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THE LONG HOOK OF HIGH SEAS FISHERIES MANAGEMENT:

USE OF THE NATIONALITY BASE OF JURISDICTION TO COMBAT IUU FISHING IN THE CCAMLR AREA

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ABSTRACT

The Southern Ocean Patagonian toothfish stock has been nearly decimated by illegal, unreported and unregulated fishing. The Commission for the Conservation of Antarctic Marine Living Resources has unsuccessfully relied on flag State control of fishing vessels to check the illegal fishery. Serious violations of the Commission's conservation measures have been conducted by vessels flagged to non-members but owned and operated by nationals of CCAMLR's Contracting Parties. Direct targeting of those nationals is necessary to establish effective control over their extra-territorial activities. Contemporary law of the sea obligates CCAMLR Parties to exercise any species of legal authority possessed to protect the Southern Ocean marine environment and the fish stocks within it. The traditional exclusivity of flag State jurisdiction has narrowed and tolerates a number of exceptions to this end. Nationality is a recognised basis for extraterritorial jurisdiction. Jurisdiction over nationals has been embodied in a number of high seas fisheries instruments. Incorporation of Nationality jurisdiction as an explicit responsibility of its Contracting Parties would equip CCAMLR with a powerful tool with which to protect the Patagonian toothfish stock from illegal fishing and thereby to salvage its own legitimacy in the eyes of the international community.

The text of this paper (excluding contents page, abstract, footnotes, bibliography and annexes) comprises approximately 11 200 words.

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I INTRODUCTION

Harvesting of global fish stocks increased explosively over the second half of the nineteenth century. Fishing effort outstripped the capacity of the world's oceans to meet the demands of its over capitalised fishing industry. The long held belief that the sea could provide an inexhaustible source of nutrition was soundly discredited. The burgeoning capability of increasingly sophisticated vessels coupled with pressure to feed expanding populations led to a search for new fishing grounds and potential target species.[1] Eventually, that search led global fishing interests to the Southern Ocean and the Patagonian toothfish.

Like other finfish species in the Southern Ocean, Patagonian toothfish is vulnerable to over-fishing due to its slow growth and low productivity.[2] Taken only as a by-catch until the mid-1980s, the stock has come under enormous pressure in recent years, in particular through illegal, unreported and unregulated (IUU) fishing.[3] Since the mid-1990s, Patagonian toothfish has been a highly prized directed catch commanding high prices in the international market.[4] It has also been, since then, the target of levels of fishing activity so high as to have pushed the stock almost to extinction.[5]

The efforts of the Commission for the Conservation of Antarctic Marine Living Resources (CCAMLR) to control over-exploitation of the species have foundered in part because of non-cooperation by some nationals of its member States.[6] Flagged to non-Parties, a number of Party State owned and operated vessels have fished with impunity outside CCAMLR's conservation framework. This illegal fishery has not only decimated stocks of Patagonian toothfish and damaged the eco-

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[1] See generally Christopher C Joyner "Compliance and Enforcement in New International Fisheries Law" (1998) 12 Temp Int'l & Comp L J 271, 271-2.

[2] The Patagonian toothfish is a sub-Antarctic oily white fleshed demersal fish of long life span, late sexual maturity and low fecundity. See *Report of the Sixteenth Meeting of the Scientific Committee* (CCAMLR, Hobart, 1997) paragraph 5.47.

[3] DJ Agnew "The Illegal and Unregulated Fishery for Toothfish in the Southern Ocean, and the CCAMLR Catch Documentation Scheme" (2000) 24 Marine Policy 361, 362.

[4] Market prices of Patagonian toothfish range from $5000 –7000/tonne. See ASOC "Southern Ocean Goldrush" (1997) *The Antarctic Project* 6(2) 3-4.

[5] Beth C Clark and Alan D Hemmings "Problems and Prospects for CCAMLR Twenty Years On" (2001) 4 Journal of International Wildlife Law and Policy 1, 4.

[6] Gail Lutgen "The Rise and Fall of the Patagonian Toothfish: Food for Thought" (1997) 27 Envl Pol & Law 401, 402.

system of which it is part, but has also undermined CCAMLR's legitimacy in the eyes of the international community.[7]

The failure of CCAMLR's reliance on the flag States of such vessels to reign in their piracy has prompted calls from some quarters for Contracting Parties to act directly to control their citizens and companies.[8] Yet, despite the perilous State of Patagonian toothfish stocks, an initiative to this effect put to the CCAMLR Commission in 1998 was rebuffed as some members resolutely sought to preserve the exclusive sovereignty of such vessels' flag States.

Three years later, there is an even greater sense of urgency in international fisheries management. The concept of using 'nationality' jurisdiction has gained greater currency in the international community. States' obligations as regards conservation of high seas stocks have been defined with greater clarity. Accordingly, it may be time for CCAMLR to consider the 'nationals' option again.

This paper seeks to demonstrate that obliging Parties to exercise jurisdiction over their nationals to compel their compliance with the regime's conservation measures would be a legitimate course for CCAMLR to follow, and one not necessarily inconsistent with flag States' traditionally exclusive jurisdiction on the high seas. Part II of this paper describes CCAMLR and the nature of the illegal fishing problem it faces. Part III identifies the obligations of conservation and cooperation borne by CCAMLR parties. Part IV briefly examines the principles governing extra-territorial jurisdiction in international law. Part V assesses the exclusivity of flag State jurisdiction on the high seas. Part VI discusses support for nationality jurisdiction in modern fisheries regulation. The paper concludes, in Part VII, by evaluating the practical operation of jurisdiction over nationals in the CCAMLR context.

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[7] Lutgen, above, 401, maintains that management of the Patagonian toothfish crisis stands as a test of CCAMLR's ability to conserve adequately the waters which it purports to govern.

[8] See ISOFISH *The Vikings: The Involvement of Norwegian Fishermen in Illegal and Unregulated Long Line Fishing for Patagonian Toothfish in the Southern Ocean* Occasional Report No (ISOFISH, Hobart, 3 October 1998) paragraph 1.5. See also Beth C Clark and Alan D Hemmings, above, 10.

II THE ILLEGAL SOUTHERN OCEAN FISHERY

Over-fishing is not a new phenomenon in the Southern Ocean. Invariably harvesting of Antarctic fish stocks has followed a pattern of "discovery, full scale exploitation and depletion, followed by a switch to other stocks or species."[9] In the late nineteenth century hunters decimated stocks of pelagic seals and whales.[10] In the 1960s large scale catches of Antarctic finfish around South Georgia brought about the collapse of those fisheries.[11] Finfish were aggressively targeted across the Southern Ocean in the 1970s and 1980s.[12] With the exhaustion of many other species, Patagonian toothfish emerged as the next target.[13]

IUU fishing of Patagonian toothfish began in the south-west Atlantic Ocean off the coast of Argentina and the Falkland/Malvina Islands in 1994. During the 1996 and 1997 seasons, fishing efforts were directed increasingly further east. The catch area extended to South Georgia, Bouvet Island, Prince Edward, Crozet, Marion, Kergulen, and the Heard, and the McDonald and Macquarie Islands.[14] The fishery is now concentrated in the southern reaches of the Atlantic and Indian Oceans. Stocks show signs of being over-fished in all areas where they have been targeted and have reached commercial extinction in many.[15]

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[9] Erik Jaap Molenaar, "Southern Ocean Fisheries and the CCAMLR Regime" in Alex G Oude Elferink and Donald R Rothwell (eds) *The Law of the Sea and Maritime Delimitation and Jurisdiction* (Kluwer Law International, Great Britain, 2001) 293, 293.

[10] See GE Fogg, *A History of Antarctic Science* (Cambridge, University Press, 1992) 38-40. See also ISOFISH Report No 3, above, paragraph 1.5.

[11] See Karl-Herman Kock, *Antarctic Fish and Fisheries* (Cambridge, University Press, 1992) 183-89.

[12] ISOFISH *The Involvement of Mauritius in the Trade of Patagonian Toothfish from Illegal and Unregulated Long Line Fishing in the Southern Ocean and What Might be Done About It* Occasional Report No 1 (ISOFISH, Hobart, August 1998) 5.

[13] The scientific name of Patagonian toothfish is Dissostichus eleginoides. In its markets it is known as Mero, Sea Bass, Chilean Sea Bass, Merlusa Nigra, Butterfish, Robalo, and Back Hake. See M Lack and G Sant *Patagonian Toothfish: Are Conservation Measures Working* (2001) Offprint from Traffic Bulletin 19(1), 11.

[14] See map of the CCAMLR Area in Annex II of this paper.

[15] For example, the toothfish fishery around Prince Edward and Marion Islands reached commercial extinction after only two years of fishing. See ASOC *ECO 2* paper informally circulated at CCAMLR XVIII (Hobart, October 2 1999).

The Commission for the Conservation of Antarctic Living Marine Resources

The Convention on the Conservation of Antarctic Marine Living Resources was negotiated in the 1970s with the aim of securing protection of the fragile ecosystem of the Southern Antarctic Ocean.[16] The original 22 parties were brought to the negotiating table out of a concern that a lack of management in the past had been responsible for the wholesale destruction of Antarctic resources. Their concern was galvanised by recognition of the need to prevent over-exploitation of krill so as to avoid the adverse effects that this would have on the Antarctic ecosystem as a whole.[17] The Convention was eventually concluded on 20 May 1980.[18]

The regulatory area of the Convention encompasses all high seas ocean south of 60° South latitude and all Antarctic marine living resources of the area between that latitude and the Antarctic Convergence.[19] The Convention's objective, set out in Article II, is "conservation of Antarctic marine living resources". The term "conservation" therein "includes rational use". Article II further lists the three principles of conservation that should be observed for harvesting and other activities in the CCAMLR Area.[20] Their cumulative meaning clearly demonstrates the original

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[16] See David Edwards & John A. Heap, "Convention on the Conservation of Antarctic Marine Living Resources: A Commentary," (1981) 20 Polar Record 353, 354-56

[17] See John A Heap "Has CCAMLR Worked? Management Policies and Ecological Needs" in *The Antarctic Treaty System in World Politics* (Arnfinn Jorgensen-Dahl & Willy Ostreng eds, St Martins Press, New York, 1991) 43, 43-49. An additional incentive also came from the increasing likelihood of United Nations involvement in regulating the Antarctic marine environment, something the Antarctic Treaty Consultative Parties were committed to avoiding. See Fernando Zegers "The Canberra Convention: Objectives and Political Aspects of its Negotiation, in Antarctic Resources Policy" in Francisco Orrego Vicuna (ed) *Antarctic Resources: Policy Scientific, Legal and Political Issues* (Cambridge University Press, New York, 1983) 149,152.

[18] Convention on the Conservation of Antarctic Marine Living Resources (20 May 1980) 1329 UNTS 47; NZTS 1981, No 12; ATS 1982 No 9; UKTS 1982 No 48; CTS 1988 No 37. Current Contracting Parties are listed in Annex I of this paper.

[19] Article 1(1). The Antarctic Convergence is a clear divide where cold Antarctic waters are sub-ducted beneath warmer more northerly waters forming a natural barrier that separates Antarctic and sub-Antarctic species from fauna in more temperate waters. See 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 Case W Res Int'l LJ 75, 82-3.

[20] The three principles are: (a) prevention of decrease in the size of any harvested population to levels below those which ensure its stable recruitment, that is, a level close to that which ensures the greatest net annual increment; (b) maintenance of the ecological relationships between harvested, dependent and related populations of Antarctic marine living resources and the restoration of depleted populations to the levels defined in sub-paragraph (a) above; and (c) prevention of changes or minimization of the risk of changes in the marine ecosystem which are not potentially reversible over two or three decades, taking into account the State of available knowledge of the direct and indirect impact of harvesting, the effect of the introduction of alien species, the effects of associated activities on the marine ecosystem

Parties' intention to put the welfare of the area's marine eco-system to the fore of decisions concerning activities under the Convention.[21]

To meet this objective, the Convention's Contracting Parties established a Commission empowered to designate protected species, to set harvesting quotas, seasons, and methods and to direct the undertaking, compilation and dissemination of research.[22] The decisions of the Commission are recorded as Conservation Measures and Resolutions. Conservation Measures form the principal means by which the Commission regulates members' access to the marine living resources within its jurisdiction.[23]

Enforcement of these measures takes place in accordance with an arrangement for the boarding and inspection of CCAMLR flag vessels by inspectors designated by Commission members. The scheme requires reports to be prepared for both the Commission and the flag State by the authorities of the inspecting State. The flag State is then obliged to investigate and, as appropriate, prosecute and impose sanctions for violations, and report back to the Commission steps so taken. CCAMLR's Standing Committee on Observation and Inspection (SCOI) reviews members' reports on their enforcement of the Conservation Measures and passes these to the annual Commission meeting for review.[24]

Although theoretically efficacious, in practice this flag-State-based system has not equipped CCAMLR to control harvesting of Patagonian toothfish by non-member flagged vessels. The Commission's control over Patagonian toothfish fishing was increasingly marginalised over the course of the 1990s. By the middle of that decade, NGOs claimed the organisation had fast lost efficacy in the face of a "massive

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and of the effects of environmental changes, with the aim of making possible the sustained conservation of Antarctic marine living resources.

[21] This, pioneering, eco-system approach is evident in the Convention's adherence to multi-species management. See Erik Jaap Molenaar, "Southern Ocean Fisheries and the CCAMLR Regime" in Alex G Oude Elferink and Donald R Rothwell (eds) *The Law of the Sea and Maritime Delimitation and Jurisdiction* (Kluwer Law International, Great Britain, 2001) 293-318, 294.

[22] Article IX(1)(a), (b) and (c).

[23] Article IX(2).

[24] Text of the CCAMLR System of Inspection *Basic Documents* (7th ed, CCAMLR, Hobart, 1995)

breakout of illegal, unregulated and unreported fishing."[25] At its 18th meeting, CCAMLR itself admitted the possibility of the long term yield of the stock being compromised in the future by its "ineffective control" of the illegal fishery.[26] Scientists contemporaneously predicted the commercial extinction of the entire fishery in only two years.[27] At CCAMLR XIX, the Commission recorded that the level of IUU fishing in the Convention Area "continued to be unacceptable."[28] The illegal fishery was also a primary preoccupation of the CCAMLR XX SCOI, Commission and Scientific Committee meetings.[29]

IUU Fishing in the CCAMLR Area

The term 'IUU' fishing describes collectively a range of unlawful activities. 'Illegal' fishing refers to activities conducted in waters under the jurisdiction of a State, without the permission of that State, or in contravention of its laws and regulations. The term encompasses fishing by vessels of States that are party to a fisheries management organisation (FMO) in violation of that organisation's agreed management rules.[30] In the CCAMLR context, the term describes vessels fishing without permits within the exclusive economic zones of the sub-Antarctic islands of undisputed sovereignty.[31]

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[25] ISOFISH *The Involvement of Mauritius in the Trade of Patagonian Toothfish from Illegal and Unregulated Long Line Fishing in the Southern Ocean and What Might be Done About It* Occasional Report No 1 (ISOFISH, Hobart, August 1998), 5.

