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ABSTRACT

2022-2023 40 104,000 2019-2020

Environmental Protection to the Antarctic Treaty (Protocol)² in 1991, the number of tourists visiting Antarctica³ has increased from almost 6,500 in the 1991–1992 season to 74,401 tourists for the 2019–2020 season.⁴ During the COVID-19 pandemic, numbers dropped dramatically, but the International Association of Antarctic Tour Operators (IAATO)⁵ has reported that in the 2022–2023 season more than 104,897 tourists have visited the Antarctic.⁶ This is a more than 40 percent increase compared to the pre-pandemic 2019–2020 season. In this five-year period, the number of SOLAS tourist vessels active in the Antarctic region increased from thirty-seven to fifty, a more than 35 percent increase.⁷ IAATO’s tourist number estimate for the next season (2023–2024) is 118,089,⁸ which means a further growth of 12.5 percent in one year.

Most tourists (> 60 percent) travel to Antarctica on small- and mid-sized ships, making landings at various sites in the Antarctic Peninsula region on a seven- to ten-day trip.⁹ Another relatively large group of tourists aboard ships with a capacity of over five hundred passengers do not make landings in Antarctica and have a “cruise only” experience (> 30 percent). Smal(gs)-16t16.9(ou)20.1

themselves from their competitors. Activities carried out in the Antarctic¹³ include marathons,¹⁴ mountain climbing, camping,¹⁵ scuba diving, kayaking, cross country skiing, downhill skiing, long distance swimming, base jumping,¹⁶ video-making with drones,¹⁷ visits to penguin colonies by helicopter, heli-skiing from super yachts,¹⁸ and stays in semi-permanent luxury camps in the Antarctic interior.¹⁹ Individual tourists may also seek to experience in Antarctica activities that they have undertaken on other continents, to showcase their experiences on all continents. For instance, in the 2019–2020 season, an Indian national traveled to Antarctica with his motorbike because of his personal “seventh continent-dream”: “I had ridden across six continents and my dream for the last 25 years has been to ride on the seventh.”²⁰ Other manifestations of the growth of Antarctic tourism are the increase in the number of sites visited (now > 600) and the lengthening of the season.²¹

This Article will analyze the efforts within the Antarctic Treaty System to address concerns about Antarctic environmental degradation from growing Antarctic tourism. These efforts have been sclerotic and inadequate, partly because of the strong consensus rule that operates within this regime, but there are ways to enhance the efficacy of this rule so as to meet the political will that exists among a sizable group of participating states to take conservation more seriously.

II. REGULATORY RESPONSES AND OUTSTANDING POLICY QUESTIONS

In 1959, the Antarctic Treaty²² was signed by twelve countries involved in international scientific cooperation in the International Geophysical Year of 1957/58: seven states that have claimed territorial sovereignty over parts of Antarctica during the first half of the twentieth century (Argentina, Australia, Chile, France, Norway, New Zealand, and the United Kingdom) and five other states that did not make claims (Belgium, Japan, the Soviet Union, now succeeded by Russia, South Africa, and the United States). Of these five non-claimant states, the United States and Russia maintain a “basis” for a territorial claim. Based on an agreement to disagree on the extant territorial claims in the area, these states agreed to

¹³ IAATO, *Antarctic Tourism Statistics: 2021–22* (2022–23), <https://www.ats.aq/devAS/Meetings/Documents/94>; IAATO, *Antarctic Tourism Statistics: 2022–23*, ATCM XLII, IP145 (2019), <https://www.ats.aq/devAS/Meetings/Documents/87>.

¹⁴ Antarctic Ice Marathon, <https://www.icemarathon.com/event>; Marathon Tours & Travel, <https://www.marthontours.com/races/antarctica-marathon-and-half-marathon-2022-8746>.

¹⁵ Adventure Life, <https://www.adventure-life.com/antarctica/tours/camping>.

¹⁶ Echoboom Sports, *Echoboom Sports* (Dec. 12, 2013), https://www.youtube.com/watch?v=AeenOIKysWM&ab_channel=EchoboomSports.

¹⁷ eSysman Super Yachts, *eSysman Super Yachts* (Apr. 13, 2018), https://www.youtube.com/watch?v=KHSbdkidf0&ab_channel=eSysmanSuperYachts.

