

Resource Sharing in Antarctica: For Whose Benefit?

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I. Introduction

Long neglected by international lawyers, Antarctica has recently begun to occupy center stage in world politics. Increasing concern about the protection of the environment, the broadening hole in the ozone layer over the continent, and the debate about the proper role of the United Nations in Antarctic politics, have all been factors in extending the interest over Antarctica well beyond the limited group of the States Parties to the Antarctic Treaty of 1989.¹

No other single factor, however, has contributed so much to stir up such interest as the opening of negotiations for the adoption of an Antarctic Minerals regime by the Consultative Parties to the Antarctic Treaty. From the time of their inception, such negotiations had been challenged by non-governmental organizations concerned with the future of the Antarctic environment and by a group of states within the UN General Assembly whose view is that the general interest of all mankind in Antarctic resources would require a universal involvement in the building of the pertinent legal regime, rather than a restricted negotiating forum within the Antarctic Treaty System.

Despite this opposition, the Consultative Parties concluded the minerals negotiations in Wellington, New Zealand, on 2 June 1988, when the Convention on the Regulation of Antarctic Mineral Resource Activities was adopted together with the Final Act of

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¹ The Antarctic Treaty was adopted at Washington on December 1 1959 and entered into force on June 23 1961. The original feature of the Treaty – whose main purpose was to establish a system of international administration in order to avoid the risk of conflicts arising from competing territorial claims – is the two-tiered structure of consultative and non-consultative Parties. The latter are the original 12 parties to the Treaty plus the subsequent acceding Parties which have shown to be able to conduct substantial scientific activities in Antarctica so as to acquire the capacity to take responsible decisions over Antarctic matters in the consultative meetings that are held periodically. As of May 1 1989 there are 38 Parties and 24 Consultative Parties, with the number of the latter group progressively increasing as interest in Antarctica increases. After completion of this article, three new states became Consultative Parties as a consequence of deliberations adopted by consensus at the XVth Antarctic Treaty Consultative Meeting, held in Paris, October 1989. They are: Finland, Peru and South Korea.

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the conference.² The Convention was opened for signature on 25 November 1988 and it was to remain open until 25 November 1989 for signature by states which had participated in the final session of the Antarctic minerals negotiations (Article 60). This period of time has now elapsed and several events have occurred that have made the issue of resource management and environmental protection in Antarctica more timely and complex. The first was the announcement made by the Government of Australia in May 1989 that it would not sign the Convention. Shortly thereafter the French Government decided to join the Australian position in promoting initiatives for the adoption of a comprehensive agreement on the protection of the Antarctic environment.

The second event was the disastrous shipwreck of the Argentinian vessel *Bahia Paraiso* which ran aground in Antarctic waters in January 1989. This accident, unfortunately followed by the even graver *Exxon Valdez* oil spill in Alaska, dramatized concerns about hazardous industrial and transport activities in polar regions and ultimately led other countries to decide not to sign the Wellington Convention. These countries include Italy, Belgium and India.

Thirdly, the XVth Antarctic Consultative Meeting took place in Paris, 9-20 October 1989, and two recommendations were adopted that call, respectively, for the convening of a meeting to consider a comprehensive set of environmental protection measures, and for the starting of negotiations for the adoption of a Protocol on liability for mineral resource activities in Antarctic as required by Article 8(7) of the Wellington Convention.

Against this complex background, this note is intended to offer some reflections on a few general questions that have been raised in the aftermath of the adoption of the minerals regime. These questions are:

- 1) whether the Antarctic minerals convention is necessary or desirable in view of the perceived threat that it poses to the Antarctic environment;
- 2) whether the solutions adopted in the Convention represent a balanced accommodation between the interests of those states that claim sovereignty in Antarctica and of those states – the great majority – that oppose such claims;
- 3) whether the Convention sufficiently takes into account the interest of the international community as a whole, particularly in view of the special international status of Antarctica and of the possibility of subjecting its resources to the regime of the common heritage of mankind.