[26] *Report of the Seventeenth Meeting of the Commission* (CCAMLR, Hobart, 1998) paragraph 5.5

[27] Ian J Popick "Are There Really Plenty of Fish in the Sea? The World Trade Organisation's Presence is Effectively Frustrating the International Community's Attempts to Conserve Chilean Sea Bass" (2001) 50 Emory LJ 939, 943.

[28] *Report of the Nineteenth Meeting of the Commission* (CCAMLR, Hobart, 2000) paragraph 5.5

[29] See *Report of the Twentieth Meeting of the Commission* (CCAMLR, Hobart, 2001) paragraphs 5.1-5.43.

[30] International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing (IPOA) <http://www.fao.org/DOCREP/003/x6729e/x6700.htm> (last accessed 3 February 2002) paragraph 3.1.

[31] The maritime zones declared around a number of sub-Antarctic islands not subject to sovereignty disputes are included in the CCAMLR Area; namely Heard and McDonald Islands (Australia), Kergulen and Crozet Islands (France), Bouvetoya Island (Norway), Prince Edward and Marion Islands (South Africa), and South Georgia, the South Sandwich Islands and Shag Rocks (claimed by both Argentina and the United Kingdom but in the 'effective control' of the latter). Even though conservation measures may apply within their maritime zones, Article IV(2)(b) and (c) of the Convention preserves these States' competence to regulate access and revenues. See Erik Jaap Molenaar, "Southern Ocean Fisheries and the CCAMLR Regime" in Alex G Oude Elferink and Donald R Rothwell (eds) *The Law of the Sea and Maritime Delimitation and Jurisdiction* (Kluwer Law International, Great Britain, 2001) 293, 302.

'Unreported' fishing refers to fishing activities which have not been accurately reported to the relevant national authority or FMO in contravention of national laws or FMO reporting procedures.[32] The concept encompasses the disposal of catch in a manner designed to avoid reporting catch data to the competent authority.[33] In the CCAMLR context, the term is used to describe Party flagged vessels, otherwise acting in compliance with CCAMLR regulations, concealing the fact of exceeding their total allowable catch, and thus undermining the reliability of stock assessments and scientific understanding of the fishery.[34]

'Unregulated' fishing refers to fishing activities in the area governed by a FMO conducted by vessels flying the flag of a State not party to that organisation. Unregulated fishing takes place in contravention of the conservation and management measures of the relevant FMO. In relation to areas for which there are no applicable conservation or management measures, the term describes fishing in a manner inconsistent with States' responsibilities under international law.[35] CCAMLR uses the term to describe fishing by vessels flagged to non-member States within the CCAMLR area in defiance of the quotas and fisheries rules which it has established.

According to CCAMLR estimates, IUU fishing of Patagonian toothfish represented 49 per cent of the total estimated catch over the 1996-2001 period,

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[32] IPOA, above, paragraph 3.2.

[33] John Fitzpatrick, "Measures to Enhance the Capability of Flag State to Exercise Effective Control Over a Fishing Vessel" Paper presented to the Expert Consultation on Illegal, Unreported and Unregulated Fishing organised by the Government of Australia in cooperation with the FAO (Sydney, 15-19 May 2000).

[34] David J Bederman "CCAMLR in Crisis: A Case Study of Marine Management in the Southern Oceans" in HN Scheiber (ed) *The Law of the Sea* (Kluwer Law International, The Hague, 2000) 169, 176.

[35] IPOA, above, paragraph 3.3.

including 32 per cent in 1999-2000, and 39 per cent in 2000-2001.[36] NGOs give even higher estimates of IUU fishing than those produced by CCAMLR.[37]

While IUU activity appears to have reduced from the initial plunder of the mid-1990s, it remains a serious problem. Compared with other fisheries, the annual aggregated catch of Patagonian toothfish in the CCAMLR Area is significant in neither quantity nor in value.[38] However, there is little doubt that IUU activity has grave implications for the future of the fish stock and its eco-system.[39] It also tempers the willingness of member States to agree on management measures which bind themselves but impose no constraints on the illegal fishing industry.[40]

Part of the problem rests with the Commission's institutional inadequacies. CCAMLR operates by consensus decision-making and it is open to its members to refuse to be bound by decisions to which they explicitly object.[41] Moreover, the

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[36] CCAMLR estimates for the 1997-2000 period were; 1996/7- 68234 tonnes of 100970 tonnes caught; 1997/8- 26829 tonnes of 54967 tonnes caught; 1998/9- 6636 tonnes of 53955 tonnes caught; 1999/2000- 8418 tonnes of 33660 tonnes caught. See CCAMLR *Report of the Working Group on Fish Stock Assessment* Annex V in the *Report of the Seventeenth Meeting of the Commission* (CCAMLR, Hobart, 1998), CCAMLR *Report of the Working Group on Fish Stock Assessment* Annex V in the *Report of the Eighteenth Meeting of the Commission* (CCAMLR, Hobart, 1999), CCAMLR *Report of the Working Group on Fish Stock Assessment* Annex V in the *Report of the Nineteenth Meeting of the Commission* (CCAMLR, Hobart, 1999), *Statistical Bulletin Volume 12* (CCAMLR, Hobart, 2000) and *Report of the Twentieth Meeting of the Commission* (CCAMLR, Hobart, 2001) paragraph 5.3.

[37] NGO commentators dispute the accuracy of CCAMLR's estimates and question CCAMLR's assertion that total catch of Patagonian toothfish declined over the 1997-2000 period, suggesting that a more likely explanation for the decline in the CCAMLR estimates of IUU fishing lies in the short comings of the estimates themselves. NGO analysis of recorded catch and trade data for 2000 suggests that IUU catch comprised around 57 per cent of the total trade in that year and was four times greater than the CCAMLR estimate of IUU landings of Patagonian toothfish. See M Lack and G Sant *Patagonian Toothfish: Are Conservation Measures Working* Offprint from Traffic Bulletin 19(1)(Traffic International, Cambridge, 2001) 7-9.

[38] Erik Jaap Molenaar, "Southern Ocean Fisheries and the CCAMLR Regime" in Alex G Oude Elferink and Donald R Rothwell (eds) *The Law of the Sea and Maritime Delimitation and Jurisdiction* (Kluwer Law International, Great Britain, 2001) 293, 307-8.

[39] At its 2000 meeting, CCAMLR's Scientific Committee estimated total incidental mortality of albatrosses and other seabirds (which dive on the baited hooks of longlining fishing boats as they are being set) because IUU fishers do not use the mitigation methods developed by CCAMLR from pirate fishing in the Convention area at between 105900 and 257000 birds over the preceding four years, a level of depredation which was "completely unsustainable for the species and populations concerned". See Beth C Clark and Alan D Hemmings "Problems and Prospects for CCAMLR Twenty Years On" (2001) 4 Journal of International Wildlife Law and Policy 1, 4.

[40] Gail Lutgen "The Rise and Fall of the Patagonian Toothfish: Food for Thought" (1997) 27 Envl Pol & Law 401, 401.

[41] Article XII.

Commission has no independent means to acquire and develop the scientific data on which its decisions are based.[42]

CCAMLR's greatest disadvantage, however, is the absence of any means to enforce conservation measures against either Parties or non-Parties.[43] Violation of conservation measures is hard to detect. The vastness of the CCAMLR Area, the rigours of climate, and the absence of nearby populated settlements makes for difficult and costly surveillance.[44] Even when it does establish that infractions have taken place, the Commission can merely "draw to the attention" of States activities which undermine the principles of the Convention, or adversely affect its implementation.[45] Effectively, with respect to both Parties and non-Parties, "the only weapon at the Commission's disposal is the embarrassment of being publicly seen as a State lacking an environmental conscience."[46]

Contracting Party Links with the Illegal Fishery

It is often the case that participants in fisheries management regimes may be involved simultaneously in the IUU fishery. Their involvement may not be confined to vessels flying their flag, but may include allowing use of their ports for landings of IUU catch; permitting the import, processing, sale or export of IUU caught fish; or tolerating ownership or operation of IUU vessels or participation in the trade or processing of IUU catch by their nationals and registered companies.[47] The experience of CCAMLR has generated allegations that member State nationals and

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[42] NGOs suggest the Scientific Committee has been hampered by inadequate and incomplete submission of data by those exploiting the resources. See Clarke and Hemmings, above, 4. See also Ian J Popick "Are There Really Plenty of Fish in the Sea? The World Trade Organisation's Presence is Effectively Frustrating the International Community's Attempts to Conserve Chilean Sea Bass" (2001) 50 Emory LJ 939, 966-67.

[43] David J Bederman "CCAMLR in Crisis: A Case Study of Marine Management in the Southern Oceans" in H N Scheiber (ed) *The Law of the Sea* (Kluwer Law International, The Hague, 2000) 169, 172-3.

[44] Richard Herr "The International Regulation of Patagonian Toothfish: CCAMLR and High Seas Fisheries Management" in Olav Schram Stokke (ed) *Governing High Seas Fisheries Management: The Interplay of Global and Regional Regimes* (Oxford, University Press, 2001) 303, 314.

[45] Article X.

[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 Case W Res Int'l LJ 75, 85.

companies, ports and markets all share responsibility for IUU fishing in the CCAMLR Area.[48]

As in many over harvested fisheries, there is in CCAMLR a perception that fishing in contravention of international conservation and management measure by vessels flying non-member 'flags of convenience' is a primary cause of the stock's depletion.[49] Technically characterised as "unregulated" fishing, this type of illegal activity poses a great challenge to CCAMLR because of the negative signals sent to third parties by member States' failure to keep even their own vessels from side-stepping its regulatory framework.[50]

A sizeable proportion of the illegal Patagonian toothfish fleet is owned and operated by member State nationals flying the flags of non Parties to the CCAMLR Convention such as Belize, Panama, Namibia and Vanuatu. The flags of the Faeroe Islands, Guinea-Bissau, Honduras, Malta, the Marshall Islands, Portugal, the Seychelles, and Taiwan have also been used, although in smaller numbers.[51] NGOs have identified Spanish and Norwegian, and to a lesser extent South African, Argentinean, Chilean and United States interests as the beneficial owners of many such vessels. Spanish and Norwegian nationals have been identified as IUU vessel masters.[52] NGO reports have also implicated Namibian and Uruguyan ports and Chilean and Japanese markets in the IUU fishery.[53]

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[47] Erik Jaap Molenaar, "Southern Ocean Fisheries and the CCAMLR Regime" in Alex G Oude Elferink and Donald R Rothwell (eds) *The Law of the Sea and Maritime Delimitation and Jurisdiction* (Kluwer Law International, Great Britain, 2001) 293, 307.

[48] Molenaar, above, 307.

[49] Gail Lutgen, "The Rise and Fall of the Patagonian Toothfish: Food for Thought" (1997) 27 Envl Pol & Law 401, 403.

[50] The phenomena of open registries, which offer such flags, is discussed further in Part V of this paper.

[51] David Vidas "Emerging Law on the Sea issues in the Antarctic Maritime Area: A Heritage for the New Century" (2000) 31 Ocean Dev and Int'l Law 197, 201.

[52] ISOFISH *The Vikings: The Involvement of Norwegian Fishermen in Illegal and Unregulated Long Line Fishing for Patagonian Toothfish in the Southern Ocean* Occasional Report No 3 (ISOFISH, Hobart, October 1988) names specific Norwegian vessels and companies, some of which were identified as being registered in Argentina, Panama and the Cayman Islands. See also ISOFISH *The Chilean Fishing Industry: Its Involvement in and Connections to the Illegal, Unreported and Unregulated Exploitation of Patagonian Toothfish in the Southern Ocean* Occasional Report No 2 (ISOFISH, Hobart, March 1999) and Lutgen, above, 403.

[53] See M Lack and G Sant *Patagonian Toothfish: Are Conservation Measures Working* Offprint from Traffic Bulletin 19(1) 9 and ASOC (Antarctic and Southern Ocean Coalition) "Southern Ocean Goldrush" (1997) The Antarctic Project 6(2) 3. See also ISOFISH *The Involvement of Mauritius in the Trade of Patagonian Toothfish from Illegal and Unregulated Long Line Fishing in the Southern Ocean and What Might be Done About It* Occasional Report No 1 (ISOFISH, Hobart, August 1998)

Although the scale and magnitude of IUU fishing for Patagonian toothfish is well-known, the detailed operation of the illegal fishery is obscured not only by the fact the vessels involved frequently countries of registration, but also by the use of shell corporations to obscure the beneficial interests of these ships.[54] NGOs have publicised examples of Spanish controlled vessels transferred to Belize, Mauritius and Chilean registered front companies and the operation of front Norwegian companies in Panama, Argentina, the Cayman Islands and Hong Kong. [55]

CCAMLR's efforts to deal with IUU Fishing by reflagged vessels

By the mid 1990s CCAMLR was well aware of the peril it faced in the form of IUU fishing.[56] The need to combat illegal fishing and trade by member State nationals using vessels flagged to non-parties was also evident to a number of CCAMLR members.[57]

CCAMLR has responded to this unregulated fishing with a number of conservation measures and resolutions. Conservation Measure 147/XIX provides that non-Party flagged vessels sited engaged in fishing in CCAMLR Area are to be presumed to be undermining the effectiveness of CCAMLR conservation measures and thus subjected to stringent port State inspections. [58] Non-Contracting Party vessels entering the ports of Contracting Parties must be inspected. Landings and transshipments by those vessels are prohibited where it cannot be established that the vessels' catch was taken in compliance with CCAMLR's conservation measures.[59] Resolution 13/XIX calls upon States to avoid reflagging or licensing any vessel with Southern Ocean IUU history. Further, CCAMLR XX set in place a regime for

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[54] ISOFISH *Toothfish Poachers Changing Vessel Names in an Attempt to Avoid Identification by the CCAMLR Catch Documentation Scheme* Report No 4 (ISOFISH, Hobart May 2000). See also David Vidas "Emerging Law on the Sea issues in the Antarctic Maritime Area: A Heritage for the New Century" (2000) 31 Ocean Dev and Int'l Law 197, 204.

[55] See ISOFISH Occasional Report No 1 above and Report No 4 above. See also *Report of the Secretary General of the United Nations* A/53/473 (United Nations, New York, 1998) paragraph 147.

[56] See *Report of the Sixteenth Meeting of the Commission* (CCAMLR, Hobart, 1997) 152.

[57] See Penelope Ridings "Compliance, Enforcement and the Southern Oceans: The Need for a New Approach" in RA Herr (ed) *Sovereignty at Sea: From Westphalia to Madrid* (Wollongong Papers on Maritime Policy No 11, Centre for Maritime Policy, University of Wollongong, 2000) 175.

