

**Perspectives on Consensus in the Commission  
for the Conservation of Antarctic Marine  
Living Resources**

By

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Master of Science  
University of Tasmania

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\* The views expressed in this thesis are those of the author and do not reflect the official views or decisions of the Commission for the Conservation of Antarctic Marine Living Resources (CCAMLR).

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## Statement of co-authorship

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# Abstract

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The Commission for the Conservation of Antarctic Marine Living Resources (CCAMLR) is an intergovernmental organisation that manages the marine living resources of the Southern Ocean (approximately 11% of the world's oceans). It has as its principal objective the conservation and rational use of not only the species targeted for harvest, but the ecosystem as a whole.

CCAMLR utilises a consensus-based decision-making process to formulate management measures. This thesis examined what is meant by consensus and whether it has worked for CCAMLR, enabling effective implementation of precautionary and ecosystem approaches to fisheries management.

A literature review was conducted to investigate and understand the idea of consensus and its origins within the Antarctic Treaty System. Together with an analysis of data gathered from questionnaires and interviews about perceptions of consensus, these results informed an analytical approach to case study material on decisions made by CCAMLR. Using a number of case studies, the thesis illustrated how consensus has been used, both successfully and unsuccessfully, by CCAMLR in its 27-year history. The case studies used include CCAMLR's fight against Illegal, Unreported and Unregulated (IUU) fishing; CCAMLR's management of the krill fishery; CCAMLR's response to incidental mortality of seabirds in longline fishing; and CCAMLR's regulations for new and exploratory fisheries.

The study also explored the relatively new term 'consensus-minus-one', which had its roots in CCAMLR, and assessed whether it could be effectively used as a legitimate decision-making alternative. Three examples of consensus-minus-one were examined, and it was concluded that although the use of consensus-minus-one would have alleviated the so called *consensus paralysis*, it is doubtful that the dissenting parties would implement any agreed measures.

Finally the study analysed the need for consensus in CCAMLR and whether this approach to the making of decisions had made it more difficult for CCAMLR to reach its conservation objectives. The thesis measured the effectiveness of CCAMLR as a decision-making organisation and came to the conclusion that by using its original form of *inclusive consensus* CCAMLR has adopted and implemented conservation and management measures that have practically and effectively applied the ecosystem and precautionary approach to fisheries management.

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## Acronyms and Abbreviations

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ATCM	Antarctic Treaty Consultative Meeting
ATCP	Antarctic Treaty Consultative Parties
ATS	Antarctic Treaty System
CAMLR Convention	Convention on the Conservation of Antarctic Marine Living Resources
CCAMLR	Commission for the Conservation of Antarctic Marine Living Resources
CCAS	Convention for the Conservation of Antarctic Seals
CCSBT	Commission for the Conservation of Southern Bluefin Tuna
CDS	Catch Document Scheme
CEMP	CCAMLR Ecosystem Monitoring Program
CEP	Committee for Environmental Protection
COLTO	Coalition of Legal Toothfish Operators
CP	Contracting Party
CPRP	CCAMLR Performance Review Panel
CRAMRA	Convention for the Regulation of Antarctic Mineral Resource Activities
C-VMS	Centralised Vessel Monitoring System
DCD	<i>Dissostichus</i> Catch Document
EC	European Community
E-CDS	Electronic Catch Document System
FAO	Food and Agriculture Organisation of the United Nations
ICCAT	International Convention for the Conservation of Atlantic Tunas
ICRW	International Convention for the Regulation of Whaling
IOTC	Indian Ocean Tuna Commission
IUCN	International Union for Conservation of Nature
IUU	Illegal, Unreported and Unregulated fishing
IWC	International Whaling Commission
MPA	Marine Protected Area



NGO	Non-Governmental Organisation
RFMO	Regional Fisheries Management Organisation
SCAF	Standing Committee on Administration and Finance
SCAR	Scientific Committee on Antarctic Research
SCIC	Standing Committee on Inspection and Compliance
SCOI	Standing Committee on Observation and Inspection
SCOR	Scientific Committee on Oceanic Research
SEAFO	South East Atlantic Fisheries Organisation
UNFSA	United Nations Fish Stocks Agreement
VME	Vulnerable Marine Ecosystem
VMS	Vessel Monitoring System
WCPFC	Western and Central Pacific Fisheries Commission
WG-DAC	Working Group on Development of Approaches to Conservation of Antarctic Marine Living Resources
WG-EMM	Working Group on Ecosystem Monitoring and Management
WG-FSA	Working Group on Fish Stock Assessment
WG-IMAF	Working Group on Incidental Mortality Associated with Fishing
WG-SAM	Working Group on Statistics, Assessments and Modelling
WTO	World Trade Organisation

“But if that ain’t the consensus view,  
then hell, let’s put it to a vote”

- Ethan Coen, *O Brother, Where Art Thou?*

# 1. Introduction

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## 1.1 CCAMLR

The 1980 Convention on the Conservation of Antarctic Marine Living Resources (hereafter referred to as the CAMLR Convention) is a longstanding international agreement. The Commission for the Conservation of Antarctic Marine Living Resources (hereafter referred to as CCAMLR) is the intergovernmental organisation established by the Convention and has as its principal objective the conservation and rational utilisation of marine living resources in the Southern Ocean. This objective not only includes species targeted for harvest, but the ecosystem as a whole (Article II).

CCAMLR utilises a consensus-based decision-making process to formulate management measures (Article XII.1). All other matters of substance are also agreed by consensus (Section 2.3).

This thesis firstly explores what ‘consensus’ means and why it is used by CCAMLR. It also addresses the origins, functions and operation of CCAMLR as a decision-making organisation. This includes exploring CCAMLR’s history and how the competing interests of Members<sup>1</sup> have been appeased through cooperation, compromise and compliance.

## 1.2 Significance of the Study

This study is important in light of CCAMLR’s principal objective to conserve Antarctic marine living resources (CCAMLR Article II.1). The Southern Ocean has a history of over-exploitation starting with the harvest of seals in the 19<sup>th</sup> century,

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<sup>1</sup> A Member of CCAMLR is a Contracting Party that has fulfilled membership requirements as per Article VII of the CAMLR Convention (see Section 5.2.1.3). A Contracting Party (CP) is a State that has signed the CAMLR Convention, but is not a Member of the Commission.

whales up to the middle of the 20<sup>th</sup> century, marbled rock cod (*Notothenia rossii*) in the 1970s and most recently some stocks of Patagonian toothfish (*Dissostichus eleginoides*) (Constable *et al* 2000).

The Southern Ocean is often referred to as a ‘krill-based’ ecosystem as this species is at the centre of the marine ecosystem that depends on it (Nicol and de la Mare 1993). Increasing interest in harvesting krill for human consumption, fish meal and, to a lesser extent, biochemical products, has mandated that CCAMLR takes its decisions in such a manner that the Convention’s primary objectives are expeditiously met (Turner *et al* 2008).

The decisions taken by CCAMLR during its 27-year history have been extensively discussed elsewhere (Constable *et al* 2000, Miller *et al* 2004, Sabourenkov and Miller 2004, CPRP Report 2008). Conversely, the utility and effectiveness of the organisation’s consensus based decision-making has not been widely considered other than to intimate that it is slow and difficult to implement (Kaye 2001).

### 1.3 Aim

This study aims to determine whether CCAMLR’s use of consensus-based decision-making is effective (the criteria for assessing effectiveness are described in Section 3.2). In so doing, the study will address the following questions:

1. Has CCAMLR’s use of consensus been effective, expeditious and efficient in resolving relevant issues?
2. Does CCAMLR’s use of inclusive consensus-based decision-making facilitate effective and timely adoption of management measures and do CCAMLR Members implement accordingly? and
3. Has CCAMLR’s use of consensus-based decision-making affected the ability of the organisation to meet the objectives of Article II of the CAMLR Convention?

## 1.4 Structure of the Thesis

This study examines the questions listed above (Section 1.3), structured as follows.

Chapter 2 is a literature review undertaken to ascertain what is meant by consensus decision-making. Decision-making procedures in CCAMLR are discussed then compared to decision-making procedures in other fisheries conventions (Sections 2.3 and 2.4).

The methodology of the study is presented in Chapter 3. This firstly outlines how the literature review was undertaken (Section 3.1) then the methodology on how the study will assess CCAMLR's decision-making and its effectiveness is presented (Section 3.2). Lastly, the methodology of the questionnaires and interviews undertaken to better understand participants' perspectives on consensus in CCAMLR is detailed (Section 3.3).

Chapter 4 presents the results of the questionnaires on consensus and then the more detailed interviews, analysing participants' perspectives on consensus and whether it has worked for CCAMLR.

Consensus and cooperation is investigated in Chapter 5, starting with the origins of cooperation and compromise in the Antarctic (Section 5.1). This involves considering the precautionary and ecosystem approaches to resource management, as well as issues on sovereignty and jurisdiction, and CCAMLR Membership (Section 5.2). It also investigates how consensus decision-making works in CCAMLR (Section 5.4), including consideration of its organisational structure (Section 5.3).

Chapter 6 investigates CCAMLR's cooperation with other international organisations, such as elements of the Antarctic Treaty System and other Regional Fisheries Management Organisations. It was important to consider the effectiveness of CCAMLR's decisions when there are other players involved and jurisdictions/competencies overlap.

Case studies of how consensus has been used, both successfully and unsuccessfully, by CCAMLR are presented in Chapter 7. These case studies include the issues of Illegal, Unreported and Unregulated (IUU) Fishing (Section 7.1), CCAMLR's krill fishery (Section 7.2), France's by-catch of seabirds in longline fishing (Section 7.3), CCAMLR's New and Exploratory Fisheries (Section 7.4) and the concept of consensus-minus-one (Section 7.5).

Chapter 8 refers back to the three questions outlined in Section 1.3, using all the information gathered in this study. This chapter discusses CCAMLR's need for consensus (Section 8.1), whether this type of decision-making is seen as an equaliser between Members (Section 8.2), and whether consensus has enabled CCAMLR to meet its conservation objectives (Section 8.3). The study will then discuss whether CCAMLR has been effective in their management of Antarctic resources (Section 8.4).

Lastly, Chapter 9 presents a conclusion on whether consensus has made it harder for CCAMLR to formulate and implement effective management measures in line with Article IX of the CAMLR Convention.

## 2. Initial Literature Review

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### 2.1 Consensus – A decision-making tool

Three main elements are involved in the taking of institutional decisions: political will, legal obligations and institutional mechanisms (Swan 2004). Political will establishes an agenda of work that combines with a willingness to cooperate to direct consequent action towards a desirable outcome. Once a decision is taken, a legal obligation is usually created to bind and affect implementation of the decision. Institutional mechanisms provide information essential for facilitating informed decisions. Without these three elements any agreed decision is likely to be of dubious standing, and difficult to implement. Equally, implementation would essentially be on a voluntary basis.

Ideally too, decision-making also should address elements associated with accountability, participation and transparency (Swan 2004). All parties to a decision should thus be provided an opportunity to participate in the decision-making process and need to be accountable for the final decision(s) (Swan 2004). This ensures ownership, and therefore implementation of the decision. Without accountability any decisions would be effectively voluntary. The entire process should be as transparent as possible (Swan 2004) to ensure broad, and in CCAMLR's case international, legitimacy.

Consensus is a form of decision-making, however an exact definition is hard to determine. The Webster's Dictionary defines consensus as an "agreement of the majority in sentiment or belief". However it is also defined in the social sciences domain as a "general agreement, characterised by the absence of sustained oppositions" and "a process that involves seeking to take into account the views of all parties concerned and to reconcile any conflicting arguments".<sup>2</sup>

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<sup>2</sup> Sourced from Webster's Online Dictionary:  
<http://www.websters-online-dictionary.org/definition/consensus>

Consensus decision-making aims to be cooperative, endeavouring to reach the best possible decision for the group as a whole and all of its members (Partridge, 1971). The ideal form of consensus would be participatory and inclusive, actively soliciting the input of all and including them in the discussion and resulting decision.

With consensus decision-making parties with conflicting interests and demands can reach a compromise that they can accept for the short-term as a base from which further demands can be projected (Partridge, 1971). Although the decision may not be exactly what the majority of parties wanted, the decision can become a stepping-stone towards the ultimate objective.

It is generally understood that consensus is used in a uniform way, without flexibility. However from the literature, there are two versions of consensus that are not so strict. These are ‘sufficient consensus’ and ‘consensus-minus-one’.

Sufficient consensus is a term that has been used in multiparty negotiations in South Africa and Northern Ireland. In these instances the term meant that if a general consensus could not be reached (i.e. all agree or no objections) then an agreement could be passed if there was *sufficient* consensus (Mnookin 2003). Effectively this meant a majority vote. In the South African example, it was at the discretion of the Chairperson to decide what was regarded as sufficient consensus, whereas in Northern Ireland there was a qualifier as to the makeup of the majority (Mnookin 2003). Sufficient consensus is not applicable to CCAMLR and so will not be discussed further.

Consensus-minus-one is a term that has been used in CCAMLR which is understood to mean that although there is one dissenter, the decision is binding for all. The term consensus-minus-one was first used in CCAMLR by Russia in 2003 (CCAMLR 2003, paragraph 8.55) and will be discussed further in Section 7.5.

The use of consensus for decision-making is not new although majority-type voting has been more prominently used as a decision-making process. Organisations such as the United Nations, the International Commission for the Conservation of Atlantic



Tunas (ICCAT) and the International Whaling Commission (IWC) use majority-type voting systems.<sup>3</sup> However, consensus decision-making is also commonly used, with varying forms and meanings, in political arenas such as the World Trade Organisation (WTO) and the South East Atlantic Fisheries Organisation (SEAFO).<sup>4</sup>

Consensus decision-making was first used in the Antarctic political arena by the 1959 Antarctic Treaty (see Section 5.1.1 below), an element of the Antarctic Treaty System (see Section 5.1.2), of which CCAMLR is also a part.

CCAMLR is responsible for regulating fisheries in the Southern Ocean and is generally considered to be more than a Regional Fisheries Management Organisation (RFMO), largely due to its origins in the Antarctic Treaty (Molenaar, 2001). Regardless, most of its decisions are RFMO-type decisions. Examination of decision-making best practice, as articulated through prescriptions within the United Nations Fish Stocks Agreement, is useful as a starting point for examining consensus in the CCAMLR context.

## 2.2 United Nations Fish Stocks Agreement

When considering RFMO decision-making processes, one must look at the RFMO agreements themselves. But reference is also necessary to the 1995 United Nations Fish Stocks Agreement (UNFSA).<sup>5</sup> UNFSA is the international community's best, and most recent, attempt to outline practical action necessary to implement the ideals of the 1982 United Nations Convention on the Law of the Sea (UNCLOS). This agreement provides a global framework for consolidating the role and management processes of RFMOs.

UNFSA was set up by States "determined to ensure the long-term conservation and sustainable use of straddling fish stocks and highly migratory fish stocks" and to "commit themselves to responsible fisheries" through cooperation (Preamble, UNFSA

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<sup>3</sup> United Nations Charter, Article 18; ICCAT Article III.3; IWC Article III.

<sup>4</sup> WTO Article IX.1; SEAFO Article 17.1.

<sup>5</sup> Full title: Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks.

1995). It is dependent on all RFMOs establishing conservation and management measures for the high seas and for their enforcement through member States (Swan 2004).

Four areas relating to decision-making in RFMOs are addressed by UNFSA. These are: the precautionary approach (UNFSA Article 6), functions for RFMOs (UNFSA Article 10, attached as Appendix 3), transparency (UNFSA Article 12) and prevention of disputes (UNFSA Article 28).

To implement the precautionary approach UNFSA requires States to “improve decision-making” via best scientific knowledge (UNFSA Article 6.3). Transparency should be provided for in the decision-making process (UNFSA Article 12.1) and States should “agree on efficient and expeditious decision-making procedures” and to “strengthen existing decision-making procedures as necessary” to prevent disputes (UNFSA Article 28). However, the most important of these areas of decision-making is the functions listed in Article 10, which calls for “effective decision-making” (see Box 1), requiring States party to RFMOs to agree on conservation and management measures ensuring long-term sustainability of harvested resources in a “timely and effective manner” (UNFSA Article 10(a) and (j)).

It is important to note that the UNFSA was agreed upon in 1995 when a number of RFMOs had been in place for many years prior, especially in the Northern Hemisphere. Consequently, States party to the Agreement are obligated to strengthen their decision-making capabilities to ensure they are in line with UNFSA Article 10.

Box 1: Article 10 of the UNFSA – functions of subregional and regional fisheries management organisations and arrangements (only relevant parts are presented, see Appendix 1 for full text)

In fulfilling their obligation to cooperate through subregional or regional fisheries management organisations or arrangements, States shall:

(a) agree on and comply with conservation and management measures to ensure the long-term sustainability of straddling fish stocks and highly migratory fish stocks;

...

(j) agree on decision-making procedures which facilitate the adoption of conservation and management measures in a timely and effective manner;

...

(l) ensure the full cooperation of their relevant national agencies and industries in implementing the recommendations and decisions of the organisation or arrangement.

Some members of RFMOs are not party to UNFSA, and therefore are under no obligation to consider the wording of UNFSA (McDorman 2005). This is not necessarily relevant when considering CCAMLR Contracting Parties, as they are Members of CCAMLR and are thus obligated to implement any decisions. However non-Contracting Parties are under no such obligation in respect of CCAMLR decisions, but if they are party to UNFSA then they are obligated to cooperate in the conservation and management of the resource (UNFSA Article 17).

## 2.3 Decision-making procedures in CCAMLR

The CAMLR Convention was negotiated in the Antarctic Treaty (AT) forum and is part of the ATS (see Section 5.1). Therefore it could be assumed that consensus would have been the ideal decision-making procedure to use because it is consistent with other ATS conventions. However, during CCAMLR negotiations there was a debate on whether to use a three quarters majority or a consensus decision-making

system (Edwards and Heap 1981). As previously mentioned (Section 2.1 above), three quarters majority voting was commonly used in other resource management organisations, such as the International Whaling Commission (IWC) and the International Commission for the Conservation of Atlantic Tunas (ICCAT). But it was the method of consensus traditionally used by the Antarctic Treaty that was ultimately agreed upon for CCAMLR (see Box 2).

Box 2: Article XII of the CAMLR Convention

1. Decisions of the Commission on matters of substance shall be taken by consensus. The question of whether a matter is one of substance shall be treated as a matter of substance.
2. Decisions on matters other than those referred to in paragraph 1 above shall be taken by a simple majority of the Members of the Commission present and voting.
3. In Commission consideration of any item requiring a decision, it shall be made clear whether a regional economic integration organisation will participate in the taking of the decision and, if so, whether any of its Member States will also participate. The number of Contracting Parties so participating shall not exceed the number of Member States of the regional economic integration organisation which are Members of the Commission.
4. In the taking of decisions pursuant to this Article, a regional economic integration organisation shall have only one vote.

During negotiations the interests of conservationist (for example Australia, the United Kingdom and the United States of America) and of fishing (Japan and the Soviet Union) nations needed to be reconciled (Beck 1986). The use of consensus in CCAMLR gives every participating Member an equal voice. Decisions on the size of catch limits are legally binding and can have economic and social effects upon the Members and their fishing communities. Thus, it is important that the fishing nations are able to have an equal vote instead of being blocked out of decisions by conservationists in a three-quarters majority, as experienced in the IWC (Kaye 2001). With consensus, no decisions are forced through on a majority vote against the will of

one or several Members. As a result the decisions that are eventually reached have the backing of all Parties, ensuring that these decisions will be implemented (Trolle-Andersen, 1987).

Consensus is not defined in the CAMLR Convention, but it was defined in another ATS convention, the 1988 Convention on the Regulation of Antarctic Mineral Resource Activities<sup>6</sup> (CRAMRA), as “the absence of a formal objection” (CRAMRA Article 22.5). CRAMRA was negotiated in the same arena as the CAMLR Convention and it could be assumed that the use of consensus in CCAMLR has a similar definition, i.e. the absence of formal objection. UNCLOS, whose negotiations culminated shortly after the CAMLR Convention, had also used this definition (UNCLOS Article 161.8(e)). Therefore it is reasonable to assume that this also influenced CCAMLR’s working definition of consensus. Effectively this gives any member of CCAMLR a veto over any proposed measure (Watts 1992, Kaye 2001).

It has been argued that consensus weakens the possibility of reaching effective decisions (Trolle-Andersen, 1987), but it could also be argued that in CCAMLR it ensures decisions, including Conservation Measures (CMs), will be applied by Members. By reaching consensus, the decision has already achieved a level of acceptability with all parties concerned.

CMs are agreed to by consensus and because CCAMLR practices inclusive consensus, by which all Parties debate until a common decision can be agreed upon, or as evidenced with the *Volna* issue at CCAMLR-XXV (see Section 7.5.1 below), a compromise is developed that all can accept (CCAMLR 2006, paragraph 9.38). Once agreed to, Members are notified that the CMs become binding 180 days later (Article IX.6(b)).

In practice the CMs become binding earlier. Fishing seasons for several fisheries (krill, toothfish and icefish in some Statistical Areas) commence a few weeks after the CCAMLR meetings, thus implementing these CMs.

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<sup>6</sup> Although this CRAMRA was signed in 1988, it has never been ratified and therefore not in force.

### 2.3.1 CCAMLR Objection Procedure

The CAMLR Convention has an objection procedure, or what is more commonly referred to as an “opt out” procedure, whereby a Member has 90 days to notify that it is unable to accept a CM agreed to by CCAMLR (Article IX.6(c)). Using this “opt out” procedure means that the measure “shall not, to the extent stated, be binding upon that Member” (Article IX.6(c)). CCAMLR’s objection procedure is further discussed in Section 5.4.2.

### 2.3.2 Dispute Resolution in CCAMLR

Dispute resolution is an important element of any decision-making process. Article XXV in the CAMLR Convention outlines a three-step approach to be applied in this eventuality. Firstly, the disputing parties are encouraged to resolve the issue bilaterally, using negotiation, conciliation, arbitration, or other peaceful means. If this does not work then the parties have a choice of either referring the dispute to the International Court of Justice, or to an arbitral tribunal (a procedure for which is annexed to the Convention). CCAMLR’s dispute resolution procedure is further discussed in Section 5.4.3.

## 2.4 Comparison of decision-making procedures in (other) Fisheries Conventions

In the waters north of the area to which the CAMLR Convention applies<sup>7</sup> there are four “Tuna Commissions” operating (Table 1): ICCAT, the Commission for the Conservation of Southern Bluefin Tuna (CCSBT), the Indian Ocean Tuna Commission (IOTC) and the Western and Central Pacific Fisheries Commission (WCPFC). The South East Atlantic Fisheries Organisation (SEAFO) also shares a

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<sup>7</sup> The area to which the CAMLR Convention applies, as per Article I will hereby be referred to as the Convention Area.

boundary with CCAMLR. All of these RFMOs have the ability to enact management measures.

#### 2.4.1 Decision-making procedures in RFMOs

The CAMLR Convention and the 2001 Convention on the Conservation and Management of Fishery Resources in the South-east Atlantic Ocean (SEAFO) both contain provisions that decisions on matters of substance will be taken by consensus (CAMLR Convention Article XII.1; SEAFO Convention Article 17.1). However, neither defines what type of consensus is to be used.

Under the 1993 Convention for the Conservation of Southern Bluefin Tuna (CCSBT) decisions are taken by a unanimous vote (CCSBT Convention Article 7).

The 1966 International Convention for the Conservation of Atlantic Tunas (ICCAT) and the 1993 Agreement for the Establishment of the Indian Ocean Tuna Commission (IOTC) use majority voting to decide matters of substance (ICCAT Convention Article III.3; IOTC Agreement Article VI.2).

WCPFC uses consensus decision-making; in this case consensus is defined as “a lack of formal objection” (WCPFC Article 20.1). This convention also allows for the possibility that consensus may not be reached and so decisions may be made by a majority of Members. However, there is a qualifier as to the makeup of Members in the majority decision (Article 20.2).

All of these RFMOs have developed conservation and management measures using their prescribed decision-making systems.

Once the decisions are made within an RFMO the onus is on the States party to implement them (McDorman 2005). Swan (2004) concludes that in some RFMOs (not named) the decisions to manage fisheries are not binding, nor are they timely and effective. This could be because of the decision-making mechanism used by those RFMOs.

Table 1: Comparison of some Regional Fisheries Management Organisations and CCAMLR. (Source: information taken from respective Conventions and Agreements).

TOPIC	Regional Fisheries Management Organisation					
	CCAMLR	ICCAT	CCSBT	IOTC	SEAFO	WCPFC
Convention Name	Convention on the Conservation of Antarctic Marine Living Resources	International Convention for the Conservation of Atlantic Tunas	Convention for the Conservation of Southern Bluefin Tuna	Agreement for the Establishment of the Indian Ocean Tuna Commission	Convention on the Conservation and Management of Fishery Resources in the South-East Atlantic Ocean	Convention of the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean
Area of competence	Southern Ocean as defined by the Convention.	All waters of the Atlantic Ocean, including the adjacent seas	Species migratory range	Indian Ocean and adjacent seas	All waters beyond national jurisdiction in Convention Area	Western and Central Pacific Ocean
Species Covered	Antarctic Marine living resources, excluding whales and seals	Tuna and tuna-like fishes	Southern Bluefin Tuna	Tuna and tuna-like fishes (listed in Annex B of the Agreement).	All fishery resources in the Convention Area	Tuna fishes
Signature Entry into Force	1980 1982	1966 1969	1993 1994	1993 1996	2001 2003	2000 2004
Objective	The conservation, including rational use, of Antarctic marine living resources	Maintain populations of tuna and tuna-like species found in the Atlantic Ocean	Ensure the conservation and optimum utilisation of global Southern Bluefin Tuna stocks	Ensure the conservation and optimum utilisation of tuna stocks through a sustainable fishery	Ensure long-term conservation and sustainable use of fishery resources	Ensure long-term conservation and sustainable use of highly migratory fish stocks
Decision-making Mechanism	Consensus	Majority	Unanimous	Majority	Consensus	Consensus <sup>8</sup>

<sup>8</sup> Article 20 of the WCPFC Convention states that decision-making shall be taken by consensus, but if consensus cannot be reached then decisions may be taken by majority (see Section 2.4.1).



However, the choice of consensus or majority voting is just the mechanism used to reach agreement. Behind that agreement there must be Swan's (2004) three elements of taking decisions: political will to debate a topic and cooperate with each other; legal obligation to be bound to implement decisions; and institutional mechanisms providing information to facilitate decision-making. Without these elements, the implementation of decisions made may not be effective, despite the commitment of many Members.

#### 2.4.2 Objection Procedures in RFMOs

CCAMLR, ICCAT, IOTC and SEAFO have outlined their "opt out" procedures (CCAMLR Convention Article IX.6(c); ICCAT Article VIII.3; IOTC Article IX.5; SEAFO Convention Article 23.1(c)). These procedures in CCAMLR and the IOTC are fairly straightforward (see Section 2.3.1 above). The objection procedure for SEAFO is similar to CCAMLR's up to a point. Having notified the Commission of their objection to a measure, the Member must then provide reasons for this objection and proposals for an alternative measure (SEAFO Article 23.1(d)). A review can be called by any Contracting Party and then an ad hoc expert panel is convened that will recommend interim measures to be binding on all parties (SEAFO Article 23.1(g)). This is such a lengthy procedure that it seems unlikely any Member would wish to lodge an objection. It could be inferred that the procedure was designed for precisely this purpose.

The ICCAT "opt out" procedure appears to be a complicated and protracted objection procedure where Members have a right to object to the objector, thus making the original measure binding, unless another objection is recorded.

The CCSBT does not have an official objection procedure outlined in the Convention.

The WCPFC does not have an objection procedure *per se*. Instead any Member that voted against a decision, or was absent, has the opportunity to seek a review by a review panel (WCPFC Article 20.6). Until the review is complete the disputed measure is not required to be implemented.

### 2.4.3 Dispute Resolution in RFMOs Generally

UNFSA Part VIII, Articles 27 to 32 outlines procedures for the peaceful settlement of disputes using negotiation, inquiry, mediation, conciliation, arbitration, and judicial settlement.

CCSBT (Article 16), ICCAT (Article 26), IOTC (Article XXIII) and SEAFO (Article 24) each have a three tiered approach similar to CCAMLR's three-step approach (Section 2.3.2), which are all consistent with the UNFSA procedure.

The WCPFC does not have step by step instructions for dispute resolution outlined in the Convention, instead specifying that provisions set out in UNFSA apply.

## 2.5 Chapter Summary

The primary objective of any decision-making organisation is to provide the best informed advice possible in a timely and effective manner (Swan 2004). To this end, CCAMLR uses consensus decision-making to formulate Conservation Measures (CMs) (Section 2.3). The exact definition of consensus is not stated in the CAMLR Convention, but is generally inferred to mean a "lack of formal objection".

UNFSA calls for effective decision-making by all RFMOs to implement a precautionary approach to resource management, using transparent procedures (Section 2.2). Out of the twenty-five Members of CCAMLR only three are not party to the agreement (Argentina, Chile and China). However, the fact that they are not parties to UNFSA makes no difference to their obligations under CCAMLR.

Using the information in this chapter for reference, a methodology was created to determine whether CCAMLR is effective in its management of Antarctic marine living resources (Section 3.2), and also to gauge expert opinion on the various perspectives of consensus in the form of questionnaires and interviews (Section 3.3).

### 3. Methodology

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The methodology for this study is complex and involves three components. The first comprises the literature review, commenced in Chapter 2 and expanded here, which is used to extract various perspectives on consensus (Section 3.1). The second is an exploration of the normative and operating systems of CCAMLR (conducted below in Section 3.2) in order to understand how decisions are made and the players behind those decisions. This includes establishing a method of assessing regime effectiveness (Section 3.2.2), from which it can be determined whether CCAMLR has achieved its objectives. The third is the methodology supporting the gathering of data (from questionnaires and interviews) which was used to interpret and understand informed (expert) opinions on CCAMLR and its decision-making procedures (Section 3.3).

#### 3.1 Subsequent Literature Review

An initial literature review was undertaken in Chapter 2 to extract and examine variations of the concept of consensus decision-making. The literature was searched for definitions of consensus and for decision-making in selected RFMOs. The history of CCAMLR was then reviewed, using information from CCAMLR reports, journal articles, books and the websites of international organisations.

From the information gathered and analysed in the initial review, a study of the normative and operating systems of CCAMLR will be undertaken to enable an assessment of CCAMLR's effectiveness. Building on the information from the initial literature review, questionnaires were composed and interviews undertaken to gather more in depth and focused information on CCAMLR's decision-making.

3.2 Normative System of CCAMLR and Regime Effectiveness

3.2.1 The normative system of CCAMLR

This section of the methodology is adapted from that of Turner *et al* (2008) (see Attachment 1).

A hybridized template was created in Turner *et al* (2008), and based on the work of Diehl *et al* (2003), to address the four essential CCAMLR ‘Cs’: cooperation, compromise, consensus and compliance. While CCAMLR processes are essentially factual and structural, this approach allowed for assessment of the normative system of CCAMLR in terms of both process and structure.

The framework employed to explain the dynamics of international law, illustrated in Figure 1, was created in Turner *et al* (2008) to formulate a way to measure CCAMLR’s effectiveness.

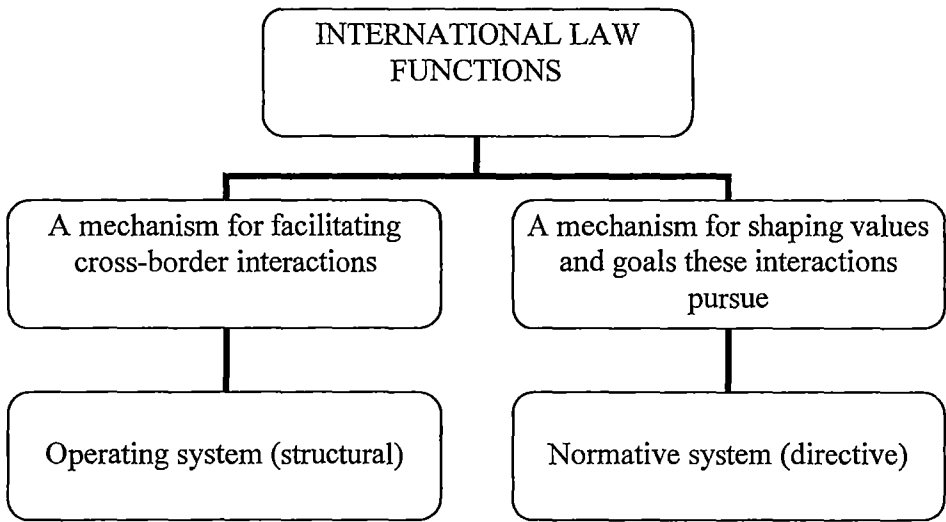


Figure 1: Framework for explaining the dynamics of international law.  
(Source: Turner *et al* 2008.)

As per Turner *et al* (2008), regime effectiveness is taken in this study as comprising the elements of cooperation, compromise and compliance and their interaction in decision-making and outcomes.

It was assumed that without alignment between the operating and normative elements of the Convention as a legal instrument, and in the absence of State commitment to the values and goals of that instrument, its legal or regulatory outcomes may fail. Therefore, as articulated by Diehl *et al* (2003), to assess CCAMLR's international legal effectiveness, the operating system, normative system and the political will must be considered.

Based on interpretations from the literature, it was assumed that an operating system is essentially a constitution for the purposes of international law. In this study this is represented in the CAMLR Convention (Section 5.2). An operating system would usually be independent of any particular norm and would often precede the evolution of a norm rather than reacting to its existence (Diehl *et al* 2003). For this purpose, the operating system components include the sources of law (including the rules for law formation, participation, and obligation), the actors involved (including those with legal rights and duties), the applicable jurisdiction (including actors' or institutions' obligations and rights in respect of disputes) and various institutional aspects (including forums to enforce compliance or settle disputes) (Diehl *et al* 2003). Thus, CCAMLR itself constitutes the CAMLR Convention's operating system in structure and process (Sections 5.3 and 5.4 below).

In the Turner *et al* (2008) methodology, the normative system allowed an extrapolation of CCAMLR norms from particular values or policies to then define acceptable standards of actor behaviour. In general terms, it was recognised that norms develop from issue-specific areas. Therefore, in the CCAMLR context it can be determined that norms are derived from the stewardship of Antarctic marine living resources as well as the environmental responsibility attached to the sustainable exploitation of such resources. Thus the CCAMLR normative system comprises the normative content of the regime's processes, institutional as well as regulatory.

In assessing the CCAMLR regime's effectiveness as a decision-making organisation a combination of structures in an international law context were considered:

1. the normative framework from which this structure derives, or to which it responds; and
2. the reaching of political consensus in meeting the Convention's objectives.

### 3.2.2 Assessing CCAMLR's effectiveness

In this study CCAMLR's effectiveness was evaluated against the following three statements:

- The initial goals were realistic;
- There were distinct changes in actor behaviour; and
- There are identifiable phases of problem solving (Young 1989; Levy 1993; Haas *et al* 1994).

Conversely, CCAMLR's lack of effectiveness was evaluated using the following three statements:

- CCAMLR'S goals were unrealistic in the first place;
- It contained imprecise objectives, leading to the parties not really knowing what was required of them; and
- This lead to a superficial, or no change, to actor behaviour.

