Balancing Sovereign Interests beyond National Jurisdictions

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Fifty years ago on 2 May 1958 the government of the United States of America circulated a note to the 12 states most actively involved in scientific research in Antarctica during the International Geophysical Year, initiating discussions regarding the convening of a conference on Antarctica and the conclusion of an international treaty for this area. Shortly after the circulation of the note, on 10 June 1958, these 12 states, namely, Argentina, Australia, Belgium, Chile, France, Japan, New Zealand, Norway, South Africa, the United Kingdom, the United States, and the Union of Soviet Socialist Republics (USSR), started informal preliminary discussions in Washington that resulted in the convening of an international conference in Washington on 15 October 1959. On 1 December 1959 the conference resulted in the signing of the Antarctic Treaty, which entered into force on 23 June 1961 and currently defines an international regime for this vast area of our planet. The Antarctic Treaty turned out to be one of the most successful international agreements concluded by states belonging to two opposite ideological and military blocks, despite the extreme tension existing between them during the cold war period. It is also remarkable that the 12 states concerned managed to overcome a disagreement that existed and continues to exist among them regarding the legal status of the Antarctic continent in general and certain parts thereof that are considered by seven of them, namely, Argentina, Australia, Chile, France, New Zealand, Norway, and the United Kingdom, to be part of their territory.

A lot was said at the Antarctic Treaty Summit: Science-Policy Interactions in International Governance about the important role played by the Antarctic Treaty in ensuring close international cooperation in Antarctica, in providing solid ground for development of scientific research in Antarctica in the interest of all mankind, and in preserving Antarctica as an area of peace and stability, free of military rivalry and confrontation. Therefore, I will concentrate only on one aspect of the Antarctic Treaty that, in my view, is crucial for understanding what constitutes a foundation of the treaty and for retaining Antarctica as an area of peace and stability in the interests of future generations. I refer to the provisions of Article IV of the Antarctic Treaty.

In a balanced way, Article IV reflects the positions of the three groups of states that negotiated the Antarctic Treaty: states that consider the respective

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parts of the Antarctic continent as their territory; states that did not claim any sovereignty in Antarctica at the time of the conclusion of the treaty but consider that they may have legitimate right to do so; and states that take the position that no state can claim sovereignty in Antarctica. The position of the first group of states is reflected in paragraph 1(a) of Article IV, which states that nothing contained in the present treaty shall be interpreted as "a renunciation by any Contracting Party of previously asserted rights of or claims to territorial sovereignty in Antarctica." Paragraph 1(b) conveys the position of the second group by providing that nothing contained in the present treaty shall be interpreted as "a renunciation or diminution by any Contracting Party of any basis of claim to territorial sovereignty in Antarctica which it may have whether as a result of its activities or those of its nationals in Antarctica, or otherwise." Finally, paragraph 1(c) reflects the position of the third group, which currently constitutes the overwhelming majority of the Treaty Parties; it states that nothing contained in the present treaty shall be interpreted as "prejudicing the position of any Contracting Party as regards its recognition or nonrecognition of any other State's right of or claim or basis of claim to territorial sovereignty in Antarctica."

The above provisions are supplemented by an important commitment contained in paragraph 2 of Article IV, which states that "no acts or activities taking place while the present Treaty is in force shall constitute a basis for asserting, supporting or denying a claim to territorial sovereignty in Antarctica or create any rights of sovereignty in Antarctica. No new claim, or enlargement of an existing claim, to territorial sovereignty in Antarctica shall be asserted while the present Treaty is in force."

What is important to understand in relation to Article IV of the treaty is that contrary to widespread perception, the Antarctic Treaty does not freeze claims to territorial sovereignty in Antarctica. The Antarctic Treaty proclaims noble goals and contains concrete provisions aimed at ensuring their implementation. It states that Antarctica shall be used for peaceful purposes only and in this regard prohibits any measure of a military nature, such as the establishment of military bases and fortifications, the carrying out of military manoeuvres, and the testing of any type of weapon. In addition, it prohibits nuclear explosions in Antarctica and the disposal there of radioactive waste material. The treaty guarantees freedom of scientific investigation in Antarctica and cooperation toward that end and provides for the exchange of information regarding plans for scientific programs, scientific observations, and results from Antarctica and the exchange of scientific personnel in Antarctica. None of the objectives of the Antarctic Treaty could have been achieved on the basis of the position of only one of the groups of states referred to above. In order to achieve these objectives, which represented the common interests of the drafters of the treaty, the 12 original parties to the treaty agreed to retain status quo in Antarctica; in other words, they agreed to freeze the settlement of the issue of territorial claims in Antarctica. The Antarctic Treaty Parties agreed to assume obligations that correspond to the objectives of the treaty, but they retained at the same time their respective positions with regard to the issue of sovereignty.