II. Was an Antarctic Minerals Regime Really Necessary?

Despite the sharp diversity of views on this issue it is fair to say that the main motives behind the starting of the minerals negotiations were essentially two: 1) the absence in the Antarctic Treaty adopted at Washington in 1959 of specific provisions addressing the issue of mineral resources; and 2) the fear that this lacuna might facilitate unilateral deposits in Antarctica.

The latter argument carried a special weight for the Consultative Parties to the Antarctic Treaty in so far as possible unilateral action in the field of mineral activities would have unavoidably resurrected the specter of sovereignty claims in Antarctica, a specter that for the time being has been put to rest by the "freezing clause" of Article IV of the

² The English text of the Convention, whose authentic languages are also French, Russian, Spanish and Chinese, is reprinted in 27 ILM (1988) 859.

Treaty.³ On the basis of these considerations, the Consultative Parties had already endeavoured to preempt the risks of unilateral action by adopting in 1977 Recommendation IX-1 which imposed a "voluntary" moratorium on mineral activities in Antarctica pending the adoption of a regime agreed upon amongst the Consultative Parties. In 1981 another recommendation, n. XI-1, was adopted by the Consultative Parties which in effect started the process of mineral negotiations and eventually led to the 1988 Convention. These arguments in favour of an Antarctic minerals regime have been sharply criticized by some environmental organizations whose lobbies were particularly active during the negotiations. They maintain that a mineral regime is neither necessary nor desirable simply because no mineral activities should ever take place in Antarctica. On this assumption, they forcefully argue for the designation of the continent as a world park, a solution that would better guarantee the preservation of the Antarctic environment and the continuation of scientific activities under the scope of the Antarctic Treaty. As for the risk of unilateral action in the absence of any international regulation, the proponents of this theory tend to dismiss it as a false problem since, they maintain, no one would ever engage in the extremely costly and risky business of exploring Antarctica for mineral resources without a legal framework capable of guaranteeing the investment and the enjoyments of its products.

The arguments of the opponents of the mineral regime have undoubtedly certain merits: they are supported by the moral strength of the idea that the devastating effects of industrial activities, as they are felt now all over the inhabited part of the globe, should not be extended as well to the last pristine continent on earth, Antarctica. Further, economic considerations lend support to the world park option for Antarctica since there is no doubt that today's world market prices can in no way justify the commercial exploitation of Antarctic oil, gas or hard minerals. However, the opponents of the mineral regime fail to recognize that, at least for the time being, the *a priori* exclusion of the possibility of conducting mineral resource activities in Antarctica was not politically acceptable to the Governments. Not one of the 22 Consultative Parties which participated in the final meeting at which the minerals convention was adopted, was in fact prepared to consider such exclusion: neither the two superpowers, nor the group of the seven claimant countries, including Japan, the Federal Republic of Germany and Italy, nor the less developed countries including the leading powers of the group, China, India, Brazil. In this situation, also the argument that the minerals regime was not needed because no one would in its absence engage in Antarctic mineral activities risked becoming an exercise in self-deception. Governments were so unwilling to exclude the mineral resources option that, as a consequence, no one could exclude that, for reasons of prestige, economic gain, strategic self sufficiency or others, a unilateral program of Antarctic mineral exploration and exploitation might be launched.

If this analysis is correct, then the answer to the question whether the minerals convention was necessary is yes. Undoubtedly, however, the minerals negotiations have caused new environmental concerns and put a strain on both the Antarctic Treaty system – because of the unresolved sovereignty issue in Antarctica – and on the relationship between the Parties to this system and the rest of the international community, which may legitimately ask in whose interest the new mineral regime really is. How the Convention deals with these questions and whether it resolves the tensions within the Antarctic system and between that system and the outside world is what I am going to discuss now.