## 3.3 Methodology of Questionnaires and Interviews about Consensus

Under normal circumstances, sampling size underpins the quantitative validity of questionnaires and interviews in respect to the overall population being sampled (Bradshaw and Stratford 2000). However, for the current study, it was considered that soliciting informed or expert views would be the most appropriate approach. Consequently, a qualitative rather than quantitative inquiry was applied.

Potential participants in the questionnaires and interviews were chosen on the basis of their experience and expertise in Antarctic policy specifically or other RFMOs more generally.

It was decided that interviews would provide more clarity than questionnaires alone. Therefore, in-depth interviews were conducted with a small number of people intimately connected with CCAMLR processes and procedures to provide significant insights into the research topic at hand – the effectiveness of consensus decision-making in CCAMLR.

For the questionnaires a form of “maximum variation sampling” (Patton 1990) was used with participants being chosen from a wide range of backgrounds, including CCAMLR Members and those outside the CCAMLR community.

The interviews were more a case of “convenience sampling” (Patton 1990), as participants were chosen based on their experience and expertise, as well as on the basis of ease of access and availability. Most interviews were conducted during the annual CCAMLR meetings in Hobart, Tasmania, when access to delegates from CCAMLR Members and participating Non-Governmental Organisations (NGOs) was easiest.

For both the questionnaires and interviews, it was deemed important to represent each sector within the CCAMLR community. These comprised NGOs and a Contracting Party which was not a CCAMLR Member.<sup>9</sup> CCAMLR Members from the following demographics were questioned - delegates from developing countries (Argentina, Chile, Namibia, Russia, and South Africa) and developed countries (Australia, France, Japan, Korea, Norway, Sweden, United Kingdom, and the United States of America)<sup>10</sup>.

Ethics approval was given by the University of Tasmania for the questionnaires (Ethics Reference Number: H0008556, Project Title; Consensus in the Commission for the Conservation of Antarctic Marine Living Resources (CCAMLR)) and interviews (Ethics Reference Number: H0008557; Project Title: Perspectives on consensus in CCAMLR).

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<sup>9</sup> As noted earlier (footnote 1) a Contracting Party (CP) is a State that has signed the CAMLR Convention, but is not a Member of the Commission.

<sup>10</sup> Classification of developing and developed countries was taken from the World Bank list of economies (April 2009). Website:

<http://siteresources.worldbank.org/DATASTATISTICS/Resources/CLASS.XLS>

### 3.2.1 Questionnaires

Questionnaires regarding consensus in CCAMLIR were prepared and emailed to 26 people generally regarded as possessing experience and expertise in Antarctic policy or RFMOs. The questionnaires (attached as Appendix 2; list of participants is Appendix 3) were made up of 15 questions with a mixed format of multiple choice and short answer. The questions were drafted to provide an indication of what the participant thought about:

- (a) The meaning of consensus;
- (b) Consensus as applied by CCAMLIR; and
- (c) CCAMLIR's effectiveness.

#### *Question 1 – What is consensus?*

Participants were given six different definitions of consensus that had been found in the literature (see Partridge 1971; Trolle-Andersen 1987; CRAMRA; and Kaye 2001) (Section 2.1). Participants were asked to rank their answers from the definition they most agreed with to the definition they least agreed with.

#### *Question 2 – CCAMLIR is a model of what form of consensus decision-making?*

Participants were asked to choose which of the definitions in Question 1 they believed CCAMLIR practised.

#### *Question 3 – In your view CCAMLIR has succeeded as a decision-making system*

Participants were given a yes/no option.



*Question 4 – In your view CCAMLR has failed as a decision-making system because...*

Participants were given four reasons for CCAMLR failing. The first three options were criticisms taken from the literature: decisions take too long, decisions are so diluted as to be meaningless, and because of lack of commitment (see Trolle-Andersen 1987 and Kaye 2001). The fourth option was “other reasons”. For better understanding of their choice, participants were then asked to elaborate on their answer.

*Question 5 – Are decisions reached by consensus weaker because they have had to be negotiated until all parties agree?*

One of the major criticisms about consensus decision-making in the literature was that everybody has to negotiate until all are happy with the decision and that this makes the decision weaker in substance and commitment (see Kaye 2001). Participants were asked their opinion.

*Question 6 – It has been argued that consensus weakens the possibility of reaching effective decisions. Do you agree?*

This question takes Question 5 a step further by questioning the ability of a consensus decision-making system to reach “effective” decisions. Participants were given a yes/no option.

*Question 7 – Do you believe consensus should be unqualified or should there be an “opt out” procedure?*

Participants were questioned about their opinions regarding objection procedures (see Sections 2.3.1 and 2.4.2). They were asked what objection procedures should be used and how they should be used.

*Question 8 – Do you believe “opt out” procedures are contrary to the idea of consensus?*

This question takes Question 7 a step further to understand participants’ opinions on whether objection procedures are consistent with their idea/s of consensus.

*Question 9 – What is consensus-minus-one?*

Participants were asked their views on the relatively new term ‘consensus-minus-one’ (see Sections 2.1 and 7.5). They were given six different definitions constructed by the student to attempt to understand the general thought of this type of decision-making. Participants were asked to elaborate on their choice.

*Question 10 – Do you believe consensus-minus-one could be used in certain circumstances, such as black listing of vessels where the reaching of consensus is unlikely?*

There are some contentious issues in CCAMLR where achieving consensus has not occurred (see Sections 7.2.2, 7.2.3 and 7.5). Participants were asked their views on whether they believed consensus-minus-one could be legitimately used in such circumstances.

*Question 11 – Do you believe that CCAMLR is in line with Article 10 of the United Nations Fish Stocks Agreement?*

Participants were asked their view on whether CCAMLR has a decision-making procedure that facilitates the adoption of conservation and management measures in a timely and effective manner.

*Question 12 – Should consensus remain the basis of all decision-making in CCAMLR for matters of substance or is there room for another method?*

One of the major questions of this thesis is whether consensus has been and is still appropriate for CCAMLR to reach all its management objectives. Participants were asked their opinion on this.

*Question 13 – What other decision-making method could CCAMLR use for matters of substance?*

Building on the previous question participants were then asked what other decisions making procedures CCAMLR could use. Their answers would be fundamental to understanding their perspectives on effectiveness.

*Question 14 – Does consensus make it harder for CCAMLR to formulate management measures in fulfilling the obligations of Article IX of the Convention?*

This is the main question of this study, whether the decision-making procedure that CCAMLR has in place enables it to fulfil its management and conservation objectives. Thus, the opinions of the participants were also crucial to determining effectiveness.

*Question 15 – Do you have personal experience of a decision-making process other than consensus?*

In order to understand how CCAMLR is seen to perform in comparison with other international organisations, participants were asked about their experiences in other organisations and how decisions made in CCAMLR rate compared to the other organisations.

Seven questionnaires were returned. The answers were grouped into the following categories:

- Does CCAMLR operate consensus as you would define it?
  - Questions 1 and 2
- Does CCAMLR work?
  - Questions 5 and 6
- Should CCAMLR change the use of consensus?
  - Questions 3, 4 and 11
- Is there an alternative for when consensus cannot be reached?
  - Questions 7 - 10
- Is there another decision-making option for CCAMLR?
  - Questions 12 - 15

The answers were then collated and analysed.

### 3.2.2 Interviews

Interviews were conducted during the 2006 and 2007 annual CCAMLR meetings. Interviewees were asked 15 set questions based on the questionnaire (attached as Appendix 4; list of participants is Appendix 5). A total of 10 interviews were conducted. In addition, one CCAMLR delegate declined a formal interview, instead opting for an informal discussion. Although this discussion gave an insight into the Delegate's personal views, none of this information was able to be included in the study. All formal interviews were recorded and then transcribed.

For consistency the answers were grouped to fit into the aforementioned categories (Section 3.2.1). The answers were then collated and analysed.

Using these methods the results of analyses on the information gathered are presented in Chapter 4 - Results of the Questionnaires and Interviews on Consensus.

## 4. Results of Questionnaires and Interviews on Consensus

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### 4.1 Questionnaires

The aim of the questionnaires was to understand in greater detail the views of CCAMLR participants and non-participants on the CCAMLR consensus decision-making process.

The results of the questionnaires are presented to address the following questions:

- (a) Does CCAMLR operate consensus as you would define it?
- (b) Does CCAMLR work?
- (c) Should CCAMLR change the use of consensus?
- (d) Is there an alternative for when consensus cannot be reached?
- (e) Is there another decision-making option for CCAMLR?

#### 4.1.1 Define consensus in CCAMLR

Questions 1 and 2

Of the seven returned questionnaires, 4 agreed that CCAMLR uses consensus as they would define it (i.e. they chose the same answer for both Questions 1 and 2). The most common definition of consensus was “lack of formal objection” (Figure 2). CCAMLR’s model of consensus decision-making was mostly defined as “lack of formal objection” (57%; 4 out of 7 people), with the “everybody agrees” definition also considered (29%; 2 out of 7 people). One person believed CCAMLR’s model for consensus decision-making was a majority agreement. This person had not served on a CCAMLR Member delegation.

It is worth noting that the five participants that have served on CCAMLR Member delegations chose either “lack of formal objection” or “everybody agrees” as the working model of consensus for CCAMLR, yet only three chose those definitions as their idea of consensus in operation. Therefore it can be inferred that some

individuals participating on Member delegations have conflicting views on the way CCAMLR operates with consensus and their personal ideas of consensus. For example, these individuals chose “condescending to the minority point of view” and an “overwhelming majority agreement” as their personal definitions, but agreed that CCAMLR uses “lack of formal objection” as its working model for consensus.

However, as Members questioned are consistent with their interpretation of the type of consensus that CCAMLR operates, it can be assumed that personal opinions offered in Question 1 do not affect decision-making in CCAMLR.

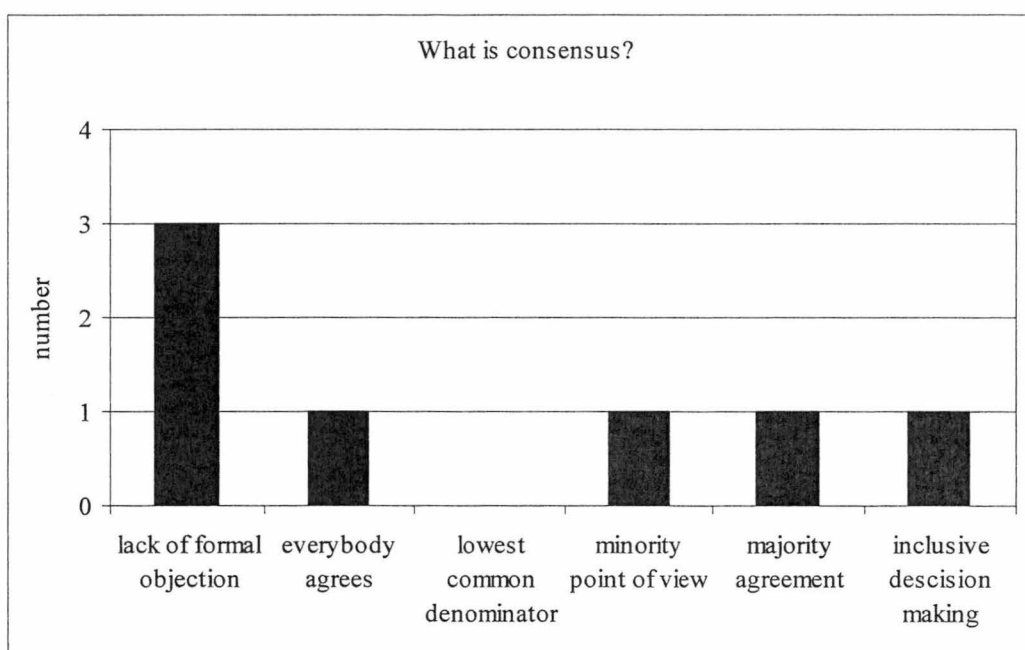


Figure 2: Histogram of definitions of consensus (Question 1).

#### 4.1.2 Does consensus decision-making work?

##### Questions 5 and 6

It has been argued in the literature that decisions reached by consensus are weaker because they have had to be negotiated until all parties agree (Trolle-Andersen, 1987). Two participants agreed with this statement, believing that it was an inevitability of decisions requiring political commitment. However, all participants believed that although consensus decisions may be weaker, they could still be “effective”.

#### 4.1.3 Has CCAMLRL worked?

Questions 3, 4 and 11

All but one participant believed that CCAMLRL has succeeded as a decision-making system. The lone dissenter was of the opinion that decisions take too long and failure arose when “interests in appropriation obtained the right to veto conservation moves”. This participant was a CCAMLRL Member delegate.

Despite responding that CCAMLRL had succeeded, two other participants who had served on Member delegations also believed that CCAMLRL had failed because decisions took too long and there was a lack of commitment from Members.

However, all participants believe that CCAMLRL is in line with Article 10 of UNFSA (see Appendix 3 for full text of this Article) and has a decision-making procedure which “facilitates the adoption of conservation and management measures in a timely and effective manner”.

#### 4.1.4 Is there an alternative for when consensus cannot be reached?

Questions 7-10

The four participants that answered question 7 believed there should be an “opt out” procedure in place and quoted the procedure outlined in Article IX.6 of the CAMLR Convention.

Views on whether “opt out” procedures were contrary to the idea of consensus (Question 8) were varied (Figure 3). Those that answered in the negative noted “opt out” procedures are important ensuring a Member is not obligated to implement a decision that their domestic legislation cannot support.

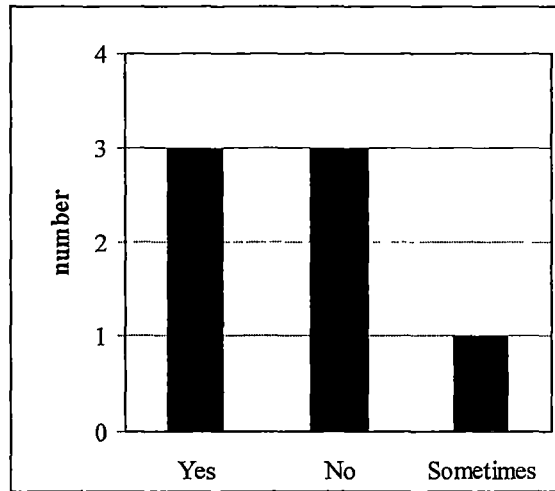


Figure 3: Histogram of answers on question 8: do you believe “opt out” procedures are contrary to the idea of consensus.

When questioned on the option of using consensus-minus-one as an alternative when consensus cannot be reached the results were tied (Figure 4).

The majority (57%; 4 out of 7 people) were negative in their opinion of consensus-minus-one as a decision-making process (Figure 4(A) - Question 9). They believed that it violates inclusivity in decision-making and was against the nature of the Antarctic Treaty, and therefore CCAMLR. Others regarded it a useful naming and shaming tool or a legitimate decision-making process.

However the majority (57%; 4 out of 7 people) were in favour of using consensus-minus-one in CCAMLR for certain issues when the reaching of consensus was unlikely, such as the black listing of vessels (Figure 4(B) - Question 10). It was believed that the Member/s whose vessel/s were being considered for inclusion on such lists were unlikely to agree, thus a form of consensus-minus-one was needed.



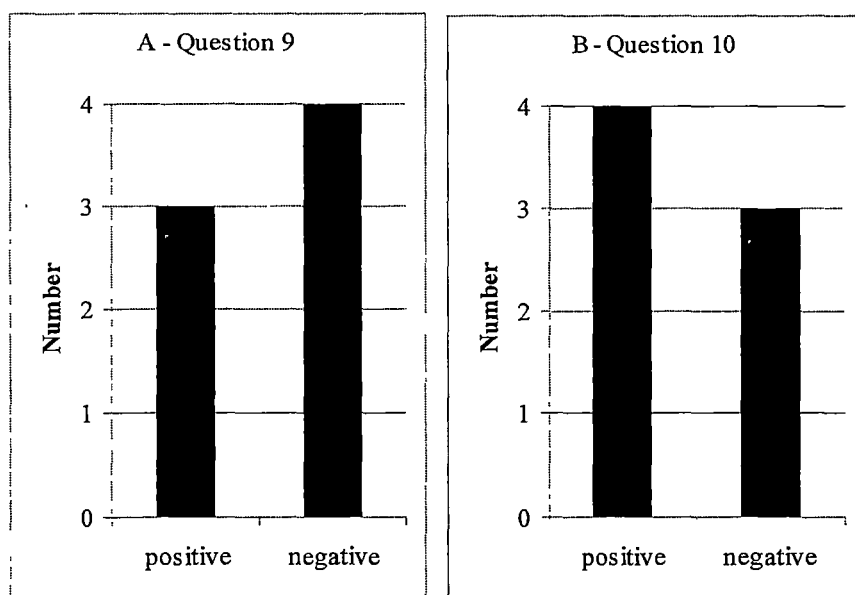


Figure 4: Histogram of answers to:  
 Questions 9 (A) – What is consensus-minus-one; and  
 Question 10 (B) – Should consensus-minus-one be used in certain circumstances  
 when reaching consensus is unlikely.

However, those that gave negative responses believed that consensus was needed to ensure the full cooperation of all Members.

#### 4.1.5 Is there another decision-making option for CCAMLRL? Questions 12-15

All participants, except for one, believe that consensus should remain the basis for all decision-making in CCAMLRL. However two believed that improvements could be made in some areas, with reference to dispute settlement. The lone dissenter believed that consensus-minus-one is the only decision-making method that can address the current needs of CCAMLRL. This participant was from a Contracting Party (CP) to the CAMLR Convention, but not a CCAMLRL Member.

There were suggestions that transparent discussions and improved dispute settlement could be implemented, however no more detail was given. It was also suggested that various forms of majority voting could work in exceptional circumstances, but that consensus should lie at the heart of all decision-making in CCAMLRL.

All participants agreed that consensus makes it harder for CCAMLR to formulate management measures because it may take longer to arrive at such decisions due to the necessary debate. However, all believe that the use of consensus is integral as it reinforces the obligatory nature of the decisions and facilitates compliance and uniformity in their application. One participant stated that this is the only way to effectively regulate the high seas.

Some participants had experience with other decision-making processes and agreed that it was difficult to compare decisions made by CCAMLR to other organisations, as different decision-making procedures are needed, depending on the issues, time available and political context. All agreed that a majority system like the IWC would not be practical. Majority voting was seen as politicised and divisive, as the majority is prepared to enforce its views, irrespective of the minority.

Overall it was agreed that for CCAMLR, the use of consensus is appropriate and has been demonstrated as a workable decision-making process.

## 4.2 Interviews

The aim of the interviews was to understand in greater detail the views of CCAMLR participants on the consensus decision-making process that CCAMLR uses.

For consistency, the results of the interviews are presented using the following questions:

1. Does CCAMLR operate consensus as you would define it?
2. Does CCAMLR work?
3. Should CCAMLR change the use of consensus?
4. Is there an alternative for when consensus cannot be reached?
5. Is there another decision-making option for CCAMLR?

#### 4.2.1 Define consensus in CCAMLR

Questions 1 and 2

All interviewees agreed that CCAMLR uses consensus as they would define it. The most common definition of consensus was “lack of formal objection” (80%; 8 out of 10 people), followed by “everybody agrees (20%; 2 out of 10 people). CCAMLR’s model of consensus decision-making was mostly defined as “lack of formal objection” (80%), with the “everybody agrees” (20%) definition also considered.

#### 4.2.2 Does consensus decision-making work?

Questions 5 and 6

It has been argued in the literature that decisions reached by consensus are weaker because they have had to be negotiated until all parties agree (Trolle-Andersen, 1987). Two participants agreed with this statement, clarifying that by weaker, they meant decisions are delayed. However, all participants who answered concluded that reaching effective decisions was not affected by consensus. It was believed that although the decisions took longer to come about, their overall effectiveness was very good.

#### 4.2.3 Has CCAMLR worked?

Questions 3, 4 and 11

All participants believed that CCAMLR has succeeded as a decision-making system. However, one interviewee also believed that CCAMLR fails only when the Contracting Parties are not committed and block consensus in cases of conflicting interests.

Participants did consider that failure could be implied as decisions can take too long. However, it was considered that CCAMLR was a reactive organisation so once there was a clear need for management measures a decision, based on the best scientific knowledge, would usually be agreed upon.

All but one participant believe that CCAMLR is in line with Article 10 of UNFSA (see Appendix 3 for full text of this Article) and has a decision-making procedure which “facilitates the adoption of conservation and management measures in a timely and effective manner”. The term “timely” was considered subjective with many questioning its meaning. Timely for one country might mean three years, whereas timely for another might mean one year. However, overall it was agreed that the decisions were effective, especially when considering the implementation of measures.

#### 4.2.4 Is there an alternative for when consensus cannot be reached?

##### Questions 7-10

All participants, except one, believed there should be an “opt out” procedure in place and quoted the procedure outlined in Article IX.6 of the CAMLR Convention. The dissenter believed that “you either have consensus or you don’t”. This respondent believed that an “opt out” procedure was akin to majority voting.

The option of using consensus-minus-one as an alternative when consensus cannot be reached was rejected by 78% of participants (7 out of 9 people<sup>11</sup>). One believed it to be a useful naming and shaming tool and could effectively be used for blacklisting of IUU vessels. However the majority considered it nonsense. It was their opinion that instead of consensus-minus-one Members with an interest in the decisions, such as blacklisting of IUU vessels, should present their evidence, be involved in the debate and then abstain from participating in the decision-making process.

It was the majority opinion that consensus was needed to ensure the full cooperation of all Members.

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<sup>11</sup> One participant declined to answer Questions 9 and 10, concerning consensus-minus-one.

#### 4.2.5 Is there another decision-making option for CCAMLRL?

##### Questions 12-15

All participants believed that consensus should remain the basis for all decision-making in CCAMLRL. However one believed that there was also room for an 80% majority for issues when reaching consensus was unlikely.

It was noted that consensus was inclusive and cooperative, involving States that are interested in harvesting resources as well as those that are more conservation-minded. The strength of consensus was its power as an equaliser, giving everyone the same power of veto over management measures.

One participant believed that, although consensus should remain, punitive measures for failure to comply should be introduced to prevent undermining of the CAMLR Convention. This participant believed CCAMLRL needed a work plan to ensure that time is not wasted on a single contentious item. The respondent proposed a formal Working Group be established to work on rules and regulations.

Others suggested that for matters of compliance a majority type decision-making system could theoretically be set up. However, the efficacy of such a system was questioned, with participants believing that consensus is the only way to ensure full implementation and compliance with all management measures.

The participants' views on whether consensus makes it harder for CCAMLRL to formulate management measures were split with 40% agreeing (4 out of 10 people). Most believed that it might take longer to arrive at such decisions due to the necessary debate. Another believed that consensus made it difficult to deal with recalcitrant Members.

However, the majority (60%; 6 out of 10 people) believed consensus carried with it a respect for the decision and the need to cooperate within the CCAMLRL community to reach consensus. These respondents believed that without consensus, the chances of full implementation decline.

One participant had experience with majority type decision-making processes. They believed that although this style of organisation may move forward faster, the decisions are not as strong and their progression in terms of their objectives is far behind CCAMLR.

Another had experience in the International Whaling Commission (IWC), which uses a three quarters majority voting system. They believed that the IWC had not been successful, as each country's rights were not protected. With consensus in CCAMLR, each Member was equal and had similar objectives, thus providing stronger and more efficient decisions.

Overall it was agreed that CCAMLR is very good at making decisions and adopting management measures. It was believed that CCAMLR's decisions, although not perfect, are strong and that consensus decision-making has worked in CCAMLR as the organisation still functions and all Members participate.

### 4.3 Chapter Summary

From these results it can be concluded that in a CCAMLR context consensus is seen as a lack of formal objection. Although this type of decision-making has its flaws, namely timeliness and often the need to indulge the interests of the lowest common denominator, consensus decision-making works for CCAMLR. Decisions that have been compromised to garner consensus agreement can then be used as stepping-stones to firmer, more proactive decisions.

It can also be concluded that participants believe CCAMLR has succeeded as a decision-making system, although it was noted that decisions can take too long. It was also noted that due to its use of consensus, CCAMLR has the ability to fail when interests of States are not the interests of the Commission collectively and there is a lack of commitment.

A minority of participants believed that when consensus cannot be reached other options, such as consensus-minus-one could be used. However all participants believed that consensus was needed to ensure the full cooperation of all Members.

Therefore, it was the majority point of view that consensus remain the basis for all decision-making in CCAMLR, with improvements in transparency and dispute resolution being required.

Using the methods in Section 3.2 and the results presented in Chapter 4, this study will proceed in considering cooperation, compromise and consensus in CCAMLR. These help to explain and contextualise decision-making.

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## 5. CCAMLR – Consensus and Cooperation

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### 5.1 The Origins of Cooperation and Compromise in the Antarctic

The CAMLR Convention is unique. It is unique because it is entrenched with cooperation, from its sovereignty compromise to the makeup of its Members, conservationists, harvesting nations, and more recently port States. This form of cooperation began in the Antarctic Treaty (AT Article III) and has flowed through to CCAMLR and other ATS instruments.

#### 5.1.1 The Antarctic Treaty

The 12 countries active during the International Geophysical Year of 1957-58 negotiated and signed the Antarctic Treaty (AT) with the main objectives of ensuring that Antarctica is “used for peaceful purposes only” (AT Article I.1) and to “promote international cooperation in scientific investigation” (AT Article III.1) in areas south of 60° South Latitude (AT Article VI). The Treaty entered into force on 23 June 1961 (ATS 2009).

Antarctic Treaty Consultative Meetings (ATCMs) are held annually by Member Countries “for the purpose of exchanging information, consulting together on matters of common interest pertaining to Antarctica, and formulating and considering, and recommending to their Governments, measures in furtherance of the principles and objectives of the Treaty” (AT Article IX.1).

As noted earlier, ATCMs operate on the basis of consensus decisions and measures become effective only when approved by all the Consultative Parties (AT Article IX.4). In practice this means that discussions about an issue continue until agreement which all Consultative Parties can live with is found (i.e. no objections are made). Although this can be a time consuming process, when considering the diversity and



scope of the topics discussed by Antarctic Treaty Consultative Parties (ATCPs) and the vast number of decisions<sup>12</sup> that have been agreed upon and implemented over the last forty-eight years of meetings, the use of consensus decision-making in ATCMs could be considered effective.

The Antarctic Treaty did not cover all aspects of human activity in Antarctica, and some say it never intended to because the exploitation of resources is not mentioned in the Treaty (Trolle-Andersen 1987). Instead the Antarctic Treaty, via its ATCMs, provided an arena of international cooperation for the discussion of matters of interest to the ATCPs and to work towards their objective of preservation and conservation of living resources in Antarctica (AT Article IX.1(f)).

### 5.1.2 The Antarctic Treaty System

The Antarctic Treaty System (ATS) is a complex regime made up of the Antarctic Treaty, the measures in effect under that Treaty, its associated separate international instruments in force and the measures in effect under those instruments (Madrid Protocol, Article 1(e)) (see Box 3). The primary purpose of the ATS is to coordinate relations among states with respect to Antarctica. Each of these instruments was a consequence of consensus, which had its genesis in the “parent” instrument, the Antarctic Treaty. CCAMLR’s role in the ATS and cooperation with its other instruments is discussed in Section 6.1.

#### Box 3: The Antarctic Treaty System (ATS):

- The Antarctic Treaty - 1959;
- The Protocol on Environmental Protection to the Antarctic Treaty (commonly known as the Madrid Protocol) - 1991;
- The Convention for the Conservation of Seals (CCAS) - 1972; and
- The Convention on the Conservation of Antarctic Marine Living Resources (CAMLR Convention) - 1980.

<sup>12</sup> For a full list of Recommendations, Measures, Decisions, and Resolutions taken by ATCPs see the Antarctic Treaty Secretariat website: [www.ats.aq/index\\_e.htm](http://www.ats.aq/index_e.htm)

## 5.2 Convention on the Conservation of Antarctic Marine Living Resources

As noted earlier, commercial harvesting of fin-fish in the Southern Ocean developed in the late 1960s with several species becoming over-fished by the mid-1970s (Miller *et al* 2004). A fishery for Antarctic krill, *Euphausia superba*, commenced in the early 1970s (Everson 2000). As krill are at the centre of the Antarctic ecosystem, with many predators dependant entirely on them, there was concern over the effects that such a fishery might create (Miller 1991, Agnew 1997).

CCAMLR's origins are in the Antarctic Treaty, with ATCPs at the 9<sup>th</sup> ATCM in 1977 calling for the establishment of "a definitive regime" which would deal with both the direct and indirect effects of harvesting in the Southern Ocean (ATCM Recommendation IX-2). It was agreed that such a regime would be ecosystem-based and designed to regulate the use of marine living resources "within the framework of the Antarctic Treaty" (ATCM Recommendation VIII-10).

From this the CAMLR Convention was signed in May 1980 (CCAMLR 2007b). The Convention entered into force on 7 April 1982, having application over all Antarctic marine living resources south of the Antarctic Convergence (Article I.1) (see CCAMLR Map insert, page 124).

The CAMLR Convention defines the marine living resources it has authority over as populations of "fin fish, molluscs, crustaceans and all other species of living organisms, including birds, found south of the Antarctic Convergence" (Article I.2). This would technically include whales and seals under CCAMLR's jurisdiction. However, Article VI recognises the International Convention for the Regulation of Whaling and the Convention for the Conservation of Antarctic Seals as having prior and continued authority over these species.

CCAMLR's cooperative approach began with the Antarctic Treaty (Edwards and Heap 1981) and is entrenched in the Convention under Article VI and also Article XXIII. These Articles allow CCAMLR to cooperate with, and enter into, working

relationships with various inter-governmental and non-governmental organisations (see also Chapter 6).

### 5.2.1 The CAMLR Convention is Unique

#### *5.2.1.1 Ecosystem and Precautionary Approach*

The CCAMLR approach to resource management is considered unique for a variety of reasons. Firstly, its conservation principles apply an “ecosystem and precautionary” approach (Powell 1990, Constable *et al* 2000).

As mentioned in Section 2.3, the competing interests of conservationist and fishing nations needed to be resolved. By stating that the main objective of the Convention is “the conservation of Antarctic marine living resources” and qualifying that “the term ‘conservation’ includes rational use”, (Article II, Box 4), the Convention does just that. CCAMLR allows for the harvesting of resources in a way that will conserve stocks, as well as protect the species dependant upon those stocks. Article II.3.a-c goes on to state that any harvesting activities in the Convention Area must be undertaken in a precautionary manner so as to ensure:

- The prevention of decrease in the size of any harvested population to levels below those which ensure its stable recruitment;
- The maintenance of ecological relationships between harvested, dependent and related populations;
- The restoration of depleted populations; and
- The prevention of changes in the marine ecosystem which are not potentially reversible over two or three decades.

A definition of the term “rational use” was attempted for operational purposes by CCAMLR in 1989 by the Working Group on Development of Approaches to Conservation of Antarctic Marine Living Resources (WG-DAC) (CCAMLR 1989, Annex E, Appendix 1, paragraph 2). It was agreed that “rational use” included:

1. The harvesting of resources is on a sustainable basis;

2. That harvesting on a sustainable basis means that harvesting activities are so conducted as to ensure that the potential for achieving the highest possible long-term yield is preserved, subject to the principles of conservation (bullet points above); and
3. That the cost-effectiveness of harvesting activities and their management is given due weight.

Box 4: Article II of the CAMLR Convention

1. The objective of this Convention is the conservation of Antarctic marine living resources.
2. For the purposes of this Convention, the term 'conservation' includes rational use.
3. Any harvesting and associated activities in the area to which this Convention applies shall be conducted in accordance with the provisions of this Convention and with the following principles of conservation:
  - a) prevention of decrease in the size of any harvested population to levels below those which ensure its stable recruitment. For this purpose its size should not be allowed to fall below 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 subparagraph (a) above; and
  - c) prevention of changes or minimisation 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 and of the effects of environmental changes, with the aim of making possible the sustained conservation of Antarctic marine living resources.

The definition was endorsed by CCAMLR (CCAMLR-VIII, paragraph 69) and so became binding, consistent with other such agreements, such as the definition and source of the best available science (further discussed in Section 5.3).

It was thought that an operational definition of Article II, i.e. conservation and rational use, would provide criteria against which management performance procedures could be assessed (Miller, 1991). Conservation approaches in relation to the management of krill and finfish stocks were thus considered (SC-CAMLR 1990, paragraphs 8.1 – 8.16; SC-CAMLR 1991, paragraphs 9.1 – 9.9). From this work, the definitions of a new fishery were developed (SC-CAMLR 1991, paragraph 9.3). This point is further discussed in Section 7.4.

#### *5.2.1.2 The Convention Area and Jurisdiction*

The second and major point of uniqueness of the Convention is its area of application (see CCAMLR Map insert, page 124). The CAMLR Convention was the first international agreement to identify its area of application by reference to an ecosystem. The Convention applies to Antarctic marine living resources south of 60° South latitude, which is the same as the Antarctic Treaty area (Section 5.1.1).

However, the CAMLR Convention goes further to include the area between that latitude and the Antarctic Convergence, which forms part of the Antarctic marine ecosystem (Article I.1). The Antarctic Convergence, now termed the Polar Front, is where the colder waters of the Southern Ocean mix with and sink below warmer waters from the north (Laws 1985). This is an environmental barrier which many Antarctic species do not cross. It therefore effectively becomes the northern boundary of Antarctic marine populations covered by the CAMLR Convention. For the purpose of the Convention, the Antarctic Convergence/Polar Front has been defined by geographic coordinates (Article I.4).

Jurisdiction has always been a highly contentious issue in the Antarctic, with disputed territories and recognition and non-recognition of sovereignty (Edwards and Heap 1981; Triggs 1987; Watts 1992). The Antarctic Treaty deals with the issue of

claimants and non-claimants by effectively freezing current claims and not prejudging future claims. Article IV of the Antarctic Treaty thus recognises that nothing in the Treaty can be used to recognise or dispute sovereignty on the Antarctic continent, nor can any activity undertaken support existing claims (see Box 5). This has been referred to as a “bifocal approach” to sovereignty and coastal State jurisdictional issues (Edwards and Heap 1981; Triggs 1987), in that States can interpret the Treaty to what best suits their own position.

Box 5: Article IV of the Antarctic Treaty

1. Nothing contained in the present Treaty shall be interpreted as:
  - (a) A renunciation by any Contracting Party of previously asserted rights of or claims to territorial sovereignty in Antarctica;
  - (b) A renunciation or diminution by any Contracting Party of any basis of claim to territorial sovereignty in Antarctica which it may have whether as a result of its activities or those of its nationals in Antarctica, or otherwise;
  - (c) Prejudicing the position of any Contracting Party as regards its recognition or non-recognition of any other State’s right of claim or basis of claim to territorial sovereignty in Antarctic.
2. No acts or activities taking place while the present Treaty is in force shall constitute a basis for asserting, supporting or denying a claim to territorial sovereignty in Antarctic or create any rights of sovereignty in Antarctica. No new claim, or enlargement of an existing claim, to territorial sovereignty in Antarctica shall be asserted while the present Treaty is in force.

Before negotiations began on the CAMLR Convention the associated jurisdiction issues were being contemplated. AT Recommendation IX-2 (1977), which called for a definitive regime for Antarctic marine living resources, also stated that “the provisions of Article IV of the Antarctic Treaty shall not be affected by the regime” and that “it should ensure that the principles embodied in Article IV are safeguarded



in application to the marine areas south of 60° South latitude” (ATCM Recommendation IX-2, Part III, paragraph 3(b)). This means that nothing in this regime would affect any claims, or non-claims, for sovereignty.

