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THE CONVENTION ON THE CONSERVATION OF ANTARCTIC MARINE LIVING RESOURCES: THE PROBLEM OF ENFORCEMENT

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ABSTRACT

The Convention on the Conservation of Antarctic Marine Living Resources (CCAMLR) sets up the regime which manages the use and conservation of the living resources of the Southern Ocean, an area comprising one tenth of the world's marine areas and containing an abundant but fragile ecosystem.

While the CCAMLR regime has generally been considered fairly progressive in its aims and has made a positive contribution to Antarctic conservation, it is currently under serious strain as a result of its inability to control the rapid development of illegal and unregulated fishing in the Convention area. These developments have brought into sharp relief CCAMLR's single most important shortcoming: its lack of effective enforcement capacity.

This paper argues that CCAMLR needs urgently to address this shortcoming and develop more effective methods of enforcing its conservation measures on Parties and non-Parties alike. The various options available to CCAMLR to strengthen enforcement and promote compliance are considered and assessed. The paper concludes that there while the problems facing CCAMLR are complex and will not be easily overcome, there are a number of solutions available to CCAMLR.

The text of this paper (excluding contents page, footnotes, bibliography and annexures) comprises approximately 16,000 words.

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I INTRODUCTION

The Convention on the Conservation of Antarctic Marine Living Resources (the CCAMLR Convention)[1] sets up the regime which manages the use and conservation of the living resources of the Southern Ocean, an area comprising one tenth of the world's marine areas and containing an abundant but fragile ecosystem. The CCAMLR Convention is a product of the Antarctic Treaty System, that unique legal and political compromise which has successfully managed to keep the Antarctic region free of conflict for nearly forty years.

Although negotiated in late seventies and early eighties, CCAMLR is still regarded as a remarkably progressive conservation regime as a result of its ambitious aims, its whole-ecosystem focus and wide geographical area of application, its strong reliance on the precautionary approach and the fact it was introduced prior to wide-scale exploitation of the resources. Unfortunately, however, an assessment of CCAMLR's achievements since its commencement in

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[1] Convention on the Conservation of Marine Living Resources, 1980, 19 ILM 837. In this paper the abbreviation CCAMLR is used to refer to the regime as a whole. Where the Convention or the Commission is referred to more specifically the terms CCAMLR Convention and CCAMLR Commission are used.

1982 reveals that there has been a substantial gap between the concepts and ideals embodied in CCAMLR Convention and their application in practice.

Initially the regime was dogged by a slowness to set up the machinery required to operate the system and a failure to produce concrete results. The vitally important observation and inspection system envisaged in the CCAMLR Convention was not established until 1989. The consensus decision-making process, and blocking from fishing nations, meant that in its first seven years of operation the regime produced only 12 conservation measures, none of which was particularly significant or far-reaching. The Scientific Committee, intended to operate as an empirical and scientific counter-balance to the more overtly political environment of the Commission, was racked with internal dissension and consequently unable to fulfil its role. CCAMLR appeared unable to translate the strong objectives of the Convention into meaningful action.

By 1989, however, it appeared that this initial institutional sluggishness was starting to be overcome. The demise of the former Soviet Union meant that agreement on conservation measures was much easier to accomplish. The consensus decision-making processes appeared to be working much better. The annual meetings of the Commission started producing more concrete conservation measures covering a range of species and areas and including measures on methods of catch, catch reporting systems, permissible by-catch levels, sea bird protection, and on a precautionary approach to new and exploratory fisheries. Changes to the rules regarding the admission of observers at Commission meetings meant that it became one of the more transparent fisheries regimes in existence. Growing membership and increased links with other international organisations enhanced the regime's legitimacy with the outside world. Even the NGO observers were of the opinion that CCAMLR was beginning to fulfil its promise and make a positive contribution to conservation in the Southern Ocean.

Unfortunately this period of optimism has proved to be short-lived and CCAMLR is once again facing serious difficulties. The problems began emerging in 1993 and 1994 as evidence filtered through of increasing illegal and unregulated fishing taking place in the CCAMLR area. It soon became apparent that the rapid development of these unauthorised activities was putting the regime under considerable strain. Since the magnitude of the problem became apparent CCAMLR has made some attempts to come to terms with it and to develop solutions. The gold rush for the Southern Ocean's riches has, however, continued unabated.

These developments have brought into sharp relief CCAMLR's single most important shortcoming: its lack of effective enforcement capacity. This is a problem that is endemic amongst fisheries management and conservation organisations. As Burke has written:[2]

> Enforcement is the largest and most critical problem, and no fishery agency on an international level has ever been allowed either formal enforcement authority equal to the task or the resources necessary for effective exercise of control.

In CCAMLR's case in addition to the problems commonly faced by fisheries organisations, there are particular obstacles to enforcement which arise as a result of the unique legal, political and geographical circumstances of the region.

The inability to enforce its measures has revealed a huge gap between the objectives and aims set out in the CCAMLR Convention and the reality of its implementation. This paper argues that CCAMLR needs urgently to address this problem of illegal fishing and develop more effective methods of enforcing its conservation measures on Parties and non-Parties alike. Unless CCAMLR can

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[2] William T Burke, *The New International Law of Fisheries: UNCLOS 1982 and Beyond* (Clarendon Press, Oxford, 1994) 98.

develop effective enforcement methods the whole regime is likely to "founder on a sea of non-compliance"[3] and become irrelevant.

Part II of the paper introduces the CCAMLR regime by outlining its background and negotiation and by describing its key features. It summarises CCAMLR's strengths and weaknesses as a fisheries management regime and identifies the way in which it differs from similar organisations.

Part III focuses on the issue of enforcement. It describes the recent development of widespread illegal and unregulated fishing in the CCAMLR area and details the regime's failure to date adequately to address the issue. The lack of effective enforcement capacity and the consequent inability to address the problem of illegal and unregulated fishing is identified as the major problem facing CCAMLR today.

The main part of the paper, Part IV, considers what action CCAMLR can take to address its enforcement problems and assesses the merits of the various options available.

Part V briefly looks at and comments on the actions that were taken at CCAMLR XVI, the 1997 annual meeting of CCAMLR, which took place while this paper was under preparation.

The paper concludes, in Part VI, that while the problems facing CCAMLR are serious and will not easily be overcome, the Parties to CCAMLR are not impotent to resolve them. There are a number of options available to CCAMLR to deal with the problem of illegal and unregulated fishing. The members of the CCAMLR regime have the means to improve CCAMLR's enforcement capacity and thus to increase the prospect of protecting the abundance of the Southern

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[3] ECO: Fifteenth Meeting of the Commission for the Conservation of Antarctic Marine Living Resources Number 1, 21 October – 1 November 1996 Hobart, Australia. *ECO* is an occasional newsletter published by interested NGOs in the margins of international meetings relating to the environment.

Ocean for future generations. The real question is whether they have the political will and commitment to try to achieve this.

II THE CCAMLR REGIME

A Background

1 The Antarctic Treaty System

Sir Arthur Watts has written:[4]

> Nothing in Antarctica is as it is anywhere else in the world. Its geographical uniqueness is obvious; less obvious, but just as true, is its distinctive international political and diplomatic complex of relationships; and its legal aspects stand out for their novelty and singularity.

The Antarctic area is governed by the Antarctic Treaty System (ATS), the central element of which is the Antarctic Treaty.[5] The Antarctic Treaty was concluded in 1959 following the International Geophysical Year (IGY) in 1957–8.[6] The IGY had seen an unprecedented level of scientific activity and co-operation take place in Antarctica. The countries which had participated in these activities wished to maintain their stations on the continent and continue their research efforts. This led to the negotiation in 1959, by the 12 states which had been

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[4] Sir Arthur Watts *International Law and the Antarctic Treaty System* (Grotius Publications Limited, Cambridge, 1992) 2.

[5] The Antarctic Treaty, 1959, 402 UNTS. 71.

[6] The IGY was a major global scientific endeavour conceived by the International Council of Scientific Unions, an eighteen month period during which twelve countries participated in extensive government funded scientific research programmes in the Antarctic area. The Antarctic claimant nations entered into a "gentlemen's agreement" that for the duration of the IGY free access would be allowed for the scientists of any country and that any scientific expeditions that took place or bases that were established would not be considered to have any legal significance affecting any of the territorial claims. The twelve countries involved operated some 40 stations throughout the continent and studied various scientific processes on Antarctica including meteorology, geomagnetism, gravity, cosmic radiation, sunspots, oceanography, seismology, and glaciology.

active in Antarctica, of a treaty to preserve the compromises that had operated during the IGY.

The Antarctic Treaty represents an accommodation of the divergent interests of the claimant states and the non-claimant states involved in Antarctica at that time.[7] The preamble proclaims that "it is in the interests of all mankind that Antarctica . . . shall not become the scene or object of international discord".[8] The Antarctic Treaty preserves Antarctica as an area dedicated to peaceful purposes and freedom of scientific research. Any militarisation or nuclearisation of the area is explicitly prohibited and co-operation in scientific endeavour is encouraged. The Antarctic Treaty achieves this by getting the Parties to "agree to disagree" on the contentious issue of claims to sovereignty.[9]

While the Antarctic Treaty does not establish an international organisation as such, through the mechanism of regular meetings of the parties and the formulation of measures in furtherance of the objectives of the Treaty, a complex and comprehensive regime has evolved which now includes a number of

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[7] The states which have territorial claims over parts of Antarctica are New Zealand, Australia, Chile, the United Kingdom, France, Norway and Argentina. The non-claimant states involved in the negotiations were the United States, the USSR, Belgium, Japan, and South Africa.

[8] Second preambular paragraph of the Antarctic Treaty.

[9] Article IV of the Antarctic Treaty provides:

(1) Nothing in the present Treaty shall be interpreted as :

(a) A renunciation by any Contracting Party of previously asserted rights of or claims to territorial sovereignty in Antarctica;

(b) A renunciation or diminution by any Contracting Party of any basis of claim to territorial sovereignty in Antarctica which it may have whether as a result of its activities or those of its nationals in Antarctica, or otherwise;

(c) Prejudicing the position of any Contracting Party as regards its recognition or non-recognition of any other State's right of or claim or basis of claim to territorial sovereignty in Antarctica.

(2) No acts or activities taking place while the present Treaty is in force shall constitute a basis for asserting, supporting or denying a claim to territorial sovereignty in Antarctica or create any rights of sovereignty in Antarctica. No new claim, or enlargement of an existing claim, to territorial sovereignty in Antarctica shall be asserted while the present Treaty is in force.

Article VI of the Treaty also relates to the issue of sovereignty. It provides:

. . . nothing in the present Treaty shall prejudice or in any way affect the rights, or the exercise of the rights, of any State under international law with regard to the high seas within the area.

subsidiary treaties and is known as the Antarctic Treaty System.[10] The treaty is open to accession by other states and over the years membership has grown from the 12 original Parties to 26 Consultative Parties and 17 Non-Consultative Parties.[11]

2 *The negotiation of the CCAMLR Convention*

The Antarctic Treaty was largely concerned with the overriding political concerns of the era, and contains only scant reference to environmental and economic issues.[12]

The need for an international instrument to protect living resources was recognised at the first Antarctic Treaty Consultative Meeting (ATCM) held in 1961 and was reiterated at the second ATCM in 1962.[13] The first specific steps in this direction were taken at the third ATCM with the adoption of the Agreed Measures for Conservation of Antarctic Fauna and Flora in 1964.[14] These measures focused largely on the reduction of incidental damage to Antarctic flora and fauna as a result of human activities in Antarctica and covered birds, mammals, and plant life native to the region. The Agreed Measures were adopted in the form of a recommendation, not in a treaty binding at international law. The

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[10] These meetings are known as the Antarctic Treaty Consultative Meetings (ATCMs) and are held annually. The Antarctic Treaty System is made up of the Antarctic Treaty, some 200 recommendations adopted at ATCMs which are in effect, associated international instruments and the measures in force under those instruments.

[11] The Antarctic Treaty has a two tier approach to membership. While any member of the United Nations may accede to the Treaty, only those which demonstrate a serious interest in Antarctica by conducting substantial research activity in the area may participate in the periodic consultative meetings. Thus the membership is divided into the Consultative Parties (the 12 original Parties and Acceding Parties which conduct substantial activities in Antarctica) and the Non-Consultative Parties (other Acceding Parties). The Non-Consultative Parties are, however, able to attend consultative meetings as observers.

[12] This is found in Article IX which sets up the mechanism of regular consultative meetings (ATCMs) of the Antarctic Treaty Parties to formulate measures designed to further the principles and objectives of the treaty and specifically states that these include measures for the "preservation and conservation of living resources in Antarctica".

[13] Recommendation I-8 and recommendation II-2.

[14] Recommendation III-8. The Agreed Measures can be found in the Second Schedule to the Antarctic Act 1960 (as amended).

Agreed Measures make no reference to the protection of fish or other marine living resources.

Then at the ninth ATCM in 1977 the Consultative Parties adopted a resolution calling for a "definitive regime" to address the issue of marine living resources. A number of fundamental bases were identified for the new regime: it should provide for protection of the Antarctic ecosystem as a whole, the geographical boundaries of the regime should match the geographical boundaries of the Antarctic ecosystem, and the carefully balanced compromises of Article IV of the Antarctic Treaty should be preserved.[15]

The Consultative Parties' decision to negotiate a treaty to cover marine living resources was motivated by a number of factors. There was growing international concern at the time about the decline of fish resources. This factor and the extension of coastal state jurisdiction over large areas of water that had previously been high seas led to considerable focus amongst distant-water fishing nations on finding new fishing grounds and new food sources. Attention turned to krill, the small crustacean found in vast quantities in the Southern Ocean. By 1977 a commercial krill fishery had developed in Antarctic waters and by 1982 a catch of some 500 000 tons was being taken annually.[16] Past experience with the devastation of the Antarctic seal population last century and the depletion of Antarctic finfish in the 1960s and 1970s led to concern amongst the Consultative Parties that the same would happen to the krill population. The implications of over-fishing of krill were particularly serious to the Antarctic ecosystem as a whole, because of the crucial place krill occupies in Antarctic food chain.