[58] Conservation Measure 147/XIX *Report of the Nineteenth Meeting of the Commission* (CCAMLR, Hobart, 2000) Annex 6.

[59] Conservation Measure 118/XVII *Report of the Seventeenth Meeting of the Commission* (CCAMLR, Hobart, 1998) Annex 6.

identification of the flag States of non-complying non-Party vessels as States unwilling to exercise their flag State obligations. This initiative was intended to lay the foundation for the Commission later to take multilateral trade related measures and other sanctions against States so identified.[60]

As an incentive to compliance, the Commission routinely invites non-Parties involved in IUU fishing to attend Commission Meetings as observers, to accede to the Convention and to become Members of the Commission. It also invites non-Parties to participate in specific Conservation Measures.[61]

The Limitations of the Flag State Approach

CCAMLR's outreach has had some success in bringing outsiders within the fold.[62] Yet, bolstered by powerful foreign-controlled fishing interests, many non-Parties have proved difficult to persuade. On the other hand, however, reliance on flag States to sanction transgressions is thought by some to have exacerbated the IUU problem.[63] Critics claim the practice of reflagging of vessels from member to non-member registries has removed the effective relationship between flag States and vessels on which CCAMLR's compliance and enforcement system is based.[64]

CCAMLR's reporting requirements assist to identify the involvement in incidents of non-compliance by member State nationals. However, CCAMLR has been thwarted by the fact that few States have any appropriate mechanism in place to respond to such information. Poachers are able to carry out their activities because the fishing States where they live and work have no domestic legislation capable of applying sanctions to their nationals and residents for fishing offences committed

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[60] Conservation Measure 118/XX *Report of the Twentieth Meeting of the Commission* (CCAMLR, Hobart, 2001) Annex 10.

[61] See, for example, the Catch Documentation Scheme established by Conservation Measure 170/XIX and Resolution 16/XIX in *Report of the Nineteenth Meeting of the Commission* (CCAMLR, Hobart, 2000) Annex 6.

[62] For example, the Commission welcomed the accession of Namibia at CCAMLR XIX. See *Report of the Nineteenth Meeting of the Commission, above,* Annex 5 paragraphs 2.49-2.50.

[63] See "Further Measures to Combat Illegal, Unreported and Unregulated Fishing in the Convention Area" paper presented by the New Zealand delegation to CCAMLR XVII (Hobart, October 1998) published in Ministry of Foreign Affairs and Trade *Commission for the Convention for the Conservation of Antarctic Marine Living Resources CCAMLR XVII: Hobart 26 October - 6 November 1998: Report of the New Zealand Delegation* (Wellington, 1998) Annex E.

outside their own exclusive economic zones.[65] Consequently, neither CCAMLR's enforcement system nor its scheme to promote non-Party cooperation has had the desired deterrent effect.[66]

Alternative Approaches

Ineffective reliance on national authorities to control their own flag vessels has prompted some coastal States in the CCAMLR Area, namely France, Australia and South Africa, to take steps individually to enforce their own fisheries regulations. Such efforts have met with a degree of success,[67] but the magnitude of IUU fishing in the CCAMLR area is too great to rely upon coastal State enforcement alone. This is especially so given that the coverage of such jurisdiction falls well short of the area of illegal fishing, and even its existence may be subject to dispute.[68] Port State jurisdiction has increasing currency, as envisaged by Conservation Measure 147/XIX. However, in the CCAMLR context, its application is limited as it depends upon the offending vessel calling voluntarily in a Member State port, rather than the more usual non Party 'ports of convenience'.[69]

The demonstrated limitations of flag, coastal and port State jurisdiction demand that CCAMLR take a new approach to the issue of compliance and enforcement. Effective control of illegal fishing must include direct confrontation of Party State nationals who use the reflagging mechanism to circumvent conservation and

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[64] Beth C Clark and Alan D Hemmings "Problems and Prospects for CCAMLR Twenty Years On" (2001) 4 Journal of International Wildlife Law and Policy 1, 4.

[65] ISOFISH *The Vikings: The Involvement of Norwegian Fishermen in Illegal and Unregulated Long Line Fishing for Patagonian Toothfish in the Southern Ocean* Occasional Report No 3 (ISOFISH, Hobart, 1998), paragraph 6.2.

[66] Penelope Ridings "Compliance, Enforcement and the Southern Oceans: The Need for a New Approach" in RA Herr (ed) *Sovereignty at Sea: From Westphalia to Madrid* (Wollongong Papers on Maritime Policy No 11, Centre for Maritime Policy, University of Wollongong, 2000) 175, 182.

[67] See, for example, details of subsequent coastal State prosecutions outlined in the "Report of the Standing Committee on Observation and Inspection" in *Report of the Seventeenth Meeting of the Commission* (CCAMLR, Hobart, 1998) Annex 5 paragraph 2.8 and I the "Report of the Standing Committee on Observation and Inspection" in *Report of the Twentieth Meeting of the Commission* (CCAMLR, Hobart, 2001) Annex 5 paragraphs 2.2, 2.15 and 2.24.

[68] In Antarctica, coastal State jurisdiction is universally recognised only in respect of sub-Antarctic islands set out in n31 above. Recognition allows the States to which the islands belong to promulgate their own conservation measures. However not all stocks of Patagonian toothfish fall within the jurisdiction of a coastal State. Port State jurisdiction also has a very limited application as it depends on the offending vessel being voluntarily within port. See Ridings, above, 181-182.

[69] See discussion at 14 above.

management obligations with would otherwise be opposable to them.[70] It is submitted that this form of control may be achieved, at least partly, by obligating CCAMLR's member States to exercise jurisdiction based on the nationality of the IUU vessel's owner, operator, master and/or crew to combat the illegal fishery.

A 'Nationals' initiative

In 1998 New Zealand put to the SCOI meeting a draft Conservation Measure which included a proposal that the Commission formalise an obligation on Contracting Parties to ensure that not only their flag vessels, but also their nationals and all companies established in and subject to their jurisdiction, comply with the CCAMLR conservation measures to which that Party was bound. The paper proposed that Parties would make the contravention of a CCAMLR conservation measures an offence under their national legislation. Contracting Parties would assist each other in identifying vessels and their masters, owners or operators reported to have engaged in activities undermining the effectiveness of CCAMLR Conservation Measures.[71]

The proposal met surprising resistance.[72] Some parties rallied in defence of "the sacrosanct Flag-State principle and the principle of not giving laws extra-territorial application."[73] In the Commission meeting, when the proposal arose, a Norwegian delegate pronounced that: [74]

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[70] David F Matlin "Re-evaluating the Status of Flags of Convenience Under International Law" (1991) 23 Vand J Transnat'l L 1017, 1055.

[71] See "Further Measures to Combat Illegal, Unreported and Unregulated Fishing in the Convention Area" paper presented by the New Zealand delegation to CCAMLR XVII (Hobart, October 1998) published in Ministry of Foreign Affairs and Trade *Commission for the Convention for the Conservation of Antarctic Marine Living Resources CCAMLR XVII: Hobart 26 October - 6 November 1998: Report of the New Zealand Delegation* (Wellington, 1998) Annex E.

[72] See CCAMLR "Report of the Standing Committee on Observation and Inspection" in *Report of the Seventeenth Meeting of the Commission* (CCAMLR, Hobart, 1998) Annex V paragraphs 2.41-3. See also Ministry of Foreign Affairs and Trade *Commission for the Convention for the Conservation of Antarctic Marine Living Resources CCAMLR XVII: Hobart 26 October - 6 November 1998: Report of the New Zealand Delegation* (Wellington, 1998) 19.

[73] *Report of the Seventeenth Meeting of the Commission* (CCAMLR, Hobart, 1998) paragraph 5.8. Prior to the CCAMLR Meeting, the EC and France expressed reservations about the inconsistency of the nationals proposal with flag State jurisdiction. The EC also cited the difficulty of penetrating complex corporate structures to identify controlling interests and the impossibility of assuming responsibility for nationals' actions in light of Community Members' inability to restrict the nationality of those employed on its vessels, and thus to monitor the vessels on which its nationals might be employed. Ministry of Foreign Affairs and Trade Internal Reports "Antarctic Fisheries: CCAMLR: Enforcement and Compliance" C05506/BRU 10 September 1998 and "Antarctic Fisheries: CCAMLR Enforcement & Compliance" C06045/PAR 10 September 1998.

[74] CCAMLR *Report of the Seventeenth Meeting of the Commission*, above, paragraph 5.8.

> *These principles have, so to speak, been pillars of marine resource management both in CCAMLR and other international marine management organisations. In the Norwegian view, the Flag-State principle – i.e. that the responsibility resides with the Flag State – should continue as the basis of regulatory measures. We should therefore stop short of measures undermining the Flag-State principle. Likewise we should tread cautiously when approaching questions of extra-territoriality.*

As a consequence of such misgivings CCAMLR's consensus decision making norm ensured that the proposal ultimately foundered.[75] Technically the New Zealand paper remains on the table and may be further reconsidered if the SCOI or the Commission choose to revisit the nationals issue in the future. Developments in fisheries management, which have taken place since the proposal was last made, suggest that the above objections would resonate less powerfully if the initiative were raised again.

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[75] Chile and South Africa both endorsed the need for new enforcement initiatives. CCAMLR *Report of the Seventeenth Meeting of the Commission*, above, paragraphs 5.10 and 5.11.

III HIGH SEAS CONSERVATION OBLIGATIONS

In addition to signaling the full commitment of its members to the principles on which the Convention is based, incorporation of a nationals approach would demonstrate CCAMLR's compliance with recognised conservation and cooperation duties and developing environmental protectionist norms. In recent years international instruments have further developed understanding of States' obligations to protect the marine environment and the viability of fish stocks therein. These understandings point to a responsibility on the part of CCAMLR Parties to avail themselves of all means open to them to prevent the annihilation of fish stocks, such as the Patagonian toothfish. Contemporary international agreements posit that obligation as a condition of high seas fishing access.

Freedom of Fishing

As early as the seventeenth century, freedom of the high seas was seen by some as a fundamental principle of international law.[76] The contemporary reStatement of this - now universally recognised - freedom can be found in Article 87 of the United Nations Convention on the Law of the Sea (UNCLOS) 1982.[77] That provision stipulates that the high seas is open to both coastal and land locked States for navigation, over-flight, the laying of submarine cables and pipelines, the construction of artificial islands and other installations, scientific research, and fishing.

These high seas freedoms are not unqualified, however. Article 87 provides that their exercise is subject to the rules of international law, including UNCLOS itself, and is conditional on due regard for the interests of other States and their right to exercise the same freedoms. Accordingly, as the common property of all States, high

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[76] In the seventeenth century, Spain and Portugal claimed large parts of the high seas as part of their respective territories. In response, Hugo Grotius, counsel to the Dutch East India Company, developed his now famous theory that the sea was by nature free from the sovereignty of any State, because it could not be taken into possession through occupation. Freedom of the high seas so expressed was eventually reflected in both customary international law and relevant treaty instruments. See Sir Robert Jennings and Sir Arthur Watts (eds) *Oppenheim's International Law Vol1* (9th ed, Longman, Harlow Essex, 1992) 721. See also M N Shaw *International Law* (Grotius Publications Ltd, Cambridge, 1991) 337 and Brian D Smith *State Responsibility and the Marine Environment* (Clarendon Press, Oxford, 1988) 185.

[77] United Nations Convention on the Law of the Sea, (10 December 1982) 21 ILM 1261 1982; NZTS 1996 No 14.

seas fish stocks may be harvested. However, they may be fished only with due regard for other State's rights to access to the same stocks.

The collective nature of States' interests in high seas fisheries is expanded by subsequent UNCLOS articles. Article 116 makes clear that all States share an interest in conserving marine living resources.[78] Recognition of the duty to conserve such resources serves as a fundamental limitation on the freedom of the high seas, the substance of which is further elucidated in Articles 117-119.[79]

Duties to Conserve and Cooperate

Article 117 of UNCLOS imposes a duty on all States to take, or to cooperate with other States in taking, such measures for their own nationals "as may be necessary for the conservation of the living resources of the high sea".[80] Article 118 sets out the obligation on States to cooperate in the conservation and management of living resources on the high seas inter alia through the establishment of regional fisheries organisations and, by implication, by cooperative participation in them.[81] Article 119 requires States to ensure that decisions concerning the allowable catch and necessary conservation measures for the living resources of the high seas are based on the best scientific evidence available.[82]

The combined effect of these provisions is the conservation measures taken by States in accordance with Article 119 should be the result of the cooperation provided for in Article 118. The articles reveal that implementation of conservation measures

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[78] The duty to conserve is first mentioned in Article 62(1) of UNCLOS, in relation to coastal State's obligations toward their EEZs. Therein it is qualified by a corresponding duty of optimal utilisation (maximum sustainable yield) to be determined by scientific calculation as well as factors including the economic needs of coastal fishers and special requirements of developing States. See Sean Hern "Competing Values: Taking a Broad View on the Narrowing Conservation Regime of the 1982 United Nations Convention on the Law of the Sea" (2000) 16 Am U Int'l L Rev 177, 180.

[79] The qualifications referred to in Article 87 of UNCLOS have their roots in the 1958 Convention on the Law of the Sea, the 1958 Convention on the Conservation of the Living Resources of the High Seas, and the earlier work done on drafts of those conventions by the International Law Commission. See United Nations *Yearbook of the International Law Commission 1955 Volume 1: Summary records of the seventh session* (United Nations, New York, 1960).

[80] The meaning of nationals in this context is subject to some debate and will be discussed further in Part V of this paper.

[81] See Division for Ocean Affairs and the Law of the Sea Office of Legal Affairs (DOLAS) *The Law of the Sea: Regime for High Seas Fisheries: Status and Prospects* (United Nations, New York, 1992) 10.

for high seas fish stocks was designed to be a cooperative activity. States are required by Article 117 to individually apply to their nationals those conservation measures determined in cooperation with other States.[83]

Elaboration of High Seas Obligations

The conservation and cooperation duties set out in UNCLOS are described only broadly. Multilateral fisheries management arrangements negotiated in recent years have given them more precise definition.

The Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas 1993 (Compliance Agreement)[84] builds on the cooperation obligation in UNCLOS described above by unequivocally identifying signatories' fundamental responsibility to ensure that their vessels do not undermine the effectiveness of international conservation and management regimes. They must prevent their vessels from fishing on the high seas unless they have been authorised to do so. They must ensure that they can exercise effective control over those vessels before issuing such authorisation.[85] Although the Compliance Agreement is primarily focused on flag State obligations, both its tone and content illustrate the international community's expectation that the conservation and management of high seas fish stocks is to be secured by positive action on the part of States.