Why is it so important to understand the role of Article IV of the Antarctic Treaty? The answer is because any new activity in Antarctica that goes beyond the scope of the Antarctic Treaty requires revisiting the provisions of Article IV to determine whether that activity could be accommodated by extending the application of Article IV. The development of the so-called Antarctic Treaty System has demonstrated that so far, the Antarctic Treaty Parties have been willing and capable of applying the understandings embodied in Article IV of the treaty to some new activities by adjusting such understandings as required. The Antarctic Treaty System is a set of complex arrangements made for the purpose of coordinating relations among states with respect to Antarctica and includes the Antarctic Treaty itself, recommendations adopted at meetings of the Antarctic Treaty Consultative Parties, the Protocol on Environmental Protection to the Antarctic Treaty, and two separate conventions, the Conservation of Antarctic Seals (London, 1972) and the Conservation of Antarctic Marine Living Resources (Canberra, 1980). The Antarctic Treaty System also includes the results of Meetings of Experts and the decisions of Special Consultative Meetings and, at a nongovernmental level, reflects the work of the Scientific Committee on Antarctic Research (SCAR) on all aspects of the system.

However, efforts of the Antarctic Treaty Parties have not always been successful. The Convention for the Regulation of Antarctic Mineral Resource Activities (Wellington, 1988) has not been ratified by any state and, consequently, has never entered into force. This lack of ratification occurred not only because of deficiency of or dissatisfaction with its provisions concerning protection of environment but also, as I will try to demonstrate, because of reasons related to the issue of sovereignty. Consequently, the future of the Antarctic Treaty and the system that has evolved on the basis of its provisions will depend, to a great extent, on the ability of these three groups of states to continue to work together within the framework

of the treaty to accommodate new activities, in particular, those relating to the potential use of Antarctic mineral resources, both on land and off the shore.

As we are celebrating the 50th anniversary of the conclusion of the Antarctic Treaty and look with pride on the past achievements, we should be mindful of what lies ahead, be realistic, and have the courage to acknowledge that there are serious perils on the horizon that may endanger the delicate balance of interests preserved by the Antarctic Treaty System, the cornerstone of which is the treaty itself. Recent submissions to the Commission on the Limits of the Continental Shelf by states claiming sovereignty in Antarctica have clearly demonstrated that rivalry over the territorial status of Antarctica is still present. It has not vanished over the last 50 years despite all the achievements of the Antarctic Treaty System; it is still alive and raises questions about the ability of the Antarctic Treaty System to withstand challenges posed by the potential opening of Antarctic mineral resources for exploitation.

According to Article VI of the Antarctic Treaty, its provisions apply to the area south of 60°S latitude, including all ice shelves. This is an artificial boundary as it does not represent the geographical boundary of Antarctica. Presumably, this latitude was selected because all land that is disputed and viewed by many states as territorial claims is located south of 60°S latitude.

The first time that the Antarctic Treaty Parties had to deal with the regulation of a commercial activity in Antarctica related to its resources was in 1972 in the case of the Convention for the Conservation of Antarctic Seals. Although there had been no attempt to exploit Antarctic seals commercially since 1964, the SCAR Group of Specialists on Antarctic Seals continued to monitor the taking of seals for scientific purposes, and the Treaty Parties came to the conclusion that there was a need to develop an international mechanism to protect the conservation of Antarctic seals. The Antarctic Treaty Parties had the choice of incorporating the agreement in the form of an Antarctic Treaty Recommendation or of adopting a free-standing instrument, and they chose the latter option. As there was no commercial activity related to the exploitation of Antarctic seals, the Antarctic Treaty Parties easily agreed that this convention should apply to the seas south of 60°S latitude (Article 1, "Scope of the Convention"), in respect of which the Contracting Parties affirmed the provisions of Article IV of the Antarctic Treaty.

