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“Fit for Purpose?”
*A Study of the Political and Legal Aspects of
CAML*

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Executive Summary

The Convention for the Conservation of Antarctic Marine Living Resources (CAMLRL) is an integral part of the Antarctic Treaty System (ATS). The Convention Area covers the Southern Ocean, extending beyond the ATS Area up to the Antarctic Convergence.

Several reviews in the past have concluded that CAMLR's objective has generally been met, albeit with some recommendations for improvement. Concern has arisen more recently, however, over certain tensions in meetings of the Commission for CAMLR (CCAMLR) leading to a lack of consensus over various conservation proposals. This Research Paper considers whether CAMLR (and the Commission itself) is 'fit-for-purpose' in making adequate progress towards its principal objective of marine conservation and, to the extent it may not be, what might constructively be done to rectify matters.

Content

The Study analysed several procedural issues, namely, decision-making and dispute settlement; scope (concerning incorporation of climate change); and policy (concerning the role of science). It separately considered the issues of institutional standards (involving accountability and transparency); and legitimacy (pertaining to the status of the relevant legal instruments and to the interaction among governments, the private sector and civil society).

The Study has identified the ecosystem characteristics of the Area and the activities of ATS/CAMLRL Parties and some non-Parties. It considered the regulatory framework and the scientific information that feeds into monitoring, surveillance and compliance obligations. It then focused on the relationship between national, regional and global interests.

The Study notes the view recorded in some recent articles that, while internal disagreement is not new to Antarctic governance, current and persistent impasses on key matters, and the blocking of consensus to pursue "narrow national interests" run counter to the obligations of parties to the ATS and established norms. It was queried whether it was therefore time now for Parties to the ATS, including CAMLR, to consider holding diplomatic discussions to map the path forward.

Conclusions

The Paper concurs with the reviews that the CCAMLR should take a strategic approach to achieve its objective and that the role of CAMLR within the ATS should be enhanced through joint CCAMLR/ATCM meetings with the Commission considering actions arising from ATCM recommendations.

The main conclusion, however, is that there is a compelling reason for diplomatic discussions among ATS parties to map a path forward to ensure that the objectives of the ATS including CAMLR are achieved. Every ATCP and CCAMLR Member has pursued, and always will, a national interest blending political, commercial and environmental components. Such national interests, however, will need to be harmonised with the global interest in conserving the planet's ecosystem, biological biodiversity and climate stabilization. The ATS has historically reflected a mix of legal exclusivity and political tension, and this is playing out now in contemporary CCAMLR debates reflecting heightened commercial interests. While the problems are perceived on the surface as involving conservation against commercial interests, the underlying forces are also influenced by geo-strategic rivalry that is not in any way new.

The following conclusions are reached in the paper:

- The Antarctic Treaty served as a powerful symbol of international cooperation across political divisions of the 1950s and subsequent decades, which, *inter alia*, enshrined the principle of scientific progress as a portal for political cooperation.
- The maintenance of national territorial claims in Antarctica, based on historical criteria that predate the UN era and which have negligible recognition, is a source of continuing tension.
- The refusal of some ATS Parties to accept the acknowledgement by the UN Secretary-General that Antarctica is regarded as a part of the global commons falls short of progressive political thought appropriate to the 21st century.
- The selectivity of ATCPs in maintaining exclusive decision-making rights, based on 'substantial research activity', while positive for scientific cooperation, has a negative impact on universal participation of all UN Member States in one part of the global commons.

- Consensus decision-making within the ATS/CCAMLR framework has had a blocking effect on its evolution: originally from Western countries over the admission of potential members (and retention of apartheid South Africa); more recently from other countries over evidence-based policy.
- Notwithstanding these dynamic decadal problems, there remains potential for constructive initiatives to be taken.

Recommendations

Because of current heightened tensions, any discussions aimed at reform will need to be at a high level and, as a precondition to success in shared ATS/CCAMLR interests, meet certain challenging requirements. The diplomatic negotiating principles of mutual respect and reciprocal concession will need to be applied. Some far-reaching initiatives are included on the basis that the added value the Paper aims to provide involves a comparison between the ‘possible’ and the ‘probable’, using the method of ‘back-casting’ for potential futures, as employed in climate change negotiations.

Three tiers of potential reform are envisaged: procedural change, political-legal change, and paradigmatic change, together comprising ten recommendations.

Incremental measures for operational improvement could include the adoption of various versions of consensus decision-making to modify the blunt effect of a single veto; a more independent and authoritative scientific panel ‘owned’ by all CCAMLR members; collective recognition of the causal factors underlying ecosystem health in the Area; and emulation of creative work elsewhere in the UN on accountability and transparency.

Political-legal change would involve a stronger commitment by certain countries to existing treaty instruments for global conservation that would signal a greater respect for international law.

