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**Critical Literature Review
(ANTA602)**

***Title: How Successful is CCAMLR in Meeting its
Objective in the Southern Ocean?***

Name Laetitia Laubscher

Student ID: 97251625

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Abstract:

The Commission for the Conservation of Antarctic Marine Living Resources ("CCAMLR") was praised upon its adoption for being a trailblazing, international ecosystem-based fishery management regime achieving much over the years including: the development of a precautionary approach to the establishment of catch limits for target species; the development of a management regime for Antarctic krill which takes into account the impact of fishing on dependent species; the establishment of an ecosystem monitoring program; the development of specific policies to manage new and exploratory fisheries; the adoption of effective seabird by-catch mitigation rules and other gear restrictions to minimise the ecosystem impact of fishing; and the collection of data on by-catch and ecosystem impacts through the CCAMLR Scheme of International Observation. (CCAMLR, 1995)

While it has achieved much since its formation, the pioneering Commission must continue to develop and seek new means of ensuring compliance by member states with CCAMLR's objective in the present day and well into the future.

Introduction

The Commission for the Conservation of Antarctic Marine Living Resources (“CCAMLR”) was praised upon its adoption for being a trailblazing, international ecosystem-based fishery management regime achieving much over the years including: the development of a precautionary approach to the establishment of catch limits for target species; the development of a management regime for Antarctic krill which takes into account the impact of fishing on dependent species; the establishment of an ecosystem monitoring program; the development of specific policies to manage new and exploratory fisheries; the adoption of effective seabird by-catch mitigation rules and other gear restrictions to minimise the ecosystem impact of fishing; and the collection of data on by-catch and ecosystem impacts through the CCAMLR Scheme of International Observation. (CCAMLR, 1995)

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History

CCAMLR was created to address a jurisdictional gap that the Antarctic Treaty 1959 (“the Treaty”) explicitly created. Article VI of the Treaty stated that the treaty provisions would only apply to “the area south of the 60° South Latitude, including all ice shelves, but nothing in the present Treaty shall prejudice or in any way affect the rights, or the exercise of the rights, of any State under international law with regard to the the high seas within that area.” As per Article IV of the Treaty, territorial sovereignty claims were frozen, which meant that no sea surrounding Antarctica could be classified as territorial waters under Section 1 and 2 of the United Nations Convention on the Law of the Sea (“UNCLOS”), nor could any exclusive economic zones be created in the Southern Ocean under Part V of UNCLOS, meaning that the sea surrounding the Antarctic would be universally classified as high seas. Thus the original Treaty application was stringently limited to the terrestrial aspects of Antarctica, leaving the ecosystem of the Southern Ocean vulnerable to continued exploitation.

Sealing in the Southern Ocean area had begun shortly after Captain Cook visited South Georgia in 1775 and commented on the abundance of seals on the island. Just a handful of years after Captain Robert Falcon Scott’s first attempt to reach the South Pole in 1901, Norwegian whaler C.A. Larsen established the first whaling station in the Southern Ocean at Grytviken in South Georgia in 1904. Both industries boomed, rapidly diminishing the various seal and whale populations. (Jacquet, 2015) By the time the Treaty was signed in 1959, the International Whaling Commission had already been established in 1946 (with a special Southern Ocean Whale introduced much later in 1994), but it took some years before Treaty members eventually established and signed the Convention for the Conservation of Antarctic Seals in 1972. All other living marine resources remained unprotected.

Rapid Expansion of Fisheries

Since the 1950s until the 2000s fisheries had been expanding southward from the North Atlantic and West Pacific at a rate of 0.8 degrees latitude per year on average, with an even greater expansion taking place in the 1980s and early 1990s. (Swartz, 2010) In a 35-year period, from 1961 to 1995 marine fisheries underwent a 2.4-fold increase in catch (34 million tonnes to 83 million tonnes in catch weight or 17 billion tonnes to 44 billion tonnes in PPR, wet weight) and required a nearly 4-fold increase in exploited area. (Swartz, 2010) By the mid-1990s the relatively inaccessible waters of the Arctic and the Antarctic became the last fishing 'frontiers' for an ever-hungry industry. (Swartz, 2010)