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¹⁹ White Desert, *White Desert*, <https://white-desert.com/our-camps>; Antarctic Logistics & Expeditions, <https://antarctic-logistics.com/services/camp-services>.

²⁰ Deepak Kamath, *Motorcycle to Antarctica*, MADorNOMAD (July 2, 2020), <https://www.madornomad.com/motorcycle-to-antarctica>.

²¹ Bastmeijer & Gilbert, *note 12*.

²² Antarctic Treaty, *note 3*.

govern Antarctica jointly. The Treaty entered into force in 1961 and, as of June 2023, has twenty-nine Antarctic Treaty Consultative Parties (Consultative Parties) that govern the

specified,” and a resolution is a “hortatory text,”³¹ often on substantial issues but not intended to be legally binding.

The complex of the Antarctic Treaty, the associated separate international agreements, and the measures, resolutions, and decision under the Treaty and these agreements constitutes the Antarctic Treaty System (ATS).³²

B.

Tourist activities fall under the scope of the Protocol. Consequently, the Parties to the Protocol (all twenty-nine Consultative Parties and thirteen other non-Consultative Parties) have to ensure that the tourist activities that fall under their jurisdiction take place in a manner consistent with the environmental principles of Article 3 of the Protocol and comply with requirements regarding prior environmental impact assessment (EIA)³³ and the more specific prohibitions and obligations of the Annexes to the Protocol. These prohibitions and obligations relate, for instance, to waste management, the protection of flora and fauna, and special protection of areas with outstanding values.

But while Antarctic tourism is evidently not “unregulated,” the Protocol’s provisions are not specifically tailored to regulate tourism. Shortly after the adoption of the Protocol in 1991, five Consultative Parties (Chile, France, Germany, Italy, and Spain) submitted a proposal for a separate annex to the Protocol with rules on tourism and other non-governmental activities,³⁴ but no consensus could be reached.

Many proposals from Consultative Parties for ATCM action related to relatively specific

Since the adoption of the Protocol in 1991, the ATCM deliberations on Antarctic tourism have resulted in the adoption of one recommendation, two measures⁴⁶ and forty resolutions (Table 1 and Figure 1). At first glance this looks impressive, however, the two measures that were adopted in 2004 and 2009 focus on fairly specific topics (safety and certain conditions for making tourism landings), and neither is yet in force because neither has been approved by all states that had consultative status at the time of adoption. Measure 4 (2004) is waiting for approval by eleven Consultative Parties, and the entry into force of Measure 15 (2009) still requires fifteen additional approvals.⁴⁷

Furthermore, a closer analysis of the resolutions shows that only twenty-two of the forty tourism-related resolutions are still current (Figure 1).⁴⁸ The other eighteen resolutions are

TABLE 1.
RECOMMENDATIONS, MEASURES, AND RESOLUTIONS ON ANTARCTIC TOURISM ADOPTED SINCE 1991, BASED ON THE ANTARCTIC TREATY DATABASE, AVAILABLE <https://www.ats.aq>
AND FERRADA, NOTE 62.

Topic	Recommendations (until 1994) (become effective after approval by all ATCPs)	Measures (legally binding after approval by all ATCPs)	Resolutions (non-legally binding)	Current?
<i>Substantive norms applicable to the whole Antarctic Treaty area and particularly relevant for environmental protection</i>				
Norms for landings from ships		Measure 15 (2009)	Resolution 4 (2007)	Yes Yes (but not in force)
Discouragement of any tourism activities which may substantially contribute to the long-term degradation of the Antarctic environment and its dependent and associated ecosystems			Resolution 5 (2007)	Yes
General Principles of Antarctic Tourism			Resolution 7 (2009)	Yes
General Guidelines for visitors/operators to the Antarctic (and Site Guidelines Checklist)	Recommendation XVIII(1) (1994)			Yes
Guidelines on the assessment of land-based expeditionary activities			Resolution 3 (2011) Resolution 4 (2021) Resolution 9 (2012)	No Yes Yes
Encouragement of a risk-based assessment approach in planning and authorization of tourism activities			Resolution 6 (2014)	Yes
Permanent facilities for tourism and other non-governmental activities in Antarctica			Resolution 5 (2022)	Yes
Urgent measures to be taken with respect to certain tourist and non-governmental activities			Resolution B (2023) (number not yet known)	Yes