The CAMLR Convention binds all Contracting Parties to AT Articles IV and VI in their relations with each other (Article IV.1). These AT Articles deal with sovereignty, area of jurisdiction and the high seas. The CAMLR Convention goes further to state that no act or activity will affect the current status of claimants and non-claimants. Like Article IV of the Antarctic Treaty, Article IV of the CAMLR Convention is essentially a non-solution intended to side step any legal controversy (Beck 1986). It is once again a “bifocal approach” so that all States can interpret the Convention in a way that best suits their jurisdictional position. Other formal links between CCAMLR and the AT are discussed in Section 6.1.

The Convention Area includes both high seas areas and coastal areas under national jurisdiction, disputed and recognised. In addition to the intentional ambiguity (bifocal approach) of the Convention (as per Articles III to V), a statement by the Chairman of the Conference on the Conservation of Antarctic Marine Living Resources was attached to the Convention and was also included as part of the Final Act of the Conference text (attached here as Appendix 6).

The statement, commonly referred to as the Chairman’s Statement, addresses the application of the Convention to waters adjacent to Kerguelen and Crozet Islands which fall under French jurisdiction (Appendix 6, paragraphs 1 to 4). By implication, the provisions are also extended to waters adjacent to other islands within the area to which the Convention applies, and over which the existence of State sovereignty is recognised by all Contracting Parties (Appendix 6, paragraph 5).

The Chairman’s Statement can be considered an ingenious piece of diplomacy to establish agreement from countries that did not wish to hand over authority to CCAMLR for what are considered “their” own resources. CCAMLR Members effectively have the opportunity to side-step implementation of CMs as the Chairman’s Statement gives applicable States the freedom to choose whether they agree that their coastal waters are to be included in any CM (Appendix 6, paragraphs

2 and 5), leaving Members able to adopt any national measures as it deems appropriate.

At present only South Africa has joined France in overtly invoking the Chairman's Statement for waters adjacent to Prince Edward Island. Through the years they have made reservations to CMs likely to impact on their jurisdiction in the form of footnotes to the CMs.<sup>13</sup> It should be noted that even though South Africa puts forward these reservations, it does apply CCAMLR measures.

In these terms the Chairman's Statement could also be considered a way for Members to avoid their obligations, as once invoking the Chairman's Statement, they have the legitimate right not to implement any CMs. This will be discussed further under the case studies, specifically with regard to France and the issue of incidental by-catch of seabirds in their fishery (Section 7.3).

Australia has, to date, never officially invoked the Chairman's Statement, but every year at the CCAMLR meetings it issues a statement advising CCAMLR that any fishing or fisheries research activities in the Australian Exclusive Economic Zone (EEZ) around the Australian Territory of Heard Island and the McDonald Islands must have prior approval by the Australian authorities (CCAMLR 2007a, paragraph 13.84). Consequently all fishing concessions are fully subscribed, seemingly by Australian vessels, thus closing the fishery to other Members without having to invoke the Chairman's Statement overtly. Australia implements all applicable CCAMLR CMs in its waters, including a CCAMLR-derived Total Allowable Catch (TAC).

Norway also has undisputed coastal waters surrounding Bouvet Island in the Convention Area. However, it has not made any statement regarding jurisdiction over these waters. This could be because there is no fishery in that area at present and so there is no need to protect Norwegian jurisdiction, interests and sovereignty. Norway

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<sup>13</sup> For example: "Except for water adjacent to the Kerguelen and Crozet Islands" and "Except for waters adjacent to the Prince Edward Islands".



has, however, declared a territorial sea adjacent to the islands and a special nature reserve.<sup>14</sup>

The United Kingdom's possession of, and therefore jurisdiction over, South Georgia Island and the South Sandwich Islands is disputed by Argentina, and therefore provisions of the Chairman's Statement theoretically cannot be applied. This ongoing dispute could potentially affect the formulation of resource management measures.

In practice, however, it does not. The UK government has claimed a maritime zone (EEZ) for South Georgia and the South Sandwich Islands (South Georgia Proclamation<sup>15</sup>). This proclamation states that the UK has jurisdiction over the exploration, exploitation, conservation and management of the natural resources in this zone (paragraph 3). The UK has a fishing authority in place and issue licences to fish in its coastal waters. The reason behind this authority is to implement all applicable CCAMLR CMs, as well as some of its own measures. It does, however, also give the UK a physical authority over resources the proclamation covers.

Although Argentina contests UK sovereignty, it does not block any decisions in CCAMLR on management measures for the disputed area.

#### *5.2.1.3 CCAMLR Membership*

The CAMLR Convention differs from other international fisheries conventions in terms of its membership (Kaye 2001).

Article XXIX opens the Convention for accession "by any State interested in research or harvesting activities" in relation to Antarctic marine living resources to which the Convention applies. A State which has acceded to the CAMLR Convention is entitled to be a Member of the Commission "during such time as that acceding Party is

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<sup>14</sup> More information available online at

[http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/mzn\\_s/mzn53.pdf](http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/mzn_s/mzn53.pdf)

<sup>15</sup> United Kingdom of Great Britain and Northern Ireland/Proclamation (Maritime Zone) No. 1 of 1993 taken from website:

[http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/GBR\\_1993\\_Proclamation1.pdf](http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/GBR_1993_Proclamation1.pdf)

engaged in research or harvesting activities in relation to the marine living resources” to which the CAMLR Convention applies (Article VII.2(b)).

It can thus be inferred that in order to become a CCAMLR Member, Acceding States should demonstrate a “real interest”,<sup>16</sup> either scientific or fishery related, in the resources covered by CCAMLR (Molenaar, 2000).

Members of CCAMLR are thus able to fully participate in the organisation’s meetings and decision-making (Article VII). Contracting Parties are not able to participate in any CCAMLR decision-making with their participation being subject to conditions outlined in Commission Rules of Procedure, Rule 30(b).

Some flexibility has been extended in respect of the definition of “real interest” in the past. For example, Namibia became a Member of CCAMLR in 2001 (CCAMLR 2001b, paragraph 2.3) despite not being actively engaged in scientific research or resource harvesting in the Convention Area. It was, however, a Port State used by vessels discharging toothfish and so it was beneficial for CCAMLR to have Namibia as a Member to implement all applicable port state CMs.

The People’s Republic of China (hereafter referred to as China) became a CCAMLR Member in 2007 (CCAMLR 2007a, paragraph 2.3). China, as a major consumer of toothfish, had already voluntarily implemented trade-related CMs for toothfish (CCAMLR 2006, paragraph 8.1).

From this it could be inferred that a “real interest in harvesting” also includes Port States where fish or krill are landed.

The Cook Islands acceded to the CAMLR Convention in 2005 with an interest in licensing vessels to fish in CCAMLR waters. However, the probability of full membership of the Commission under Article VII is unlikely due to the Cook Islands standing as a semi-autonomous State.

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<sup>16</sup> The concept of “real interest” is a term used in Article 8(3) of the 1995 United Nations Fish Stock Agreement as a condition that States must fulfil before they can participate in a Regional Fisheries Management Organisation, meaning any State with a genuine interest in a fishery has the right to become a Member of the applicable RFMO.

In general, the makeup of a decision-making organisation's membership will always affect the quality of decisions. In CCAMLR it is the Members who decide the agenda of work (Commission Rules of Procedure, Rule 17) and so they ultimately choose the direction that CCAMLR takes. Perhaps one of the reasons that CCAMLR initiated a "real interest" prerequisite for Membership was so that those involved in the decision-making were interested in obtaining the objectives in Article II. States that are not actively engaged in resource harvesting or scientific research may not fully understand or be committed to the management measures that are proposed.

This was evidenced at CCAMLR-XXVII, when China reserved its position on the issue of the placement of international scientific observers on all krill vessels (further discussed in Section 7.2.2) even though China does not currently participate in the krill fishery (CCAMLR 2008a, paragraph 11.7). China's concerns were in relation to a proposal that new entrants to the krill fishery would require 100% coverage by international scientific observers for the first two years of operation, even if the rest of the fleet were at a scaled back percentage of coverage. From the published report, it could be construed that China did not fully understand the proposal and so, rather than be proactive on the important issue of scientific observers, it chose to be conservative.

### 5.3 Organisational structure of CCAMLR

As stated earlier, to facilitate the objectives and principles set out in Article II of the CAMLR Convention the CPs established the Commission for the Conservation of Antarctic Marine Living Resources (CCAMLR).

CCAMLR has various responsibilities, such as to facilitate research, compile data, and acquire catch and effort statistics on harvested populations. Furthermore, it is mandated to analyse, disseminate and publish this information (Article IX.1). CCAMLR was also instructed to implement a system of observation and inspection, as established in Article XXIV of the Convention (Article IX.1(g)).

One of the more important roles of CCAMLR is to identify conservation needs, formulate, adopt and revise CMs on the basis of the best scientific evidence available (Article IX.1(f)). These CMs are regulations on when, where and how the Members can participate in CCAMLR fisheries. Items such as precautionary catch limits, open and closed seasons, by-catch limits and Vessel Monitoring System (VMS) requirements are openly discussed and decided upon in CCAMLR (for full text see Box 6).

Box 6: Article IX.2 of the CAMLR Convention

2. The Conservation Measures referred to in Paragraph 1(f) include the following:

- (a) The designation of the quantity of any species which may be harvested in the area to which the Convention applies;
- (b) The designation of regions and sub-regions based on the distribution of populations of Antarctic marine living resources;
- (c) The designation of the quantity which may be harvested from the populations of regions and sub-regions;
- (d) The designation of protected species;
- (e) The designation of the size, age and, as appropriate sex of species which may be harvested;
- (f) The designation of open and closed seasons for harvesting;
- (g) The designation of opening and closing areas, regions or sub-regions, for purposes of scientific study or conservation, including special areas for protection and scientific study;
- (h) Regulation of the effort employed and methods of harvesting, including fishing gear, with a view, inter alia, to avoiding undue concentration of harvesting in any region or sub-region;
- (i) The taking of such other conservation measures as the Commission considers necessary for the fulfilment of the objective of this Convention, including measures concerning the effects of harvesting and associated activities on components of the marine ecosystem other than the harvested populations.

The CAMLR Convention established the headquarters of CCAMLR (Article XIII, paragraph 1) in Hobart, Australia, and assigned CCAMLR to appoint an Executive Secretary (Article XVII.1).

CCAMLR has established two standing committees in accordance with Article XIII.6 (Figure 5). The Standing Committee on Administration and Finance (SCAF) deals with administrative and budgetary issues. The Standing Committee on Inspection and Compliance (SCIC)<sup>17</sup> deals with compliance issues, such as inspections, observers, the Catch Document Scheme (CDS), Vessel Monitoring Systems (VMS) and Illegal, Unreported and Unregulated (IUU) fishing. Discussions from the standing committees are presented to CCAMLR upon where decisions are taken by consensus.

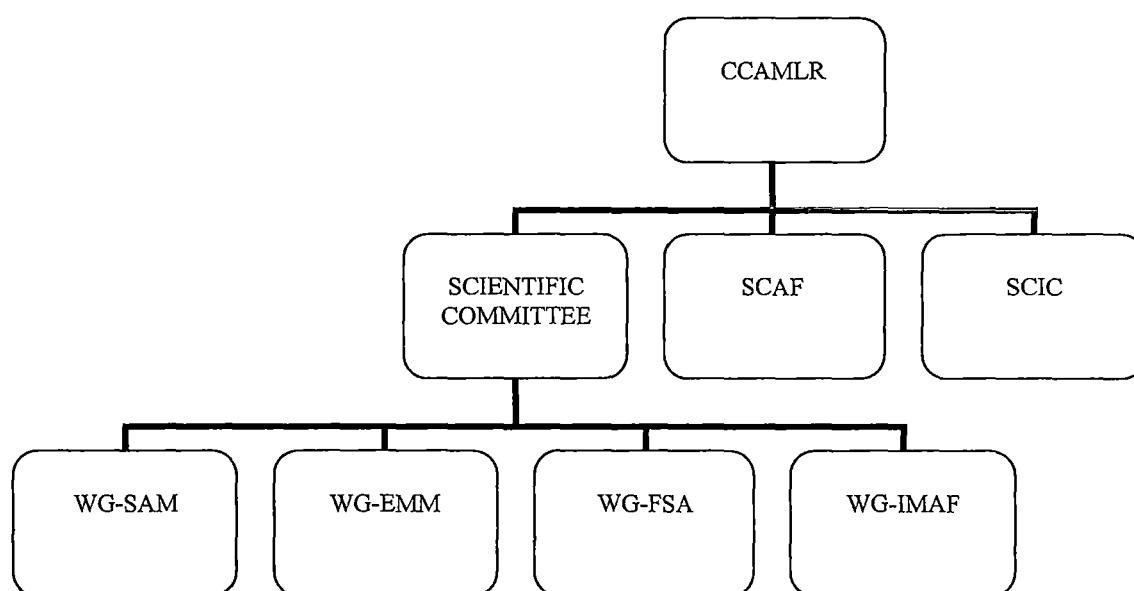


Figure 5: CCAMLR organogram illustrating connections between its Standing Committees and the Scientific Committee and its Working Groups.

To ensure CCAMLR bases its decisions on best scientific advice the Contracting Parties, under Article XIV, established the Scientific Committee, a consultative body to CCAMLR. The Scientific Committee provides a “forum for consultation and co-operation concerning the collection, study and exchange of information” (Article XV.1). The designation of the Scientific Committee as the only source of the best

<sup>17</sup> This Standing Committee was previously titled the Standing Committee on Observation and Inspection (SCOI). For the discussions resulting in the change in name see CCAMLR 2002, paragraphs 5.15 and 5.16, and CCAMLR 2002, Annex 5, paragraphs 6.1 to 6.4.

scientific evidence available for CCAMLR was formalised in 1990 (CCAMLR 1990, paragraph 7.6). This recognition took place five years before UNFSA. However, it does make CCAMLR consistent with UNFSA Article 6.3, in that it uses the best scientific knowledge to implement the precautionary approach.

Under Article XVI.3, the Scientific Committee has set up a number of working groups (Figure 5). These are the Working Group on Ecosystem Monitoring and Management (WG-EMM), the Working Group on Fish Stock Assessment (WG-FSA), the Working Group on Incidental Mortality Associated with Fishing (WG-IMAF) and most recently the Working Group on Statistics, Assessment and Modelling (WG-SAM). The data used by these working groups are collected by Members fishing in the Convention Area, scientific observers, and scientific surveys (CCAMLR 2001a). The working groups present their discussions and analyses to the Scientific Committee and all recommendations and advice for CCAMLR are determined by consensus.<sup>18</sup> Where consensus cannot be achieved the Scientific Committee sets out all views advanced on the matter under consideration in its report to CCAMLR.

Although there is no strict procedure on how to proceed when the science is either absent or ambiguous, generally when there is no science to allocate a catch limit then a precautionary approach is taken. If the Scientific Committee cannot agree on a catch limit then the general rule of CCAMLR seems to be to maintain the status quo and keep existing catch limits from the previous year. For example, at the twenty-fourth Commission meeting in 2005 the Scientific Committee could not provide new advice on by-catch catch limits (SC-CAMLR 2005, paragraphs 4.179, 4.186 and 4.187), so CCAMLR maintained the catch limits for by-catch from the previous season (CCAMLR 2005a, paragraph 4.49).

At the same meeting some Members proposed an increase in the precautionary catch limit for *Dissostichus spp.* in Division 58.4.3b to allow increased fishery-based research, such as tagging, and to allow a greater surveillance presence. CCAMLR decided that it did not have enough time to consider this proposal and so deferred to

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<sup>18</sup> Scientific Committee Rules of Procedure, Part II, Rule 3, in CCAMLR Basic Documents (CCAMLR 2007b).

the previous advice from the Scientific Committee and retained the existing precautionary catch limit (CCAMLR 2005a, paragraph 11.54).

Examples like these are plentiful in the last twenty-seven years of CCAMLR and so it can be observed that the precautionary approach to resource harvesting is practised as a high priority.

## 5.4 Consensus in CCAMLR

The origin of CCAMLR's decision-making process has already been discussed in Section 2.3 and from the questionnaires and interviews it can be assumed that consensus, as it is used in CCAMLR, does not necessarily mean that everybody agrees with the decision, rather that they are happy enough not to disagree, i.e. there is a lack of formal objection (Sections 4.1.1 and 4.2.1).

### 5.4.1 Consensus at work

CCAMLR has a vast suite of CMs in force ranging from environmental protection to catch limits to trade related measures.<sup>19</sup> At each meeting the measures are negotiated until everybody is satisfied with the outcome. If an agreement cannot be reached then the measure is deferred until the next meeting where parties can discuss intersessionally their issues and come back with a more readily acceptable suggestion (see Section 7.1).<sup>20</sup>

Where there is a lack of agreement in CCAMLR the full debate is included in the report to ensure transparency. For example at CCAMLR-XVIII the European Community (EC) submitted a notification on behalf of Portugal to enter New and Exploratory Fisheries (CCAMLR 1999, paragraph 7.5) (Section 7.4). It was argued that as a CP to CCAMLR, the European Community and all its Member States were

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<sup>19</sup> See various CMs in CCAMLR, *Schedule of Conservation Measures in Force 2008/09* (CCAMLR, Hobart, Australia, 2009). Available from website: [http://www.ccamlr.org/pu/e/e\\_pubs/cm/drt.htm](http://www.ccamlr.org/pu/e/e_pubs/cm/drt.htm)

<sup>20</sup> For a more in depth discussion on CCAMLR Conservation Measures, their development and efficacy, see Miller *et al* 2004.

bound by CCAMLR's CMs (CCAMLR 1999, paragraph 9.43). However, the majority of Members believed it would contravene the Convention if a Portuguese-flagged vessel fished without Portugal having first acceded to the Convention (CCAMLR 1999, paragraph 9.44). The EC reserved its right under the CAMLR Convention in relation to EC vessels (CCAMLR 1999, paragraph 9.45), but Portugal did not fish that season, and has not fished in the Convention Area in subsequent years to date.

Due to the lack of agreement on this issue CCAMLR's debate was presented in its entirety in the report (CCAMLR 1999, paragraphs 9.47 to 9.52). This ensures transparency of the decision-making process, but also allows all views to be recorded.

#### 5.4.2 Objection Procedures

The objection procedure of the CAMLR Convention is outlined in Section 2.3.1.

Popular opinion is that once an objection procedure has been used in a convention it becomes easier to use it again (Edwards and Heap 1981). However, from the data collected in this study the "opt out" procedure was seen as necessary for reasons relating to domestic legislation (Sections 4.1.4 and 4.2.4). This is evident in the first of only two examples in CCAMLR history of the "opt out" procedure being used.

At CCAMLR-X in 1991 the submission of haul-by-haul data from the commercial fishery in five-day periods was endorsed (CCAMLR 1991, paragraph 10.8 and 10.9), even though some Members expressed the view that they had legal and technical difficulties in submitting this data (CCAMLR 1991, paragraphs 4.10 and 4.11). It was understood that Chile notified CCAMLR, in accordance with Article IX.6(c), that it was unable to implement CM 37/X<sup>21</sup> due to infrastructure reasons. This meant that the CM did not apply to them for the 1991/92 fishing season for *Dissostichus eleginoides* in Subarea 48.3.

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<sup>21</sup> CM 37/X – Effort and Biological Data Reporting System for *Dissostichus eleginoides* in Statistical Subarea 48.3 for the 1991/92 Season.



It should be noted that Chile complied with all data reporting requirements, just not in the five-day time period that the CM required (CCAMLR 1992, paragraphs 4.3 and 9.28). CM 37/X evolved into CM 56/XI<sup>22</sup>; the only change was that Members were required to submit data at the end of each month rather than at the end of each (five-day) reporting period. Chile was able to comply with this measure.

This measure has evolved to CM 23-05<sup>23</sup> that requires fine-scale biological data to be submitted monthly. Chile has complied fully with this measure.

The second use of the objection procedure was by Russia in 2006 when it indicated that it might “opt out” of CM 10-08,<sup>24</sup> using the procedures in Article IX.6 (CCAMLR 2006, paragraph 12.22; see also Section 7.5.1). However, as there has been no mention of this issue in the next two meeting reports, it can be assumed that Russia did not lodge an official objection.

While objection procedures are usually condemned as weakening or delaying implementation of the measures (Swan 2004; McDorman 2005), they do protect a State from being bound by a decision that it cannot implement within national legislation. Therefore, instead of failing to comply with the CM the State will choose not to implement it in strict accordance with the CM, for example Chile in 1991. This is a subtle, but important difference.

McDorman (2005) notes that while objection procedures can provide some relief from *consensus paralysis* it would not be wise to apply them in respect of catch allocation decisions as this would effectively allow the objecting State to set their own quota. For example, ICCAT allocates quota to individual Members and there have been instances of Members formally objecting (ICCAT 2009), thus making the agreed recommendation (catch allocation) non-binding to the objecting party (ICCAT Article VIII.3).

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<sup>22</sup> CM 56/XI - Effort and Biological Data Reporting System for *Dissostichus eleginoides* in Statistical Subarea 48.3 for the 1992/93 Season.

<sup>23</sup> CM 23-05 – Monthly Fine-Scale Biological Data Reporting System for Trawl, Longline and Pot Fisheries

<sup>24</sup> CM10-08 - Scheme to promote compliance by Contracting Party nationals with CCAMLR CMs.

This has not happened in CCAMLR thus far and as catches are not allocated to States, but as a catch limit for the entire CCAMLR fleet, it does not appear a likely event. However, if catch allocation to States does occur in the future then the objection procedure may be used regularly.

#### 5.4.3 Dispute Resolution

The CCAMLR Convention dispute resolution procedure is outlined in Section 2.3.2. There has been no dispute requiring the implementation of this procedure in CCAMLR's 27-year history.

### 5.5 Chapter Summary

As noted earlier, CCAMLR is sometimes considered more than an RFMO. It was the first international effort to apply an ecosystem approach to marine resource conservation (Arnaudo, 2005), and has its roots in the cooperative environment of the ATS.

Multispecies management is difficult to apply in practice (Molenaar, 2001), especially in an area as remote as Antarctica. Although CCAMLR does not implement such multispecies management implicitly, it does take into account non-harvested species in its management, thus applying an ecosystem approach.

In order to achieve CCAMLR's conservation objectives it must have Member States that are committed, and so have a real interest. The flexibility of this real interest to include Port States when the need arose (Section 5.2.1.3) is an important step.

The organisational structure, or operating system, of CCAMLR provides for an opportunity for cooperation and knowledge sharing between Members in order for appropriate CMs to be formulated and then implemented by CCAMLR Members (Section 5.3).

The objection procedure has only been used once in CCAMLR's history and from the lack of use of the dispute resolution procedure it can be assumed that the CCAMLR meetings provide an arena for sufficient debate enabling any disagreements to be discussed and appropriate compromises to be made (Section 5.4).

The remoteness of Antarctica does not mean that CCAMLR is isolated from other international organisations. As previously discussed, CCAMLR has links with other elements of the ATS. CCAMLR also shares jurisdictions and boundaries with other RFMOs. Cooperation with these organisations is vitally important for CCAMLR to ensure its management measures are upheld by those with other interests in the Convention Area. This is further discussed in Chapter 6.

## 6. CCAMLR's Cooperation with Other International Organisations

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CCAMLR does not operate in a vacuum and is actively involved with other international organisations on matters of mutual interest. The following illustrates CCAMLR's cooperation with the ATS (Section 6.1) and other RFMOs (Section 6.2).

### 6.1 CCAMLR and the Antarctic Treaty System

As noted earlier (see Section 5.1), cooperation is an important element of CCAMLR and began with the Antarctic Treaty. Thus formal links between CCAMLR and the Antarctic Treaty are present in both organisations. Article III of the CAMLR Convention binds Contracting Parties, regardless of whether they are Parties to the Antarctic Treaty, in agreement that they “will not engage in any activities in the Antarctic Treaty area contrary to the principles and purposes of that Treaty” and they are bound by the obligations contained in Articles I and V of the Antarctic Treaty.

As discussed in Section 5.2.1.2 the issue of areas subject to national jurisdiction, both disputed and recognised, and high seas areas are dealt with in the CAMLR Convention (Article IV and the Chairman's Statement) and AT Articles IV and VI.

Article V of the CAMLR Convention binds Contracting Parties which are not Parties to the Antarctic Treaty to observe the Agreed Measures for the Conservation of Antarctic Fauna and Flora and “other measures as have been recommended by the Antarctic Treaty Consultative Parties”.

The Antarctic Treaty has various resolutions regarding the negotiation and entry into force of the CAMLR Convention<sup>25</sup>, the support of CCAMLR measures<sup>26</sup> and general

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<sup>25</sup> Recommendation X-2 (Washington, 1979); Recommendation XI-2 (Buenos Aires, 1981).

<sup>26</sup> Resolution 3 (1999) – ATCM XXIII, Lima; Resolution 2 (2000) – ATCM SXII, The Hague; Resolution 2 (2001) – ATCM XXIV, St. Petersburg; Resolution 3 (2002) – ATCM XXV, Warsaw; and Resolution 1 (2004) – ATCM XXVII, Cape Town.

support for work of CCAMLR.<sup>27</sup> This means that decisions reached by CCAMLR are recognised by ATCPs.

CCAMLR also has formal links with other ATS instruments, such as the Madrid Protocol. The Madrid Protocol established a Committee for Environmental Protection (CEP) (Article 11), whose functions are to provide advice and formulate recommendations to ATCPs with regards to the protection of the Antarctic environment.<sup>28</sup> The CEP issues a standing invitation to the Scientific Committee Chairperson to participate as an observer, and in turn attends the annual CCAMLR meetings as an observer.

CCAMLR and the CEP have worked together on the issue of Marine Protected Areas (MPAs) (CCAMLR 2008a, paragraph 7.2). They have also held a joint workshop in April 2009 to discuss matters of mutual interest, such as MPAs and bioregionalisation.

The CEP Chairman was also a member of the CCAMLR Performance Review Panel in 2008. From this, we can see that cooperation between CCAMLR and the CEP is substantial.

## 6.2 CCAMLR and other RFMOs

CCAMLR interests overlap, to varying extents, with a number of other international bodies, including the Food and Agriculture Organisation of the United Nations (FAO), the Scientific Committee on Antarctic Research (SCAR), the Scientific Committee on Oceanic Research (SCOR), CCSBT, IOTC, SEAFO, WCPFC (see Section 2.4), the 1972 Convention for the Conservation of Antarctic Seals (CCAS), the 1946 International Convention for the Regulation of Whaling (ICRW) and the Agreement for the Conservation of Albatrosses and Petrels (ACAP).

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<sup>27</sup> Resolution 1 (2006) – ATCM XXIX, Edinburgh

<sup>28</sup> For more information see CEP page on ATS website: <http://www.ats.aq/e/cep.htm>

CCAMLR Resolution 22/XXV also lists the abovementioned RFMOs, and others,<sup>29</sup> with which CCAMLR seeks cooperation with the implementation of seabird by-catch mitigation measures (Section 7.3).

As mentioned earlier CCAMLR concedes authority to CCAS and the ICRW for the conservation and harvesting of seals and whales, respectively (Section 5.2). The Polar Front, which creates the boundary for the Convention Area, does not constitute a boundary between species within the competence of CCAMLR and other RFMOs (Molenaar 2001). Therefore, CCAMLR also works cooperatively with applicable RFMOs on matters of mutual interest and invites them to participate in the annual CCAMLR meetings as observers (as per Article XXIII). CCAMLR has an item on its agenda dedicated to “cooperation with other international organisations”. Cooperation between these organisations suggests informed decision-making on both sides.

The responsibilities of CCAMLR and CCSBT overlap as the CAMLR Convention applies to all marine living resources within the Convention Area while the CCSBT applies to Southern Bluefin Tuna throughout its range (CCAMLR 2005a, paragraph 15.21).

Unlike the CCSBT the CAMLR Convention is not species specific and the provisions of Article II include the conservation of seabirds, such as albatrosses, that breed in CCAMLR waters. CCAMLR has CMs in place to minimise incidental mortality of seabirds during longline fishing operations (CMs 24-02 and 25-02<sup>30</sup>). But these birds have a wide range and unknown numbers are killed in fisheries outside the Convention Area (SC-CAMLR 2008, paragraphs 5.14-5.17).

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<sup>29</sup> The Inter-American Tropical Tuna Commission (IATTC), the 1952 Agreement on the Organization of the Permanent Commission on the Exploitation and Conservation of the Marine Resources of the South Pacific (CPPS), the Southwest Indian Ocean Fisheries Commission (SWIOFC), the Western Indian Ocean Tuna Organization Convention (WIOTO), and the Southern Indian Ocean Fisheries Agreement (SIOFA).

<sup>30</sup> CM 24-02 – Longline weighting for seabird conservation; CM 25-02 – Minimisation of the incidental mortality of seabirds in the course of longline fishing or longline fishing research in the Convention Area

Overlap with the tuna fisheries can have an adverse effect on CCAMLR's management if birds that breed in the Convention Area are being killed. Therefore CCAMLR's cooperation with the applicable RFMOs is critical.

CCAMLR initiated discussions with CCSBT in 2005 with the aim of establishing an agreement in relation to fishing for Southern Bluefin Tuna in the Convention Area, to try to ensure that all necessary CMs are adhered to (CCAMLR 2005a, paragraph 15.22). Although it seemed that the two RFMOs were exploring ways to formalise cooperation (Hemmings 2006), to date, there has been no response from the CCSBT to any communication from CCAMLR (CCAMLR 2008a, paragraph 16.25).

CCAMLR adopted a Memorandum of Understanding between CCAMLR and the WCPFC in 2008 which facilitates cooperation between the two RFMOs, enhancing the conservation and rational use of stocks and species which are within the competence of both organisations (CCAMLR 2008a, paragraph 16.28 and Annex 6). This document provides a framework that could be used in CCAMLR-CCSBT relations.

It should be noted that CCSBT has put in place a resolution on using Vessel Monitoring Systems (VMS), consistent with the CCAMLR CM 10-04, when fishing for Bluefin Tuna in the Convention Area (CCSBT 2008, Attachment 8, paragraph 1(c)). CCSBT also agreed on a recommendation to mitigate the impact on ecologically related species of fishing for Southern Bluefin Tuna, which recommends members implement the International Plan of Action for Reducing Incidental Catches of Seabirds in Longline Fisheries (IPOA-seabirds) and to comply with all binding CMs when fishing in waters under the jurisdiction of the Indian Ocean Tuna Commission (IOTC) and the Western and Central Pacific Fisheries Commission (WCPFC) (CCSBT 2008, Attachment 16). Regrettably, though, CCSBT Members are currently under no obligation to implement the IPOA-Seabirds in the Convention Area.

This is a clear example of CCAMLR's intent to cooperate as part of its working paradigm, being thwarted by lack of reciprocity. CCAMLR can make the strongest measures to ensure the conservation of seabirds during fishing operations. However,

if these birds are being killed outside CCAMLR jurisdiction then the decisions and objectives of CCAMLR are undermined.

### 6.3 Chapter Summary

CCAMLR needs the cooperation of other international organisations to ensure that its “best practice” management measures are being applied in the Convention Area, whether participating in a CCAMLR fishery or not.

Article X of the CAMLR Convention allows CCAMLR to draw to the attention of a CP any activity undertaken, whether by its nationals or flagged vessels, that affect the implementation of the objectives of the Convention. Therefore any CP, whether or not it is fishing for CCAMLR managed species, should theoretically be bound by its obligations under the CAMLR Convention and ensure it operates in a manner which does not undermine the Convention.

CCAMLR also cooperates with CPs that have jurisdiction in marine areas adjacent to the Convention Area, attempting to harmonise CMs in respect of CCAMLR managed stocks that also occur in the CP managed waters (Article XI).

Cooperation is a key element of CCAMLR, both with other international bodies and within the organisation. However, as expressed by the very first Executive Secretary of CCAMLR, it is only realistic to expect that there will be differing positions on various issues among Members (Powell, 1983). Chapter 7 presents some examples of cooperation and compromise, and also some examples where consensus was ultimately unable to be obtained.



## 7. Case Studies – How CCAMLR uses consensus

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With any decision-making within an organisation there are successes and failures. In the 27-year history of CCAMLR there are, of course, instances of both. The following case studies demonstrate both successful resolution of issues facing CCAMLR and some issues that have not been resolved.

### 7.1 IUU Fishing in the Convention Area

Illegal, unreported and unregulated (IUU) fishing occurs in virtually all fisheries and poses a great threat to managing fish stocks (FAO 2002). The CCAMLR managed toothfish (*Dissostichus* spp.) are particularly vulnerable to over-fishing due to slow growth rates and limited information on the reproductive cycle of the species concerned (Everson and Murray 1999, Agnew 2000, Candy and Constable 2008).

Aside from the obvious problem of resource removal, CCAMLR also has to consider the other effects of IUU fishing on the ecosystem. Legal fishers in the Convention Area must abide by strict CMs with regards to seabird by-catch mitigation and marine debris, whereas IUU operators do not. Thus unknown numbers of seabirds are killed by IUU fishing operations every year (SC-CAMLR 2008, paragraph 5.18). Although the Scientific Committee does try to quantify the extent of seabird mortality due to IUU fishing (SC-CAMLR 2007, Annex 6, Part II, Table 18), estimates are considered to be inaccurate, a “best guess”.

Furthermore, the fishing techniques used by IUU operators have changed from predominately longline to the reported use of gillnets in 2008 (SC-CAMLR 2008, paragraph 7.2). Little is known about this new technique and information from which to estimate seabirds killed by IUU is not available. Therefore no new estimates of mortality level due to gillnets have been possible (SC-CAMLR 2008, paragraph 5.18).

Members with experience in gillnet fisheries were invited to provide information to WG-IMAF so that extrapolation of estimates of seabird mortalities in this fisheries can be calculated (SC-CAMLR 2008, paragraph 5.21).

Reducing the extent of IUU fishing in the Convention Area has been a priority item on CCAMLR's agenda since 1996 (Sabourenkov and Miller 2004). No single measure is likely to immediately eliminate all IUU fishing in the Convention Area (Kirkwood and Agnew 2004), consequently a suite of CMs and resolutions have been adopted by CCAMLR to combat the problems associated with IUU fishing (Table 2). CCAMLR also has a Policy to Enhance Co-operation between CCAMLR and Non-Contracting Parties (CCAMLR 2006, Annex 8). It should be noted that unlike CMs, Resolutions are not legally binding (see Table 2).

The most important and effective of the listed CMs are the Vessel Monitoring Systems (VMS) (Section 7.1.1) and the *Dissostichus* spp. Catch Documentation Scheme (CDS) (Section 7.1.2). Also cooperation amongst Members has played a vital role in reducing IUU activity (Section 7.1.3).

#### 7.1.1 Vessel Monitoring System

As a first step to eliminate IUU activities in the Convention Area, CCAMLR initially adopted Resolution 12/XVI in 1997, which urged Members to establish an Automated Vessel Monitoring System to monitor their flag vessels targeting finfish only. Consensus has not yet been reached to require vessels harvesting krill to implement VMS (further detailed in Section 7.2.3).

At CCAMLR-XVII in 1998, CCAMLR adopted CM 148/XVII which required Members to establish an automated VMS to monitor the position of its finfish fishing vessels (CCAMLR 1998, paragraph 5.37).