The underlying challenge to reform, however, involves a paradigmatic change to the ATS/CCAMLR framework. Political accord and specific breakthroughs provide the foundation for enduring legal integrity. The ATS was a positive achievement in establishing peace, demilitarisation and scientific cooperation during a tense decade of the 1950s, but the geo-strategic dynamic over the subsequent half-century has fundamentally changed matters. The current problems reflect the broader issue of global strategic rivalry. If effective progress is to be achieved, the geo-political relationships among the contracting parties to both CAMLR and the Antarctic Treaty need to be improved.

This is not easy at a time of high strategic tension with multiple crises unresolved. Yet critical times offer an opportunity to make constructive moves, not in the immediate problem areas, but elsewhere. While tension is high in Europe and Asia, the potential for constructive initiative in Antarctica exists, as was originally the case in 1958. If today’s opportunity is seized and progress is made, this would not only have direct benefit for Antarctica and the Southern Ocean, but indirect benefit elsewhere.

The report notes, in fact, some visionary declaratory statements made recently, at the highest political levels, that could provide a foundation for practical initiatives – such as “humanity standing at an inflection point in history”, and the need to “build a community of shared future for mankind ... through improved global environmental governance”. Building upon this, some progressive ideas advanced for consideration include re-conceptualising operational relationships within CCAMLR, recognising the ATS/CAMLR Area as part of the global commons, embracing the idea of Earth trusteeship compatible with sovereign responsibility of the state, and applying the concept of legal personhood to the Southern Ocean.

For visionary leadership and political creativity at the global level to attract consensus at the international negotiating level, however, the principles of mutual respect and reciprocal concession will require significant policy change – including surrender of some entrenched national positions that have long been held. The Paper concludes that, if political compromise were to unlock contemporary blockages, it may need to take the form of a change in historical positions retained by one group of ATCPs coupled with a contemporary commitment to global and regional conservation measures by the other. The pursuit of any narrow national interest will require modification, but by all ATCPs/CCAMLR members, not simply one particular group. In the 21st century, the planetary interest rests on the legitimate interest of every nation-state.

To move from the probable to the possible will require unusual political and diplomatic commitment and skill. CCAMLR is fit for purpose provided all the Commission members move constructively, if incrementally, in mapping a path forward, and reach agreement on the balance of global and regional interests.

The Antarctic Treaty allows for an ‘amendment conference’ to be held at the request of any Consultative Party (CP), so it is open to any one of the 29 CPs to initiate this. For its part, CAMLR requires an ‘amendment meeting’ whenever one-third of its 26 Commission members so request (i.e. nine). The way is thus open for reform.

Table of Contents

Part A Context

- | | |
|---|---|
| 1. The Ecosystem | 5 |
| (a) State of the ecosystem | |
| (b) State of the marine environment | |
| (c) The marine environment and international institutions | |
| (d) Antarctic and the Southern Ocean in global context | |

Part B Analysis

- | | |
|---|----|
| 2. The Convention and the Commission | 8 |
| (a) Origin of the Convention | |
| (b) Contemporary problems | |
| (c) Procedural issues | |
| (d) Institutional standards | |
| 3. CAMLR within the ATS Legal Framework | 18 |
| (a) Context | |
| (b) Legitimacy | |

Part C Prescription

- | | |
|--|----|
| 4. An Explanatory Framework for CCAMLR | 24 |
| (a) CCAMLR as an institution | |
| (b) Roles within CCAMLR | |
| (c) CCAMLR as a complex network | |
| 5. Global Legal Concepts for ATS / CAMLR | 29 |
| (a) Earth trusteeship | |
| (b) Legal personhood | |
| 6. Geo-political Options: Crisis and opportunity | 34 |
| (a) Contemporary crises | |
| (b) Preconditions of progress | |
| (c) Recent initiatives | |
| (d) Mapping a path forward | |
| 7. Recommendations: Tiers of potential reform | 36 |
| (a) Procedural change | |
| (b) Political-legal change | |
| (c) Paradigmatic change | |

Glossary; Interview participants; Project mandate; Project team	39
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Background Papers

- | | |
|---|---|
| 1 | Origins of CAMLR: Review of the negotiations (Keating) |
| 2 | CAMLR within the ATS: The geo-political context (Graham) |
| 3 | 'Outside the Box': Conceptual frameworks for CCAMLR (Webb) |
| 4 | Global Commons, Earth trusteeship, state sovereignty (Bosselmann) |
| 5 | Legal Personhood and the Oceans (Finlayson) |

Research Assistant Papers

- SRP-A: CCAMLR reports and country research (Bentley, Chetty, Johansson-Pugh)
- SRP-B: Literature reviews (Chung, Krylova, Mezencio)

Part A Review

1. The Ecosystem

The health of Earth's ecosystem is a precondition for life on the planet. For some considerable time, the ecosystem has been under pressure from human 'development'. In some cases, parts of the ecosystem have been managed sustainably for millennia but, since the industrial revolution, the scale and range of pressures have increased dramatically due to the rapid development and scaling up of modern technology and practices.

