Consensus in the Antarctic Treaty System

Does a consensus voting system make good sense today within the Antarctic Treaty System?

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Executive summary

The Antarctic Treaty System operates primarily through consensus. However, increasing membership and associated problems in finding consensus, have led some to question the merits of the system.

Analysis through evaluative criteria shows that consensus decision-making is critical to the stability and functioning of the Antarctic Treaty System. Intangible benefits inherent with consensus decision-making, such as sense of unity, political stability, common purpose and commitment, are as important to the Antarctic Treaty System as are sensible outcomes.

Rather than altering the current decision-making mechanism, this analysis shows that increased focus on the process of enhancing the effectiveness of consensus decision-making is the preferred approach to mitigating these issues.

Consensus remains the most stable and appropriate decision-making model for the Antarctic Treaty System today.
**Table of contents**

Executive summary ........................................................................................................ i

Table of contents ........................................................................................................ ii

Table of figures ........................................................................................................ iii

Acronyms ................................................................................................................ iv

1 Introduction ............................................................................................................. 1

2 The concept of consensus ....................................................................................... 3
   2.1 Definition .............................................................................................................. 3
   2.2 The Consensus process ....................................................................................... 4
   2.3 Advantages and disadvantages of consensus .................................................... 4
   2.4 Alternatives to consensus .................................................................................. 6

3 The Antarctic Treaty System ..................................................................................... 8
   3.1 Background .......................................................................................................... 8
   3.2 The decision-making structure in the Antarctic Treaty ...................................... 9
   3.3 The consensus principle in the ATS .................................................................. 11

4 Understanding consensus decision-making in the ATS ........................................ 13
   4.1 Decision making at the state level .................................................................... 13
   4.2 Negotiations at the international level ............................................................... 15

5 Analytical framework and evaluative criteria ......................................................... 17

6 Analysis of decision-making in the ATS ................................................................. 18
   6.1 Participation ....................................................................................................... 18
   6.2 Workability ....................................................................................................... 19
   6.3 Effectiveness .................................................................................................... 21

7 Evaluation of findings ............................................................................................ 24

8 Potential improvements to current decision-making ............................................. 26
   8.1 Improving the process of consensus .................................................................. 26
   8.2 Consensus-minus-one ....................................................................................... 27
   8.3 Opting out ......................................................................................................... 28
Table of figures

Figure 1: Stages in the consensus process .......................................................... 4
Figure 2: Degrees of agreement for decision-making ........................................... 6
Figure 3: The institutional framework of the ATS .............................................. 9
Figure 4: The operational structure of the Antarctic Treaty ............................... 11
Figure 5: Constraints on a state’s decision-making power .................................. 14
Figure 6: Negotiation between states ................................................................ 16
<table>
<thead>
<tr>
<th>Acronyms</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>AT</td>
<td>Antarctic Treaty</td>
</tr>
<tr>
<td>ATCM</td>
<td>Antarctic Treaty Consultative Meeting</td>
</tr>
<tr>
<td>ATS</td>
<td>Antarctic Treaty System</td>
</tr>
<tr>
<td>ASOC</td>
<td>Antarctic and Southern Ocean Coalition</td>
</tr>
<tr>
<td>CCAMLR</td>
<td>Convention for the Conservation of Antarctic Marine Living Resources</td>
</tr>
<tr>
<td>CRAMRA</td>
<td>Convention for the Regulation of Antarctic Mineral Resource Activities</td>
</tr>
<tr>
<td>CCAS</td>
<td>Convention for the Conservation of Antarctic Seals</td>
</tr>
<tr>
<td>IAATO</td>
<td>International Association of Antarctic Tour Operators</td>
</tr>
<tr>
<td>IGY</td>
<td>International Geophysical Year</td>
</tr>
<tr>
<td>IUCN</td>
<td>World Conservation Union</td>
</tr>
<tr>
<td>NGO</td>
<td>Non-Governmental Organisation</td>
</tr>
<tr>
<td>SCAR</td>
<td>Scientific Committee on Antarctic Research</td>
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<tr>
<td>UN</td>
<td>United Nations</td>
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<tr>
<td>UNEP</td>
<td>United Nations Environment Programme</td>
</tr>
<tr>
<td>WMO</td>
<td>World Meteorological Organisation</td>
</tr>
</tbody>
</table>

1 For a brief description of relevant institutions, organisations and key terms, please also refer to the Glossary.
1 Introduction

The Antarctic Treaty System is the international legal regime for governing and managing the Antarctic. Since its emergence through the Antarctic Treaty in 1959, the system and its various components have emphasised the use of the consensus decision rule as a main decision-making mechanism. While it can be argued that this system made good sense when the Antarctic Treaty was negotiated amongst the twelve original signatory states, circumstances have changed considerably, and the increasing number of parties in the Antarctic Treaty System and the increasing complexity of issues make it more and more difficult to reach consensus. This has led to a situation in which the merit of the consensus decision rule in the Antarctic Treaty System (ATS) is being questioned since “effective [...] rules can be compromised by the need to maintain consensus or protect political compromises” (Elliot, 1994b, p.12). This paper will attempt to shed light onto the question of whether maintaining consensus as a decision-making rule in the ATS does – or does not – make sense today. For this, the paper is structured in the following way:

Section 2 will conceptualise consensus and outline the involved process, discuss its advantages and limitation as well as outline alternatives to consensus as decision-making system.

Section 3 will discuss the Antarctic Treaty System, its decision-making structure and the existence of the consensus principle in the system.

Section 4 will discuss theoretical models useful for understanding consensus decision-making in the ATS.

Section 5 will introduce an analytical framework and relevant criteria through which the merits of the consensus decision rule in the ATS will be analysed.

Section 6 will analyse the consensus decision-making system on the basis of the evaluative criteria.

Section 7 will evaluate the findings from the analysis and discuss their relevance in relation to the question whether the consensus principle does – or does not – make sense today.
Section 8 will propose potential improvements to the current decision-making system and discuss their advantages and limitations.