The Code of Conduct for Responsible Fisheries[86] is a voluntary arrangement which establishes principles to be implemented in order to exercise control over fishing vessels wherever they may be. It calls upon users of marine living resources to conserve marine eco-systems, and couples the right to fish with an obligation to do so

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[82] Article 119 further stipulates that such measures shall be designed to maintain or restore populations of harvested species at levels which can produce the maximum sustainable yield, as qualified by relevant environmental and economic factors.

[83] See DOLAS, above, 9-11 and 25-29.

[84] Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas 1993, United Nations Department of Oceans and Law of the Sea and Food and Agriculture Organisation *International Fisheries Instruments* (United Nations, New York, 1998) 41-50.

[85] Although the Agreement has yet to enter into force many nations have begun voluntarily applying its principles. See Deirdre M Warner-Kramer and Krista Canty "Stateless Fishing Vessels: The Current International Regime and a New Approach" (2000) Ocean and Coastal Law Journal 227, 232-233.

in a manner consistent with the effective conservation and management of the living resources.[87] Specifically, States are urged:

- to facilitate the sustained recovery of resources which have been adversely affected by fishing or other human activities;[88]
- as participants in regional fisheries management organisations, to implement measures consistent with international law to deter activities of non-participant flagged vessels which undermine the effectiveness of conservation and management measures established by such organisations;[89]
- to implement an effective domestic framework for fisheries resource conservation and fisheries management;[90] and
- to ensure that domestic laws and regulations provide for sanctions applicable in respect of violations which are adequate in severity to be effective.[91]

High seas conservation obligations were further developed by the negotiation of the Agreement for the Implementation of the Provisions for the United Nations Law of the Sea of 10 December 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks 1995 (Fish Stocks Agreement) which came into force in November 2001.[92] The Fish Stocks Agreement provides that States shall give effect to their UNCLOS duties by becoming members of fisheries management organisations (FMOs), or by agreeing to apply the conservation and management measures established by such organisations.[93] The

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[86] Code of Conduct for Responsible Fisheries (29 September 1995) United Nations Department of Oceans and Law of the Sea and Food and Agriculture Organisation, above, 56-80.
[87] Article 6.1
[88] Article 7.6.10
[89] Article 7.7.5
[90] Article 7.7.1
[91] Article 7.7.2
[92] Agreement for the Implementation of the Provisions for the United Nations Law of the Sea of 10 December 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (4 December 1995), United Nations Department of Oceans and Law of the Sea and Food and Agriculture Organisation, above, 7-38.
[93] Currently there is insufficient scientific evidence to determine whether Patagonian toothfish should be regarded as one single (straddling) stock, or it is composed of several distinct stocks. See Erik Jaap Molenaar, "Southern Ocean Fisheries and the CCAMLR Regime" in Alex G Oude Elferink and Donald R Rothwell (eds) *The Law of the Sea and Maritime Delimitation and Jurisdiction* (Kluwer Law International, Great Britain, 2001) 293, 298. CCAMLR's qualification as a regional fisheries management organisation for the purposes of the Fish Stocks regime is also subject to debate. See ASOC *Report on the XIVth Meeting of the Convention on the Conservation of Antarctic Marine Living Resources* (ASOC, Auckland and Washington, 1995) 9.

Agreement provides that States fishing on the high seas must take measures to prevent or eliminate over-fishing.[94] States' obligation to uphold conservation measures for high seas fish stocks is thus extended beyond its area of territorial jurisdiction.

In fulfilling their obligation to cooperate through FMOs, States are required to ensure the full cooperation of their national agencies and industries in implementing the decisions of such organisations.[95] To bolster the authority of FMOs, the Fish Stocks Agreement provides that only those States which join or cooperate with the relevant organisation shall have access to the fisheries resource to which those measures apply.[96] Importantly, it adds enforcement and sanctions provisions to the more general UNCLOS obligations.

Environmental Protection Obligations

The responsibility of CCAMLR Parties to utilise all means available to combat illegal fishing is further amplified by developing norms of environmental protection. Evidence of an emerging notion that the marine environment is fragile and its resources limited can be found in the routine incorporation of the environmental protection principles and the precautionary approach into new fisheries management arrangements.[97] The ocean is viewed in a number of multilateral environmental arrangements as the common concern of all humanity, the preservation of which transcends national interests.[98] In this context, over-fishing of Southern Ocean fish

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[94] Article 5(h).
[95] Article 10(1).
[96] Article 8(4). However, it must be noted that the scope of the Fish Stocks Agreement is limited by the pacta tertiis rule, as Stated in Article 34 of the Vienna Convention on the Law of Treaties 1969. Thus, if a State chooses not to become a party to the Agreement, it cannot be held to be in breach of the obligations therein. However, most non-Parties to regional fisheries agreements are bound by Articles 64 and 116-119 of UNCLOS. See Kevin Bray "A Global Review of Illegal, Unreported and Unregulated (IUU) Fishing" Paper presented to the Expert Consultation on Illegal, Unreported and Unregulated Fishing organised by the Government of Australia in cooperation with the FAO (Sydney, 15-19 May 2000) AUS:IUU/2000/6.
[97] See Yann-Huei Song "The Eco-system Approach: New Departures for Land and Water: Concluding Perspectives on Ecosystem Management" (1997) 24 Ecology LQ 861, 863.
[98] For example, Agenda 21 (Rio Declaration on Environment and Development (14 June 1992) <www.un.org/documents/ga/conf151/aconf15126-/annex1.htm> (last accessed 3 February 2002) and the Convention on Biological Diversity (June 5 1992) 31 ILM 818. See Emeka Duruigbo "Multinational Corporations and Compliance with International Regulations Relating to the Petroleum Industry" (2001) 7 Ann Surv Int'l & Comp L 101, 145. See also David S Ardia "Does the Emperor Have No Clothes" Enforcement of International Laws Protecting the Marine Environment" (1998) 19 Mich J Int'l L 497, 506.

stocks can be seen as a threat to the well-being of the international community as a whole.[99] CCAMLR Parties and non-Parties both, therefore, have an interest in managing harvesting of fish stocks and, as necessary, an obligation to contribute to efforts to mitigate the above mentioned threats.[100]

Preventative obligations toward the environment generally are recognised not only in the marine pollution context, but also in the realm of protection of biodiversity. UNCLOS provides for the protection of rare and fragile eco-systems and imposes a general obligation to protect and preserve the marine environment.[101] The Convention on Biological Diversity imposes on States the responsibility to ensure activities under their control do not damage areas beyond their national jurisdiction.[102] By implication, this injunction extends to the high seas, and the activities of a State's nationals thereon.[103]

Duty to conserve CCAMLR Fish Stocks

CCAMLR's foundation upon eco-system wide management and its embodiment of the precautionary approach indicate a willingness on the part of its negotiators to accept obligations to prevent destruction of the marine environment.[104] The obligation to take preventative action inherent in those undertakings extends to actions needed to prevent damage to the marine environment by over-fishing.

CCAMLR's own framework fits comfortably with the conservation, cooperation and environmental protection principles expanded in treaties of the last decade. Specifically, the Convention requires its signatories to take appropriate steps to ensure

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[99] Elana Geddis States that in the Southern Bluefin Tuna cases (*New Zealand v Japan; Australia v Japan* (ITLOS, 27 August 1999 ILM 38(6) 1624) the International Tribunal of the Law of the Sea "effectively recognised that a threat to the sustainability of a fish stock is a threat of harm to the marine environment itself." In so concluding, ITLOS not only relied on the rights of the parties, but also their obligation to prevent serious harm to the marine environment. Elana Geddis "Resource and Environment: International Environmental Law: Covering the Gaps for the 21st Century" Paper Presented to the ANZIL/ASIL Conference, 26-29 June 2000, Canberra and Sydney.

[100] Duruigbo, above, 145.

[101] Articles 194(5) and 192 respectively.

[102] Article 3.

[103] Cyrille De Klemm "Fisheries Management and Marine Biological Diversity" in Ellen Hey (ed) *Developments in International Fisheries Law* (Kluwer, The Netherlands, 1999) 423, 440.

[104] Parties have accepted binding conservation measures relating to regulation of krill harvests to preserve the food supply of other species, seeking to eliminate incidental mortality of seabirds as a result of long Line Fishing and dumping of plastic and other waste. See De Klemm, above, 458.

compliance with its provisions and with conservation measures adopted by the Commission and to which the Party is bound. To meet this obligation, Parties are required to set in place measures to ensure that all activities which fall within their jurisdiction are undertaken consistently with the purpose of the Convention. Logically, this obligation encompasses activities of nationals and companies as well as flag vessels within the jurisdiction of that Party.[105]

The apparent indifference of non-Party governments of Panama, Vanuatu, Seychelles and Belize and others to the unregulated fishing by their flag vessels in the CCAMLR area clearly sets them at odds with the aforementioned conservation and cooperation duties. However, it is equally apparent that those CCAMLR member States whose citizens use vessels registered in the above countries for IUU fishing are also obliged to act to control those nationals to prevent them from undermining CCAMLR's conservation efforts.[106] The primacy of the obligation of the flag State does not abrogate the responsibility of other Parties. Similarly, full observance of the duty of cooperation on the part of member States whose nationals practice unchecked IUU fishing would logically extend to taking action to prevent nationals undermining conservation measures.

CCAMLR Parties are clearly obliged, as far as they are able, to address the IUU fishing activities of their nationals - even on foreign flagged vessels. Against this background of duties of active conservation, it would be incongruous for them to choose not to exercise appropriate jurisdiction based on nationality if a legitimate means to do so existed. It is submitted that to fully meet these obligations, CCAMLR as an organisation, and its members individually, need to recognise their responsibility to do everything in their power to curb the illegal plunder of the Patagonian toothfish.

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[105] See "Further Measures to Combat Illegal, Unreported and Unregulated Fishing in the Convention Area" paper presented by the New Zealand delegation to CCAMLR XVII (Hobart, October 1998) published in Ministry of Foreign Affairs and Trade *Commission for the Convention for the Conservation of Antarctic Marine Living Resources CCAMLR XVII: Hobart 26 October - 6 November 1998: Report of the New Zealand Delegation* (Wellington, 1998) Annex E.

[106] The discussion above has used the term "nationals" used in Article 117 to encompass vessels, and legal and natural persons. This interpretation is not universally acknowledged, as was evident in CCAMLR's discussion of the 1998 proposal prior to the CCAMLR meeting in which the EC maintained that vessels only were covered by the term. Ministry of Foreign Affairs and Trade Internal Report "Antarctic Fisheries: CCAMLR: Enforcement and Compliance" C05506/BRU 10 September 1998.

Their duty to do so in international law is clear. This discussion will now turn to the question of whether international law allows for the exercise of extra-territorial jurisdiction over nationals as a mechanism for giving that duty effect.

IV JURISDICTION IN INTERNATIONAL LAW

New Zealand's 1998 suggestion that member States should exercise jurisdiction over nationals to assist CCAMLR to combat IUU fishing prompted a number of countries to suggest that such an initiative would somehow undermine the concept of flag State jurisdiction over vessels on the high seas.[107] This position requires further examination.

Prescriptive and Enforcement Jurisdiction

The term "jurisdiction" describes the characteristic power of States to define and enforce the rights and duties of the natural and legal persons over which they exercise authority.[108] It thus consists of both prescriptive and enforcement elements. A State exercises the former by the creation of rules to control people's conduct, relations, status or interests in things. Such rules may be made by legislation, executive act or order, administrative rule or regulation, or judgment of a court. Enforcement jurisdiction is the physical and material action taken by the State to impose those rules.[109] The nature of a State's entitlement and obligation to exercise either type of jurisdiction as regards its nationals, and vessels, varies according to where the State seeks to give it effect. [110]

Extra-territorial Jurisdiction

An often cited cardinal rule of international law holds that a State's sovereignty implies unlimited prescriptive legal authority to prescribe the laws to

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[107] See discussion at 19-20 above.

[108] More narrowly, "jurisdiction" describes a State's authority to establish procedures for identifying breaches of its rules and the precise consequences thereof and to impose consequences for such breaches. The term is also used at times to refer to a State's right to act on behalf of the said persons vis-à-vis other international persons. See Bernhard H Oxman in R Bernhadt (ed) *Encyclopedia of Public International Law Vol 3* (Elesvier, Amsterdam, 1991) 55. See also Brian D Smith *State Responsibility and the Marine Environment* (Clarendon Press, Oxford, 1988) at 143-4.

[109] Smith, above, 133.

[110] ReStatement of the Foreign Relations Law of the United States (Revised) § 401 (Tent. Draft no 3, 1982)

apply within its own territory.[111] Prescriptive jurisdiction may be exercised by a State in relation to all persons (and resources) within its territorial limits irrespective of their nationality.[112] International law also recognises that acts of prescriptive jurisdiction may extend abroad in certain circumstances. Legal commentators note that exercise of extraterritorial prescriptive legal authority is acceptable provided the State possesses a substantial and direct connection with the facts, so long as it does not interfere in the central internal affairs of another State and that "the elements of accommodation, mutuality, and proportionality" are respected.[113]

Extra-territorial prescriptive jurisdiction has been accepted in five recognised situations: [114]

(i) where the conduct in question has territorial impact;

(ii) to protect the interests of the State (typically security and public processes);

(iii) where the conduct in question is a delicta juris gentium offence subject to universal jurisdiction (such as piracy);

(iv) when involving a State's 'passive personality' (where the conduct abroad affects the person or interests of a national); and

(v) when the conduct in question is perpetrated by the State's nationals abroad.

The legitimacy of enforcement jurisdiction may be similarly differentiated between territorial and extra-territorial situations. Territorial enforcement of law bears little restraint. However, the authority to prescribe with respect to matters within the borders of a foreign State discussed above, does not carry with it the authority to enforce in such regions. The enforcement authority of the State within its own

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[111] The relationship between jurisdiction and sovereignty is subject to debate. Compare FA Mann *The Doctrine of Jurisdiction in International Law* (1964) 111 Recueil des Cours 1 and Rosalyn Higgens "The Legal Bases of Jurisdiction" in Professor Cecil J Olmstead (ed) *Extraterritorial Application Of Laws And Responses Thereto* (ECS Publishing Ltd, Oxford, 1984) 3, 4.

[112] See Sir Robert Jennings, "Extraterritorial Jurisdiction and the United States Antitrust Laws" (1957) 33 Brit Yb Int'l L 146, Wade Estey "The Five Bases of Extraterritorial Jurisdiction and the Failure of the Presumption Against Extraterritoriality" (1997) Hastings Int'l & Comp L Rev 177, 177, Higgens, above, 5 and M N Shaw *International Law* (Grotius Publications Ltd, Cambridge, 1991) 393-4.

[113] Ian Brownlie *Principles of Public International Law* (5th ed, Oxford University Press, New York, 1998) 309-310, 313. See also Jennings, above, 157-160 and Higgens, above, 6.