(a) State of the Ecosystem

Judging from the condition of ecosystems globally and regionally, the challenge of meeting human needs and development aspirations, while at the same time conserving ecosystems and biodiversity, has yet to be met. According to the Global Assessment Report on Biodiversity and Ecosystem Services (IPBES, 2019), "Nature and its vital contributions to people which together embody biodiversity and ecosystem functions and services are deteriorating worldwide."

This finding reflects previous global studies: the Millennium Ecosystem Assessment (2005) found that, "Over the past 50 years, humans have changed ecosystems more rapidly and extensively than in any comparable period of time in human history, largely to meet rapidly growing demands for food, fresh water, timber, fibre and fuel." This has resulted in a substantial and largely irreversible loss in the diversity of life on Earth.

These studies highlight that humanity is an integral part of the ecosystem which provides services that go beyond 'provisioning' and include 'regulating' and 'cultural' services. Limiting harm and maintaining such services comprise an important part of sustainable development where human activity meets the needs of the present generation without compromising the ability of future generations to meet theirs. In short, the future situation is bleak. According to IPBES:

"Goals for conserving and sustainably using nature and achieving sustainability cannot be met by current trajectories, and goals for 2030 and beyond may only be achieved through transformative changes across economic, social, political and technological factors. ... To achieve the goals humanity has set for ourselves requires urgent and concerted efforts."

Specifically with respect to climate change, the latest reports show that global GHG emissions (all-gases) rose by 6.4% in 2021 over the previous year. No single policy or change can generate the transformations required to improve ecosystems globally or address pressures such as climate change. Instead, it takes multiple ongoing efforts and adaptive institutions to address these challenges. This has particular meaning, and poignancy, in respect of the planet's marine environment.

(b) State of the marine environment

The combined ocean covers 71% of Earth's surface, comprising 1.3 b. cubic km. and absorbing 50 times more CO₂ than the atmosphere. There has been extensive damage to the marine environment and, on current trends, the future portends worse. According to IPBES, "Human activities have had a large and widespread impact on the world's oceans. These include direct exploitation, in particular overexploitation, of fish, shellfish and other organisms, land- and sea-based pollution, including from river networks, and land-/sea-use change, including coastal development for infrastructure and aquaculture."

The UN's Intergovernmental Panel on Climate Change has arrived at five conclusions (IPCC 2019):

- (a) It is virtually certain that the global ocean has warmed unabated since 1970, and has taken up more than 90% of the excess heat in the climate system (high confidence);
- (b) Since 1993, the rate of ocean warming has more than doubled (likely);
- (c) Marine heatwaves have very likely doubled in frequency since 1982 and are increasing in intensity (very high confidence);
- (d) By absorbing more CO₂, the ocean has undergone increasing surface acidification (virtually certain);
- (e) A loss of oxygen has occurred from the surface to 1,000 m. (medium confidence).

On current trends, the outlook for marine environments is also bleak, as the IPCC notes:

- Over the 21st century, the ocean is projected to transition to unprecedented conditions with increased temperatures (virtually certain), greater upper ocean stratification (very likely), further acidification (virtually certain), oxygen decline (medium confidence), and altered net primary production (low confidence).

- Marine heatwaves (very high confidence) and extreme El Niño and La Niña events (medium confidence) are projected to become more frequent.
- The rates/magnitudes of the changes will be smaller under scenarios with low emissions (very likely).

Similarly, IPBES has observed that, “Marine and terrestrial biodiversity in boreal, subpolar and polar regions is projected to decline mostly because of warming, sea ice retreat and enhanced ocean acidification. The magnitude of the impacts and the differences between regions are much greater in scenarios with rapid increases in consumption or human population than in scenarios based on sustainability.”

However, global action can still rectify the problems that are accumulating. IPBES concludes:

“Acting immediately and simultaneously on the multiple indirect and direct drivers has the potential to slow, halt and even reverse some aspects of biodiversity and ecosystem loss. ... Sustaining and conserving fisheries and marine species and ecosystems can be achieved through a coordinated mix of interventions on land, in freshwater and in the oceans, including multilevel coordination across stakeholders on the use of open oceans.”

(c) The Marine Environment and International Institutions

International institutions are critical in coordinating action across stakeholder views, setting principles, guidelines and obligations. This includes regional bodies such as the CCAMLR. The 1972 Stockholm Declaration’s Action Plan contains a diagram that still serves as a template for international environmental agreements (Figure 1).