The overexploitation of marine animals closer to market centres forced foreign industries to expand into those last fishing 'frontiers' of the Southern Ocean in a 'fishing down the food web' trend. Marine mammal populations (whales and seals) in the Antarctic Peninsula collapsed and/or were protected by new legal regimes by the 1970s, groundfish fishing collapsed by the early 1980s. After that time the only economically viable fishing in the Antarctic was confined to Antarctic krill fishing – the base of the Antarctic food chain. (Jacquet, 2015) In other parts of the Southern Ocean the same trend occurred with the addition of the especially lucrative Patagonian and Antarctic toothfish. (Jacquet, 2015)

In 1975, at the Antarctic Treaty Consultative Meeting VIII, the Consultative Parties adopted Recommendation VIII-10 which noted the need to “promote and achieve within the framework of the Antarctic Treaty, the objectives of protection, scientific study and rational use of [Antarctic] marine living resources”. This recommendation formed the basis for the establishment of CCAMLR in 1982, which excluded only the already-protected whales and seals from its scope. One of the key species that CCAMLR set out to protect was krill, the base of the Antarctic food chain. (Schiffman, 2009)

Legislative Objective

Per Article II of the CAMLR Convention, the objective of the CAMLR Convention is “the conservation of Antarctic marine living resources”. This is a qualified objective. “For the purposes of this Convention, the term ‘conservation’ includes rational use.”

‘Rational use’ is governed by Article II(3) which states that: “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) the 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 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 sub-paragraph (a) above; and
- (c) prevention of changes or minimization of the risk of changes in the marine ecosystem which are not potentially reversible over two or three decades, taking into account the state of available knowledge of the direct and indirect impact of harvesting, the effect of the introduction of alien species, the effects of associated activities on the marine ecosystem and of the effects of environmental changes, with the aim of making possible the sustained conservation of Antarctic marine living resources.”

Article I of CCAMLR states that the Convention applies to the Antarctic marine living resources of the area south of 60° South latitude and to the Antarctic marine living

resources of the area between that latitude and the Antarctic Convergence which form part of the Antarctic marine ecosystem, a pioneering piece of legislation which empowered CCAMLR to meet its conservation objective thoroughly.

Machinery

CCAMLR's objective is primarily pursued through CCAMLR's 24-member Commission which meets annually in Hobart, Australia.¹ Article IX of CCAMLR sets out the means to give effect to the objective and principles set out in Article II. Article IX empowers the Commission to: facilitate research into the comprehensive studies of Antarctic marine living resources and of the Antarctic marine ecosystem; compile data on the status of changes in population of Antarctic marine living resources and on factors affecting the distribution, abundance and productivity of harvested species and dependent or related species or populations; ensure the acquisition of catch and effort statistics on harvested populations; analyse, disseminate and publish the information relating the aforementioned compiled data and statistics to the reports of the Scientific Committee; identify conservation needs and analyse the effectiveness of conservation measures; formulate, adopt and revise conservation measures on the basis of best scientific evidence available subject to any relevant measures or regulations established or recommended by the Consultative Meetings pursuant to Article IX of the Antarctic Treaty or by existing fisheries commissions responsible for species which may enter the area to which this Convention applies; implement the system of observation and inspection established under Article XXIV of the Convention; and carry out such other activities as are necessary to fulfil the objective of the Convention.

Thus CCAMLR's Conservation Measures are variable and dependent on the findings of two specialist 'working groups' within the Scientific Committee who undertake detailed assessments of fish stocks and the ecosystem impacts in order to present management advice to the Commission, advice which includes setting total allowable catch limits, season limits and gear type restrictions – which may be in force on an annual basis or for an indefinite period.

