizes negative governmental influence over a decision to proceed with mining, even by United States representatives.

V. DECISION-MAKING UNDER THE CONVENTION

The Convention establishes three basic organs. Two of these organs are composed of all parties to the Convention: the Scientific, Technical and Environmental Advisory Committee,⁷⁰ and the Special Meeting of Parties.⁷¹ One organ, the Antarctic Mineral Resources Commission, has a more limited membership.⁷² In addition, if the Commission decides to open a part of Antarctica to applications for exploration and development, an Antarctic Mineral Resources Regulatory Committee,⁷³ normally composed of ten states,⁷⁴ would be established for the particular area identified.⁷⁵

69. J. MYHRE, *supra* note 59, at 7.

70. Convention, *supra* note 1, art. 23(2).

71. *Id.* art. 28(2).

72. See *id.* art. 18(2) for membership requirements.

73. *Id.* art. 29(1).

74. *Id.* art. 29(2).

When considering the question of membership in the various organs established by the Convention, one should bear in mind that only parties to the Antarctic Treaty may become parties to the Convention.⁷⁶ All members of the United Nations have the right to become parties to the Antarctic Treaty, although many have not exercised that right to date.⁷⁷

In general, the smaller the organ, the more extensive its decision-making powers under the Convention. Each Regulatory Committee has broad authority to determine specific conditions of exploration and development.⁷⁸ The Commission sets general standards on a number of matters,⁷⁹ makes the basic decision to open an area for exploration and development applications,⁸⁰ and has limited powers to review certain Regulatory Committee decisions.⁸¹

A. *Advisory Committee and Special Meeting of Parties*

The Advisory Committee⁸² reports to the Commission and the Regulatory Committees on selected matters.⁸³ The Special Meeting of Parties⁸⁴ reports to the Commission regarding the decision to identify or open an area for exploration and development.⁸⁵ Both the Advisory Committee and the Special Meeting of Parties are designed to afford some opportunity for participation in the decision-making process to all parties to the Convention.⁸⁶ The Advisory Committee is also designed to encourage technical, environmental, and scientific input from all sources.⁸⁷

The Advisory Committee and the Special Meeting of Parties have no independent decision-making power and are required to

75. *Id.* art. 29(1).

76. *Id.* art. 60.

77. See Antarctic Treaty, *supra* note 2, art. 13.

78. Convention, *supra* note 1, art. 31.

79. See *id.* art. 21.

80. *Id.* art. 21(1)(d).

81. *Id.* arts. 21(1)(l), 49. See *infra* app., table I setting forth the membership in each of the Convention organs and table II identifying selected decisions, the organ which acts on those decisions, and the requisite vote.

82. *Id.* art. 23.

83. See *id.* arts. 26, 27, 46(1).

84. *Id.* art. 28(1).

85. *Id.* arts. 28(1), 40(3).

86. *Id.* art. 41(1).

87. *Id.* art. 26(1).

include all views in their reports.⁸⁸ One may nevertheless expect—as the Convention requires—that for substantive as well as political reasons their reports and recommendations would be seriously considered by the decision-making organs to which they report.

B. *The Commission*

Most substantive decisions of the Commission require a three-fourths vote.⁸⁹ The remainder require consensus, which is defined as the absence of a formal objection.⁹⁰

1. Membership

At least twenty-two states, if they become a party to the Convention,⁹¹ would serve on the Commission: Argentina, Australia, Belgium, Brazil, Chile, China, France, Federal Republic of Germany, German Democratic Republic, India, Italy, Japan, New Zealand, Norway, Poland, South Africa, Spain, Sweden, Union of Soviet Socialist Republics, United Kingdom, United States, and Uruguay.

In addition, states sponsoring on-going exploration or development of minerals in Antarctica and states actively engaged in substantial scientific, technical or environmental research there may be added as members.⁹² If such a state were a “Consultative Party”⁹³ to the Antarctic Treaty, it would take a vote of one-third plus one of the existing Commission members to block an application to join; otherwise, any Commission member could block the application.⁹⁴ Parties to the Antarctic Treaty have the right to become “Consultative Parties” during such time as they conduct substantial scientific research activity in Antarctica.⁹⁵

88. *Id.* arts. 27, 40(4).

89. *Id.* art. 22(1).

90. *Id.* arts. 22(2),(5).

91. *Id.* art. 18(2)(a). See *infra* app. for list of consultative parties and others to the treaty.

92. Convention, *supra* note 1, art. 18(2)(b),(c).

93. See Antarctic Treaty, *supra* note 2, art. IX.

94. Convention, *supra* note 1, art. 18(4).

95. Antarctic Treaty, *supra* note 2, art. IX.

2. Decisions Requiring a Three-Fourths Vote

Assuming an initial membership of twenty-two states, for matters requiring a three-fourths vote seventeen votes would be required for an affirmative decision and six votes would be sufficient to block such a decision. It is unlikely that decisions perceived as contrary to Western or industrial state interests could easily be taken in this setting, although it is imaginable that the United States might be unable to persuade the other industrial states to support particular positions.

Should the membership of the Commission increase, the number of votes necessary to block a decision would increase proportionately, while the overall composition of the Commission might shift away from its initial Western plurality. In the face of any given application to become a member of the Commission, there is an ever-present risk that most existing members, including the United States, will prove to be more responsive to immediate political concerns than to the long-range problems posed by gradual enlargement and alteration of the balance of the Commission. For example, the requirements in fact for becoming a "Consultative Party" to the Antarctic Treaty (which facilitates Commission membership) may continue to decline in rigor in response to the political desire to discourage states from supporting U.N. involvement in Antarctica.

It will not be simple for any state to achieve the necessary three-fourths vote for an affirmative decision on substantive matters in the Commission. The area where this might prove most troublesome for the United States relates to environmental regulation and supervision. Initially, these concerns should not be too significant because states that have no present plans to engage in mineral development in Antarctica would have little immediate reason to oppose strict environmental measures. Indeed, such states may even perceive some economic advantage in slowing down the leaders in the field.

If and when a "gold rush" mentality sets in, that is, if environmental regulation becomes a practical rather than anticipatory necessity, a growing number of states may regard strict environmental requirements as an impediment to investment both directly and because the state that sponsors mining may itself become lia-

ble for inadequate supervision of its miners.⁹⁶ One can easily imagine an argument claiming that a strict regime of environmental regulation and liability is designed to favor the most advanced companies from the wealthiest states.⁹⁷ One can almost as easily imagine that argument being made by a diplomatically skilled proto-industrial state desirous of securing special privileges for itself by virtue of its characterization as a "developing" country.

It may be that the unusually strong environmental requirements of the Convention,⁹⁸ coupled with compulsory dispute settlement and a strong liability system likely to emerge in any liability protocol,⁹⁹ are sufficient insurance against any such contingencies.

3. Decisions Requiring Consensus

The most serious aspect of the Commission's decision-making procedures relates to those decisions requiring consensus.

a) Amendment of the Convention

Amendment of the Convention is not permitted for the first ten years.¹⁰⁰ Thereafter, adoption of an amendment at a meeting of the parties requires a two-thirds vote¹⁰¹ (in some cases a three-fourths vote¹⁰²), including the concurrent votes of the Commission members.¹⁰³ Amendments thereafter enter into force only after ratification, acceptance or approval by all Commission members.¹⁰⁴ Once an amendment has entered into force, the other parties must either accept it or be deemed to have withdrawn from the Convention.¹⁰⁵

This procedure permits the United States to block any amendment either at the adoption or ratification stage. At the same time, if all the Commission members can agree, necessary amendments

96. Convention, *supra* note 1, art. 8(3)(a).

97. One can expect the Third World States to adopt such a position.

98. *See* Convention, *supra* note 1, arts. 21(1)(c), 4(2).

99. *See id.* art. 57.

100. *Id.* art. 64.

101. *Id.* art. 64(3).

102. *Id.* art. 64(4).

103. *Id.* art. 64(3),(4).

104. *Id.* art. 64(5).

105. *Id.* art. 65(3).

may be adopted in a reasonably efficient manner particularly when one recalls that the effect of an amendment is to alter a state's treaty obligations.

b) Monetary Matters

Consensus is required for decisions regarding budget and finance, notification and application fees and so-called "levies" on miners to help defray the costs of administering the Convention system.¹⁰⁶ In general, United States interests are probably best served by maximizing its negative voting power on these issues to protect the finances of the United States and the miners. The requirement of a consensus on decisions regarding the distribution of surplus revenues is also helpful. Such a requirement allows the United States to ensure that its position regarding non-recognition of territorial claims is not prejudiced by distributions based on those claims, despite the presence in the text of a provision¹⁰⁷ that could be interpreted to permit such distributions.¹⁰⁸

c) Non-Discrimination

Consensus is required for decisions to implement the principle of non-discrimination under the Convention.¹⁰⁹ The fact that such implementation is subject to a consensus decision may imply substantial disagreement over the principle. Whatever the history of this curiosity, it is likely that developing countries would prefer a system of discrimination in their favor. In this regard, developing countries could argue that such favoritism is implied by the way in which the provisions on international participation in mining are drafted. From this perspective, it may be just as well that the United States could block any specific attempt at "implementation" of the non-discrimination principle.

The greatest problem in connection with the non-discrimination principle relates to the conclusion that it requires regulatory implementation. This leaves open the argument that the principle as set forth in the Convention is not self-executing, and that, absent implementation by the Commission, the provision cannot be

106. *Id.* art. 22(2)(a).

107. *Id.* art. 35(7)(b).

108. *See generally infra* app. table II.