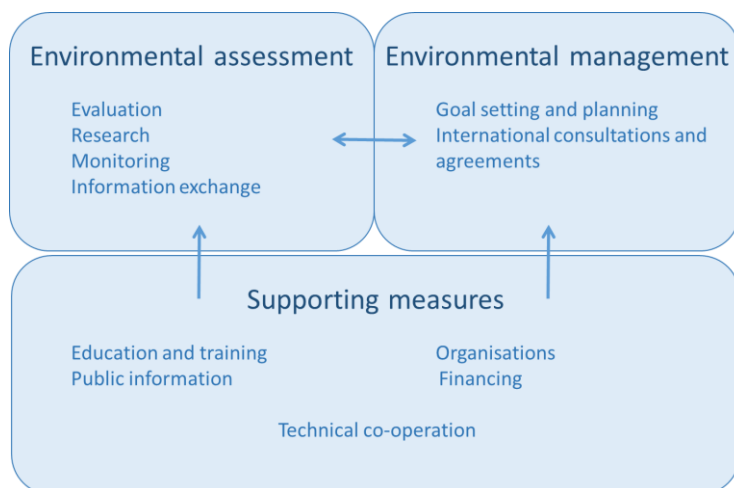


Figure 1 – Framework Diagram for Global Environmental Goals

CAMLR’s objective is ‘the conservation of Antarctic marine living resources’, based on three principles: sustainable population of harvested species (‘stable recruitment levels’); maintenance of ecological relationships; and ecosystem risk-minimisation. CCAMLR and its contracting parties face the challenge of ensuring the effective achievement of this objective, based on continuing consensus over the principles, in light of the critical state of the global and regional ecosystems. With respect to practical measures that international conservation bodies might take, the following have been advocated: ecosystem-based approaches to fisheries management, spatial planning, effective quotas, marine protected areas, protecting and managing key marine biodiversity areas, reducing run-off pollution into oceans and working closely with producers and consumers. The question arises: is the CCAMLR framework ‘fit-for-purpose’?

(d) Antarctica and the Southern Ocean in Global Context

It is evident from all sources – official policy statements over decades, contemporary scientific interest and concern, and the strengthening embrace of civil society – that the Antarctic-Southern Ocean area is, in a deep and compelling way, unique. Objectively, it is the remotest place on Earth, historically without artisanal human exploitation and thus our last chance ‘not to spoil’ an area of the planet. Above any political-legal-economic policy mix, this stark fact exists – of moral significance and imposing, perhaps, unique ethical duties upon us.

The national benefits of commercial exploitation have, to date, accrued to a sub-set of the world's states, giving rise to issues of equity and natural justice around the control and conditions of such activity in the name of sustainable global food production.

Contemporary exploitation of the continent's resources, and potential interest in future exploitation of its marine environment – not only its living resources but also the sedimentary basins and deep seabed – remain decoupled from the grim scientific insight identified above over the planet's ecosystem and biodiversity, and the human condition. Given that much of this insight derives from research done in and concerning Antarctica, there is a potential paradox ahead if further ecosystem deterioration results from future damaging treatment of the Southern Ocean. This moral-ethical dimension needs, as an imperative, to be consciously integrated into any future framing of the international community's approach to issues concerning the 'rights' and 'duties' of states in the use of the Southern Ocean.

Part B Analysis

2. The Convention and the Commission

(a) *Origin of the Convention*

Negotiations for CAMLR commenced in 1978. The context for establishing CCAMLR involved a number of factors: commercial realities and related governmental economic interests; practical considerations such as the unknown capacity of the ecosystem to cope with growing interest in commercial exploitation; the near-extinction of certain whale and seal species; global geo-political and strategic considerations; sovereignty-related issues; the impact of wider institutional developments in the UN system, and the growth of civil society interest in environmental protection. In fact, marine harvesting had already commenced in Antarctic waters, not least in krill from the 1960s – the centre of the entire food web of the region, with obvious detrimental implications for ecological stability if it were not rigorously managed.

A number of questions, therefore, require answers, in particular:

- Should the new regime be established as part of the Antarctic Treaty System or become a more open regime, perhaps as a regional fisheries arrangement such as envisaged in the United Nations Convention on the Law of the Sea (UNCLOS) negotiations?
- If the regime were to be under the ATS, how would the parties respond to the wider international pressure for UNCLOS to cover the Southern Ocean as well? And how would the system cope with emerging fishing interests by countries not party to the Antarctic Treaty?
- How would the issue of sovereign rights to maritime jurisdiction and over living resources in the ocean be resolved?
- What should be the area of application of the regime? Some of the stocks requiring management straddled the 60°S parallel, extending north in some locations to the Antarctic Convergence and possibly beyond. Was this consistent with the ATS model?
- Bearing in mind the difficult lessons from the International Whaling Commission (IWC) and Seals Convention, and the earliest organizational models then in place under Food and Agriculture Organisation (FAO) auspices for regional fisheries, how would conservation principles be formulated? How would such a new, detailed model balance conservation and exploitation? What principles should guide decision-making and what would be the actual mechanics of decision-making within the regulatory institution to be established?
- Would the new regime be only open to nation-states or extend to economic integration bodies? This issue, arising from the competence regarding marine living resources devolved by European Economic Community (EEC) member states to the European Community, complicated the negotiations.

As the CAMLR regime was being developed it was clear that a procedural framework that enabled a State with an economic interest to unilaterally block necessary conservation measures through consensus decision-making was likely to be problematic, and perhaps even result in a failed regime. CCAMLR in fact contains a 'double-veto' system. Article XII is the main decision-making provision and under paragraph (1) all decisions on substance must be made by consensus. But Article IX, 6(c) provides for a separate 'opt-out' provision for conservation measures adopted by consensus. Under this provision, a party may unilaterally indicate within 90 days of a consensus decision that it is 'unable to accept' the measure. This allows the objecting State to avoid the conservation measure becoming binding upon it. While other States may challenge this at a special Commission meeting, the unilateral right to opt out ultimately prevails. Essentially, the geo-political imperatives of the Antarctic treaty were operative for CCAMLR, which repeated the Treaty's article IV, providing the *de facto* veto.