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[15] Recommendation IX-2. See above n 9 for the text of Article IV of the Antarctic Treaty.

[16] *Conserving Antarctic Marine Life: The Commission for the Conservation of Marine Living Resources . . . its origins, objectives, functions and operation* (Information booklet produced by the CCAMLR Secretariat, Hobart, 1991) 5.

The 1970s was also a time of growing international concern about environmental and conservation issues[17] and the Antarctic Consultative Parties were also spurred on by knowledge that if they did not act to provide some solutions to Antarctic environmental problems within the Antarctic Treaty System, there would be increasing pressure to have Antarctic environmental issues dealt with in other fora, such as the United Nations.[18]

Negotiations commenced at a special Consultative Meeting in Canberra in March 1978. Further meetings took place in Buenos Aires and Washington later that year. The text of the Convention was finally agreed upon at a diplomatic conference in Canberra on 20 May 1980[19] and entered into force on 7 April 1982.

B Key Features

1 Links with the ATS

The Preamble of the CCAMLR Convention proclaims that:[20]

> . . . the conservation of Antarctic marine living resources calls for international co-operation with due regard for the provisions of the

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[17] The United Nations Conference of the Human Environment had taken place in Stockholm in 1972 and had led to the establishment of the United Nations Environment Programme (UNEP).

[18] Both the United Nations Environmental Program and the Food and Agriculture Organisation (FAO) had been showing interest in becoming more involved in Antarctic fishing issues. This concern of "interference" was made clear in a New Zealand Ministry of Foreign Affairs memorandum:

> The need for some agreement regulating the exploration and exploitation of resources in the Antarctic is becoming increasingly urgent and if the Consultative Parties do not come up with a solution it will be difficult for them to justify resistance to throw the whole question over to a wider international body.

Memorandum of 11 May 1976 from Secretary of Foreign Affairs to DSIR, Trade and Industry, Agriculture and Fisheries, and the Fishing Industry Board quoted in Malcolm Templeton *A Wise Adventure? NZ in Antarctica 1920–90* (unpublished manuscript available from the NZ Ministry of Foreign Affairs and Trade).

[19] The original signatories of the CCAMLR Convention were Argentina, Australia, Belgium, Chile, France, Germany (both FRG and GDR), Japan, New Zealand, Norway, Poland, South Africa, the United Kingdom, the United States, and the USSR.

[20] Fifth preambular paragraph of the CCAMLR Convention.

Antarctic Treaty and with the active involvement of all states engaged in research or harvesting activities in Antarctic waters;

Consistent with this view, the Convention reiterates and preserves the compromises on territorial claims which form the foundation of the Antarctic Treaty and allows open access to other states which wish to join the Convention.

These links with the Antarctic Treaty are found in Articles III – V of the CCAMLR Convention. Article III carries over the obligations of non-militarisation and non-nuclearisation contained in the Antarctic Treaty. Article IV continues the "agreement to disagree" contained in the Antarctic Treaty with the effect that claimants and non-claimants alike can co-operate in the management and conservation of living resources in the Southern Ocean without affecting or prejudicing their position on the subject of Antarctic territorial claims.[21] Article IV also, through its incorporation of Article VI of the Antarctic Treaty, makes clear that CCAMLR does not intend to derogate from established international law rights with regard to the high seas. It leaves ambiguous the extent to which the Antarctic waters are high seas, allowing parties to interpret the provision in accordance with their views on the sovereignty issue and the application of the law of the sea to the Antarctic region. Article V involves an acknowledgement by those Contracting Parties not Party to the Antarctic Treaty of the special obligations and responsibilities of the Antarctic Treaty

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[21] Article IV of the CCAMLR Convention provides:

(1) With respect to the Anarctic Treaty area, all Contracting Parties, whether or not they are Parties to the Antarctic Treaty, are bound by Articles IV and VI of the Antarctic Treaty in their relations with each other.

(2) Nothing in the Convention and no acts or activities taking place while the present Convention is in force shall:

(a) constitute a basis for asserting, supporting or denying a claim to territorial sovereignty in the Antarctic Treaty area or create any rights of sovereignty in the Antarctic Treaty area;

(b) be interpreted as a renunciation or diminution by any Contracting Party of, or as prejudicing, any right or claim or basis of claim to exercise coastal state jurisdiction under international law with the area to which the Convention applies;

(c) be interpreted as prejudicing the position of any Contracting Party as regards its recognition or non-recognition of any such right, claim or basis of claim;

Consultative Parties for the protection and preservation of the Antarctic Treaty area.

The CCAMLR Convention is open to accession by any state interested in research or harvesting activities in relation to marine living resources in the CCAMLR area.[22] Since its original adoption the following countries or regional economic integration organisations have acceded to CCAMLR: Brazil, Bulgaria, Canada, the European Union, Greece, India, Italy, Korea, the Netherlands, Peru, Spain, Sweden, Ukraine and Uruguay. This brings the membership of the CCAMLR Convention to 28.

2 *Objective of the Convention*

The objective of the CCAMLR Convention is the conservation of Antarctic marine living resources, which is defined to include rational use of the resources.[23] The central tenet of the Convention is that any harvesting of marine living resources in the area is to be carried out in accordance with three key conservation principles: that levels of harvested populations remain stable; that ecological relationships between harvested and other populations are maintained; and that changes to the Antarctic marine ecosystem which are not reversible over two or three decades are avoided. These three conservation principles make up what is known as the CCAMLR's "ecosystem approach".

Consistent with the objective of protecting the Antarctic ecosystem as a whole, the Convention applies to the whole of the area south of the Antarctic Convergence, a natural oceanographic boundary formed where the circulation of

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(d) affect the provision of Article IV, paragraph 2, of the Antarctic Treaty that no new claim, or enlargement of any claim, to territorial sovereignty in Antarctica shall be asserted while the Antarctic Treaty is in force.

[22] Article XXIX.

[23] Article II.

the cold waters of the Antarctic oceans meet the warmer waters to the north.[24] As very few species migrate beyond the Antarctic Convergence, this area forms the natural boundary for the management of Antarctic marine living resources. Antarctic marine living resources are defined widely as finfish, molluscs, crustaceans and all other species of living organisms including birds which are found south of the Antarctic Convergence.[25]

3 *Institutions*

The CCAMLR Convention is an umbrella convention which sets up the basic machinery of a conservation and management regime for the Southern Ocean. Its twin institutional pillars are the CCAMLR Commission and the Scientific Committee.

The CCAMLR Commission is the prime political and decision making body. It is made up representatives of all those Members of the Convention which are either original Members or acceding Members which are currently engaged research or harvesting activities in the Convention area.[26] The Commission is an international organisation with legal personality.[27] It meets annually at its headquarters in Hobart,[28] where it is supported by a Secretariat headed by an Executive Secretary.[29]

The Commission is the body charged with giving effect to the objectives and principles of the Convention. It has a range of functions and responsibilities, the most important of which is the formulation, adoption and revision of specific conservation measures to implement the conservation principles of the

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[24] The precise oceanographic reference points for the Antarctic Convergence are set out in Article I(4). This area is a wider area of application than the Antarctic Treaty which applies to the area south of 60° south latitude.

[25] Article I(2).

[26] Article VII.

[27] Article VIII.

[28] Article XIII.

[29] Article XVII.

Convention.[30] Other activities of the Commission include the facilitation of research, the compilation of data, and the implementation of the system of observation and inspection.[31]

The Scientific Committee is designed to act as an empirical and scientific counterbalance to the Commission. It operates as a consultative body to the Commission.[32] Each Member of the Commission is entitled to appoint a representative to the Scientific Committee, who should have "appropriate scientific qualifications" and may be accompanied by other experts and advisers. The role of the Scientific Committee is to provide a forum for consultation and co-operation concerning the collection, study and exchange of information in order to extend knowledge of the marine living resources of the Antarctic marine ecosystem.

4 Production of conservation measures

It is intended that the Commission and the Scientific Committee will work together on producing the main conservation and management tool of the CCAMLR regime: the conservation measures. The Convention envisages that a range of different types of conservation measures will be adopted to further the aims of the regime, including: quantitative restrictions, the designation of specific regions and seasonal restrictions, the designation of protected species, restrictions relating to the age, size and sex of harvested species, and effort restrictions.[33]

The Scientific Committee is responsible for analysing and assessing the available scientific data on Antarctic marine living resources and for establishing criteria and methods to be used for determinations concerning conservation measures.[34]

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[30] Article IX(1).
[31] Article IX(1).
[32] Article XV.
[33] Article IX(2).
[34] Article XV.

The Scientific Committee's assessments, analyses, reports and recommendations are transmitted to the Commission. To assist with the Scientific Committee's work Members of the Commission are required to provide to the Committee annual statistical, biological and other information regarding marine living resources and their activities in the Convention area to assist with its functions.[35]

The Commission is the decisive body with the authority to adopt conservation measures. However, in doing so, it is bound to "take full account of" the recommendations and advice of the Scientific Committee.[36] Conservation measures are also required to be based on the best scientific evidence available.[37] Decisions of the Commission on matters of substance, such as the adoption of conservation measures, must be taken by consensus, which means that all Members of the Commission must be in agreement before a measure is adopted.[38] A conservation measure adopted by the Commission becomes binding on all Members of the Commission unless they use the opting-out procedure available to them in the Convention.[39]

Members are required to take appropriate measures within their own jurisdictions to ensure that the provisions of the Convention, and any conservation measures which are binding on them, are complied with.[40] Members are also required to keep the Commission informed about actions taken to implement the Convention within their jurisdiction and sanctions imposed for any violations.[41] In addition Members undertake to exert appropriate efforts consistent with the Charter of the United Nations to ensure that no-one engages in any activity contrary to CCAMLR and to notify the Commission of any such activities.[42]

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35 Article XX.
36 Article IX(4).
37 Article IX(1)(f).
38 Article XII.
39 Article IX(6)(c).
40 Article XXI.
41 Article XXI(2).
42 Article XXII.

The main mechanism to assist with ensuring compliance with conservation measures and other provisions of the Convention is the Observation and Inspection System, adopted in 1989. The Observation and Inspection System is intended to promote compliance by enabling official observers and inspectors to be appointed with the authority to board Members' vessels operating in the Convention area to gather evidence to enable flag state prosecutions for any violations.[43]

C Strengths and weaknesses

The United Nations Food and Agriculture Organisation's Advisory Committee on Marine Resources Research has identified that the four basic requirements for successful fisheries management are:

1) discussions and agreement on the objectives of the management measures;
2) adequate technical and scientific information;
3) a mechanism to introduce management measures; and
4) steps to ensure agreed measures are actually implemented, to review their success and if necessary to revise them.

In addition there is the overriding requirement that at each stage of the process there is participation by all those actually or potentially interested in the resource.[44]

While these requirements set out by the FAO might be considered by some to be fairly conservative they, nonetheless, provide a useful framework for reviewing the assessments which have been made over the years on CCAMLR's success as a fisheries management and conservation regime. Such a review shows that

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[43] Article XXIV.

while the views of commentators vary, common themes still emerge. Particularly evident is concern about the large gulf between CCAMLR's laudable and innovative principles and its reality as a conservation regime. This is well summarised by Joyner:[45]

> CCAMLR has been appraised as a paradox since it is viewed with mixed positive and negative feelings. On the one hand, CCAMLR is regarded as an innovative contribution to international environmental law. But on the other it is seen as an inherently flawed mechanism for conservation of marine resources.

1 Participation in the regime

One of the positive factors about the CCAMLR regime, and one that differentiates it from most other resource management regimes, is its wide membership. The Members of CCAMLR cover the full range of the spectrum; from those whose prime interest in the region is exploitation through to those whose main interest is either research or conservation.[46] That this has occurred is a product of the unique legal and political geography of Antarctica.

CCAMLR has, however, faced criticism that it operates as a exclusive club, particularly from those who question the legitimacy of the ATS and who seek internationalisation of the Antarctic region. This attitude is well summed up by Barnes who wrote:[47]

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[44] These requirements are summarised by J. A. Gulland in "The Antarctic Treaty system as a resource management mechanism" in Gillian D. Triggs (ed) *The Antarctic Treaty Regime* (Cambridge University Press, Cambridge, 1987) 118.

[45] Christopher Joyner *Antarctica and the Law of the Sea* (Martinus Nijhoff Publishers, Dordrecht, Boston, London, 1992) 232.

[46] Stuart B. Kaye "Legal Approaches to Polar Fisheries Regimes: A Comparative Analysis of the Convention for the Conservation of Antarctic Marine Living Resources and the Bering Sea Doughnut Hole Convention" (1995) 26 Cal. W. Int'l L. J. 7584.

[47] James Barnes quoted in Peter Beck *The International Politics of Antarctica* (Croom Helm, London, Sydney, 1986) 229.

> It is unclear on what basis the Parties felt they had the right to negotiate in secret a treaty regarding high seas resources and then to present the document for the rest of the world to endorse as a *fait accompli*.