109. Convention, *supra* note 1, art. 22(2)(b).

invoked before an arbitral tribunal. This argument, while not difficult to rebut, introduces an element of uncertainty.

This problem aside, it is unlikely that the United States would need to seek affirmative elaboration of the non-discrimination principle. The United States could protect many of its interests simply by relying on its ability to block specific decisions it regards as discriminatory.

d) Identification of an Area for Exploration and Development

The most serious decision requiring consensus—and in some respects the most serious single decision in the Convention as a whole—is whether to open an area for applications for exploration and development.¹¹⁰ To the extent that the United States is reluctant for any reason, including environmental concerns, to see a part of Antarctica opened to mineral activity, the consensus requirement ensures that the decision can be blocked. Indeed, the need for a consensus makes it likely that the United States need not take full responsibility for blocking the decision.

From the perspective of environmental interests, according a treaty right to any one of at least twenty-two states to block a decision to open any part of Antarctica to exploration and development is as protective a procedure as one might imagine. Without a treaty dealing with the matter, either a claimant or non-claimant could, at any point, decide to exercise its asserted right to use Antarctica, in this case for minerals extraction purposes. On the other hand, a treaty flatly prohibiting all mining in Antarctica could come under strong pressure from parties or non-parties in the event of a serious shortage of a significant commodity available in Antarctica. Security needs or consumer pressure sufficient to persuade a state to take environmental risks (and attendant political risks with respect to the environmental lobby) could well be sufficient to persuade that state to ignore or denounce a treaty banning all mining in Antarctica. At that point, mining might occur without the elaborate control and international supervision envisaged by a convention that does not prohibit mining *a priori* but permits it only when and if there is a broad consensus among concerned governments that the mining is environmentally safe.

The problem concerning this consensus requirement would

110. See *id.* art. 41.

arise if and when the United States Government were to determine that it is in its interests for the Commission to decide to open an area of Antarctica to applications for exploration and development. Any member of the Commission could block that decision.¹¹¹ Because there is a possibility that at least some environmental groups might oppose the decision or seek to impose conditions having the same practical effect, Commission members would have a pretext for voting "no," whatever their real motives.

Because the decision to open an area is irrelevant to prospecting, one can assume that the issue would probably arise after one or more prospectors determined that there was sufficient incentive to proceed with intensive exploration of a particular site. Still, it is unclear what financial, temporal or other disincentives to proceeding with exploration might deter a state or company from seeking to have an area opened to exploration applications relatively early. This is particularly true because the initial effort would likely take more time, due to the absence of precedent and experience within the regulatory system. Therefore, while one might predict with reasonable confidence that actual mining development is unlikely absent a very valuable find and extremely favorable projected market conditions (*i.e.*, high demand and prices), it is not clear how far in advance a serious effort would be made to "trigger" the system by requesting the identification of an area for which applications to explore would be received. The requirement that prospecting data be revealed after ten years,¹¹² unless that period is extended by three-fourths vote of the Commission,¹¹³ could itself serve to encourage early attempts to have an area identified and an exploration permit issued. On the other hand, data requirements in connection with identification of an area and issuance of an exploration permit could deter early applications.

It is reasonably predictable that the greater the importance to consumers of the decision to open an area, the greater the pressure on Commission members not to exercise their right to veto the decision. The "nightmare" scenario of a Western community in desperate need of oil being frustrated by Commission vetoes is not probable at the present time. If the situation were that critical to the West, the threat to denounce the Convention would presumably be real and public opinion would either accommodate or su-

111. *Id.* art. 41(2).

112. *Id.* art. 37(12).

113. *Id.* art. 22(1).

bordinate environmental objections.

However, some territorial claimants might at that point welcome the collapse of the Convention system. The need to proceed with oil development would quickly be translated into a need, by private companies in particular, for "recognized" exclusive rights to the areas being intensively explored. A territorial claimant could offer private companies a traditional public law basis for obtaining private title, thereby encouraging the major Western non-claimants to recognize, or at least acquiesce in, the validity of title granted by the claimants pursuant to their territorial claims.

Thus, a United States threat to withdraw in the event of an unreasonable failure to open an area lacks some measure of credibility. The lack of credibility stems from the need for recognized exclusive mining rights, coupled with the absence of a plausible alternative system for granting miners exclusivity which does not require abandoning the United States position of not recognizing foreign territorial claims and retaining a right of access to the entire continent without foreign consent.

Were the United States to accept the Convention, this problem could be remedied in part by ensuring that the United States is prepared to authorize mining by U.S. companies throughout Antarctica in the event that the United States is forced to exercise its right to withdraw from the Convention following unreasonable failure to open an area. The purpose would not be to contemplate withdrawal but, by making prudent preparation for such a contingency, to deter others from using their voting power in ways unreasonably prejudicial to U.S. interests.

The legislation implementing the Convention could simultaneously establish a fall-back domestic system that would become effective in the event that the United States withdrew from the Convention. Some aspects of the approach of the Deep Seabed Hard Minerals Act¹¹⁴ might be examined in this regard. The legislation could perpetuate any rights acquired by U.S. miners under the Convention prior to United States withdrawal, establish a system modeled on the Convention for domestic regulation and authorization of mining activities throughout Antarctica, prohibit United States nationals from mining in areas already granted to other United States nationals or nationals of reciprocating states, and authorize reciprocal agreements with other governments for this

114. See generally Deep Seabed Hard Minerals Act, 30 U.S.C. §§ 1401-1473 (1982).

purpose.

While the Commission as originally constituted will include some oil exporters, none thus far has associated itself vigorously, if at all, with attempts to cartelize the market for economic or political ends. However, the consensus requirement could inspire a more committed member of the Organization of Petroleum Exporting Countries to make the investment in Antarctic research necessary to become a Commission member, in order to gain control over the decision to open an area.

An economically motivated move by an oil exporter to restrain Antarctic production would probably stimulate most states active in Antarctica to unite in opposition to such a move, partly because most of the states are consumers and partly because most would perceive that "their" system was being manipulated for outside ends. In such an atmosphere, it is unlikely that the attempt to block would long survive. However, there are two analogous situations in which one cannot be quite so sanguine about an attempt to halt competing production from Antarctica. One situation would arise if the oil exporter were a territorial claimant, particularly if the area proposed to be opened were the area claimed. The other situation would arise if the issue concerned hard minerals, rather than oil, and the objecting state were a developing territorial claimant that exports hard minerals, such as Chile.

The question of whether the consensus requirement is unduly stringent because of the presence of the Soviet Union on the Commission demands careful analysis. The Soviet Union is certainly capable of using its veto for purely political ends. Whether in particular circumstances the Soviet Union would find it in its interests to use the veto solely for political gains is, however, another matter. If the question arose at a time when the Soviet Union were seeking better relations with the West or more Western capital and investment, the chances of a veto would be reduced. If the question arose at a time of high tension, the Soviet Union would nevertheless have to consider its interests in maintaining the stability of the Antarctic system and possible interests as a consumer of the commodity concerned. The Soviet Union would also have to weigh its own interests in developing Antarctic mineral resources whether for economic or political reasons. In that regard, the Soviet Union would have to be as cautious about vetoing a U.S. request as the United States would have to be about vetoing a Soviet one.

In sum, while the cataclysmic scenarios are extremely unset-

ting, they are not very likely. Firm and prudent domestic legislation could help in this regard. The more serious problems posed by the consensus requirement are two-fold: genuine disagreement about whether opening the area is consistent with the requirements of the Convention, and price.

There are two sets of requirements under the Convention that could spur genuine disagreement about whether the proposed conditions for opening the area satisfy the Convention, namely, environmental protection¹¹⁵ and promoting international participation in Antarctic minerals activities.¹¹⁶ The consensus system gives the benefit of the doubt to advocates of values implicit in either set of requirements. The report to the Commission of the Special Meeting of Parties is likely to reflect the larger proportion of developing countries and the presence of other states that do not conduct substantial activities in Antarctica on their own.

The first problem is less unsettling from the perspective of United States interests. United States interests include the environmental interest. The United States is likely to be among the more environmentally sensitive members of the Commission. U.S. companies have substantial experience in working with environmental groups to achieve a generally satisfactory accommodation of development and environmental goals. Any proposed activity that survives the U.S. domestic political process might, but is not likely to, attract strong and genuine foreign opposition on environmental grounds. This is particularly true because United States environmental procedures and standards are likely to apply to any decision by the United States government to propose the opening of an area or to sponsor an applicant.¹¹⁷

The second problem is more serious. Demands for participation in mining activities could emanate from a variety of sources. For example, the Soviet Union might demand participation for political or economic reasons. A territorial claimant might demand participation primarily to establish the principle that mining in the area it claims requires the participation of its state or private companies, thereby guaranteeing accommodation of its claims in practice by states and companies interested in mining. Developing countries might demand participation for ideological reasons. One

115. See Convention, *supra* note 1, art. 2.

116. *Id.* art. 6.

117. See National Environmental Policy Act, 42 U.S.C. § 4331 (1982).

could expect to find the economic interests of state or private companies in one or more proto-industrial states behind the ideological rhetoric.

One may assume that a demand for participation is likely to arise where market conditions would not otherwise make that participation appear attractive to an investor. Therefore, foreign participation may involve some economic cost to the investor. If the concession is made to a territorial claimant regarding the area it claims, there will also be political cost represented by the incremental damage to the U.S. position regarding the validity of the territorial claims.