³ Article IV provides that nothing in the Antarctic Treaty and no activity carried out under it may be interpreted as renunciation, diminution or enlargement of rights or claims over Antarctic territory, or as a prejudice to the position of any state regarding non-recognition of such claims.

III. Does the Minerals Convention Pose a Threat to the Antarctic Environment?

Since it became apparent that the mineral negotiations would be successfully concluded with the adoption of the Convention, the Consultative Parties have come under attack for their alleged attempt at opening Antarctica for commercial mining. The environmentalist associations that are in the forefront of this attack of course do not conceive of Antarctica being opened to minerals exploitation even under the most rigorous system of supervision. Their position, as already mentioned, is uncompromising in their demand that the whole continent be declared a world park.

Whether this option will prevail in the long run, or whether Antarctica will be opened to mineral resource activities under the 1988 Convention is, for the time being, only a matter of speculation. What is certain now is that all the states active in Antarctica have shown that they are not willing to exclude the option of mineral activities in that continent. Therefore, even if one were to hope that the continent of Antarctica should in the future remain immune from mineral activities, it is nonetheless realistic to assume that some mineral activities may be considered in the future as an acceptable risk by those states that hitherto have engaged in scientific exploration and investigation of Antarctica. In this perspective, it is important to assess as objectively and impartially as possible to what degree the new Convention provides a guarantee for the environment.

First of all one must recognize that the adoption of the Convention and its signature by states does not in itself involve the opening of Antarctica or of any sector of it to mineral exploration initiatives. In the period preceding the entry into force of the Convention – which in accordance with Article 62 will require the deposit of the instruments of ratification by 16 out of the 20 states that participated as Consultative Parties in the final session of the minerals negotiations – no mineral activities are allowed in Antarctica because of the Final Act's confirmation of the moratorium originally adopted in 1977 by Recommendation IX-1. The Final Act requires that "[a]ll states represented at the Meeting would urge their nationals and other states to refrain from Antarctic mineral resource activities as defined in the Convention pending its timely entry into force." The moratorium so established goes even beyond the 1977 one. First, because it concerns not only the activities of exploration and exploitation but also prospecting. The latter has previously been considered free as scientific research. As a result of the mineral negotiations, however, prospecting has been differentiated from scientific research and defined by Article 1(8) by reference to the aim of "[i]dentifying areas of mineral resource potential for possible exploration and development", making it clear that drillings and excavations beyond the depth of 25 meters are not to be considered as scientific research. Further, the Final Act expands the geographic scope of the moratorium as compared to Recommendation IX-1. The latter did not apply to marine areas of Antarctica with the consequence that off-shore prospecting could be carried out under the guise of scientific research. Under Article 5 of the Convention the sea bed of Antarctic coastal zones is subject to the Convention and, prior to its entry into force, to the moratorium instituted by the Final Act.

If for the time being the adoption of the Minerals Convention has expanded rather than reduced the scope of environmental safeguards in Antarctica, what will be the situation after its possible entry into force? The Convention addresses the question of environmental protection at different levels corresponding to different stages of mineral activities. The first stage, prospecting, does not require prior licencing. However, it re-

quires the fulfillment of a series of obligations intended to protect the Antarctic environment. First, the so called "sponsoring state" must notify the organs of the regime (the *Commission*) at least nine months before the beginning of planned prospecting. Second, the sponsoring state must certify the technical and financial ability of the operator to comply with the provisions of the Convention concerning liability for damage to the Antarctic environment (Article 8(1)). Third, the operator must ensure at the end of its activities the removal of equipment and installations as well as site rehabilitation. Fourth, prospecting must be carried out at all times in compliance with the principles laid down in the Convention, particularly Articles 2, 3, 4, concerning the compatibility of the mineral activities with the Antarctic Treaty system, the Antarctic environment and the dependent and associated ecosystems, and "other legitimate uses of Antarctica." Fifth, all prospecting installations are subject to inspection by individual states under Article VII of the Antarctic Treaty and by the institutions of the regime under Article 12 of the Convention. Finally, prospecting activities are subject to the dispute settlement procedure whenever they are considered to be prejudicial to the environment (Article 6 of the Annex for the Arbitral Tribunal).