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Table 1. Continued

Topic	Recommendations (until 1994) (become effective after approval by all ATCPs)	Measures (legally binding after approval by all ATCPs)	Resolutions(non-legally binding)	Current?
<i>Site specific guidelines</i>				
Site Guidelines for Visitors			Resolution 5 (2005) Resolution 2 (2006) Resolution 1 (2007) Resolution 2 (2008) Resolution 4 (2009) Resolution 1 (2010) Resolution 4 (2011) Resolution 4 (2012) Resolution 5 (2012) Resolution 3 (2013) Resolution 4 (2014) Resolution 2 (2016) Resolution 1 (2018) Resolution 2 (2019) Resolution 3 (2019) Resolution 3 (2021) Resolution 2 (2022)	No No No No No No No No Yes No No No No No No No No Yes
<i>Safety</i>				
Guidelines on contingency planning, insurance			Resolution 4 (2004) (see also Resolution 9 (2012)) Resolution 6 (2017)	No Yes
Maritime safety and search & rescue		Measure 4 (2004)	Resolution 6 (2008) Resolution 6 (2010) Resolution 10 (2012)	Yes Yes Yes

Other non-substantive norms

Notification and reporting:

Resolution 3 (1995) Yes

Resolution 3 (1997) Yes

Resolution 6 (2005) No

Resolution 3 (2004) Yes

Resolution 2 (1996) Yes

Information exchange and consultation

Acknowledgment of the value of educational and cultural activities

Resolution 7 (2014) Yes

Promotion of approval of Measure 4(2004)

Resolution 9 (2021) Yes

Voluntary on-board observer operational framework for vessel-based tourism in the Antarctic Treaty Area

Post-visit site report form for tourism and non-governmental activities in Antarctica

Resolution 10 (2021) Yes

Revised standard post-visit report form

Resolution 6 (2022) Yes

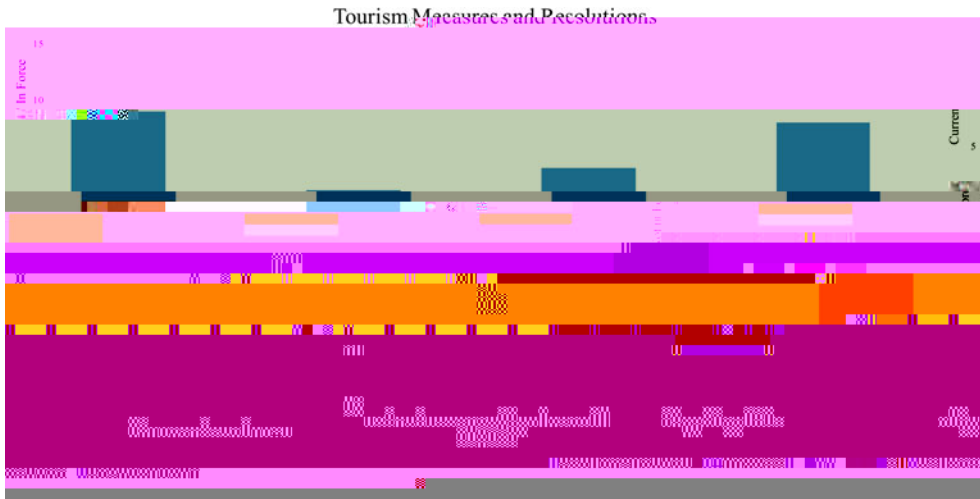


FIGURE 1. Tourism related recommendations, measures and resolutions, adopted since the signing of the Protocol (1991), per topic and status, based on the Antarctic Treaty Database, available <https://www.ats.aq> and Ferrada, note 62. Recommendations (until 1994) and measures (since 1995) are legal norms that are in force or not in force, depending on whether they have been approved by all states that had consultative status at the time of adoption (Antarctic Treaty, note 3, Art. IX.4). Recommendations, measures, and resolutions may be current or not current, depending on whether it has been declared expired or replaced.