One may find some solace in the fact that the text of the Convention limits the role of the Commission to "elaborating opportunities"¹¹⁸ for joint ventures or different forms of participation.¹¹⁹ There is also helpful interpretative language in the Final Act of the Convention affirming the "freedom of choice" of an investor regarding partners in a joint venture, including the terms of their partnership.¹²⁰ Nevertheless, there is ample opportunity for bargaining. Potential investors will have to consider that even if a veto in the Commission can be avoided, both the Soviet Union and a territorial claimant in the area in question will be members of the relevant Regulatory Committee and thus will be in a position to wreak further havoc if their interests are not accommodated. It may take a larger dose of Oriental patience and French *sang froid* to deal with the problem than some Americans, whether in government or industry, typically possess.

It is also imaginable that some Commission members will demand a price for their cooperation in supporting a decision to open an area. Where the concession demanded is unrelated to the Antarctic minerals regime, firm diplomacy may be sufficient to deal with the matter. One cannot, however, exclude the possibility that the issue will arise in a context in which potential investors are in favor of the U.S. government paying an unrelated political price.

The more complex scenario is one in which the price is directly relevant to the Antarctic minerals regime in general or to the

118. See Convention, *supra* note 1, art. 41.

119. *Id.*

120. Final Act of Fourth Special Antarctic Treaty Consultative meeting on Antarctic Mineral Resources, *reprinted in* 27 I.L.M. 865 (1988).

specific proposal. A demand for participation is an example that finds its basis in the Convention text itself.¹²¹ Questions of style and subtlety aside, it is sometimes difficult to distinguish unreasonable "blackmail" from reasonable demands for cooperation in this context. "Log-rolling" is a time-honored characteristic of collective decision-making bodies.¹²² The problem is more severe when one needs to achieve consensus, but it can never be avoided completely.

In sum, the requirement of consensus in the Commission to open an area for receipt of exploration and development applications:

1) guarantees that no areas will be open for exploration and development in Antarctica over the objections of the United States;

2) comes close to guaranteeing that no area will be opened for development over well-founded environmental objections;

3) provides no guarantee that any area of Antarctica will be opened; and

4) subjects states seeking to open an area to a variety of demands that may have to be accommodated to achieve consensus.

Although this consensus requirement supplies a great deal of protection for United States environmental and scientific interests, it offers little protection for potential economic interests. It protects the United States interests in stability in Antarctica by guaranteeing the consent of all substantially interested states before mining is undertaken. In actual operation, however, it may prejudice the long-term stability of the current Antarctic system, along with long-term United States political, legal, economic, and environmental interests, by forcing substantial concessions to territorial claimants as the price for a decision to open an area. In truth, the concessions made to the territorial claimants in the text of the Convention itself may be an unsettling harbinger of things to come.

In practice, consensus may well be achieved if the matter is approached with patience, flexibility, and determination, but also

121. See Convention, *supra* note 1, art. 6.

122. "Log-rolling" is the "exchange of assistance or favors, such as political assistance or favors, or the trading of votes by legislators to secure favorable action on projects of interest to each other." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1331 (3d ed. 1976).

absolute minimal zeal. A trial run in a small area of limited economic, scientific, and environmental importance might be undertaken in the early years under the Convention. The difficulty is that such a trial run would represent a decision in principle that all of Antarctica is not to remain permanently closed to all mineral development. It is unclear that either a domestic or international consensus exists on that issue. Yet another difficulty is that a trial run, where significant economic interests are not directly engaged, might accentuate political and ideological differences.

C. The Regulatory Committees

1. General Role

Apart from fairly elaborate provisions on environmental protection,¹²³ the Convention does not contain a detailed mining code or set of regulations. Rather, it relies on general guidelines and some specific requirements and prohibitions in much the same way as a general statute delegating authority to an administrative agency.

With respect to exploration and development, most of the regulatory system will be put into place for each area of Antarctica when that area is opened by the Commission for receipt of applications for exploration and development.¹²⁴ Some of the conditions and guidelines will be specified by the Commission at the time it identifies the area.¹²⁵ Most conditions and guidelines will be determined by the Regulatory Committee established for the particular area either by general regulation or in the context of the management scheme applicable to a certain operator in a particular block within the larger area for which the designated Regulatory Committee is competent.¹²⁶

This system has the advantage of flexibility. It defers decisions on precise regulations until there is a practical need and until more information is available to inform those decisions. The system also has the advantage of placing important decisions as to detail in the hands of a relatively small Regulatory Committee composed largely of more interested states. Unfortunately, it also leaves a

123. See generally Convention, *supra* note 1, arts. 2, 4, 13, 27, 41.

124. *Id.* art. 41.

125. *Id.*

126. *Id.* art. 43(2)(a),(3).

great deal of uncertainty regarding the nature of the precise conditions with which a miner must comply.

It would not appear that this uncertainty will significantly deter prospecting, which does not require a permit under the Convention and which may take place prior to the identification of an area for exploration and development. Miners are generally used to a system under which investments in prospecting will not necessarily entitle them to exclusive rights to explore or exploit in the area in which they conduct prospecting. If, as the Convention contemplates, the uncertainties are resolved at the time a miner is prepared to commit substantial capital to exploration and development of a specific block, uncertainty regarding the nature of regulatory conditions would not, as such, be an impediment to investment at that stage.

Overall, this system poses two critical questions: 1) What is the likelihood that the detailed regulations and management scheme will prove acceptable to potential miners, particularly miners from the United States and other market economies, and to the United States with respect to the full range of its interests? and 2) What is the extent of the security and predictability afforded to miners once the Regulatory Committee approves the management scheme and exploration permit?

The answers to the two questions depend in large measure on predictions about the behavior of the Regulatory Committees. In this regard, one must bear in mind the tension between United States interests in blocking adverse decisions and achieving affirmative decisions. The easier it is to block decisions, the easier it will be for the United States to prevent adverse regulatory decisions. No mining at all might take place under bad regulatory conditions. It is equally true, however, that no mining at all can take place unless the requisite number of affirmative votes for various decisions can be assembled.

If the United States had been opposed to opening the area at all to exploration and development, its veto in the Commission would be sufficient to stop the decision to open the area or ensure the inclusion of necessary environmental or other conditions. Thus it is likely that at the Regulatory Committee stage, the United States will either favor proceeding with exploration and development or, at the very least, not be strongly opposed. In such a setting, the smaller the number of votes necessary to block a Regulatory Commission decision, the greater the likelihood that the

United States, while finding it relatively easier to block decisions imposing objectionable requirements, will find it relatively more difficult to achieve the affirmative decisions necessary to permit exploration and development to proceed. Nevertheless, opposition to opening the area or insistence on certain conditions on the part of other members of the Regulatory Committee also normally would have arisen in the Commission. This suggests that the Regulatory Committees may not pose insurmountable obstacles to desirable affirmative decisions.

2. Composition

Each Regulatory Committee will normally be composed of representatives of ten states that are members of the Commission.¹²⁷ Six non-claimants, including the United States and the Soviet Union, will be members of each Regulatory Committee.¹²⁸ Four territorial claimants will also be selected for each Committee.¹²⁹ The four claimants will include the state or states making territorial claims in the area identified¹³⁰ and other territorial claimants effectively selected by the state or states making territorial claims in the area identified. The ten members must include states that contributed substantial scientific, technical or environmental information relevant to identification of the area over which the Regulatory Committee will be competent as well as at least three developing countries.¹³¹

3. Application Procedures

The Regulatory Committee will first establish procedures for receipt of applications for exploration and development permits.¹³² Subject to any decisions by the Commission regarding maximum

127. In the event that a state sponsoring prospecting, exploration or mining development in the specific area concerned is not one of the 10 members of the Regulatory Committee, that state has the right to be added as a member for specific periods and purposes. The sponsor of prospecting serves only until it applies for an exploration permit. The sponsor of exploration or mining development participates in decisions affecting only the activities it sponsors and need not be a Commission member. See *id.* art. 29(6).

128. *Id.* art. 29(2)(c)(i).

129. *Id.*

130. *Id.* art. 29(2)(a).

131. *Id.* art. 29(3)(a),(b).

132. *Id.* art. 43(2)(d).

block size and application fees,¹³³ it will divide the area into blocks and set the relevant application fees.¹³⁴

These procedures may include a limit on the number of blocks that may be accorded to any given Party.¹³⁵ One should note in this regard that operators or miners must have a substantial and genuine link with their sponsoring state.¹³⁶

The Regulatory Committee will also establish procedures for resolving competing applications for the same block where the applicants have not resolved the matter themselves by means of their own choice.¹³⁷ Those procedures must include giving priority to the application with the broadest participation among interested parties, including developing countries in particular.

These decisions require a two-thirds majority of the states present and voting, that is seven out of the normal ten votes.¹³⁸ States that abstain are normally not considered to be "voting."¹³⁹ Four negative votes would be necessary to block a decision if there were no abstentions or only one abstention. If there were between two to four abstentions, three votes would be sufficient to block.¹⁴⁰

To the extent that an issue surfaces relating to a difference in principle with the territorial claimants, the four claimants, if united, will be able to block any decision favored by the six non-claimants.

To the extent that an issue arises relating to the general interests of Western consumer nations, the United States should not normally find it too difficult to find three additional negative votes (or two additional negative votes and two abstentions) to block adverse decisions. The four territorial claimants on the Committee will come from among the following group: Argentina, Australia, Chile, France, Norway, New Zealand, and the United Kingdom. At least two of the four claimants might normally be expected to share many of the same interests as the United States or at least favor accommodation of substantial United States concerns. In

133. *Id.* art. 43(2)(a).

134. *Id.* art. 43(2)(b).

135. *Id.* art. 43(2)(a).

136. *See id.* art. 44(2)(a).

137. *Id.* art. 43(2)(e).

138. *Id.* art. 32(4).