At the stage of exploration and development the full range of environmental guarantees provided by the Convention would come into play, following what has been called the "cascade effect" mechanism, which involves a system of authorizations, permits, controls and supervision that makes the mineral regime one of the most demanding and sophisticated multilateral arrangements developed so far in the field of international environmental law. The features of the mechanism can be summarily described as follows:

1) The Party having an interest in the identification of a given area of Antarctica for possible exploration and development must present an application to the secretary of the *Commission*, indicating the type of mineral activities and methods of operation, and providing a detailed impact assessment study (Article 39).

2) The application is circulated amongst all Parties and to observers attending the meetings of the *Commission*; then it is considered by the *Advisory Committee*, the organ of the regime competent for scientific, technical and environmental questions, and by the *Special Meeting of Parties*, the organ including all Parties to the Convention, both Consultative and non-Consultative (Article 40). These two organs provide advice and prepare a report for the Commission. Although their conclusions concerning the application are not binding for the Commission, the latter must nevertheless take "full account of the views and the conclusions of the *Advisory Committee*" and give "special weight to the conclusions of the *Special Meeting of Parties* (Article 41).

3) The decision by the *Commission* to accept an application for identification of an area for possible exploration and development must be taken by *consensus* (Article 41(2) and 22(2)(c)). This provision, undoubtedly, maximizes the environmental guarantees against the risk of majority decisions taken under the foreseeable pressure of mining interests.

4) After the Commission's decision to identify an area for possible exploration and development, the relevant Regulatory Committee shall be established in accordance with Article 29. The Regulatory Committee, by way of general guidelines and regulations, shall set the requirements and conditions of general applicability that shall govern mineral activities in the relevant area. Among other things, such measures are intended to deal with: a) the division of the area into blocks in respect to which applications for exploration and development may be lodged; b) the establishment of procedures and criteria for the handling of applications; c) the determination of methods for resolving competing applications; d) the regulation in a general manner of mineral activities in the area so as to guarantee the observance of the Convention and of the measures of general applicability adopted by the Commission. Once this preparatory work has been

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performed by the Regulatory Committee, any Party to the Convention, on behalf of the operator for which it is the "sponsoring state", may submit to the Regulatory Committee an application or a development permit. If the Regulatory Committee is satisfied that the application meets the general requirements set forth in the Convention, it shall elaborate what is certainly the most important instrument in the whole mineral regime: the management scheme. This is the equivalent of a work contract which must prescribe the specific terms and conditions for exploration and development in the block with respect to which the application has been made and in particular it must provide "measures and procedures for the protection of the Antarctic environment and dependent and associated ecosystems, including methods, activities and undertakings by the operator to minimize environmental risks and damage", as well as provisions for contingency plans, response action clean up and restoration in case of accidents or threats to the Antarctic environment (Article 47).

5) Besides the above substantive rules and procedural guarantees, the Convention tends to enhance the protection of the Antarctic environment through the deterrent of liability for environmental damage. Article 8 lays down the principle of strict liability of every operator for "damage to the Antarctic environment or dependent and associated ecosystems" as well as for loss of or damage to property or life of a third party arising directly out of damage to the Antarctic environment. Next to this strict liability, the same Article 8 lays down a form of subsidiary liability of the sponsoring states, whose liability is limited to that portion not satisfied by the operator. This further guarantee of state responsibility, however, is based on *culpa in vigilando*: the sponsoring state shall be liable only if it is shown that it has failed to exercise proper supervision over its operator as required by the Convention.