(b) *Contemporary Problems: Marine Protected Areas, Catch Limits and Illegal Unreported and Unregulated Fishing*

Notwithstanding these challenges, CAMLR negotiations were successfully concluded after two years and it entered into force in 1982. Through the 1980s and '90s, the harvesting of krill was adequately managed, particularly as Soviet fishing declined, although fishery management of finfish and toothfish subsequently proved more problematic.

Over the past decade, concern has arisen over certain tensions within CCAMLR leading to the blockage of various proposals. To cite one report (Polar Perspectives, 2022):

“Throughout its history, Antarctica has not been free from internal or external geo-political tensions ... Both the 2021 ATCM and CCAMLR meetings made progress on aspects of Antarctic governance and management, but also raised important concerns regarding adherence to the spirit of Antarctic consensus decision-making, and divergence from customary practice.... internal disagreement is not new to Antarctic governance, but current, persistent impasses on key matters and blocking consensus to pursue narrow national interests runs counter to the obligations of parties to the ATS and established norms. Is it time to consider that all Parties to the Antarctic Treaty and the CAMLR Convention hold diplomatic discussions to map the path forward?”

The three most significant problems over the past decade have been the following:

- Failure to agree on establishing three MPAs (Antarctic Peninsula, East Antarctica, Weddell Sea);
- Non-agreement over harvesting quotas for toothfish and krill; and
- Disputes over reports of illegal, unidentified and unreported (IUU) fishing in the Area.

Marine Protected Areas (MPAs)

Marine ecosystems and species do not align with political boundaries, making political policy among countries complex and legal agreement elusive. The 1992 Biodiversity Convention (CBD) defines biological diversity as the variability of living organisms from all sources including, inter alia, terrestrial, marine and other aquatic ecosystems and the ecological complexes of which they are a part, including diversity within species, between species and diversity of ecosystems. All 196 contracting parties to the CBD are required to implement the Convention with respect to the marine environment consistently with the provisions of UNCLOS. The only UN Member State that has not ratified the CBD is the United States, having signed but lacking Senate support on the perception that it may infringe US national sovereignty, put commercial interests at risk, and impose a financial burden.

The CBD does not explicitly identify the notion of a marine protected area, but the Parties subsequently adopted specific measures. The Nagoya Protocol (2010) established the CBD Strategic Plan which then included the Aichi Targets (2011):

- Target 6 required that by 2020 all fish and invertebrate stocks and aquatic plants would be managed and harvested sustainably and legally, applying ecosystem-based approaches, in order that: overfishing is avoided; recovery measures were in place for all depleted species; fisheries would have no adverse impacts on threatened species and vulnerable ecosystems; and the impacts of fisheries on stocks, species and ecosystems would be within safe limits.
- Target 11 sets a goal of 10% of coastal and marine areas conserved by 2020, especially areas of particular importance for biodiversity and ecosystem services.

The UN SDG 14 (2015) aims to conserve and sustainably use the oceans, seas and marine resources for sustainable development through ten targets, the fifth of which is to conserve coastal and marine areas. At the 2017 UN Oceans Conference, however, it was acknowledged that, notwithstanding a large number of MPAs, only 4-6% of the world's ocean is protected (short of the 10% target), and the extent of the high seas that is highly protected is below 1%.

The Aichi targets and SDG 14 have direct implications for the Antarctic and Southern Ocean. The CAMLR Area was divided by the Scientific Committee workshop on MPAs (2011) into nine 'planning domains': Western Peninsula, North Scotia, Weddell Sea, Bouvet Maud, Crozet – del Cano, Kerguelen Plateau, Eastern Antarctica, Ross Sea, and Amundsen-Bellingshausen. To date, only two MPAs have been established in the Southern Ocean: in 2009 for the South Orkney Islands (94,000 sq. km) and in 2016 for the Ross Sea (1.6 m. sq. km), the world's largest MPA. Other proposals have not yet attracted a consensus within the CCAMLR:

- In 2012, Australia together with the EU and other Commission member states proposed an MPA for East Antarctica.
- In 2017, Argentina and Chile proposed to the Scientific Committee an MPA for Domain 1: Western Antarctic Peninsula and South Scotia (670,000 sq. km).
- In 2018, Germany and the EU proposed an MPA for the Weddell Sea (790,000 sq. km). After the adoption of a two-phased approach, Norway dropped its initial opposition, and the proposal currently has widespread support but not a consensus. Russia noted that the proposal needed to be complemented by information on the commercial potential and future 'rational use' of krill and other dominant species, while China proposed an analysis of the mechanism and extent of potential threats.