In the face of the increasingly wide membership of CCAMLR, developments in international environmental law to embrace many of the concepts embodied in CCAMLR, and the endurance of the ATS as a regime, such criticisms have less force than they once did. Even NGOs such as Greenpeace now support the ATS and encourage states to accede to it and its subsidiary instruments.[48] The attitude of NGOs today seems to be that although the ATS is a club, it is a fairly good club which has made reasonable moves towards conservation and that there is no reason to think that turning the responsibility over to a more global organisation such as the United Nations would serve conservation needs any better.[49]

Overall CCAMLR can be considered a fairly open and comprehensive regime. It was negotiated by all those states active in Antarctica at that time. Any country interested in its subject matter can accede to the CCAMLR Convention and the Commission is open to any acceding Members if they become involved in harvesting or research activities. CCAMLR counts amongst its Parties all five members of the Security Council and countries representing two thirds of the population of the world. In addition, with the granting of observer status to ASOC in 1988, it is also one of the more transparent regimes.[50]

Recently, however, vessels flagged to non-CCAMLR states have become active in harvesting in the CCAMLR area. This has lead to serious problems for

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[48] Lee Kimball "The Role of Non-Governmental Organisations in Antarctic Affairs" in Christopher C. Joyner and Sudhir K. Chopra (eds) *The Antarctic Legal Regime* (Martinus Nijhoff Publishers, Dordrecht, Boston, London 1988) 39.

[49] Interview with Janet Dalziell, the ASOC observer at CCAMLR XIV, held on 4 October 1997. ASOC is the Antarctic and Southern Ocean Coalition, a coalition of NGOs interested in Antarctica. It has over 150 member organisations in some 35 countries. Greenpeace is ASOC's largest member organisation. ASOC's primary objective has been to preserve the wilderness values of Antarctica.

[50] See above n 49.

CCAMLR in the area of compliance and enforcement. This problem is discussed in detail in the next part of this paper.[51]

2 *The objectives of the regime*

CCAMLR's objectives and aims receive support from most commentators. The Parties are often commended for having the forethought to establish the conservation regime before any large scale harvesting had taken place.[52] Its ecosystem-wide approach is generally accepted as groundbreaking in international environmental law and is what sets it apart from other conservation and management regimes.[53] As Joyner has written:[54]

> . . . the ecosystem approach in CCAMLR furnishes a valuable contribution to resource conservation and to the emerging law of the sea. No other expression of resource conservation in international ocean law so explicitly affirms that conservation of non-targeted species dependent on targeted species should be incorporated into management policies.

The regime is also considered remarkable for the fact that its geographical area of application coincides with the ecosystem which it is set up to protect.[55]

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[51] See the discussion in part III of this paper.

[52] Gulland has written:

> Such public forethought is highly exceptional in the history of the utilisation of natural resources, and owes a lot to the forethought and initiative of a few individuals in a number of the Treaty countries.

Above n 44, 122. See also n 45, 251.

[53] See for example Suzanne Iudicello and Margaret Lytle "Biodiversity Symposium: Marine Diversity and International Law: Instruments and Institutions that can be used to conserve marine biological diversity internationally" (1994) 8 Tul. Envtl L. J. 123, 135.
The ecosystem approach is also strongly endorsed by ASOC. See James N. Barnes "Protection of the Environment in Antarctica: Are Present Regimes Enough?" in Arnfinn Jorgensen-Dahl and Willy Ostreng (eds) *The Antarctic Treaty System in World Politics* (MacMillan, Houndmills, Hampshire, 1991) 187.

[54] Above n 45, 232.

[55] Above n 45, 241. See also Keith Suter *Antarctica: Private Property or Public Heritage?* (Pluto Press Australia, London and New Jersey, 1991) 39.

There are reservations, however, about the application of the ecosystem approach in practice. Some commentators are not really convinced that the regime was ever genuinely intended to meet is aims and have labelled it as "a self serving convention in the guise of an international conservation regime".[56] Others do not question the intentions of the Parties but consider that the ecosystem approach as set out in the CCAMLR convention, while laudable, is flawed. Joyner suggests that the problem arises because the burden of proof falls on the wrong side of the equation. CCAMLR places the onus on non-fishing states to prove that continued exploitation is causing harm to a particular species or the ecosystem as a whole rather than requiring the fishing states to demonstrate the reverse. Joyner advocates a true precautionary approach where the fishing states are required to demonstrate the soundness of their activities.[57]

3 *Adequacy of technical and scientific information*

Commentators tend to agree that the gathering of technical and scientific information is an area where the CCAMLR regime falls short. They point out that the ecosystem approach is complicated and imposes new and sometimes ambiguous data requirements.[58] The fact that CCAMLR has no independent data gathering capacity or research capacity, and is therefore reliant on information submitted by the Parties, is widely considered to be a serious shortcoming.[59] Frank concluded (in an assessment made shortly after CCAMLR's entry into force) that the failure to create the necessary institutions to facilitate the accumulation of the critical information required to operate the ecosystem approach was a serious flaw with the potential to emasculate the positive aspects of the Convention.[60] It must be acknowledged, however, that in recent years the

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[56] Ronald F. Frank "The Convention on the Conservation of Antarctic Marine Living Resources" (1983) 13 Ocean Development and International Law Journal 313.

[57] Above n 45, 251.

[58] Sir Anthony Parsons (Chairman) *Antarctica: The Next Decade (Report of a Study Group; The David Davies Memorial Institute of International Studies)* (Cambridge University Press, Cambridge, 1987) 86.

[59] See above n 46, 88; and n 45, 250.

[60] Above n 56, 316.

situation has improved somewhat as a result of increased observer coverage under Observation and Inspection System.

The requirements on states to submit data have also been criticised as weak. Joyner claims that this problem has been compounded by states' tendency to submit data derived from commercial sources only, and thus pertaining only to harvested species, thereby reducing the ability of the regime to take an ecosystem-wide approach.[61] These problems, of course, are not unique to CCAMLR and appear in most other fisheries organisations.[62]

4 The mechanism to introduce management measures

Views vary on CCAMLR's decision-making mechanisms and the quality of their outcomes.

The establishment of a separate Scientific Committee is generally seen as a useful innovation, although some consider it hampered by lack of resources and by the fact that it is under the direction of the Commission. There are suggestions, however, that the effectiveness of the Scientific Committee has improved over the years.[63]

Much attention has been focused on the Commission's consensus decision-making process. Many regard the need for consensus on conservation measures as a serious problem, which has hampered the ability of the Commission to give effect to its aims.[64] Others however consider that consensus decision-making is a useful discipline which means that results produced by the regime are well

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[61] Above n 45, 250. However, this does include information on non-target by-catch species, including sea birds.

[62] Above n 58, 68.

[63] Kaye concludes that the Scientific Committee "has melded into a useful and forceful body" and "has ultimately grown into something that resembles the original vision" see above n 46, 89.

[64] Above n 56, 316; see also Boleslaw Adam Boczek "The Protection of the Antarctic Ecosystem: A Study in International Environmental Law" (1983) 13 Ocean Development and International Law Journal, 377.

considered, and because they have the support of all Parties, more likely to be effectively implemented.[65] The arguments regarding the decision making processes are well summarised by Joyner:[66]

> Arguments for consensus maintain that agreement can only be reached after thorough discussion and all views have been aired. Moreover to obtain consensus, serious negotiating efforts must be made, and decisions taken through consensus tend to be self-enforcing, since general agreement already exists. The counter argument suggests that no tough decision can be made through a consensus approach. Any maverick Party can veto a measure inimical to its interests, a situation that obviously favours states interested in resource exploitation.

The objection procedure (by which Parties can exempt themselves from being bound by a conservation measure that has been agreed upon) has also been the subject of criticism and is seen as unnecessary as it gives Members a double veto.[67] In practice it has not been used as much as similar opt-out provisions in other similar agreements, but this is no great achievement in a regime where conservation measures require consensus before adoption.

In practice many of the concerns about the effectiveness of CCAMLR's machinery appear to have been borne out, particularly in the earlier years of its operation. Initially CCAMLR produced few concrete results. Inability to reach agreement in the Commission meant that out of its first seven meetings CCAMLR managed to produce only 12 conservation measures. Predictably these measures were very conservative and imposed no great restrictions on fishing activities. They all related to finfish stocks in the vicinity of South

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[65] See Francisco Orrego Vicuna "The Effectiveness of the Decision Making Machinery of CCAMLR: An Assessment" in *The Antarctic Treaty System in World Politics* above n 53, and Fernando Zegers "The Canberra Convention: objectives and political aspects of its negotiation" in Francisco Orrego Vicuna (ed) *Antarctic Resources Policy* (Cambridge University Press, Cambridge, 1983).

[66] Above n 45, 236.

[67] Above n 45, 236.

Georgia that were, by and large, no longer commercially viable. In particular it is notable that although concern about the exploitation of krill was one of the main catalysts for the regime, limitations on the harvesting of krill were not put into place until 1991.

The results from 1989 onwards, however, seem to demonstrate that CCAMLR's processes are capable of producing results if the Parties are minded to make them work. Since 1989 there has been a marked increase in both the quantity and quality of conservation measures emerging from the Commission. Kaye reported that 77 measures were created or amended between 1989 and 1995, a huge increase on previous years. The measures adopted cover a range of matters and have included measures to protect sea birds, measures setting maximum permissible by-catch levels and measures on catch data reporting systems.[68] Kaye identifies two new initiatives during this time as being particularly notable, those on new and exploratory fisheries and those setting up the CCAMLR Ecosystem Monitoring Programme.[69] These improved results led to a much more optimistic outlook on CCAMLR.[70]

4 Implementation of management measures

> The ATS has no mechanism to enforce its own rules and regulations. This makes it difficult to have honest discussions about compliance. . . . There is really no regulatory system for the region. Instead, there is a

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[68] Above n 46, 90.

[69] Above n 46, 90–91. The measures on exploratory fisheries (CM 31/X and 65/XII) require that States that wish to initiate activity in a fishing ground must first notify the Commission of their intention and accompany that notification with data on the fishery itself and on dependent and associated species. The CCAMLR Ecosystem Monitoring Program (CEMP) involves the implementation of special sites sealed off from fishing to enable scientific research to be undisturbed.

[70] An outlook that at the time at least was shared by environmental NGOs. Interview with Janet Dalziell (above n 49) and interview on 14 October 1997 with Barry Weeber of the Royal Forest and Bird Protection Society of New Zealand. Mr Weeber has been the NGO representative on the New Zealand Delegation to CCAMLR for a number of years.

> wide range of individual countries' views on what the various measures and codes mean, and an equally wide practice of compliance.[71]

In making the above comment, Barnes was referring to the ATS in general but his comments could just as easily have applied specifically to the CCAMLR regime.

Like most fisheries organisations CCAMLR lacks collective enforcement mechanisms. While reluctance to provide international fisheries organisations with enforcement authority is not unusual, it is likely that in the case of CCAMLR the Parties were particularly reluctant to cede enforcement authority out of concern to protect their position on sovereignty issues in Antarctica.[72]

The result is that the obligations in the Convention regarding enforcement are minimal. The Convention merely requires that each Party "take appropriate measures within its competence" to ensure compliance with the Convention and conservation measures. There is no specific guidance or direction to states on how this should be done. The Commission's only authority in this regard, whether the vessel is flagged to a CCAMLR Member or not, is the ability to draw the non-complying activities to the attention of the flag state concerned and the contracting Parties. The Convention does however make provision for an observation and inspection system, designed to assist with gathering information on vessels' activities and to facilitate enforcement.

As a result enforcement is largely left to flag states. In addition, the carefully worded requirement that Parties take appropriate measures "within [their]

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[71] Above n 53, 200.

[72] Grolin has written:

> The reason for these weaknesses [regarding enforcement] is the unresolved problem of sovereignty . . . The Consultative Parties chose to establish a weak fishery regime which was sovereignty-neutral by being devoid of any sovereign relevant authority . . ."

Jesper Grolin "The Question of Antarctica and the Problem of Sovereignty" (1987) IX(1) International Relations 45–6 quoted in Peter J. Beck, "The Antarctic Resource Conventions Implemented: Consequences for the Sovereignty Issue" in *The Antarctic Treaty System in World Politics* above n 53.

competence" allows Parties to interpret the provision in accordance with their views on Antarctic territorial sovereignty and leaves open the possibility of the enforcement of coastal state jurisdiction over the vessels of third parties. In the case of the sub-Antarctic islands coastal state jurisdiction is accepted and enforced. In the case of continental Antarctica no attempt has ever been made to enforce coastal state jurisdiction over the vessels of other states, even though claimant states claim the right to maritime zones around their claims.

Commentators have criticised flag state enforcement as weak and decentralised, and have argued that it has already been shown in other organisations to be ineffective,[73] and open to abuse.[74]

5 *The balance sheet*

Overall, a reading of the available commentary on CCAMLR suggests that although the organisation had a slow start and is burdened by many of the failings common to international fisheries organisations, its effectiveness improved noticeably toward the end of the 1980s. The late 1980s and early 1990s have been characterised by increased co-operation amongst the Parties and an ability to produce meaningful conservation measures. This in turn has led to increased regard and acceptance for CCAMLR internationally.

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[73] See Boczek above n 64, 380.

[74] Joyner suggests that while on the surface the obligations regarding implementation bolster the commitments of the parties, in fact they furnish the means for some fishing states to wink at questionable practices of other fishing states: above n 45, 250. See also Frank above n 56, 315.

III ILLEGAL AND UNREGULATED FISHING AND THE PROBLEM OF ENFORCEMENT[75]

In 1992 Joyner commented that CCAMLR's enforcement capacity had never really been tested and raised doubts about its ability to effectively preclude intensive multinational efforts at krill harvesting should they ever go forward.[76] In recent years Joyner's reservations about CCAMLR's enforcement capacity have been shown to be fully justified. As it has turned out, however, the challenge has not come from the expansion of krill harvesting, but rather as a result of the discovery of lucrative stocks of the highly valued Patagonian toothfish in CCAMLR waters.

A The history of the issue

The Patagonian toothfish was first found in the early 1990s in the CCAMLR area off the coast of Patagonia.[77] More recently stock have been found in other CCAMLR areas including around South Georgia and the South Sandwich Islands, around Prince Edward and Marion Islands, on the Ob and Lena Banks, around the Crozet and Kerguelen Islands and on the McQuarrie Ridge.