IV. Benefits and Power Sharing Within the Antarctic Treaty

From the time of their inception, the Antarctic minerals negotiations had to tackle the task of reconciling the position of those states that assert sovereignty over Antarctic sectors (Argentina, Australia, Chile, France, New Zealand, Norway and the United Kingdom) with the one of states that do not recognize such rights. The first group, obviously, tended to look at Antarctic mineral resources in terms of territorial sovereignty. The second, instead, would look at them in terms of freedom of access or *res communis omnium*. To further complicate things, the negotiations had to take into account also the position of two states, the United States and the Soviet Union, which, although they oppose sovereignty claims in Antarctica, maintain that they have a basis of claims over the continent (inchoate title). The diplomatic compromise between these positions was made possible by a skilful balancing of interests in the organs of the regime, by a set of procedural safeguards to avoid that decisions over an Antarctic sector might be taken against the will of the claimant state, and by certain provisions concerning the coastal jurisdiction and the economic benefits to be derived from Antarctic mineral activities.

As to the organs, the key issue in their composition and competence was: who is to decide whether, how, and for whose benefit mineral resource activities in an Antarctic area should be undertaken? The answer to this question is to be found in the distribution of powers between the two decision-making organs, the *Commission* and the *Regulatory Committee* (one for each area open to mineral resource activities). The first is an organ of general competence composed on a permanent basis of every Party to the Convention "which was an Antarctic Treaty Consultative Party on the date when this Convention was opened for signature" (Article 18(2)). The second is an organ of specific competence

whose composition is established in such a way as to ensure that no mineral resource activities are possible without the consent of the relevant claimant(s) state(s). This result is achieved by a two-chambered structure of the Committee: 4 claimants, including the state or states that assert sovereignty rights or claims over the relevant area, 4 non-claimants, plus the two states that do not assert rights but maintain that they have a basis for possible claims, that is, the United States and the Soviet Union. Besides its assured seat in the Regulatory Committee, the relevant claimant state is given a special role in the preparation of the Management Scheme (Article 46). This provision represents what is left in the Convention of a proposal insistently put forward in the negotiations for the purpose of setting up a formal sub-committee within which the bargaining process between the sponsoring state and the relevant claimant(s) was supposed to unravel in a cosier atmosphere. Fortunately this solution was avoided. However, even without the formal niche of a sub-committee, the risk that the negotiation of the management scheme may be left too much in the hands of the relevant claimant(s) still exists due to the explicit reference made in Article 46 to the special role that the interested claimant is allowed to play in this regard.

Faced with this privileged treatment given to claimants, non-claimant states struggled throughout the negotiations to introduce a system of "checks and balances" so as to bring the operational mechanism of the mineral regime as much as possible under the control of the Commission and under the purview of the dispute settlement machinery. This objective was achieved in the final text of the Convention. First of all, Article 41(1) makes room for the Commission to limit the discretionary powers of the Regulatory Committees by adopting general guidelines and regulations relating to terms and operational conditions of mineral resource activities in each area. These guidelines would thus constitute the legal parameters within which the powers of the Regulatory Committee should be exercised. At a second level, the Commission is given the power to review the Regulatory Committee's action. Indeed, any member of the Commission or of the Regulatory Committee may within one month of a decision taken by that Regulatory Committee request the Commission to review such decision. If the complaint is well founded, the Commission may ask the Regulatory Committee to reconsider its decision (Article 49). The third level is that of dispute settlement. Despite fierce opposition, the Convention finally adopted a system of compulsory dispute settlement which – although softened by the provision (Article 58) on excludable categories of disputes – permits also the referral of disputes concerning the management scheme (Article 57(3)) as well as disputes between operators and a Regulatory Committee to the arbitral Tribunal contemplated by the Convention.

Also with regard to the voting procedures, the tension between the conflicting interests of claimants and non-claimants shows up in the provisions requiring a double chamber majority for Regulatory Committee's decisions. Article 32(1) requires a two-thirds majority for the adoption of a management scheme and for the issuance of a development permit. However, this majority must include a simple majority of the members in each chamber of claimants and non-claimants. A similar discipline is provided by paragraph 2 of the same article concerning the adoption of general guidelines for exploration and development which requires a *quorum* of at least half the claimants and half non-claimants.