Section 9 will conclude by drawing together the findings, and section 10 will draw up recommendations with regard to the use of consensus decision-making in the ATS.
2 The concept of consensus

This section will conceptualise consensus and outline the involved process, discuss its advantages and limitation as well as outline alternatives to consensus as decision-making system.

2.1 Definition

"The magic word consensus in short, solves many puzzles – but only infrequently is the term given any precise meaning" (Key, cited in Partridge, 1971, p.74).

The word ‘consensus’ is derived from the Latin word for agreement. The Oxford Dictionary (The Oxford Encyclopaedic English Dictionary, 1991) defines consensus as a general agreement. This has been extrapolated to mean a mutually acceptable decision that integrates the interests of all concerned parties (Saskatchewan, 2005). Unanimous agreement is therefore not required, and the decision may not satisfy each participant’s interest equally or receive a similar level of support from all participants. A decision may nevertheless receive enough support to be acceptable to all concerned parties.

Different authors (e.g. Moscovici & Doise, 1994; Sandelin, ?) promote a range of characteristics inherent within ‘consensus’; however, central to all appear to be an understanding that consensus involves the

- participation of all parties,
- co-operative intent and active negotiation,
- and integration of the interests of – and information from – all concerned parties.

This combines to reach a mutually acceptable agreement that

- does not require unanimous consent,
- may not satisfy each participant’s interests equally,
- may not receive a similar level of support from all participants,
- and is supported by parties as it is considered worthwhile.
2.2 The Consensus process

The process by which consensus is reached can be simplified into a 3 stage model as shown in Figure 1. Stage 1 is the discussion stage, during which the group meets to share and synthesize ideas, and to react and discuss various contributions. As different perspectives are presented, the opinions of participants are likely to change.

The second stage is where concerns and proposals are identified, areas of common understanding are summarised, and proposal statements are recorded. The third stage involves testing and modifying the proposals, adjusting them to meet the needs of the group.

The time required for this process can vary, ranging from a single session to many months or years. The process may move between stages 1 to 3 many times before consensus is reached.

Figure 1: Stages in the consensus process

Source adopted from Sandelin (?)

2.3 Advantages and disadvantages of consensus

Advantages

- More intelligent decisions are produced with consensus, as generally all angles are considered, and the outcomes incorporate the best thinking of everyone. The process centres on group participation. As individuals are empowered by the process, group strengths can come to the fore (Shepard, 2003).
Another critical feature of consensus is commitment. The act of participation, negotiation and agreement, contributes to parties’ commitment to the jointly agreed decisions. Parties tend to ‘buy-into’ the end result, as it meets their needs (Moscovici & Doise, 1994, p.42).

The process is consultative, patient, and based on acceptance of certain values and the need to conform. It is therefore less likely to be disrupted through coercion or inducement (Shepard, 2003).

Consensus is considered the most democratic and least confrontational of the decision-making processes (Shepard, 2003). Since egos are kept from being tied to a win-loose outcome, a co-operative dynamic is created.

Parties who are negotiating within a consensual framework are generally motivated to find accommodations when conflict does appear, as consensus becomes not just the process, but also the goal. They tend to restrain from pursuing conflicts to the point where intrinsic common interests could be damaged, and will strive to find the common ground. As “the issues get settled [...] the settlement becomes part of the structure [...] at least for a time” (Moscovici & Doise, 1994, p.94). Therefore, one of the strengths of consensus is that the more consensus operates, the more institutionalised and central it becomes.

Disadvantages

The advantages of the consensus process can be undermined in several ways. Hard bargaining may occur, whereby those who are not committed to finding a solution that is acceptable to everyone, may dominate discussion. The powerful group dynamic may also manipulate parties to feel obligated to agree with a proposal to avoid conflict (McGhee, ?).

Conversely, consensus can also favour the status quo where group process is unable to arrive at a consensus. It can also favour ‘lowest common denominator’ decisions, due to the number of participants, wide ranging positions and opinions. Consensus has therefore been described as a slow process in instances where it involves many people and complex issues (Shepard, 2003).

Another potential disadvantage is the interference of personality and cultural differences between participants, or when parties are not operating from the same value
set. Clashes between the value sets of states or stakeholders can block the decision making process. Any factor which can interfere with the effectiveness of the communication process can disrupt the consensus process (Shepard, 2003).

2.4 Alternatives to consensus

Group decision-making methods are represented on a continuum with decreasing levels of agreement. The level of participation increases towards the right on this decision-making continuum. Unanimity is considered the ultimate agreement, where all parties express identical opinions. Consensus and majority rule involve everyone to a greater or lesser degree respectively. As the majority decision-making system is next to the consensus system on the continuum, it is examined further as a credible alternative to consensus.

Figure 2: Degrees of agreement for decision-making

[Diagram showing various degrees of agreement: Majority, Consensus, Unanimity, Decreasing degrees of agreement]

Majority vote or competition decision-making is a means whereby a group is asked to choose one alternative from several. Unlike consensus, it is quantitative rather than qualitative, as focus comes onto numbers of voters, rather than issue resolution.

When compared with consensus, it is quick, although there is less communal ownership of a decision. Parties are not required to participate and when it is considered to their advantage, they may abstain. This provision reduces possible 'hold-ups' in the decision-making process. However, when majority rule is compared to autocracy, the shared responsibility of a majority vote adds to the legitimacy of a decision.

Unlike the cooperative spirit evoked in consensus decision-making, majority rule fosters a competitive dynamic (Butler & Rothstein), where it is acceptable to attack others and pro-
mote one's own ideas. Voting ensures a "win-loose" situation, where defeated members may leave or retaliate (Schutt, ?). The process is prone to coercion where parties are more concerned with numbers required to win the vote, then with the issue in question.