However, eight years later in the case of Antarctic marine living resources the Antarctic Treaty Parties were confronted with a serious challenge to reach an agreement on how it would be possible, if at all, to apply the provisions of Article IV of the treaty to the activities related to the use of these resources. In the 1970s, the Antarctic waters were gradually becoming an area of quite extensive fishery activities. The Antarctic Consultative Parties recognized that there was an urgent need to establish some form of regulatory mechanism that would ensure conservation and sustainable use of the Antarctic marine living resources. At that time, negotiations on the Law of the Sea Convention had not been completed yet. However, it was more or less accepted by all states that the new convention would entitle coastal states to establish zones extending up to 200 nautical miles, within which they would have the sovereign rights for the purpose of exploiting, conserving, and managing its living resources. On 26 September 1977 New Zealand adopted a new law regarding the territorial sea and the exclusive economic zone, and in 1979 Australia adopted new legislation on the 200 nautical mile fishery zone. The states claiming sovereignty in Antarctica took and continue to maintain a position that the establishment of such zones is an act of exercise of their sovereign rights under international law and therefore does not constitute an extension of the existing claim to territorial sovereignty, which is prohibited by paragraph 2 of Article IV of the Antarctic Treaty. States that do not recognize claims to territorial sovereignty in Antarctica took and continue to maintain the opposite position.

Marine living resources do not recognize boundaries. To be effective, their conservation and management should be organized on a regional basis covering all areas of their migration. It should be acknowledged as a significant achievement of the Antarctic Treaty Parties in the 1970s that, first, they agreed to approach the conservation and management of Antarctic marine living resources by negotiating a convention applying to the entire area of the Antarctic marine ecosystem and, second, in the process of such negotiations conducted within the framework of a Special Consultative Meeting convened for this purpose, they managed to reach a common understanding on how the provisions of Article IV of the treaty could be extended to this new activity while preserving, with respect to the issue of sovereignty, the status quo enshrined in the Antarctic Treaty.

The Convention on the Conservation of Antarctic Marine Living Resources, which was concluded in Canberra, Australia, in May 1980 and entered into force on 7 April 1982, applies to the entire area of the Antarctic marine ecosystem and is limited in the north by the Antarctic Convergence, a major circum-Antarctic biogeographic boundary where the cold, northerly moving

waters dip beneath warmer, southerly moving subtropical waters. Article I, paragraph 1, of this convention provides that the convention applies to the Antarctic marine living resources of the area south of 60°S latitude and to the Antarctic marine living resources of the area between that latitude and the Antarctic Convergence, which form part of the Antarctic marine ecosystem.

The issue of territorial sovereignty, as in the case of the Antarctic Treaty, is addressed in Article IV of the convention. Since the convention is open to states and entities (e.g., the European Union) who are not parties to the Antarctic Treaty, the convention contains an important condition that binds all parties to the convention by the provisions of Article IV of the treaty. Paragraph 1 of Article IV of the convention states that with respect to the Antarctic Treaty area, all Contracting Parties, whether or not they are parties to the Antarctic Treaty, are bound by Articles IV and VI of the Antarctic Treaty in their relations with each other. Article VI of the Antarctic Treaty relates to freedoms of high seas.

The compromise between the three groups of states as reflected in Article IV of the convention contains three main elements. Paragraph 2(a) of that article reiterates their basic positions and states that nothing in the convention and no acts or activities taking place while it is in force shall constitute a basis for asserting, supporting, or denying a claim to territorial sovereignty in the Antarctic Treaty area or create any rights of sovereignty in the Antarctic Treaty area. Paragraph 2(d) addresses the issue of the extension of sovereign claims and provides that nothing in the convention and no acts or activities taking place while it is in force affect the provision of Article IV, paragraph 2, of the Antarctic Treaty that no new claim, or enlargement of an existing claim, to territorial sovereignty in Antarctica shall be asserted while the Antarctic Treaty is in force.

Paragraphs 2(b) and (c) deal with coastal state jurisdiction and reflect the positions of claimant and nonclaimant states on this issue. They respectively provide that nothing in the convention and no acts or activities taking place while it is in force shall be interpreted as a renunciation or diminution by any Contracting Party of, or as prejudicing, any right or claim or basis of claim to exercise coastal state jurisdiction under international law within the area to which this convention applies or be interpreted as prejudicing the position of any Contracting Party as regards its recognition or nonrecognition of any such right, claim, or basis of claim.