The opposition to these proposals has caused concern over the priority of marine conservation versus commercial interests and challenges regarding the ‘best available science’.

Catch Limits

The CCAMLR currently targets four types of fish: Antarctic toothfish, Patagonian toothfish (known also as Chilean sea bass), Mackerel icefish and Antarctic krill. Catch limits within each fishery are based on ecosystem management and the precautionary approach, applying the ‘best available science’ that balances conservation with the ‘rational use’ criterion, reviewed annually by the Scientific Committee. The Commission explains that:

“the fisheries operate in a regulatory framework which recognises five types of fisheries that reflect the stage of development and the level of information available to make management decisions. Catch limits in each fishery are agreed using decision rules that ensure the long-term sustainability of the fishery. These limits and the other operational aspects defined in the conservation measures determine when, where and how fisheries are conducted in order to manage the potential impacts on the ecosystem. These regulations are usually specific to a fishing season, and currently apply to toothfish, icefish and krill fisheries. Other fisheries have operated at various times in the past and are no longer active.”

A matter of concern arose in 2021 with Russia’s rejection of the proposed catch-limit for Patagonian toothfish recommended by the Scientific Committee. In response, the UK, in 2022, unilaterally issued fishing licences to its vessels in the South Georgia Fishery, causing consternation among other Commission members including the US, whose representative stated that, “What the Russians did clearly violates the spirit of science-based fisheries management. But that doesn't necessarily mean that the UK can act unilaterally.”

Illegal, Unreported and Unregulated Fishing

The issue of illegal, unreported and unregulated fishing (IUU fishing), defined by FAO in its 2001 International Plan of Action, has also become a matter of global concern. The Marine Conservation Council has developed a Certification & Eco-labelling Programme for sustainable seafood, including a Chain of Custody in which entities involved in the supply chain that handles a certified fishery catch are subject to checking.

Unsurprisingly, IUU fishing has become a problem for CCAMLR. In response, it operates a vessel licensing system, on-board observers plus VSM units, and strict documentation. The sheer vastness of the Southern Ocean, however, makes rigorous monitoring and compliance a major challenge. Political tensions within the Commission over IUU have become acute with a report in January 2020 that a Russian vessel was spotted by NZ aerial surveillance to be fishing in one area of the Ross Sea (zone 88.1, closed to fishing) while the ship’s satellite reported itself to be in another (zone 88.2). Russia responded that it had inspected the vessel’s VMS and found no faults, and suggested that the NZ data had been incorrect (although some other Members did not agree). Russia also argued that, in any event, aerial patrolling did not comply with CCAMLR inspection rules, and accordingly blocked a decision to hold the vessel and flag nation to account. For its part, China published a White Paper on its own compliance guidelines for distant-water fishing, and noted the problems raised for CCAMLR by this particular case.

Concern over these contemporary problems has prompted questions as to whether CCAMLR’s procedures and institutional standards are ‘fit-for-purpose’.

(c) *Procedural Issues: Decision-making, Scope and Policy*

The CCAMLR is not alone among international organizations, or indeed national governments, in confronting criticism over procedural shortcomings. In the case of CCAMLR, three main issues of concern over the procedural operation have been identified: decision-making and dispute settlement; scope (climate change within the conservation framework); and policy (the role of science). These are addressed below.

(i) *Decision-making and Dispute Settlement*

A number of academic studies have raised concerns over the efficacy of the procedures within CCAMLR for decision-making and for dispute settlement, and this has also been addressed in the two review panels.

Decision-making

CCAMLR’s consensus decision-making effectively accords any one of the 26 voting Commission members a veto. Although consensus proved achievable in the early decades, the last half-decade has proved to be problematic, with a few

countries (China and Russia but also other member states – Norway and South Korea) prepared to withhold consensus. It is instructive, first, to have regard for other institutions in the international system.

International procedures

International organizations employ a variety of decision-making procedures:

- The UN General Assembly requires that a binding decision on ‘important questions’ is made by a two-thirds majority; on other questions by a simple majority. The decision on whether a matter is ‘important’ is taken by simple majority (unlike the CCAMLRL Commission which requires consensus on whether a matter is one of ‘substance’).
- UN Framework Convention on Climate Change (UNFCCC) makes decisions by consensus, giving rise to slow progress and excruciating moments.
- IMO and UNEP make decisions by simple majority.
- FAO’s Committee on Constitutional and Legal Matters stipulates that, if consensus fails, it will decide a matter by majority.
- Modern regional fisheries management organizations (such as the South Pacific RFMO) adopt a qualified majority voting regime with a constrained opt-out procedure that requires prescribed alternative measures that are effectively equivalent to the original proposal.

The most problematic of all such bodies remains the UN Security Council, with the following record:

- triple vetoes (France, UK, US) on thirteen occasions from 1974 to 1989, covering situations in Namibia, South Africa, Libya and Panama;
- dual vetoes (UK, US) on nine occasions (from 1970 to 1987) covering what was then known as Southern Rhodesia, Falklands/Malvinas, Namibia, Southern Africa and South Africa;
- dual vetoes (China, Russia) on thirteen occasions (from 2007 to 2022) covering Myanmar, Zimbabwe, Syria, Middle East and Venezuela;
- single veto (Russia) on climate change (2021).