139. *Id.*

140. *See infra* app., table III which correlates the number of votes necessary to block with the number of abstentions or absences.

that case, the United States would need to persuade only one of the five other non-claimants of its point of view. It is probable that the non-claimant group will include at least one additional Western state, for example an European Economic Community member or Japan, particularly if the four claimants include only two Western states. Moreover, at least on monetary questions such as fees, the Soviet Union can be expected to be conservative.

Nevertheless, the United States is a possible target of a move to limit the number of blocks that can be granted to any given party. The Soviet Union and some United States allies, such as France, have favored similar limitations in other contexts. Given the multinational nature of the oil and mining industries, as well as the capacity to establish subsidiaries with substantial and genuine links to foreign states, the extent to which the risk of an adverse decision on this point should give rise to serious underlying economic concerns is unclear. In practice, this risk adds some pressure to assure international participation in exploration applications.

4. Guidelines

The Regulatory Committee is required to adopt guidelines identifying the general requirements for exploration and development in the area of its competence.¹⁴¹ These guidelines will cover a large number of detailed items normally associated with mining regulations.¹⁴²

The adoption of such guidelines requires a two-thirds majority,¹⁴³ as well as the votes of half the claimants and half the non-claimants present and voting.¹⁴⁴ Blocking power is thereby increased. A territorial claimant, including the state with a territorial claim in the area in question, would need to persuade only two other claimants to support its position in order to block a decision even if there are no abstentions.

Under this formula, the United States would still need to persuade at least three other states to vote "no" in order to block a decision. The difference is that fewer states need to abstain to reduce the number of states the United States would have to per-

141. Convention, *supra* note 1, art. 43(3).

142. *Id.* art. 47.

143. *Id.* arts. 32(2), 48.

144. *Id.*

suade to vote "no." For example, if one non-claimant abstained, the negative votes of only three non-claimants would be sufficient to block.¹⁴⁵

The primary impact of this formula is to increase the power of the claimants in general, and more specifically, the claimant making claims within the area in question. The formula strengthens the claimants' ability to extract practical or legal concessions to the territorial claims. An extreme example of this power would be a demand that the guidelines conform in significant respects to the mining laws of the state that claims sovereignty in the area.

This formula may have the additional effect of increasing the power of states interested in forcing broader participation, a group potentially including claimant and non-claimant developing countries, the Soviet Union, other claimants, and other non-claimants. While the text does not provide a clear basis for making participation demands at this stage,¹⁴⁶ it is politically possible that these demands will have to be met to overcome an objection grounded publicly on the need to respect the Commission's elaboration of opportunities for participation or on environmental or other requirements referred to in the relevant text.

5. Approval of Exploration Permit and Management Scheme

The Regulatory Committee has the authority to approve an exploration permit and management scheme or contract.¹⁴⁷ The approval of an exploration permit and management scheme in a specific block grants an operator or miner exclusive rights to explore for the resources identified and to develop (mine) those resources, subject to subsequent issuance of a development permit.¹⁴⁸ The management scheme sets out the specific terms and conditions for both exploration and development.¹⁴⁹ Those terms and conditions must be consistent with the Convention and applicable regulations and guidelines adopted either by the Commission or the

145. See *infra* app. table III which correlates the number of votes necessary to block with the number of abstentions or absences.

146. The list of items in article 47 cross-referenced by article 43(3) does not include participation. Some states might argue however that the guidelines are not necessarily limited to the items covered by article 47, and that the article 47 list itself is expressly non-exhaustive. See *id.* arts. 43(3), 47.

147. *Id.* art. 48.

148. *Id.*

149. *Id.* art. 47.

Regulatory Committee and would include procedures for settlement of disputes between the operator and the Regulatory Committee.¹⁵⁰

When considering the application and management scheme, the Regulatory Committee is required to "have recourse"¹⁵¹ to certain of its members: the sponsoring state, any state making claims in the area in which the Regulatory Committee is competent, and, as may be required, one or two additional Committee members.¹⁵² The meaning of this requirement is unclear. A procedural right to be deeply involved in the process is suggested. The provision may imply a core negotiating or drafting group, or some less structured form of consultation. The reference to "one or two" additional members¹⁵³ may imply that the United States and the Soviet Union are to be included in all cases, although there appears to be no formal pronouncement in the Final Act to this effect.

The approval of a management scheme by the Regulatory Committee constitutes authorization for the issuance of an exploration permit without delay.¹⁵⁴ The decision to approve the management scheme requires a two-thirds vote of the Regulatory Committee, including a majority of the votes of claimants and non-claimants.¹⁵⁵ Absent abstentions, this means that either two claimants or three non-claimants could block the decision.¹⁵⁶

This formula increases the ability of the United States to block an adverse decision. Absent abstentions, the United States would need to persuade either two other non-claimants or two claimants to vote "no." This scheme also increases the difficulty of achieving affirmative decisions, particularly in light of the fact that two claimants could block the decision.

The potential difficulties that the United States may encounter in achieving an affirmative decision to approve a management scheme are essentially the same as the problems identified in connection with the adoption of guidelines by the Regulatory Committee. From the simple perspective of vote counting, those difficulties are somewhat increased. However, one should consider that the

150. *Id.* art. 47(r).

151. *Id.* art. 46.

152. *Id.*

153. *Id.*

154. *Id.* art. 48.

155. *Id.* art. 32(2).

156. See *infra* app., table III.

management scheme must be consistent with the guidelines adopted by the Regulatory Committee and therefore a number of issues may be treated as resolved.

6. The Development Permit

The holder of an exploration permit pursuant to an approved management scheme may apply to the Regulatory Committee at any time for a development or mining permit for the block and resources covered.¹⁵⁷ Various provisions of the management scheme, including time limits and performance requirements applicable to the exploration and development stages,¹⁵⁸ are likely to influence the timing of an operator's application.

It is likely that the applicant for a development permit will have made substantial investments in exploration of the block.¹⁵⁹ The risk that a development permit will not be issued or will be subject to new and onerous conditions can therefore have a deterrent effect on investment during the exploration stage. This risk may be reduced by specifying time limits and performance requirements in the management scheme consistent with a fairly early application for a development permit, thus reducing the amount of investment needed prior to approval of the development permit.

The function of the Regulatory Committee at this stage is to consider whether modifications are necessary in the management scheme.¹⁶⁰ The Convention declares two reasons for such modifications. First, the application reveals modifications by the operator to the planned development envisaged at the time the management scheme was approved.¹⁶¹ Second, as a result either of changes in the planned development or increased knowledge, the development would cause impacts on the environment that were previously unforeseen.¹⁶²

Article 32, Paragraph 1, of the Convention provides that decisions by a Regulatory Committee "pursuant to" Article 54(5) shall be taken by a two-thirds majority vote, including a majority of the

157. See Convention, *supra* note 1, art. 53.

158. See *id.* art. 45.

159. See *id.* art. 53(2).

160. *Id.* art. 54(4).

161. *Id.* art. 54(3)(a).

162. *Id.* art. 54(3)(b).

votes of claimants and a majority of the votes of non-claimants.¹⁶³ This is the same majority required for original approval of the management scheme.¹⁶⁴ Absent abstentions, either two claimants or three non-claimants could block the decision.¹⁶⁵

Article 54, Paragraph 5 of the Convention provides: "If the Regulatory Committee in accordance with Article 32 approves modifications [to the management scheme], or if it does not consider that such modifications are necessary, the Regulatory Committee shall issue without delay a development permit. . . ."¹⁶⁶

Undoubtedly, then, the approval of modifications to the management scheme would be a decision "pursuant to" Article 54(5) requiring the concurrent majorities specified in Article 32, Paragraph 1.¹⁶⁷ It would be relatively easy to block such a decision. It is also clear that once modifications are approved, the development permit must be issued.¹⁶⁸ It must be borne in mind, however, that states might seek to block modifications either because they oppose them or because they favor more extensive modifications.

A new question then arises: What happens if the requisite majority does not vote in favor of any modifications to the management scheme? The Regulatory Committee is required to issue a development permit without delay if it does not consider that such modifications are necessary. How, and when, does one know that the Regulatory Committee "does not consider that such modifications are necessary"?

Three answers to this question are possible:

1) The exhaustion of efforts to achieve the requisite support for modifications within a reasonable time means that the Committee does not consider that such modifications are necessary and, hence, it is required to issue the development permit without delay;

2) The Committee must take an affirmative decision, by the qualified majority specified in Article 32, Paragraph 1, that it does not consider that such modifications are necessary before it is re-

163. *Id.* art. 32(1).

164. *Id.* art. 48.

165. See *infra* app., table III.

166. Convention, *supra* note 1, art. 54(5).

167. *Id.* arts. 32(1), 54(5).

168. *Id.* art. 54(5).

quired to issue the development permit without delay;¹⁶⁹ or

3) The Committee must take an affirmative decision by a lesser majority that all reasonable efforts to achieve the requisite support for modifications have been exhausted before it is required to issue the development permit without delay. The requisite vote in this case might be the two-thirds majority required by Article 32, Paragraph 3, for matters of substance generally or the simple majority required by Article 32, Paragraph 4, for matters of procedure.¹⁷⁰

The precise text of Article 54 tends to support the first interpretation. Article 54 makes no reference to an affirmative decision to approve a development permit.¹⁷¹ Paragraphs 3 and 4 address the question of modifications to the management scheme.¹⁷² The text of Paragraph 5 does not refer to a decision not to modify the management scheme or even to a decision that modifications are unnecessary.¹⁷³ The relevant requirement for issuance of the development permit is that the Regulatory Committee "does not consider that" modifications to the management scheme are necessary.¹⁷⁴ Thus the language of the text itself suggests that what is meant is the absence of a decision to modify the management scheme and not an affirmative decision to the contrary.