Little is known about the fish or its demography. CCAMLR has attempted to keep up with the discoveries and has sanctioned a number of new and exploratory fisheries for CCAMLR Members within the CCAMLR area for the new stocks of toothfish. There has, however, been a rush for the resources from vessels of both Members and non-Members of the CCAMLR regime. CCAMLR has been

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[75] In this paper the term "illegal fishing" is used to describe fishing activities by vessels of Member States which are in contravention of the Convention or conservation measures. The term "unregulated fishing" is used to refer to fishing activities in the CCAMLR area by vessels of non-Members of the regime. Both illegal and unregulated fishing undermines the effectiveness of the CCAMLR regime. Fishing activities by vessels which have reflagged to evade CCAMLR obligations falls somewhere in between the two categories, depending on what view is taken regarding the obligations of Member States to prohibit their vessels from reflagging.

[76] Above n 45, 243.

[77] The scientific names for the Patagonian toothfish are *Dissostichus eleginoides* and *Dissostichus mawsoni*.

unable to keep control of the situation, and the illegal and unregulated catch quickly overtook the legal catch.

The report of the 1993 CCAMLR Commission meeting shows some signs of concern about CCAMLR's ability to enforce conservation measures but no awareness at that stage that a serious problem was emerging. The Scientific Committee reported that there had been substantial exploitation of toothfish over the last year and that it seemed that this was taking place both within and outside of the Convention area.[78] Concern was expressed that some vessels operating within the CCAMLR area were misreporting their catches as coming from just outside of the area. The possibility that the toothfish found both inside and outside the area were a single stock was mentioned.[79] In addition disapproval was expressed that Bulgaria had been fishing in the CCAMLR area contrary to conservation measures. This was seen as particularly disappointing in view of the fact that Bulgaria, while not a Party to the CCAMLR Commission, was an acceding state to the CCAMLR Convention.[80]

The next year's report shows an increasing level of awareness of the problem amongst Member States. The Subcommittee on Observation and Inspection (SCOI) reported that there were strong indications of illegal fishing taking place in the Convention area, in particular involving misreporting of catches as being caught on the high seas outside the CCAMLR area when actually caught within it. In connection with this the Commission reaffirmed that Members should ensure that their flag vessels conduct harvesting in areas adjacent to the Convention area responsibly and with due respect for CCAMLR conservation measures. The Commission reminded Members of their treaty obligations to ensure that their flag vessels conduct their activities in the Convention Area in conformity with conservation measures in force and that infractions of these measures are dealt with promptly and effectively. The Commission also

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[78] Report of the Twelfth Meeting of the Commission (Commission for the Conservation of Antarctic Marine Living Resources, Hobart, Australia, 25 October - 5 November 1993), 9.

[79] Above n 78, 106.

[80] Above n 78, 105.

specifically acknowledged the problem of fishing by non-Member countries in the Convention area.[81]

At the 1995 meeting considerable time was spent on discussion of the issue. The United Kingdom reported its estimate that the level of illegal fishing in CCAMLR waters was at twice the level of legal fishing permitted by CCAMLR. There was further discussion about the possibility of the use of vessel monitoring systems to combat illegal fishing, although no agreement was reached on this.[82] Concern about illegal and unregulated fishing was underlined in the reports of the two NGO observers, ASOC and IUCN.[83] There was further discussion regarding the activities of non-Member States in the Convention area.[84]

By 1996 the Commission had accepted that illegal fishing was a serious problem, and expressed its "extreme concern". The Commission also acknowledged that the problem was exacerbated by the presence of vessels of non-Members in the area fishing without any regard for CCAMLR conservation measures and providing no reports of their catches, thus undermining the overall fisheries management effort.[85] The problem of reflagged vessels was also acknowledged and discussion took place on approaches to deal with this issue.[86] The meeting noted that reflagging contravened Members' obligations to ensure compliance with CCAMLR measures.

B CCAMLR's response to the problem

Following the 1996 CCAMLR meeting the New Zealand delegation felt able to report that "overall the Commission [had] responded well" to the challenge of

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[81] Report of the Thirteenth Meeting of the Commission (Commission for the Conservation of Antarctic Marine Living Resources, Hobart, Australia, 26 October - 3 November 1994), 16.

[82] Report of the Fourteenth Meeting of the Commission (Commission for the Conservation of Antarctic Marine Living Resources, Hobart, Australia, 23 October - 3 November 1995).

[83] Above n 82, 64.

[84] Above n 82, 125.

[85] Report of the Fifteenth Meeting of the Commission (Commission for the Conservation of Antarctic Marine Living Resources, Hobart, Australia, 23 October - 3 November 1996) 25.

[86] Above n 85, 26.

large-scale illegal fishing.[87] It is hard to see, however, exactly what this response amounts to. The record of CCAMLR Commission meetings over this period shows that while there has been a growing acceptance that a problem exists, and considerable time has been spent at meetings discussing the issue, very little effective action has been taken to address the issue and prevent it escalating further.

On the whole the Member States appear to have been merely going through the motions of addressing the problem. There has been a reluctance on the part of some states to accept the magnitude of the problem. This was particularly evident at the 1995 meeting where Chile and Argentina claimed that the extent of the problem was being exaggerated and argued strongly that CCAMLR should avoid taking "overpowering" measures that would reduce the freedom of the high seas to non-existence.[88] Other states have been more willing to acknowledge that the problem is serious, but have been slow to come up with concrete proposals to remedy the problem. Even where practical strategies have been put forward, such as the adoption of a vessel monitoring system to assist with surveillance in the area, it has not been possible for Member States to reach agreement.

CCAMLR's discussion on the issue of reflagging typifies its response to the problems it is facing. Over the years Members have been slow to address this issue, taking a legalistic view of nationality of vessels with the result that states have turned a blind eye to the activities of their nationals and their companies. Reflagging was acknowledged as a problem at the 1996 meeting, but the real issue — the fact that some Members are not taking adequate steps to ensure that their vessels do not evade their obligations — was ignored. The only response that Member States were able to come up with was the proposal that Members should submit information to create a register of vessels fishing in the area

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[87] See below n 110, 1.
[88] Above n 82, 22.

including details on ships which Members think have been reflagged in other registries.[89]

The few practical measures adopted have been a number of amendments to the Observation and Inspection System to improve its ability to deal with illegal fishing. In 1994 changes were made to the procedures for advising Parties of infringements, designed to improve reporting time and enable states to respond to infringements more rapidly.[90] Subsequently in 1995 further changes were made so that inspectors could more easily carry out inspections on board vessels operating in the CCAMLR area. The definition of "fishing" was expanded so that vessels would be presumed to have been engaged in fishing activities if any one of a number of indicators were present, and inspectors were given the absolute right to board any Member State's vessel in the CCAMLR area to check for those indicators.[91]

C Developments over the last year

Over the last year the problem has continued to grow apace, far outstripping any initiatives that CCAMLR has been able to develop to combat the problem. It even caught the attention of the media for a period. Media interest was prompted by the French seizure of a number of vessels found fishing in the EEZ around the Crozet and Kerguelen Islands. Vessels flying the flags of Argentina, Belize and Portugal were boarded by French commandos and seized.[92] These reports were followed by reports that Britain also was sending warships to the Antarctic region to stop the poaching for toothfish and that it had already used gunboats to chase out Spanish and Norwegian fishing boats around its South Georgia Islands.[93]

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[89] Above n 82, 11.
[90] See above n 82, 3.
[91] Above n 82, 5-6.
[92] "French seize fishing boats as NZ steps up air patrols" *The Dominion*, Wellington, New Zealand, 1 May 1997
[93] "Warships and Planes hunt Antarctic Fish Raiders" *Independent*, London, United Kingdom, 1 May 1997.

Concern was expressed that ships were reflagging to evade CCAMLR obligations.[94]

The reports of the enforcement action being taken within EEZs around the sub-Antarctic Islands led to questions being put in the media as to what action other affected countries would take. In Australia and New Zealand private fishing interests called upon their respective Governments to take decisive action against any "poaching" of the fisheries resources in the CCAMLR areas near Australia and New Zealand, with one member of the fishing industry in Australia threatening to take the law into his own hands if this were not done.[95] Efforts were made by a number of countries to have the issue discussed at the ATCM held in Christchurch in the middle of this year but they were not successful.

ASOC has gone on record describing the plunder as a "disaster" and has expressed its frustration at CCAMLR's failure to stem the increase in illegal and unregulated fishing:[96]

> CCAMLR is proving itself incapable of addressing the realities of the international fishing industry.... Beyond doubt the credibility of CCAMLR is at stake. In a world where governments can read a car license plate from a satellite, how can those same governments credibly claim to protect the Southern Ocean when sizeable fishing vessels with holds full of illegally caught fish cannot be identified, stopped and prosecuted? Ultimately there must be a viable enforcement mechanism to deal with violations of the rules, or CCAMLR may fall apart.

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[94] "Antarctic plundered by fishing pirates" *The Age*, Melbourne, Australia, 2 May 1997.

[95] "Sealord backs French action" *The Dominion*, Wellington, New Zealand, 2 May 1997; "Antarctic poaching war heats up" *The Age*, Melbourne, Australia, 7 June 1997; and "Polar fish fleet boss threaten poachers" *The Sydney Morning Herald*, Sydney, Australia, 7 June 1997.

[96] "Plunder and the Protocol" *ECO* (Friends of the Earth/ Greenpeace International/ Antarctic and Southern Oceans Coalition, Vol 125, 2, 27 May 1997, Christchurch New Zealand). See above, n 3.

CCAMLR needs urgently to take action, otherwise it will be exposed as a hollow regime, unable to protect the resources it was established to manage and conserve. The piecemeal and tentative steps to date have clearly not been enough. If CCAMLR is to address the issue adequately it will need to devote considerable time and energy to developing comprehensive strategies that go to the core of the problem.

The issue is arguably the most serious that CCAMLR has had to face during its existence and the costs if CCAMLR does not succeed are likely to be great. The toothfish resources are currently being depleted in an unsustainable way rendering CCAMLR conservation and management measures with regard to the fishery futile. In addition the illegal and unregulated fishing is causing the death of vast numbers of seabirds as the conservation measures designed to reduce seabird by-catch are being flagrantly ignored. ECO believes that some species of seabird are under threat of extinction.[97] CCAMLR's inability to manage the situation is likely to lead to increased frustration and non-compliance on the part of fishers, who may be unwilling to incur the costs of compliance when they see others reaping the benefits of non-compliance. Illegal and unregulated activity may well snowball. There is also the risk that CCAMLR's inability to enforce its measures may also lead to unwise unilateral action on the part of individual Members. South Africa indicated at CCAMLR XV that it was most concerned about illegal fishing as this resource was vitally important to its economic development and said that it would not stand idly by while the resources were being plundered. Unilateral attempts to resolve the problem are not likely to be conducive to the stability of the region and may give fuel to arguments against the legitimacy of the ATS.

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[97] "Dead Bird Flying" *ECO* above n 3, 2.

IV OPTIONS TO STRENGTHEN ENFORCEMENT AND PROMOTE COMPLIANCE

A Overview

If the problem of illegal and unregulated fishing is to be curbed it will be necessary to simultaneously introduce measures to improve enforcement capacity amongst Members of CCAMLR and to develop strategies to compel or encourage compliance from non-Members of the regime. The rest of this paper considers and assesses the range of options available to CCAMLR Members to do this.

The options considered here are all collective options, involving concerted action carried out under the auspices of CCAMLR, as the legitimate regional fisheries organisation operating in the Antarctic region. It is acknowledged that collective responses are not necessarily the only options available to Member States, particularly those Members States who are claimant states. It can be argued that claimant states are entitled under international law to establish maritime zones in the waters next to their claims.[98] Such action would vastly increase the scope of CCAMLR waters under national jurisdiction and open the possibility of coastal state enforcement under UNCLOS in those areas in which illegal and unregulated fishing is taking place. Some writers appear to consider the time has come for the territorial claimants to take a more assertive role in the conservation of marine living resources and appear to consider that such action could be compatible with the operation of the CCAMLR regime.[99] Rothwell and Kaye have suggested:[100]

> To more effectively implement the terms of CCAMLR, it may then be appropriate for all the Antarctic territorial claimants to assert EEZ claims

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[98] Currently EEZs and territorial seas are only enforced in respect of the Antarctic Islands above 60° latitude.

[99] Donald R. Rothwell "A Maritime Analysis of Conflicting International Law Regimes in Antarctica and the Southern Ocean" (1994) 15 AYBIL 155.

[100] D. R. Rothwell and S. Kaye "Law of the Sea and Polar Regions" (1994) 18 Marine Policy 41, 55.

which implement the CCAMLR marine living resource conservation regime. This approach would at least ensure that CCAMLR could through the enforcement of coastal state sovereignty and jurisdiction be enforced out to the edge of 200 nautical mile EEZ limits.

This paper, however, focuses on collective responses available under the auspices of CCAMLR and does not consider or advocate options based on extensions of maritime zones by claimant states. There are a number of reasons for this.

Firstly, the legal basis of such a move would be highly contentious and would be open to criticism on number of bases. It has been argued that there is no legal capacity to designate lawfully recognised zones of offshore jurisdiction in the Antarctic region because of the absence of recognised sovereignty over the continent.[101] It could also be said that a claimant state who established and enforced an EEZ in the region would be in breach of Article IV(2) of the Antarctic Treaty which states that no new claim, or enlargement of an existing claim to territorial sovereignty in Antarctica can be asserted while the Treaty is in force.