A recent development has occurred requiring an automatic review of Security Council vetoes. In April 2022, the General Assembly adopted without a vote a resolution sponsored by 83 Member States under which it will henceforth meet within 10 working days following any Council veto, to discuss the situation and consider the veto. A vetoing State is obliged to give explanatory reasons for its action. The initiator of the proposal (Liechtenstein) cited a “growing concern” that the Council had found it increasingly difficult to carry out its work in accordance with its mandate under the Charter, “of which the increase in the use of the veto is but the most obvious expression”. The resolution was ‘straightforward, legally sound and politically meaningful’. In May, China and Russia vetoed a draft Council resolution that would have strengthened sanctions against North Korea, triggering the first Assembly meeting of this kind.

The question that arises is whether a modification of the Convention’s articles governing decision-making may be politically possible, or perhaps even legally appropriate in terms of historical intent? In this respect, CCAMLRL is not alone – the question reflects an underlying dilemma of the legitimacy of international organizations in the contemporary era. Nonetheless, the question is addressed below.

In cases where a vote is not recorded and a consensus is the preferred method of decision-making, three methods can be identified.

Method A

There is no option to veto; opposition can be recorded for the record but provided a majority (without vote) exists, a decision is made that is (i) binding or (ii) not binding on all.

Method B

There is an option to veto; simply record opposition, and no decision can be made. No agreement

Method C

- (a) Accept consensus, articulate opposition but not for the written record
- (b) Accept consensus, register opposition for the record
- (c) Object to consensus, block agreement; which imposes an obligation on the body to

- (i) Continue discussion indefinitely in the same meeting, without continuing to the next agenda item, until an agreement is reached.
- (ii) Defer discussion, and return to it later in the meeting (same day or subsequent day)
- (iii) Defer discussion until the next meeting (annual or whatever frequency)

CCAMLR

By way of reform with regard to CCAMLR, five examples could be considered over proposals that have near, but not total, unanimity.

Non-blocking options:

- 1. Opposition remaining verbal, without objection recorded.
- 2. Opposition with objection recorded but concurrence to the proposal acknowledged for group action.

Blocking options:

- 3. Opposition with objection recorded by two or three Members, and proposal for group action blocked.
- 4. Opposition with objection recorded by one Member, and proposal for group action blocked.

Facilitating options:

- 5. In either option 3 or 4, the Commission does not proceed to the next agenda item and discussion continues (including with external input as determined by the Chair) until some form of consensus for group action is achieved or agreement over no action is recorded.

A more ambitious possibility is an amendment to CAMLR requiring a two-thirds or three-quarters majority (18 or 20 Commission Members respectively) over matters of substance, including a determination of what constitutes a matter of substance requiring a simple (50%) majority (14) with or without an opt-out. The potential for the 26 Members to proceed with any of the options, however, is tempered by the early record of ATCPs opposing and blocking action at the United Nations to make Antarctica a universal matter of concern. While major countries (China, India, Malaysia) have subsequently joined the ATS/CCAMLR framework, the question of universality has not disappeared: the framework in 2022 covers some 80% of the global population but only 18% of the total membership of the United Nations.

The challenge of procedural change can be disaggregated into a separate political and legal aspects:

- whether modifying or replacing consensus decision-making is a politically-sensible option considering a globally-disparate range of national interests suggests that issues one Commission member might support may be complemented by subsequent, less palatable, proposals;
- how an international body can change from an agreed decision-procedure when, as noted previously, any rule-change itself requires consensus.

Whether these difficulties are materially eased, by confining any proposed change to certain matters only, becomes a matter of judgement. Some states may see still this as too high a 'bar of reform'.

There may be some value in exploring some modification of the consensus and 'opt-out' provisions. This might be accomplished by the following:

- amending Article XII (1) so that, while consensus is preserved for certain categories of policy decisions under Article IX (1) and various administrative and financial matters under Article XVII and Article XIX, specific conservation measures under Article IX (2) could be adopted under a modified consensus rule requiring a two-thirds majority, or negative votes by two or three members to block a decision: and
- changing the unilateral 'opt out' rule in Article IX (6) (d) so that, after an 'opt out' is notified and a review of a conservation measure by the Commission has been triggered, it will require at least three members to support the 'opt out' becoming permanent.

There may be CCAMLR members, especially those with active economic interests in the region, reluctant to renegotiate the Convention. The issue will be important to China and Russia. Other Commission Members concerned over protecting 'sovereign rights' may also be reluctant to abandon the consensus principle. The argument may be that, while the system can be slow, it is not broken. The difficult but ultimately successful example of the 2016 agreement on the Ross Sea MPA may

be cited as a case where the system works. Notwithstanding these considerations, however, it is possible that a well-timed and well-crafted initiative for reform of CCAMLR decision-making could have positive results.