Finally, on the substantive side, two types of provisions are particularly indicative of the fundamental question of who is to benefit from Antarctic resources and on the basis of what legal title. The first concerns the sharing of possible surplus revenues resulting after all the administrative and operational costs of the regime have been met. Article 35(7)(b) provides with cryptic and awkward language that the Commission, in disposing of such surplus, must ensure that "the interests of the members of the Regulatory Com-

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mittee having the most direct interest in the matter ... are respected." This provision is what is left of a proposal made by Australia and the United Kingdom to the effect of formally recognizing a claimant state's right to a special share of revenues. Such a proposal was finally defeated, and with good reasons, for it would have openly clashed with the freezing clause of Article IV of the Antarctic Treaty. But the present text may still allow a claimant state to assert in principle a special entitlement to the economic benefits deriving from the exploitation of minerals located in the claimed area. In this sense it represents a regressive development in the Antarctic system, for it may be interpreted as a step toward the recognition of sovereignty claims. The practice dangers, however, are mitigated by the requirement that the Commission must ultimately decide by a three-fourths majority.

The second type of provision that touches directly upon the legal basis of mineral resource activities in Antarctica relates to the area of application of the Convention. As is known, the Antarctic Treaty does not prejudge the legal nature of off-shore areas, thus, the mineral negotiations had to face the issue of how to define and up to what limit to extend the coastal zone subject to the mineral regime. Understandably enough, for claimant countries the coastal zones of Antarctica had to be defined in terms of continental shelf, a specific attribute of state sovereignty. For non-claimants the absence of sovereignty in Antarctica and the freezing of claims by virtue of Article IV of the Antarctic treaty rendered unacceptable the characterization of the Antarctic margin in terms of continental shelf, a notion that international law attaches to territorial sovereignty. The solution was found in the language of Article 5 which recognized the applicability of the Convention to mineral activities taking place on the Antarctic continent and "... in the seabed and subsoil of adjacent offshore areas up to the deep seabed." The area of application of the Convention is defined in negative terms, that is, by way of exclusion of the deep seabed which is intended to fall within the jurisdiction of the future international seabed Authority.⁴

V. Does the Minerals Regime take into Account the Interests of the International Community in Antarctic Resources?

This question presents two distinct aspects. The first is the relationship between the mineral regime, as a product of the restricted system of the Antarctic Treaty, and the United Nations, as the universal institution representing the general interests of the international community. As is known, the Antarctic minerals negotiations have produced sharp criticism within the UN General Assembly both on the ground of the alleged lack of legitimation for a restricted group of states to dispose of common resources – which some states feel should be subject to the common heritage of mankind – and because of the continuing presence in the Antarctic system of a state such as South Africa whose policy of apartheid has caused its exclusion from the General Assembly meetings.

The second aspect concerns whether the minerals regime, regardless of its lack of a formal relationship with the United Nations, is nevertheless capable of contributing to the general interest of mankind in terms of economic benefits, cooperation and progress.

On the first point, it is fair to say that the minerals negotiations hardly made any concession to the United Nations demand for wider participation in Antarctic politics. The Secretary-General was not invited to participate in the negotiations, and the Consul-

⁴ Article 5(3) employs the term continental shelf in an indirect manner, i.e. for the purpose of defining the notion of deep seabed.

tative Parties consistently rejected the request made by a group of non-aligned countries to adopt a moratorium on minerals negotiations in view of wider involvement of the international community in Antarctica. The Consultative Parties' position is that the Antarctic system, with its pluralistic composition and the participation of the most directly interested states, both from the point of view of territorial claims and of commitment to scientific activities in Antarctica, represents the best forum for resolving the tension between special (claimants) and general interests in Antarctica, especially when new issues, such as that of mineral resource activities, arise. Transferring the forum to the United Nations, they argue, would unduly expose Antarctic politics to the risk of ideological confrontation and would hardly be conducive to a workable regime for peaceful use of Antarctic resources.