The grammatical structure of Article 54, Paragraph 5, is inconsistent with the second interpretation, namely, that an affirmative decision in accordance with Article 32 is required stating that modifications are not necessary.¹⁷⁵ The text does not say, "If the Regulatory Committee in accordance with Article 32 approves modifications or does not consider that such modifications are necessary." Such a text might plausibly, if somewhat awkwardly, be interpreted to mean "If the Regulatory Committee in accordance with Article 32 . . . does not consider that such modifications are necessary." But the actual text of Article 54(5) contains additional punctuation and repeats the word "if."¹⁷⁶ Adding emphasis to the additional language, what the text states is, "If the Regulatory Committee in accordance Article 32 approves modifications under

169. *Id.*

170. *See id.* art. 32(3),(4).

171. *Id.* art. 54.

172. *Id.* art. 54(3),(4).

173. *Id.* art. 54(5).

174. *Id.*

175. *See id.* arts. 54(5), 32.

176. *Id.* art. 54(5).

Paragraph 4 above, *or if it* does not consider that such modifications are necessary."¹⁷⁷ The cross-reference to Article 32 does not apply to the clause following the comma and the word "if." Article 32 governs all affirmative decisions by the Regulatory Committee¹⁷⁸ and the failure to apply the cross-reference to Article 32 to the clause following the comma suggests that no affirmative decision is required.

Proponents of the first interpretation might argue that the language of Articles 47, 48, and 50 reinforces their view.¹⁷⁹ Article 47 requires that the management scheme approved in connection with the exploration permit prescribe the specific terms and conditions for both exploration and development.¹⁸⁰ Proponents of the first interpretation might argue that this does not make much sense if Article 54, Paragraph 5 is interpreted to mean that the Regulatory Committee must in effect approve not only modifications but the original terms and conditions for development again by the same majority.¹⁸¹

Article 48 grants the operator (miner) whose management scheme is approved exclusive rights both to explore and develop the resources.¹⁸² While the latter right is subject to issuance of the development permit,¹⁸³ the inclusion of the reference to development in Article 48¹⁸⁴ is given little or no effect if all that is meant is that the miner will have the exclusive right to apply for a development permit, subject to precisely the same affirmative vote, and thus to precisely the same uncertainties, that the miner faced when applying for the exploration permit.

The language of Article 54 parallels the language of Article 48.¹⁸⁵ Under Article 48, once the management scheme is approved, the exploration permit is to be issued "without delay."¹⁸⁶ No separate affirmative decision to issue the exploration permit is required. This might suggest to proponents of the first interpretation that the parallel language of Article 54 should be interpreted in the

177. *Id.* (emphasis added).

178. *See id.* art. 32.

179. *See id.* arts. 47, 48, 50.

180. *Id.* art. 47.

181. *See id.* art. 54.

182. *Id.* art. 48.

183. *Id.*

184. *Id.*

185. *Compare id.* art. 54 with *id.* art. 48.

186. *See id.* art. 48.

same way.¹⁸⁷ The question requiring affirmative decision is whether to amend the management scheme. No separate affirmative decision to issue the development permit is required.

Article 50 refers to the procedure in Article 54 as an exception to the rule that no management scheme may be modified without the consent of the sponsoring state.¹⁸⁸ This arguably reinforces the view that Article 54 was regarded as a modification procedure, not a re-approval procedure.¹⁸⁹

Accordingly, one could conclude that the first interpretation of the text is the best, namely, that the exhaustion of efforts to achieve the requisite support for modifications in a reasonable time means that the Committee does not consider that such modifications are necessary, and that it is then required to issue the development permit without delay.

From an environmental point of view, this interpretation is subject to the objection that it gives less substance to Article 54 than is already contained in Article 51, which permits the Regulatory Committee to modify a management scheme at any time, for stated environmental reasons, by a two-thirds vote.¹⁹⁰ Proponents of this view would argue that development entails additional risks to the environment that require an affirmative policy decision by a broad majority before they are judged acceptable.

One might point to Articles 49 and 59 to support this argument.¹⁹¹ Article 49 provides for the possibility of review by the Commission of "a decision by [a] Regulatory Committee to . . . issue a development permit."¹⁹² Article 59, Paragraph 1, Clause b, refers to the possibility of arbitration between a miner or sponsoring state and a Regulatory Committee regarding "a decision to decline the issue of a development permit."¹⁹³ Proponents of the second interpretation would argue that these portions of the Convention suggest that an affirmative decision to issue or to decline to issue a development permit is contemplated.

Supporters of the first interpretation would argue that while it is true that investors run the risk that a two-thirds majority might

187. *Cf. id.* art. 54.

188. *See id.* art. 50.

189. *See id.* art. 54.

190. *Id.* art. 51(1).

191. *See id.* arts. 49, 59.

192. *Id.* art. 49(1).

193. *Id.* art. 59(1)(b).

alter the management scheme for stated environmental reasons under Article 51,¹⁹⁴ that is a far cry from running the risk that two or three states, by blocking the issuance of a development permit, could render the investment in exploration useless. Their position would be that the stringent requirements for consensus in the Commission to open an area¹⁹⁵ and for concurrent majorities in the Regulatory Committee to approve the management scheme,¹⁹⁶ represent the appropriate time for according a small minority the power to block economic activity, namely before substantial investments have been made.

In this connection they might also note that even where a two-thirds majority modifies a management scheme under Article 51, the text expressly contemplates the possibility of compensation to the investor.¹⁹⁷ No such provision appears in Article 54.¹⁹⁸ It would be anomalous to argue that a small minority is empowered to impair investments without compensation, while a two-thirds majority is not.

With respect to Articles 49 and 59, they might argue that these provisions are peripheral to the main articles dealing with the question, and are simply not drafted as carefully as they might have been.¹⁹⁹ Thus, for example, Article 59 also refers to arbitration of a decision to decline a Management Scheme,²⁰⁰ whereas the directly applicable Article 48 contemplates only a decision to approve, not an affirmative decision to decline, a management scheme.²⁰¹

Given the fact that Article 54 is not a model of clarity, and that differing interpretations may be proffered not only by different states, but by different groups in the United States, it might be prudent to attach a specific statement of interpretation on this point, approved by the United States Senate, to any instrument of ratification. Such a statement is, however, no guarantee that other states or, if the matter is brought to arbitration, a tribunal will agree. The main object of any statement would be to enhance the bargaining leverage of the United States with respect to both its

194. *See id.* art. 51(1).

195. *See id.* arts. 21, 22.

196. *See id.* art. 32(1).

197. *Id.* art. 51(6).

198. *See id.* art. 54.

199. *See id.* arts. 49, 59.

200. *Id.* art. 59(1)(a).

201. *See id.* art. 48.

economic and environmental interests.

Without minimizing the importance of economic and environmental values implicated by this issue, it may be that the risks posed by the lack of clarity in Article 54 are not as great as the underlying conflicting positions of principle might suggest. It is reasonably clear that absent modifications to the planned development proposed by the miner, the only relevant issue under Article 54 relates to previously unforeseen impacts on the environment. Politically difficult issues, such as participation, will already have been settled at the time the management scheme was originally approved. Thus, while one can never completely exclude the use of environmental objections as a pretext, it does not seem very likely that the underlying problem will involve more than an accommodation of new environmental concerns.

From this perspective, the investor may in fact welcome the chance to resolve any new environmental problems before proceeding with additional significant investment associated with actual development. The alternative, should the environmental critics turn out to be correct in predicting new environmental risks, could be a far more costly suspension of operations or modification of a management scheme under Article 51 at a later stage.

Conversely, environmental critics would have to be cautious about the implications of raising new environmental problems in the context of Article 54.²⁰² The fact that they raised those concerns at the time the application for a development permit was under consideration could make it more difficult to argue later under Article 51 that operations should be suspended because of environmental impacts beyond those previously judged acceptable by the Regulatory Committee.²⁰³

The fundamental political problem with both the first and second interpretations is that they swing the balance very far in the direction of blocking power given the stringent concurrent majority required by Article 32, Paragraph 1.²⁰⁴ However, the first interpretation would only have this effect when, and if, it is decided that a reasonable time for reaching agreement on modifications has elapsed. It is not very likely that a tribunal would be willing to make that determination in the absence of extreme circumstances.

202. See generally *id.* art. 54.

203. See *id.* art. 54(3),(4).

204. See *id.* art. 32(1).

Thus, the true advantage of the first interpretation is that it leaves room for judicial intervention in extreme cases while, in normal cases, increasing the leverage of the majority under the third interpretation. In this regard, it should be noted that while the third interpretation is technically a legal variant of the first, as a practical matter it represents a compromise between the first and second interpretations.

7. Suspension, Modification, Cancellation, and Penalties

The Regulatory Committee has the power to suspend, modify, or cancel a management scheme as a result of impacts on the environment beyond those judged acceptable pursuant to the Convention.²⁰⁵ It also has the power to take such action, or to impose a monetary penalty, in the event an operator (miner) violates the Convention, measures adopted under the Convention, or the management scheme.²⁰⁶ The response must be proportional to the seriousness of the violation.²⁰⁷

The power of the Regulatory Committee in these respects is subject to general measures previously adopted by the Commission.²⁰⁸ Those measures may include provision for compensation to the miner, presumably for certain losses incurred as a result of action taken by the Regulatory Committee in response to new environmental concerns.²⁰⁹

The power of the Regulatory Committee in these respects will also be subject to arbitration.²¹⁰ If it finds that the Regulatory Committee acted unlawfully, the arbitral tribunal would presumably have the authority to award damages to the operator, determine that the Committee may not take the action contemplated, or both.