Even if these legal problems could be overcome there are sound policy reasons for believing that such an approach would be unwise. While arguments can be made that the establishment and enforcement of EEZs is not incompatible with the operation of CCAMLR and the ATS, it is inconceivable that the Parties to CCAMLR as a whole would agree to sanction such action on the part of the claimant states. Consequently any state or group of states choosing to enforce EEZs would be doing so in the face of opposition from the rest of CCAMLR Members. Such a move would cause considerable dissension within CCAMLR and expose it to increased challenge from without. In addition, overlapping territorial claims would likely lead to overlapping maritime zones and conflicts over exercise of jurisdiction. Such a step would likely threaten the foundations

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[101] Above n 45, 264.

CCAMLR and the ATS and would risk destabilising the balance that has existed in the region since the conclusion of the Antarctic Treaty.

Finally, while the extension of maritime zones may be theoretically attractive for the conservation benefits that might follow, it is not a feasible solution to the urgent problems facing the Southern Ocean for the simple reason that no claimant state is likely to adopt this approach. The fact remains while states have made various maritime claims in Antarctica no state has attempted to enforce its jurisdiction over foreign vessels, and none are likely to do so.[102]

B Members

The first priority facing CCAMLR is to ensure that it can enforce its conservation measures amongst its own membership. While this on its own will not address the full extent of the problems involving illegal and unregulated fishing it is a necessary first step. It is also vital if CCAMLR is to maintain any credibility as the legitimate fisheries conservation and management regime for the area. If CCAMLR is to seek and expect compliance from those not currently within the regime it must first be able to demonstrate compliance from those within the regime.

It is evident from its own reports and the media reports on illegal fishing that it is not, at present, in a position to do this. CCAMLR needs to adopt a range of measures to improve compliance and enforcement amongst Members. These measures should include: strengthening the existing enforcement obligations in the CCAMLR Convention, making existing enforcement mechanisms more effective, adopting new mechanisms of enforcement, and adopting measures to address the problem of vessels reflagging to evade CCAMLR obligations. These potential new measures are considered in more detail below.

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[102] Australia has gone the furthest in this regard and in 1994 proclaimed an EEZ off the Australian Anarctic Territory. However Australia has avoided implementing legislation to enable it to enforce its EEZ against foreign nationals and vessels.

Measures to improve compliance amongst Members could be adopted in a number of different forms. The exact legal status of the measures would not be as important as the commitment of the Parties to give effect to them, although a legally binding document would be preferable. The simplest approach might be to gather together all the different measures agreed upon in one document and adopt it as a subsidiary agreement or understanding. It would be preferable for such an agreement to be accepted by all CCAMLR Members, but if this were not possible, a document subscribed to by only some of the Members would still be a step in the right direction. Another possibility if CCAMLR Members wish to adopt measures which are legally binding would be to adopt them in the form of conservation measures.

1 Strengthen enforcement obligations

The enforcement obligations set out in the CCAMLR convention are currently weak and expressed in vague terms. These obligations should be strengthened and elaborated, and moves should be made to ensure that enforcement procedures are standardised across the CCAMLR membership.

The main enforcement obligation is set out in Article XXI(1) which provides that each Member shall "take appropriate measures within its competence to ensure compliance with the provisions of this Convention and with conservation measures adopted by the Commission to which the Party is bound". Article XXI(2) requires that Members provide the Commission information on what enforcement measures, including what sanctions, if any, they have imposed for violations but gives no further indication on how the obligations in the Convention should be implemented and enforced. There is no specific requirement to prosecute offenders or to impose sanctions.

The first step in strengthening these obligations would be to precisely identify all the substantive obligations binding on Members and to collate them in one place.

The next step would be to collate information on how exactly Member States have implemented and enforced these obligations in each of their jurisdictions. Such an exercise would be of considerable educational value for Members and would enable discussion to take place on the effectiveness of different approaches to implementation and enforcement.

CCAMLR should then be in a position to decide what is the most desirable approach to enforcement and to adopt a common approach CCAMLR-wide. This would need to be sufficiently flexible to allow for different domestic legal systems but be detailed enough to leave states in no doubt as to what their obligations are and what action they must take to implement them.

The United Nations Implementation Agreement (UNIA)[103] which was negotiated to elaborate on the provisions of UNCLOS regarding straddling fish stocks and highly migratory species may prove to be a useful model for CCAMLR. The UNIA contains very clear and specific implementation and enforcement obligations. *Part V: Duties of the Flag State* sets out detailed requirements regarding the licensing and control of vessels on the high seas and regarding reporting and verifying of catches. *Part VI: Compliance and Enforcement* (Article 19) sets out specific obligations on flag states regarding the investigation and prosecution of violations and the sanctions to be imposed. Investigations must take place immediately and must be reported promptly to other states concerned and the relevant fisheries organisation. There is an obligation to prosecute where there is sufficient evidence, and judicial proceedings must be carried out expeditiously. Sanctions must be adequate in severity to be effective in securing compliance and must deprive offenders of the benefits of their illegal activities.

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[103] The United Nations Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, 1995 ILM 1547.

Members' vessels operating in the area are obliged to allow observers/inspectors to board the vessel. Once aboard the vessel observers and inspectors have the authority to observe and inspect catch, nets and other fishing gear, as well as harvesting and scientific research activities, and are entitled to have access to records and reports of catch and location data insofar as necessary to carry out their functions.

There are a number of problems with the Observation and Inspection System. Some of the problems are inherent in the Antarctic environment. The CCAMLR area is vast and it is very difficult to operate an effective on-board inspection system in such a large area of water, which is so far from Member States' countries.

However, the main problem seems to be that Members States are not committed to put sufficient resources into the system to make it work. The system depends on Member States designating and funding observers and inspectors to travel on vessels operating in the Convention area, and carry out scientific observation and inspections on board both the vessel they are travelling on and others that they come in contact with.

Research has shown that the probability of apprehension is vital for inducing compliance with conservation and management measures. There must be a minimum level of enforcement activity before fishers will pay attention to the conservation measures and if the level falls below that minimum the result is massive disregard of the regulations.[104] In the case of CCAMLR it seems clear that inspections are not taking place sufficiently frequently to have an impact on compliance. The discussions at CCAMLR meetings show that very few inspections are taking place. In the 1995/96 season, for example, only 5

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[104] Above n 2, 308.

inspections were carried out pursuant to the scheme. This inspection rate needs to be substantially raised.

CCAMLR has stressed in the past that Members need to accept their obligations to participate in and make full use of the inspection system, but there has been little response to this call.[105] Ideally CCAMLR would have a centrally operated CCAMLR-wide scheme. However in view of Members' reluctance to commit resources to the existing nationally operated scheme it seems unlikely that they would be prepared to incur the substantial costs that this would involve.

3 *Compulsory Use of Vessel Monitoring Systems*

Vessel monitoring systems (VMS) involve the use of modern technology to track vessels' movements and location. Vessels are required to carry automatic location communicators which transmit, on a real-time basis, positional data back to the management centre at a frequency controlled by that centre. Speed and course details can be derived from this positional data, and inferences can be made based on these details regarding the likely activities of the vessel. The operator of the vessel is not able to tamper with this information. VMS not a replacement for on-board inspection systems and is more likely to be effective if it is backed up by a physical enforcement presence in the region.

There has been considerable discussion at CCAMLR meetings over the years on the possibility of adopting VMS within the CCAMLR region. The possibility of the use of transponders to track vessels' positions was suggested by Chile in 1993 and the Secretariat was asked to prepare a paper on the subject for following year's meeting.[106] Following discussion of the subject at the 1994 CCAMLR meeting the United States, Australia and New Zealand agreed to assist the Secretariat with a feasibility study on the use of VMS in the CCAMLR

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[105] Below n 107, 3.

area.[107] There was considerable discussion of the issue at the 1995 and 1996 meetings but no agreement on its introduction.

A number of states have blocked the adoption of VMS raising fairly spurious international law arguments against it.[108] The suggestions which have been made that a VMS agreement would be contrary to international law and the freedoms of navigation in UNCLOS are incorrect. While it is true that VMS cannot be applied to foreign flagged vessels without the consent of the flag state, there is nothing to stop flag states from giving this consent, either on an ad hoc basis or through an agreement. Such agreements are in fact encouraged by UNCLOS. ASOC has been extremely critical of those countries who have blocked the adoption of VMS and has said that it believes the reluctance to see VMS implemented stems from concerns about what such monitoring may show about their vessels' true activities.[109]

The result is that the Commission has been able to go no further than encouraging those states who use VMS within their own jurisdiction to require their flag vessels to use it in the CCAMLR area as well and recommending that

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[106] Report of the New Zealand Delegation to the Twelfth Meeting of CCAMLR 25 October – 5 November 1993 (Delegation Report produced by the New Zealand Ministry of Foreign Affairs and Trade) 4.

[107] Report of the New Zealand Delegation to the Thirteenth Meeting of CCAMLR 26 October - 4 November 1994 (Delegation Report produced by the New Zealand Ministry of Foreign Affairs and Trade) 16.

[108] Argentina and Chile indicated at the 1995 meeting of the Commission that they considered the notification and monitoring systems being considered were incompatible with general international law and in particular, with the Convention on the Law of the Sea. They also indicated that they had concerns about the administrative and budgetary implications of such a system: see n 82, 5. This lead to a paper being prepared by the UK for the next year's meeting which clarified the legal basis of the proposed systems and concluded that there was no legal barrier to a CCAMLR agreement on VMS. At the 1996 meeting Argentina and Chile had softened their positions but still opposed a CCAMLR-wide agreement, stating that flag states should retain control of their own vessels. Other countries expressed support in principle for the proposal but were unwilling to go ahead with any concrete measures at that time.

[109] "VMS: Viable, Manageable, Sustainable" in *ECO* see above n 3, 2.

Parties work intersessionally to enable co-operative monitoring and information sharing by flag states.[110]

While VMS is by no means a complete solution to the problem of non-compliance by Member States' vessels it would be a useful tool for CCAMLR to adopt. It would be particularly useful for implementing conservation measures relating to closed areas of fishing and involving management of fishing effort over fine-scale rectangles. It would also be helpful for sifting out those vessels operating within the CCAMLR regime from illegal or unregulated vessels: if a vessel was sighted in the CCAMLR area and reported to the Secretariat, it would be possible to ascertain quickly whether it was operating legally, and if not, approach the flag state to take action.

It is hoped that following the explosion of the illegal fishing problem it will now be possible to reach agreement on the adoption of VMS. This already has the support of a good number of CCAMLR countries[111] and has long been endorsed by ASOC as a method of getting on top of the illegal fishing problem. A large number of CCAMLR Members are already using VMS within national jurisdictions and the experience of these countries should be helpful in developing a CCAMLR scheme.[112] The best result would be the adoption of a centralised system, operated out of the Secretariat in Hobart. However, if it is not possible to reach agreement on that the next best scenario would be an obligation on states to require all flag vessels to participate in a national VMS with the obligation on states to promptly pass on the information to the Secretariat.

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[110] Report of the New Zealand Delegation to the Fifteenth Meeting of CCAMLR 21 October – 1 November 1996 (Delegation Report produced by the New Zealand Ministry of Foreign Affairs and Trade) 13.

[111] Including New Zealand, the US and Australia are all strongly supportive of VMS.

[112] Argentina, Australia, Chile, the EU, New Zealand, Norway, South Africa and the US all reported to the 1996 Commission meeting that they were either using some form of VMS within their national jurisdiction or in the process of carrying out field studies. In the case of Australia, New Zealand, South Africa and USA the use of VMS extends to the CCAMLR area: see n 85, 146-147.

4 Adoption of collective enforcement methods

CCAMLR, like most fisheries organisations, relies on flag state enforcement. The experience with fisheries organisations internationally has been that states are loath to cede enforcement authority over their vessels to other states or international organisations. In the case of CCAMLR this reluctance has been amplified by states' concerns to protect their position regarding sovereignty in Antarctica.

There is, however, no sound basis for this concern and states should have nothing to fear in adopting collective enforcement methods. Their position regarding territorial claims in Antarctica is specifically safeguarded by Article IV of the CCAMLR Convention.[113] The acceptance of some form of collective enforcement within the CCAMLR area would quite clearly be an "act or activity taking place while the present Convention is in force" and can not prejudice the position of any state regarding the sovereignty issue.

It is argued that in view of the problems CCAMLR is experiencing CCAMLR Members should consider other options in addition to flag state enforcement. From a conservation point of view the ideal would be some sort of CCAMLR police force, authorised by Member States to not only carry out observation and inspections but to take enforcement action as well. This could involve seizure of vessels and the right to prosecute either in the country of registry or in an international tribunal the results of which had automatic consequences in the country of registry. However, it is accepted that such an approach would be unprecedented internationally and extremely unlikely to be adopted.

There is however precedent in the UNIA for shared enforcement mechanisms, which considerably exceed the mechanisms currently available to CCAMLR[114] The UNIA provides for enforcement action by other Member States where the

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[113] See above n 21 for the text of Article IV of the CCAMLR Convention.
[114] See above n 103.

flag state fails to investigate alleged violations and take appropriate enforcement action. Under the UNIA agreement states can board and inspect others' vessels provided both states are party to the agreement. There is no requirement to have suspicion of a violation. Flag states are required to investigate any alleged violations and take enforcement action, or if the flag state prefers, it can authorise the inspecting state to do so. If the flag state fails to take appropriate action, the inspecting state may bring the vessel to port for further investigations.

This suggests that CCAMLR Members should also be able to come up with some form of collective enforcement.

5 *The problem of reflagging*

CCAMLR's attempts to achieve adequate enforcement of its conservation measures amongst its own Members has been complicated by Member States' vessels changing their registration to countries outside the CCAMLR regime in order to avoid having to comply with CCAMLR requirements. In particular, reports of states and media reports suggest that vessels formerly registered in CCAMLR countries such as Norway, Spain and the USA have been reflagging to small countries which are not Party to the CCAMLR regime such as Vanuatu, Panama, Belize, and Mauritius. There are also suggestions that vessels are reflagging in Namibia and Madagascar. Although reflagged, the vessels still maintain significant links to their previous country of registration, most significantly the return of profits.