Table 2: CCAMLR CMs and Resolutions aimed at eliminating IUU activities in the Convention Area.  
(Source: CCAMLR 2009a.)

CM	Title
10-01 (1998)	Marking of fishing vessels and fishing gear
10-02 (2008)	Licensing and inspection obligations of Contracting Parties with regard to their flag vessels operating in the Convention Area
10-03 (2008)	Port inspections of vessels carrying toothfish
10-04 (2007)	Automated satellite-linked Vessel Monitoring Systems (VMS)
10-05 (2008)	Catch Documentation Scheme for <i>Dissostichus</i> spp.
10-06 (2008)	Scheme to promote compliance by Contracting Party vessels with CCAMLR CMs
10-07 (2008)	Scheme to promote compliance by non-Contracting Party vessels with CCAMLR conservation areas
10-08 (2006)	Scheme to promote compliance by Contracting Party nationals with CCAMLR CMs
10-09 (2008)	Notification system for transshipments within the Convention Area
Resolutions	Title
14/XIX	Catch Documentation Scheme: implementation by Acceding States and Non-Contracting Parties
15/XXII	Use of ports not implementing the Catch Document Scheme for <i>Dissostichus</i> spp.
16/XIX	Application of VMS in the Catch Documentation Scheme
17/XX	Use of VMS and other measures for the verification of CDS catch data for areas outside the Convention Area, in particular, in FAO Statistical Area 51
19/XXI	Flags of non-compliance
21/XXIII	Electronic Catch Documentation Scheme for <i>Dissostichus</i> spp.
25/XXV	Combating illegal, unreported and unregulated fishing in the Convention Area by the flag vessels on Non-Contracting Parties

By 2002 it had become apparent to some Members that the automated VMS was not working as well as had been hoped and that some Members' vessel monitoring systems were not in compliance with the CM (CCAMLR 2002, Annex 5, paragraph 5.12). A Member had sighted vessels off the Antarctic coast when the Flag State VMS showed them to be located over 1,000 kilometres to the north (CCAMLR 2002, Annex 5, paragraph 5.12).

As a solution Australia put forward a proposal for a centralized vessel monitoring system (C-VMS) at CCAMLR-XXI which would require vessels fishing for toothfish to transmit identification and position information directly to the CCAMLR Secretariat as well as to Flag States (CCAMLR 2002, paragraph 8.55). It was believed that the dual reporting system would ensure that all VMS units were compliant and therefore VMS positioning would be accurate. Although the proposal was discussed by CCAMLR, consensus was not reached and no decision was made.

At CCAMLR-XXII in 2003 some Members put forward a revised proposal for a C-VMS (CCAMLR 2003, Annex 5, paragraphs 3.27-3.54). Although most Members supported the rationale behind the proposal there were concerns over security and the financial costs of such a system, as well as the possibility of having to change national legislation. CCAMLR was again unable to adopt the proposal due to lack of consensus. As an alternative, a trial C-VMS was established and all Members were urged to voluntarily participate (CCAMLR 2003, paragraph 10.12). The trial was successful and led to the full implementation of the C-VMS being agreed upon at CCAMLR-XXIII in 2004 (CCAMLR 2004a, paragraph 10.8).

C-VMS provides Flag States and the CCAMLR Secretariat with real-time vessel positions, giving them the ability to verify whether a vessel has complied with applicable CMs.

CM 10-04 also allows for VMS reports to be provided by the Secretariat to Members undertaking, or intending to undertake, surveillance and/or inspections in the Convention Area (CM10-04, paragraphs 20 and 21). Permission of the vessel/s Flag State/s is not required during active surveillance and/or inspections. This is an important piece of cooperation allowing sensitive information to be shared between Members.

Port inspection of vessels carrying toothfish requires vessels to provide a written declaration that they have not engaged in or supported IUU fishing in the Convention Area (CM 10-03, paragraph 2). In accordance with CM 10-04, Members are able to request VMS reports from the Secretariat to verify such declarations.

Although VMS is good at ensuring Contracting Party vessels are fishing in a manner consistent with CMs, it has little effect on Non-Contracting Party vessels. But that is another discussion. What should be noted here is that CCAMLR implemented automated VMS after a one-year voluntary trial period, which may have been to allow Members to prepare for full implementation. And when CCAMLR realised that automated VMS was not the solution to combat IUU it fully implemented the C-VMS two years after it was first proposed.

#### 7.1.2 The *Dissostichus* spp. Catch Documentation Scheme

Toothfish stocks occur both inside and outside the Convention Area, making it difficult to trace fish taken during IUU operations in the Convention Area on the international market (Sabourenkov and Miller, 2004). A catch certification scheme for tracking the landings and trade flows of *Dissostichus* spp. from the Convention Area was first discussed in CCAMLR at CCAMLR-XVII (CCAMLR 1998, paragraphs 5.16 to 5.25). The proposal had two objectives (Sabourenkov and Miller, 2004):

1. to track landings of, and the world trade in, toothfish caught inside and outside the Convention Area; and
2. to restrict access to international markets of toothfish caught by IUU operators.

Although a proposal was put forward, not all Members were satisfied (CCAMLR 1998, paragraph 5.24) so the *Dissostichus* spp. Catch Documentation Scheme was further developed during the intersessional period.

At CCAMLR-XVIII in 1999, CCAMLR adopted CM 170/XVIII ‘Catch Documentation Scheme for *Dissostichus* spp.’ (now CM 10-05) requiring all landings, transshipments and importations of toothfish into the territories of the Contracting Parties be accompanied by a completed *Dissostichus* Catch Document (DCD). This document specifies a range of information relating to the volume and location of

catch, and the name and Flag State of the vessel (CCAMLR 1999, Annex 7). This CM became binding on all Members on 7<sup>th</sup> May 2000.<sup>31</sup>

Although not all Contracting Parties were able to implement the CDS by the required date (CCAMLR 2000a, Annex 5, paragraph 2.24), by 2001 the remaining Members were able to fully implement the scheme (CCAMLR 2001b, Annex 5, paragraph 2.68).

At CCAMLR-XX in 2001, it was noted by SCIC that the issuing and copying of paper catch documents allows opportunity for fraudulent practices (CCAMLR 2001b, Annex 5, paragraph 2.95), and suggested the development of an electronic paperless web-based system. At CCAMLR-XXI in 2002 a pilot project of the Electronic CDS (E-CDS) to run alongside the paper-based scheme (CCAMLR 2002, paragraph 7.16) was approved. The electronic system (E-CDS) allows CDS Parties to issue and process catch documents online in a secure environment (Miller *et al* 2005).

Although the E-CDS trial was generally considered successful, some Members have voiced doubts as to whether full implementation of the electronic scheme could ever be achieved (CCAMLR 2004a, Annex 5, paragraph 4.16). Thus at CCAMLR-XXIII CCAMLR adopted Resolution 21/XXIII urging Contracting Parties and Non-Contracting Parties to cooperate in the CDS and to adopt the E-CDS as a matter of priority (CCAMLR 2004b). Significantly, at CCAMLR-XXIV the US, the largest importer of toothfish (CCAMLR 2009b, Table 16), stated that any toothfish imports into the US would now have to be accompanied by electronically issued documentation (CCAMLR 2005a, paragraph 7.5).

The E-CDS is no longer referred to as a trial in CCAMLR meeting reports, but as 'E-CDS format', which is voluntary. Although Members are required to use CDS under CM 10-05, it is their choice if they use E-CDS or the paper based version. Since January 2008, all CCAMLR Members have used the E-CDS format (CCAMLR 2008a, paragraph 2.8).

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<sup>31</sup> See CCAMLR website [www.ccamlr.org/pu/e/cds/intro.htm](http://www.ccamlr.org/pu/e/cds/intro.htm)

One important provision of the CDS is that it can be implemented by Non-Contracting Parties (NCPs) with regards to toothfish landed, imported or exported in their countries. Resolution 14/XIX urges all Acceding States, Members of CCAMLR and NCPs which fish for, or trade in, toothfish to implement the scheme (CCAMLR 2007b). Since 2000 many NCPs<sup>32</sup> have voluntarily implemented the CDS. China, as a major importer and exporter of toothfish (CCAMLR 2008b, Section D, Tables 16 and 17), acceded to the CAMLR Convention in 2006 (CCAMLR 2006, paragraph 2.3) and became a Member of CCAMLR in 2007 (CCAMLR 2007, paragraph 2.3).

IUU operators were known to land toothfish in Port Louis, Mauritius (CCAMLR 2000a, paragraph 5.2). With the assistance of Australia, Mauritius implemented some elements of the CDS in 2001 (CCAMLR 2001b, paragraph 5.37), with full implementation in 2004 (CCAMLR 2004a, paragraph 2.12). Mauritius also became a Contracting Party in 2004 (CCAMLR 2004a, paragraph 1.7).

The CDS is generally considered a success, with the trade of toothfish caught both inside and outside the Convention Area able to be better estimated and tracked. It has helped CCAMLR to identify Port States such as Namibia, Mauritius and China, where toothfish is landed (Sabourenkov and Miller, 2004) and thus make it possible for CCAMLR to invite them to implement the scheme (see also Section 5.2.1.3).

Hong Kong, as a Special Administrative Region of China, is not a CP or Member of CCAMLR, despite China's status (CCAMLR 2007, paragraph 4.5). Hong Kong is involved in the trade of toothfish (CCAMLR 2008a, Annex 5, paragraph 4.6), without implementing the CDS (CCAMLR 2008a, paragraph 9.3). Although China has advised CCAMLR of its willingness to consult with the Hong Kong SAR to voluntarily implement the CDS (CCAMLR 2008a, Annex 5, paragraph 4.6), as yet full implementation of the CDS has not occurred.

Alone the VMS and CDS are vulnerable to sidestepping via loopholes, but together they limit the entry of illegal toothfish into the trade, ensuring operators harvest

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<sup>32</sup> At CCAMLR-XXVII in 2008 the CDS was reported to be voluntarily implemented by Seychelles and partially by Singapore (CCAMLR 2008a, paragraph 9.1).

toothfish in open management areas and that the fish are caught in accordance with CCAMLR CMs.

There is also a noted price difference between documented toothfish catches, at US\$7-15/kg, compared to undocumented toothfish, at US\$3-9/kg.<sup>33</sup> The quoted prices depend upon the quality of the cut.

These are clear examples of consensus working as a decision-making mechanism. When CCAMLR needed urgent action to address a matter of major concern they were able to use consensus and agree on these significant CMs which were implemented quickly. And because all Members agreed, all Members are bound by the decisions.

CCAMLR has gone from placing the issue of IUU on its agenda in 1996 to a decade later virtually eliminating IUU fishing in the Convention Area (CCAMLR 2008a, paragraph 10.1) by blocking off trade access, requiring strict VMS use, and by the other CMs and Resolutions as shown in Table 2.

### 7.1.3 Member Cooperation and Compliance

Another positive element of the CCAMLR fight against IUU operators is the resulting cooperation between Members with regard to compliance with CMs. This study does not go into detail but notes instances of positive cooperation between CCAMLR Members in matters of compliance.

There have been several instances of Member cooperation. For example, South Africa and the US worked together to convict a South African fishing company, Hout Bay Fishing Industries, found to be smuggling toothfish into the US in 2001.<sup>34</sup>

Again cooperation between the US, Australia and others enabled court action against Antonio Vidal Pego, a Spanish national, and Faidulur S.A, a Uruguayan company, which were convicted of illegally importing toothfish into the US in 2004.<sup>35</sup>

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<sup>33</sup> Natasha Slicer, CCAMLR Compliance Officer, personal communication (2009).

<sup>34</sup> See the statement issued by the South African Ministry of Environmental Affairs and Tourism: [http://www.environment.gov.za/NewsMedia/MedStat/2002april30/Scorp\\_30042002.htm](http://www.environment.gov.za/NewsMedia/MedStat/2002april30/Scorp_30042002.htm)



There has also been the high profile hot pursuit of the *Viarsa I*, a Uruguayan flagged vessel, found illegally fishing in Australian Antarctic waters.<sup>36</sup> South Africa, the UK and Australia all worked together to arrest the vessel on the high seas. This was an extraordinary case of three CCAMLR Members working together to chase a vessel flagged to another Member without compromising the Commission.

Better intelligence, joint on-water patrols (Australia and France), and shared information are all integral components of CCAMLR's fight against IUU fishing. Having inclusive consensus in CCAMLR allows its Members to have an open alliance without compromising their own interests or the interests of CCAMLR.

This kind of cooperation is at the core of UNCLOS (Article 118) and UNFSA (Articles 8 and 9) and works well in CCAMLR.

## 7.2 Krill

As discussed earlier, the Southern Ocean is often referred to as a krill-based ecosystem and it was concern over the potential to over-exploit this resource that instigated the CAMLR Convention and, therefore, CCAMLR.

### 7.2.1 Precautionary Catch Limits

Unlike most conservation arrangements that are only entered into when their resource has already been heavily exploited (Edwards and Heap 1981), CCAMLR was set up prior to the heavy exploitation of krill. It was expected that CCAMLR's priority issue would be the management of the harvesting of krill (Nicol and de la Mare 1993), as this was arguably the reason behind the CAMLR Convention. After much negotiation the first precautionary catch limit for the harvesting of krill was agreed to in 1991 at CCAMLR-X (CCAMLR 1991, paragraphs 6.17 and 10.4). CM 32/X allowed for a

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<sup>35</sup> See statement by the Australian Minister for the Environment and Heritage, Senator Ian Campbell: <http://www.aad.gov.au/default.asp?casid=27558>

<sup>36</sup> See statement by the Australian Minister for Defence, Senator Robert Hill: <http://www.minister.defence.gov.au/HillTpl.cfm?CurrentId=3166>

total catch of 1.5 million tonnes per season in Area 48, kept under review by CCAMLR on advice from the Scientific Committee.

This catch limit was further defined in CM 32/X, with a precautionary catch limit of 620 000 tonnes (in total) in Subareas 48.1, 48.2 and 48.3. This was an important step for CCAMLR as the division of the catch limit specifically took into account the foraging range of vulnerable land-breeding predators (CCAMLR 1991, paragraph 6.16).

When looking at the catch (tonnes) of krill in the Convention Area since 1982 (Figure 6), it could be assumed that the introduction of the precautionary catch limits has had an effect on the amount of krill caught. Reported catch sizes decreased in 1993 to approximately a third of the catch reported for 1992. However, it is more likely that the collapse of the Soviet Union in 1991 was the cause of this decrease, as they consistently caught upwards of 76% of the reported krill catch each season and no longer participated in the fishery (CCAMLR 1992b, Table 3.2).

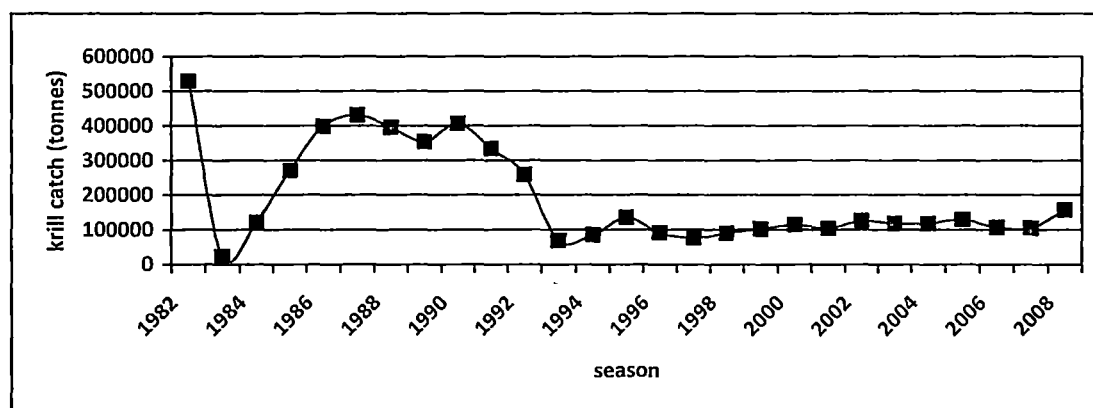


Figure 6: Catch of krill (tonnes) in the CCAMLR Area from 1982 to 2008. Source: CCAMLR Statistical Bulletin Volume 21 (electronic website version: [www.ccamlr.org/pu/e/e\\_pubs/sb/intro.htm](http://www.ccamlr.org/pu/e/e_pubs/sb/intro.htm) )

The introduction of the precautionary catch limit was a big step in the management of krill resources and yet things seem to have stalled. In 2002, CCAMLR agreed to the establishment of Small Scale Management Units (SSMUs) in Statistical Subarea 48.1, 48.2 and 48.3 (Figure 7).<sup>37</sup> The SSMUs were intended to subdivide the precautionary catch limit for krill in the short term, and in the long term aid in the development of a

<sup>37</sup> The SSMUs are around the Antarctic Peninsula (48.1), the South Orkney Islands (48.2) and South Georgia Island (48.3).

feedback management scheme for krill which accommodates localised effects on predators (CCAMLR 2002, paragraph 4.5; SC-CAMLR 2002, paragraph 3.4(i)). New SSMUs in Statistical Subarea 48.4<sup>38</sup> were agreed to at CCAMLR-XXVII (CCAMLR 2008a, paragraph 4.8(iv); SC-CAMLR 2008 paragraphs 3.28 and 3.29).

Although some work has been undertaken in the application of precautionary catch limits in these SSMUs, thus far no agreement has been reached.

Kaye (2001) has criticised the use of consensus decision-making with the issue of krill management as it effectively stymied all early attempts at conservation and management measures because krill fishing Members (he notes USSR and Japan) objected to any CMs being imposed.

His point is valid. It did take ten years before any catch limit was set. And things do not seem to have progressed much. Although the SSMUs are mapped out and are used in the reporting of catches to WG-EMM by the CCAMLR Secretariat, there has been no agreement over the allocation of catch limits to SSMUs.

However, it should be noted that CCAMLR was the first and only RFMO to introduce a precautionary catch limit. In addition, at CCAMLR-XXVII in 2008, CM 51-04<sup>39</sup> was adopted to require fishing for krill in any statistical subarea or division to cease when the reported catch reaches 15,000 tonnes. It also states that no more than 75% of the catch limit shall be taken within 60nm of known breeding colonies of land-based krill-dependant predators.

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<sup>38</sup> The SSMUs are around the South Sandwich Islands (48.4).

<sup>39</sup> CM 51-04 – General measure for exploratory fisheries for *Euphausia superba* in the Convention Area in the 2008/09 season.

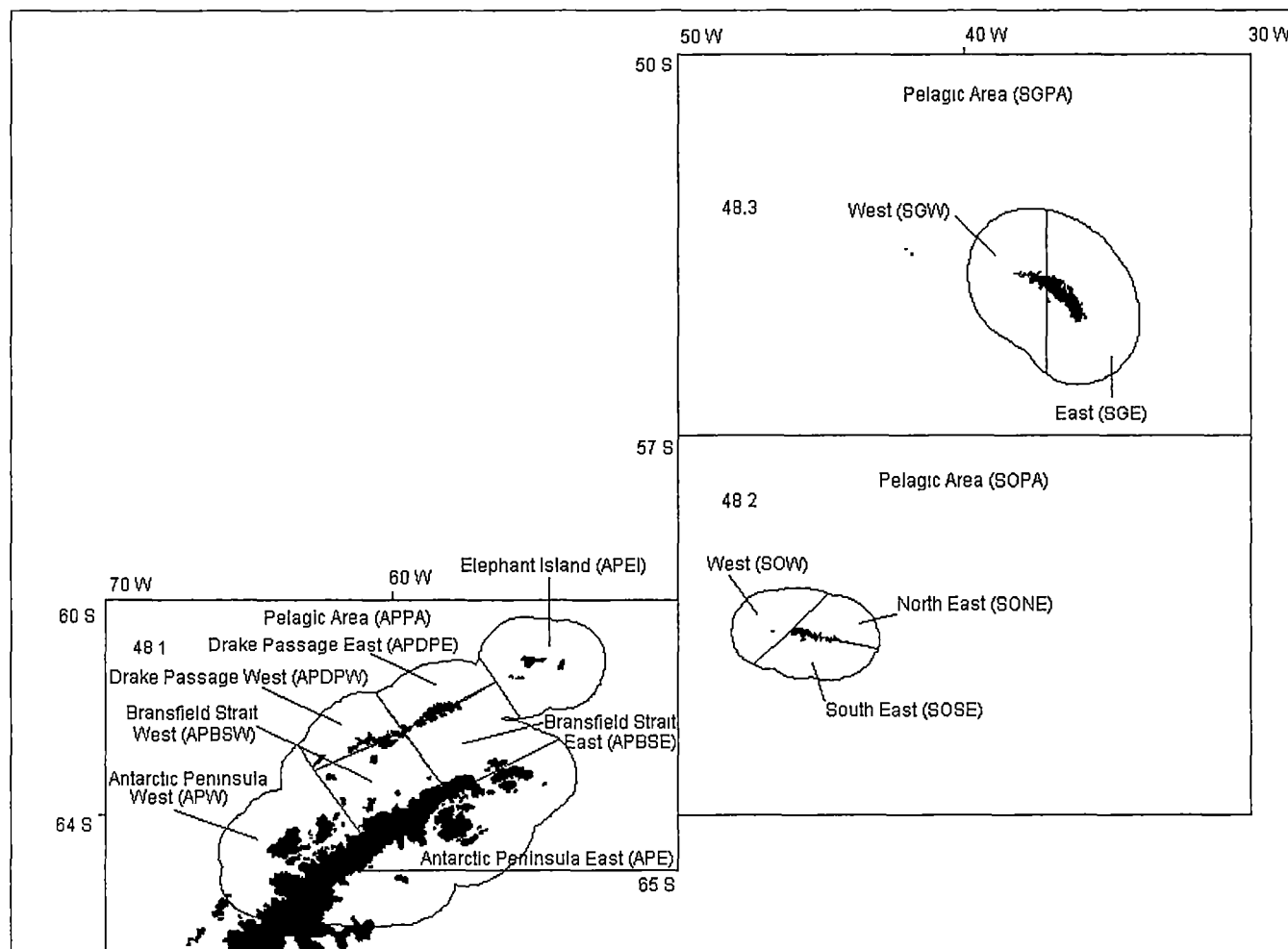


Figure 7: SSMUs in Subareas 48.1, 48.2 and 48.3. Source: CCAMLR Secretariat.

Although this is not a division of catch limits to the order of SSMUs, it is a big step on the way. The restriction with regards to breeding colonies of krill predators clearly demonstrates CCAMLR's ability to incorporate the ecosystem when allocating catch limits.

### 7.2.2 International Observers on the krill fleet

Article XXIV of the CAMLR Convention agrees to establish a system of observation. At CCAMLR-XI in 1992 the CCAMLR Scheme of International Observation was adopted (CCAMLR1992a, paragraph 6.11). CMs 41-01, 42-01 and 42-02<sup>40</sup> require the presence of at least one scientific observer appointed in accordance with the CCAMLR Scheme of International Scientific Observation on all vessels fishing for finfish in the Convention Area. There is no such requirement for the krill fishing fleet in Area 48. Krill fishing vessels are required to carry at least one scientific observer appointed in accordance with the scheme of CCAMLR International Scientific Observation in Statistical Division 58.4.2 (CM 51-03<sup>41</sup>); however there is no current fishery in this area.

There has been a long and frustrating debate on this issue, with two CCAMLR Members, Japan and Korea, continually refusing to agree to 100% coverage of scientific observers under the CCAMLR Scheme of International Scientific Observers.

Systematic coverage of the krill fishery has been debated since 2005 (SC-CAMLR 2005, paragraph 2.16), the idea being that each vessel in the krill fishery would carry an observer at the same time in the same areas to enable comparisons (SC-CAMLR 2006, paragraph 2.18). However, no agreement could be reached. At WG-EMM in 2007 different methods of data collection were discussed with the best options being

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<sup>40</sup> CM 41-01 – General measures for exploratory fisheries for *Dissostichus* spp. in the Convention Area in the 2008/09 season;

CM 42-01 – Limits on the fishery for *Chamsocephalus gunnari* in Statistical Subarea 48.3 in the 2008/09 Season;

CM 42-02 – Limits on the fishery for *Chamsocephalus gunnari* in Statistical Division 58.5.2 in the 2008/09 Season.

<sup>41</sup> CM 51-03 – Precautionary catch limitation on *Euphausia superba* in Statistical Division 58.4.2.

100% coverage by international and/or national scientific observers (SC-CAMLR 2007, Annex 4, paragraphs 4.44 to 4.56). Again, no decision was reached in the Scientific Committee or CCAMLR that year.

At WG-EMM in 2008, Japan, as a member of WG-EMM, finally agreed to systematic 100% observer coverage on its krill fleet (SC-CAMLR 2008, Annex 4, paragraph 4.58). But at the Commission meeting later in the same year, Japan reneged and, with Korea, blocked consensus on the issue (CCAMLR 2008a, paragraphs 11.8 and 11.8). China reserved its position on the issue even though it does not currently participate in the krill fishery (CCAMLR 2008a, paragraph 11.7). China's concerns were over the proposal that new entrants into the krill fishery would require 100% coverage for the first two years of operation, even if the rest of the fleet were at a scaled back percentage of coverage.

Observer coverage on krill vessels is an important issue and, from the many statements made by concerned Members at CCAMLR-XXVII (see CCAMLR 2008a, paragraphs 11.9 – 11.21), a frustrating one. There have been continued calls for Members to think of science rather than politics, and see the great value and important data that could come from a systematic observer program on the krill fishing fleet.

However, it seems, for the moment, politics has won. The scientific knowledge that could be garnered from such a system is great and undisputed. It can only be assumed, therefore, that some CCAMLR Members are concerned about their fishing privacy and do not want to share their fishing practices with others. Article XXIV agrees to establish a system of observation which had the intention of being applied across the entire CCAMLR fleet (vessels engaged in harvesting of marine living resources in the CAMLR Convention Area), not just in selected fisheries. However, Article XXIV leaves the terms and conditions to be established by CCAMLR, thus requiring consensus.

### 7.2.3 Vessel Monitoring System and the krill fleet

CCAMLR included the krill fisheries in VMS reporting in 2007 (CCAMLR 2007a, paragraphs 8.13(i) and 13.8), for which it had been previously excluded. CM 10-04 now requires the krill fishing fleet to use satellite-linked vessel monitoring devices to continuously report on their position in the Convention Area to their Flag State. It should be noted that the krill fishery does not operate C-VMS and are under no obligation to provide the CCAMLR Secretariat with “real-time” vessel positions or any other VMS data.<sup>42</sup>

There is no reference in the 2007 CCAMLR report as to why krill vessels are excluded from this requirement, although SCIC did discuss the matter and some Members<sup>43</sup> did not agree with VMS reporting to the Secretariat (CCAMLR 2007a, Annex 5, paragraphs 2.49 to 2.54). Therefore it can be assumed that consensus was not reached to implement C-VMS on the krill fleet.

It is a definite failure of CCAMLR as a decision-making organisation that the different regulatory issues surrounding the krill fishery, the acknowledged reason for the CAMLR Convention, cannot be agreed upon in a timely and effective manner.

## 7.3 France and the by-catch of seabirds

The topic of seabird by-catch in the longline fisheries has long been considered by CCAMLR. Members were first asked to assess and monitor the species and numbers of birds being caught incidentally during fishing operations at CCAMLR-III in 1984 (CCAMLR 1984, paragraph 23). Although Members may have undertaken these assessments, they were not calculated for the entire Convention Area (with the exception of Crozet and Kerguelen Islands) until 1997 (see Figure 8).

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<sup>42</sup> See footnote 4 of CM 10-04 (CCAMLR 2009)

<sup>43</sup> Only Japan was named, but other Members agreed with them.

In 1989, CCAMLR became the first international organisation to institute seabird incidental mortality mitigation measures (Miller *et al* 2004, Miller *et al* 2005) with the adoption of Resolution 5/VIII, the Protection of Seabirds from Incidental Mortality Arising from Longline Fishing (CCAMLR 1989, paragraphs 129 and 130). This Resolution urged all Parties to the Convention engaged in longline fishing in the Convention Area to investigate and introduce methods to minimize the incidental mortality of seabirds.

In 1991 CCAMLR adopted CM 29/X, aimed at preventing or minimizing incidental mortality of seabirds associated with longline fishing, and CM 30/X, which prohibits the use of net monitor cables on trawl vessels from the 1994/95 fishing season (CCAMLR 1991, paragraphs 10.1 and 10.2). CM 29/X initiated the mandatory use of streamer lines to keep birds away from the line during day settings and weighting of baited hooks to ensure fast sink rates, among other things. Although it has been considerably revised as new methods of deterrence have been found, it is still in force today as CM 25-02.

In 1994 the first *ad-hoc* Working Group on Incidental Mortality Arising from Longline Fishing (*ad-hoc* WG-IMALF) was held (SC-CAMLR 1994, Annex 8). The terms of reference included the review of data on seabird by-catch and the efficacy of seabird mitigation measures. The Working Group's name was changed in 2001 to the *ad hoc* Working Group on Incidental Mortality Associated with Fishing (*ad hoc* WG-IMAF) to reflect the work of the group in also considering incidental mortality associated with trawl and pot fisheries. At CCAMLR-XXVII, the Working Group dropped *ad hoc* from its name (SC-CAMLR-2008, Annex 6).

WG-IMAF has been successful in quantifying and reducing incidental seabird mortalities. Unknown numbers of seabirds were incidentally caught in 1994 and large numbers (6589 seabirds) were observed caught in 1997 (CCAMLR 1997, paragraphs 6.40 and 6.41). At present CCAMLR is proud of the continued low levels of incidental seabird mortality in regulated fisheries and for the first time in 2006, no albatrosses were reported taken in legal longline operations (CCAMLR 2006, paragraph 5.6). Since then numbers of seabirds caught have remained low (Figure 8).



This is not only a direct result of strict mitigation measures, but also the resolve of the Members to ensure their vessels comply with such measures.

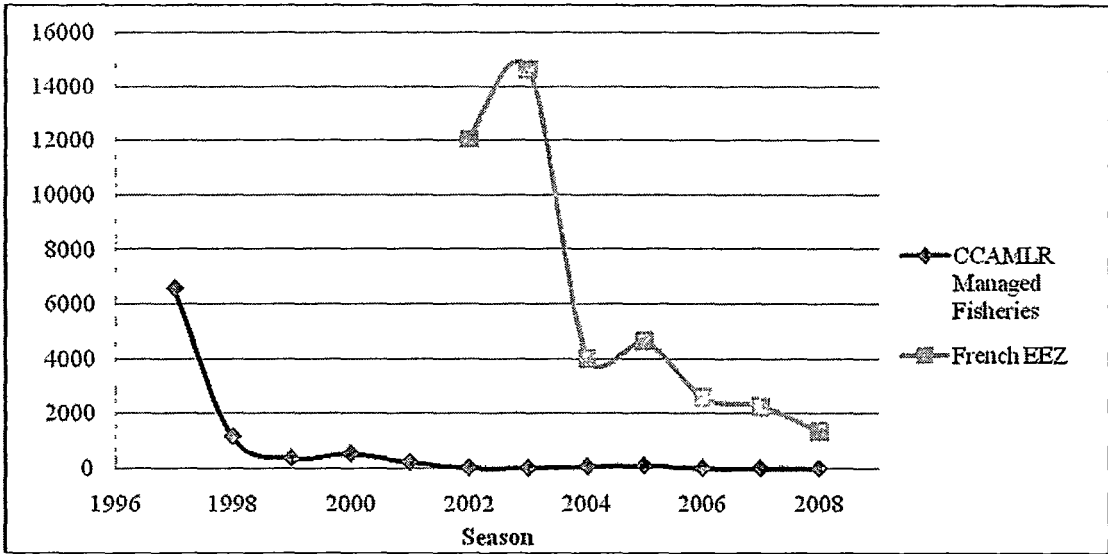


Figure 8: Total extrapolated incidental mortality of seabirds in the Convention Area from 1997 to 2008.  
Source: SC-CAMLR 2008, Annex 6, Table 3.

It must be noted that the French Kerguelen and Crozet islands are not included in these figures because France has invoked the Chairman’s Statement regarding seabird mitigation measures. This means it is under no obligation to apply CCAMLR agreed measures; instead they can use their own. Seabird by-catch levels at the Kerguelen and Crozet Islands are high (Figure 8) and are mainly White-chinned petrels (*Procellaria aequinoctialis*) and Grey petrels (*Procellaria cinerea*) (SC-CAMLR 2008, paragraph 5.3(i)). Both species are listed on the International Union for Conservation of Nature (IUCN) Red List of Threatened species; White-chinned petrels are listed as “vulnerable”, while Grey petrels are “near threatened”, both with declining populations (IUCN 2008).

It is interesting that CCAMLR is acknowledged as having best practice mitigation measures for avoiding seabird deaths in longline fishing (Waugh *et al* 2008), yet France has chosen not to use these methods that have been proven so effective in other parts of the Convention Area. The longline fishery around South Georgia was catching thousands of birds in 1997, yet with season closures during critical breeding times and the implementation of other CCAMLR CMs, these numbers have been

reduced to an observed by-catch of zero since 2006 (SC-CAMLR 2008, Annex 6, Table 3).

France has not been forthcoming with information about numbers of seabird mortalities in their EEZ fisheries (SC-CAMLR 2003, paragraph 5.4). This seems to be changing, however, with historical data provided starting from the 2001 (only partial data) and 2002 seasons (SC-CAMLR 2004, paragraph 5.4). At CCAMLR-XXVI France announced it had developed a three-year plan to reduce mortalities of seabirds in the French EEZs by a factor of two (CCAMLR 2007a, paragraph 6.6).

The results of the first year of the plan were presented in 2008 at CCAMLR-XXVII showing observed reductions in incidental mortality of seabirds (CCAMLR 2008a, paragraph 6.8). This is a positive step and it is encouraging to see that France has implemented a number of measures in an effort to bring mortalities to near zero levels.

## 7.4 New and Exploratory Fisheries

Ideally, all the information needed for the sustainable exploitation of fish stocks should be known before commercial harvesting begins to allow “before and after” comparisons of stock status (Miller *et al* 2004, Miller *et al* 2005). This may seem an unrealistic approach, yet CCAMLR has protocols in place for new and exploratory fisheries that require the collection of data prior to and during the development of a fishery.<sup>44</sup> This helps to ensure that development does not outpace CCAMLR’s ability to collect the data necessary to achieve the objectives of Article II (CCAMLR 1990, paragraph 9.3).

Under CM 21-01,<sup>45</sup> Members are required to notify their intention to fish a new fishery; this includes established fisheries that employ new fishing techniques. This measure aims to collect the necessary information on the target and associated species, as well as limiting catch and/or effort.

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<sup>44</sup> See CCAMLR 1990, paragraphs 9.1 to 9.10; CMs 21-01 and 21-02.

<sup>45</sup> CM 21-01 – Notification the Members are considering initiating a new fishery.

After a year of fishing as a new fishery, a fishery then becomes an exploratory fishery (Miller *et al* 2004). Exploratory fisheries are not new, but still require intensive data collection for informed management. CM 21-02<sup>46</sup> provides for the necessary data collection.

Combined, these CMs allow CCAMLR to actively implement a precautionary approach when setting catch limits and open/closed areas. It also reduces the potential for reversible changes to the ecosystem.

Using the information gathered the Commission, via the Scientific Committee, can then discuss and decide upon issues such as catch limits, division of the catch in areas, and also limit the number of vessels allowed to fish in some areas. This is a very important example of the successful use of consensus to continually determine the potentially contentious issue of catch allocation. Members could block such catch limits with ease. However, as these limits are based on the best scientific knowledge available from the Scientific Committee and its working groups, there is no apparent reason to dissent. Such dissention could be seen as political and not in the best interest of the Convention.