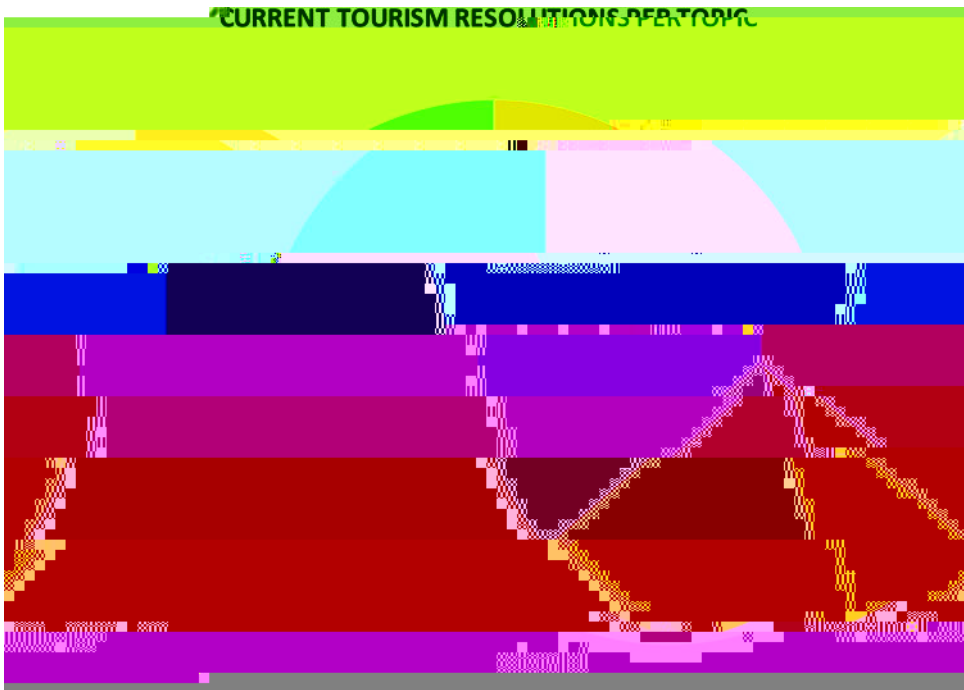


FIGURE 2. All tourism resolutions adopted since the signing of the Protocol (1991).

paints a stark picture of a treaty organization failing to respond adequately to pressing international environmental priorities.

III. THE DIFFICULTY OF REACHING CONSENSUS

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The “consensus rule”

which has always been successful until the 2022 ATCM in Berlin. For measures, consensus is needed for adoption and unanimous subsequent approval is required for entry into force: A measure does not become effective until formally approved by all Consultative Parties that were entitled to participate in the ATCM at which the measure was adopted.⁶⁹ There is an exception to this rule, where, unless the measure specifies otherwise, formal approval is not necessary and “tacit approval” is enough.⁷⁰

The consensus practice of the ATCM should be distinguished from the practice of “best efforts to reach consensus, before taking a decision by a majority.” The latter approach is taken at many of the United Nations convened conferences, the most famous being the United Nations Conference of the Law of the Sea (UNCLOS).⁷¹ ATCM consensus decision making should also not be equated with “pseudo-consensus” practices as can be observed in some environmental treaty conferences, where, notwithstanding a formal objection by one or two participants, a “consensus” was declared by the chair.⁷² At the ATCM, it is the substantive consensus that controls the conduct of business, in which the chairs of the plenary, its Working Groups as well as the Committee for Environmental Protection (CEP) under the Protocol, get sufficient assurance that the Consultative Parties present at the meetings are satisfied with the outcome of the negotiation. This requires attention for the interests of all Consultative Parties. Still, decision making is not based on unanimity because consent need not be expressed explicitly and the system continues to function on the basis of the absence of objections.

The fundamental character of the consensus rule and the substantial progress of Antarctic governance explain why the rule has been referred to as “the ATS principle of consensus” by some Consultative Parties⁷³ and why it has so often been considered a cornerstone of Antarctic governance. For instance, in the time period of Protocol negotiations, the Under-Secretary of Foreign Affairs of Chile, Edmundo Vargas, stated:

If man[kind] has behaved maturely in this southernmost region it is because the wise mechanism of consensus has functioned. Perhaps we have not achieved all the things we would have liked to, but what we have done has been permanent.⁷⁴

⁶⁹ Antarctic Treaty, note 3, Art. IX(4); Decision 1 (1995), note 29, para. 1(a).