In a majority rule system, participant's ideas are owned individually. This differs from consensus, whereby, through the process of discussion and negotiation, ideas transfer into the group domain.
3 The Antarctic Treaty System

While the previous section conceptualised consensus, discussed its advantages and limitations and outlined processes and alternatives to consensus, this section will discuss the Antarctic Treaty System, its decision-making structure and the existence of the consensus principle in the system.

3.1 Background

The Antarctic Treaty (AT) was completed on December 1, 1959 after the success of the International Geophysical Year (IGY) in 1957 – 58. The AT entered into force on June 23, 1961 and establishes the guiding principles for all activity in Antarctica. The Antarctic Treaty applies to the area south of 60° South latitude including all ice shelves. The Protocol on Environmental Protection to the Antarctic Treaty (the Protocol) designates Antarctica as "a natural reserve, devoted to peace and science". The Antarctic Treaty achieves this by freezing sovereignty claims, demilitarisation, and the prohibition of nuclear testing and dumping of radioactive waste. It is a unique legal regime providing a form of international governance in an area where no final agreement exists with regard to sovereignty claims (Hemmings, 2004b) and Gould (Project Ice-Share, 2004) describes it as "unique in history which may take its place alongside the Magna Carta and other great symbols of man's quest of enlightenment and order".

The truly international dimensions of the activities which take place in the Antarctic require states to act cooperatively through a variety of norm-creating and quasi-normative devices. Over time and through the addition of regulating arrangements, the Antarctic Treaty has evolved into the core component of what is now called the Antarctic Treaty System (ATS). The ATS (as shown in Figure 3) refers to a whole complex of arrangements developed for the purpose of regulating relations among states in the Antarctic. According to Art.1(e) of the Protocol (1991), the Antarctic Treaty System means: "the Antarctic Treaty, the measures in effect under that Treaty, its associated separate international instruments in force and the measures in effect under those instruments". The ATS is thus, according to (Stokke & Vidas, 1996, pp.42-43), composed of four major components: the Antarctic Treaty (AT) as it constitutes the basis for all other parts of the ATS, those recommendations adopted at Consultative Meetings that are in effect, treaties in force that have been adopted on the ba-
sis of the Antarctic Treaty, i.e. the 1972 Convention for the Conservation of Antarctic Seals (CCAS), the 1980 Convention for the Conservation of Antarctic Marine Living Resources (CCAMLR) and the 1991 Protocol on Environmental Protection (The Protocol) and its annexes\(^2\), as well as measures in effect under those treaties.

Figure 3: The institutional framework of the ATS

3.2 The decision-making structure in the Antarctic Treaty

Recognising that (at present) there are 47\(^3\) states that are parties in the ATS, it is important to note that membership differs for the four treaties and conventions. Only 15 states are parties to the Antarctic Treaty and all additional conventions and protocols. As this paper is concerned with the use of the consensus principle in the decision-making of the ATS, it is necessary to outline the decision-making structure. The following discussion will do this by looking at the structure as provided through the Antarctic Treaty. However, it will not con-

\(^2\) The 1988 Convention on the Regulation of Antarctic Mineral Resource Activities (CRAMRA) has not been mentioned here as it has not entered into force. While it is not legally ‘dead’, its purpose has been overtaken by the Protocol on Environmental Protection (Stokke & Vidas, 1996, p.171).

\(^3\) The European Union is also a party in the ATS but cannot be regarded a state.
sider the decision-making structures of other treaties as they either use the same system or are very similar to it.

As shown in Figure 4 (below), the Antarctic Treaty distinguishes among parties by categorizing their status as either 'consultative' or 'non-consultative'. The first category comprises 28 states that take part in the decision making process (i.e. they are voting members) at annual Antarctic Treaty Consultative Meetings (ATCM). At these meetings the 'Consultative states' set policy by adopting recommendations (now termed measures, decisions and resolutions). 12 of the 28 'Consultative states' are original signatories to the Treaty, this includes seven claimant states\(^4\) (states that have made sovereignty claims within the Antarctic Treaty 60°S northern boundary), two that have not made a claim but retain their right to make one (United States and Russia) and three non-claimants (Belgium, South Africa and Japan). These twelve retain a right to attend and participate in discussion and policy formulation during ATCMs by virtue of being founding members of the treaty. Moreover, the category also includes 16 parties that acceded to the treaty subsequently and have qualified for consultative status by conducting substantial scientific activity in Antarctica\(^5\). The second category comprises 19 parties that have acceded to the treaty but have yet to meet the requirement of 'substantial scientific activity'. While they are entitled to attend ATCMs as observers they do not take part in decision-making (i.e. they are non-voting members) (Joyner, 1998, pp.60-61).

\(^4\) United Kingdom, New Zealand, France, Australia, Norway, Chile, Argentina.
\(^5\) Austria, Canada, Colombia, Cuba, the Czech Republic, Denmark, Estonia, Greece, Guatemala, Hungary, the Democratic People's Republic of Korea, Namibia, Papua New Guinea, Romania, the Slovak Republic, Switzerland, Turkey, Ukraine, Venezuela (15.01.2005)
In addition to representatives from the consultative and non-consultative members, ATCMs are also attended by observers and experts. Observers have open access and include, but are not limited to, representatives from the Scientific Committee on Antarctic Research (SCAR), Council Of Managers of National Antarctic Programs (COMNAP) and CCAMLR. Experts are invited and address agenda item specific areas in the role of consultants. Experts are sent by intergovernmental and non-governmental organisations such as the International Association of Antarctic Tour Operators (IAATO), the World Conservation Union (IUCN) or the United Nations Environment Program (UNEP).

3.3 The consensus principle in the ATS

While the previous section outlined the decision-making structure and the key role of consultative states in the decision-making under the Antarctic Treaty, it was not clarified what mechanism is used for decision-making. The following discussion will thus explore the principal mechanism for decision-making in the Antarctic Treaty System.