Political Limitations

However, if a member of the Commission feels it should not be subject to the application of a Conservation Measure, it can object or seek an exemption. Some critics have praised this opt-out clause as a "particularly useful mechanism for circumventing the tendency of consensus politics to produce the lowest common denominator outcomes..." and that "states that do not object have presumably less grounds for subsequent complaint because they could have used the opt-out clause...". (Herr, 2000, p. 275)

Even if a member state doesn't object to a Conservation Measure, the member state's compliance with a Conservation Measure depends on other factors as well, such as the domestic legal status of treaty obligations, internal judicial processes (e.g. whether it's a judicial or administrative system), administrative and political

¹ CCAMLR's members (and those who meet annually) are Argentina, Australia, Belgium, Brazil, Chile, People's Republic of China, France, Germany, India, Italy, Japan, Republic of Korea, Namibia, New Zealand, Norway, Poland, Russia, South Africa, Spain, Sweden, Ukraine, United Kingdom, United States of America, Uruguay and the rest of the EU.

infrastructures and any other related domestic factors as seen in the case of the Chilean-registered longliner *Antonio Lorenzo*.

Illegal, Unregulated and Unreported Fishing

Illegal, unregulated and unreported (“IUU”) fishing is one of the biggest challenges to CCAMLR and of which a considerable level is conducted by CCAMLR members themselves. (Schiffman, 2009) In the *Antonio Lorenzo* case, the Chilean member state’s longliner was found in a CCAMLR area with longlining hooks, plate freezers which were emptied “hurriedly” and incomplete vessel logbooks, making it impossible for the inspectors to ascertain the activities the vessel had been engaged in. As the Chilean judicial system had placed the onus of proof on the prosecutors the evidence was not satisfactory and there no grounds for prosecution as the vessel was not fishing when the inspectors found it. (CCAMLR, 1995, p. 104) The perfect local enforcement of Conservation Measures is thus not guaranteed.

Even though CCAMLR’s overall performance in terms of fishing management has been praised and regarded as respectable (especially in regard to krill fishing), the (“IUU”) harvesting of the Patagonian toothfish in particular (also known as Chilean sea bass) has become a serious issue in the Southern Ocean. During the 2003-04 season, for example, 2,622 tons of the 15,929 tons of toothfish were caught in the area subject to terms of the CCAMLR in the IUU category (Herber, 2007)

This issue is currently being addressed through open dialogue by member states and through development of advanced monitoring technology which has seen the Commission steadily decrease IUU fishing over the past twenty years, reducing IUU to less than 10% of its peak value in the mid 1990s. (O. Bodin, 2013)

Rational Use

As the term conservation according to CCAMLR includes ‘rational use’ member states have had difficulty in agreeing exactly how to interpret rational use and which restrictions can be placed on fishing. Some member states have interpreted it as an almost inalienable right to fish during decision-making processes while other member states, notably those bordering the Southern Ocean and with a territorial sovereignty claim showing a vested interest in the conservation of the marine area, favouring a conservation-based interpretation. (CCAMLR, 1977, p.2-3)

For example, in 1985, during one of CCAMLR first annual meetings, rational use was seen as a right to fish in regard to the use of gill nets “There are no substantial gill net operations at present in the Convention Area, so that at this stage, prohibiting the use of gill nets as a preventative measure could unnecessarily interfere with the rational use of resources, one of the objectives of the Convention.”²

However, in 1987 The Working Group for the Development of a Conservation Strategy for Antarctic Marine Living Resources aimed to create a common

² CCAMLR IV (1985) para 22.

understanding of the term 'rational use' in the convention text as a means to curb and restrict fisheries. It was agreed that "this term would require progressive refinement as knowledge and understanding of the Antarctic marine ecosystem developed" and proposed the following: Harvesting and associated activities are to be conducted in accordance with the following principles of conservation:³

(i) maintenance of ecological relationships (ii) maintenance of populations at levels close to those which ensure the greatest net annual increment (iii) restoration of depleted populations (iv) minimization of the risk of irreversible change in the marine ecosystem. With these principles in mind the Working Group felt that rational use involved inter alia the following elements: (i) that the harvesting of resources is on a sustainable basis (ii) that harvesting on a sustainable basis means that harvesting activities are so conducted as to ensure that the highest possible long-term yield can be taken from a resource, subject to the general principles of conservation above (iii) that the cost-effectiveness of harvesting activities and their management is given due weight.