## 7.5 CCAMLR and consensus-minus-one

From the data collected for this study, views on the legitimacy of consensus-minus-one as a decision-making tool were varied (Sections 4.1.4 and 4.2.4). While some considered it a legitimate decision-making tool, others believed it was nonsense. As one interviewee said, “consensus-minus-one is not consensus, it is nothing”. And although some considered it useful, they did not believe it was appropriate for use in CCAMLR. However as matters become more complicated, the use of consensus-minus-one is inviting.

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<sup>46</sup> CM21-02 – Exploratory fisheries.

### 7.5.1 IUU Vessel Lists

The idea of consensus-minus-one has arisen in CCAMLR discussions over the years, but never as clearly as in the 2006 meeting during the discussion of the Contracting Party IUU Vessel List. The CCAMLR Contracting Party IUU (CP-IUU) and Non-Contracting Party IUU (NCP-IUU) vessel lists are prepared by the Secretariat using information provided by Members intersessionally (CM 10-06<sup>47</sup> and 10-07<sup>48</sup>). Evidence is presented indicating that vessels were/are engaged in IUU activities in the Convention Area and as such have undermined the effectiveness of CMs in force. Once the IUU vessel lists are adopted, Members are required to take action against listed vessels by blocking their ports to them, refusing to register, or deregistering the vessels concerned, withdrawing fishing licences, nullifying catch documents and/or other trade related measures (CM10-06, paragraph 17; CM 10-07, paragraph 21).

At CCAMLR-XXV in 2006 the inclusion of the Russian-flagged *Volna* on the CP-IUU list was unable to be agreed upon due to lack of consensus (CCAMLR 2006, paragraph 9.16). Although it had been placed on the list for fishing in a closed area, Russia stated that the longlines had been set in an open area, but had drifted into the closed area and the vessel was simply retrieving them. However other Members were convinced that the *Volna* had been engaged in illegal activities and thus satisfied the criteria for being included on the CP-IUU list. Russia blocked consensus on the decision, thus leaving the *Volna* off the list. In the absence of a decision the *Volna* was not included on the CP-IUU list. The following describes the event, as reflected in the CCAMLR-XXVI meeting report.

It was reported that on the 1<sup>st</sup> of February 2006 the Russian-flagged vessel *Volna* was sighted hauling a longline and dumping by-catch in a small scale research unit (SSRU) in Subarea 88.2 that, at that time, was closed for fishing (CCAMLR 2006b, Annex 5, paragraph 2.37). It was included in the Provisional CP-IUU vessel list for having “fished during closed fishing periods or in closed areas in contravention of CCAMLR Conservation Measures”, namely CM 10-06.

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<sup>47</sup> CM 10-06 – Scheme to promote compliance by Contracting Party vessels with CCAMLR conservation measures

<sup>48</sup> CM 10-07 – Scheme to promote compliance by non-Contracting Party vessels with CCAMLR conservation measures

During SCIC discussions of the Provisional CP-IUU vessel list, Russia noted that it had informed Members (via the CCAMLR Secretariat, COMM CIRC 06/51) that it had conducted a full investigation into the matter. Russia concluded that the *Volna* had been fishing inside Subarea 88.1, in an SSRU that was open when one of their longlines had torn and drifted into the closed SSRU in Subarea 88.2 (CCAMLR 2006b, Annex 5, paragraph 2.38). The captain had decided to haul the longline that was inside the closed area.

Some Members found this explanation improbable and a paper was tabled indicating the drift theory was unlikely due to currents in the area flowing in the opposite direction to that necessary to carry the longline into the closed SSRU (CCAMLR 2006b, Annex 5, paragraphs 2.39 and 2.41).

Perhaps anticipating the inability of SCIC to reach consensus over the CP-IUU vessel list some Members had, at the start of the debate, called for Members whose flag vessels were under consideration for inclusion on the CP-IUU vessel list to voluntarily abstain from the decision-making process (CCAMLR 2006b, Annex 5, paragraph 2.29). Though this could be construed as using consensus-minus-one, these Members believed that it would not undermine the concept of consensus-based decision-making as no *formal* objection would be raised (CCAMLR 2006b, Annex 5, paragraph 2.29). Other Members believed that it was important to maintain an unqualified consensus, “in keeping with the highest objectives of the Antarctic Treaty System” (CCAMLR 2006b, Annex 5, paragraph 2.30).

Russia noted that other vessels had contravened CMs but were not being considered for inclusion on the IUU vessel lists (CCAMLR 2006b, Annex 5, paragraph 2.56). Either these vessels did not fit the criteria set out in CM 10-06 or there were, potentially, double standards at play.

Whether or not the *Volna* was involved in IUU fishing is not the point; more interesting is the fact that Russia would not agree to the placement of the *Volna* on the CP-IUU list, despite demonstrable evidence for the inclusion, and so effectively blocked the consensus. This resulted in some Members calling for a reversal of the

procedure in which it would take consensus to remove the vessel from the list (CCAMLR 2006b, paragraph 9.32).

The procedures set out in CM 10-06 are very clear and the provisional CP-IUU vessel list is prepared without bias by the Secretariat, so it is most probable that the *Volna* had been correctly placed on the list. Nevertheless the *Volna* debate was lengthy and SCIC remained unable to reach consensus (CCAMLR 2006b, Annex 5, paragraph 2.57), and the issue was forwarded to the Commission. A compromise was finally accepted when Russia agreed to investigate further using new information and would communicate the results to CCAMLR “in a timely fashion the actions that it would now take to bring this issue to an acceptable resolution” (CCAMLR 2006b, paragraph 9.39). Other Members accepted this compromise and agreed to postpone the decision on whether to include the *Volna* on the CP-IUU vessel list until, or before, CCAMLR-XXVI (CCAMLR 2006b, paragraph 9.40).

Regardless, the *Volna* continued fishing in the Convention Area during 2007 and Russia neglected to provide licence details to the Secretariat as required in CM 10-02.<sup>49</sup> At CCAMLR-XXVI in 2007 Russia concluded that the incident was of a technical and non-deliberate nature and the case was therefore closed (CCAMLR 2007a, paragraph 10.63). CCAMLR Members were not satisfied with this situation, but the *Volna* was not included in CP-IUU vessel list (CCAMLR 2007a, paragraph 10.67).

This is a clear failure of CCAMLR, through the use of consensus, to reach a decision in an effective and timely manner. If consensus-minus-one had been used as a legitimate decision-making tool an agreement would have been reached at CCAMLR-XXV. However, whether the dissenting party would have agreed to any actions against its vessel is doubtful.

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<sup>49</sup> CM 10-02 – Licensing and Inspection obligations of Contracting Parties with regard to their flag vessels operating in the Convention Area.

### 7.5.2 Australian CITES proposal

There have also been cases of consensus-minus-one in reverse. In the following example a Member's actions were limited by the need for consensus in order for them to put forward a proposal seemingly on behalf of CCAMLR.

At CCAMLR-XXI in 2002 Australia advised CCAMLR that it had nominated toothfish for listing under Appendix II<sup>50</sup> of the Convention for the International Trade in Endangered Species (CITES) (CCAMLR 2002, paragraph 10.1). Australia believed this would give a greater coverage of trade measures with States that are Members of CITES but not party to CCAMLR.

However, the majority of CCAMLR Members opposed the Australian proposal for a variety of reasons (CCAMLR 2002, paragraphs 10.3 to 10.75). Mostly they were concerned that CCAMLR's competency and authority might be undermined by deference to CITES. As a result CCAMLR did not support Australia's proposal. Consequently toothfish was not listed under Appendix II of CITES, but at the Twelfth Conference of Parties (CoP12) CITES adopted Resolution Conf. 12.4 which recommended that their Parties adhere to the CAMLR Convention and CCAMLR's Conservation Measures.<sup>51</sup>

Consensus-minus-one could have its uses in a decision-making organisation such as CCAMLR, especially with regards to the *Volna* issue, however its legitimacy as a binding decision, and consequent implementation, would be debatable.

That having been said, there are circumstances where CCAMLR has used a form of consensus-minus-one as a norm in their decision-making procedure.

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<sup>50</sup> Appendix II includes species not necessarily threatened with extinction, but in which trade must be controlled in order to avoid utilization incompatible with their survival.

From website: [www.cites.org/eng/disc/how.shtml](http://www.cites.org/eng/disc/how.shtml)

<sup>51</sup> CITES Resolution Conf. 12.4 – Cooperation between CITES and the Commission for the Conservation of Antarctic Marine Living Resources regarding trade in toothfish.

From website: <http://www.cites.org/eng/res/12/12-04.shtml>

### 7.5.3 CCAMLR Member Contributions

Every Member of CCAMLR must contribute to the budget (Article XIX.3). Member contributions are determined by two criteria: the amount harvested and an equal sharing among all Members (Article XIX.3). The proportion in which the criteria apply is decided by CCAMLR.

Individual contributions can be quite high and given the demographic of Members (developed and non-developed States) it would be reasonable to assume that some Members may find it difficult to pay by the date required.

CCAMLR's Financial Regulations<sup>52</sup> permit extensions of the due date (1<sup>st</sup> January) of up to 90 days for individual Members who are unable to comply (CCAMLR 2007b, paragraph 5.6). The Executive Secretary then reports at each CCAMLR meeting on the receipt of the contribution and the position of those Members who are in arrears.

Article XIX.6 states that a Member who "fails to pay its contributions for two consecutive years shall not, during the period of its default, have the right to participate in the taking of decisions of the Commission".

In 1999 CCAMLR defined the period of default in Article XIX.6 to be "the period commencing when a contribution is payable, if the whole or part of the previous contribution is outstanding, and ending when both these contributions are paid in full" (CCAMLR 1999, paragraph 3.12).

There have been a few cases of financial default, most notably Brazil and Ukraine in 2000 (CCAMLR 2000a, paragraph 3.5). Brazil advised CCAMLR that this was a temporary situation and despite being in default, it would participate in the discussions (CCAMLR 200a, paragraph 3.6), although it correctly did not say

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<sup>52</sup> First adopted at CCAMLR-I (paragraph 23), and amended at CCAMLR-XIII (Annex 4, Appendix 2), CCAMLR-XVII (Annex 4, Appendix III), CCAMLR-XVIII (paragraph 3.5; Annex 4, paragraph 38) and CCAMLR-XXI (Annex 4, paragraph 23).



“decisions”. Ukraine referred to its financial difficulties and indicated that it would make efforts to make payments to its obligations (CCAMLR 2000a, paragraph 3.7).

At CCAMLR-XX in 2001, one Member was still in financial default (CCAMLR 2001b, paragraph 3.4) although the report does not state which Member. Once again at CCAMLR-XXI in 2002 one Member was in financial default (CCAMLR 2002, paragraph 3.8), and again the report does not identify the Member.

Brazil was once more in financial default at CCAMLR-XXIII in 2004. There is no mention of it in the SCAF report, however in the CCAMLR-XXIII report, paragraph 3.26 states that:

“Brazil noted that funds have now become available to enable its outstanding contribution to be paid in full very shortly. It expressed appreciation to all Members for their patience and understanding of Brazil’s difficulties in this respect, extended to Brazil during this year’s meeting.”

From this brief statement it can be assumed that Brazil was not excluded from the taking of decisions as it should have been. It is also interesting to note that despite Brazil defaulting on its payments a Brazilian was elected Chair of the Scientific Committee that year (SC-CAMLR 2004, paragraph 14.1).

Ukraine was again in financial default in 2007. However, CCAMLR decided that the previous definition of default would not be applied and asked SCAF to discuss interpretations of Article XIX.6 of the CAMLR Convention (CCAMLR 2007a, paragraphs 3.30 to 3.32). SCAF discussed the issue in 2008, with three options being proposed by Members (CCAMLR 2008a, Annex 4, paragraph 48). Consensus could not be reached on any one option (CCAMLR 2008a, paragraph 3.35).

These examples raise a number of issues. First, does the intentional exclusion of a Member from the decision-making processes due to financial default turn CCAMLR’s inclusive consensus into consensus-minus-one? And if so, are excluded Members able to renege on agreed measures as they weren’t party to the agreement?

The Convention was agreed to and signed by each Member. The Financial Regulations were negotiated and adopted by CCAMLR using consensus. The definition of “default period” was agreed to using consensus. Therefore by earlier agreeing to the process of exclusion due to financial default, no Member appears to have the right to reject decisions made based on their non-participation in the decision-making process. As Brazil demonstrated at CCAMLR-XXIII, just because you cannot participate in the decisions, doesn’t mean you can’t contribute to the discussion leading up to such decisions.

## 7.6 Chapter Summary

In the 27-year history of CCAMLR there have been both successes and failures as decision-making organisation. The fact that CCAMLR is in charge of such precious resources means that any failures may have dire consequences.

CCAMLR’s fight against IUU fishing is impressive (Section 7.1). Trade in IUU toothfish has been virtually cut off with the introduction of CDS, and more importantly E-CDS, and C-VMS for all vessels fishing for toothfish in the Convention Area, as well as other CMs and Resolutions (shown in Table 2).

CCAMLR’s management of krill fishing has both positive and negative elements. It is impressive that CCAMLR uses precautionary catch limits for the krill fishery, although this is lessened somewhat by the unsuccessful attempt to break these catch limits further into SSMUs (Section 7.2.1). However, even this has taken a positive step recently with the introduction of CM 51-04. The lack of agreement for international scientific observers across the fleet and the use of C-VMS is a concern and does reflect badly on CCAMLR’s record (Sections 7.2.2 and 7.2.3).

These case studies show that CCAMLR, as a decision-making organisation, can effectively implement appropriate management measures when needed (IUU), however consensus has been used to block decisions that would benefit the conservation objectives of the CAMLR Convention (Sections 7.2.2, 7.2.3 and 7.5.1).

This chapter has also shown that the pressure of the Commission and the cooperation of Members can compel a coastal state Member to conform to CCAMLR's objectives of near zero incidental mortality levels of seabirds during fishing operations (Section 7.3).

It has also shown that CCAMLR's operating system allows CCAMLR to use the best scientific knowledge to appropriate catch allocation, what could be a contentious issue, by consensus each year (Section 7.4).

Using these case studies as examples, and the information presented in the previous chapters, this study will now discuss whether consensus decision-making has worked for CCAMLR.

## 8. Discussion

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The real challenge of decision-making processes within any RFMO is to have a process that respects State sovereignty, yet limits the ability of States to obstruct the adoption and effective implementation of conservation and management measures (McDorman 2005). Has CCAMLR risen to this challenge? To assess this we must go back to the three questions listed in the aim of the study:

1. Has CCAMLR's use of consensus been effective, expeditious and efficient in resolving relevant issues?
2. Does CCAMLR's use of inclusive consensus-based decision-making facilitate effective and timely adoption of management measures and do CCAMLR Members implement accordingly? and
3. Has CCAMLR's use of consensus-based decision-making affected the ability of the organisation to meet the objectives of Article II of the CAMLR Convention?

### 8.1 The need for consensus in CCAMLR

Consensus in CCAMLR is seen as a lack of formal objection. This does not necessarily mean that everybody agrees; more that they are satisfied enough to not disagree.

From the literature, the most notable disadvantage of consensus decision-making is that it takes too long. This shortcoming has become clear in this study. When Members cannot agree to a common purpose there is no alternative but to agree to nothing. After 27 years the krill fishery is still considerably under-managed. CCAMLR did well to implement catch limits in 1991, even though it took an entire decade after the CCAMLR Convention, yet virtually nothing has been done since.

There are no small scale catch limits, no mandatory observers and no obligation to implement C-VMS.

CCAMLR relies on advice from the Scientific Committee, which in turn relies on information gathered from scientific observers, as well as scientific research and commercial fisheries data. At present the Scientific Committee is the best available, but it could be better. In the krill fishery, for the 2007/08 season, 20-67% of the vessels had observers (national and international) on board at some time during their trips (SC-CAMLR 2008, Annex 6, paragraph 2.19). Of these low percentages of vessels, between 20-86% of the tows were observed, per observer trip (SC-CAMLR 2008, paragraph 6.20). This gives a low overall percentage of observation in this fishery. As a result, the data collection, and hence the scientific advice garnered, is not at CCAMLR's usual "best practice" (as per the finfish fisheries) and potentially puts CCAMLR and its management objectives at a disadvantage.

Another problem with the inclusive consensus that CCAMLR uses is that Members have the ability to block a decision that could affect them negatively. This has been exemplified over the years by Japan and Korea with the krill fishery and also Russia with the IUU listing of vessels.

The *Volna* episode was not the first time that consensus has been blocked by Russia for the CP-IUU vessel list. At CCAMLR-XXII in 2003 two other Russian-flagged vessels were nominated for inclusion in the list. Russia denied reports of toothfish offloads from two of their vessels, the *Strela* and the *Zarya*, using fishing licenses and catch documents that couldn't be verified as authentic (CCAMLR 2003, Annex 5, paragraphs 2.48 and 2.49). Russia argued that this incident had occurred under previous Bolivian owners and so the vessels should not be included in the CP-IUU vessel list (CCAMLR 2003, paragraph 8.30). It also rejected claims that the *Strela* was sighted by Australia in its EEZ in Division 58.5.2. Russia asserted to have evidence of the vessel's inability to be at that location (CCAMLR 2003, Annex 5, paragraphs 2.51 and 2.52). Consensus was not reached and although Russia did not want to be singled out in the report as blocking consensus (CCAMLR 2003, paragraph 8.55), the European Community reiterated that all Members except Russia

had agreed that the *Strela* and the *Zarya* should be on the CP-IUU vessel list (CCAMLR 2003, paragraph 8.56).

Alternatively, several Uruguayan-flagged vessels have been recommended for inclusion on the CP-IUU vessel list since its inception in 2002 and Uruguay has not once used the need for consensus to block their inclusion.

From the continual blocking of consensus by Russia, it is obvious that the use of consensus decision-making does not always work when applied to the blacklisting of Member vessels. Using consensus-minus-one could resolve this issue, but then there may be an issue of the dissenting party not agreeing with the decision and thus not implementing any measures and/or penalties. The Member whose vessel is nominated for inclusion could abstain from the decision, as suggested by some Members at CCAMLR-XXV (CCAMLR 2006b, Annex 5, paragraph 2.29). However, in order to do this the Rules of Procedure would need to be changed – by consensus.

The idea of “inclusive” consensus is that everyone participates in the discussions and the resulting decisions. Therefore mandatory abstaining from a decision is against the ideal of the consensus that CCAMLR uses.

Article XXII, paragraph 1 of the Convention states that:

*“each Contracting Party undertakes to exert appropriate efforts, consistent with the Charter of the United Nations, to the end that no one engages in any activity contrary to the objective of this Convention”.*

It could be construed that by blocking consensus a CP may be engaging in activities contrary to the objectives of the Convention.

At CCAMLR-XXVI in 2007 it was decided to undertake a Performance Review of the organisation (CCAMLR 2007, Annex 7, (Appendix I)). A review panel was appointed by CCAMLR and carried out the review in 2008.<sup>53</sup> The CCAMLR

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<sup>53</sup> Report of the CCAMLR Performance Review Panel. From CCAMLR website: [www.ccamlr.org](http://www.ccamlr.org)

Performance Review Panel Report (CPRP Report) was submitted to, and discussed at, CCAMLR-XXVII. The report concluded that consensus decision-making has worked for CCAMLR over a long period of time, but there may have been some costs associated with it (CPRP Report, Chapter 5.1.1, recommendation 1). The CPRP do not list these costs, but some have been identified in this study. When national interests are put in front of the interests of CCAMLR as a whole, issues do not get resolved. The examples given in this study is the krill fishery (Section 7.2), which is considerably undermanaged when compared to the finfish fisheries and France's actions in respect to seabird by-catch during longline fishing (Section 7.3).

The CPRP also stated that consensus can create problems and prevent or delay decisions on the *implementation* of some CMs (Chapter 5.1.2, paragraph 7). This has been exemplified with the krill fishery case study (Section 7.2) and the CP-IUU vessel lists (Section 5.2.5). The CPRP suggests that decisions regarding implementation could be adopted by majority rule, or that any State concerned would abstain from participating in the decisions. Alternatively, it proposed that these decisions are not seen as matters of substance, as articulated by Article XII.2, and therefore do not require consensus.

However, these are clearly matters of substance, as demonstrated by the in-depth debates recorded in the CCAMLR reports. With regard to resource management it is difficult to subjectively determine what is not considered a matter of substance, as all issues are important. This would be especially difficult for CCAMLR, noting that their ecosystem approach means the focus is not entirely on the resources harvested. Any decision that leads to legal obligation could be seen as a matter of substance.

However, consensus comes with a moral expectation; if it was agreed upon by all then it must be implemented by all. Therefore, a matter of substance could be seen as a decision that leads not only to legal obligation, but moral obligation also.

The literature maintains that consensus can be seen as an obstacle to achieve effective and timely decisions yet the CPRP concluded that the need for consensus on matters of substance did not prevent CCAMLR from addressing important issues (CPRP Report, Chapter 5.1.1, paragraph 2). However, this study has shown that the need for

consensus in CCAMLR can be harmful to CCAMLR's overall conservation objectives when consensus cannot be reached. This is when national interests have outweighed a Member's commitment to the CCAMLR objectives.

## 8.2 Consensus in CCAMLR is an equaliser

CCAMLR practices an inclusive decision-making process. All Members have the right to participate in the discussion and decision. Consensus brings with it a strong sense of cooperation and compromise. Although the debate and negotiations can make the process longer, a decision is made that all Members have agreed to and so are bound to implement. This makes the decisions strong as there is political will behind them and Members respect and will implement the decisions.

CCAMLR's Members are from different socio-economic groups. All Members come to the meetings with differing opinions and interests. Consensus enables them all to have a voice. It is an equaliser. If there were a majority vote then the fishing nations, 70% of CCAMLR's membership, would be in control of the decisions. This could lead to CCAMLR's conservation objectives being secondary to resource harvesting.

Another positive element of CCAMLR's decision-making procedure is the transparency it displays. Transparency in the decision-making process and other activities of regional fisheries management organisations is important (Swan 2004) and adds to the legitimacy of the regime.

In the literature transparency is usually associated with the inclusion of observers in discussions (see Swan 2004). In the case of CCAMLR, observers are invited to participate in the annual meetings of the Scientific Committee and the Commission. However, they are currently unable to attend any meetings of the Scientific Committee Working Groups.<sup>54</sup> Members can also restrict the presence of observers in the Commission and the Scientific Committee agenda items.<sup>55</sup>

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<sup>54</sup> Birdlife International has been represented at WG-IMAF. However, they have attended as "invited experts" rather than observers.

<sup>55</sup> CCAMLR Rules of Procedure, Rule 33(b); Scientific Committee Rules of Procedure, Rule 22.



This restriction of observers in the discussions of CCAMLR, and its subsidiary bodies, does not necessarily reduce its transparency. Member delegations can and do include NGO observers as expert advisors. This gives the Members added expertise and NGOs a voice in forming decisions.

In addition, all CCAMLR discussions and resulting decisions are published in the meeting reports and are available publicly. Also publicly available from CCAMLR is the current, and historical, Schedule of Conservation Measures, and the CCAMLR Basic Documents.<sup>56</sup>

The CPRP concluded that the consensus procedure followed by CCAMLR is transparent and consistent, and adopts management measures in a reasonable timeframe (Chapter 5.1.2, paragraph 6).

### 8.3 CCAMLR and its conservation objectives

Links with the ATS clearly differentiates CCAMLR from other RFMOs (CPRP Report, Chapter 5.1.1, paragraph 1). With the other components of the ATS, CCAMLR works to protect the Antarctic as a whole. CCAMLR was the first international organisation to apply an “ecosystem” and “precautionary” approach to resource management and has been adopted as a best practice standard on how to do so.

Article II of the CAMLR Convention attempts to limit the effects of vast unchecked harvesting and instigates the “precautionary approach” to fisheries management. At the time of entry into force of CCAMLR, less than 40% of the Members were fishing States (CPRP Report, Chapter 1.3, paragraph 23). That proportion has increased over time to 70% of Members classed as fishing States in 2008.

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<sup>56</sup> The CCAMLR Basic Documents contain the CAMLR Convention, Commission and Scientific Rules of Procedure and other CCAMLR regulations and rules.

The CPRP concluded that CCAMLR has a very strong record of developing and applying the precautionary approach to fishery management and is recognised internationally as a leader of this (Chapter 3.5.2, paragraph 104).

Willock and Lack (2006) undertook an assessment of best practice in RFMOs and concluded that CCAMLR is the most advanced of the RFMOs assessed in their application of the precautionary and ecosystem approaches, noting the CAMLR Convention, unlike other RFMO governing conventions, is framed around an ecosystem rather than a species.

Another assessment of RFMOs by Mooney-Seus and Rosenberg (2007) also concluded that CCAMLR was the most advanced of the RFMOs assessed in developing and implementing management measures using precautionary and ecosystem approaches.

The New and Exploratory Fisheries case study (Section 7.4) is an excellent example of how CCAMLR has achieved implementation of a “precautionary” approach that is in line with Article II of the CAMLR Convention.

Another example of the ecosystem approach to resource management is the CCAMLR Ecosystem Monitoring Program (CEMP). The CEMP was established in 1985 to detect and record significant changes in the ecosystem and distinguish between changes due to harvesting of commercial species and changes due to environmental variability (SC-CAMLR 1985, paragraph 7.2). The program uses ‘indicator species’, species dependant on harvested commercial species, to detect changes. CEMP has been active for over two decades and the CCAMLR Secretariat holds data on four penguin species, the Black-browed albatross and the Antarctic fur seal.

A more recent example of CCAMLR’s commitment to conserving the ecosystem is their work with Vulnerable Marine Ecosystems (VMEs). United Nations General

Assembly Resolution 61/105<sup>57</sup>, in 2006, called upon States to take immediate action to protect vulnerable marine ecosystems (paragraph 80). In response, CCAMLR began to develop approaches to avoid and mitigate significant adverse impacts on VMEs (CCAMLR 2008a, paragraph 5.4). The result was the adoption of CMs 22-06<sup>58</sup> and 22-07.<sup>59</sup> These CMs require Members to notify all encounters with VMEs while fishing and in cases where prescribed amounts of VME materials are found, fisheries in the local area are closed.

This was an important step for CCAMLR, once again putting it at the forefront of fisheries management practices by actively implementing the ecosystem and precautionary approach as a high priority.

As well as the precautionary approach to fisheries management, CCAMLR identifies conservation needs and formulates, adopts and revises CMs on the basis of the best scientific knowledge, provided by the Scientific Committee and its working groups (Section 5.1). The organisational structure, or operating system, of CCAMLR allows for the different working groups and committees to interact and give CCAMLR not only scientific advice but also the best overall advice available. This is very important; if the different groups didn't cooperate then the advice could be one-sided or biased, rather than inclusive.

McDorman (2005) contests that using consensus to allocate catch limits can lead to paralysis and continuation of outdated, and not necessarily sustainable, quotas. However, the organisational structure of CCAMLR makes it easier for Members to agree on catch limits. WG-FSA and WG-EMM calculate the limits, where they are firstly discussed in the Scientific Committee. They are then presented to the Commission, and given that it is the 'best scientific advice' they will be agreed upon.

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<sup>57</sup> UNGA Resolution 61/05 – Sustainable fisheries, including through the 1995 Agreement for the Implementation of the Provisions of the United Nations Convention of the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, and related instruments. Website:

<http://daccessdds.un.org/doc/UNDOC/GEN/N06/500/73/PDF/N0650073.pdf?OpenElement>

<sup>58</sup> CM 22-06 – Bottom fishing in the Convention Area.

<sup>59</sup> CM 22-07 – Interim measure for bottom fishing activities subject to Conservation Measure 22-06 encountering potential vulnerable marine ecosystems in the Convention Area.

As stated earlier (Section 5.3), the Scientific Committee is officially the only source of the best scientific evidence available for CCAMLR.

All Members have the opportunity to be involved in the science and the resulting decisions. This negates the likelihood of any consensus paralysis at the Commission level. By working its way up the chain it has been agreed to, by consensus, by all.

Although this organisational structure may make it harder to formulate management measures, as every relevant group must have their say, by the time the decision is ready to be made it has been comprehensively evaluated.

## 8.4 Measuring CCAMLR's effectiveness

Using the three statements from Section 2.1, and reintroduced here, CCAMLR's effectiveness can thus be evaluated.

### 8.4.1 Were the initial goals realistic?

CCAMLR's goals or objectives, while very ambitious, were realistic. Put simply, it wished to conserve the Antarctic ecosystem, while still operating a viable fishing industry. With the objectives so clearly defined in the CAMLR Convention, the organisation has been able to keep these goals a priority. CCAMLR has formulated and implemented various CMs aimed at conservation, e.g. protection of VMEs, seabird measures, and New and Exploratory measures, as well as having a long standing Ecosystem Monitoring Program that has collected a vast amount of scientific data to better understand the ecosystem implications of resource harvesting.

From all these measures it is clear that CCAMLR is not just an organisation managing resource harvesting, it is an arena for scientists to share their research. CCAMLR uses this expertise to better understand the Antarctic environment and thus better implement the "ecosystem" and "precautionary" approach to fisheries management.

#### 8.4.2 Was there distinct changes in actor behaviour?

CCAMLR's consensus is based on cooperation and compromise. Without these elements the decisions would never be made. CCAMLR considers itself to be proactive, using feedback management for all fisheries (SC-CAMLR 1991, paragraph 9.7), for example krill and New and Exploratory measures (Section 7.2 and 7.4). CCAMLR also needs to be reactive with the ability to be flexible and change to the issues of the day. IUU fishing is a good example of this. With IUU fishing prevalent in the Convention Area, drastic measures needed to be taken. The CDS has succeeded in monitoring the trade in IUU, but without the commitment of Member States it would not have been so effective.

Uruguay is a good example of positive changes in behaviour. It had vessels listed on the CP-IUU list, with one interviewee going so far as to call Montevideo a port rampant with pirate fishing vessels. However, with the introduction of a suite of compliance measures (see Table 2, Section 7.1) and the commitment of Uruguay to abide, there have been no recent connections between IUU operations and Uruguay.

There have, however, been other Members who continually use consensus to block decisions that will affect them (Russia and black listing of vessels; Japan, Korea and China and krill measures).

#### 8.4.3 Were there identifiable phases of problem solving?

CCAMLR has many examples of incremental problem solving. Through various seabird CMs, CCAMLR has virtually eliminated mortalities in the Convention Area, with the exception of the French Islands of Crozet and Kerguelen. However, due to continual pressure by other Members, France is currently undertaking a three-year plan to reduce seabird mortalities during fishing operations to near zero levels (Section 7.3).

Again, the problem with IUU (Section 7.1) has been swiftly and efficiently dealt with by CCAMLR using an increasingly sophisticated array of CMs to tackle the problem

as different elements of the problem were revealed. This illustrates that when there is urgent need for action, CCAMLR is able to respond.

Therefore it can be concluded that CCAMLR, as a decision-making organisation, has been effective in its work to conserve, while rationally using, Antarctic marine living resources.

## 9. Conclusion

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The use of consensus in CCAMLR has harmonised the contrasting views of Members enabling a common purpose and common goal, the conservation of Antarctic marine living resources, including the rational use. Links with the ATS clearly differentiates CCAMLR from other RFMOs (CPRP Report, Chapter 5.1.1, paragraph 1). With the other components of the ATS, CCAMLR works to protect the Antarctic as a whole.

Swan's (2004) three elements of taking decisions: political will, legal obligation and institutional mechanisms, are all exhibited in CCAMLR decisions. There is science, political will and self-enforcement. Mooney-Seus and Rosenberg (2007) concluded in their report of RFMO best practices that CCAMLR and its respective Contracting Parties appeared to comply consistently with both scientific advice and the corresponding management measures.

CCAMLR has been working for 27 years to conserve the marine living resources of the Southern Ocean, while rationally harvesting finfish and krill. There has been a vast amount of scientific research undertaken by CCAMLR Members: CEMP, the CCAMLR Scheme of International Scientific Observation, and research surveys. CCAMLR has adopted precautionary catch limits, open and closed fishing areas, by-catch mitigation measures, as well as trade related measures. There are a vast number of Conservation Measures and Resolutions in place.<sup>60</sup> All of this combines to present strong evidence that consensus decision-making has worked for CCAMLR.

It is evident that the work of CCAMLR is going to become more difficult over time. The inclusion of climate change on the agenda (CCAMLR 2008a, Annex 3), and the vast work being undertaken with regard to VMEs,<sup>61</sup> in addition to the already heavy workload of CCAMLR and its subsidiary groups, means that a considerable amount of work must be done in a short amount of (meeting) time. It has been acknowledged

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<sup>60</sup> See CCAMLR website: [www.ccamlr.org/pu/e/e\\_pubs/cm/drt.htm](http://www.ccamlr.org/pu/e/e_pubs/cm/drt.htm)

<sup>61</sup> For the full discussions on Vulnerable Marine Ecosystems at CCAMLR-XXVII see CCAMLR 2008a, paragraphs 5.4 to 5.30.

that some decisions are negotiated at late hours and without all the necessary input, and while this may produce a consensus decision, it does not necessarily produce a sound and effective outcome (CPRP Report, Chapter 5.1.2, paragraph 8).

A majority style voting system may save time, as decisions would not have to be discussed until everybody agrees or until it is clear that there will be no formal objection. Even consensus-minus-one could work in those instances when only one Member objects. However, consensus is an important element of CCAMLR. It is inclusive and an equaliser, giving every Member the same rights. With the different socio-economic makeup of CCAMLR's membership, it is important that all contribute to the decisions, whether it be sending their scientists to the working group meetings, or just participating in the debate at the CCAMLR meeting. This ensures ownership of all decisions, making implementation more likely.

There is also a chance that any change in the decision-making method could, in very extreme circumstances, force a Member to consider withdrawing from the Convention. As the third element of IUU is *unregulated* fishing, this would be a less than ideal situation.

Instead of attempting to change the decision-making procedures to accommodate its increasing workload and the problems that will be associated with it, the suggestion has been made that perhaps CCAMLR should look to its dispute resolution mechanisms. Although Article XXV of the CAMLR Convention does contain a dispute settlement mechanism (as discussed in Section 5.2.4) the CPRP concluded that it appeared to be unsatisfactory (Chapter 5.2, recommendation 1). Their opinion was that it is weak and can prevent a dispute from being considered if a Member is not willing to submit it to a third party.

The CPRP suggested the possibility of following the WTO example which allows the political body to cast a decision of the Appellate body in the last resort (CPRP Report, Chapter 5.1.1, recommendation 1(b)). This would mean that the decision by the impartial organ would be binding, but it would still give CCAMLR the ability to decide otherwise in the last resort, and even then consensus would be required.



This study has shown that CCAMLR is consistent with Article 10 of UNFSA, to which all but three of CCAMLR Members are also Parties. By using inclusive consensus as their decision-making process, CCAMLR has, with a few exceptions, adopted and implemented CMs in a timely and effective manner. Such measures practically and effectively apply the “ecosystem” and “precautionary” approach to fisheries management as a high priority. Therefore it can be concluded that consensus has not made it harder for CCAMLR to formulate and implement management measures is consistent with Article IX of the CAMLR Convention.