Despite their disagreement regarding coastal state jurisdiction in Antarctica, reflected in Article IV of the convention, both claimant and nonclaimant states as parties to the convention agreed to entrust the responsibility for the conservation and management of Antarctic marine living resources to the Commission for the Conservation of Antarctic Marine Living Resources established pursuant to Article VII of the convention. The commission is empowered under the convention, inter alia, to identify conservation needs and analyze the effectiveness of conservation measures; to formulate, adopt, and revise conservation measures on the basis of the best scientific evidence available; to implement the system of observation and inspection established under Article XXIV of this convention; and to carry out such other activities as are necessary to fulfil the objective of the convention. The conservation measures that may be adopted by the commission include the designation of the quantity of any species which may be harvested in the area to which this convention applies; the designation of regions and subregions based on the distribution of populations of Antarctic marine living resources; the designation of the quantity which may be harvested from the populations of regions and subregions; the designation of protected species; the designation of the size, age, and, as appropriate, sex of species which may beharvested; the designation of open and closed seasons for harvesting; the designation of the opening and closing of areas, regions, or subregions for purposes of scientific study or conservation, including special areas for protection and scientific study; and regulation of the effort employed and methods of harvesting, including fishing gear, with a view, inter alia, to avoiding undue concentration of harvesting in any region or subregion.

The compromise achieved in Article IV of the convention was possible because of the good will of all the parties concerned who shared the view that effective conservation and management of Antarctic marine living resources requires a regional approach and that such a regime should apply to the whole area of the Antarctic marine ecosystem. However, in addition to Article IV, the convention also includes other provisions that guarantee that no activities will take place in Antarctica on the basis of the convention if they are not acceptable to the states, whose interests are protected by Article IV of the convention. These guarantees are embodied in Articles IX and XII of the convention. Article XII provides that decisions of the Commission for the Conservation of Antarctic Marine Living Resources on matters of substance are taken by consensus, which allows any claimant or nonclaimant state to block the adoption of a decision by the commission if that state disagrees with it. According to Article IX, paragraph 6(b), conservation measures adopted by the commission become binding

upon all members of the commission 180 days after the receipt of a notification from the commission about their adoption. However, pursuant to paragraph 6(c) of this article, if a member of the commission, within 90 days following such notification, informs the commission that it is unable to accept the conservation measure, in whole or in part, the respective measure shall not, to the extent stated, be binding upon that member of the commission.

The Antarctic Treaty Parties found themselves in a much more complex situation in the case of mineral resources, namely, in determining whether it would be likewise possible to find common ground regarding a minerals regime that should govern their exploration and exploitation. In the mid-1970s some geophysical prospecting companies started making inquiries about the possibility of prospecting for mineral resources in the Southern Ocean surrounding Antarctica. At the time of the negotiation of the Antarctic Treaty the question was raised as to whether the treaty should also cover mineral exploration and exploitation, and it was concluded that to do so would be premature. However, in the mid-1970s it was understood by the Antarctic Treaty Parties that the question of how Antarctic mineral activity was to be regulated, were it ever to occur, would not go away.

As a first step the Antarctic Treaty Consultative Parties agreed, by adopting Recommendation IX-1 at the Ninth Consultative Meeting, to "urge their nationals and other States to refrain from all exploration and exploitation of Antarctic mineral resources while [they are] making progress towards the timely adoption of an agreed regime." Negotiations on a minerals regime, which lasted for almost 10 years and were conducted within the framework of the Fourth Special Consultative Meeting convened for that purpose, culminated in the adoption of the Convention on the Regulation of Antarctic Mineral Resources Activities (CRAMRA) on 2 June 1988 in Wellington, New Zealand.

The first problem that the Antarctic Treaty Parties needed to resolve in elaborating a minerals regime was the question of the potential area of its application. Pursuant to Article 1, paragraph 1(a) of the Convention on the Law of the Sea (UNCLOS), to which, with one exception, all Antarctic Treaty Parties are members, the seabed and ocean floor and subsoil thereof beyond the limits of national jurisdiction constitute the "Area." In accordance with Articles 136 and 137 of UNCLOS, the Area and its resources are the common heritage of mankind and no state shall claim or exercise sovereignty or sovereign rights over any part of the Area or its resources, nor shall any state or natural or juridical person appropriate any part thereof, and no such claim or exercise of sovereignty or sovereign rights nor such appropriation shall be recognized.