Article IX (4) of the Antarctic Treaty (1959) establishes that measures shall only become effective when approved by ‘all’ the Contracting Parties and Article XII (1a) requires that any modification or amendments to the Antarctic Treaty at any time may be made only by ‘unanimous agreement’.
'Unanimous agreement' can be defined as everyone being of one mind (Hyperdictionary, 2005). This means that by strict definition the Antarctic Treaty operates under the requirement that all parties, when making a decision, must be uniform in their thinking. Considering the definition of consensus from section 2, unanimous agreement is thus not the same as agreement reached through consensus. This is because under the requirement for unanimity all parties must agree whereas under the requirement for consensus parties may not necessarily agree but support a decision anyway because it may be considered worthwhile. However, ever since the Antarctic Treaty's inception the legal provision for unanimity has been interpreted as a mechanism of consensus. As Elliot puts it (1994b, p.39), the de facto veto ensures that no state can be outvoted and the requirement for consensus is implicit. Moreover, since this decision-making principle is also employed by the other treaties in the ATS, decision-making in the Antarctic Treaty is representative of the decision-making in the whole system.
4  Understanding consensus decision-making in the ATS

The previous section discussed the Antarctic Treaty System, its decision-making structure and the existence of the consensus principle in the system. This section considers theoretical models useful for understanding consensus decision-making in the ATS. For gaining this understanding, decision-making is considered on two levels: state-level decision-making and international-level decision-making. At the state level, there are constraints that will influence a state in what position it brings to the international negotiating table. At the international level, a model is used to identify whether consensus between states is possible.

4.1  Decision making at the state level

Under the current decision-making system, one vote is allocated to each consultative state, regardless of the states’ size and global standing. This method ensures that every state has an equal voting ‘weight’ and the system is regarded as equitable and democratic.

However, in reality, there are many players who do not have a vote on the ATS, yet who can still influence the proceedings. States are influenced by the various physical and social constraints of a situation. It is these constraints that are important in explaining behavioural change (Hovi, 1998) and ultimate success or otherwise of a proposal. Therefore, to understand the negotiating position a state will take on, we need to examine the various constraints that cause these changes.

Hovi (1998) has identified six different constraints that a state faces when interacting with other states, these interactions are shown in Figure 5 below. These constraints are split into two areas. Constraints 1 to 3 are constraints imposed at a state level. Constraints 4 to 6 are imposed at an international level.
1. *Constraints that are self-imposed*

States with a claim to sovereignty may place the sovereignty issue before economic and environmental concerns.

2. *Constraints imposed by states’ natural endowment & level of technological development*

States like Argentina, New Zealand or Australia may be influenced by the fact that they are used as gateways to Antarctica. This could influence their decision on matters such as tourism and bio-security. Additionally, requirements under the ATS for scientific research might preclude poor countries from becoming involved as a consultative state.

3. *Constraints imposed by domestic institutions*

For example, due to environmental concerns the domestic constraint imposed upon Australia in regards to CRAMRA meant Australia was unwilling to agree to CRAMRA. Therefore, consensus was not attainable, and CRAMRA was not ratified.

4. *Constraints imposed by another state or organisation with which the state is interacting*

For instance, although being a consultative member, Japan is precluded from becoming a claimant state by constraints imposed on it after the Second World War.
5. Constraints imposed by international treaties

The Antarctic Treaty imposes constraints on New Zealand's claim to sovereignty. As long as the Antarctic Treaty is in place, New Zealand cannot assert any territorial claim.

6. Constraints imposed by international norms

If North Korea attempted to develop nuclear weapons in Antarctica, international norms would be used as a legitimate way of stopping them.

These six constraints are all relevant to consensus decision making in as far as any one of the six constraints can influence the bargaining position of a state. In summary, each member state may have different constraints imposed from both, state level and international level, and these constraints will influence the participation and negotiation processes between the different states of the ATS.

4.2 Negotiations at the international level

The previous section has identified and analysed the constraints on a state's decision as to which position to take in international negotiations (as shown in Figure 5). The next step for a state is to take their position to the negotiations and attempt to reach a consensus with other states.

An analysis of theoretical models of decision-making suggests that the concept of Pareto-optimal conditions is most applicable to decision making within the ATS\(^6\). This Pareto-optimal concept states that a decision will only occur if each state benefits from the decision. In this respect, the decision reached by all states must reflect the position chosen by the individual states. Indeed, negotiations within multi-party conferences are often dedicated to finding the maximum Pareto-optimal solution (Hovi, 1998).

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\(^6\) Please note that a number of models exist to explain decision-making at the international level. The Pareto-optimal concept can be applied to decision making within the ATS.
Figure 6: Negotiation between states

A state will have minimum requirements that must be fulfilled before it agrees to a decision (Figure 6). If the final negotiation reaches a point above a state’s minimum requirement, then the state will be willing to agree to the decision (consensus). If the final negotiation reaches a point below the state’s minimum requirement, then the state will not agree to the decision (no consensus). Therefore, in order to realistically achieve consensus, all negotiation must occur in the zone where both parties will be better off. This zone is identified as the ‘Zone of negotiation’ as shown in Figure 6 above. Negotiations can be successful if they are conducted within this zone.

As can be concluded from the previous discussion, any consensus within the ATS will involve both negotiations within states (i.e. state level decision-making as illustrated in section 4.1) and negotiations between states (i.e. at an international level).

After having gained an understanding of consensus decision-making in the ATS, the following section will introduce an analytical framework and relevant criteria through which the merits of the consensus decision rule in the ATS can be analysed.
5 Analytical framework and evaluative criteria

In order to evaluate whether the consensus principle as a decision-making mechanism in the ATS does – or does not – make sense today, it is necessary to define criteria through which structured analysis can take place. A number of key themes haven been identified in relation to the assessment of a decision-making system and the following criteria are considered relevant in this regard.