⁷⁰ The exception relates to amendments to the Protocol’s annexes. Protocol, note 2, Annex I, Art. 8(1); Annex II, Art. 9(1); Annex III, Art. 13(1); Annex IV, Art. 15(1); Annex V, Art. 12(1); Annex VI, Art. 13(2). For the approval of a Management Plan of an Antarctic Specially Protected or Specially Managed Area and the designation of a Historical Site or Monument, see *d.*, Annex V; Art. 6(1); Art. 8(2).

⁷¹ Rules 37, 39, UN Doc. A/CONF.62/30 and rev.1–3 (1974, 1975, and 1980); Barry Buzan, Akiho Shibata, 75 AJIL 324 (1981); 24 CAL. W. INT’L L.J. 17, 44 (1993).

⁷² A case from the Convention on Biological Diversity (CBD) is examined by Akiho Shibata. Akiho Shibata, JAPANESE Y.B. INT’L L. 28, 51 (2011). Note that the decision-making rule under

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That many of the concerns and important policy questions discussed above have not led to

and informal talks with ATCM delegates, the authors can suggest the following potential reasons.

Consultative Parties may be concerned that certain new measures would not fit into their existing domestic implementation legislation, for instance because the topic of such new measures (e.g., human safety) falls outside of the legal scope of that legislation (e.g., environmental protection). Some Consultative Parties may consider amendment of the domestic legislation too time-consuming.

Mutual relations between Consultative Parties and sovereignty issues may also play a role. For instance, a claimant state may consider limitations to certain new tourism developments in its claimed territory unacceptable, particularly if another claimant state is already conducting or authorizing such activities in the same region.

It is also conceivable that a Party does not want to limit certain potential future developments, for instance in light of scientific, economic, or other interests. Certain Parties may also consider tourism as a source of financing scientific research and infrastructural facilities.

Uncertainty or different views about how various Antarctic principles and values should be defined and what could be the threshold for determining unacceptable impacts can also lead to decisions not being taken. This appears to be particularly relevant with regard to Antarctica's intrinsic values (e.g., wilderness values), which are referred to in Article 3(1) of the Protocol and Annex V to the Protocol.⁸⁴

Another factor that seems to play a role in the difficulty of reaching consensus is the emphasis on science-based decision making in the CEP and ATCM and particularly the way this is interpreted by some states. Science-based decision making aims to ensure that decisions are based on available knowledge as much as possible, however, it does not necessarily exclude decision making in situations where gaps in knowledge exist. In such situations, decisions may be based on the best available knowledge as well as the precautionary approach. Consultative Parties appear to agree on the need to follow the best available science and precaution, but may disagree on what that means in given circumstances.

Another possible reason is that, in parallel with rising tensions in international relations and lack of cooperation within international organizations generally and as the number of Consultative Parties rises, the spirit of Antarctic cooperation has become less assured over time. Great power politics among strategic competitors, which were difficult enough in the context of the Cold War rivalry between the United States and the Soviet Union, have become even more complex given the rise of China and its intention to influence ATS proceedings.⁸⁵ As countries find it difficult to reach agreement on climate change, nuclear disarmament, and even the Ukraine confl

conflict with domestic law may be prevented by listening to the concerns and investing time to find compromise legal language that provides sufficient flexibility.⁸⁶

IV. THE CONSEQUENCE OF THE ABSENCE OF CONSENSUS: DECISION MAKING BY NON-DECISION MAKING

While it has never been the aim to close Antarctica for human presence (facilitating science was the primary focus of the Treaty), the Consultative Parties granted Antarctica a protected status at an early stage. With the adoption of the 1964 Agreed Measures for the Conservation of Antarctic Fauna and Flora, Antarctica was designated as a “Special Conservation Area.”⁸⁷ The protected status of the whole of Antarctica was also reflected in Article 2 of the Protocol: “The Parties commit themselves to the comprehensive protection of the Antarctic environment and dependent and associated ecosystems and hereby designate Antarctica as a natural reserve, devoted to peace and science.”⁸⁸ This aim is also reflected in opening addresses and interventions of representatives of certain Consultative Parties during the negotiations of the Protocol. For instance, in 1990, the Chilean foreign under-secretary stated that the ATCM is “faced with the challenge of reconciling a pollution-free Antarctica with one that is also open to human activity.”⁸⁹