## Appendix 1

### Article 10 of UNFSA - Functions of Subregional and Regional Fisheries Management Organizations and Arrangements (Source: UNFSA 1995)

In fulfilling their obligation to cooperate through subregional or regional fisheries management organizations or arrangements, States shall:

- (a) agree on and comply with conservation and management measures to ensure the long-term sustainability of straddling fish stocks and highly migratory fish stocks;
- (b) agree, as appropriate, on participatory rights such as allocations of allowable catch or levels of fishing effort;
- (c) adopt and apply any generally recommended international minimum standards for the responsible conduct of fishing operations;
- (d) obtain and evaluate scientific advice, review the status of the stocks and assess the impact of fishing on non-target and associated or dependent species;
- (e) agree on standards for collection, reporting, verification and exchange of data on fisheries for the stocks;
- (f) compile and disseminate accurate and complete statistical data, as described in Annex I, to ensure that the best scientific evidence is available, while maintaining confidentiality where appropriate;
- (g) promote and conduct scientific assessments of the stocks and relevant research and disseminate the results thereof;
- (h) establish appropriate cooperative mechanisms for effective monitoring, control, surveillance and enforcement;
- (i) agree on means by which the fishing interests of new members of the organization or new participants in the arrangement will be accommodated;
- (j) agree on decision-making procedures which facilitate the adoption of conservation and management measures in a timely and effective manner;
- (k) promote the peaceful settlement of disputes in accordance with Part VIII;
- (l) ensure the full cooperation of their relevant national agencies and industries in implementing the recommendations and decisions of the organization or arrangement; and
- (m) give due publicity to the conservation and management measures established by the organization or arrangement.

## Appendix 2

### Questionnaires

#### Consensus in CCAMLR – Questionnaire

Benefits: First hand knowledge and opinions from professionals with experience and expertise in Antarctic policy or Regional Fisheries Management Organisations.

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1. What is consensus?

Please rank your answers from 1 to 6, 1 being the answer you most agree with and 6 being the answer you least agree with.

1. lack of formal objection
2. everybody agrees
3. lowest common denominator that everybody agrees
4. condescending to minority point of view
5. overwhelming majority agreement
6. a mechanism allowing inclusiveness in decision-making

2. In your opinion CCAMLR is a model of what form of consensus decision-making?

Please choose one.

- (a) lack of formal objection
- (b) everybody agrees
- (c) lowest common denominator that everybody agrees
- (d) condescending to minority point of view
- (e) overwhelming majority agreement

3. In your view CCAMLR has succeeded as a decision-making system

YES                      NO

4. In your view CCAMLR has failed as a decision-making system because

- (a) decisions take too long
- (b) decisions are so diluted as to be meaningless
- (c) because of lack of commitment
- (d) other reasons

Please elaborate on your answer.

5. Are decisions reached by consensus weaker because they have had to be negotiated until all parties agree?

YES NO

6. It has been argued that consensus weakens the possibility of reaching effective decisions. Do you agree?

YES NO

7. Do you believe consensus should be unqualified or should there be an “opt out” procedure?

If so, what “opt out” procedure should be used and how?

8. Do you believe “opt out” procedures are contrary to the idea of consensus?

YES NO

9. What is consensus-minus-one?

Please choose one.

- (a) nonsense
- (b) useful for naming and shaming
- (c) legitimate decision-making tool
- (d) is against the nature of the Antarctic Treaty, and therefore CCAMLR
- (e) is useful in CCAMLR
- (f) violates inclusivity in decision-making

Please explain your answer.

10. Do you believe consensus-minus-one could be used in certain circumstances, such as black listing of vessels where the reaching of consensus is unlikely?

YES NO

11. Do you believe CCAMLR is in line with Article 10 of the United Nations Fish Stock Agreement (attached for your reference) and has a decision-making procedure which “facilitates the adoption of conservation and management measures in a timely and effective manner”?

YES NO

12. Should consensus remain the basis of all decision-making in CCAMLR for matters of substance or is there room for another method?

YES NO

13. What other decision-making method could CCAMLR use for matters of substance?

14. Does consensus make it harder for CCAMLR to formulate management measures in fulfilling the obligations of Article IX of the Convention (attached for your reference)?

YES NO

15. Do you have personal experience of a decision-making process other than consensus? And if so, how would you rate the decisions made compared to those in CCAMLR?

## Appendix 3

### Questionnaire participant list

Dr Marcus Haward – School of Government, University of Tasmania

Dr. Marie Jaccobsson - Sweden

Ambassador Jorge Berguno – Chile

Dr Enrique Marschoff – Argentina

Dr Erik Molenaar – Netherlands

Dr Mike Richardson – United Kingdom

Mr Kunio Yonezawa – Japan

## Appendix 4

### Consensus in CCAMLR - Interview questions

Benefits: First hand knowledge and opinions from professionals with experience and expertise in Antarctic policy or Regional Fisheries Management Organisations.

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1. What is consensus?
2. In your opinion CCAMLR is a model of what form of consensus decision-making?
3. In your view CCAMLR has succeeded as a decision-making system
4. In your view CCAMLR has failed as a decision-making system because
5. Are decisions reached by consensus weaker because they have had to be negotiated until all parties agree?
6. It has been argued that consensus weakens the possibility of reaching effective decisions. Do you agree?
7. Do you believe consensus should be unqualified or should there be an “opt out” procedure? If so, what “opt out” procedure should be used and how?
8. Do you believe “opt out” procedures are contrary to the idea of consensus?
9. What is consensus-minus-one?
10. Do you believe consensus-minus-one could be used in certain circumstances, such as black listing of vessels where the reaching of consensus is unlikely?
11. Do you believe CCAMLR is in line with Article 10 of the United Nations Fish Stock Agreement (attached for your reference) and has a decision-making procedure which “facilitates the adoption of conservation and management measures in a timely and effective manner”?
12. Should consensus remain the basis of all decision-making in CCAMLR for matters of substance or is there room for another method?
13. What other decision-making method could CCAMLR use for matters of substance?
14. Does consensus make it harder for CCAMLR to formulate management measures in fulfilling the obligations of Article IX of the Convention (attached for your reference)?

15. Do you have personal experience of a decision-making process other than consensus? And if so, how would you rate the decisions made compared to those in CCAMLR?



## Appendix 5

### Interview participant list

Mr Peter Amutenya – Namibia

Ambassador Karsten Klepsvik – Norway

Mr Gennady Boltenko – Russian Federation

Mr Martin Exel – Coalition of Legal Toothfish Operators (COLTO)

Mr Michel Trinquier – France

Ms Theresa Akkers (Frantz) – South Africa

Dr Seo-Hang Lee – Republic of Korea

Mr Alistair Graham – Non-Governmental Organisation (NGO) representative

Dr Andrew Constable – Australia

Dr Anthony Press - Australia

## Appendix 6

### Statement by the Chairman of the Conference on the Conservation of Antarctic Marine Living Resources (Source: CCAMLR 2007b)

The Conference on the Conservation of Antarctic Marine Living Resources decided to include in the publication of the Final Act of the Conference the text of the following statement made by the Chairman on 19 May 1980 regarding the application of the Convention on the Conservation of Antarctic Marine Living Resources to the waters adjacent to Kerguelen and Crozet over which France has jurisdiction and to waters adjacent to other islands within the area to which this Convention applies over which the existence of State sovereignty is recognised by all Contracting Parties.

1. Measures for the conservation of Antarctic marine living resources of the waters adjacent to Kerguelen and Crozet, over which France has jurisdiction, adopted by France prior to the entry into force of the Convention, would remain in force after the entry into force of the Convention until modified by France acting within the framework of the Commission or otherwise.
2. After the Convention has come into force, each time the Commission should undertake examination of the conservation needs of the marine living resources of the general area in which the waters adjacent to Kerguelen and Crozet are to be found, it would be open to France either to agree that the waters in question should be included in the area of application of any specific CM under consideration or to indicate that they should be excluded. In the latter event, the Commission would not proceed to the adoption of the specific CM in a form applicable to the waters in question unless France removed its objection to it. France could also adopt such national measures as it might deem appropriate for the waters in question.
3. Accordingly, when specific CMs are considered within the framework of the Commission and with the participation of France, then:

France would be bound by any CMs adopted by consensus with its participation for the duration of those measures. This would not prevent France from promulgating national measures that were more strict than the Commission's measures or which dealt with other matters;

in the absence of consensus, France could promulgate any national measures which it might deem appropriate.

4. CMs, whether national measures or measures adopted by the Commission, in respect of the waters adjacent to Kerguelen and Crozet, would be enforced by France. The system of observation and inspection foreseen by the Convention would not be implemented in the waters adjacent to Kerguelen and Crozet except as agreed by France and in the manner so agreed.

5. The understandings, set forth in paragraphs 1 to 4 above, regarding the application of the Convention to waters adjacent to the islands of Kerguelen and Crozet, also apply to waters adjacent to the islands within the area to which this Convention applies over which the existence of State sovereignty is recognised by all Contracting Parties.'

No objection to the statement was made.

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## Attachment 1

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“Consensus or not Consensus:  
That is the CCAMLR Question.”

by Jacquelyn Turner, Julia Jabour  
and Denzil Miller.

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M. McConnell (Eds). *Ocean Yearbook* 22. Martinus  
Nijhoff Publishers, Netherlands. Pp 117-158.

## **Consensus or Not Consensus: That Is the CCAMLR Question**

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### **INTRODUCTION**

Recent commentary has highlighted inconsistencies between international legal concepts (norms and rules) and the capacity of States to adopt or implement them.<sup>1</sup> In some cases, the State legal systems in place are readily able to accommodate the dynamic new norms that have evolved from rapid changes in contemporary international values or policies (e.g., in respect of torture, trade, greenhouse gas emissions, etc.). When this is not the case, the obvious conclusion is that legal operating systems need to adapt, or imbalances are likely to persist and new norms will not be given full effect.<sup>2</sup>

The Convention on the Conservation of Antarctic Marine Living Resources (CAMLR Convention)<sup>3</sup> is a longstanding international agreement that celebrated its 25th annual meeting in 2006. In this article, we retrospectively analyze the Convention's implementation by its administrative Commission (CCAMLR) to evaluate the regime's adaptability. The article focuses on the key role that CCAMLR's consensus-based decision-making has played in relation to a recent qualification to past practice arising from "consensus-minus-one" decisions. The overall effectiveness of the regime is accordingly assessed.

Recognizing that consensus does not operate in a vacuum, we hypothesize that CCAMLR's management of Southern Ocean marine living

\*The opinions expressed in this article are those of the authors and do not represent the collective, or official, views or decisions of the Commission for the Conservation of Antarctic Marine Living Resources (CCAMLR).

1. C. Ku and P. Diehl, "Filling in the Gaps: Extrasystemic Mechanisms for Addressing Imbalances Between the International Legal Operating System and the Normative System," *Global Governance* 12 (2006): 161-183.

2. *Id.*, p. 161.

3. Convention on the Conservation of Antarctic Marine Living Resources, 19 *International Legal Materials* 837.

*Ocean Yearbook* 22: 117-157.

resources comprises at least four essential elements: cooperation, compromise, consensus, and compliance. To help explain how CCAMLR functions, a particular methodological template is applied to these elements to ascertain if it is possible to place them within either an operating or a normative system or sometimes both. As Figure 1 shows, the elements are essentially discrete, but linked; we emphasize this point by illustrating how they interact.

Our study begins by exploring CCAMLR's history and how cooperation has been achieved even though the overriding interests of the States involved encompass a commercially competitive activity (harvesting). Like many international legal instruments, the Convention's negotiation invariably led to compromises. The Chairman's Statement, appended to the Convention, is itself a built-in compromise on the application of CCAMLR's jurisdiction.

Finally, we examine what is meant by "consensus": how it operates to underpin compliance, and what the emerging notion of "consensus-minus-one" implies. Our primary objective is to establish if the current CCAMLR decision-making process actually improves compliance—a reasonable expectation that indicates if the regime is working effectively.

## METHODOLOGY

Based on the work of Diehl et al.<sup>4</sup> a hybridized template was created to address the four essential CCAMLR Cs (cooperation, compromise, consensus and compliance) highlighted in Figure 1. While CCAMLR processes are essentially factual and structural, our approach allowed explanatory interrogation of the normative system in terms of both process and structure.

The framework employed to explain the dynamics of international law illustrated in Figure 2 was used to formulate a way to measure CCAMLR's effectiveness.

As such, regime effectiveness (E) in our study was taken as comprising the function:

$$E = C_1 + C_2 + C_3$$

Where:

$C_1$  = Cooperation

$C_2$  = Compromise

$C_3$  = Compliance

4. P. Diehl, C. Ku and D. Zamora, "The Dynamics of International Law: The Interaction of Normative and Operating Systems," *International Organization* 57 (Winter 2003): 43–75.

FIG. 1.—The Four Essential Cs of CCAMLR with linkages.

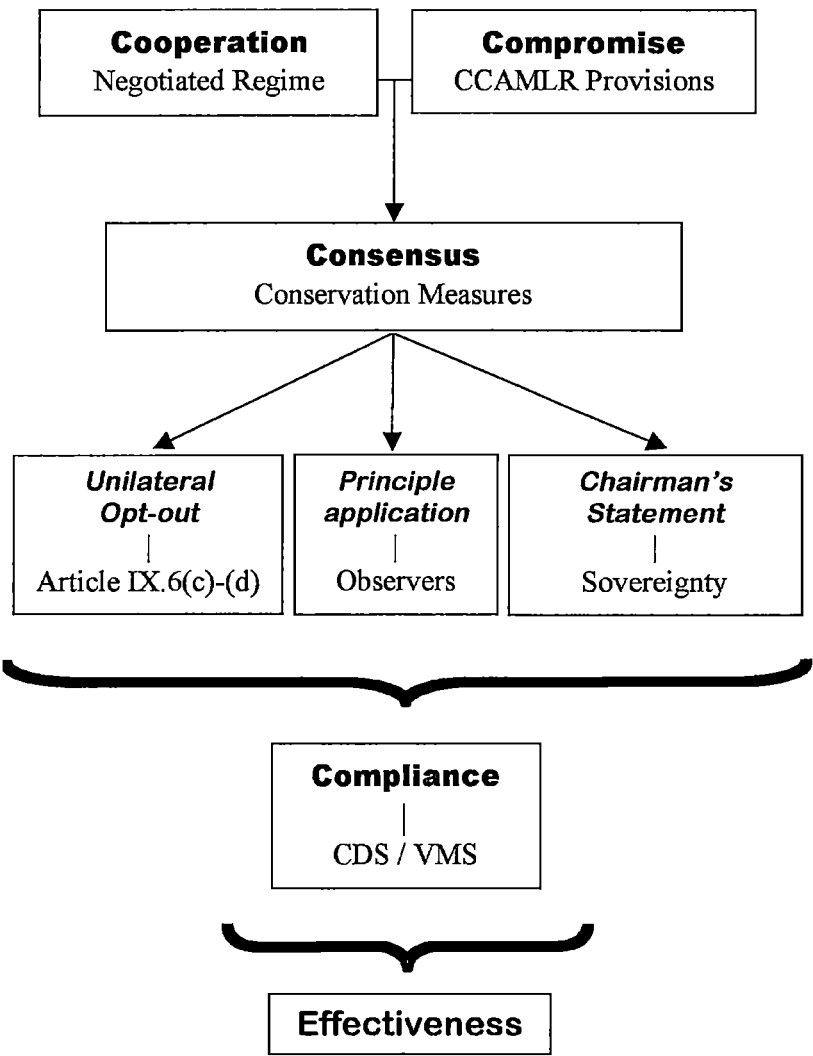
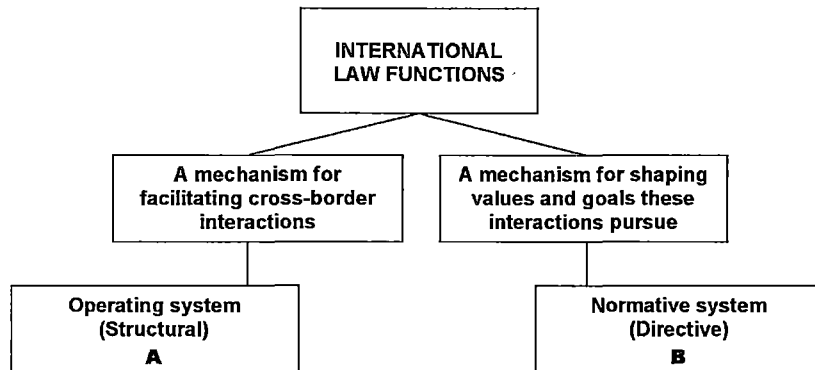




FIG. 2.—Framework for explaining the dynamics of international law (after Diehl et al., n. 4).



It was also assumed that without alignment between the operating and normative elements of the Convention as a legal instrument, and in the absence of State commitment to the values and goals of that instrument, its legal or regulatory outcomes may fail. As articulated by Diehl et al., our formulation above can then be refined in terms of international legal effectiveness (*E*) to:

$$E = A + B + P_c$$

Where:

*A* = Operational System (Structural) (see Figure 2)

*B* = Normative System (Directive) (see Figure 2)

*P<sub>c</sub>* = Political Consensus and Will

Based on interpretations from the literature, we assumed that an operating system (*A*) is essentially a constitution for the purposes of international law. It would be derived from such instruments as the Vienna Convention on the Law of Treaties<sup>5</sup> and appropriately represented in the CAMLR Convention. As such, an operating system would usually be independent of any particular norm and would often precede evolution of a norm rather than reacting to its existence.<sup>6</sup> For our purposes, operating system components include the sources of law (including the rules for law formation, participation, and obligation), the actors involved (including

5. Diehl, Ku and Zamora, see n. 4 above, p. 46.

6. *Id.*, p. 48.

those with legal rights and duties), the applicable jurisdiction (including actors' or institutions' obligations and rights in respect of disputes) and various institutional aspects (including forums to enforce compliance or settle disputes).<sup>7</sup> CCAMLR itself therefore constitutes the Convention's operating system in structure and process.

In our methodology, the normative system (*B*), as interpreted by Diehl et al., allowed us to extrapolate CCAMLR norms from particular values or policies and then to define acceptable standards of actor behavior. In general terms, we recognized that norms generally develop from issue-specific areas, such as human rights, or more recently, nuclear non-proliferation.<sup>8</sup> In the CCAMLR context, norms are derived from the stewardship of common resources as well as the environmental responsibility attached to the sustainable exploitation of such resources. The CCAMLR normative system was thus seen to comprise the normative content of the regime's processes, institutional as well as regulatory.

Therefore, in assessing the CCAMLR regime's effectiveness, we have considered a combination of structure in an international law context; the normative framework from which this structure derives, or to which it responds; and the reaching of political consensus in meeting the Convention's objectives. Diehl and Ku have described such interaction between these components as "colouring within the lines,"<sup>9</sup> a most appropriate artistic analogy.

#### THE OPERATING SYSTEM—COOPERATION AND COMPROMISE

CCAMLR is an intergovernmental organization with legal personality established under Articles VII and VIII of the CAMLR Convention. Its primary purpose is the conservation and rational use of marine living resources in the Southern Ocean south of the Antarctic Convergence (now termed the Polar Front).<sup>10</sup> The genesis of the CAMLR Convention,<sup>11</sup> CCAMLR itself and the attached structural system is to be found in the Antarctic Treaty.<sup>12</sup>

7. *Id.*, p. 47.

8. *Id.*, p. 53.

9. P. Diehl and C. Ku, "Coloring Within the Lines: How the International Legal Operating System Influences Treaty Making" (paper presented at the Annual Meeting of the International Studies Association, Chicago, 28 Feb.–3 Mar. 2007).

10. CCAMLR Basic Documents, available online: <<http://www.ccamlr.org>>.

11. D. Edwards and J. Heap, "Convention on the Conservation of Antarctic Marine Living Resources: A Commentary," *Polar Record* 20, 127 (1981): 353–362.

12. 402 *United Nations Treaty Series* 71.

**ANTARCTIC TREATY**

The twelve countries active during the International Geophysical Year (IGY) of 1957–58 signed the Antarctic Treaty in Washington, D.C. on 1 December 1959. The Treaty's main purposes are to ensure that Antarctica is "used for peaceful purposes only" (Article I.1) and to promote "international cooperation in scientific investigation" (Article III.1) in areas south of 60° South latitude (Article VI). It entered into force on 23 June 1961.

States Parties hold annual Antarctic Treaty Consultative Meetings (ATCMs) to exchange information and consult together on matters of common interest pertaining to Antarctica. They formulate and deliberate on measures in "furtherance of the principles and objectives of the Treaty" (Article IX.1), including the "preservation and conservation of living resources" (Article IX.1(f)).

ATCMs operate on the basis of consensus decisions taken by Consultative Parties, whereby discussions continue until an agreement acceptable to all Consultative Parties is found. ATCM outcomes are only brought into effect "when approved by all the Contracting Parties" (Article IX.4). Consultative Parties comprise the twelve original signatories plus sixteen additional Contracting States that have demonstrated their interest in Antarctica by conducting significant scientific research there (Article IX.2).

The Antarctic Treaty draws heavily on a strong philosophy of cooperation based on the free exchange of information, personnel, and scientific results within the Treaty Area (especially under Articles III and IX). This philosophy was derived from some of the key events associated with the Treaty's genesis. The most prominent of these was scientific collaboration during the IGY, which helped to smooth the way for, and inspire confidence in, a political process aimed at solving potential problems attached to Antarctic sovereignty.<sup>13</sup> Seven States (Australia, Argentina, Chile, France, New Zealand, Norway, and the United Kingdom) claimed parts of the continent; two others, the United States and the former Soviet Union (now the Russian Federation), reserved their right to make claims in the future; while the three remaining original Treaty signatories (Japan, Poland, and South Africa) were silent on the issue. This situation encouraged the States most actively involved with the IGY to reach a compromise on sovereignty as outlined in Article IV of the Treaty. Effectively, Article IV acknowledges the existence of, but then sets aside, all claims in favor of the ongoing peaceful use of Antarctica. This compromise has served the Treaty Parties well over

13. P. Beck, *The International Politics of Antarctica* (Beckenham: Croom Helm, 1986).

the years by allowing States to engage in peaceful activities in the Treaty Area.<sup>14</sup>

Finally, the Antarctic Treaty relies on States to implement their Treaty obligations and to assist with compliance: a system of mutual observation and inspection was established by Article VII.

The Antarctic Treaty itself did not explicitly regulate all forms of human activity in Antarctica, such as harvesting of marine living resources or mineral exploitation. In fact, Article VI clearly states that the Treaty's provisions are without prejudice to any rights that States might enjoy under international law with respect to the high seas. Under the 1982 United Nations Convention on the Law of the Sea<sup>15</sup> (UNCLOS) such rights would include the right to fish as balanced with the obligation to cooperate in the conservation of marine living resources under UNCLOS Articles 116–119. In fact, this derogation appears to have been a compelling motive for Parties to negotiate a dedicated regime to conserve Antarctic marine living resources at a time when there was major concern that an impending Antarctic krill (*Euphausia superba*) fishery could have severe implications for the Antarctic marine ecosystem as a whole.<sup>16</sup>

Since the Treaty Consultative Parties themselves negotiated the CAMLR Convention, its operating system largely replicates the Treaty's founding principles.

## CCAMLR

### Background

Significant commercial harvesting of finfish in the Southern Ocean developed in the late 1960s and the development of a krill fishery followed in the early 1970s.<sup>17</sup> With the severe commercial depletion of Antarctic whale and seal populations in mind, and given the key position of krill in the Antarctic marine food chain,<sup>18</sup> this development gave rise to growing concern that over-harvesting of krill might have serious effects on other

14. C. Joyner, *Governing the Frozen Commons* (Columbia: University of South Carolina Press, 1998).

15. 21 *International Legal Materials* 1261.

16. D. Miller, "Exploitation of Antarctic Marine Living Resources: A Brief History and a Possible Approach to Managing the Krill Fishery," *South African Journal of Marine Science* 10 (1991): 321–339.

17. I. Everson, *Krill: Biology, Ecology and Fisheries* (Oxford: Blackwell Science, 2000).

18. D. Agnew, "Review: The CCAMLR Ecosystem Monitoring Programme," *Antarctic Science* 9, 3 (1997). 235–242.

species and the Antarctic marine environment. This point was clearly expressed in the CAMLR Convention's Preamble.<sup>19</sup>

At the ninth ATCM in 1977 the Consultative Parties initiated Recommendation IX-2, calling for the establishment of a definitive regime for the conservation of Antarctic marine living resources within the Treaty framework. Ideally, this required an ecosystem-based management regime to deal with both the direct and indirect effects of harvesting.<sup>20</sup> A Special Consultative Meeting was convened in 1978 to draft such a regime.

The CAMLR Convention was subsequently negotiated during a series of formal and informal consultations before being finalized at an international conference (the Conference on the Conservation of Antarctic Marine Living Resources) in Canberra, Australia in May 1980.<sup>21</sup> The Convention entered into force on 7 April 1982.

### *Institutional Provisions*

The CAMLR Convention defines marine living resources as "populations of fin-fish, molluscs, crustaceans and all other species of living organisms, including birds, found south of the Antarctic Convergence" (Article I.2). Technically this would place whales and seals under CCAMLR jurisdiction. However, Article VI of the Convention expressly recognizes the 1946 International Convention for the Regulation of Whaling and the 1972 Convention for the Conservation of Antarctic Seals as having prior and continued authority over the harvesting and conservation of whales and seals respectively.

The CCAMLR approach is considered unique for a variety of reasons. These include its conservation principles, which apply an "ecosystem and precautionary approach"<sup>22</sup>; the fact that conservation is balanced with rational use; and its bio-geographical definition of the Convention Area (Figure 3). Therefore, as set out in Articles I and II of the Convention,

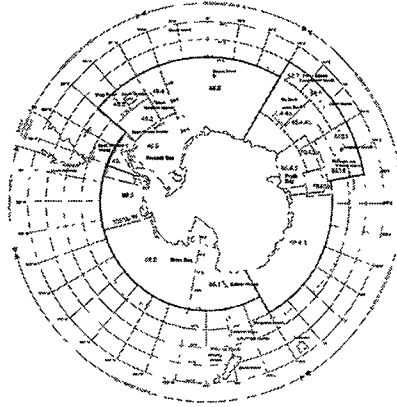
19. B. Mitchell and R. Sandbrook, *The Management of the Southern Ocean* (London: International Institute for Environment and Development, 1980); S. Nicol and W. de la Mare, "Ecosystem Management and the Antarctic Krill," *American Scientist* 81 (1993): 36–47.

20. Edwards and Heap, see n. 11 above.

21. CCAMLR Basic Documents, see n. 10 above.

22. D. Powell, "Antarctic Marine Living Resources and CCAMLR," in *Antarctica's Future: Continuity or Change?* ed. R. Herr, H. Hall and M. Haward (Hobart: Tasmanian Government Printing Office, 1990), pp. 61–70, A. Constable, W. de la Mare, D. Agnew, I. Everson and D. Miller, "Managing Fisheries to Conserve the Antarctic Marine Ecosystem: Practical implementation of the Convention on the Conservation of Antarctic Marine Living Resources (CCAMLR)," *ICES Journal of Marine Science* 57 (2000): 778–791.

FIG. 3.—CCAMLR area of application.



Source: <<http://www.ccamlr.org>>.

CCAMLR became the first international regime to formalize an ecosystem and precautionary approach for a defined bio-geographical area.<sup>23</sup>

The bio-geographic definition of the CAMLR Convention Area applies not only to Antarctic marine living resources south of 60° S (that is, the Treaty Area), but also to living resources farther north to encompass the area south of the Antarctic Convergence (now termed the Antarctic Polar Front). The Convergence is essentially a hydrographic feature that separates cold Antarctic waters from warmer sub-Tropical waters to the north. It is thus seen as constituting an effective bio-geographic boundary to organisms found in Antarctic waters of the Southern Ocean as well as to the Antarctic marine ecosystem.<sup>24</sup> While the Convention not only duplicates Treaty sovereignty provisions (Articles IV and V), it effectively expands the Treaty's geographic influence northwards to the Convergence as defined in Article I.4 of the CAMLR Convention..

The CAMLR Convention therefore encompasses areas within the Treaty Area, high seas areas, and areas subject to national jurisdiction, both disputed and universally recognized. As highlighted, Article IV specifically deals with sovereignty in the Treaty Area along Treaty lines. However, this raises questions concerning the Convention's application within areas

23. R. Arnaudo, "A short history of CCAMLR: A Unique Management and Conservation Regime" (paper presented to CCAMLR Symposium, Valdivia, 05-08 Apr. 2005); see also Constable et al., n. 22 above.

24. *Id.*

under national jurisdiction in the CCAMLR Area north of 60°S. The interpretive statement (the so-called “Chairman’s Statement”) made by the presiding Chairman of the Conference on the Conservation of Antarctic Marine Living Resources draws on the precedent of French sovereignty over waters adjacent to Kerguelen and the Crozet Islands to outline how conservation measures agreed by CCAMLR under Article IX could be applied in such waters. In practice, various interpretations of the Chairman’s Statement have been applied to other islands within the Convention Area.<sup>25</sup>

The CAMLR Convention was open for signature by all States participating in the Conference (Article XXVI), and accession has been subsequently offered to any State interested in research or harvesting (Article XXIX). Under Article XXVIII, regional economic integration organizations may also accede to the Convention; the European Community became a Party on 21 April 1982 and then a CCAMLR Member on 21 May 1982. The conditions for becoming a CCAMLR Member are more stringent under Article VII.2 (“actively involved in harvesting or research”) and a Party must accede before seeking membership. Only Members take part in decision making under Article XII, meaning that the system is essentially two-tiered in that respect.

Under Article XXI, the Convention imposes obligations on each Contracting Party to “take appropriate measures within its competence to ensure compliance” with the Convention’s provisions and with “conservation measures adopted by the Commission to which the Party is bound in accordance with Article IX.”

CCAMLR was established under Article VII of the Convention to give effect to the objectives and principles set out in Article II. The functions of the Commission are enumerated in Article IX; they include facilitating research, compiling data, and acquiring catch and effort statistics on harvested populations. The dissemination and publication of attached information is also part of CCAMLR’s mandate (Article IX.1).

However, CCAMLR’s key function is to develop measures (Article IX.1 and 2) in relation to conservation needs and to formulate, adopt, and revise such measures based on the best scientific evidence available (Article IX.1(f)). Such “conservation measures” (hereafter CMs) generally regulate where and how Parties can participate in CCAMLR-sanctioned fisheries. CCAMLR negotiates measures such as precautionary catch limits, open and closed seasons/areas, by-catch limits, and Vessel Monitoring Systems.

Like any other matter of substance before CCAMLR (Article XII), decisions on CMs are made by consensus. Once a decision is made on a CM, the Members are notified and, in the absence of any objection, the CM

25. CCAMLR Basic Documents, see n. 10 above.

becomes binding after 180 days (Article IX.6). However, Article IX sets out what is commonly referred to as an “opt out” procedure, wherein a Member has ninety days to notify CCAMLR that it is unable to accept a CM. Under this provision the measure “shall not, to the extent stated, be binding upon that Member” (Article IX.6(c)).

Under Article XXIV, CCAMLR has adopted both a System of Inspection and an International Scientific Observer Scheme. Both these institutions aim to promote the Convention’s objectives and monitor its implementation in respect of compliance with CMs and the collection of essential scientific data from fishing vessels, respectively.

Article XXV outlines a three-step approach to be applied in resolving disputes. First, the affected Contracting Parties are urged to resolve issues bilaterally and in-house. Should this fail the parties can then choose either to take the matter to the International Court of Justice, or attempt to resolve it by convening an arbitral tribunal under a procedure annexed to the Convention. It is worth noting that no dispute has arisen in CCAMLR’s twenty-five year history.

#### *Administrative Arrangements*

The CAMLR Convention establishes CCAMLR’s headquarters (Article XIII.1) in Hobart, Australia and appoints an Executive Secretary (Article XVII.1). The Executive Secretary and the Secretariat staff “perform the functions entrusted to them by the Commission” (Article XVII.3). The Secretariat therefore supports the annual meetings and carries out CCAMLR’s day-to-day administrative functions. These include:

- facilitation of communications with and between Members;
- production and distribution of publications;
- receipt and management of scientific data;
- central management of a Catch Document Scheme and Vessel Monitoring System; and
- monitoring of compliance with CMs and other decisions of the Commission.

CCAMLR is served by two standing committees established under Convention Article XIII.6 (see Figure 4). The Standing Committee on Administration and Finance (SCAF) deals with administrative and budgetary issues. The Standing Committee on Inspection and Compliance (SCIC), formerly the Standing Committee on Observation and Inspection, deals with compliance issues such as inspections, observers, the Catch Document Scheme, Vessel Monitoring Systems, and Illegal, Unreported and Unregulat-



ed (IUU) fishing. The Standing Committees essentially advise CCAMLR and inform its consensus-based decision making.

The Scientific Committee, established under Convention Article XIV, is a consultative body that also advises CCAMLR. It provides a “forum for consultation and co-operation concerning the collection, study and exchange of information” (Article XV.1) and is the source of the “best scientific evidence available,” consistent with Article IX.1(f). The designation of the Scientific Committee as the only source of the best scientific evidence available for CCAMLR was formalized in 1990.<sup>26</sup>

The Scientific Committee also uses consensus as the basis for decisions on matters of substance. Where consensus cannot be achieved the Scientific Committee sets out all views advanced on the matter under consideration in its report to CCAMLR.<sup>27</sup>

Largely as a legacy of the Convention’s origins in the Antarctic Treaty, cooperation and compromise are essential elements of CCAMLR’s operating system. Both manifest themselves in the normative system, where they are implemented through consensus decision making—the element that, added to the moral compunction to comply with Articles IX and XXI—inspires compliance.

## THE NORMATIVE SYSTEM—COMPROMISE AND COMPLIANCE

### General

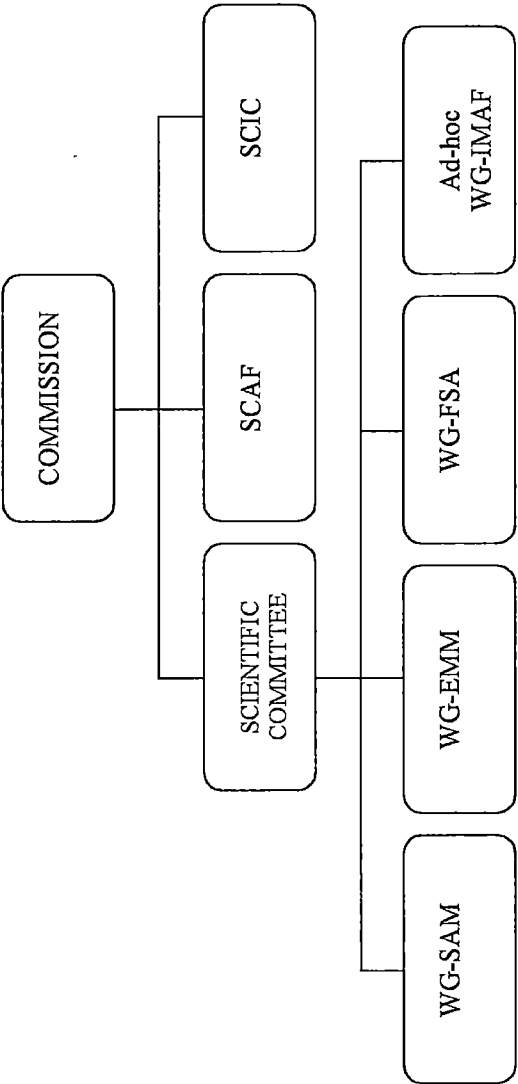
The CCAMLR normative system originates in the cooperative elements described in the previous section, but is also inherently bounded by compromise and compliance. As such, consensus-based decision making is the glue that holds CCAMLR’s normative system together. These four elements provide both prescriptions for acceptable behavior and proscriptions on certain unacceptable activities. Under Article II of the Convention, CCAMLR’s normative objective is to ensure that key Antarctic marine ecosystem elements are taken into account when applying precaution to the management of Antarctic marine living resources.