Participation

Participation refers to the input to decisions. Participatory decision making can be conducive to trust building, therefore minimising conflict. It is also important with regard to fair and democratic involvement as well as equitable representation of states. For these reasons, and for moral as well as ethical considerations, participation is considered important in decision-making.

Workability

Workability refers to the question whether the decision-making mechanism is conducive to solutions and decisions being adopted in a timely and efficient manner. It also assesses whether the system is feasible and attuned to political realities (i.e. acceptable to the involved parties) and what the political effects of the particular decision-making mechanism are or may be.

Effectiveness

Effectiveness applies to the outcome of decisions and refers to the question whether decisions contribute to achieving objectives. Do they represent sensible solutions with regard to their purpose or do they only represent the lowest common denominator? Furthermore, it also considers the question whether the system encourages commitment.

It is noted that the above criteria may not necessarily apply to international regimes in a general sense. However, in relation to the analysis of the ATS these criteria are considered as having relevance and it is the analysis of the decision-making mechanism in the Antarctic Treaty System to which this paper now turns.
6 Analysis of decision-making in the ATS

The following sections will analyse the consensus decision-making mechanism in the ATS on the basis of the evaluative criteria and sections are structured according to the respective criteria: participation, workability and effectiveness.

6.1 Participation

*Is the system conducive to fair and democratic involvement as well as equitable representation of states?*

Participation is a critical element in decision-making in the Antarctic Treaty System as it is the actual participation that is a prerequisite for finding consensus on issues. Under the current decision-making system, the Antarctic Treaty allocates one vote per consultative state, regardless of size and global standing, thereby ensuring equal “weighting”. This ensures that every state has an equal voting ‘weight’ and this system may be regarded as ensuring equitable and democratic involvement. The consensus system may nevertheless favour less powerful states, compensating for their disadvantage in size and power. For instance, it can be argued that smaller and less powerful states may be able to block a decision, thereby increasing their real ‘voting’ weight disproportionately in the ATS. However, this is not to say that larger and more powerful states do not have means of influencing the political agenda as they may be able to push through a particular position by applying political pressure.

*Is the system conducive to trust building?*

The consensus system also encourages proponents of an idea to present their case clearly and concisely, with adequate supporting information (Hemmings, 2004b). Because the *de facto* veto exists, a minority cannot be ignored and as people participate and gain faith that their opinion has been heard and carries weight (one vote per state), participants develop trust in the system. Over time, members and delegates develop enhanced rapport with colleagues and this contributes to a sense of goodwill, commitment and trust within the Antarctic Treaty System which binds everyone together with a common purpose. The consensus system therefore indirectly contributes to trust building.
6.2 Workability

Is the consensus decision-making mechanism conducive to solutions and decisions being adopted in a timely and efficient manner?

Consensus is a very demanding decision rule as it enables reluctant parties to block collective measures. This is all the more important when membership to the ATS increases and Beeby (1990, cited in Elliot, 1994b, p.42) notes that it is much less easy to generate a dynamic that will lead to consensus acceptable to all. Consensus therefore becomes harder as the number of consultative parties increases (Hemnings, 2004b) and it may favour the status quo (Stokke & Vidas, 1996, p.238). Case Study I (below) illustrates the lengthy processes involved for finding solutions in the ATS using the example of the development of a liability annex to the Protocol and indicates the limitations of the consensus approach in the process of decision-making. The issue of liability nevertheless is an important one and a decision (if not agreement) on the issue is desirable.

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Case Study I: The development of a liability regime

Considering the notion that the only thing predictable about the Antarctic is that it is unpredictable, activities such as travelling to the Antarctic can be dangerous and the potential for accidents, and adverse effects resulting from those, can be considerably high. Failure to take proper care may hence result in damage to the environment (e.g. oil spills). Although Article XVI of the Protocol proclaims that Parties should "...elaborate rules and procedures relating to liability..." as an Annex to the Protocol (1991, Art.16), negotiations have so far not resulted in the successful conclusion of such an Annex. Within the Antarctic Treaty System there is thus currently no regulatory framework relating to liability for damage arising from activities in the Antarctic Treaty area and parties, whether governmental or non-governmental, cannot be held liable for any damage. Although the Protocol was adopted in 1991 and the discussion on liability rules commenced in 1993, Parties have failed to find agreement and have yet to meet the commitment made in Article XVI (AAD, 2002). This may be due to factors such as the complexity of the issue, the jurisdictional situation and the extreme remoteness but the need for consensus decision-making and the existing de facto veto are key determinants.

Even though there are a number of areas of conflict, one of the key issues is the diversion over the need for a comprehensive liability regime on the one hand and a more restricted regime on the other. One of the latest proposals as a basis for discussion, the Chairman’s Draft of Annex VI to the Protocol on Environmental Protection to the Antarctic Treaty for the ATCM XXVII in Cape Town 2004 (MacKay, 2004), focuses on liability arising from environmental emergencies and thus represents a restricted approach. However, this approach may not necessarily preclude the development of further annexes that together with the proposed
annex may form a comprehensive regime (e.g. also comprising other aspects of liability not limited to environmental emergencies, for more information also refer to the report on liability by the ‘Group of Legal Experts’ (ATCM, 1998)). Consensus therefore seems possible only with an approach that will result in the successful conclusion of the Annex on liability arising from environmental emergencies but also satisfy those stakeholders that see this restricted annex only as the beginning of a comprehensive liability regime. As Hemmings (2004a) puts it, what seems needed is a provision of “some sort of undertaking that additional development of a [comprehensive] regime is possible through additional annexes” and some kind of tight language that will require action with regard to the development of such annexes and is not limited to “rhetorical glazing without substantive effect”.

However, there are instances where low degrees of efficiency and timeliness have been useful in retro respect. For instance, in case of CRAMRA the long period of negotiation allowed for global awareness of resource exploitation to mature and for external lobbying of member states, though this should not be used as a general argument for encouraging lengthy decision-making processes.

Is the system feasible and attuned to political realities (i.e. acceptable to the involved parties)? What are the political effects of the consensus decision-making mechanism?