Is the Consultative Parties' position self-serving? And is there really a problem of legitimacy in the Antarctic Treaty Parties' claim to extend their competence to the management and exploitation of Antarctic mineral resources? The answer here must be subtle. First of all, one must recognize that although divergence of opinion still exists, the recent cooperation in the Antarctic system of major actors in the Third World camp – such as India, China and Brazil – undoubtedly has reduced the intensity of the original movement in the General Assembly. Secondly, with regard to the issue of legitimacy, one must judge the Antarctic system not so much in terms of numeric participation but in terms of effective contribution to the global interests of the international community in Antarctica. In this perspective, it is hard to deny that so far the Antarctic Treaty participants have acted as the trustees of the world community interests in Antarctica: they have preserved the continent for peaceful use, they have promoted and guaranteed access to it for scientific research, they have preserved the environment and developed international cooperation. Most important, they have prevented Antarctica from becoming the object of international conflicts because of the competing territorial claims. Far from being incompatible with the United Nations, the Antarctic Treaty System presents itself as a specialized arrangement whose strength is in its capacity for ever expanding and adjusting to the new demands of the international community. The sole criterion for admission to the system is the demonstrated capacity of any state to engage in substantial scientific activities in Antarctica and to respect the fundamental principles of the Antarctic Treaty including disarmament, freezing of claims and mutual inspection. Looked at in this realistic perspective, the issue of legitimacy does not revolve so much around whether the regulation and management of Antarctic mineral activities is formally provided by the United Nations or by the Consultative Parties, but rather around whether the actual mineral regime, as adopted by the Antarctic Treaty Parties is substantively capable of satisfying the interests and of gaining the support of the outside world in terms of access to resources, sharing of benefits, information and decision-making powers.

This is the second aspect of the question raised above. In addressing it, one must recognize at the outset that the Minerals Convention does not make any formal concession to the idea of the common heritage of mankind. This notion haunted the Consultative Parties' meetings throughout the minerals negotiations: at times to evoke the specter of the unmanageable bureaucracy of the International Seabed Authority; at times to provide the bargaining chip to recall that – were things to turn out for the worst in the negotiations – the option to go back to the UN was still open. In the end, not only was the mention of the common heritage accurately avoided, but even the faint reference to the need that the mineral regime should be for the "benefit of mankind", a reference that surfaced in the early drafts of the negotiating text, disappeared from the language of the Convention.

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In spite of this, several aspects of the Convention are notable for their attempt to incorporate some general interests of the international community in the minerals regime in order to make it acceptable to the wider world. These aspects concern:

- 1) international cooperation and information,
- 2) participation in the decision-making of the institutions,
- 3) participation in mineral resources activities and equitable sharing of benefits.

With regard to the first point, Article 5, concerning the area of application of the Convention, requires that the Antarctic minerals regime remain limited to the Antarctic margin without intruding into the deep seabed which is supposed to be left to the jurisdiction of the International Seabed Authority. This provision is complemented by Article 34(2) which requires cooperation between the Commission and the UN, including the possibility of an "... international organization which may have competence in respect of mineral resources in areas adjacent to those covered by this Convention." Similarly, Article 34(3) mandates the Commission to cooperate with the International Union for the Conservation of Nature and Natural Resources and with other international organizations, governmental and non-governmental, that have a special interest and expertise in Antarctica. With regard to transparency, the provisions on Institutions require that international organizations having an interest in Antarctica may have access as observers to meetings of the Commission and of the Advisory Committee. The Commission must keep a public record of its meetings, decisions, reports submitted to it, as well as notifications of requests to identify an areas for exploration and development with all relevant information attached to it (Article 21(4)). Similarly, the Regulatory Committees must maintain a public record of decisions and of management schemes adopted, as well as of regulations and measures relating to the monitoring of relevant mineral activities. These provisions are quite positive and are complemented by the requirement that the Commission give public notice of matters upon which it is requesting the advice of the Advisory Committee (Article 21(1)(g)), and that the Advisory Committee give advance public notice of its meetings and of its agenda so as to enable interested organizations to obtain pertinent information and submit their views for considerations (Article 25(3)).