Reflagging to evade management regimes is a common problem amongst fisheries organisations world wide.[115] Janet Dalziell of ASOC suggests that reflagging is part of a much wider problem. She believes that increasingly activities which impact on the environment are being carried out by entities which transcend nationality and are not clearly under the control of any particular

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[115] Above n 2, 306.

state. The problem is particularly acute in the area of high seas fisheries. International law is not well equipped to deal with the issue because international law regimes tend to assume that all activities are carried out by states, or entities under the control of states. Dalziell considers that dealing with this issue will be the major challenge of environmental law for years to come.[116]

In the case of CCAMLR the reflagging raises a number of issues. Many of the media reports are very critical of the reflagging labelling it as flying "flags of convenience". This raises the question of whether there is any scope to challenge the validity of the reflagging. International law and UNCLOS do not appear to offer a solution. While there is a requirement at international law that there be a genuine link between the state and vessel flying its flag and provision that ships which sail under the flags of two or more states using them according to convenience are not entitled to claim any nationality,[117] these rules are vaguely expressed and there is no way to test or enforce them.

The FAO Compliance Agreement[118] was negotiated partly with this in mind, but offers no real solutions either. The Agreement acknowledges that reflagging vessels as a means of avoiding compliance with international conservation and management measures seriously undermines the effectiveness of such measures

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[116] Interview with Janet Dalziell, see above n 49.

[117] Article 91 (Nationality of Ships):

1. Every State shall fix the conditions for the grant of its nationality to ships, for the registration of ships in its territory, and for the right to fly its flag. Ships have the nationality of the State whose flag they are entitled to fly. *There must exist a genuine link between the State and the ship.*
2. Every State shall issue to ships to which it has granted the right to fly its flag documents to that effect.

Article 92 (Status of Ships):

1. Ships shall sail under the flag of one State only and, save in exceptional cases expressly provided for in international treaties or in this Convention, shall be subject to its exclusive jurisdiction on the high seas. A ship may not change its flag during a voyage or when in a port of call, save in the case of a real transfer of ownership or change of registry.
2. *A ship which sails under the flags of two or more States using them according to convenience, may not claim any of the nationalities in question with respect to any other State, and may be assimilated to a ship without nationality.*

(emphasis added) United Nations Convention on the Law of the Sea 1982, 21 ILM 1261.

[118] Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas 33 ILM 969.

and sets out to achieve its objective by specifying flag states' responsibility in respect of fishing vessels flying their flags.[119] It seems likely that the flag states of the reflagged CCAMLR vessels are falling short of these obligations. The agreement however has yet to enter into force and does not seem likely to do so in the near future[120] and accordingly provides no ready solutions to the problems being experienced by CCAMLR.

This does not mean, however, that CCAMLR Members are powerless to deal with the issue of reflagging. The most immediate answer to the problem is in how states implement their obligations in their domestic law. CCAMLR states should able to take legislative and regulatory action to ensure that vessels operated by their nationals or their companies are not able to evade the CCAMLR regime.

The Parties should start with an information sharing exercise on what approaches Members have taken to date. Hopefully this would throw up useful models which could be followed by other countries. CCAMLR Parties need then to agree on a set of guidelines on measures to be implemented in each country to discourage vessels from reflagging and to ensure that the original flag state maintains jurisdiction over them. Member States would then need to act promptly to implement these guidelines in their own jurisdictions. The specific measures taken in each country would likely vary considerably to take account of the different domestic law situations. Member States should be required to report back by a particular date on the measures they have taken.

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[119] Ninth and tenth preambular paragraphs. Flag states are required (amongst other things): to take measures to ensure their vessels do not engage in activities which undermine the effectiveness of international conservation and management measures; to make sure that they can effectively exercise their responsibilities; to not authorise fishing vessels previously registered in the territory of another party that has undermined the effectiveness of international conservation and management measures except in certain circumstances (this includes vessels previously registered to non-Parties as well) and to take enforcement measures against their vessels and impose sanctions are required to be of sufficient gravity to ensure compliance.

[120] The agreement will enter into force on its 25th accession. The New Zealand Ministry of Foreign Affairs and Trade Treaty Database indicates that to date there have been only 10 accessions. Of these 10 countries that have acceded Madagascar is the only one amongst them that has been mentioned as a reflagging country for vessels evading CCAMLR.

In addition to tightening up their domestic laws and regulations to counter reflagging CCAMLR Members should continue to exert political and moral pressure on the reflagging states to encourage them to join the CCAMLR regime. Methods to do this are discussed in the next section.

C Non-Members

In conjunction with efforts taken to improve compliance within the regime, CCAMLR needs to take steps to ensure that it is not undermined by non-Parties. This is more difficult to achieve than improving enforcement within the regime, but is not impossible. The first part of this section considers what obligations, if any, non-Parties have regarding the CCAMLR regime. It concludes that although the regime can not actually be enforced against those that fall outside of it, non-Parties do have a number of obligations with regard to CCAMLR as a result of the developing law of the sea and international environmental law. The rest of this section considers what can be done to ensure that non-Parties do not undermine the regime. The following possibilities are considered: the use of a regional register of vessels in conjunction with blacklisting of violators, the use of port state controls, and the use of market end controls.

1 Rights and obligations of non-Members

Under the CCAMLR Convention the Commission is required to bring any non-complying activities in the CCAMLR area carried out by vessels and nationals of non-Parties to the attention of the flag state concerned.[121] In practice the Commission has done this fairly frequently, urging the state in question to consider acceding to the CCAMLR regime.[122] In addition to this the Convention specifically provides that each contracting Party undertakes "to exert appropriate

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[121] Article X of the CCAMLR Convention.

[122] See the letter sent to non-member countries after the 1995 meeting, above n 85 Annex 6.

efforts, consistent with the Charter of the United Nations, to the end that no one engages in any activity contrary to the objectives of this Convention."[123]

What exactly are the obligations of non-Parties and how should Member States go about discharging their undertaking to "exert appropriate efforts"?

The fundamental rule is that non-Parties to a treaty are not bound by it.[124] Although some academics have attempted to argue that the ATS is an objective regime which applies to all states or that the ATS parties possess some form of collective jurisdiction over the area, that involves quite a departure from the accepted rule.

Sir Arthur Watts examines the issue of whether the ATS can be considered an objective regime. He identifies that the following requirements have been considered necessary before a regime can be regarded as objective:[125]

a) an intention on the part of parties to create a regime applicable to all states;
b) a sufficiently precise object and a general community interest in the object in question being covered by an objective regime; and
c) general acceptance (even if only implicitly) that the regime has an objective character.

Watts considers the issue of whether treaties can establish objective regimes valid *erga omnes* to be a highly debatable area of international law on which there is no clear consensus. In the case of the ATS he considers that there are factors pointing in each direction but he does not make a conclusion either way. He does, however, suggest that it is possible an objective quality might attach to

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[123] Article XXII of the CCAMLR Convention.
[124] This principle is expressed in the maxim "pacta tertiis nec nocent nec prosunt". The principle is repeated in Article 34 of the Vienna Convention on the Law of Treaties which provides that "a treaty does not create either obligations or rights for a third State without its consent".
[125] See n 4, Chapter 11.

part of the Antarctic Treaty regime, such as the provisions on de-militarisation, even if not to all of it. Other writers who consider the issue dismiss the possibility of the ATS being an objective regime which is binding on non-Parties, but suggest that a number of ATS norms, including the environmental provisions, have become increasingly accepted as customary international law.[126]

The other possibility contemplated by commentators is that the ATS parties exercise some type of collective jurisdiction and form a condominium in respect of the marine areas around Antarctica. These suggestions arise particularly in discussions of the relationship between the CCAMLR regime and the UNCLOS regime.[127]

These arguments, while interesting do not really take the issue any further. It is more helpful, in this writer's view, to focus on the developing international law on high seas management and conservation. This area of law throws up a number of obligations falling on high seas fishing states, which are highly relevant to the issues facing CCAMLR. As a result of these obligations it can be convincingly argued that non-Parties are not free to continue turning a blind eye to unregulated fishing the CCAMLR area.

These obligations are set out in Articles 117-120 of UNCLOS. They are intimately connected with the right to fish.[128] Article 117 provides that:

> All states have the duty to take or to co-operate with other states in taking such measures for their respective nationals as may be necessary for the conservation of the living resources of the high seas.

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[126] See Boczek above n 54, p 386 and Beck above n 72, 241.

[127] See Vicuna "Jurisdiction over Antarctic maritime areas has developed in a collective manner whereby it tends to be exercised jointly by the Consultative Parties, or by other countries participating in the regimes. . . . In the context of these special regimes, the Consultative Parties accept limitation on the powers that might belong to them individually, in favour of the joint exercise of jurisdiction for the same purposes" above n 65.

[128] Above n 45, 189.

Article 118 elaborates further on the obligations of co-operation of fishing states and provides that:

> . . . States whose nationals exploit identical living resources, or different living resources in the same area, shall enter into negotiations with a view to taking the measures necessary for the conservation of the living resources concerned. They shall, as appropriate, co-operate to establish subregional or regional fisheries organisations to this end.

Article 119 sets out conditions for determining the allowable catch and establishing other conservation measures. This must be done on the basis of the best scientific evidence available and must take into consideration the effects on associated and dependent species. Conservation measures and their implementation must not discriminate in form or fact against the fishermen of any country. Article 119(2) contains requirements regarding exchange of information regarding conservation and management:

> Available scientific information, catch and fishing effort statistics, and other data relevant to the conservation of fish stocks shall be contributed and exchanged on a regular basis through competent international organisations, whether subregional, regional or global, where appropriate and with participation by all states concerned.

While these obligations are codified in UNCLOS they are also considered to form part of customary international law.[129] Reinforcement for these principles also comes from the developing area of international environmental law.[130]

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[129] See above n 2, 99. These principles received recognition by the International Court of Justice in *Fisheries Jurisdiction* case (UK v Iceland) 1974 ICJ Rep 3. Numerous resolutions of the United Nations General Assembly in recent years have given added support to the status of these principles.

[130] See Chapter 17 of Agenda 21, United Nations Conference on Environment and Development, 3-14 June 1992, Rio de Janeiro, Brazil. See also the Code of Conduct for Responsible Fisheries adopted under the auspices of the FAO, following the International Conference on Responsible Fisheries in Mexico in 1992.

It is very hard to see how countries can be said to be meeting these obligations while continuing to allow their flag vessels to fish in the Antarctic in flagrant disregard of the CCAMLR conservation and management measures. This is particularly so in view of the requirement in Article 300 of UNCLOS that:

> States Parties shall fulfil in good faith the obligations assumed under this convention and shall exercise the rights, jurisdiction and freedoms recognised in the Convention in a manner which would not constitute an abuse of right.

CCAMLR clearly is just the sort of regional fisheries organisation envisaged by UNCLOS and is recognised as such by the United Nations and its subsidiary body the FAO.[131] In the view of this writer states such as Panama, Vanuatu and Belize, whose vessels are fishing in the CCAMLR area have two choices. Either they prohibit their vessels from fishing in the CCAMLR area or they meet their obligations under international law regarding conservation and management of CCAMLR resources.

On a practical level, in view of CCAMLR's established presence, breadth of membership, open access to new Members, and commitment to the approach to conservation set out in Article 119(1), this can really only be achieved by joining the CCAMLR regime. CCAMLR is clearly the legitimate conservation and management regime for the region and those states currently outside of it can have no valid objection to joining it.[132] It is too late to negotiate to set up a new conservation regime. Nothing useful would be served by it. CCAMLR has been operating for over 15 years. States are required to enter into negotiations "with a view to taking the measures necessary for the conservation of living

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[131] Joyner writes that CCAMLR "obviously qualifies" as a regional fisheries regime, above n 45, 253.

[132] States who are not party to the ATS could raise the objection that they are not able to join the CCAMLR Convention without also accepting the key premises underlying the ATS. This objection is not sustainable and can be countered with the argument that the relevant articles which link the CCAMLR Convention to the ATS are no more than a "without prejudice clause".

resources".[133] Clearly the way to do this is to participate in the Commission where such negotiations on conservation measures take place on an annual basis. States are also obliged to contribute and exchange available scientific information, catch and fishing effort statistics, and other relevant data.[134] This is also done within the Commission and the Scientific Committee on a regular basis. All that is required to join is that the state concerned is "engaged in research or harvesting activities" in the CCAMLR areas. All the states in question fit this requirement and are entitled to join the regime.

This argument is strengthened by the conclusion of the UNIA. The basic principle of this agreement is that states should either join or co-operate with relevant regional fisheries management regimes, or ensure that their vessels do not fish on the high seas for the stocks covered by that regime.[135] The Agreement obliges states to join or at least co-operate with existing regimes or to establish new ones involving fishing states and coastal states where none exist. The agreement has yet to enter into force but is expected to attract widespread support, and its principles may even eventually come to represent customary norms.

So what is the practical effect of the conclusion that the offending non-Parties are required to join CCAMLR or ensure that their vessels to not undermine its effectiveness?

It might be possible for CCAMLR Member States to take the issue to the International Court of Justice for a decision to this effect. Whether this is possible would depend on whether the countries in question had accepted the compulsory jurisdiction of the Court, and if so, whether their acceptance was

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[133] UNCLOS Article 118.

[134] UNCLOS Article 119(2).

[135] The UNIA covers straddling fish stocks and highly migratory fish stocks. It appears that this will include a number of stocks within the CCAMLR regime, including the toothfish which is the subject of the illegal fishing problem at present. To date CCAMLR Members have been unable to agree on the extent to which the UNIA will apply to the CCAMLR area. The

subject to any exceptions relevant to the issue at hand. It is accepted, however, that even if this is possible, it is unlikely to be taken up by Member States. Going to the ICJ is a resource intensive exercise and Members may well be reluctant to take this rather dramatic step particularly in view of the fact that there would be no guarantee of a decision in their favour.