In terms of prescriptions for acceptable behavior, it is worth noting that the Convention was negotiated at a time when the interests of conservation-minded States (for example, Australia, the United Kingdom, and the United States) had to be balanced with those of harvesting States (for example,

26. Report of the Ninth Meeting of the Commission (CCAMLR-IX), (Hobart: CCAMLR, 1990), para. 7.6.

27. Scientific Committee Rules of Procedure, Part II, Rule 3, in CCAMLR Basic documents, see n. 10 above.

FIG. 4.—CCAML organogram illustrating connections between its Standing Committees, Scientific Committee and scientific Working Groups.



Japan and the Soviet bloc).<sup>28</sup> This compromise is clearly reflected in Article II of the Convention, which states that the main objective of the Convention is “the conservation of Antarctic marine living resources” such that “the term ‘conservation’ includes rational use.” Article II then outlines the “principles of conservation” to be applied in meeting this objective (Article II.3), including CCAMLR’s ecosystem and precautionary approach. Article II also sets some standards for risk minimization in addressing the anticipated effects of harvesting and environmental variability. The Scientific Committee provides the scientific advice on which to base any attached management action aimed at achieving Article II goals.

Ideally, all the information required for sustainable exploitation of fish stocks should be known before commercial harvesting begins.<sup>29</sup> To this end, CCAMLR has protocols in place for new and exploratory fisheries that require the collection of data prior to and during the development of a fishery. This helps to ensure that development does not outpace CCAMLR’s ability to collect the data necessary to achieve its objectives.<sup>30</sup>

CCAMLR’s normative system is evident in the way in which the Scientific Committee goes about its business. In accordance with Article XVI.3, the Scientific Committee has set up a number of working groups to facilitate its work (see Figure 4). These comprise the Working Groups on Ecosystem Monitoring and Management (WG-EMM), Fish Stock Assessment (WG-FSA), an ad hoc Working Group on Incidental Mortality Associated with Fishing (WG-IMAF), and most recently, the Working Group on Statistics, Assessment and Modelling (WG-SAM). Members fishing in the Convention Area, scientific observers, and scientific surveys provide the data used by CCAMLR’s scientific working groups.<sup>31</sup> The products of these Groups’ deliberations are formally presented to the Scientific Committee, where all recommendations or advice to CCAMLR are determined by consensus or recorded if consensus cannot be reached.<sup>32</sup>

28. Beck, see n. 13 above.

29. D. Miller, E. Sabourenkov and D. Ramm, “CCAMLR’s Approach to Managing Marine Living Resources,” in *Deep Sea 2003: Conference on the Governance and Management of Deep-sea Fisheries, Part 1: Conference reports, 1–5 December 2003, Queenstown, New Zealand*, ed. R. Shotton (Rome: FAO, 2006), pp. 433–481.

30. CCAMLR-IX, see n. 26 above, paras. 9.1–9.10; D. Miller, E. Sabourenkov and D. Ramm, “Managing Antarctic Marine Living Resources: The CCAMLR Approach,” *International Journal of Marine and Coastal Law* 19, 3 (2004): 317–325.

31. CCAMLR Commission, “CCAMLR’s Management of the Antarctic” (Hobart: CCAMLR Secretariat, 2001).

32. CCAMLR Basic Documents, n. 10, Part II, Rule 3.

## COMPROMISE AND CONSENSUS

As noted earlier, CCAMLR decisions on matters of substance are consensus-based. To avoid confusion, it is important to establish exactly how the term “consensus” is used, first in general terms and then in the CCAMLR context specifically.

Consensus decision-making was enshrined in the Antarctic Treaty System (ATS) following the enactment of Treaty Article IX.4. Since the CAMLR Convention was negotiated under the Treaty forum and the Convention is a key part of the ATS, consensus-based decision-making procedure naturally followed the precedent set in the Treaty itself, as well as in the 1972 Convention for the Conservation of Antarctic Seals (CCAS).

In the CCAMLR context, consensus decision-making also serves to reconcile the conservationist and harvest-directed interests of the participating States as highlighted above. Under Article XII of the CAMLR Convention, each CCAMLR Member has an equal voice in decisions. Such decisions are legally binding and, in the case of catch limits, can have significant economic or social implications.<sup>33</sup> In contrast to the International Whaling Commission, where a three-quarters majority voting procedure prevails, harvesting interests within CCAMLR are given equal weight when making decisions affecting harvesting activities. In other words, no CCAMLR decision is forced through against the will of one or more of the Parties.<sup>34</sup>

Although the form of consensus used by CCAMLR is not explicitly defined, it has been defined in another ATS instrument. Article 25.5 of the Convention on the Regulation of Antarctic Mineral Resource Activities (CRAMRA<sup>35</sup>) described consensus as “the absence of a formal objection.” Although never formally ratified, CRAMRA was opened for signature in 1988, six years after CCAMLR entered into force. However, both agreements were negotiated under the Treaty’s auspices for a similar purpose, that is, management of commercial resource exploitation.<sup>36</sup> Therefore, it would appear justified to assume that “consensus” in the CCAMLR context has a similar interpretation, that is, a decision made in the absence of any formal objection.

33. David Anderson, pers. comm. (2006).

34. R. Trolle-Anderson, “The Antarctic Scene: Legal and Political Facts,” in *The Antarctic Treaty Regime: Law, Environment, & Resources*, ed. G. Triggs (Cambridge: Cambridge University Press, 1987), pp. 57–64.

35. CRAMRA, available online: <<http://www.ats.aq>>.

36. J. Charney, “The Antarctic System and Customary International Law,” in *International Law for Antarctica*, eds. F. Francioni and T. Scovazzi (The Hague: Kluwer Law International), pp. 51–101 at pp. 52–53.

It has been said that consensus gives any single CCAMLR Member a power of veto over any proposed measure.<sup>37</sup> However, practice appears to indicate otherwise. The opt-out provisions of Article IX of the Convention have only been invoked twice in twenty-five years and the dispute resolution procedures in Article XXV have never been activated. Therefore, since consensus is essentially inclusive, CCAMLR tends to debate an issue until consensus is achieved, as the *Volna* issue at CCAMLR-XXV demonstrates (see below), or until a compromise acceptable to all is reached.<sup>38</sup>

The pace at which the institution has been able to pursue innovative and trend-setting measures is further evidence for the effectiveness of CCAMLR decision-making. In both timing and effect such measures have tended to outpace those of other regional fisheries management organizations<sup>39</sup> and have set the standard for best practice internationally.<sup>40</sup>

From a regime perspective, CCAMLR decisions are also confined by three key attributes—political will, legal obligation, and institutional mechanisms.<sup>41</sup> Political will influences not only the overall decision agenda but also represents a desire, collective or otherwise, to cooperate in reaching an acceptable outcome. The attached cost(s) are usually assessed in terms of self-interest and carry with them a moral obligation to implement any decision taken.

Institutional mechanisms provide the necessary information to facilitate decision making. In CCAMLR's case, this ranges from the reporting of necessary information by Members (Convention Article XX) through the compilation of necessary data, including dissemination of essential information (Article XV.2(b)-(d)), to the provision of scientific advice (Article XV.2(e)). In the absence of the three attributes outlined above, attached decisions would be essentially pointless since their implementation is voluntary and the basis for the decision would be dubious. On balance, our hybrid analysis framework is closely aligned with this general formulation, as CCAMLR's structure (the operating system) and directives (the normative

37. A. Watts, *International Law and the Antarctic Treaty System* (Cambridge: Grotius Publications, 1992); S. Kaye, *International Fisheries Management* (London: Kluwer Law, 2001).

38. Report of the Twenty-fifth Meeting of the Commission (CCAMLR-XXV) (Hobart: CCAMLR, 2006), para. 9.38.

39. Miller et al., see n. 30 above.

40. A. Willock and M. Lack, *Follow the Leader: Learning from Experience and Best Practice in Regional Fisheries Management Organisations* (WWF International and TRAFFIC International, 2006).

41. J. Swan, "Decision-Making in Regional Fishery Bodies or Arrangements: The Evolving Role of RFBs and International Agreement on Decision-Making Processes," *FAO Fisheries Circular No 995* (Rome: Food and Agriculture Organization of the United Nations, 2004).

system) conjoin with political ownership to ensure the effectiveness of decisions.

In CCAMLR's case, it can therefore be said that decision making is fair and strives to include elements of accountability, participation, and transparency. It follows that all Member States share responsibility for any decision made and should be held accountable for its effective implementation, since they participated in making the decision in the first place. Transparency in turn serves to provide legitimacy to the decision, particularly for those outside the normative system.

To summarize CCAMLR's circumstances, consensus is essentially decision making that reflects a modicum of agreement between all Members. In these terms, decisions represent the collective "best interest." However, recent developments within CCAMLR now appear to challenge this institutional norm.

#### CONSENSUS-MINUS-ONE

The notion of "consensus-minus-one" has emerged in CCAMLR deliberations over the past few years. At CCAMLR's twenty-fifth meeting in 2006, the SCIC was unable to reach consensus on the inclusion of the Russian-flagged *Volna*<sup>42</sup> in the IUU Vessel List set up under CCAMLR CM 10-06.<sup>43</sup> The Russian delegation explained that while the vessel had been placed on the List for fishing in a closed area, it had in fact set its longlines in an open area. Having drifted into a closed area, the vessel was in the process of retrieving its lines when observed. Other Members were equally convinced that the *Volna* had been acting in such a way as to justify inclusion in the CCAMLR IUU Vessel List for Contracting Parties in accordance with CM 10-06. The absence of a decision thus resulted in the *Volna* not being listed. We will now attempt to examine the facts of the matter as reflected in the meeting record.

The CCAMLR Contracting Party (CP-IUU) and non-Contracting Party (NCP-IUU) IUU vessel lists are both prepared by the Secretariat using information provided by Members intersessionally. They are based on agreed-upon criteria elaborated in CMs 10-06 and 10-07.<sup>44</sup>

It was reported that the *Volna* had been sighted on 1 February 2006 hauling a longline and dumping by-catch in a part of CCAMLR Statistical

42. CCAMLR-XXV, see n. 38 above, para. 9.16.

43. The text of this, and all CCAMLR Conservation Measures, is available online at <<http://www.ccamlr.org>>.

44. Report of the Twenty-fourth Meeting of the Commission (CCAMLR-XXIV), (Hobart: CCAMLR, 2005), CMs 10-06 and 10-07.

Subarea 88.2 that was closed to fishing at the time.<sup>45</sup> It was included in the Provisional CP-IUU Vessel List in accordance with procedures set out in paragraphs 8–11 of Conservation Measure 10-06 on the basis of having “fished during closed fishing periods or in closed areas in contravention of CCAMLR Conservation Measures.”

During SCIC discussions under paragraph 12 of Measure 10-06 Russia noted that it had informed Members<sup>46</sup> of a full investigation into the *Volna* incident. The investigation had concluded that the vessel was fishing inside Subarea 88.1, in an area open to fishing, when one of its longlines tore and drifted into an adjacent closed area in Subarea 88.2.<sup>47</sup> The vessel Master then decided to retrieve the longline from inside the closed area. Some Members found this explanation improbable and a paper was tabled to indicate that any ocean current prevailing at the time was likely, in fact, to have moved the line in a direction *opposite* to that suggested.<sup>48</sup>

Anticipating the SCIC’s inability to agree to the CP-IUU Vessel List, some Members opened the debate by calling for those States whose flag vessels were being considered for inclusion to voluntarily abstain from the decision-making process.<sup>49</sup> While this could be construed as consensus-minus-one decision-making, these Members believed that it would not undermine the general principle of consensus as no formal objection would be raised.<sup>50</sup> Conversely, other Members felt that it was important to maintain an unqualified consensus, “in keeping with the highest objectives of the Antarctic Treaty System.”<sup>51</sup>

Russia also noted that other vessels had contravened CMs but were not being considered for inclusion on the IUU vessel lists.<sup>52</sup> This would suggest that either these vessels did not fit the criteria in CM 10-06, or some double-standard was at work. Since the procedures set out in CM 10-06 are clear and were judiciously applied, it can only be concluded on the balance of probability that the *Volna* was correctly listed in the Provisional CP-IUU Vessel List.

Therefore, the question then became not whether the *Volna* had been involved in IUU fishing but rather how agreement on its status could be reached. This situation resulted in some Members calling for a reversal of

45. CCAMLR-XXV, see n. 38 above, Annex 5, para. 2.37.

46. CCAMLR Secretariat, COMM CIRC 06/51.

47. CCAMLR-XXV, see n. 38 above, Annex 5, para. 2.38.

48. *Id.*, paras. 2.39 and 2.41.

49. *Id.*, Annex 5, paras. 2.28–2.62.

50. *Id.*, para. 2.29.

51. *Id.*, paras. 2.57, 2.29 and 2.30 respectively.

52. *Id.*, para. 2.56.

the procedure so that a consensus would be necessary to remove the vessel from the CP-IUU Vessel List.<sup>53</sup>

Despite the lengthy debate, the SCIC remained unable to resolve the issue, and it was forwarded to CCAMLR for further consideration. A compromise was finally struck when Russia agreed to investigate the *Volna's* actions further based on the new information provided at CCAMLR-XXV. Russia also undertook to "communicate to the Commission in a timely fashion the actions that it would now take to bring this issue to an acceptable resolution."<sup>54</sup> The other Members accepted this compromise and CCAMLR agreed to postpone any decision on whether to include the *Volna* on the 2006 CP-IUU vessel list until, or before, CCAMLR-XXVI.<sup>55</sup>

It could thus be said that in failing to achieve consensus on the *Volna* issue CCAMLR demonstrated a clear failing of this type of decision-making. Individual interest(s) overwhelmed any possible agreement. Consensus-minus-one as suggested above<sup>56</sup> appears an obvious solution. However, consensus as a principle means that all parties have a say in any decision. Furthermore, mandatory abstention from a decision runs rather counter to the inclusivity implied by ATS practice over time. The dissenting party may also choose not to agree with a consensus-minus-one decision and decide not to implement it, even invoking the opt-out provisions in Article IX.6 of the CAMLR Convention.

Objection or opt-out procedures are widely criticized for weakening or delaying the implementation of measures.<sup>57</sup> However, it should be noted that these procedures are employed to protect a State from being bound by a decision that is inconsistent with or cannot be applied by their current domestic law.<sup>58</sup> In the two instances where such a procedure has been invoked in relation to CCAMLR CMs this has appeared to be the case.<sup>59</sup>

An additional consideration is that by not reaching consensus on a matter of substance, any particular CCAMLR Member could be held to account for violating the provisions of Article XXI.1 of the Convention. Allowing a vessel to continue operating in a CCAMLR-sanctioned fishery when, on the reasonable balance of available evidence, it has been implicated in contravention of agreed CMs could well be interpreted as

53. *Id.*, para. 9.32.

54. *Id.*, para. 9.51.

55. *Id.*, paras 9.52, 9.40 and 9.39 respectively.

56. *Id.*, para. 2.29.

57. Swan, see n. 41 above.

58. T. McDorman, "Decision-Making Processes of Regional Fisheries Management Organizations (RFMOs)," (paper presented at the Conference on the Governance of High Seas Fisheries and the United Nations Fish Stock Agreement, St. John's, Newfoundland and Labrador, 1-5 May 2005).

59. CCAMLR-XXV, see n. 38 above, para. 12.22.



such a violation. It would then be the place of the Member concerned to ensure that appropriate measures were taken to rectify the situation under Article XXI.1. Failure to achieve this, along with an apparent unwillingness to join a consensus aimed at addressing such a problem, could then be construed as a lack of commitment to the Convention's objectives as well as a cause for dispute under Article XXV. This would be a final resort, and an avenue that has not yet been explored by or within CCAMLR. Its main advantage would be that it might provide for an interpretive precedent to be set.

The above situation would be exacerbated if non-Contracting Parties are seen to be treated differently to CCAMLR Members when they are subject to IUU listing procedures under CM 10-07. This could well lead to a perception of discrimination or bias inconsistent with Article 116 of UNCLOS, as well as an imbalance in applying Article XXII.1 of the Convention when compared to Article XXI.1.

Finally, it is possible that the debate should not be about consensus as a principle, but rather about "consent," and that any decision should be made only when no Party has any persuasive objection to that decision. The consent principle differs from consensus because, with respect to consensus-based decision making, the participants are agreeing to a decision; with respect to consent-based decision making there is no formal statement of "unacceptance" required.<sup>60</sup> This definition of "consent" is very similar to CCAMLR's "lack of formal objection" standard. Therefore it could be said that although CCAMLR makes its decisions by consensus, it governs by consent—and in the case of the *Volna*, such consent is lacking.

## THE ROLE OF COMPLIANCE

A number of articles in the CAMLR Convention help the Parties to maintain harmony, comply with general principles and conservation measures, ensure compliance from third parties, and deal with breaches. These include, *inter alia*, Articles X (third parties and integrity), XI (harmonization with adjacent jurisdictions), XX (information), XXI (compliance), XXII (third party compliance), XXIV (observation and inspection), and XXV (dispute settlement). As Green and Agnew and others point out, the biggest compliance issue facing the Parties is IUU fishing.<sup>61</sup> Globally, IUU fishing is

60. P. Partridge, *Consent and consensus* (London: Pall Mall Press Limited, 1971).

61. J. Green and D. Agnew, "Catch Document Schemes to Combat Illegal, Unreported and Unregulated Fishing: CCAMLR's Experience with Southern Ocean Toothfish," *Ocean Yearbook* 16 eds. E. Mann Borgese, A. Chircop and M. McConnell (Chicago: University of Chicago Press, 2002): 171–194 at 172–173.

a feature of almost all fisheries and poses a great threat to managing fish stocks.<sup>62</sup> However, the relatively open access to the CCAMLR-managed Patagonian toothfish (*Dissostichus eleginoides*) is particularly susceptible to this kind of fishing. The species is also vulnerable to overfishing since it grows very slowly and reproduces at an advanced age (between six to ten years old). Its management is also complicated by limited information on various key aspects of the species' biology.<sup>63</sup>

Aside from the obvious danger of overexploitation of the target species, IUU fishing in the CCAMLR Area also appears to have a detrimental effect on the ecosystem as a whole. Legal fishers in the CCAMLR Area are bound by stringent measures aimed at mitigating seabird by-catch during longlining, as well as measures minimizing marine debris (especially CM 29/X, now CM 25-02). The accepted wisdom is that IUU fishers have no incentive to abide by such measures and therefore significant numbers of seabirds are killed by IUU fishing operations every year. Although estimates are uncertain, they are sure to be well in excess of any incidental seabird mortality in CCAMLR-sanctioned fisheries.<sup>64</sup>

The topic of seabird by-catch in the longline fisheries has long been considered by CCAMLR. The Commission asked Members at CCAMLR-VIII to assess and monitor the species and numbers of birds being caught incidentally during fishing operations.<sup>65</sup> CCAMLR thus became the first international organization to institute seabird incidental mortality mitigation measures with the adoption of Resolution 5/VIII<sup>66</sup>: the Protection of Seabirds from Incidental Mortality Arising from Longline Fishing.<sup>67</sup> The Resolution urged all Parties to the Convention engaged in longline fishing in the Convention Area to investigate and introduce methods to minimize the incidental mortality of seabirds.

In 1991, the Commission adopted CM 29/X, aimed at preventing or minimizing incidental mortality of seabirds associated with longline fishing,

62. FAO, *Implementation of the International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing* (Rome: Food and Agricultural Organization of the United Nations, 2002); U. Sumaila, J. Alder and H. Keith, "Global Scope and Economics of Illegal Fishing," *Marine Policy* 30, 6 (2006): 696–703.

63. I. Everson and A. Murray, "Size at Sexual Maturity of Patagonian Toothfish (*Dissostichus eleginoides*)," *CCAMLR Science*, 6 (1999): 37–46.

64. Report of the Twenty-fourth Meeting of the Scientific Committee (SC-CAMLR-XXIV), (Hobart: CCAMLR, 2005), Annex 5, Appendix O, Table 18.

65. Report of the Eighth Meeting of the Commission (CCAMLR-VIII), (Hobart: CCAMLR, 1989) para. 25.

66. Unlike CMs, Resolutions are not legally binding. Resolutions are consecutively numbered according to the meeting they were adopted, that is, in this case the fifth Resolution from the eighth Meeting.

67. CCAMLR-VIII, see n. 65 above, paras. 129–130.

and CM 30/X, which prohibits the use of net monitor cables on trawl vessels for the 1994–1995 fishing season.<sup>68</sup> Conservation Measure 29/X initiated the use of streamer lines to keep birds away from the longline as it is set and the weighting of baited hooks to ensure fast sink rates, among other measures. Although it has been considerably revised as new methods of deterrence are found, it is still in force today as Conservation Measure 25-02(2005).

In 1994, the first ad hoc Working Group on Incidental Mortality Arising from Longline Fishing (WG-IMALF) was held.<sup>69</sup> The terms of reference included a review of data on seabird by-catch and the efficacy of seabird mitigation measures. The Working Group's name was changed in 2001 to the ad hoc Working Group on Incidental Mortality Associated with Fishing (WG-IMAF) to reflect the work of the group in considering incidental mortality associated with the trawl and pot fisheries.

IMAF has been successful in quantifying and reducing incidental seabird mortalities. Unknown numbers of seabirds were incidentally caught in 1994 and large numbers were observed caught in 1997.<sup>70</sup> At present, CCAMLR is proud of the continued low levels of incidental seabird mortality in regulated fisheries. For the first time, no albatrosses were reported taken in longline operations<sup>71</sup> (see also Figure 5). This is a direct result not only of strict mitigation measures, but also of Members' will to ensure that their vessels comply with such measures. (It must be noted that the French islands of Kerguelen and Crozet are not included in these figures, as the French have invoked the Chairman's Statement regarding seabird mitigation measures.)

Reducing the extent of IUU fishing in the Convention Area has been a priority item on the Commission's agenda since 1996.<sup>72</sup> Consequently, CCAMLR has adopted a suite of CMs and Resolutions to combat the problems associated with IUU fishing (Table 1). A Policy to Enhance Co-operation between CCAMLR and non-Contracting Parties has also been put in place.<sup>73</sup>

68. Report of the Tenth Meeting of the Commission (CCAMLR-X) (Hobart: CCAMLR, 1991), paras. 10.1–10.2.

69. Report of the Thirteenth Meeting of the Scientific Committee (SC-CAMLR-XIII), (Hobart: CCAMLR, 1994), Annex 8.

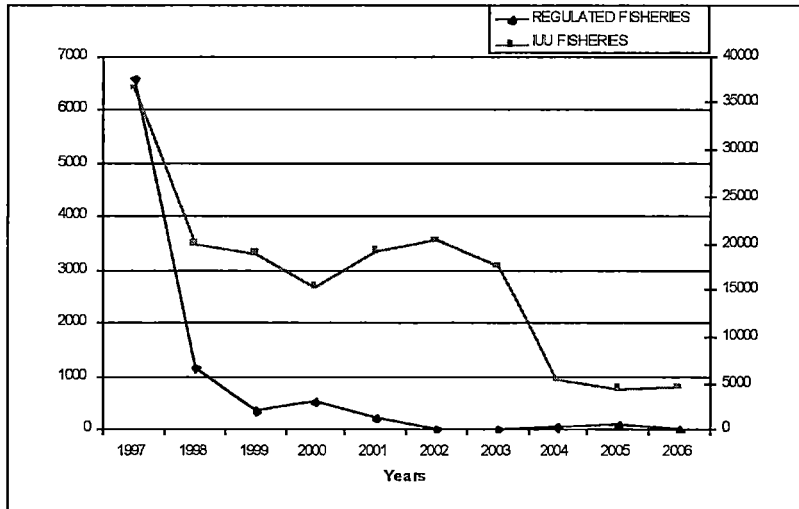
70. Report of the Sixteenth Meeting of the Commission (CCAMLR-XVI) (Hobart: CCAMLR, 1997), paras. 6.40–6.41.

71. CCAMLR-XXV, see n. 38 above, para. 5.6.

72. E. Sabourenkov and D. Miller, "The Management of Transboundary Stocks of Toothfish, *Dissostichus* spp., Under the Convention on the Conservation of Antarctic Marine Living Resources," in *Management of Shared Fish Stocks* eds. A. Payne, C. O'Brien and S. Rogers (Oxford: Blackwell Publishing Ltd., 2004): pp. 68–94.

73. Report of the Twenty-Fifth Meeting of the Scientific Committee (SC-CAMLR-XXV) (Hobart: CCAMLR, 2006), Annex 8.

FIG. 5.—Reported incidental seabird catches by regulated and IUU fisheries during longline fishing in the CCAMLR Area (note the different scales). A notable decrease in the former to negligible numbers is apparent.



Source: Information as compiled from CCAMLR Scientific Committee reports, available online: <[http://www.ccamlr.org/pu/e/e\\_pubs/sr/drt.htm](http://www.ccamlr.org/pu/e/e_pubs/sr/drt.htm)>.

Two key measures have been CCAMLR's introduction of a Vessel Monitoring System (VMS) and the *Dissostichus spp.* Catch Documentation Scheme (CDS). As a first step, CCAMLR requires vessels to be licensed (CM 10-02 in Table 1). Licensing allows authorities to determine whether a vessel is fishing with due authorization. To that end, vessels may be inspected at sea under the System of Inspection or are inspected in port on their return from fishing grounds (CM 10-03).

#### *Vessel Monitoring System (VMS)*

To counter IUU activities in the Convention Area, CCAMLR initially adopted non-binding Resolution 12/XVI in 1997. The resolution urged Contracting Parties to deploy automated VMS to monitor the location of flag vessels targeting finfish. (The Contracting Parties have never reached consensus on the issue of requiring vessels harvesting krill to implement VMS.) The following year CCAMLR adopted CM 148/XVII (now CM 10-

**Table 1.—CCAMLR Conservation Measures and Resolutions Aimed at Eliminating IUU Activities in the Convention Area (in consecutive order).**

<i>CM</i>	<i>Title</i>
10-01 (1998)	Marking of fishing vessels and fishing gear
10-02 (2006)	Licensing and inspection obligations of Contracting Parties with regard to their flag vessels operating in the Convention Area
10-03 (2005)	Port inspections of vessels carrying toothfish
10-04 (2006)	Automated satellite-linked Vessel Monitoring Systems (VMS)
10-05 (2006)	Catch Documentation Scheme for <i>Dissostichus</i> spp.
10-06 (2006)	Scheme to promote compliance by Contracting Party vessels with CCAMLR conservation measures
10-07 (2006)	Scheme to promote compliance by non-Contracting Party vessels with CCAMLR conservation areas
10-08 (2006)*	Scheme to promote compliance by Contracting Party nationals with CCAMLR conservation measures
<i>Resolution</i>	<i>Title</i>
14/XIX	Catch Documentation Scheme: implementation by Acceding States and non-Contracting Parties
15/XXII	Use of ports not implementing the Catch Document Scheme for <i>Dissostichus</i> spp
16/XIX	Application of VMS in the Catch Documentation Scheme
17/XX	Use of VMS and other measures for the verification of CDS catch data for areas outside the Convention Area, in particular, in FAO Statistical Area 51
19/XXI	Flags of non-compliance
21/XXIII	Electronic Catch Documentation Scheme for <i>Dissostichus</i> spp.
25/XXV	Combating illegal, unreported and unregulated fishing in the Convention Area by the flag vessels on non-Contracting Parties
* Will not become applicable until 1 July 2008. Contracting Parties may voluntarily implement prior to this date. <i>Source:</i> CCAMLR Secretariat	

04), mandating Contracting Parties to deploy VMS and imposing various operational requirements.<sup>74</sup>

By 2002, it had become apparent to some Members that VMS was not working as well as expected and that some Members' VMS were not fully compliant with CM 10-04.<sup>75</sup> A centralized VMS (C-VMS) was proposed; the C-VMS would require licensed toothfish vessels to transmit positional information to the CCAMLR Secretariat as well as to Flag States.<sup>76</sup> Although the C-VMS proposal was discussed at length, no decision was made.

In 2003, the C-VMS proposal was revised.<sup>77</sup> Although most Members supported the proposal's rationale, many expressed concerns over the security and the financial cost of such a system as well as the need to modify national legislation in some cases. In the absence of consensus, a trial C-VMS was established and all Members were allowed to participate.<sup>78</sup> Full implementation of a CCAMLR C-VMS was finally agreed upon in 2004.<sup>79</sup>

While VMS makes it easy to locate licensed Contracting Party vessels fishing in the CCAMLR Area, VMS is likely to have little effect on non-Contracting Party vessels other than endorsing the assumption that vessels observed fishing without VMS are involved in IUU fishing.

On balance, CCAMLR's introduction of C-VMS was an iterative process that took place over the course of two years. It took into account potential technical difficulties while striving to make the System as effective as possible. As such, it stands as one of the few examples of such a System globally.<sup>80</sup>

#### *Dissostichus spp. Catch Documentation Scheme*

CCAMLR first discussed certification as a means of tracking toothfish (*Dissostichus spp.*) landings from, and trade of, catches in the Convention Area in 1998.<sup>81</sup> Although a proposal was put forward, the actual development of the CDS took place during the 1998/99 intersessional period.

74. Report of the Seventeenth Meeting of the Commission (CCAMLR-XVII) (Hobart: CCAMLR, 1998), para. 5.37.

75. Report of the Twenty-First Meeting of the Commission (CCAMLR-XXI) (Hobart: CCAMLR, 2002), Annex 5, para. 5.12.

76. *Id.*, para. 8.55.

77. Report of the Twenty-Second Meeting of the Commission (CCAMLR-XXII) (Hobart: CCAMLR, 2003, Annex 5, paras. 3.27–3.54.

78. *Id.*, para. 10.12.

79. Report of the Twenty-Third Meeting of the Commission (CCAMLR-XXIII) (Hobart: CCAMLR, 2004), para. 10.8.

80. Willock and Lack, see n. 40 above.

81. CCAMLR-XVII, see n. 74 above, paras. 5.16–5.25

In 1999, CCAMLR adopted CM 170/XVIII Catch Documentation Scheme for *Dissostichus spp.* (now CM 10-05). The measure requires a completed Catch Document for all landings, transshipments, and importations of toothfish into the territories of CCAMLR Contracting Parties. This Document specifies a range of information relating to the volume and location of catch and the name and Flag State of the vessel. Conservation Measure 10-05 became binding on all Members on 7 May 2000.<sup>82</sup>

Not all Contracting Parties were able to implement the CDS by the required date. However, by 2001 the Scheme was fully implemented.<sup>83</sup>

To counter fraudulent practices that could arise from issuing and copying paper documents, the development of an electronic, paperless, Web-based CDS was proposed in 2001.<sup>84</sup> The following year, CCAMLR approved a pilot project for an electronic CDS (E-CDS) to run alongside the paper-based Scheme.<sup>85</sup> The electronic system enhances security by issuing and processing catch documents online.<sup>86</sup>

Although the E-CDS trial was generally seen as successful, some Members voiced doubts that its full implementation could ever be achieved.<sup>87</sup> Consequently, Resolution 21/XXIII was adopted in 2004, urging Contracting Parties and non-Contracting Parties to cooperate in implementing the CDS and adopt the E-CDS as a matter of priority. In 2005, the U.S. indicated that any toothfish imports into the U.S. would have to be accompanied by electronically issued documentation.<sup>88</sup>

While most CDS Parties apply the E-CDS exclusively, it essentially remains on trial.<sup>89</sup> It is likely to remain on trial until the domestic legislation of all CCAMLR Members at least provides for the full implementation of E-CDS. Domestic legislation will allow CDS Parties to eventually comply with E-CDS requirements, while also promoting a positive image of its efficiency—given current levels of implementation.

## COMPROMISE

As indicated, the Treaty Parties' desire to regulate Antarctic marine living resources north of 60° S and south of the Polar Front involved islands which

82. Report of the Eighteenth Meeting of the Commission (CCAMLR-XVIII) (Hobart: CCAMLR, 1999), para. 5.27 and attached footnote.

83. Reports of the Nineteenth and Twentieth Meetings of the Commission (CCAMLR-XVIX and XX) (Hobart: CCAMLR, 2000 and 2001), Annex 5, para. 2.24 and Annex 5, para. 2.68 respectively.

84. *Id.*, CCAMLR-XX, Annex 5, paras. 2.89 and 9.12.

85. *Id.*, CCAMLR-XX, para. 2.95; CCAMLR-XXI, n. 75 above, para. 7.16.

86. Miller et al., see n. 29 above.

87. CCAMLR-XXIII, see n. 79 above, Annex 5, para. 4.16.

88. CCAMLR-XXIV, see n. 44 above, para. 7.5.

89. *Id.*, para. 4.5.

for the most part were subject to undisputed sovereignty. During the CAMLR Convention's negotiation, it was logically assumed that States asserting sovereignty would be unwilling to abrogate any jurisdictional rights attached to managing living resources in the maritime zones<sup>90</sup> of such islands. Nevertheless, Treaty Parties expressed concerns and, as indicated by the first CCAMLR Executive Secretary, "It was only realistic to expect there would be differing positions on various sovereignty issues among Members."<sup>91</sup>

The CAMLR Convention solved a potential impasse over sovereignty in the Convention Area by applying four key principles. Discussed below, these comprised: (1) clear linkage with the Antarctic Treaty; (2) decision unanimity through consensus (already discussed); (3) the ability to legitimately opt-out of decisions (CCAMLR Article IX.6.c–6.d); and (4) the Chairman's Statement (appended to the Convention).

### *Compromise Through Opt-Out*

While it may appear inconsistent to allow parties to opt out of decisions made by consensus, this is not an unusual procedure (the SEAFO Convention also allows parties to opt out) for the reasons explained above.

For example, at CCAMLR's tenth meeting in 1991 the submission of haul-by-haul data from the commercial fishery per five-day period was endorsed.<sup>92</sup> However, some Members expressed legal and technical difficulties in submitting this data.<sup>93</sup> In particular, Chile was understood to have notified the Commission, in accordance with Article IX.6(c), that it was unable to implement CM 37/X due to infrastructure deficiencies. This meant that the Measure did not apply to Chile in the 1991–1992 fishing season in respect of the *Dissostichus eleginoides* fishery in Subarea 48.3. Chile complied with all data-reporting requirements,<sup>94</sup> just not in the time period that the CM required. Conservation Measure 37/X evolved into CM 56/XI in 1992; the only change was that Members were required to submit data at

90. UNCLOS was not in force at the time of the CCAMLR negotiations, although a 200-NM fishing zone was not uncommon. Australia declared its Australian Fishing Zone in 1979, including the area around Heard Island but excluding waters adjacent to its continental Antarctic territory.

91. D. Powell, "Scientific and Economic Considerations Relating to the Conservation of Marine Living Resources in Antarctica" in *Antarctic Resources Policy: Scientific, Legal and Political Issues*, ed. F. Vicuña (Cambridge: Cambridge University Press, 1983), pp. 111–118.