Decisions of the Regulatory Committee on these matters require a two-thirds vote.²¹¹ There is no requirement here for concurrent majorities. Thus, absent abstentions, the United States would

205. See *id.* art. 51(1). This seems to mean impacts beyond those judged acceptable at the time relevant decisions regarding the opening of the area and the management scheme were taken.

206. *Id.* art. 51(3)(d).

207. *Id.* art. 51(4).

208. *Id.* art. 51(6).

209. See *id.*

210. See generally *id.* arts. 56, 57; see also *id.* annex for an arbitral tribunal.

211. See *id.* art. 32(1).

have to obtain three other negative votes to block a decision.

On its face, it seems odd that Regulatory Committee decisions on such matters would not require a more stringent majority. There may be three explanations for this. First, it should not be unduly easy to block a decision to make environmental adjustments. Second, Regulatory Committee decisions that the operator has committed a violation of its obligations do not, as such, involve the exercise of discretionary judgment, and therefore are easily subject to review by arbitrators.²¹² Third, the small size of the Regulatory Committee and the proportionately large number of Western consumer states likely to be members means that a smaller number of votes are necessary to block a decision requiring a two-thirds majority, and may be obtained more easily, than would be the case in a larger decision-making body of different composition.

Given the availability of arbitration, the size and likely composition of the Regulatory Committees, and the possibility that the Commission's general measures will add protections for the investor, it may not be very likely that arbitrary or unreasonable exercise of power by a Regulatory Committee on these matters will occur. Even if this is so, and even taking into account the unique environmental concerns in Antarctica, were a mere two-thirds voting requirement to be regarded as a precedent in other contexts, there would certainly be reason for concern.²¹³

VI. TREATMENT OF TERRITORIAL CLAIMS

The parties to the Antarctic Treaty and other treaties negotiated in the context of the Antarctic Treaty have consistently recognized the necessity of including the territorial claimants in the decision-making processes.²¹⁴ The Antarctic Treaty and other trea-

212. This is not true of decisions as to sanctions, because the choice of sanctions involves some exercise of discretion within the broad requirement of proportionality to the seriousness of the violation.

213. By way of comparison, under the United Nations Convention on the Law of the Sea, suspension or modification of operations for environmental reasons for more than 30 days requires a consensus decision of the 36-member Council; sanctions for violations by a miner require a three-fourths majority, cannot be imposed until there has been judicial review and may include suspension or termination of the right to mine only in cases of serious, persistent and willful violations and after warnings to the miner. U.N. Convention on the Law of the Sea, arts. 162(2)(t), (u), (w), 185, *opened for signature* Dec. 10, 1982, U.N. Doc. A/CONF. 62/122 (1982), *reprinted in* 21 I.L.M. 1261, 1302, 1306 (1982).

214. *See, e.g.,* Antarctic Treaty, *supra* note 1, art. IX; *see generally* Agreed Measures for the Conservation of Antarctic Flora and Fauna, June 2-13, 1964, 17 U.S.T. 996, T.I.A.S.

ties negotiated prior to the Convention protected all interests, including those of the territorial claimants, by requiring a consensus or unanimity for binding decisions.²¹⁵ Nowhere in the Antarctic Treaty, or in other treaties related to Antarctica negotiated prior to the Convention, is a territorial claimant either given an express right to a special position by virtue of being a claimant, or accorded any express right to a special role with respect to the particular area it claims.

The Convention departs radically from this tradition. It explicitly establishes a decision-making structure for Regulatory Committees that divides claimants and non-claimants into separate groups.²¹⁶ Any given territorial claimant on a Regulatory Committee has greater capacity to block the most important decisions than any given non-claimant.

In addition to these general concessions to territorial claimants, specific concessions are also made. A state making a territorial claim to a particular area has, by virtue of that claim to that particular area:

1) a right to serve on a Regulatory Committee established for an area that includes the area it claims;²¹⁷

2) a right in effect to decide which of the other territorial claimants will sit on that Regulatory Committee, giving it potential influence over the way they will vote transcending mere similarity of interests;²¹⁸

3) a right to demand that a Regulatory Committee "have recourse" to it in considering an application for an exploration permit and the related management scheme;²¹⁹

4) a possible argument that its interests are entitled to special respect in any disposition of surplus revenues from the area it claims;²²⁰ and

5) a possible argument that it has a duty to take measures in

No. 6058 (1966), *modified in* 24 U.S.T. 1802, T.I.A.S. No. 7692 (1973); Convention for the Conservation of Antarctic Seals, June 1, 1972, 27 U.S.T. 441, T.I.A.S. No. 8826; Convention on the Conservation of Antarctic Marine Living Resources, *supra* note 17.

215. See, e.g., Antarctic Treaty, *supra* note 1, art. XII.

216. See Convention, *supra* note 1, art. 29.

217. *Id.*

218. *Id.*

219. *Id.* art. 46.

220. *Id.*

the area it claims to ensure compliance with the Convention.²²¹

This is, of course, a far cry from a state's right to decide on its own how it chooses to regulate mining in its territory. Nevertheless, it does breach two important lines of principle: territorial claimants are given special rights because they are territorial claimants, and the claimant in a specific area is given special rights with respect to the very area it claims.

Moreover, the membership accorded the United States and the Soviet Union on all regulatory committees is explained not in terms of their widespread activities in Antarctica, or their political and strategic importance, but in terms of their status as states that believe they have a basis for a claim in Antarctica.

With the Convention, the question is no longer whether territorial claimants will receive special accommodations, particularly with respect to the areas they claim. The question now is, how much? The very power of the claimants on the Regulatory Committees suggests that further special accommodations will be demanded if any Antarctic resources in areas claimed by at least certain states are to be developed. Because the concessions demanded may have either economic impact on miners or juridical impact on the position of states that do not recognize claims, it can be expected that potential miners might choose to encourage their sponsoring states to accommodate the juridical demands of the claimants so as to reduce the pressure for economic concessions from the miners.

The difficulty with this system is that it whets the appetites of nationalistic elements in the claimant states beyond what they might have expected on the basis of earlier Antarctic arrangements. The claimants are now in a position to "salami-slice" the position of the non-claimants on so many issues (and in such thin slices) that it will be difficult for the non-claimants to resist further erosion. The fact that the territorial claimants are allies or friends of the United States merely increases the temptation. Yet the end result of each new "accommodation" may be an increase in the expectations of the claimants.

Thus, each new "accommodation" brings us closer to the day when nationalistic elements in one of the territorial claimant states will be tempted to believe that the non-claimant position has been

221. *Id.* art. 29.

so completely compromised that it is safe to attempt exercising at least some aspects of territorial sovereignty in the claimed area. The end result, as even the more moderate claimant states recognize, would be a collapse of the entire Antarctic system and a resultant scramble for position. Meaningful international environmental regulation could be the first casualty.

In order for the forces of moderation within the claimant states to prevail, they need to be able to raise serious doubts (if only privately) about both the legality and the practical enforceability of the claims. While some flexibility on the part of the non-claimants is needed to reinforce the position of the moderates, at some point further "accommodation" of the territorial claims will begin to undermine the position of the moderates. The Convention text itself may be that point.

The difficulty is that the very completion of the Convention text, whether or not it is ratified, means that the genie is at least partially out of the bottle. It is by no means clear that the most effective way to deal with the problem is to reject the Convention, in the belief that the genie will disappear. Rejection could precipitate a crisis regarding the territorial claims in a context in which domestic and foreign public opinion would be unwilling to support the measures necessary to protect the United States position. The question is whether the United States could come to a domestic understanding that would allow it to accept the Convention under conditions that might deter the genie's further progress and even reinforce the U.S. position. If the question is whether the United States ratifies the Convention—particularly if the question is whether the Senate gives its advice and consent and Congress enacts implementing legislation before debates about arcane provisions of a liability protocol ensue—then it might be possible to reach domestic agreement on fairly firm language and measures to protect the long-range integrity of the United States position.

Two steps can be considered. The first is a clear reaffirmation of the United States juridical position in unmistakable terms in any instrument of ratification to the effect that the United States will not recognize any foreign territorial claims in Antarctica, that it will not acquiesce in any attempt to apply or enforce those claims, that it has a right to use all of Antarctica subject only to its treaty obligations, that it has a basis of claim in Antarctica, and that it has no intention of abandoning or prejudicing these positions. This should be done at a minimum.

However, this in and of itself says nothing to the claimants about what the United States is and is not prepared to do, and how the United States may react if it is pushed too far. To achieve a clear message on these issues, while avoiding unnecessary provocation, the United States should consider several steps:

1) the instrument of ratification, or the implementing legislation, might clarify the points at which the United States will not accept any attempt to impose the policies or give priority to the interests of a territorial claimant with respect to the specific area it claims;

2) the United States might make clear that any attempt to apply the laws of a territorial claimant to a United States national by virtue of activities in or affecting the claimed area will be resisted by the United States by all appropriate means;

3) the United States might include in its implementing legislation provisions that would take effect in the event that the United States withdraws from the Convention. The legislation might permit prospecting anywhere in Antarctica, and permit the appropriate U.S. Government agency to grant American citizens rights to conduct mineral exploration and development activities anywhere in Antarctica that are exclusive as against U.S. nationals and the nationals of reciprocating states (and perhaps others doing business in the United States either directly or through subsidiaries or agents). Environmental and other standards similar to those set forth in the Convention could also be included;

4) the United States might indicate to the claimants privately that if pushed too far it might lose its incentive to oppose United Nations involvement in Antarctica; and

5) the United States might coordinate its policy with other non-claimants, including Germany, Japan and the Soviet Union, and encourage them to take steps similar to those outlined above.