With regard to the second point, concerning participation in the decision-making organs, the record of the Convention seems less satisfactory. The institutions of the mineral regime are structured following the two-tiered system of the Antarctic Treaty, so that a state which is a Party to the minerals Convention does not automatically become a member of the Commission or of the Regulatory Committee. Full membership in these organs depends on the "substantial activity" criterion that forms the basis of the Consultative Party status. To overcome this obstacle - which may be overwhelming for many states that do not have sufficient financial resources to engage in substantial scientific activities in Antarctica - a proposal had been made during the negotiations for the setting up of a plenary organ, the Special Meeting of Parties, which would have had limited decision-making competence in some significant matters such as the opening of an area for mineral resource activities. The final text of the Convention has retained the organ (Article 28), but its competence has been reduced to an advisory role. On the other hand, all Parties to the Convention, both Consultative and non-Consultative, are full members of the Advisory Committee. Non-Consultative Parties also take part as observers in the meetings of the Commission and of Regulatory Committees, but a non-Consultative Party can become a temporary member of the Commission only for the time in which it is "actively engaged" in substantial research in the area, or as long as it performs the role of sponsoring state in relation to a management scheme in force (Article 18(2)).

A group of norms on the institutional structure introduces a form of affirmative action with regard to developing countries by requiring that in the composition of Regulatory

Committees "adequate and equitable representation" must be given to these countries in such a way as to guarantee them at least three seats in each Committee (Article 29(3)(b)). This may sound generous; but in fact the only developing countries that may benefit from such provision are those which already enjoy a privileged status as members of the Commission. Further, Article 29(3)(b) does not specify to which of the two Regulatory Committee chambers – claimants and non-claimants – this obligatory quota of three seats must be referred. Thus one must conclude that, in the calculation of the three seats reserved to developing countries, the two developing claimants, Argentina and Chile, must be included although they are already entitled to seats in Regulatory Committees in their own right.

If we come to consider the third aspect of the "external" accommodation, i.e., access and participation of less developed countries in mineral resource activities and benefits, the record of the mineral regime becomes even less satisfactory. The Convention, it is true, provides a series of incentives and opportunities for less developed countries that can be summarized as follows:

1) joint ventures and other similar forms of international participation involving developing countries are given preferential treatment in view of access to mineral activities and on the basis of criteria to be specified by the Commission at the time of the opening of an area for exploration and development (Articles 6, 41(1)(d), 44(2)(e));

2) in case of competing applications for exploration and development with regard to the same site, priority must be given to the applicants presenting the "broadest participation" particularly of developing countries (Article 43(2)(e));

3) the Advisory Committee is entrusted with a consulting role in favour of developing countries regarding scientific and technological problems having a relevance for mineral activities and for the opportunities of international cooperation at a commercial level. Despite the unquestionable potential for expansive implementation of these criteria, it is certain that they fall short of satisfying the original demands made by developing countries participating in the minerals negotiations. These demands included the allocation of a reserved quota of mineral concessions for the benefit of less developed countries only, and the application of an automatic criterion of priority in favour of those requests for exploration permits presented by joint ventures characterized by international participation with developing countries. These automatic mechanisms were ultimately found to be incompatible with the general philosophy of the mineral regime, which is inspired by the primacy of environmental protection and by the efficient use of resources, especially in view of the conspicuous investments that Antarctic mineral activities will require. Faced with these hard realities, developing countries will hardly find consolation in the Final Act clause stating that with regard to Regulatory Committee decisions, the two-thirds majority required under Article 32 "should include at least one developing country"!