If there is no sovereignty over land mass in Antarctica, theoretically, there should be no continental shelf in Antarctica, which according to Article 76 of UNCLOS, constitutes the natural prolongation of the land territory of a state up to the outer edge of the continental margin. The Antarctic Treaty Parties sidestepped the problem of the origin of rights to the continental shelf by adopting an approach implying that if a minerals regime is elaborated that is applicable to the land mass in Antarctica, irrespective of its status (in other words, applicable to the Antarctic continent and surrounding islands), then it should logically be extended to what constitutes the natural prolongation of this land mass in submarine areas appertaining to that land mass. Article 5, paragraphs 2 and 3, of CRAMRA provide that the convention "shall regulate Antarctic mineral resource activities which take place on the continent of Antarctica and all Antarctic islands, including all ice shelves, south of 60° south latitude and in the seabed and subsoil of adjacent offshore areas up to the deep seabed" and that "for the purposes of this Convention 'deep seabed' means the seabed and subsoil beyond the geographic extent of the continental shelf as the term continental shelf is defined in accordance with international law."

In the Final Act of the Fourth Special Antarctic Treaty Consultative Meeting that adopted the convention it is clarified that the area of regulation of Antarctic mineral resource activities defined in Article 5, paragraph 2, of the convention does not extend to any continental shelf appurtenant in accordance with international law to islands situated north of 60°S latitude. It is further clarified in the Final Act that the geographic extent of the continental shelf as referred to in Article 5, paragraph 3, of the convention would be determined by reference to all the criteria and the rules embodied in paragraphs 1–7 of Article 76 of UNCLOS.

Article 9 of CRAMRA, "Protection of Legal Positions under the Antarctic Treaty," is aimed at extending the balance reflected in Article IV of the Antarctic Treaty to new activities related to mineral resources and follows the format of Article IV of the Convention on the Conservation of Antarctic Marine Living Resources. It contains three main elements. Paragraph (a) of this article reiterates the basic positions of the three groups of states and provides that nothing in the convention and no acts or activities taking place while it is in force shall constitute a basis for asserting, supporting, or denying a claim to territorial sovereignty in the Antarctic Treaty area or create any rights of sovereignty in the Antarctic Treaty area. Paragraph 2(d)

addresses the issue of extension of sovereign claims and states that nothing in the convention and no acts or activities taking place while it is in force shall affect the provision of Article IV, paragraph 2, of the Antarctic Treaty that no new claim, or enlargement of an existing claim, to territorial sovereignty in Antarctica shall be asserted while the Antarctic Treaty is in force.

Paragraphs (b) and (c) of Article 9 deal with potential rights to the continental shelf and therefore the text of paragraph (b) is slightly different from the text of the similar paragraph in Article IV of the Convention on the Conservation of Antarctic Marine Living Resources (paragraph 2(b)). Paragraphs (b) and (c) of Article 9 of CRAMRA respectively provide that nothing in the convention and no acts or activities taking place while it is in force shall be interpreted as a renunciation or diminution by any party of, or as prejudicing, any right or claim or basis of claim to territorial sovereignty in Antarctica or to exercise coastal state jurisdiction under international law or be interpreted as prejudicing the position of any party as regards its recognition or nonrecognition of any such right, claim, or basis of claim.

In addition, the issue of territorial claims is also addressed in a special preamble paragraph stating that a regime for Antarctic mineral resources must be consistent with Article IV of the Antarctic Treaty and in accordance therewith be without prejudice and be acceptable to those states which assert rights of or claims to territorial sovereignty in Antarctica and those states which neither recognise nor assert such rights or claims, including those states which assert a basis of claim to territorial sovereignty in Antarctica.

Although the above provisions reiterate that the status quo is preserved in Antarctica in the case of the minerals regime, from my point of view, they are mostly symbolic in nature because as in the case of living resources the real issue is whether other substantive provisions of the minerals convention confirm that respective interests of the three groups of states are adequately protected. Analysis of substantive provisions of CRAMRA raise doubts in this regard.

Two main institutions that are envisaged to be established under CRAMRA are the Antarctic Mineral Resources Commission (hereinafter "the Commission") and the Antarctic Mineral Resources Regulatory Committees (hereinafter "the Regulatory Committees").