The proposition that non-Parties are legally obliged not to undermine the effectiveness of CCAMLR does, however, put Members in a very good position to put pressure on non-Parties to join CCAMLR through political and diplomatic means. If all CCAMLR Members are prepared to put forward this argument with a single voice, it could have considerable force, and might produce positive results particularly if carried out in conjunction with other measures designed to put pressure on non-Parties to join the regime. There are such measures which could be adopted and these are discussed in the rest of this section.

2 *Use of a regional register and blacklisting of violators*

One approach which has been used effectively in the South Pacific to promote enforcement of coastal jurisdiction in EEZs is the use of a Regional Register and the blacklisting of persistent violators.

This method of enforcement was adopted by the members of the South Pacific Forum Fisheries Agency (FFA)[136] in 1992 and came into effect in 1993. FFA members have vast EEZs in comparison to their land area and they were concerned about their inability to police foreign fishing in these areas. FFA members agreed that they would only license foreign vessels to fish in their EEZs if they were in good standing on a Regional Register operated by the FFA. The register is a computer database which lists details of vessels, their markings,

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Commission has to date been limited to encouraging parties to consider the issue for themselves and to consider becoming members.

[136] See Gerald Moore, "Enforcement without force: New techniques in Compliance Control for Foreign Fishing Operations Based on Regional Co-operation" in (1993) 24 Ocean Development and International Law 197.

ownership, vessel and fishing masters, operational base, their gear and equipment, and fishing or other activities carried out by the vessel. The good standing status can be withdrawn where the owner of master of the fishing vessel has been convicted of a serious offence under the fisheries laws of a member country or where there is a prima facie case of a serious offence against the fisheries laws and the offender has not submitted to the jurisdiction of the member country concerned. If good standing is withdrawn the vessel in question is effectively blacklisted and precluded from fishing in any Member State's EEZ.

Such an approach is unlikely to translate well to the CCAMLR context. The problem with this approach is that it relies upon the exercise of sovereign authority, something that to a large extent is absent in Antarctica. In the CCAMLR area the only EEZs which are policed and enforced against foreign vessels are the waters around the Subantarctic islands above 60°.[137] In view of this and the relatively small amount of licensed foreign fishing taking place in these EEZs, it seems unlikely that the risk of being blacklisted would provide sufficient incentive to warrant a Regional Register for this purpose alone.

However Member States may still find it useful to consider whether the same end could be achieved by excluding violators from access to their EEZs and registration in their registries.

3 Port state controls

Another option for encouraging enforcement relies on exploiting the need vessels have to use the port facilities of "gateway countries" when going to and from the CCAMLR region. CCAMLR countries close to the CCAMLR area can impose controls on vessels coming and going from their ports which have the effect of prohibiting access to vessels, both of Member States and non-Parties, which are undermining the CCAMLR regime. While this approach can not stop vessels

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[137] While Australia has proclaimed an EEZ around its continental territorial claim, this is not enforced against foreign flagged vessels.

using the port facilities of non-CCAMLR countries such as Namibia, it is still a very effective tool especially in those geographical areas where vessels have few choices about which port facilities they use.

Port state control has already been used by a number of CCAMLR states. South Africa reported to the CCAMLR in 1996 that it had adopted strict controls regarding toothfish. The primary condition for landing catch in South African ports was that the operator must prove, by providing information on the position of catches through a satellite based VMS, that the fish aboard the vessels have not been caught in South Africa's EEZ or in CCAMLR waters in violation of any conservation measures.[138] Other CCAMLR states which have implemented port state controls are New Zealand and Australia. SCOI commended South Africa for its efforts and requested that Members exercise port state Control where possible to ensure that fish from CCAMLR waters brought into their ports have been taken in accordance with CCAMLR Conservation Measures.[139]

It would be helpful for CCAMLR to focus on the issue of port state control and attempt to reach a consensus amongst Members on what port state controls should be implemented. The measures adopted should be as comprehensive as possible and could include: inspection of documents, fishing gear and catch, prohibition of landings and transhipments, refusal to subsequently register in that state's registry, and refusal to allow access to the state's EEZ. The obligations should be drafted to make clear that port state controls apply to both CCAMLR country vessels and the vessels of non-Parties. The UNIA contains a provision on port state enforcement which could be considered as a precedent.[140]

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[138] Above n 85, 134-5.

[139] Above n 110, 13.

[140] UNIA Article 23. This Article contains a strong statement that a port State "has the right and duty to take measures, in accordance with international law, to promote the effectiveness of subregional, regional and global conservation and management measures". Article 23 is not, however, precise on how port States should discharge this duty and merely indicates a number of measures that States "may" take.

4 *Market end controls*

Market end controls involve the closing of markets to those who can not demonstrate that their fish has been caught in compliance with the relevant conservation and management regime. They are a powerful tool because they remove the economic incentive behind the illegal and unregulated fishing and put pressure on states not party to conservation and management regimes to join the relevant regime and ensure that their vessels comply. Market end measures can either be adopted unilaterally or pursuant to a multilateral agreement.

If CCAMLR is truly committed to its own conservation measures it should adopt market end controls to ensure that they are not rendered pointless by non-compliance. If the illegal and unregulated fishers are unable to find markets for their fish, they will either stop or put pressure on their governments to bring them within the CCAMLR regime. The major markets for toothfish are all within the CCAMLR regime so CCAMLR-wide measures are likely to have considerable impact. Market end measures are seen by ASOC as the best solution. They have been used by the US in the past on a unilateral basis[141] and have been used by another multilateral fisheries organisation which has a number of members in common with CCAMLR,[142] but do not appear to have been discussed to date in CCAMLR.

One issue which will inevitably arise if market end restrictions are considered is the WTO consistency of such measures. Following the conclusion of the Uruguay Round of negotiations and the establishment of the WTO, the multilateral trading system now has a new and much more effective dispute settlement process. Any market end measures adopted by CCAMLR to assist in the enforcement of its conservation measures would potentially be subject to review by this dispute settlement process.

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[141] The United States has a record of taking unilateral trade restrictions in pursuit of environmental objectives. Two examples which have involved the oceans are the Pelly Amendment to the Fishermans Protection Act and the Marine Mammals Protection Act. Above n 45, 252.

Market end restrictions tend to conflict with the central WTO obligations to treat like products in the same way, regardless of where they come from, and to give equal treatment to imported products and products of national origin.[143] This means that, in the case of a dispute emerging, the country imposing the market end restrictions would need to justify the measures as coming within the exceptions set out in Article XX of the General Agreement on Trade and Tariffs. In the case of restrictions taken in pursuance of conservation objectives the relevant parts of Article XX are XX(b) and XX(g).[144]

There are already in existence a number of multilateral environmental agreements which contain trade restrictions.[145] The relationship between these environmental agreements and the WTO is currently being considered by the WTO's Committee on Trade and Environment (CTE).[146] The report of this Committee to the WTO Ministerial Conference held in Singapore at the end of 1996 shows that there is no agreement amongst WTO members on the extent to

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[142] See text at n 153 below.

[143] These obligations are contained in the Articles I and III of the General Agreement on Tariffs and Trade 1947 which is an annex to the Agreement Establishing the World Trade Organisation, 33 ILM 1144.

[144] The text of the relevant part of Article XX is:

> Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:
>
> (b) necessary to protect human, animal or plant life or health;
>
> ...
>
> (g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption;
>
> ...

Above n 143.

[145] Examples are the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) 993 UNTS 243, the Montreal Protocol on Substances that Deplete the Ozone Layer, 26 ILM. 1550 and the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes, 28 ILM 1550.

[146] The CTE was established pursuant to the Decision on Trade and Environment adopted on 14 April 1994 at the time of the signing of the Final Act embodying the results of the Uruguay Round of Multilateral Trade Negotiations at Marrakech. The Decision on Trade and Environment acknowledged that there need be no policy contradiction between upholding an open, non-discriminatory and equitable multilateral trading system and acting for the protection of the environment and promoting sustainable development.

which the trade provisions in existing environmental agreements are consistent with members' WTO obligations.[147] The work of the CTE may eventually lead to changes in the WTO agreements to better accommodate the issue.

There is no reason at present though, based on the work of the CTE, to conclude that trade measures in multilateral environmental agreements are prohibited or inconsistent with WTO obligations. Indeed the CTE has specifically acknowledged in its Conclusions and Recommendations to the Ministerial Conference that trade measures may be needed in certain cases to achieve the environmental objectives of a multilateral environmental agreement, particularly where trade is directly related to the source of an environmental problem. It has, however, also noted that in the negotiation of future multilateral environmental agreements particular care should be taken over how trade measures apply to non-Parties.[148]

The issue of WTO compatibility of trade measures contained in a multilateral environmental agreement has never been specifically tested, either under the new WTO dispute settlement system or under the previous system, which operated under the GATT. It should be possible, however, for a regional fisheries conservation and management organisation to adopt market end restrictions which come within the Article XX exceptions. In fact the Appellate Body of the WTO has recently stressed the freedom of states to adopt measures to protect the environment and exhaustible natural resources in one of its decisions. In the *Reformulated Gasoline* case the Appellate Body said:[149]

> WTO Members have a large measure of autonomy to determine their own policies on the environment (including its relationship with trade), their environmental objectives and the environmental legislation they enact and

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[147] Report (1996) of the Committee on Trade and Environment in Press/TE014 issued by the Information and Media Relations Division of the World Trade Organisation on 18 November 1996.

[148] Above n 147, 30.

> implement. So far as concerns the WTO, that autonomy is circumscribed only by the need to respect the requirements of the General Agreement and the other covered agreements.

It is perfectly justifiable for CCAMLR Members to proceed to develop market end measures designed to promote accession to CCAMLR. In doing so they should make every effort to ensure that the measures are consistent with WTO obligations but they should not allow their concern in this regard to dissuade them from taking action. The *Reformulated Gasoline* case provides useful guidance on how to go about constructing a trade measure which comes within the environmental exception in Article XX(g).

The first requirement is that the object of protection must be an "exhaustible natural resource". The marine living resources of Antarctica obviously come within this requirement. The second requirement is that the measures must "relate to" the conservation of that resource. In order to meet this requirement the measures must be more than "merely incidentally or inadvertently aim at" conserving the resource although it seems from the Appellate Body's comments in the *Reformulated Gasoline* case that they do not necessarily have to go as far as being "primarily aimed at" conservation of the resource, as was previously thought to be the case.[150] This second requirement should also be easy for CCAMLR to achieve, as conservation and management of the Antarctic resources is its prime object.

The next requirement is that the measures must be "made effective in conjunction with restrictions on domestic production and consumption". The Appellate Body has said that this amounts to a requirement of even-handedness in the imposition of restrictions but does not necessarily require identity of treatment. There is no requirement that measures must have a demonstrably positive effect on

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[149] United States—Standards for Reformulated and Conventional Gasoline, Report of the Appellate Body of 29 April 1996, 35 ILM 605.

[150] Above n 149, 19.

conservation as the Appellate Body acknowledges that causation can be very difficult to determine and because such an approach would not allow a precautionary approach to be taken to the environment. The likely effects of the measures can however still be relevant to determining whether the measures are "related to" the conservation of the resource.[151] In order to comply with this requirement CCAMLR Members would need to make sure that the measures impacted on their own nationals and foreign nationals in an even-handed way. As nationals of CCAMLR countries are subject to the CCAMLR regime and accordingly are required to comply with CCAMLR conservation measures this should not cause a problem.

Market measures taken by CCAMLR may also come within the exception in XX(b) by virtue of being "necessary to human, animal or plant life or health". There is less guidance available on the application of this exception, as the Appellate Body in the *Reformulated Gasoline* case did not consider this provision in any detail. On the face of it this exception would seem more difficult to demonstrate because of the requirement that the measures be "necessary" rather than just "related to". It is suggested that measures taken by CCAMLR are more likely to fit under XX(g).

The final requirement is in the "chapeau" to Article XX and accordingly applies to both XX(g) and XX(b). This requirement is designed to prevent abuse of the exceptions and relates to the manner in which the measures are applied. The Party seeking to rely on the exception must be able to demonstrate that the measures have not been applied in a manner which would constitute "a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade". This means that the measures falling within the particular exceptions must be applied reasonably with due regard to both the duties of the Party claiming the exception and the rights of other Parties. In deciding whether this requirement has been met it will be relevant whether there were other options available to the Party

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[151] Above n 149, 19-21.

relying on the measure which could have avoided any discrimination at all or involve a lesser degree of discrimination and whether those options were explored.[152]

It is this requirement in the "chapeau" that is likely to be most significant in the case of market end measures considered by CCAMLR. Members would need to give particular attention to exactly how market end controls were implemented to ensure that they complied with this final requirement. In elaborating exactly how the controls should operate CCAMLR should consider the approach taken by the International Commission for the Conservation of Atlantic Tunas (ICCAT) which has recently adopted market end measures to protect the Atlantic bluefin tuna. This 24 member organisation has a number of member countries which are also Members of CCAMLR, including the United States, and Japan, the major markets for toothfish.[153]

In 1994 ICCAT adopted an action plan to ensure co-operation from nations which were not members of ICCAT with the Commission's conservation program. The rationale for the programme is that the actions of non-complying countries undermine the credibility of ICCAT as a management body and that measures are the only effective way of dealing with the issue — a powerful last resort to force co-operation.

The ICCAT process is set out in a document entitled "Action Plan to Ensure Effectiveness of the Conservation Program for Atlantic bluefin tuna".[154] The first step is the identification of non-contracting Parties whose vessels have been fishing for Atlantic bluefin tuna in a manner which diminishes the effectiveness of the relevant conservation recommendations of the Commission. The

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[152] Above n 149, 22-28.