Central to any discussion on consensus within the Antarctic Treaty System is the paradigm that the Antarctic Treaty was originally designed to prevent conflict between claimant states, between claimants and non-claimants, over the legal validity of the claims and the right to exercise sovereignty in the Antarctic, and between the superpowers. As outlined in Case Study II (below), the treaty carefully and ambiguously enables all treaty parties to maintain their position on the validity or otherwise of the territorial claims (Hemmings, 2004b). The decision-making system is crucial in the protection of the political interests of both claimants and non-claimants, hence the use of a consensus decision making system rather than operating on a majority based system (Elliot, 1994a, p.249).

Case Study II: The unresolved sovereignty conundrum

The question of sovereignty in Antarctica is as yet unresolved. While seven states have made claims to the Antarctic continent – among them the United Kingdom (1908), New Zealand (1923), France (1924), Australia (1933), Norway (1939), Chile (1940) and Argentina (1943), these claims have not been recognised by non-claimant states.
Within the Antarctic Treaty, the issue of sovereignty is addressed in Article IV. The article is intended to assure parties that nothing in the treaty is to be interpreted (a) as a renunciation of a previously asserted claim, (b) as a renunciation or lessening of any basis for assertion of a territorial claim, and (c) as prejudicing the position of any party as regards its recognition or non-recognition of any other state's claim or basis for claim. The rationale for this article in the Antarctic Treaty is the need to integrate claimant, non-claimant and potential claimant states within the same multilateral agreement. The article thus circumvents this sensitive issue by freezing the status of claims without compromising their actual or potential claims (Joyner, 1998, p.57). It also deals with the impact of sovereignty claims during treaty duration by prohibiting any new claims, thus ensuring that the status of sovereignty claims on the continent remains unaltered throughout the AT's duration (Joyner, 1998, p.57).

The consensus decision rule may therefore be described as the *quid pro pro* for the sovereignty sensitivities of claimants & non-claimants (Hemmings, 2004b). As Stokke & Vidas (1996, p.26) put it, "the retention of decision-making authority within the Consultative Meetings, which require consensus, is important for maintaining the fine balance between claimants and non-claimants in Treaty cooperation. Any adaptation of the ATS which removed the equally shared veto would run the risk of jeopardising internal acceptance". This article is regarded as the lubricant that permits the AT to function and its chief purpose is to provide a politically workable arrangement for states with competing interests (Joyner, 1998, p.58). For instance, if a claimant state could not ensure its influence in decisions, the ATS would be much less acceptable. Any decision-making system not based on consensus does therefore neither seem politically feasible nor acceptable.

### 6.3 Effectiveness

*Are decisions contributing to achieving objectives and do they represent sensible solutions with regard to their purpose?*

Elliot (1994b, p.12) argues that "effective environmental rules can be compromised by the need to maintain consensus or protect political compromises as has been the case in the Antarctic regime". This critique is targeted at the difficulty to find a common denominator. As shown in Case Study I on the development of a liability regime, a comprehensive liability regime would be necessary for effective environmental protection. However, politically a restricted regime may be the 'common denominator'. Taking into account the variety of pressures, this common denominator will probably be low rather than high.
The effectiveness of the consensus decision rule may also have to be considered in relation to the *de facto* veto. As illustrated in Case Study III (below), the special requirements for consensus in ‘matters of substance’ under CCAMLR (1980) demonstrates a major limitation of ‘consensus’ when it comes to decisions related to specific unilateral actions of member states.

**Case Study III: Non-compliance within CCAMLR**

The Convention for the Conservation of Marine Living Resources (CCAMLR) is one of the tools within the Antarctic Treaty System for the protection and management of marine living resources. When the Ukraine applied for Consultative Party status in Cape Town in 2003, it agreed to comply with CCAMLR provisions. However, after CCAMLR had gained consultative status, evidence demonstrated non-compliance of the Ukraine through the use of renamed ‘blacklisted’ vessels and illegal fishing operations despite various assurances that vessels operating out of Ukraine were complying with the convention.

Unfortunately CCAMLR members were unable to address the issue adequately. This is due to the following. As Article XII of the Convention states, (1) “decisions of the Commission on matters of substance shall be taken by consensus. The question of whether a matter is one of substance shall be treated as a matter of substance” and (2) “decisions on matters other than those referred to in paragraph 1 above shall be taken by a simple majority of the Members of the Commission present and voting” (CCAMLR, 1980). CCAMLR members were effectively hamstring as a consensus is firstly required to determine whether a matter is a ‘matter of substance’ (and the Ukraine may not regard its actions as a matter of substance), and secondly the CCAMLR committee could not condemn Ukraine’s actions due to the fact that the Ukraine – as a voting member state – would not condemn itself. The CCAMLR committee was thus unable to act officially.

While the CCAMLR committee could not act officially, member states were able to apply political pressure. It may be due to this pressure that the Ukraine notified the member states subsequently that it put an end to its illegal fishing operations.


While the settlement in this particular case may be considered a win for political persuasion, the question remains whether a consensus approach is useful in that regard.

However, the consensus system can also contribute to effective decisions. For instance, by refusing to ratify CRAMRA a number of states departed from consensus due to environmental concerns. This in turn helped in the development of the Protocol on Environmental Protection under which mining and mineral exploitation is now banned. By contrast, under
a majority based system CRAMRA may have potentially entered into force, thereby regulating and allowing mining and thus weakening the means of environmental protection.

**Do decisions encourage commitment?**

A powerful feature of consensual decision making is that by participation in the process participants are more likely to buy into – and be committed to – the decision, thereby creating an ownership of outcome (Hemmings, 2004b). This is because a state consenting to a decision is usually also willing to support its implementation. While it was mentioned previously that effective environmental rules can be compromised by the need to maintain consensus, the regime strength also relies on states’ commitment to regime rules (Elliot, 1994b, p.42) and departure from consensus may thus undermine commitment.