92. CCAMLR-X, see n. 68 above, Conservation Measures 36/X and 37/X.

93. *Id.*, paras. 4.10 and 4.11.

94. Report of the Eleventh Meeting of the Commission (CCAMLR-XI) (Hobart: CCAMLR, 1992), paras. 4.3 and 9.28.



the end of each month rather than at the end of each (five-day) reporting period.

### **Compromise and the Chairman's Statement**

The Statement arose from the need to reconcile sovereignty arrangements (Article IV of the Treaty) in the Treaty Area with such arrangements for the CCAMLR Area under ATCM Recommendation IX-2 (1977, see extract below). The Recommendation's attached instructions proscribed any variation to Treaty sovereignty arrangements, but prescribed an extended area of application:

- (1) The Special Consultative Meeting shall base its work on this recommendation and ... in the elaboration of a draft definitive regime, shall take into account *inter alia* the following elements:
  - (a) the provisions of Article IV of the Antarctic Treaty shall not be affected by the regime. It should ensure that the principles embodied in Article IV are safeguarded in application to the marine areas south of 60° South latitude; [...]
  - (b) the regime should, [however], extend north of 60° South latitude where that is necessary for the effective conservation of species of the Antarctic ecosystem, without prejudice to coastal state jurisdiction in that area;<sup>95</sup>

The necessary linkages to the relevant Antarctic Treaty Area sovereignty provisions in Articles III to IV of the CAMLR Convention are clearly present, notwithstanding the rights referred to in Article VI of the Treaty, already discussed.

The Chairman's Statement is an integral part of the CAMLR Convention. The Statement preserves the juridical rights of all coastal States over the maritime zones surrounding their sub-Antarctic territories located within the CCAMLR Area. While the Statement's content is unique in international law, reservations to multilateral treaties are not unusual.<sup>96</sup> However, they are not often incorporated into an agreement as an attachment, but are rather elaborated in the final act when the agreement is adopted. The Statement specifically refers to France, since France already

95. Antarctic Treaty Secretariat, *Extract from ACTM Recommendation IX-2*, available online: <<http://www.ats.aq>>.

96. D. Miller and E. Molenaar, "The SEAFO Convention: A Comparative Analysis in a Developing Coastal State Perspective," *Ocean Yearbook* 20, eds. A. Chircop, S. Coffen-Smout and M. McConnell (New York: Transnational Publishers, 2006): 305–375.

had measures for the conservation of living resources in place at the time of the CAMLR Convention's negotiation. However, the Statement's provisions extend to all sovereign coastal States by virtue of its Preamble and Paragraph 5 in cases where all CCAMLR Contracting Parties recognize sovereignty. The Statement may be used by such States in two ways:

- to complement CCAMLR CMs by implementing stricter regulations than those promulgated by Member consensus (Statement Para 3.a); and/or
- to supervene CMs by making a reservation (Para 3.b) and effectively applying different regulations, as deemed appropriate in accordance with national measures.

Thus, the Statement is available to all sovereign coastal States (Australia, France, Norway, South Africa, and, arguably, the United Kingdom/Argentina) to use as they see fit. Such discretion comes from their rights under Part V of UNCLOS (Articles 55–58), which affirms the right of coastal States to declare a range of maritime zones (including a 200-nautical mile (NM) exclusive economic zone (EEZ)) seaward from their terrestrial baselines. Coastal States also have corresponding rights to exploit marine living resources in their own EEZs (UNCLOS Article 56) as well as duties to conserve the living resources of any such zones (UNCLOS Article 61).

Prior to UNCLOS's entry into force in 1994, and following discussions at the Third UN Conference on the Law of the Sea, many States exercised their rights to delimit 200-NM EEZs or "Fishing Zones" (FZ). France undertook such delimitation in 1978 around its southern possessions, including the Kerguelen Islands. Australia followed suit in 1979 for the territories of Heard Island and the McDonald Islands adjacent to Kerguelen. A bilateral treaty<sup>97</sup> in 1982 prescribed the coordinates of the shared boundary between the French EEZ and the Australian FZ.

Argentina proclaimed a 200-NM EEZ around South Georgia and the South Sandwich Islands in 1991.<sup>98</sup> Previously, Argentina had made a declaration, attached to its ratification of the CAMLR Convention, to the effect that nothing in the Convention affected or impaired its rights of sovereignty and maritime jurisdiction in the area.<sup>99</sup> The United Kingdom

97. Agreement on Maritime Delimitation between the Government of Australia and the Government of the French Republic (Melbourne, 4 Jan. 1982). *Australian Treaty Series* 1983, No. 3.

98. P. Vigni, "Antarctic Maritime Claims: 'Frozen Sovereignty' and the Law of the Sea," in *The Law of the Sea and Polar Maritime Delimitation and Jurisdiction*, eds. A. Oude Elferink and D. Rothwell (London: Kluwer Law International, 2001), p. 90.

99. W. Bush, *Antarctica and International Law: A Collection of Interstate and National Documents*, 3 Vols. (London: Oceana Publications, 1982), 1: Doc. AT20051980B, p. 431.

also proclaimed a 200-NM maritime zone (not an EEZ as such) around South Georgia and the South Sandwich Islands in 1993,<sup>100</sup> which was justified on the basis of supplementing and reinforcing CCAMLR conservation measures. However, the United Kingdom maintained control of licensing arrangements, monitoring, and enforcement in the zone through a subsequent Ordinance and an attached Order.<sup>101</sup> South Africa extended its maritime zones to formally proclaim an EEZ around Prince Edward and Marion Islands in 1994.<sup>102</sup> Some of these declarations predated UNCLOS's entry into force and some occurred during the Treaty Parties' negotiations of CCAMLR as well as after its entry into force.

Again, it needs to be emphasized that under UNCLOS coastal States have jurisdictional rights, obligations, and duties with respect to the EEZ. These rights entitle coastal States to explore, exploit, conserve, and manage the living resources in the EEZ (UNCLOS Article 56.a); exercise jurisdiction over, among other things, the protection and preservation of the marine environment in the EEZ (56.b.iii); and determine total allowable catches in the EEZ (TACs; Article 61.1).

Provided that they exercise some form of jurisdictional control, CCAMLR coastal States within the CCAMLR Area are able to determine when they will apply CCAMLR CMs, *mutatis mutandis*, to waters under their control. The Chairman's Statement effectively grants such States the right to decide the most appropriate strategy for management of the marine living resources in their sovereign waters either when they accept CCAMLR measures, when national measures are more stringent than those set by CCAMLR (Statement paragraph 3(a)), or when coastal States exercise an exclusion of application for such measures in national waters (Statement paragraph 2). As such the Statement poses no legal conflict with other CCAMLR obligations. However, there may be practical considerations attached to coastal State invocation of an exclusion to CCAMLR measures in national waters under the Chairman's Statement (see below).

Article IV.2.b of the CAMLR Convention preserves the Contracting Parties' right under international law to exercise coastal State jurisdiction in any part of the CCAMLR Area. This provision largely renders the Chairman's Statement irrelevant. However, and even if there are fundamental concerns about the Statement's legal standing, the explicit application of

100. United Kingdom, Proclamation (Maritime Zone) No. 1, 1993 (1 May 1993).

101. United Kingdom, The Fisheries (Conservation and Management) Ordinance 1993 (23 July 1993) and The Fishing (Maritime Zone) Order 1993 (26 July 1993).

102. South Africa, *Maritime Zone Act* No. 15, 1994. Application to the Prince Edward Islands is as per the *Prince Edward Islands Act* No. 43, 1948.

the Chairman's Statement by France and other undisputed claimants<sup>103</sup> over the past twenty-five years implies that the CCAMLR community accepts the legal effect of the Chairman's Statement on the Convention's provisions, and in the application of CCAMLR measures. In these terms, it is worthwhile to examine the extent to which various Contracting Parties have invoked the Chairman's Statement in practice.

As indicated, Australia, France, South Africa, and the United Kingdom/Argentina have proclaimed EEZs, FZs, or maritime zones around islands in the CCAMLR Area. At this stage, Norway has not extended a fisheries zone or EEZ around Bouvetøya Island, although it declared a territorial sea adjacent to the islands and a special nature reserve in 1971.<sup>104</sup>

Australia has never formally recorded a reservation under the Chairman's Statement. In 2006, for example, Australia accepted all of the measures contained within CM 41-08, including the TAC of 2,427 t for *Dissostichus eleginoides* in Statistical Division 58.5.2. However, Australia customarily makes a declaration reaffirming its jurisdiction, which has been recorded in the CCAMLR Report:

any fishing or fisheries research activities in that part of Divisions 58.4.3 and 58.5.2 that constitutes the Australian EEZ around the Australian Territory of Heard Island and McDonald Islands must have the prior approval of Australian authorities. ... Presently fishing concessions are fully subscribed and no further concessions are available.<sup>105</sup>

It could be inferred that by placing such remarks on the meeting record, Australia has invoked the Chairman's Statement in principle but has not recorded a formal reservation to the CM as France or South Africa are want to do (see below). By applying this formulation, Australia essentially recognizes CCAMLR's determination of a TAC. However, as a party to this determination, Australia would have been able to influence its final form under the consensus leading to the adoption of CM 41-08 in any case.

In contrast, France and South Africa have both been more explicit in their use of the Statement. Through the years, France has made many reservations to CMs likely to impact on its jurisdiction. These have been recorded as footnotes to the CMs concerned and a consistent form of wording has been developed to such effect.<sup>106</sup> They have referred to

103. Kaye, see n. 37 above, p. 388.

104. Central Intelligence Agency, *The World Factbook* (last updated 15 Mar. 2007), Bouvetøya Island, available online at <<https://www.cia.gov/cia/publications/factbook/geos/bv.html>>.

105. CCAMLR-XXV, see n. 38 above, para. 12.84.

106. For example: "Except for waters adjacent to the Kerguelen and Crozet Islands" or "Except for waters adjacent to the Prince Edward Islands."

administrative matters such as data reporting or licensing requirements and fisheries matters such as directed fisheries prohibitions. Virtually all matters falling within such reservations also tend to fall under French national regulations.

South Africa was initially less active than France and only recorded reservations to measures likely to impact directly on sovereignty, such as the granting of access or the issuing of licenses. Post-1994, it has tended to keep pace with France, particularly in respect to combating IUU fishing.<sup>107</sup> One notable exception has been a strongly worded statement by South Africa referring to its unreserved acceptance of CM 170/VIII (now CM 10-05), setting up the CDS.<sup>108</sup> South Africa has also made it clear that invariably it incorporates the substance of such CMs into its domestic regulations under the 1998 *Marine Living Resources Act* or 1996 *Antarctic Treaties Act*.<sup>109</sup>

The ongoing dispute between the United Kingdom and Argentina concerning sovereignty over, *inter alia*, South Georgia (CCAMLR Statistical Subarea 48.3) and the South Sandwich Islands (Subarea 48.4) is unique in the CCAMLR experience. It is a legally complex<sup>110</sup> and unresolved issue that is difficult to evaluate objectively in the context of the CCAMLR Chairman's Statement.

South Georgia's waters in particular were intensively targeted by Soviet fishing fleets during the late 1960s, resulting in the unsustainable harvesting of Antarctic Cod (*Notothenia rossii*). According to Levy, this was the result of a shortsighted attempt to exercise *de facto* sovereignty by the United Kingdom Government, which allowed fishing to occur.<sup>111</sup>

On the Convention's entry into force, early CCAMLR initiatives were aimed exclusively at managing fishing in the South Georgia region (Subarea 48.3). Such initiatives paved the way for measures that were later to become standard across the CCAMLR Area (e.g., mesh size limits, catch limits for *D. eleginoides*, and catch reporting systems).<sup>112</sup> In fact, the first dozen CCAMLR CMs addressed South Georgia fisheries and none of these measures was subject to formal reservations by either the United Kingdom or Argentina.

107. D. Miller, "The international framework for the management of fishing in the Southern Ocean" (paper presented to Outlook 2004, Canberra, 2 Mar. 2004), p. 12.

108. CCAMLR-XVIII, see n. 82 above, para. 5.39.

109. E. Molenaar, "CCAMLR and Southern Ocean Fisheries," *The International Journal of Marine and Coastal Law* 16, 3 (2001): 480.

110. D. Vignes, "Protection of the Antarctic Marine Fauna and Flora: The Canberra Convention of 20 May 1980 and the Commission set up by it," in *International Law for Antarctica*, eds. F. Francioni and T. Scovazzi (London: Kluwer Law International, 1996), pp. 161–164.

111. M. Levy, *The Enforcement of Antarctic Marine Living Resources Claims* (paper presented to Duke University School of Law, International Development Clinic, 1997), pp. 65–69.

112. Miller et al., see n. 30 above.

In drawing attention to a joint Argentine/United Kingdom statement issued in May 1993 (during negotiation of the United Nations Fish Stocks Agreement), Argentina reiterated that the two parties had agreed to "renew efforts in the context of CCAMLR to ensure the conservation of the marine living resources in the Southern Ocean."<sup>113</sup> It is worth noting that in July of that year the U.K. had proclaimed the South Georgia Maritime Zone<sup>114</sup>; whether Argentina was aware of this legislation prior to its CCAMLR statement is unknown. Since that time, the United Kingdom has effectively assumed jurisdictional control by applying CCAMLR CMs while issuing licenses for, and enforcing control measures over, fishing in the South Georgia zone. Unlike France and South Africa, neither the United Kingdom nor Argentina has recorded any formal reservation under the Chairman's Statement nor have they attempted to follow the Australian formulation.

An interesting paradox is the fact that the relevant United Kingdom Ordinance actually gives the United Kingdom legislative precedence over CCAMLR measures.<sup>115</sup> Ostensibly, this is to combat IUU harvesting of *D. eleginoides*, but the arrest of unlicensed Argentinean vessels fishing around South Georgia has heightened prevailing tensions and threatened to undermine CCAMLR's spirit of cooperation.<sup>116</sup> The same Ordinance provides further that no inquiry in any court shall take place over whether fisheries officers carrying out the Ordinance did so with due regard to CAMLR Convention provisions and CCAMLR measures.<sup>117</sup>

Predictably, Argentina repeatedly protests the licensing system and maintains a ritual objection to the United Kingdom's actions at the annual CCAMLR meetings. For example, the Argentine position is clearly outlined in paragraph 13.4 of the Final Report of CCAMLR XV (1996).<sup>118</sup> The opposing United Kingdom interpretation is presented in paragraph 13.16 of the same Report.<sup>119</sup>

113. Report of the Twelfth Meeting of the Commission (CCAMLR-XII), (Hobart: CCAMLR, 1993), para. 15.2.

114. South Georgia and the South Sandwich Islands Gazette (No: 3 of 1993), "The Fisheries (Conservation and Management) Ordinance 1993," (Falkland Islands: Government Printer), 23 July 1993.

115. *Id.*

116. Levy, see n. 111 above, pp. 70-73.

117. See the discussion in F. Vicuña, "The Regime of Antarctic Marine Living Resources," in Francioni and Scovazzi, n. 110 above, pp. 153-156.

118. Report of the Fifteenth Meeting of the Commission (CCAMLR-XV), (Hobart: CCAMLR, 1996), para. 13.4—"Argentina rejects the UK's interpretation that the islands referred to in the Chairman's Statement include also those under disputed sovereignty, among other reasons, because this would lead to a paradox that no islands in the Convention Area north of parallel of 60° south would be excluded by the Statement."

119. *Id.*, para. 13.6:

Clearly, the two States differ on the view of whether paragraph five of the Chairman's Statement applies to their dispute over sovereignty in relation to South Georgia. On at least one occasion, Argentina has asserted that the dispute between the two countries is relevant in terms of applying and interpreting the Chairman's Statement, which should be addressed under Article XXV of the Convention.<sup>120</sup>

Despite this impasse, international law clearly indicates that "recognition is not an essential prerequisite to allow States to exercise sovereignty over a territory."<sup>121</sup> Nonetheless, if one party asserts that a dispute exists, then from an international legal perspective it does. It is worth noting that the CIA World Factbook lists South Georgia under the heading "International Disputes."<sup>122</sup>

To summarize, France and South Africa have both used the Chairman's Statement to protect national fishery interests and, ostensibly, to combat IUU fishing. "Ostensibly" implies that without independent verification, for example, via the CCAMLR observation and inspection procedures, any reports provided to the Commission by these countries in relation to their sovereign waters should not be taken at face value.

In the absence of formal reservations, both Australia and the United Kingdom implement CCAMLR CMs in keeping with national policies. On the other hand, they also exercise jurisdictional competence regulating access to the Maritime Zones/FZs and enforcing licensing and permit conditions. The longer the situation persists, the more difficult it will be for Argentina to successfully challenge the United Kingdom's unilateral actions in respect of sovereignty over the South Georgia islands.

The UK cannot agree with Argentina that there has to be unanimous agreement within this Commission as to which state has sovereignty over South Georgia and the South Sandwich Islands before the understandings of the Chairman's Statement can apply to them. The right of the UK to exercise coastal state jurisdiction is rooted in Article IV (2)(b) of the Convention and para. 5 of the Chairman's Statement. Paragraph 5 includes the crucial phrase "over which the existence of state sovereignty is recognised by all Contracting Parties." This was most carefully formulated. Its sole purpose was to cover the islands which Parties accept are subject to the sovereignty of some state, even though there may be a dispute as to which. It is the recognition of the existence of state sovereignty which is referred to, not the recognition of the sovereignty of a particular state. There is no doubt that South Georgia and the South Sandwich Islands is sovereign territory, nor that the UK exercises sovereignty over it *de facto* and, the UK of course believes, *de jure*.

120. CCAMLR-XXII, see n. 77 above, para. 10.21.

121. Vigni, see n. 98 above, p. 90; J. Green, "Australian maritime boundaries: the Australian Antarctic Territory," *Marine Policy* 25 (2001): 1-11.

122. Central Intelligence Agency, *The World Factbook* (last updated 15 Mar. 2007), South Georgia and the South Sandwich Islands, available online: <<https://www.cia.gov/cia/publications/factbook/print/sx.html>>.

Finally, it is likely that Norway has no interest in fishing around Bouvetøya Island—which would account for Norway’s non-declaration of an EEZ/FZ and lack of reference to the Chairman’s Statement.

## DISCUSSION

The Southern Ocean is vast, covering more than 35 million km<sup>2</sup> (depending on where the boundaries are drawn). The navigable area also expands and contracts significantly with seasonal and annual sea-ice variations. Combined with geographic remoteness and persistently inclement weather, the size of the Southern Ocean has isolated the CCAMLR Area and rendered it more accessible to fishing interests apart from those bound by the sustainability provisions of the CAMLR Convention.

Since there is little maritime traffic in the CCAMLR Area, detecting vessels fishing in contravention of, or outside, CCAMLR CMs and monitoring their movements has been a constant challenge for CCAMLR. Without a designated CCAMLR “police force,” and with a low detection threshold, the obligations attached to a State’s right to fish in the CCAMLR area under UNCLOS have tended to favor IUU activities. In other words, logistic limitations arising from the remoteness and the size of the area have tended to prevent CCAMLR Members from aggressively policing CMs other than in their sovereign waters.

Under CCAMLR measures, all legitimately licensed vessels fishing for species other than krill must carry scientific observers on board. Nonetheless, it has not been uncommon for observer safety to be compromised, to the point where CCAMLR has reiterated the view that “the task of scientific observers is to report on factual information and not to make judgments or interpretations relating to compliance”.<sup>123</sup>

At the outset of this study, we stated that our objective was to determine whether consensus-based decision making should be qualified by the new norm of consensus-minus-one. If so, what would be the likely consequences for CCAMLR’s effectiveness? To answer this question, we must again examine how the notion of consensus-minus-one has arisen and the circumstances that have allowed this situation to occur.

As we have shown, CCAMLR decisions on matters of substance are normally made in a manner consistent with the provisions of Article IX of the Convention. In practice, this entails a process of more or less protracted negotiation—resulting, if necessary, in a compromise concerning any disagreement over a consensus decision. The simplest illustration of the processes’ effectiveness is CCAMLR’s adoption of its annual budget in a

123. CCAMLR-XXI, see n. 75 above, para. 5.4.



manner consistent with Article XIX. Failure to adopt a budget in the absence of consensus obviously has very serious implications for the organization's operation and has never occurred in CCAMLR's twenty-five-year history.

Similarly, CCAMLR has agreed upon a large number of Conservation Measures to address a wide range of management scenarios, ranging from environmental protection to the setting of catch limits and the implementation of trade-related provisions.<sup>124</sup> At a CCAMLR meeting, new or replacement Conservation Measures are negotiated until the Parties reach agreement on substance and wording. If an agreement cannot be reached, the measure is deferred until the next meeting to provide the Parties with an opportunity to address practical considerations related to implementation or to negotiate any points of contention further. In most instances, deferred Conservation Measures of this kind are resolved within a year or so. The best examples of such success have been described above (CDS and VMS).<sup>125</sup>

In an effort to streamline its annual decisions on Conservation Measures, CCAMLR follows the practice of instituting Measures that remain in force for a number of years, in a number of cases indefinitely.<sup>126</sup> This means that such Measures can be modified in part or whole when there is consensus to do so, otherwise they stand through time.

Where agreement on a matter of substance cannot be reached, CCAMLR attempts to reflect all prevailing views about the matter at issue. The full record of debate, or negotiation, is thus included in the Commission's annual report in an effort to ensure transparency and objectively reflect all views. For example, at CCAMLR-XVIII (1999), the European Community submitted a notification on behalf of Portugal under CCAMLR's new and exploratory fisheries provisions.<sup>127</sup> It was argued that as a CCAMLR Contracting Party, the European Community and all its Member States were bound by CCAMLR's Conservation Measures as required under Article XXIX.2 and on the basis that the Community had assumed competence for all fisheries matters in respect of its members.<sup>128</sup> However,

124. See various CMs in CCAMLR, *Schedule of Conservation Measures in Force 2006/07* (CCAMLR, Hobart, Australia, 2006) available online: <[http://www.ccamlr.org/pu/e/e\\_pubs/cm/drt.htm](http://www.ccamlr.org/pu/e/e_pubs/cm/drt.htm)>.

125. For a more in depth discussion on CCAMLR Conservation Measures, their development and efficacy, see Miller et al., see n. 30 above.

126. For example, CMs 22-01, 22-02, and 22-03 regarding mesh size have not been modified since being adopted in 1986, 1984 and 1990 respectively. CM 10-02 regarding licensing and inspection obligations of Contracting Parties has been modified four times since it was first adopted in 1997, most recently in 2006.

127. CCAMLR-XVIII, see n. 82 above, para. 7.5.

128. *Id.*, para. 9.43.

the majority of CCAMLR Members believed that such circumstances would not be consistent with the provisions of the Convention, since Portugal had not acceded to the Convention and was not a Commission Member in its own right.<sup>129</sup> The European Community reserved its standing under the CAMLR Convention in respect of its competency to regulate Community vessels.<sup>130</sup> However, Portugal did not fish that season and has yet to fish in the Convention Area. CCAMLR's prevailing lack of agreement on this issue, and the associated debate, were completely reflected in the official record.<sup>131</sup>

At CCAMLR-XXI (2002) Australia advised CCAMLR that it intended to nominate toothfish for listing under Appendix II of the Convention on the International Trade in Endangered Species (CITES).<sup>132</sup> Twenty-two of the twenty-four CCAMLR Members opposed this proposal for a variety of reasons,<sup>133</sup> most notably that such a listing could undermine CCAMLR's competency or authority in respect of managing the marine living resources for which it is responsible. The result was that toothfish was not listed under Appendix II of CITES, but the Twelfth Conference of CITES Parties (CoP12) adopted Resolution Conf. 12.4, which urged CITES Parties to adhere to the relevant CCAMLR Conservation Measures as well as the CAMLR Convention as a whole.<sup>134</sup>

Finally, the 2006 issue of the Russian-flagged longliner, the *Volna* (see below), is another clear example of CCAMLR being unable to reach consensus on an issue of substance. Again, the need for transparency was recognized and the views of the Members were reflected in the report. However, this example differs somewhat from the two outlined above. The majority of Members wanted immediate action taken against the vessel to prevent it fishing during the forthcoming season. The compromise reached formally deferred any decision on the *Volna*'s status as an IUU vessel until the following year.<sup>135</sup> The outcomes of this process are awaited with interest.

CCAMLR's 2006 Meeting was not the first time a Member has not joined consensus in finalizing the CP-IUU vessel list. At CCAMLR-XXII in 2003, Russia also denied reports of toothfish offloads from two vessels, the *Strela* and the *Zarya*, when the vessels appeared to be carrying fishing licenses and catch documents that could not be verified as authentic. Russia asserted that the prevailing circumstances were attributable to the actions of

129. *Id.*, para. 9.44.

130. *Id.*, para. 9.45.

131. *Id.*, paras. 9.47–9.52.

132. CCAMLR-XXI, see n. 75 above, para. 10.1.

133. *Id.*, paras. 10.3–10.75.

134. CITES Secretariat, Resolution Conf. 12.4, available online at <<http://www.cites.org/eng/res/12/12-04.shtml>>.

135. CCAMLR-XXV, see n. 38 above, para. 9.40.

previous Bolivian owners and therefore the vessels should not be included in the CP-IUU list.<sup>136</sup> Russia also disputed observations of the *Strela* fishing in the Australian FZ in CCAMLR Statistical Division 58.5.2 claiming that evidence existed to indicate the vessel's inability to be at the location nominated. Consensus was not reached and, although Russia did not want to be identified in the report as blocking consensus, the European Community reiterated that all Members except Russia had agreed that the *Strela* and the *Zarya* should be on the CP-IUU vessel list.<sup>137</sup>

Another CCAMLR Member, Uruguay, has also had several vessels recommended for inclusion on the CP-IUU Vessel List since 2002. The best known of these, the *Viarsa 1*, was the subject of a hot pursuit by Australia in 2003 and was ultimately arrested on the high seas with the assistance of the United Kingdom and South Africa.<sup>138</sup> Despite prevailing condemnation of the *Viarsa 1* incident, Uruguay accepted the inclusion of their vessels on the CP-IUU Vessel List.

The examples above raise interesting questions in their own right as to how CCAMLR Parties reconcile their own interests with their role as custodians of the Antarctic marine ecosystem. Consensus-based decision making is obviously a vital element in this process. It is therefore worthwhile to note that all the delegates interviewed during the 2006 CCAMLR meeting defined CCAMLR's use of consensus as decisions made in the absence of formal objection. In other words, nobody says no even if not everyone says yes.<sup>139</sup>

Furthermore, Article 10.j of UNFSA clearly indicates that decision-making procedures in regional fisheries management organizations should "facilitate the adoption of conservation and management measures in a timely and effective manner."<sup>140</sup> Let us examine this requirement in CCAMLR's case.

CCAMLR has been criticized for taking a decade to adopt a conservation measure regarding krill when krill is commonly regarded as the Convention's *raison d'être*. At the time, there was a lack of scientific knowledge about the stocks of krill on which to base management mea-

136. CCAMLR-XXII, see n. 77 above, Annex 5, para. 2.50.

137. *Id.*, Annex 5, paras. 2.48 and 2.49, 8.30, 2.51 and 2.52, and 8.55 and 8.56 respectively.

138. E. Molenaar, "Multilateral Hot Pursuit and Illegal Fishing in the Southern Ocean: The Pursuits of the *Viarsa 1* and the *South Tomi*," *The International Journal of Marine and Coastal Law* 19, 1 (2004): 19-42.

139. Interviews conducted by author, Ms. J. Turner, in her capacity as M.Sc. candidate, Institute of Antarctic and Southern Ocean Studies.

140. Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, 1995, available online: <<http://www.un.org>>.

tures<sup>141</sup>; however, at CCAMLR-X (1991), the Commission noted that reactive management was not viable for long-term management of the krill fishery and so decided to implement a precautionary approach, using precautionary catch limits that can be adjusted as new information is reported.<sup>142</sup> Conservation Measure 32/X set a precautionary catch limit for krill in Area 48. This was the first precautionary catch limit implemented by an international fisheries management forum.<sup>143</sup> The Commission continues to apply precautionary catch limits to the krill fishery in Areas 48 (CM 51-01), 58.4.1 (CM 51-02), and 58.4.2 (CM 51-03), and allocates the precautionary catch limit of Area 48 into Subareas (see CM 51-01).

While some CCAMLR Members believe that consensus-based decision making takes too long (see above), all agree that reaching consensus reflects a pragmatically-based level of acceptability to all parties. Thus, decisions reached by consensus should be more inclusive, and consequently more effective, in terms of implementation and compliance.

To facilitate consensus on CMs, CCAMLR uses an informal conservation measures drafting working group, convened during CCAMLR's annual meeting, to resolve potential differences through negotiation. Delegates attend informal sessions of this group to discuss new CMs, and revise old CMs if necessary. When the measures come up for formal adoption by CCAMLR, they have already been discussed fully and any accommodations necessary have already been made.

Kaye has indicated that consensus-based decisions may not be the best or the most robust. However, they are accepted by all parties, whereas majority decisions may marginalize dissenters, who may then ignore, or not implement, such decisions.<sup>144</sup> Such dissenters are most often those parties most likely to be affected by the decision.

The essentially non-confrontational nature of consensus-based decision making may also help develop stronger decisions. The case of the CCAMLR C-VMS already discussed is a clear example of such a process.

## CONCLUSION

In a normative sense, some CCAMLR decisions have considerable strength, particularly as they affect third parties. In this respect, the CDS has been considered to have significantly altered the balance in favor of legal fishing

141. Nicol and de la Mare, see n. 19 above.

142. CCAMLR-X, see n. 68 above, para. 6.13.

143. Willock and Lack, see n. 40 above.

144. Kaye, see n. 37 above.

operations.<sup>145</sup> For example, the CDS provides for non-Contracting Party (NCP) participation, which broadens the Scheme's potential impact in respect of toothfish landed, imported, or exported globally. Furthermore, Resolution 14/XIX urged all Acceding States and CCAMLR NCPs that fish for, or trade in, toothfish to participate in the Scheme. Since 2000, many non-Contracting Parties have voluntarily implemented the CDS. Namibia acceded to the Convention and ultimately became a CCAMLR Member in 2001. Similarly, the People's Republic of China, as a major importer and exporter of toothfish, acceded to the Convention in 2006.<sup>146</sup>

From an operating system (structural) perspective, the CDS may be considered a general success. The CDS has effectively monitored toothfish trade for catches both inside and outside the CCAMLR Area.<sup>147</sup> It has helped CCAMLR identify Port States where toothfish are landed, which in turn has allowed the Commission to solicit these States' involvement in CCAMLR's work and convince them to voluntarily implement the CDS.

Individually, the VMS and the CDS are not as effective as they are together. Combined with other monitoring, control, and surveillance measures (for example, licensing requirements, at-sea inspection, port inspections, catch reporting requirements; Table 1), the VMS and the CDS tend to limit the entry of IUU-caught toothfish into the trade cycle and ensure that fishing takes place in a regulated environment in accordance with CCAMLR CMs.<sup>148</sup> As such, they are clear examples of consensus working effectively as a decision-making mechanism. With respect to the CDS, CCAMLR required urgent action to address a matter of universal concern, IUU fishing. It is telling that CCAMLR was then able to use consensus and agree on a significant and revolutionary Scheme, which was then implemented particularly rapidly. With all CCAMLR Members involved in the CDS's development and entry into force, CCAMLR was able to implement an effective and preventative measure that has done much to reduce the toothfish IUU fishing in the CCAMLR Area.<sup>149</sup>

Therefore, in relation to IUU fishing alone, we conclude that CCAMLR has been effective in attaining concordance and coherence between its structural and normative systems. The political accommodations necessary to achieve consensus have therefore been fashioned from the legal provisions available in the Convention and the national regulations of CCAMLR Members.

145. Sabourenkov and Miller, see n. 72 above.

146. CCAMLR Statistical Bulletin 1996–2005. (Hobart: CCAMLR, 2006), Section E, Tables 17 and 18.

147. Green and Agnew, n. 61 above; Sabourenkov and Miller, see n. 72 above.

148. Miller et al., see n. 29 above.

149. Sabourenkov and Miller, see n. 72 above; M. Lack, "Catching On? Trade-Related Measures as a Fisheries Management Tool," *TRAFFIC* (2007).

The question that remains to be answered is: will this situation be undermined or affected by the adoption of a new consensus-minus-one norm? Delegates interviewed during the 2006 CCAMLR meeting were mostly in agreement that consensus-minus-one is not a useful decision-making tool. While it can “name and shame” in practical terms, the objecting Member can then choose not to agree with any related measure under debate.

The CAMLR Convention’s opt-out provision also allows Parties to express reservations concerning any particular conservation measure. Since such provisions have only been used twice in twenty-five years, there is little to suggest that Convention Article IX.6 will become the preferred way of voicing dissent in the future.

It is therefore difficult to objectively determine why the consensus-minus-one scenario has arisen in CCAMLR in the first place. Under the *Volna* scenario described here, the Russian Federation could have simply opted out under Article IX.6(c–d) after the fact. A similar set of circumstances could theoretically apply to coastal States invoking the Chairman’s Statement.

To us, the point of consensus-minus-one seems to be more germane to improving the structural efficiency of CCAMLR procedures for developing CMs than to improving decision-making *per se*. Removing a potential dissenter from the initial debate on the basis of a perceived “conflict of interest” simplifies the entire procedure to agree a measure. The decision-making process is then more likely to lead to decisions that reflect institutional norms as a whole. Nevertheless, decisions made on a consensus-minus-one basis require considerable faith on the part of the potential dissenter.

Therefore, consensus-minus-one is not only nonsense, it is an oxymoron. At best it is a protest “vote” that has no legal effect. At worst it is a reminder to CCAMLR Members that the stakes are high in the Southern Ocean. Care thus needs to be taken to avoid losing credibility in the international community, where CCAMLR is perceived as a proponent of best practice among RFMOs worldwide.

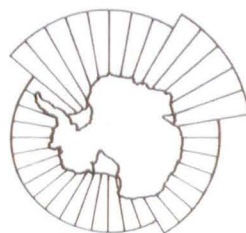
In this study, we have shown that the process of consensus decision-making, which is embedded in the structural system of CCAMLR alongside cooperation and compromise, has actually resulted in improved compliance. Under the CAMLR Convention this should be the natural outcome of any decisions made. CCAMLR’s record in this regard speaks for itself.

## CCAMLRL Map

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The following map was provided by the CCAMLRL Secretariat.





CCAMLR

Boundaries of the  
Statistical Reporting  
Areas in the  
Southern Ocean

LEGEND

— STATISTICAL AREA  
ZONE STATISTIQUE  
СТАТИСТИЧЕСКИЙ РАЙОН  
AREA ESTADISTICA

--- STATISTICAL SUBAREA  
SOUS-ZONE STATISTIQUE  
СТАТИСТИЧЕСКИЙ ПОДРАЙОН  
SUBAREA ESTADISTICA

+ ANTARCTIC CONVERGENCE  
CONVERGENCE ANTARCTIQUE  
АНТАРКТИЧЕСКАЯ КОНВЕРГЕНЦИЯ  
CONVERGENCIA ANTARTICA

— CONTINENT, ISLAND  
CONTINENT, ILE  
МАТЕРИК, ОСТРОВ  
CONTINENTE, ISLA

--- INTEGRATED STUDY REGION  
ZONE D'ETUDE INTEGREE  
РАЙОН КОМПЛЕКСНЫХ ИССЛЕДОВАНИЙ  
REGION DE ESTUDIO INTEGRADO