Even a decade after the 1987 clarification, Japan still noted in the 2008 meeting there was a need to balance conservation with rational use in implementing marine protected areas ("MPAs") in the Convention Area, thus again interpreting rational use in the 1985 manner. In the 2009 meeting, China warned that 'rational use' could potentially be compromised by MPAs. "The establishment of an MPA as a conservation measure should meet the objectives and requirements of CAMLR Convention, Article II. The balance of conservation and rational use must be maintained. The total network area of MPAs in the Convention Area should be limited to a rational proportion of the Convention Area so as not to compromise rational use."

This semantic to-ing and froing has continued well into the present with other notable comments from Ukraine in 2012, the member state strongly suggesting that allowing CCAMLR to create MPAs would render the Convention's 'rational use' objective meaningless and thus the entire CCAMLR meaningless as well.⁴

Interpretation

Critics have called this battle of meaning a "wilful misinterpretation by member countries" as a means for member states to stall progress. That "countries are loosely interpreting the legal meaning of 'rational use' of natural resources to escalate fishing efforts in Antarctic waters and hinder efforts to establish marine protected areas in the Southern Ocean." (Science Daily, 2015)

In international law, the main way to interpret a treaty, as stated by Article 31 in the 1980 Vienna Convention on the Law of Treaties, is to first look to the "ordinary meaning" of the terms of the treaty, interpreted "in their context in the light of its object and purpose." This principle rule is constrained by the caveat: "A special meaning shall be given to a term if it is established that the parties so intended." Lastly, if the initial means of interpretation would lead to an absurd result or is still

³ CCAMLR VI (1987) para 113.

⁴ "By introducing permanent restrictions on the exploratory fishery in certain areas, we have arrived at a point where it is only possible to fish in very localized areas. From an organization that should be developing methods for ensuring the rational use of marine living resources, CCAMLR has gradually turned into an organization focused just on their conservation. As we see it, if things continue in this way, the existing Convention will lose all reasonable meaning. It will then become necessary to talk about the termination of the Convention and the creation of a new one, or of a revision of the Madrid Protocol with the introduction into its terms of reference of marine areas in addition to terrestrial areas. This would not be the end of the world. (CCAMLR XXXI (2012) para 7.97)

ambiguous, “recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion.” Recourse may thus be used to either to confirm the plain meaning of the language in the Convention or to resolve either ambiguous language, or to disregard an interpretation that would lead to an absurd result.

Academics such as Hofman have argued that “the clearly stated objective of the Convention is to conserve the structure and dynamics of the Antarctic marine ecosystem(s) by ensuring that harvesting and associated activities do not have long-term or irreversible adverse effects on either the harvested species and population” (2015)

This ‘plain meaning’ view is supported in a record of draft recommendation that the Commission chose to adopt, the text stating that: “The Working Group [on Marine Living Resources] agreed to include in its Report the understanding of the Group that the word ‘conservation’ as used in the draft Recommendation includes rational use, in the sense that harvesting would not be prohibited, but the regime would exclude catch allocation and other economic regulation of harvesting.”⁵

Fishing was thus never ruled out completely, but the regulation of such fishing was required as necessary for conservation. Nowhere in CCAMLR or associated documents is there a statement that ‘rational use’ implies an implicit or unrestricted right to fish everywhere at all times, nor is there an endorsement of fishing at the cost of other objectives of the Convention.

Nevertheless, even with this clear interpretation of ‘rational use’ there is still much political and wilful muddling of meaning which cannot be solved in a voluntary membership programme through any unilateral force. As long as there is political incentive to muddy the waters, the situation shall continue in the state it is in.

Conclusion

CCAMLR has been a pioneer in fishery management and has achieved many lofty goals, however the organisation will need to foster greater member state compliance in managing IUU as well as ensuring the establishment of future MPAs in order to continue to serve its objective faithfully.

⁵ ATCM-IX (1977) para 10.

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