This section has analysed the consensus decision-making system on the basis of the evaluative criteria. However, the analysis does not make clear the relevance of the different findings. The following section thus aims at objectively evaluating the findings from the analysis and discuss their relevance in relation to the question whether the consensus principle does – or does not – make sense today.
7 Evaluation of findings

In order to evaluate the findings from the analysis objectively and discuss their relevance it is useful to summarise the key findings.

In terms of the participation criterion the system may be regarded as ensuring equitable and democratic involvement due to giving each state one vote, and as contributing to trust-building. This is because every opinion carries weight and delegates may develop enhanced rapport with colleagues. With regard to workability, the system may be considered demanding as reluctant parties can block collective measures, thus making the consensus process time intensive; and as crucial for the internal acceptability of the ATS due to the sovereignty sensitivities of claimants & non-claimants. Lastly, as regards effectiveness, sensible solutions can be compromised by the need to maintain consensus or protect political compromises. However, although effectiveness may be limited, the process is likely to create an ownership of outcome, thus encouraging commitment.

The key theme identified through the analysis is that the consensus principle is politically very important and that the stability of the ATS relies heavily on its existence. Other factors such as the effectiveness of decisions as regards environmental protection have a relatively lower significance. However, this is not to say that for the effective future governance of the Antarctic, this decision-making mechanism is necessarily the most suited. As Elliot (1994a, p.249) puts it, the consensus rule ensured the success as a security regime but this may be less so for effective environmental protection and other coming challenges. It can be expected that challenges such as liability, bio-prospecting and tourism will increasingly put pressure on the system for effective response and in order to maintain the ability to act, a majority based system may be better suited. Nevertheless, any major move to a majority based system also relies heavily on the solution of the sovereignty conundrum and until then the consensus principle is here to stay. As Stokke & Vidas (1996, p.26) point out aptly, the consensus rule implies that "consistency and acceptance prevails over problem-solving conduciveness". This means that it made good sense in the past and under the given political circumstances it makes good sense today.
The above discussion makes clear that consensus as a decision-making principle is too important to be removed or replaced by other mechanisms such as a majority system. However, the analysis in section 6 also made clear that there are limitations to the consensus system which may need to be addressed. It is in here that this paper turns its attention to potential improvements to the current decision-making system.
8 Potential improvements to current decision-making

The following discussion will identify three potential improvements to current decision-making: improving the process of consensus, consensus-minus-one and opting-out. Improving the process of consensus will be elaborated using the process stages of consensus described in section 2.2, consensus-minus-one and opting out will examined using the evaluative criteria as described in section 5.

8.1 Improving the process of consensus

Issues and problems that the parties to the Antarctic Treaty have to address can be complex. If one also considers that resolution of problems becomes harder with an increasing number of participants, then, as Beeby notes, “there might need to be a search for new methods of arriving at consensus” (1990, cited in Elliot, 1994b, p.42). The following suggestions are structured according to the process stages of consensus described in section 2.2 (also refer to Figure 1, page 4).

Discussion

As indicated in section 2, consensus relies on precise and accurate information (Moscovici & Doise, 1994). In terms of improved discussion within the ATS, increasing information flow and availability may be helpful in facilitating consensus. The Antarctic Treaty secretariat established in September 2004 has an important role here and it should be used to its fullest extent possible.

Identify proposals and concerns

Bardwell (1991, pp.604-607) notes that, when problem solving, people tend to solve the wrong problem, state the problem so it cannot be solved, and/or solve the problem before there is agreement on the problem. This indicates that problem definition is crucial for problem solving in that it leads to meaningful subsequent steps.

Additionally, reframing problems and focusing on interests, rather than positions, can be useful. Indeed, as Bardwell (1991, p.607) puts it, focusing on interests leaves room for the diversity of options whereas the focus on positions already determines possible outcomes.
For example, if states arguing for a comprehensive liability regime take the perspective that a restricted liability regime is the first step towards a more comprehensive regime, then this may help to resolve concerns.

*Resolve concerns and modify*

It could be useful to implement various methods of conflict resolution. For instance, Article XI (1) of the Antarctic Treaty refers to the possibility of using methods such “negotiation, inquiry, mediation, conciliation, arbitration, judicial settlement, or other peaceful means of their own choice”. While (Hemmings, 2004b) notes that these methods have never been used, it seems possible to assess the usefulness of those methods within the ATS.

This may also involve the need for actors to reflect upon their positions and interests. This means that they should be willing to regularly reassess their actions and to examine whether they are withholding consensus out of self-interest, bias or political reasons or whether the refusal to consensus is based on the belief that the decision is wrong (McGhee, ?).

**8.2 Consensus-minus-one**

Under a consensus-minus-one procedure, consensus is required from all but one member. In this way one dissenting member is not able to block a decision, however, two dissenting members may do so. Therefore, in cases where all parties but one agree to a decision, that decision can proceed.

*Participation*

Under this system, participation is still high as it takes two members to veto a decision. It is thus still necessary to consider the variety of perspectives and viewpoints.

*Workability*

One of the limitations to the current consensus system is that decision-making can be slow, and there is a tendency to put off hard issues until later meetings (Commentator, in Wolffram, 1995, p.112). Additionally, the consensus principle can be used to block decisions (Wolfram, 1995, p.93). Indeed, while authors generally agree that consensus is the cornerstone of the system, they also recognise that some questions seem impossible to overcome and the system is close to the limit of cooperation (Wolfram, 1995, p.93). Under consensus-
minus-one, if only one party is blocking the issue, then a decision can nevertheless be adopted. However, given the sovereignty issue, it is questionable whether the system will be acceptable to all parties because influence of states cannot be guaranteed any more.

**Effectiveness**

Considering Case Study III and the fact that parties could not act sufficiently because the Ukraine itself was required to get consensus on this issue, this mechanism may be helpful in order to come to decisions regarding illegal actions of individual states. Under consensus-minus-one, consultative states may be able to condemn the Ukraine officially for its unlawful actions because the Ukraine would not be needed for consensus.