Membership in the Commission, inter alia, includes all states that were Antarctic Treaty Consultative Parties on the date of the opening of the convention for signature, which includes all states that assert rights of or claims to territorial sovereignty in Antarctica, the two states that assert a basis of claim to territorial sovereignty in Antarctica (the United States and the Russian Federation/former USSR), and all other states that do not recognize any such rights or claims (Article 18, paragraph 2(a)). So, on the surface, the balance of Article IV is preserved.

However, decision-making provisions of CRAMRA provide that the Commission shall take its decisions on matters of substance by a three-quarters majority of the members present and voting (Article 22, paragraph 1). It is true that according to paragraph 2 of Article 22, some decisions can be taken by the Commission only by consensus. However, most of them relate to budgetary/financial matters (Articles 21, paragraph 1(p), (q), and 35, paragraphs 1–5), which are important but secondary in nature; the elaboration of the principle of nondiscrimination (Article 21, paragraph 1(i)); and the identification of an area for possible exploitation. Consensus, however, is not required for decisions of the Commission concerning the determination of disposition of revenues received from the exploitation of the mineral resources (Articles 21, paragraph 1(r), and 35, paragraph 7). The only clause that addresses, in a rather oblique form, this sensitive and most important issue for states whose positions are reflected in Article IV of the Antarctic Treaty is the statement in paragraph 7(b) of Article 35 providing that the Commission, in determining the disposition of revenues accruing to it, shall ensure that the interests of the members of Regulatory Committees who have the most direct interest in the matter in relation to the areas in question are respected in any disposition of that surplus.

The fact that decisions of the Commission on such an important issue as revenue sharing are to be taken by three-quarters majority of those present and voting raises the question as to whether this is a fair procedure that adequately and in a balanced way preserves the interests of at least two groups of states referred to in Article IV of the Antarctic Treaty, namely, those who assert rights of or claims to territorial sovereignty in Antarctica and those who assert a basis of claim to territorial sovereignty in Antarctica. In my view, at least the rights of the Russian Federation, which asserted a basis of claim, are not adequately protected by voting procedures in the Commission.

Another institution that plays a crucial role in the implementation of the convention is a Regulatory Committee. Under the convention a 10-member Regulatory Committee is to be established for each area identified by the Commission as a coherent unit for the purposes of resource management.

Provisions on membership in Regulatory Committees are contained in Article 29 of the convention. Membership of each such Regulatory Committee should always include the member, if any, or if there is more than one, those members of the Commission identified by reference to Article 9, paragraph (b), which assert rights or claims in the identified area (Article 29, paragraph 2(a)), in other words, claimant states. Such membership should also include the two members of the Commission, also identified by reference to Article 9, paragraph (b), who assert a basis of claim in Antarctica (Article 29, paragraph 2(b)). These two countries are the United States and the Russian Federation. In general, under the convention the 10-member composition of each Regulatory Committee, which is determined by the Commission, should include four members identified by reference to Article 9, paragraph (b), who assert rights or claims, including the member or members, if any, referred to in paragraph (a) of Article 29, and six members who do not assert rights or claims as described in Article 9, paragraph (b), including the two members referred to in paragraph (b) of Article 29, the two states that asserted basis of claim.

The Final Act of the Fourth Special Antarctic Treaty Consultative Meeting includes some additional clarifications with regard to membership in Regulatory Committees. In relation to Article 29 it states that the meeting agreed that the member or members of the Commission mentioned in Article 29, paragraph 2(a), are those identified by reference to Article IV, paragraph 1(a), of the Antarctic Treaty. The members of the Commission mentioned in Article 29, paragraph 2(b), are those identified by reference to Article IV, paragraph 1(b), of the Antarctic Treaty.

It is obvious from the description of the functions of Regulatory Committees defined in Article 31 of the convention that they will play a crucial role in the development of Antarctic mineral resources. The functions of each Regulatory Committee, inter alia, shall include the consideration of applications for exploration and development permits; approval of management schemes; issuance of exploration and development permits; and monitoring of exploration and development activities.