[114] See Harvard Research in International Law "Jurisdiction with Respect to Crime" (1935) 29 Am J Int'l L 474 and Christopher L Blakesley "Criminal Law: United States Jurisdiction Over Extraterritorial Crime" (1982) 73 J Crim & Criminology 1109, 1110.

territory is exclusive. Accordingly, no other State may take any measure to enforce its law in another's territory without its consent. [115]

Some of the ambiguity about the extent to which a State's jurisdiction may be exercised extraterritorially may be attributed to *The Lotus.*[116] In that case the Permanent Court of International Justice equated a State's jurisdiction over its flag vessels to its jurisdiction in its territory.[117] The PCIJ first emphasised the exclusivity of the flag State's (territorial) jurisdiction over the vessel on the high seas, but then went on to qualify that proposition so far as both legislative (prescriptive) and judicial (enforcement) jurisdiction was concerned. The court reiterated that a State was not able to exercise its power outside its frontiers in the absence of a permissive rule of international law.[118] However, the court continued, "it by no means follows that a State can never in its own territory exercise jurisdiction over acts which have occurred on board a foreign ship on the high seas." [119]

Commentators recognise that a well established and generally accepted rule of international law be identified in only a small number of cases.[120] Accordingly, enforcement jurisdiction is restricted usually to the presence of the suspect in the territorial limits.[121] However, within those limits, the exclusivity of another State's

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[115] Brownlie, above, 303. See also Brian D Smith *State Responsibility and the Marine Environment* (Clarendon Press, Oxford, 1988) at 132 -133

[116] *SS Lotus (France v Turkey)* [1927] PCIJ Ser A, no 10

[117] Early expressions of the character and basis of the flag State's authority relied on an assimilation of vessels to the territory of the State, depicting a ship as a 'kind of floating island'. See *Q v Anderson* (1868) LR I CCR 161 and *Patterson v The Eudora* 190 US 169 (1903). See also the majority opinion in the *Lotus*, above. The assimilation theory has now been superseded by acceptance of the rationale that flag State jurisdiction is the product of common sense, consensus and necessity. See Judge Finlay's dissent in the *Lotus*, above, 53. However, territoriality continues to be used as a metaphor for the characteristics of flag State jurisdiction. International law accepts that a State's legal authority over persons, property and conduct aboard vessels flying its flag is analogous to that exercised within its borders. See Smith, above, 151.

[118] In *The Lotus* MM Huber, President of the PCIJ, said "Far from laying down a general prohibition to the effect that States may not extend their application of their laws and the jurisdiction, [international law] leaves them in this respect a wide measure of discretion which is only limited in certain cases by prohibitive rules, as regards other cases, every State remains free to adopt the principles which it regards as best and most suitable.... In these circumstances all that is required of a State is that it should not overstep the limits which international law places upon its jurisdiction." *SS Lotus* Case [1927] PCIJ Ser A, no 10,19.

[119] *The Lotus,* above, 25.

[120] Prosper Weil "International Law Limitations on State Jurisdiction" in Cecil J Olmstead (ed) *Extraterritorial Application Of Laws And Responses Thereto* (ECS Publishing Ltd, Oxford, 1984) 33-7.

[121] M N Shaw *International Law* (Grotius Publications Ltd, Cambridge, 1991) 393-4.

jurisdiction in the territory where the offence took place is no impediment to a State exercising jurisdiction in respect of the same act in its own courts.[122]

Nationality Jurisdiction

The nationality base of jurisdiction, which was the legal foundation for the unsuccessful CCAMLR 'nationals initiative', permits a State to exercise control over its nationals wherever they might be.[123] The ambit of the State's jurisdiction over its nationals extends to the high seas, and even foreign countries, subject only to the rights of other nations or their nationals.[124] The State's protection of its nationals abroad generates on their part a duty to obey its prescriptions. The State's right to control the conduct of its nationals enables it to give effect to its interests, such as deterring them from conduct which damages its reputation and foreign relations.[125]

The principle of nationality jurisdiction is underlain by the concept of certain duties to their homeland owed by citizens of State. These obligations persist regardless of the national's current residence as long as certain bonds of allegiance, such as citizenship, are maintained.[126] Over time, the principle has been extended by the ascription of nationality to corporations, vessels, and aircraft and by use of former (relinquished) nationality, residence and other connections as evidence of allegiance owed by aliens.[127]

Although international law allows States to exercise jurisdiction in respect of its nationals wherever they may be, it does not oblige them to do so.[128] Consequently,

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[122] One potential obstacle lies in the presumption against double jeopardy discussed below at 54.

[123] Shalom Kassan attributes the origins of nationality based jurisdiction to ancient times "when territorial boundaries were often vague, and communities were defined by the religion, race or the nationality of the people" rather than by the territory. Kassan "Extraterritorial Jurisdiction in the Ancient World" (1935) 29 Am J Int'l L 237, 240. Watson notes that in the modern era, more use has been made of nationality jurisdiction by civil law courts than by their common law counterparts. Geoffrey R Watson "Offenders Abroad: The Case for Nationality-Based Criminal Jurisdiction" (1992) 17 Yale Journal of International Law 41,46.

[124] *Lauritzen v Larsen* 345 US 571; 73 S Ct 921; 97 L Ed 1254; 1953 US LEXIS 2533.

[125] Watson, above, 68-69.

[126] Wade Estey "The Five Bases of Extraterritorial Jurisdiction and the Failure of the Presumption Against Extraterritoriality" (1997) Hastings Int'l & Comp L Rev 177, 182.

[127] Ian Brownlie *Principles of Public International Law* (5th ed, Oxford University Press, New York, 1998) 306. See also Covey T Oliver and others *The International Legal System* (4th ed, Foundation Press, New York, 1995) 166.

[128] Sir Arthur Watts *International Law and the Antarctic Treaty System* (Cambridge, Grotius Press, 1992) 166

there are substantial variations in the character of State practice based on nationality jurisdiction. Extraterritorial prescriptive elements are evident in New Zealand legislation in a range of criminal, citizenship, fisheries, transport, taxation and social security legislation.[129] Other States have also developed a variety of applications. Like New Zealand, the United States, Sweden, Germany and Australia have responded to child sex tourism through domestic laws enabling them to prosecute their own nationals for engaging in child sex crimes abroad.[130] The United Kingdom legislature has conferred jurisdiction over nationals in respect of treason, murder, bigamy, and breaches of the Official Secrets Act,[131] wherever those offences may be committed.[132] Typical United States assertions of jurisdiction under the nationality principle include the application of tax statutes and the prosecution of United States nationals for treason and relations with enemy nations and rules for requisitioning.[133] France in 1795 established jurisdiction over all French nationals who commit 'serious crimes' outside its territories.[134]

Nationality provides the principle basis of jurisdiction for all States in cases of criminal acts in locations where the territorial criterion is inappropriate, such as in outer space,[135] or in Antarctica.[136] The 1991 Madrid Protocol on Environmental Protection to the Antarctic Treaty,[137] for example, relies on the nationality principle for

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[129] See S J Shields *Out of Sight – Out of Mind? Extraterritorial Jurisdiction* (LLM Research Paper, Victoria University of Wellington, 1981) 78.

[130] See Eric Thomas Berkman "Responses to the International Child Sec Tourism Trade" (1996) Boston College Int'l & Comp LR 397 and Margaret A Healy "Prosecuting Child Sex Tourists At Home: Do Laws in Sweden, Australia, and the United States Safeguard the Rights of Children As Mandated by International Law?" (1995) 18 Fordham Int'l LJ 1852.

[131] Official Secrets Act 1911 (UK)

[132] Ian Brownlie *Principles of Public International Law* (5th ed, Oxford University Press, New York, 1998) 303.

[133] See Wade Estey "The Five Bases of Extraterritorial Jurisdiction and the Failure of the Presumption Against Extraterritoriality" (1997) Hastings Int'l & Comp L Rev 177, 182-186.

[134] See Code de 3 brumaire an 4, art 11 (Oct 23 1795) discussed in Geoffrey R Watson "Offenders Abroad: The Case for Nationality-Based Criminal Jurisdiction" (1992) 17 Yale Journal of International Law" 41, 46.

[135] For example, see the 1998 Agreement Among the Governments of Canada, Governments of Member States of the European Space Agency, the Government of Japan, the Government of the Russian Federation, and the Government of the United States of America on Cooperation in the Detailed Design, Development, Operation and Utilisation of the Permanently manned Civil Space Station (29 January 1998) published as schedule to Civil International Space Station Implementation Act 1999 (Canada).

[136] Ian Brownlie, above, 306.

[137] Protocol on Environmental Protection to the Antarctic Treaty of 1 December 1959 (4 October 1991) 1991 ILM 461; UKTS 1999 No 6 (cm 4256); NZTS 1998 No 3.

its effective implementation. In giving domestic effect to the Madrid Protocol, countries, including CCAMLR Parties New Zealand, Australia, the United Kingdom and the United States, prescribe strict conditions for the activities of their nationals and on companies within their jurisdiction.[138]

Nationality based jurisdiction has also been developed as a tool of high seas fisheries management, as will be discussed further below. Its prescriptive use in these extra-territorial situations has been unquestioningly embraced by the international community. Based on the general principles discussed above, it can be seen that a State's nationals can not escape the confines of its laws by boarding a foreign vessel. Nor can reflagging their vessels to foreign registries set them outside its prescriptive reach. Accordingly, a State's authority can legitimately extend to directing nationals to conduct fishing operations on board foreign flagged vessels consistently with standards prescribed by that State.[139] It is only extra-territorial enforcement of those nationality based prescriptions which remains contentious.

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[138] See Antarctica (Environmental Protection) Act 1994 s 1; Antarctic Treaty (Environment Protection) 1980 (Cth) s4(1)(b); Antarctica Act 1994 (UK) ss 6-10 and 21-23 and Antarctic Conservation Act 44 USC § 2402 (1996).

[139] See Smith, above, 153.

V JURISDICTION ON THE HIGH SEAS

The principal objection raised to the 1998 proposal to formalise nationality jurisdiction in CCAMLR was concern that so doing would undermine the traditional principle of flag State jurisdiction. The concerns expressed by those States so minded implied the exclusivity of jurisdiction on board another State's flagged vessel was in some way more inviolable than States' jurisdiction over their land based territory. Their objections made no distinction between extra-territorial prescription and enforcement, thus suggesting that both were at odds with the accepted norms of high seas governance. The analysis above has shown that this is not so. Non-flag States are clearly entitled to prescribe law to apply extraterritorially to their nationals. Accordingly, discussion here focuses on the concept of flag State enforcement jurisdiction, its clear limitations in the face of flags of convenience and contemporary alternatives to exclusive flag-State-based compliance regimes.

Flag State Jurisdiction

The concept of flag State jurisdiction essentially vests sovereignty over vessels on the high seas in the State of the flag which each vessel flies. The principle was developed through customary international law and treaties so as to subject the high seas to a legal order. [140] As Grotius established, there is no inherent sovereignty over the open ocean because it is outside the territorial dominion of any single State. It follows from the notion of freedom of the high seas that that all rights pertaining to ocean resources reside in all States equally.[141] The grant of its flag is the mechanism by which a State gives individuals the right to benefit from its share in those collective sovereign rights.[142]

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[140] The need for protection of vessels from the hazards of interState commercial relations and wartime neutrality prompted the evolution of the notion of connection of every vessel to a single, identified flag. See Boleslaw Adam Boczek *Flags of Convenience: An International Legal Study* (Harvard University Press, Cambridge Massachusetts, 1967) 94. See also Sir Robert Jennings and Sir Arthur Watts (eds) *Oppenheim's International Law Vol1* (9th ed, Longman, Harlow Essex, 1992) 727.

[141] Myres S McDougal, William T Burke, and Ivan A Vlasic "The Maintenance of Public Order at Sea and the Nationality of Ships" (1960) 54 American Journal of International Law 25, 61.

The principle of flag State jurisdiction is codified in the 1982 United Nations Law of the Sea Convention. UNCLOS provides that ships may avail themselves of the flag of one State only and that vessels are subject to the "exclusive jurisdiction" of that flag State while on the high seas.[143] It also requires each State to exercise its jurisdiction to control "effectively" administrative, technical and social matters relating to all ships it permits to fly its flag.[144] The act of granting its flag thus entitles the State to apply its internal law over each ship flying its flag including its master, officers and crew. In assuming legal authority over a vessel by admission to its register, the State also assumes an obligation to ensure that the vessel and those on board act consistently with international law.[145]

The primacy of the flag State's jurisdiction underlines the entitlement of the flag States of the Southern Ocean IUU fishing fleet to demand recognition of their jurisdiction over such vessels. Their right to prescribe and enforce laws applying to those vessels within and beyond their maritime territory must be respected. No State may directly apply its authority to the ships of those States, except as in specific instances authorised by international law. Likewise, the flag State may protect the ships to which it has ascribed its national character against unlawful interference and deprivation by other States. [146] On closer examination, however, these rules confirm that the exclusivity prescribed by the UNCLOS regime relates essentially to enforcement jurisdiction - application of law, and deprivations in accordance with it, not the passage of extraterritorial law itself.

Flags of Convenience Jurisdiction

The exclusive nature of flag State enforcement jurisdiction is a clearly articulated and long held tenet of international law. The concept has not been immune

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[142] Brian D Smith *State Responsibility and the Marine Environment* (Clarendon Press, Oxford, 1988) 157.
[143] Article 9-2.
[144] Article 94.
[145] See Boczek, above, 284.
[146] Myres S McDougal, William T Burke, and Ivan A Vlasic "The Maintenance of Public Order at Sea and the Nationality of Ships" (1960) 54 Am J Int'l Law, 25, 26-27, Boleslaw Adam Boczek *Flags of Convenience: An International Legal Study* (Harvard University Press, Cambridge Massachusetts, 1967) 92.

to challenge, however, in situations where flag States have failed to exercise the jurisdiction so vested in them. CCAMLR's records of its battle with the illegal fishery are replete with incidents of such failure. Reliance on non-member flag States to enforce CCAMLR's conservation measures has achieved little to curb the piracy of Patagonian toothfish. Even those Commission members most vocal in their objection to the nationality initiative recognise the particular challenge facing the organisation in the form of flag of convenience vessels.[147]

Flags of convenience offer vessel owners considerable financial benefits, including avoidance of stringent safety standards, high wages, training requirements, and vessel conditions.[148] Reflagging is also a relatively easy means for a fishing vessel to escape internationally agreed conservation and management measures on the high seas which its own flag State would have otherwise enforced.[149] In 1999 the FAO reported to the International Maritime Organisation that some five per cent of fishing vessels in the 100-150 gross registered tonne (GRT) range were flagged in open registers. That percentage rose to 14 per cent for fishing vessels over 4000 GRT.[150] The report also noted that the number of fishing vessels being registered under open registers has continued to increase in spite of an overall reduction in the size of the global fishing fleet.[151] The FAO attributed much of the increase in fishing vessels in open registers to a proliferation of new countries offering flags of convenience.[152]

International law permits States to fix for themselves the conditions for the grant of their nationality to vessels, for the registration of vessels in their territory, and for

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[147] See, for example, the comments of Norway's 1998 CCAMLR Alternate Commissioner Terje Lobach in "Measures to be Adopted by the Port State in Combating IUU Fishing" Paper presented to the Expert Consultation on Illegal, Unreported and Unregulated Fishing organised by the Government of Australia in cooperation with the FAO (Sydney, 15-19 May 2000) AUS:IUU/2000/15.