VII. LIABILITY

The liability provisions of the Convention deal almost exclusively with environmental considerations.²²² All that the Convention says about liability for personal injury to or death of a human being or injury to property not involving environmental or related

222. See *id.* art. 8.

damage is that it is regulated by "applicable law and procedures."²²³

An operator (miner) is strictly liable for all environmental damage, including, but not limited to, clean-up and restoration costs.²²⁴ Thus, for example, the operator must pay if there is no restoration to the *status quo ante* following damage to the environment.²²⁵ How much must be paid, however, is not specified. Who precisely is entitled to payment where there is no personal injury or damage to private property is unclear, but one might assume that the funds would be collected and expended by the Commission. One also presumes that damage claims by territorial claimants for environmental damage to the claimed areas as such would not be permitted.

The operator has a limited number of defenses available. It is not liable to the extent damage was caused directly by a natural disaster of exceptional character which could not have been foreseen,²²⁶ by armed conflict,²²⁷ or by an act of terrorism against which no reasonable precautionary measures could have been taken.²²⁸

The operator's right to seek contribution or indemnity from another party which caused or contributed to the damage is unaffected,²²⁹ but this does not limit the operator's liability to a claimant.²³⁰ Even a negligent plaintiff may collect damages from the operator; only if the operator proves that the plaintiff caused the damage by an intentional or grossly negligent act is it relieved in whole or in part of the duty to pay compensation.²³¹ Pursuant to this system, an operator might well be liable for environmental damage if, for example, an iceberg or a ship crashes into the operator's offshore drilling rig.

In addition, to the extent the operator or some other source does not satisfy all claims, the sponsoring state is liable for damage caused by the operator that would not have occurred had the spon-

223. *Id.* art. 8(5).

224. *Id.* art. 8(2).

225. *Id.* art. 8(2)(a).

226. *Id.* art. 8(4)(a).

227. *Id.* art. 8(4)(b).

228. *Id.*

229. *Id.* art. 8(11)(b).

230. *See id.* art. 8(10).

231. *Id.* art. 8(6).

soring state adequately supervised the operator as required by the Convention.²³² Thus, for example, the United States could be liable for claims that are not satisfied by the operator it sponsors or insurance funds.

The result is a very risk-adverse liability regime. Such a regime may be appropriate in light of the underlying environmental values. The difficulty is that mining companies, sponsoring states, and insurance companies are likely to be reluctant to accept such potential liability if it is open-ended. Thus, the economic acceptability of these provisions depends on the protocol that remains to be negotiated and particularly on the liability limits fixed in the protocol and associated fund arrangements.²³³ The Convention also leaves open the possibility of establishing an international claims tribunal in the protocol.²³⁴

Permits for exploration and development may not be issued until the liability protocol enters into force for the applicant.²³⁵ Prospecting, on the other hand, may go forward. Pending the entry into force of the protocol, claims against prospectors may be brought in national courts pursuant to the provisions of the Convention and national law implementing those provisions.²³⁶

Given the importance and complexity of the negotiations regarding the liability protocol, it might be useful for the United States to try to establish a model by enacting a domestic liability regime for prospecting prior to the protocol's entry into force, as contemplated by the Convention. In that case Congress, in addition to the Executive, would be the arbiter of the competing interests asserted by domestic industry and environmental groups on the question of liability limits and other matters. Because a domestic statute would reflect Congress' judgment on certain underlying issues, but would apply only pending entry into force of the protocol, it might strengthen the United States position in negotiation of the protocol without unduly tying its delegation's hands.

The difficulty is that a domestic statute is only needed to the extent it is contemplated that the United States may become a party to the Convention prior to the negotiation of the protocol. Thus one must consider whether a more obvious strategy of with-

232. *Id.* art. 8(3)(a).

233. *Id.* art. 8(7).

234. *Id.* art. 8(7)(c)(ii).

235. *Id.* art. 8(9).

236. *Id.* art. 8(10).

holding congressional action on the Convention and implementing legislation until a protocol is completed would in fact strengthen the capacity of the United States, including the Congress, to influence the negotiation of a protocol more than a domestic liability statute enacted as part of the implementing legislation and ratification process prior to completion of the protocol.

VIII. CONCLUSION: QUESTIONS FOR THE FUTURE

It is wise to keep four general questions in mind when evaluating the Antarctic Minerals Convention. To what extent is the Convention likely to achieve its underlying objective of promoting stability or, conversely, to create conflicts over territorial claims and other issues that may threaten the long-term stability of the Antarctic Treaty system? What is the net effect of the Convention on the totality of United States interests in Antarctica, including, but not limited to, its economic, environmental, and scientific interests as well as its interests in stability? What can the United States do to maximize the accommodation of its interests under the Convention? What are the net costs and benefits to the United States of alternatives to ratification of the Convention?

While complete answers to any of these questions at the present time may not be possible, it is to be hoped that the analysis of the issues addressed in this article may prove helpful in arriving at any final assessment.

APPENDIX

TABLE I

Membership in Convention Organs

1. Commission

<u>Which Convention Parties?</u> ¹	<u>Who Decides?</u>
Antarctic Treaty Consultative Parties as of 25 Nov. 1988 ²	Fixed by text
State actively engaged in substantial scientific, technical or environmental research in Antarctic area that is directly relevant to decisions about Antarctic mineral exploration and exploitation, particularly environmental decisions ⁵	Commission: —if candidate is Treaty a Consultative Party, ³ $\frac{1}{3} + 1$ can block; —otherwise, any Commission member can block; ⁴
State sponsoring on-going exploration or development (mining) ⁶	Same as above

1. Only states party to the Antarctic Treaty may become parties to the Convention. Convention on the Regulation of Antarctic Mineral Resource Activities, *opened for signature*, Nov. 25, 1988, 27 I.L.M. 859, art. 61 [hereinafter Convention]. Pursuant to Article XIII of the Antarctic Treaty, all U.N. members may become parties to the Antarctic Treaty, as well as any other state invited to accede by all the Consultative Parties to the Antarctic Treaty. Antarctic Treaty, art. XIII, Dec. 1, 1959, 12 U.S.T. 794, T.I.A.S. No. 4780, 402 U.N.T.S. 71.

2. Argentina, Australia, Belgium, Brazil, Chile, China, France, Federal Republic of Germany, German Democratic Republic, India, Italy, Japan, New Zealand, Norway, Poland, South Africa, Spain, Sweden, Union of Soviet Socialist Republics, United Kingdom, United States, and Uruguay. *See generally* Convention, art. 18(2)(a).

3. *See supra* note 1 for a list the existing Consultative Parties. Any other state party to the Antarctic Treaty may become a Consultative Party during such time as it conducts substantial scientific research activity in Antarctica, such as the establishment of a scientific station or the despatch of a scientific expedition. *See* Antarctic Treaty, art. IX.

4. Convention, art. 18(2)(b).

5. *Id.* art. 18(4).

6. *Id.* art. 18(2)(c).

2. Regulatory Committee (for Specific Area)

Which Commission Members?

4 territorial claimants,⁷
including any claimants
specific area⁸

6 non-claimants, including the
2 that assert a basis of claim
in Antarctica¹⁰

Who Decides?

Unless overruled by
Commission, its in that
Chairman's recommendation
prevails⁹ but any claimant in
that specific area has right to
serve and in effect to name the
other claimant members;

Text fixes 2 members. Unless
overruled by its Commission,
its Chairman's recommendation
prevails on the remaining 4
members.¹¹

Above membership of 10 must include:

- (1) members of Commission that contributed substantial scientific, technical or environmental information relevant to identification of that specific area; and¹²
- (2) at least 3 developing countries.¹³

7. Seven states have made claims over part of Antarctica: Argentina, Australia, Chile, France, New Zealand, Norway, and the United Kingdom.

8. Convention art. 29(2)(a), (2)(c)(i), (3), (4)(a), (5). A textual cross-reference to developing countries in effect requires that nomination of Argentina or Chile at least be considered.

9. *Id.* art. 29(5). A three-fourths vote of the Commission would be required to overrule the Chairman's recommendation, unless three-fourths of the Commission were prepared to regard the matter as a procedural question requiring only a majority vote. *Id.* art. 22 (1), (3).

10. The United States and Soviet Union are the two states that assert a basis of claim in Antarctica. *Id.* art. 29(2)(b), (2)(c)(ii), (3), (4)(b), 5.

11. *See supra* note 8.

12. Convention, art. 29(3)(a). In the event that a state sponsoring prospecting, exploration or development (mining) in the specific area concerned is not one of the 10 members of the Regulatory Committee, it has the right to be added as a member for specific periods and purposes. The sponsor of prospecting serves only until it applies for an exploration permit. The sponsor of exploration or development (mining) participates in decisions affecting only the activities it sponsors, and need not be a Commission member. *Id.* art. 29(6).

13. *Id.* art. 29(3)(b). The Final Act refers to the possibility of subsequently amending the Convention to increase the number of developing country members of the Regulatory Committees if their relative representation on the Commission increases. Such an amendment would require a two-thirds majority, including the affirmative votes of all Commission members. Amendments are prohibited for the first 10 years. *Id.* art. 64.

3. Advisory CommitteeWhich Convention Parties?Who Decides?All¹⁴

Fixed in text

4. Special Meeting of States PartiesWhich Convention Parties?Who Decides?All¹⁵

Fixed in text

14. *Id.* art. 23(2). The representative should have suitable scientific, technical or environmental competence. *Id.* art. 23(3).