### 8.3 Opting out

Opting out is consensus with the option to opt-out. It can be split into two parts. The first part states that a decision adopted by a large majority will become effective unless there is an objection (Wolfram, 1995, p.93). The second part allows states to opt-out of measures. This means that any state that chooses to opt-out of a measure will not be bound by the measure. However, it is important to note that a state still has the right to veto.

**Participation**

It could be argued that opting out gives everyone the same involvement in the decision-making process as consensus does. However, opting out would negate the need for strong trust building and democratic involvement in the development stage, as not every player would be needed to pass a measure. Despite this, the right to veto remains, and states would have to be kept satisfied enough so that they chose the opt-out option, rather than the veto option.

**Workability**

Regarding the first part of opting out, passing decisions unless they are opposed would make the decision-making process smoother (Wolfram, 1995, p.93) and may improve it (Elliot, 1994a, p.259). Decision-making in the opt-out system is likely to be much faster than in the consensus system. Furthermore, political acceptance is likely, as each state would still have the right to veto.
Effectiveness

Opting out can undermine the effectiveness of the ATS as any party can choose not to accept a measure and, therefore, not be bound by it (Elliot, 1994a, p.259). For example, the effectiveness of a measure to improve wastewater management would lose effectiveness if it applied to one base, but not to a neighbouring base.

On the other hand, although there are limitations to the opt-out procedure, it may prove a useful addition to the system. Hemmings (2004b) argues that progress is often possible through unilateral action. For instance, while the majority of nations may not be convinced that a particular measure is useful, unilateral implementation may prove this and subsequently convince other states to do the same. Similarly to this, if a majority of states decided for the implementation of a certain measure with the help of the opt-out procedure, the states that previously opted out of it due to concerns may be convinced otherwise subsequently.
9 Conclusion

When the Antarctic Treaty was first developed, the twelve original signatory states were able to agree on this international document through consensus. Despite changes in global politics and the number of states involved in the process, the treaty system has continued to operate under the consensus principle. However, changing pressures and influences have led critics to question the merits of consensus in the system.

This paper has attempted to shed light onto the question of whether consensus does – or does not – make sense in the Antarctic Treaty System today. For this, this paper began by discussing and elaborating the concept of consensus, explaining the Antarctic Treaty System and its decision-making structure, and identifying consensus as the principal mechanism for decision-making. Consensus, within the context of the Antarctic Treaty System, refers to a level of agreement between parties. While unanimity between the parties is not required, a mutually acceptable agreement must nevertheless be reached.

In order to assess the merits of consensus in the ATS, key components of decision-making were identified and this led to the development of an analytical framework and three evaluative criteria through which consensus decision-making was analysed. It was found that the acceptability of the Antarctic Treaty System is closely connected to the consensus decision-making system, and that this is mainly due to the sovereignty conundrum. The high political feasibility and acceptability of the consensus system and the relatively lower significance of other aspects such as the effectiveness of decisions thus led to the conclusion that under the given political circumstances the consensus rule makes good sense today. The analysis nevertheless also showed limitations of the system. This paper therefore identified and elaborated opting-out, consensus-minus-one, and improvements to the decision-making process as potential improvements that could be used to overcome some of these limitations.
10 Recommendations

Synthesising the above information, this paper makes the following recommendations:

1. The consensus decision rule should remain and with regard to the initial research question, it makes good sense today.

2. To enable the system to express its concern about a non-complying state, there needs to be a move away from absolute consensus for compliance with existing obligations. Here the consensus-minus-one procedure is regarded as a useful addition to the system.

3. To maximise effectiveness for consensus on an operational level, strategies to enhance communication, information distribution and problem definition need to be considered.
Glossary

Antarctic Treaty (AT) (1961): The first and central treaty to the ATS. The Treaty freezes sovereignty claims, demilitarises Antarctica, prohibits nuclear testing and radioactive waste dumping, provides transparency of operations and promotes scientific co-operation.

Antarctic Treaty Consultative Meeting (ATCM): Annual meeting under the Antarctic Treaty attended by consultative and non-consultative states, experts and observers. Policies are set by adopting recommendations at these meetings.

Antarctic Treaty System (ATS): The system of treaties and conventions for governing and managing relations among states in the Antarctic.

Convention for the Conservation of Antarctic Marine Living Resources (CCAMLR) (1980): Convention with the objective of conserving Antarctic Marine Living Resources (i.e. all living species found south of the Antarctic Convergence).

Claimant: States that have made sovereignty claims within the Antarctic Treaty 60°S northern boundary. The seven claimant states include United Kingdom, New Zealand, France, Australia, Norway, Chile and Argentina.

Consultative states: Voting states Antarctic Treaty Consultative Meetings; comprises of the original claimant states and states with substantial scientific activity in Antarctica.

Convention for the Regulation of Antarctic Mineral Resource Activities (CRAMRA): Adopted in 1988, CRAMRA has not entered into force due to the refusal of some parties to ratify it. Its purpose has nevertheless been taken over by the Protocol on Environmental Protection.

Decision: The end product of an idea that started as a proposal and evolved to become a plan of action accepted by the whole group.
Expert: Intergovernmental and non-governmental organisations that are invited and address ATCM agenda item specific areas in their role as consultants.

Non-claimant: States that have not made sovereignty claims to areas within the Antarctic Treaty 60°S northern boundary.

Non-consultative states: Non-voting states in Antarctic Treaty Consultative Meetings.

Observer: Intergovernmental and non-governmental organisations that attend and participate in Antarctic Treaty Consultative Meetings but do not have any decision-making power.

Regime: Sets of implicit or explicit rules, norms and decision-making procedures around which actors’ expectations converge in a given area of international relations” (Stokke & Vidas, 1996, p.14).
References