[148] See George C. Kasoulides *Port State Control and Jurisdiction: Evolution of the Port State Regime* (M Nijhoff, Boston, 1993) 76; see also *Oceans and the Law of the Sea: Report of the Secretary General* (United Nations, New York, 2000) Doc. A/54/429, paragraph 185.

[149] Penelope Ridings "Compliance, Enforcement and the Southern Oceans: The Need for a New Approach" in RA Herr (ed) *Sovereignty at Sea: From Westphalia to Madrid* (Wollongong Papers on Maritime Policy No 11, Centre for Maritime Policy, University of Wollongong, 2000) 175, 183.

[150] FAO Report to the Seventy-First Session of the International Maritime Organisation's Maritime Safety Committee (London, 19-28 May 1999)

[151] In a 1997 report Greenpeace noted that fifteen percent of new additions to the world's fishing fleet belonged to Honduras, Liberia, and Cyprus. See discussion of Greenpeace findings in Kevin Bray "A Global Review of Illegal, Unreported and Unregulated (IUU) Fishing" Paper presented to the Expert Consultation on Illegal, Unreported and Unregulated Fishing organised by the Government of Australia in cooperation with the FAO (Sydney, 15-19 May 2000) AUS:IUU/2000/6.

[152] FAO, above.

the right to fly their flags.[153] A number of countries allow the registration of foreign owned and foreign controlled vessels under conditions which are convenient for the persons registering the vessels.[154] Such 'open registries' operate an 'open door' policy, enabling natural and legal persons, regardless of their nationality, to register their ships with them and sail under their flags.[155] Together with the complexities of multinational corporate structures, the phenomena of open registries can lead to situations where vessels may be built in one State, fly the flag of another State, and be owned and controlled by persons in yet other countries. Such vessels may also change their State of registration frequently.[157]

The authorities of so-called 'flags of convenience' registries are often hampered in their exercise of flag State jurisdiction by the fact their only link with the vessel concerned is the act of registration itself. Such flag States struggle to enforce fishing regulations over vessels which rarely call at their ports. They often lack the infrastructure necessary for policing a high seas fleet, or the real authority to exert control over powerful multinational fishing interests. [158] Significantly, however, flag States are often reluctant to strictly enforce international obligations for fear of discouraging often lucrative flag of convenience registration. [159]

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[153] Article 91 UNCLOS.

[154] Boczek, above, 2.

[155] Emeka Duruigbo "Multinational Corporations and Compliance with International Regulations Relating to the Petroleum Industry" (2001) 7 Ann. Surv. Int'l & Comp. L. 101, 110.

[156] A 1979 UK Committee of Inquiry into Shipping identified the salient features of flags of convenience as vessel ownership by non-nationals, easy access to the registry, taxes that are low and levied abroad, participation mainly by small powers to whom receipts from the business might make a difference to national income and balance of payments, manning of the ships by non-nationals, and lack of the power and administrative machinery to impose regulations or the inclination or capability to control the companies. Committee of Inquiry into Shipping, Report 51 (London: HMSO, 1979) CMND 4337. Open registries offer non-nationals reduced operating costs through avoidance of requirements to employ qualified personnel for manning and crewing purposes, social security obligations and the influence of strong. See Duruigbo, above, 113-114.

[157] Masuyaki Komatsu "The Importance of Taking Cooperative Action Against Specific Fishing Vessels that are Diminishing Effectiveness of Tuna Conservation and Management Measures" Paper presented to the Expert Consultation on Illegal, Unreported and Unregulated Fishing organised by the Government of Australia in cooperation with the FAO (Sydney, 15-19 May 2000) AUS:IUU/2000/5.

[158] See Duruigbo, above, 108.

[159] Income derived from vessel registration fees can be a significant source of revenue for flag States and foreign owned fishing vessels can make a significant contribution to a State's efforts to build catch history. On open registry operation generally see Paul Stephen Dempsey "Compliance and Enforcement in International Law: Oil Pollution of the Marine Environment by Ocean Vessels" (1984) 6 J Int'l L Bus, 459, 527.

The International Tribunal for the Law of the Sea has pointed out that:[160]

> *there is nothing in [UNCLOS] to permit a State which discovers evidence indicating the absence of proper jurisdiction and control by a flag State over a ship to refuse to recognise the right of such a ship to fly the flag of that State.*

States' right to themselves decide under what conditions they will grant nationality to their ships implicitly obliges other States to recognise the unilateral exercise of this right. However, UNCLOS also provides that there must exist a genuine link between the State and the ship.[161] It might be thought that a relationship between a State and reflagged foreign controlled fishing vessel based on no more than the act of registration would fail to meet this standard. However, UNCLOS neither clearly defines a 'genuine link'[162] nor explicitly accepts that its absence can justify another State exerting control over that vessel on the high seas.[163]

In a number of cases, States in which foreign flagged vessels are owned and controlled have sought recognition of an entitlement to exert control over the vessel on that basis. In most of these the nationality of ownership of the vessel has proved largely insufficient to dislodge the primary competence of the State of its registration.[164] However, international law has responded to situations when the flag

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[160] *M/V "Saiga" (No 2) (Saint Vincent and the Grenadines v Guinea)* (1999) 38(5) ILM 1323, 1343 (ITLOS).

[161] The concept of the 'genuine link' originates in the *Nottebohm* case (*Liechtenstein v Guatemala)* April 6 1955 (ICJ Rep 1955, 4) where the International Court of Justice faced the question of whether a State could exercise consular protection in respect of an individual whose connection with that State was limited in nature. While acknowledging that a State could fix the rules relating to nationality, the majority opinion delivered by President Green H Hackworth recognised that for the right of consular protection to be recognised the legal bond of nationality had to accord with the individual's genuine link with the State assuming to protect its citizen. The concept was introduced to formal international law in 1958 by the Convention on the High Seas having being extensively debated earlier in the International Law Commission and United Nations. See Sir Robert Jennings and Sir Arthur Watts (eds) *Oppenheim's International Law Vol1* (9th ed, Longman, Harlow Essex, 1992) 732.

[162] Subsequent attempts to define the concept led to the 1986 negotiation of the United Nations Convention on Conditions for Registration of Ships. That Agreement never came into force, and efforts have since focused on flag State responsibility. See Budislav Vukas and Davor Vidas "Flags of Convenience and High Seas Fishing" in Olav Schram Stokke ed *Governing High Seas Fisheries: The interplay of Global and Regional Regimes* (Oxford, University Press, 2001) 53-90, 65-66.

[163] In the *"Saiga" (No 2) Case,* above, 1342-3, ITLOS noted that "while the obligation regarding a genuine link was maintained in the 1958 Convention, the proposal that the existence of a genuine link should be the basis for the recognition of nationality was not adopted."

[164] See the *SS I'm Alone (Canada v United States of America)* (1933), (1935) 39 AJIL 326, (1949) 3 Rep Int Arb Awards 1611 in which Commissioners appointed to decide upon the Canadian claim for compensation for a vessel sunk by the US for smuggling liquor found the vessel de facto owned, controlled, and, at the critical times, managers and its movements directed and its cargo dealt with and disposed of by US citizens but still held the act of sinking the vessel "unlawful" and ordered the United States to apologise and pay to the Canadian Government $25,000. See also *Anklagemyndigheden v*

State is unable or unwilling to take responsibility, by recognising exceptions to flag State jurisdiction which allow for a certain degree enforcement over the vessel itself by non-flag States.[165]

The Narrowing Exclusivity of Flag State Jurisdiction

UNCLOS, therefore, offers a clear presumption that enforcement of rules over the vessels and those aboard while on the high seas will generally rest with the flag State, but it also allows that is this is not always so. Other States' jurisdictional competence may be territorial in nature or it may be based on one of the other accepted bases of jurisdiction: universality, nationality, territorial impact, passive personality or protective 'act of State'.[166]

A number of exceptions to flag State enforcement jurisdiction within UNCLOS rely on the territorial sovereignty of port and coastal States. The Convention authorises the coastal State to take the necessary steps in its territorial sea to prevent passage which is not innocent, or to prevent any breach of the conditions to which admission of those ships to its internal waters port facilities outside its internal waters is subject.[167] Further, in respect of its sovereign rights of conserving and managing natural resources, coastal States may take measures, including boarding, inspection, arrest and judicial proceedings, as may be necessary to ensure compliance with the laws and regulations adopted by it in conformity with the UNCLOS regime.[168] International law also recognises in port States authority to exercise enforcement jurisdiction over marine pollution violations that occur on the high seas or in the

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Peter Michael Poulsen and Diva Navigation Corp 1992 ECJ I 6019 in which the European Court of Justice considered the applicability of an EU regulation which implemented conservation measures (prohibiting the transport and storage on board of salmon caught in certain areas not under the sovereignty or jurisdiction of the Member States) to the Danish crew of a Panama flagged but Danish owned and controlled vessel. The court held that a vessel registered in a non-member country could not be treated as a vessel with the nationality of a Member State on the ground that it had a genuine link with that Member State. The court also reiterated that the nationality of the master and crew were insufficient grounds to displace the flag State's jurisdiction over the vessel.

[165] David Vidas "Emerging Law on the Sea issues in the Antarctic Maritime Area: A Heritage for the New Century" (2000) 31 Ocean Dev and Int'l Law 197, 203.

[166] Myres S McDougal, William T Burke, and Ivan A Vlasic "The Maintenance of Public Order at Sea and the Nationality of Ships" (1960) 54 Am J Int'l L 25, 84.

[167] Article 25.

[168] Article 73.

waters of other nations which might have serious repercussions within their territory.[169]

UNCLOS also provides extra-territorial exceptions to exclusive flag State enforcement jurisdiction. All States have the right of visit and search in enforcement of universal prohibitions against piracy, the slave trade, and unauthorised broadcasting. [170] Through recognition of the right of hot pursuit, UNCLOS authorises coastal States to continue onto the high seas in the uninterrupted pursuit of foreign vessels in relation to offences committed within their territory.[171]

Further exceptions to flag State jurisdiction can also be found in the fisheries context. The Fish Stocks Agreement allows States which are members of regional fisheries organisations to board and inspect fishing vessels flying the flag of another State which is a party to the Agreement irrespective of whether the violator (which must be a Party to the Fish Stocks Agreement) is a Party to the particular treaty establishing the rule.[172] Similar exceptions are evident in a number of regional fisheries management organisations. Boarding and inspection authority is extended to other member States by many such arrangements.[173] Others go further providing for non flag State arrest and detention.[174]

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[169] See Articles 4-6 of MARPOL 73/78 (International Convention for the Prevention of Pollution from Ships 1973 as modified by the Protocol of the 1978 Relating Thereto (MARPOL 73/78) 1046 UNTS 120), Part XII of UNCLOS and the International Convention on Intervention on the High Seas in Cases of Oil Pollution Casualties (29 November 1969) 970 UNTS 211 and the 1973 Protocol relating to Intervention on the High Seas in Case of Marine Pollution by Substances Other Than Oil (2 November 1973) 1313 UNTS 3; UKTS 27 (1983) ATS 1984 No 5.

[170] Article 110 recognises a right of visit of warships on the high seas where there are reasonable grounds for suspecting that a ship is engaged in piracy, the slave trade or unauthorised broadcasting, where the ship is without nationality, or where the vessels is flying a foreign flag or refusing to show its flag, when it is in reality the same nationality as the warship. Further, where the vessel sails under the flags of two or more States, using them according to convenience, it may be assimilated to a ship without nationality (Article 92(2)) and consequently subject to the right of visit under Article 110.

[171] Article 111.

[172] Article 21 (5)-(7). The flag State can either proceed with its own investigation and enforcement or can authorise the inspecting State to conduct the appropriate investigation and to take any necessary enforcement action. If the flag State, after notification, has failed to respond or take action and if the alleged violations are classified as serious, inspectors may remain on board and secure evidence and where appropriate may bring the vessel to the nearest port.

[173] See for example the Convention on the Conservation and Management of Pollack Resources in the Central Bering Sea (16 June 1994) <www.oceanlaw.net/texts/bering.htm> (last accessed 3 February 2002) (Article 11(6)-(7)); the International Convention for the High Seas Fisheries of the North Pacific Ocean (9 May 1952) <http://sedac.ciesin.org/entri/texts/fisheries.north.pacific.1952.html> (last accessed 3 February 2002) Art X(c); Framework Agreement for the Conservation of Living Marine

Concurrent Jurisdiction

The discussion above has shown that persons aboard vessels on the high seas are not necessarily subject to the enforcement authority of vessel's flag State alone. Other States' interests also have legal effect. These can be prescribed extraterritorially and enforced too, provided a facilitating arrangement to which the flag State has consented to be bound is in place. These exceptions to the principle of exclusive flag State jurisdiction do not diminish the primary authority of the flag State with respect to its vessels on the high seas. Instead, they identify a degree of concurrent jurisdiction vested in other, non-flag, States. The protestation of inconsistency with international law propounded by those CCAMLR parties not enthused by the nationals initiative therefore lacks the full support of legal practice, treaty and convention on which it was based.

The exercise of prescriptive jurisdiction over nationals in accordance with accepted principles of non-interference, accommodation and proportionality cannot undermine the flag State's sovereignty over the vessel.[175] Accordingly, the principle of flag State jurisdiction does not prevent CCAMLR Parties from prescribing legislation to require their nationals to conform with the regime's conservation measures. The principle does prevent them, however, from enforcing those laws while the vessel is on the high seas. The exclusivity of flag State jurisdiction is such that in the absence of the concurrence of the authorities of the State in which the IUU

Resources on the High Seas of the South Pacific (Galapagos Agreement) (14 August 1999) <http://www.oceanlaw.net/texts/galapogos.htm> (last accessed 3 February 2002) Article 9.