15. *Id.* art. 28(2).

TABLE II

Selected Functions of Convention Organs

1. Scientific Research

Scientific research is excluded from the definition of mineral resource activities and thus from regulation under the Convention.¹

2. Areas Closed to Mineral Resource Activities (or Restricted)Which areas?Who decides? How?

Area designated under Antarctic Treaty as Specially Protected Area, Site of Special Scientific Interest, or protected area.²

Who: Antarctic Treaty Consultative Parties
How: approval by all Consultative Party governments³

Area designated under Convention as protected area.⁶

Who: Commission⁴
How: ¾ majority⁵

3. All Mineral Resource Activities (Prospecting, Exploration and Development)What?Who decides? How?

General environmental protection measures⁷

Who: Commission
How: ¾ majority⁸

Notification and application fees⁹

Who: Commission
How: Consensus¹⁰

1. Convention, *supra* table I, note 1. art. 1(7). See Antarctic Treaty, *supra* table I, note 1, arts. II, III, VI, VIII(1), IX(1) regarding scientific research.

2. Unless designation provides otherwise. Convention, art. 13(1).

3. Antarctic Treaty, art. IX.

4. With advice of Advisory Committee. Convention, art. 26(2)(a).

5. *Id.* art. 22(1).

6. *Id.* arts. 13(2), 21(1)(b).

7. *Id.* art. 21(1)(c).

8. *Id.* art. 22(1).

9. *Id.* arts. 21(1)(p), 37, 39, 44, 53.

10. *Id.* art. 22(2). Consensus is defined as the absence of formal objection. *Id.* art. 22(5).

Measures on availability and confidentiality of data and information
 Who: Commission
 How: $\frac{3}{4}$ majority¹¹

4. Prospecting

What?

Who decides? How?

[Permission to prospect]

[Not required]¹²

Variation from 25-meter maximum drilling depth;¹³ time limit beyond 10 years for release of basic data¹⁵

Who: Commission
 How: $\frac{3}{4}$ majority¹⁴

5. Request of a State Party to Identify (Open) an Area for Possible Exploration and Development

What?

Who decides? How?

Advice to Commission on scientific, technical and environmental aspects, including all views expressed¹⁷

Who: Advisory Committee
 How: Pursuant to its Rules of Procedure¹⁶

Report to Commission on consistency with the Convention, including all views expressed¹⁸

Who: Special Meeting of States Parties
 How: Pursuant to its Rules of Procedure¹⁹

11. *Id.* art. 22(1).

12. *Id.* art. 37(2).

13. *Id.* arts. 1(8), 21(1)(e)(1).

14. *Id.* art. 22(1).

15. *Id.* arts. 16(a), 21(1)(h), 37(13).

16. Adoption of the Advisory Committee's rules of procedure requires a three-fourths majority of the Advisory Committee and approval in the Commission. *Id.* art. 25(4). Commission approval probably requires a three-fourths majority. *Id.* art. 22(1).

17. *Id.* arts. 26(2)(a), 27, 40(1).

18. *Id.* arts. 28, 40(2)-(4).

19. Adoption of the Special Meeting's rules of procedure requires a three-fourths majority of the participants. Until this is done, provisional rules adopted by the Commission apply. *Id.* art. 28(5). Commission adoption of provisional rules probably requires a three-fourths majority. *Id.* art. 22(1).

Decision to identify (open) Who: Commission
 an area, including resources How: Consensus²⁰
 covered, elaboration of
 opportunities for
 participation by developing
 countries and others, general
 guidelines regarding
 operational requirements,
 block size, advice concerning
 support activities, and
 dispute settlement
 procedures²¹

Establishment of Regulatory Who: Commission
 Committee for area identified How: See Table I

6. Exploration and Development (Mining)

What?

Who decides? How?

Advice to Regulatory
 Committee on scientific,
 technical and environmental
 aspects of various decisions,
 including all views
 expressed²³

Who: Advisory Committee
 How: Pursuant to its Rules
 of Procedure²²

Block sizes,²⁴ application
 fees,²⁵ application
 procedures, means for
 selecting among competing
 applicants²⁷

Who: Regulatory Committee
 How: $\frac{2}{3}$ majority²⁶

20. *Id.* arts. 22(2), 41(2). If the Commission Chairman determines that there will be an objection, he consults Commission members and, if the objection will persist, convenes members most directly interested for the purpose of producing a generally acceptable proposal. *Id.* art. 22(5).

21. *Id.* arts. 21(1)(d), 41, 42, 59.

22. See *supra* note 1, table II.

23. Convention, arts. 26, 27, 43(6), 51(2), 52, 54(6).

24. Subject to any measure adopted by the Commission in this regard.

25. *Id.*

26. Convention, art. 32(3).

27. *Id.* art. 43(2). Competing applicants for the same block are first given a prescribed time by the Regulatory Committee to resolve the matter amongst themselves by means of their own choice. *Id.* art. 45(4).

Guidelines identifying the general requirements for exploration and development²⁸

Who: Regulatory Committee
How: $\frac{2}{3}$ majority, including half the claimant members²⁹ and half of the non-claimant members³⁰

Levies on miners to cover costs of Convention institutions³²

Who: Commission
How: Consensus³¹

What?

Who decides? How?

Permit to explore and approval management scheme for exploration and development (mining), including duration, safety and environmental protection, liability, payments (taxes or royalties), data and reporting, confidentiality, and dispute settlement³⁶

Who: Regulatory Committee³³
How: $\frac{2}{3}$ majority, including majority of claimants³⁴ and majority of non-claimants³⁵

Modification of the management scheme as condition of issuing development (mining) and permit³⁹

Who: Regulatory Committee³⁷
How: $\frac{2}{3}$ majority, including majority of claimants³⁸ and non-claimants⁴⁰

28. *Id.* art. 43(3), 43(5).

29. Normally 2 of the 4 non-claimants.

30. Normally 3 of the 6 non-claimants. Convention, art. 32(2).

31. *Id.* art. 21(2).

32. *Id.* art. 21(1)(q).

33. Article 46 requires the Regulatory Committee, in considering applications for exploration permits, managements schemes and development permits, to have recourse to the sponsoring state, any state or states making claims in the area over which the Regulatory Committee has competence, and, as may be required, 1 or 2 additional members of the Regulatory Committee. *Id.* art. 46.

34. Normally 3 of the 4 claimants.

35. Normally 4 of the 6 non-claimants. Convention, art. 32(1).

36. *Id.* arts. 44-48.

37. See *supra* note 18.

38. Normally 3 of the 4 claimants.

39. *Id.* art. 54(3)-(5).

40. Normally 4 of the 6 non-claimants. Convention, art. 32(1).

Issuance of development
(mining) permit⁴¹

Who: Regulatory
Committee⁴²

Request that Regulatory
Committee reconsider its
decision to approve the
management scheme or issue
development permit⁴⁴

Who: Commission
How: $\frac{3}{4}$ majority⁴³

What?

Who decides? How?

General rules regarding
suspension, modification, or
cancellation of a
management scheme,
penalties, and compensation
to miner⁴⁶

Who: Commission
How: $\frac{3}{4}$ majority⁴⁵

Suspension, modification, or
cancellation of a
management scheme,
penalties, and compensation
to miner⁴⁸

How: Regulatory Committee
How: $\frac{2}{3}$ majority⁴⁷

7. Budget and Expenditures

What?

Who decides? How?

Budget, financial regulations,
financial obligations of
States⁵⁰ Disposition of
surplus revenues, if any⁵¹

Who: Commission
How: Consensus⁴⁹
Who: Commission
How: Consensus⁵²

41. *Id.* art. 54(5).

42. Article 42(5) provides that the Regulatory Committee shall issue a development permit without delay if it approves modifications to the management scheme or if it does not consider that such modifications are necessary. The question of when the Committee's duty to issue the development permit arises, and how it is fulfilled, is addressed in the main text of the article. *Id.* art. 42(5).

43. *Id.* art. 22(1).

44. *Id.* arts. 21(1)(1), 49.

45. *Id.* art. 21(1).

46. *Id.* art. 51(6).

47. *Id.* art. 32(3).

48. *Id.* art. 51.

49. *Id.* art. 22(2).

50. *Id.* arts. 21(1)(o), 35.

51. *Id.* art. 21(1)(r).

52. *Id.* art. 22(2).

TABLE III

Blocking Power on a Regulatory Committee
Votes Requiring a $\frac{2}{3}$ Majority

Present and Voting	Absent or Abstention	Negative Votes to Block
10	0	4
9	1	4
8	2	3
7	3	3
6	4	3
5	5	2
4	6	2
3	7	2
2	8	1

Additional Blocking Options Where $\frac{2}{3}$ Vote Must Include Half
the Claimants and Half the Non-Claimants

Claimants Present and Voting	Claimants Absent or Abstention	Claimants Negative Votes to Block
4	0	3
3	1	2
2	2	2
1	3	1

Non-Claimants Present and Voting	Non-Claimants Absent or Abstention	Non-Claimants Negative Votes to Block
5	1	3
3	3	2
2	4	2
1	5	1

Additional Blocking Options Where 2/3 Vote Must Include Majority of Claimants and Majority of Non-Claimants

Claimants Present and Voting

4
3
2
1

Claimants Absent or Abstention

0
1
2
3

Claimants Negative Votes to Block

2
2
1
1

Non-Claimants Present and Voting

6
5
4
3
2
1

Non-Claimants Absent or Abstention

0
1
2
3
4
5

Non-Claimants Negative Votes to Block

3
3
2
2
1
1