[153] The members of ICCAT as at 1 January 1997 were Angola, *Brazil*, Canada, Cape Verde, China, Cote d'Ivoire, Equatorial Guinea, *France*, Gabon, Ghana, Republic of Guinea, *Japan*, Republic of Korea, Libya, Morocco, Portugal, *Russia*, Sao Tome and Principe, *South Africa*, *Spain*, *United Kingdom*, *United States*, *Uruguay* and Venezuela. (Those that are also members of the CCAMLR Commission are indicated in italics.)

Commission then requests that these countries rectify their fishing activities and advise the Commission of actions taken in that regard. ICCAT reviews the actions taken by the non-complying countries and identifies those countries who have not rectified their fishing activities. In such cases the Commission recommends that ICCAT members take non-discriminatory trade-restrictive measures, consistent with their international obligations, on bluefin tuna products in any form, from the non-complying countries. The trade measures are lifted immediately upon a decision by ICCAT that non-complying activities have been rectified[155]

ICCAT considers its process to be WTO consistent for the following reasons: the trade sanctions are taken on a multilateral basis, they are taken solely for the purpose of conservation and management, and every effort is made to give non-complying countries a chance to rectify their actions.

It has been suggested in the past that measures will not come within the exceptions in XX (b) and (g) if they are applied extra-jurisdictionally or are directed at the method of producing or harvesting a product rather than the product itself.[156] There is however no suggestion of either of these requirements in Article XX and there seems no policy reasons why they should be the case.

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[154] Resolution adopted by the Commission at its Ninth Special Meeting (Madrid, November-December, 1994).

[155] To date three countries Belize, Honduras and Panama have been singled out by the action plan. Letters of warning were sent asking them to remedy the situation. No responses were received in 1996 and the Commission recommended the implementation of an import ban on Bluefin from these countries. Notification was sent out formally in February 1997. The three countries have 6 months to object. If no objection is made the recommendation comes into effect in mid-August. In the case of Panama, the import prohibition on Panama was lifted on receipt of notification from Panama that fishing practices have been brought into consistency with ICCAT measures. Discussion at the ICCAT meeting on these countries noted that the three were re-flagging countries without any form of infrastructure to manage their fisheries. ICCAT, 1997, Report for Biennial Period, 1996-97, I.
The process has also been started for Croatia, Italy, Greece, Malta, Taiwan, Algeria and Tunisia with a decision taken to send letters of warning to these countries.

[156] This was the reasoning of the Panel in Tuna I. The panel in Tuna II took a different approach. The discussion in the CTE indicate the some of the delegations may still support the position taken in Tuna I, at least as far as the extra-jurisdictional issue is concerned. See above n 147, 3.

To date the Appellate Body has not had to consider these issues but there is no reason at this stage to think that they would read in such additional requirements.

V THE 1997 CCAMLR MEETING

The 1997 meeting of CCAMLR was held in Hobart from 27 October to 7 November. The problem of illegal and unregulated fishing was one of the main preoccupations of the meeting. A number of measures were adopted to attempt to deal with the problem. These measures are: a scheme on port state enforcement, a conservation measure specifying Member States' implementation obligations, a temporary measure prohibiting fishing for toothfish in certain areas, and a resolution on VMS.[157]

Firstly, a scheme was adopted to promote compliance by non-Party vessels based on port state control. This was modelled on the scheme used by the North-West Atlantic Fisheries Organisation (NAFO) and on proposals put forward by the EU and ASOC. The way the scheme operates is that any non-Party vessel sighted in the area is presumed to be undermining the conservation measures of the Convention area. Upon entering the port of a Party such vessels are inspected and if any species to which CCAMLR conservation measures apply are found on board, the right to land or tranship will be denied unless it can be demonstrated that the fish was either taken outside the CCAMLR area, or in accordance with CCAMLR conservation measures. This proposal was adopted in the form of a new conservation measure.[158]

A second conservation measure was adopted which spells out the obligation on Members to prohibit fishing by its flag vessels in the Convention area except pursuant to a licence or permit. The licence or permit should specify the precise

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[157] At the time of completion of this paper the full report of the 1997 CCAMLR meeting was not yet available. The following material is based on the report of SCOI and on discussions with one of the New Zealand officials present at the meeting, Sarah Paterson of the Ministry of Foreign Affairs and Trade.

[158] Draft conservation measure A/XVI.

areas and time periods during which such fishing is authorised and all other conditions to which the fishing is subject, so as to give effect to CCAMLR conservation measures and requirements under the Convention.[159]

Agreement was reached in SCOI on a third draft conservation measure which prohibited fishing for toothfish in the Convention area, except where such fishing was regulated by a conservation measure.[160] By the time this conservation measure was put to the Commission for adoption, however, a number of Parties had changed their minds out of concern that the unlimited life of the measure could lead to fisheries being closed indefinitely as a result of lack of consensus. The draft conservation measure put forward by SCOI was rejected and replaced with a conservation measure which lasts only to the next Commission meeting and applies only to those areas in respect of which no conservation measures relating to toothfish were adopted at the meeting.

The final concrete outcome was a resolution on VMS.[161] Members resolved to endeavour to establish by the end of the Commission meeting in 1998 an automative VMS to monitor the positions of their flag vessels which are licensed to harvest toothfish or any other species for which conservation measures are in force. Any Member that cannot do this within the time-frame set out must inform the Secretariat of this fact before the next meeting and notify its alternate timetable.

There was also discussion on the possibility of the use of market end controls. SCOI agreed that states in which toothfish were marketed should contribute to the elimination of unregulated fishing by non-Members of CCAMLR. The ICCAT system was noted. SCOI agreed to study the feasibility and usefulness of a CCAMLR system involving the use of trade restrictive measures to non-contracting Parties which have been identified by CCAMLR as undermining the

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[159] Draft conservation measure B/XVI.
[160] Draft conservation measure C/XVI.
[161] Resolution 12/XVI.

effectiveness of CCAMLR measures through the activities of vessels flying their flag. The Commission requested Members to collect information on trade flows of toothfish in order to better understand international flows including where it is landed, transhipped or imported and under what product names it is being marketed, and to provide this information to the next annual meeting.

VI CONCLUSION

Shape without form, shade without colour,
Paralysed force, gesture without motion

T. S. Eliot "The Hollow Men"

The CCAMLR regime is currently under considerable strain as a result of its inability to control the rapid development of illegal and unregulated fishing in the CCAMLR area. This problem is extremely serious and threatens CCAMLR's credibility as a management and conservation regime. Not only does the illegal and unregulated fishing pose a serious threat to the viability of toothfish stocks which are the target species of the illegal and unregulated activities, but its impact on white-chinned petrels and albatrosses is also entirely unsustainable.

The measures adopted at CCAMLR VXI to attempt to address the problems of illegal and unregulated fishing are a positive development and an improvement on CCAMLR's response to date. Particularly significant are the measures on port state control and VMS. If properly implemented, the scheme on port state control and the resolution on VMS could contribute to the reduction of illegal and unregulated activities in the Convention area. The other two conservation measures are also welcome, but are likely to have only a minor impact. Overall, however, the response is a far cry from the comprehensive package of measures required to truly address the problem and is most unlikely to be adequate to stem the tide of illegal and unregulated activities which are undermining the CCAMLR regime.

One positive note at CCAMLR XVI was the discussion for the first time of the possibility of using market end controls to dissuade the vessels of non-Parties from undermining the CCAMLR regime. Market end controls are powerful because they go to the heart of the problem by making the illegal and unregulated activities economically unviable. However the time-frame set by the Commission for the consideration of market end restrictions is far too slow. The Commission has asked Member States to research the issue and report back to next year's meeting so the possibility can be further considered.

If Member States were truly committed to controlling the illegal and unregulated fishing they would move much faster than this. It would, at most, take only two or three months to collate the necessary information on toothfish trade flows. A special meeting of the Commission could be held at the request of one third of the Members of the Commission. Such a meeting could be convened within a matter of months. If a concerted effort was made to ensure that discussion papers covering the various options, and setting out definite proposals, were prepared and circulated it should be possible for States to come to a meeting prepared to adopt concrete measures.

The sad fact is that CCAMLR States as a whole appear to lack the political will to achieve this. The shadow that falls between the potency of CCAMLR and its existence is a lack of genuine commitment on the part of the Parties to implementing and enforcing its aims. Without this commitment the CCAMLR regime is merely a hollow shell.

In the case of some States the inability to translate words into action is probably merely the result of bureaucratic inertia and competing priorities elsewhere. For other States however, the likely cause is more sinister. Those States do not actually *want* to see an improvement in compliance with the regime, because their vessels and their industries are benefiting hugely from the illegal and unregulated fishing.

Whatever the cause it seems likely that CCAMLR will continue as it has to date. The Parties will go through the motions of implementing the aims of the Convention, expressing concern, making various proposals, and adopting weak and ineffectual measures, but continuing to ignore the real issues. While all this is going on the unsustainable onslaught will persist and the species that the regime is supposed to protect will continue to dwindle, dying "not with a bang but a whimper".

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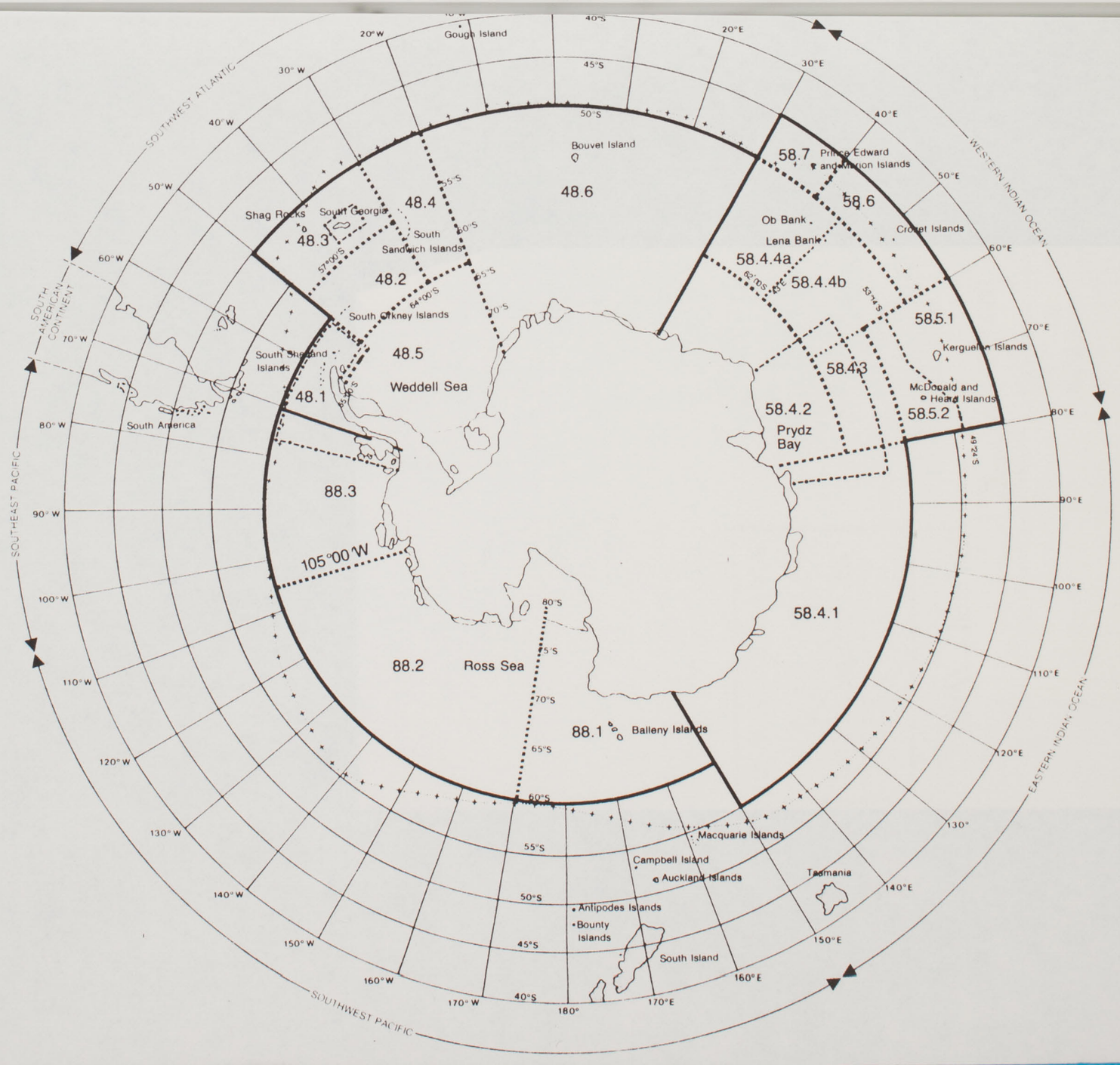
CCAMLR

Boundaries of the Statistical Reporting Areas in the Southern Ocean



LEGEND

- STATISTICAL AREA
  ZONE STATISTIQUE
  СТАТИСТИЧЕСКИЙ РАЙОН
  AREA ESTADISTICA
- STATISTICAL SUBAREA
  SOUS-ZONE STATISTIQUE
  СТАТИСТИЧЕСКИЙ ПОДРАЙОН
  SUBAREA ESTADISTICA
- ANTARCTIC CONVERGENCE
  CONVERGENCE ANTARCTIQUE
  АНТАРКТИЧЕСКАЯ КОНВЕРГЕНЦИЯ
  CONVERGENCIA ANTARTICA
- CONTINENT, ISLAND
  CONTINENT, ILE
  МАТЕРИК, ОСТРОВ
  CONTINENTE, ISLA
- INTEGRATED STUDY REGION
  ZONE D'ETUDE INTEGREE
  РАЙОН КОМПЛЕКСНЫХ ИССЛЕДОВАНИЙ
  REGION DE ESTUDIO INTEGRADO