[174] ASOC gives as examples the International Convention for the High Seas Fisheries of the North Pacific Ocean (9 May 1952) <http://sedac.ciesin.org/entri/texts/fisheries.north.pacific.1952.html> (last accessed 3 February 2002) (Article 10(1)(a)-(b)); the Convention on the Conservation of Andromous Stocks in the North Pacific Ocean (11 February 1992) <http://www.oceanlaw.net/texts/npas.htm> (last accessed 3 February 2002) Article 5; and the Agreement among Pacific Island States Concerning the Implementation and Administration of the Treaty of Fisheries between the Governments of Certain Pacific Island States and the Government of the United States of America (2 April 1987) NZTS 1988 No 32; ATS 1988 No 42 which enables Pacific Island parties to not only arrest US vessels and crews, but also to impose penalties (Art 4(1)-(2)). See "Antarctic and Southern Ocean Coalition Paper on the Creation of a CCAMLR Enforcement Regime" CCAMLR XVI/BG/38 (Paper presented to CCAMLR XVI, Hobart 27 October 1997) 8-10.

[175] See "Report of a Parliamentary Committee Inquiring into the Legal Regimes of the Australian Antarctic Territory of Heard Island and McDonald Islands 14-16 October 1992" in W Bush (ed)

fishing vessels are registered, extra-territorial enforcement of rules for a State's nationals will depend on the presence of the national within the territory of the aggrieved State.[176] Yet, as will be discussed below, this apparent limitation on the practical application of jurisdiction based on nationality has not inhibited signatories to a number of other fisheries arrangements from putting the concept to use.

Antarctica and International Law: A Collection of InterState and National Documents (loose-leaf, Oceania Publications Inc, New York) D.AU16101992.1 paragraph 3.12.

[176] See Brian D Smith *State Responsibility and the Marine Environment* (Clarendon Press, Oxford, 1988), 153.

VI NATIONALITY JURISDICTION IN FISHERIES MANAGEMENT

The analysis above has identified a right possessed by each State to prescribe its nationals conduct anywhere, including in the territory of another State and upon foreign flagged vessels. A State's duty to act positively to control its nationals may be authoritatively located in Article 117 of UNCLOS. That Article, to recall, imposes on all States a duty or individually, or cooperatively, to take such measures for their respective nationals as may be necessary for the conservation of the living resources of the high seas.

The Meaning of 'Nationals' in Multilateral Arrangements

The legal relationship between a flag State and vessel has historically been described as the 'nationality' of that vessel.[177] Hence, there is degree of ambiguity in the meaning of the term "nationals" used in Article 117.[178] The obligation set out in UNCLOS replicates a provision of the 1958 Convention on Fishing and Conservation of the Living Resources of the High Seas.[179] That Convention itself drew on the earlier work of the International Law Commission.[180] Although much of International Law Commission discussion addressed States' rights and obligations as regards "fishers", the 1958 Convention ultimately provided that: [181]

> *[F]or purposes of various articles in the Convention dealing with the effects upon fishing vessels of an actual or proclaimed conservation program, the term 'nationals' means fishing boats or craft of any size having the nationality of the State concerned, according to the law of that State, irrespective of the nationality of the members of their crews.*

This definition is somewhat incongruous given that term 'vessel' itself is synonymous with the individuals associated with a ship. Vessels do not themselves engage in conduct in violation of international rules, but are merely the tool by which

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[177] Budislav Vukas and Davor Vidas "Flags of Convenience and High Seas Fishing" in Olav Schram Stokke ed *Governing High Seas Fisheries: The interplay of Global and Regional Regimes* (Oxford, University Press, 2001) 53, 54.

[178] At CCAMLR XVII the European Community, together with other Members, expressed the view that the term 'nationals' in the context of Article 117 refers to vessels only. *Report of the Seventeenth Meeting of the Commission* (CCAMLR, Hobart, 1998) paragraph 5.64.

[179] Convention on the High Seas (29 April 1958) 463 UNTS 366.

[180] See United Nations *Yearbook of the International Law Commission 1955 Volume 1: Summary records of the seventh session* (United Nations, New York, 1960)

human actors do so.[182] With growing public awareness of current global fisheries crisis, the commonly accepted meaning of the obligation as regards "nationals" can seen to have broadened, eclipsing any doubt that it extends to citizens and registered companies.

The 1982 negotiators of UNCLOS did not retain the explicit Statement that "nationals" meant fishing vessels. More recent multilateral agreements have clearly spelled out distinct obligations as regards nationals as well as flag vessels. The Code of Conduct, for example, provides that States should identify and secure the collaboration of relevant domestic parties in achieving responsible fisheries management.[183] Further references to nationals within the Code include an injunction to ensure that measures applicable in respect of masters and other officers charged with an offence relating to the operation of fishing vessels include "provisions which may permit, inter alia, refusal, withdrawal or suspension of authorisation to serve as masters or officers of a fishing vessel."[184]

The International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing (IPOA) identifies the UNCLOS provisions as the source of obligations on States to identify those nationals who are the operators or beneficial owners of vessels involved in IUU fishing;[185] to discourage nationals from flagging fishing vessels under the jurisdiction of a State that does not meet its flag State responsibilities;[186] and to ensure that sanctions for IUU fishing by vessels and nationals are of sufficient severity to effectively prevent, deter and eliminate IUU fishing and to deprive offenders of the benefits accruing from such fishing.[187]

A brief survey of other international fisheries instruments further illustrates the acceptance of jurisdiction over nationals as a tool of high seas fisheries management.

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[181] Article 14 Convention on Fishing and Conservation of the Living Resources of the High Seas (29 April 1958) 559 UNTS 285.
[182] Brian D Smith *State Responsibility and the Marine Environment* (Clarendon Press, Oxford, 1988), 147.
[183] Article 7.1.2
[184] Article 8.1.9
[185] Article 18.
[186] Article 19.
[187] Article 21.

The Fish Stocks Agreement provides for co-operation between relevant coastal States and "States whose nationals fish for straddling or highly migratory fish stocks in the adjacent high seas areas."[188] The Agreement requires States to ensure the full cooperation of their relevant national agencies and industries in implementing the recommendations and decisions of FMOs.

Arrangements establishing a number of FMOs also refer separately to both 'vessels' and 'nationals' suggesting that the latter encompasses natural and legal persons as well as ships.[189] Other recent FMO instruments make explicit references to members' obligations concerning their nationals distinct from flag State responsibilities.[190] These responsibilities relating to the activities of nationals imply acceptance by their signatories that States may exert jurisdiction over the activities of those nationals undertaken on the high seas.[191]

Controls on Nationals in State Practice

Consistent with this understanding of their international obligations, a number of the CCAMLR fishing parties, have already established extra-territorial controls over the high seas fishing activities of their citizens, residents and corporate entities.[192]

The New Zealand Antarctic Marine Living Resources Act 1981 provides that it is an offence for any person to take an Antarctic marine living organism from the

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[188] Article 7 (a) and (b).

[189] For example, the Convention for the Conservation of Southern Bluefin Tuna (10 May 1993) UNTS 1819 359; NZTS 1994 No 11 (Article 5(4)); and the Federated States of Micronesia Arrangement for Regional Fisheries (30 September 1994) <http://www.oceanlaw.net/texts/micronesia.htm> (last accessed 3 February 2002) (Arts 12 (2)).

[190] See for example, the Convention on The Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean (Article 23(5)), the Framework Agreement for the Conservation of Living Marine Resources on the High Seas of the South Pacific (Galapagos Agreement) (Article 8); the Agreement Between the Government of Iceland, the Government of Norway and the Government of the Russia Federation Concerning Certain Aspects of Cooperation in the area of Fisheries (15 May 1999) <http://www.oceanlaw.net/texts/barents.htm> (last accessed 3 February 2002) (Article 6); and the Convention on the Conservation and Management of Fishery Resources In the South-East Atlantic Ocean (signed 20 April 2001 but not yet in force) <http://www.oceanlaw.net/texts/seafo.htm> (last accessed 3 February 2002), (Article 13 (6)(a)).

[191] Penelope Ridings "Compliance, Enforcement and the Southern Oceans: The Need for a New Approach" in RA Herr (ed) *Sovereignty at Sea: From Westphalia to Madrid* (Wollongong Papers on Maritime Policy No 11, Centre for Maritime Policy, University of Wollongong, 2000) 175-190, 186.

[192] Parties which notified CCAMLR of an intention to authorise flag vessels to fish in the CCAMLR Area in the 2001/02 season comprised: Argentina, Australia, Chile, France, Japan, ROK, New Zealand,

CCAMLR Convention Area, where that person is not authorised to do so either by New Zealand or by another CCAMLR Contracting Party. The Act applies to any act or omission occurring on any New Zealand ship or by any New Zealand citizen wherever that ship or person may be.[193] Section 113E of the New Zealand Fisheries Act 1996 prohibits New Zealand nationals from using a foreign vessel on the high seas to take for sale, to transport any fish, taken on the high seas, except in accordance with a high seas permit.[194]

The Spanish Fisheries Law 2001[195] leaves open the possibility of nationals fishing on reflagged vessels, but retains Spain's competence to find them guilty of administrative offences in relation to IUU fishing on such vessels. The legislation sets in place a regime of offences and sanctions applicable to all Spanish: [196]

> *ship owners, ship builders, shippers, captains, and managers, persons who direct fishing activities, transport carriers, any persons involved in the transport of fisheries products, owners of companies trading in or processing fisheries products and the responsible staff of such.*

Fishing without a permit, non-compliance with conditions therein, and any activity that threatens the management and conservation of living marine resources are 'serious offences' under the law. Serious offences are elevated to 'very serious offences' if conducted by a Spanish national on a flag of convenience vessel.[197]

Norway, Poland, Russia, South Africa, Spain, Ukraine, Uruguay. See notification papers in *Report of the Twentieth Meeting of the Commission* (CCAMLR, Hobart, 2001) Annex 2.

[193] Section 1 Antarctic Marine Living Resources Act 1981.

[194] Section 113E of the Fisheries Act 1996 recognises authorisation given only by the competent agency of a State that is a party to the Fish Stocks Agreement; or a party to the FAO Compliance agreement; a party to, or has accepted the obligations of, a global, regional, or sub-regional fisheries organisation or arrangement to which the authorisation relates; or either a signatory to the Fish Stocks Agreement; or a State with legislative and administrative mechanisms to control its vessels on the high seas in accordance with that Agreement. Fishing other than in accordance with such a permit is an offence.

[195] Ley de Pesca Maritima del Estado 26 March 2001 (B.O.E. No 75 De 28 de Marzo de 2001)

[196] Articles 90 – 91.

[197] Article 96 (1) (v). The limitations of Spain's legislation were revealed however in the prosecution of the master of the South Tomi. Spain's legislation requires the establishment of a list of flags of convenience by regulation. At CCAMLR XX Spain urged CCAMLR to produce such a list noting that it had been unable to prosecute the master of the South Tomi because no such list existed. See *Report of the Twentieth Meeting of the Commission* (CCAMLR, Hobart, 2001) Annex V paragraph 2.21.

Australia's Antarctic Marine Living Resources Conservation Act 1981 also extends its jurisdiction to Southern Ocean fishing activity by Australian nationals as well as Australian vessels.[198]

Although not an explicit element of its CCAMLR related legislation, Japan recognises its extra-territorial jurisdiction over its nationals in regulations designed to require Japanese nationals to obtain the Government's permission before working aboard non-Japanese flag fishing vessels operating in the Atlantic bluefin and Southern bluefin tuna fishing areas.[199] It is also the Stated intention of the Japanese Government to deny its nationals permission to work aboard a foreign fishing vessel in any other fishery if the vessel's flag State is not a member of the fisheries organisation regulating that fishery.[200]

'Non-fishing' CCAMLR parties have also put extraterritorial prescriptions in place relating to nationals in the CCAMLR area. The United States Antarctic Marine Living Resources Convention Act 1984 forbids any "individual, partnership, corporation, trust, association and any other entity subject to the jurisdiction of the United States" to engage in harvesting or associated activities in violation of provisions of the Convention or in violation of a conservation measure in force with respect to the US. [201] The Act deems it an offence to ship, transport, offer for sale, sell, purchase, import, export, or have custody, control or possession of, any Antarctic marine living resource (or part or product thereof) known, or reasonably ought to have been known, to have been harvested in violation of a conservation measure. The offence provisions apply without regard to the vessel that was used.[202]

Similarly, the United States High Seas Fishing Compliance Act 1995 makes it unlawful for any person subject to the jurisdiction of the United States to use a high

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[198] Section 5(2)(a). Although Australia has ratified the Fish Stocks Agreement, it has yet to set in place an implementing regime to control the access of its fishing vessels and nationals to the high seas. See Australian Fisheries Management Authority *Implementation of the United Nations Fish Stocks Agreement* (Discussion Paper, 2001).

[199] Ministry Decree Concerning Permission for Some Designated Fisheries (Article 98(2) Restriction on harvesting of tuna or marlin) 1998

[200] Masuyaki Komatsu "The Importance of Taking Cooperative Action Against Specific Fishing Vessels that are Diminishing Effectiveness of Tuna Conservation and Management Measures" Paper presented to the Expert Consultation on Illegal, Unreported and Unregulated Fishing organised by the Government of Australia in cooperation with the FAO (Sydney, 15-19 May 2000) AUS:IUU/2000/5.

[201] *Antarctic Marine Living Resources Convention Act* 44A USC § 2432 (1984)

seas fishing vessel on the high seas in contravention of international conservation and management measures.[203] The Act uses an expansive definition of "vessel of the United States" to extend its jurisdiction to include vessels at least partly owned by US nationals or companies and vessels formerly owned by US unlawfully sold to non-nationals or placed under a foreign flag.[204]

Examination of the relevant legislation of a number of other CCAMLR fishing States, however, shows continued reliance on flag State controls. While, Norway has regulations which allow it to control the activities of Norwegians, their application is specifically restricted to the presence of those nationals on its flag vessels.[205] Norway's legislative response to IUU fishing has focused on territorial sanctions against non-nationals. Its Regulation Relating To Fishing And Hunting Operations By Foreign Nationals In The Exclusive Economic Zone of Norway provide that an application for a licence to fish in Norwegian waters may be denied if the vessel or its owner has taken part in an unregulated fishery on the high seas on a fish stock subject to regulations in waters under Norwegian fisheries jurisdiction. [206]

South Africa's fisheries legislation applies extraterritorially to any South African citizen or resident,[207] and holds open the possibility of regulations to ensure the orderly development of high seas fisheries by South African persons and vessels, but its provisions for implementation of international conservation measures rely primarily on flag State action.[208] Others, such as the Republic of Korea, do not address high seas fishing in their principal fisheries legislation at all.[209]

As shown, there are a number of examples of CCAMLR States already using nationality jurisdiction. However, the legislative practice of most Parties does not

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[202] Section 2432-5.
[203] Sections 5505-7.
[204] Section 5502 (9)(B)(iii)(iv)–(C). The Act provides that no vessel shall engage in harvesting operations on the high seas without a valid permit s5503(a), no permit can be granted to a vessel which has been suspended because it undermined international conservation and management measures. No permit will be issued if the US will be unable to exercise its obligations toward that vessel.
[205] Regulation of 4 March 1998 Relating to Fisheries in Waters Outside the Fisheries Jurisdiction of any State (Norway).
[206] Regulation of 13 May 1977 Relating To Fishing And Hunting Operations By Foreign Nationals In The Exclusive Economic Zone of Norway.
[207] Section 70(1)(b) Marine Living Resources Act 1998 (RSA)
[208] Section 42 (3)(a)-(b) State that the Director-General may provide information on foreign vessels to flag State and notify them of a vessel's presence in South African ports.

demonstrate acceptance that States are required to take measures to control the fishing activities on the high seas of their citizens and companies as well as flag vessels. The legislation in place is patchy. To secure the cooperation necessary for its enforcement, the exercise of such jurisdiction needs to have a high degree of legitimacy, such as would come from the Commission formally recognising its utility and urging its implementation by all member States.