To enhance the protection of the Antarctic environment, the Protocol could have stipulated that all types of non-scientific or all non-governmental activities are prohibited unless explicitly agreed by the Consultative Parties that the activities may be conducted in Antarctica. The Antarctic would in that case become a real natural reserve with only activities that all Consultative Parties consider appropriate. However, this is not the approach that was taken; the opposite is the case. Under the legal design of the Antarctic Treaty and Protocol, Antarctica is open to peaceful use by all states and their nationals, except for activities that are explicitly prohibited or that are contrary to the principles or purposes of the Treaty⁹⁰ or contrary to the Protocol.⁹¹ Consequently, consensus is needed for any explicit prohibition or additional condition for the conduct of human activities in Antarctica.

Thus, for the comprehensive environmental protection of Antarctica beyond what is provided for in the Protocol, the consensus rule in reality presents a serious hurdle to overcome. This is particularly true for rapidly developing activities in Antarctica such as Antarctic tour-

consensus results in “

prior to the conference, or arising during the session.”¹⁰⁰ As the International Court of Justice (ICJ) in its *La Gravelle* cases declared, such negotiations in good faith must be “meaningful, which will not be the case when either of them insists upon its own position without contemplating any modification of it.”¹⁰¹

The consensus rule within a legal regime established by a treaty must also be implemented within an emerging international law of positive cooperation among the regime members, as pronounced by the ICJ.

One question is whether the effectiveness of the ATCM could be increased by allowing more exceptions to the consensus rule. Any debate focused on when and how such exceptions could be applied should be based on a comprehensive analysis of situations in which it would not be absolutely necessary for Consultative Parties to have an option to block consensus. It could be conceived that certain topics are less sensitive and, for example, have no or only very limited relevance from the perspective of Article IV of the Treaty, or other central interests of Consultative Parties, and for which deviation from consensus is considered acceptable. The precedents from other environmental regimes applying majority decision making for technical, scientific, and “derivative” regulations¹⁰⁷ would be worth looking into, especially when designing a regulatory framework for Antarctic tourism. It is also conceivable that a distinction is made on the basis of the legal status of a decision. The consensus rule now applies to measures, resolutions, and decisions and the question is whether letting go of consensus for adopting resolutions would be negotiable. Such a revision to the ATCM Rules of Procedure would not implicate any question of amendment to Article IX of the Treaty.

If there is space for additional exceptions to the consensus rule, various options might be debated. In addition to decision making by simple or qualified majority, the Parties could add an

reach consensus in the CEP is politically motivated, the chance of reaching consensus within the ATCM will be small.

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Ministerial or senior-level meetings are very rare in the Antarctic Treaty System. When in the 1990s progress in the discussions on the liability annex to the Protocol and illegal, unreported, and unregulated fishing was lacking, New Zealand took the initiative to organize the first ministerial meeting since the adoption of the Treaty. This meeting took place from January 24–28, 1999, including a stay in Antarctica at Scott Base (New Zealand) and McMurdo Station (United States) from January 25–28, 1999. In a press release, New Zealand Associate Minister of Foreign Affairs and Trade Simon Upton stated:

The business has always been handled by officials. That has worked well up to now. But with new pressures on the Treaty and increasing scientific and tourist traffic to the continent, offi

Groups of Consultative Parties could also use the Final Report of the ATCM to be explicit about their common view on a particular policy issue. The “views and practices” reflected in the Final Reports may not by themselves be “decisions” of the Consultative Parties at the moment of adopting the Final Reports, but the accumulations of those views and practices may over time establish a basis for new initiatives to reach consensus. There are interesting precedents in other environmental regimes, forging

outright rejection. They can also be subject to the gradual abandoning of principles or to a lack of confidence in their real possibilities of action.”¹²⁴

In light of the above, there are good reasons for the ATCM to strengthen its decision making. Options discussed in this Article go from considering ways to make the consensus rule more flexible to intensified collaboration among Party states. Given the continuing, and in some cases increasing, environmental and political pressures facing Antarctica, it will be important for the Consultative Parties to give greater attention to how the ATCM can improve its ability to act and provide the kinds of leadership and regulation needed for the coming decades.

¹²⁴ Opening Address by Oscar Pinochet de la Barra, Antarctic Treaty Secretariat, (1990), note 74, at 21–22.