Decision-making procedures in Regulatory Committees are defined in Article 32 of the convention. It provides that decisions by a Regulatory Committee regarding approval of the management scheme (Article 48) and its modification (Article 54, paragraph 5) require a two-thirds majority of the members present and voting, which majority should include a simple majority of those present and voting referred to in Article 29, paragraph 2(c)(i), in other words, states that asserted rights or claims. It also requires a simple majority of members present and voting referred to in Article 29, paragraph 2(c)(ii), which means two states that asserted a basis of claim and states that do not recognize territorial claims in Antarctica (Article 32, paragraph 1). Decisions by a Regulatory Committee on guidelines identifying the general requirements for exploration and development in its area of competence and their revision (Article 43, paragraphs 3 and 5) require a two-thirds majority of the members present and voting, which majority shall include at least half of members of two groups referred to in Article 29, paragraphs 2(c)(i) and (ii) (Article 32, paragraph 2). Decisions by a Regulatory Committee on other matters of substance require a two-thirds majority of the members present and voting (Article 32, paragraph 3). Finally, Article 32, paragraph 5, provides that nothing in it shall be interpreted as preventing a Regulatory Committee, in taking decisions on matters of substance, from endeavouring to reach a consensus.

The above rather complex decision-making formulas, despite repeated references to states asserting rights or claims and states asserting basis of claim, do not sufficiently protect their interests because they do not exclude the adoption of decisions that may not be acceptable to them. It is obvious from the provisions on decision-making procedures that although efforts to reach consensus should be endeavoured and a simple majority of the interested group of states is required, in the end, decisions on substance will be taken in a Regulatory Committee by a two-thirds majority and a country with the most vested interest in the concerned area will be unable to block a decision that is unacceptable to it.

It appears that the efforts by the drafters of CRAMRA to transfer the balance of interest embodied in the provisions of the Antarctic Treaty, which was successfully reinstated in the case of marine living resources, to potential activities related to the use of Antarctic mineral resources failed to produce the required result. Leaving aside the question of whether CRAMRA is deficient because it does not provide sufficient guarantees for an adequate protection of the very fragile Antarctic environment, a conclusion may be reached that the respective provisions of the convention that are supposed to accommodate the interests of the three groups of states referred to in Article IV of the Antarctic Treaty do not preserve the required balance of interest and leave no doubt that some key states will find it difficult to accept the convention. The lesson to be learned from this experience is that only a convention that provides guarantees for real involvement in mineral resource activities and revenue sharing of all states whose interests are reflected in Article IV of the Antarctic

Treaty, if and when such activities take place there, and a decision-making mechanism that is based on general agreement and not one that is based on majority vote can have good chance of achieving true and lasting balance of interest in Antarctica and therefore ensure continuation of stability in the area.

The Protocol on Environmental Protection to the Antarctic Treaty was hastily drafted by the Eleventh Antarctic Treaty Consultative Meeting after it became clear that CRAMRA had little chance to enter into force. Most of the provisions of the protocol, which supplements the Antarctic Treaty but neither modifies nor amends it, draw in large part from recommendations adopted earlier by the Consultative Parties (Article 4). The protocol prohibits in Article 7 any activity relating to mineral resources, other than scientific research. With respect to Article 7, the protocol provides in paragraph 5 of Article 25 that the prohibition on Antarctic mineral resource activities contained therein shall continue unless there is in force a binding legal regime on Antarctic mineral resource activities that includes an agreed means for determining whether, and if so, under which conditions, any such activities would be acceptable. It is further emphasized in Article 25 that the legal regime on Antarctic mineral resources shall fully safeguard the interests of all states referred to in Article IV of the Antarctic Treaty and apply the principles thereof. No reservations to the protocol are permitted (Article 24).

It follows that any use of Antarctic mineral resources in the future will require negotiation of a legally binding regime and such a regime should fully safeguard the interests of all states referred to in Article IV of the Antarctic Treaty. In this regard, it is worth recalling that in their submission to the Commission on the Limits of the Continental Shelf, most of the states that have asserted rights or claims to sovereignty in Antarctica have either submitted or reserved the right to submit information regarding areas of their continental shelf in Antarctica, the extent of which has yet to be defined. They also stated in communications to the commission that they have regard to the legal and political status of Antarctica under the provisions of the Antarctic Treaty, including its Article IV, and consider that it is open to the states concerned to submit information to the commission that would not be examined by the commission for the time being. These actions, as expected, have not been answered by states that do not recognize territorial claims or that assert a basis of claim in Antarctica.

Thus, rivalry over the legal status of Antarctica is still present and very much alive. The success of any negotiations on a minerals regime, if any, for Antarctica will depend on whether appropriate lessons are drawn from the positive and negative experiences in negotiating CRAMRA.