[209] See Fisheries Act (ROK) as amended by Act No 4253 August 1 1990.

VII NATIONALITY JURISDICTION IN CCAMLR IN PRACTICE

The discussion above has demonstrated that international law provides both a duty and a mechanism for CCAMLR parties to extend appropriate control over their nationals fishing in the CCAMLR area on flag of convenience vessels. It has also shown that some, but not all, CCAMLR members already have legislation in place to this effect. Use of the nationals mechanism would require specific action by both the Commission as a whole, and by all of its members individually.

To mitigate any residual doubt that the conservation obligations assumed by States on their ratification of the UNCLOS and CCAMLR Conventions encompass the duty to exercise jurisdiction over nationals, that duty should be explicitly incorporated into the CCAMLR regime.[210] This could take the form of a dedicated conservation measure, or inclusion in a broader compliance protocol.[211]

In giving effect to such a measure, CCAMLR parties would need to ensure the consistency of their domestic legislation with that injunction.[212] To this end, and ironically, the domestic legislation of United States, the sole CCAMLR Party not also Party to UNCLOS, provides a useful model. Contracting Parties would be well served by emulating its expansive extraterritorial coverage of subjects (individuals, partnerships, corporations, trusts, associations and any other entity subject to its jurisdiction) and activities (harvesting or associated activities in violation of provisions of the Convention or in violation of a conservation measure, shipping, transporting, offering for sale, selling, purchasing, importing, exporting, or having custody or control of IUU catch).

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[210] With the exception of the United States all CCAMLR Members are Parties to UNCLOS.

[211] Penelope Ridings "Compliance, Enforcement and the Southern Oceans: The Need for a New Approach" in RA Herr (ed) *Sovereignty at Sea: From Westphalia to Madrid* (Wollongong Papers on Maritime Policy No 11, Centre for Maritime Policy, University of Wollongong, 2000) 175-190, 187.

[212] Customary international law requires that signatory States must adopt and implement treaty rules into their national law. Once a State accepts international treaty obligations, it must usually develop, adopt, or modify existing national legislation to give effect to national policies or strategies that put treaty regulations into effect. Therefore, once the obligations concerning conservation and management of high seas, including Antarctic marine living resources fisheries are domestically implemented, governments must ensure that they are obeyed, specifically that those persons under that State's jurisdiction and control comply with that obligation. See Christopher C Joyner "Compliance and Enforcement in New International Fisheries Law" (1998) 12 Temp Int'l & Comp L J 271, 279.

Parties' legislation should specify sufficiently serious penalties for the detailed infractions to serve as a deterrent. In addition to the punitive measures against the vessel, masters and crew set out in the Code of Conduct, which include provisions for revocation of master and crew authorisations, States should implement CCAMLR Resolution 13/XIX forbidding the relicencing or reflagging of such vessels. To further target the companies controlling the illegal fishery, Parties should introduce proceeds of crime measures whereby States can confiscate the assets of people convicted of offences related to IUU fishing insofar as those assets were derived from that criminal activity.

Enforcement of violations with respect to nationals present in the territory of the State of nationality presents little theoretical difficulty. Individual and corporate vessel owners, and IUU catch traders are thus legitimate targets. Masters and crew members dependent on their State nationality for certification, and resident for revenue purposes are similarly accessible. With regard to front companies, non-resident and nationals, the acquiescence of other States will be a necessary ingredient in successful application of the laws discussed above.

A nationals enforcement regime would not displace responsibility for ensuring compliance by the vessel from the flag State. A nationals regime would instead provide an addition sanction if information becomes known to a Contracting party concerning the activities of a national who is fishing contrary to CCAMLR rules. That sanction would become available once the person concerned came within the territorial jurisdiction of his/her national State.[213]

In some situations prosecution by both the flag State and State of nationality would be possible.[214] Objections based on States' general intolerance of holding

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[213] See "Further Measures to Combat Illegal, Unreported and Unregulated Fishing in the Convention Area" Paper presented by the New Zealand delegation to CCAMLR XVII published in Ministry of Foreign Affairs and Trade *Commission for the Convention for the Conservation of Antarctic Marine Living Resources CCAMLR XVII: Hobart 26 October - 6 November 1998: Report of the New Zealand Delegation* (Wellington, 1998) Annex E.

[214] See M Bryan Schneider and Jody Sturtz Shaffer "Annual Survey of Michigan Law: June 1 1998 – May 31 1999: Constitutional Law" (2000) 46 Wayne L Rev 503 on the relationship between the principles of double jeopardy and separate sovereigns.

offenders double jeopardy[215] can be countered by recognition of the acts of illegal fishing as offences against both the flag State and the State of nationality. While the double jeopardy obstacle would prevent the State of nationality passing judgment on the verdict of a flag State court or the adequacy of a penalty that court imposed,[216] it would not disqualify it from trying an accused for a separate offence against its own legislation.

In practice, a degree of cooperation on the part of flag, and even Port States, is likely to be needed for successful enforcement of jurisdiction over nationals. Eventual prosecution will generally require direct reliable evidence as would be best acquired on board the vessel, or from the landing documents of ports. Given that enforcement measures on board a foreign flag vessel will be generally confined to the presence of the vessel in the non-flag State's region of territorial authority, such information will be most easily collected by those other States.

In the CCAMLR context, the residual primacy of flag State jurisdiction would arguably extend to 'first option' on prosecution and enforcement of sanctions on perpetrators of illegal conduct. Where the flag State has foregone that opportunity, there is no harm done to its sovereignty if the State of nationality chooses to prosecute in its own right. CCAMLR rules could require the State of nationality to cease its prosecution if proceedings have been commenced by the flag State. The goal of such a proposal, after all, is to deter IUU fishing. It matters little whether the nationality jurisdiction is applied on its own or used to prompt flag State compliance.

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[215] Ian Brownlie *Principles of Public International Law* (5th ed, Oxford University Press, New York, 1998) 309.

[216] See for example *P v P* [1993] DCR 843, Judge P A Moran, 849.

VIII CONCLUSION

This paper set out to examine the utility and legitimacy of CCAMLR's requiring its Contracting Parties to exercise extraterritorial jurisdiction over their nationals to stem the tide of illegal fishing by such nationals on vessels flagged to non-contracting States. Discussion of CCAMLR has demonstrated the magnitude of the illegal fishery. Action is urgently needed to tackle the main protagonists if further irreparable damage to fish stocks and the aquatic environment is to be avoided. The involvement of member State nationals across the spectrum of illegal activities represents a significant obstacle to the regime's continued functionality.

In light of the entrenched practice of reflagging, CCAMLR's reliance on flag State responsibility is ineffective. Port and coastal State jurisdiction are also relatively impotent tools in the remote CCAMLR area. Nationality as a basis of extraterritorial jurisdiction holds part of the answer.

Extraterritorial prescriptive jurisdiction is an almost unqualified right of all States; a product of their sovereignty. Extraterritorial enforcement has been revealed as a product of inter-State agreement, and, in fisheries management at least, such cooperation is a clearly emerging trend. Territorial enforcement of extraterritorial prescriptions is a matter of balance and accommodation. In the CCAMLR context, that balance is swung by the severity of the over fishing and the practical difficulties of alternative control mechanisms. Combating 'illegal' fishing for toothfish to conserve fish stocks and save albatrosses is a matter of sufficient seriousness to warrant the use of extraterritorial application of domestic legislation as another tool to help governments restrain and punish their citizens for offences committed in other jurisdictions.

The notion of a responsibility to pursue all opportunities to protect the viability of high seas fisheries is borne out by examination of a number of multilateral fisheries agreements. UNCLOS, the Compliance Agreement, the Code of Conduct, the Fish Stocks Agreement and the IPOA all reveal the expectation of the international community that States will cooperate with organisations such as CCAMLR in the conservation of common marine resources. Environmental protection instruments

describe those duties as active, and positive. It is no longer a valid choice for CCAMLR member States to rely on others to control the activities of their nationals. If an enforcement avenue is open to them, they must take it.

The CCAMLR framework implicitly creates an obligation to this end. Using nationality jurisdiction to give effect to this duty, CCAMLR members will be able to set in place a real deterrent to IUU activities by their citizens, residents and companies, and to eliminate the impunity with which the illegal industry has conducted itself while outside their territorial reach.

As the content of high seas conservation duties develop, failure to exercise jurisdiction against nationals may well come to be construed by coastal States as willful encouragement of poachers. But, realistically, nationality jurisdiction is only part of the answer to the flag of convenience problem. States must also take action to prevent the reflagging of vessels on their domestic registers. No single measure will be successful in eliminating IUU fishing, but all possible avenues of deterrence must be explored.

Continued failure may well spell the end of CCAMLR. The involvement of nationals and companies of CCAMLR Contracting Parties in illegal and unregulated fishing for toothfish is the most significant problem eroding its effectiveness and legitimacy. Confining responsibility for unregulated fishing to non-Contracting Party flag States ignores the obligations of Parties to the CCAMLR Convention and hides behind the concept of the flag State jurisdiction. The victims of this approach are the CCAMLR regime and Antarctic resources. The New Zealand initiative remains on the CCAMLR table. Its members should revisit it.

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ANNEX I : CONTRACTING PARTIES TO CCAMLR*

Current Contracting Parties:

Argentina
Australia
Belgium
Brazil
Chile
European Community
France
Germany
India
Italy
Japan
Republic of Korea
Namibia
New Zealand
Norway
Poland
Russian Federation
South Africa
Spain
Sweden
Ukraine
United Kingdom
United States of America
Uruguay

Acceding States:

Bulgaria
Canada
Finland
Greece
Netherlands
Peru

Non Contracting Parties invited to attend Commission meetings:

Belize
China
Denmark
Mauritius
Panama
Portugal
Sao Tome & Principe
Seychelles
Vanuatu

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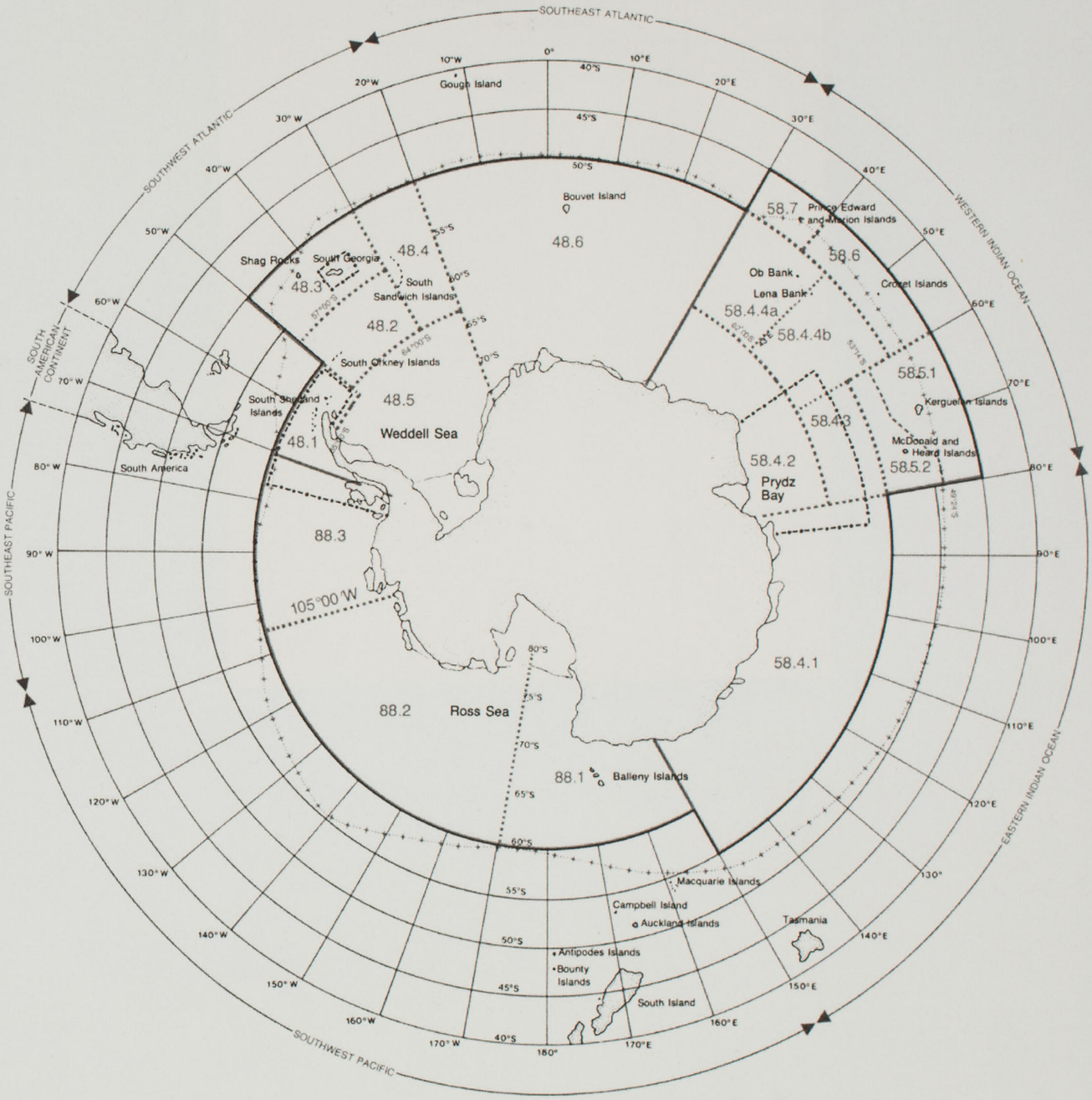
* Source: CCAMLR web page <http://www.ccamlr.org/English/e_m_ship/e_membership.htm#Top of Page> (last accessed 2 February 2002)

ANNEX II : MAP OF THE CCAMLR AREA*



* Source CCAMLR webpage < http://www.ccamlr.org/English/e-conv/e-conv-area-maplge.htm> (last accessed 14 February 2002)