Dispute settlement

Both the AT and CAMLR explicitly cite the arrangements in the UN Charter for dispute settlement (negotiation, inquiry, mediation, conciliation, arbitration, judicial settlement or other peaceful means). CAMLR stipulates that any dispute over the ‘interpretation or application’ of its text shall require recourse to such settlement and, if that fails, the dispute will be referred to the ICJ or to arbitration (an Arbitral Tribunal being constituted in the Annex). But such referral is subject to the consent of all Parties.

The 1st Panel Review regarded the dispute settlement mechanism as unsatisfactory, requiring a strengthening through Convention amendment to introduce compulsory jurisdiction akin to the UNCLOS arrangement. The issue has not been taken up, however, and the 2nd Review did not address this.

A review of the general disposition of ATCPs to refer a dispute to judicial or arbitral settlement is not encouraging. Only 17 of the 29 ATCPs currently accept compulsory ICJ jurisdiction including only one of the Security Council’s P-5 (UK). Many have refused voluntary submission to the Court (Argentina/Chile against UK) over Antarctic claims, 1955; US over Nicaragua, 1995; UK over Mauritius, 2019; Russia over Ukraine, 2021/22; and China’s refusal to recognise UNCLOS arbitration (against Philippines, 2016). Nor is state practice within the ATS encouraging in this respect: there is not one instance of a formal dispute settlement being triggered over six decades of argumentation.

It is an option for any group of UN Member States to submit a draft resolution to the General Assembly requesting an ICJ advisory opinion on, for example, whether the objectives of CAMLR have been met. Two difficulties may be encountered with this – one political, one legal. The historical reluctance of ATCPs to involve the UN in anything to do with Antarctica suggests that the adoption of such a resolution would be a challenge. Even if a resolution were adopted, there has been some caution within the Court to explore elusive legal issues that draw on contestable scientific evidence.

Recourse to judicial or arbitral settlement rests on the willingness of States to rely on and respect the rule of law (including acceptance of external judicial judgements), whereas recourse to negotiation or mediation rests on the freedom to make geo-political judgements and engage in creative initiative. The latter would appear to be most pertinent in a decade of high tension.

Another model of conflict resolution involves ‘implementation and compliance committees’. The UNFCCC Paris Agreement, for example, established such a committee with the procedural intent of being ‘transparent, non-adversarial and non-punitive’, with due regard to national capabilities and circumstances. This reflects the intent to resolve conflicts before they reach a plenary session, and acknowledges a general reluctance to accept binding decision-making. In the case of CCAMLR, the Standing Committee on Implementation and Compliance (CCAMLR) (SCIC) reviews the operation of conservation measures and compliance systems, advising the Commission on any refinements. Its terms of reference could perhaps be expanded to encourage the resolution of difficulties before they reach the Commission.

(ii) Scope: Climate Change within the Conservation Framework

For some time there has been recognition of the mutual impact between climate change and Antarctica / Southern Ocean Area (including on the Convergence boundary). One of the issues of concern has been the capacity of CCAMLR to integrate new environmental issues such as climate change into its policy framework.

In 2008 the 2nd Review Panel, applying the precautionary principle and an ecosystem approach to fisheries, anticipated the need for subsequent agreements within the ATS on global environmental concerns such as ozone depletion, climate change, biological diversity and non-native species. It concluded that climate change posed a particular challenge because changed ecological processes, productivities and species invasion could result in major change to the quantity and location of fishery catches consistent with Article III. It recommended a strategy for krill fishery development which, *inter alia*, allowed separation of the effects of fishing from climate change and natural variability.

Picking up on these recommendations, the 2nd Review Panel (2017) sounded a note of extra urgency since the previous decade. The Southern Ocean ecosystem could be experiencing long-term directional change (compared to random variation) due to climate change, affecting habitat suitability. The Panel observed that other important aspects (environmental and climate change impacts), were not being systematically considered in the context of the activities undertaken in the Convention Area.

Further effort by the ATS Scientific Committee on Antarctic Research (ATS-SCAR) to enhance collaboration with the Committee for Environmental Protection (CEP) was encouraged, and also more broadly between CCAMLR and Antarctic Treaty Consultative Meeting (ATCM). The best available science needed to be assembled and communicated to CCAMLR for deliberation on conservation measures. SCAR should evaluate options for ecosystem-based management of all CCAMLR fisheries, taking into account ecosystem and climate change and the types of data that can be reliably obtained (RP2 Rec. 6). And there should be engagement with SCAR, Southern Ocean Observing System SOOS and the Integrating Climate and Ecosystem Dynamics in the Southern Ocean along with other relevant bodies to encourage them to address such questions (RP2 Rec. 21).

The fact that little has been achieved in extending CCAMLR to include climate change is unsurprising. The experience with respect to climate change in the UN system is that both China and Russia oppose other agencies beyond the UNFCCC-COP from dealing with climate change. In the Security Council, China opposed the idea of adding it to the Council's agenda when it was first raised in 2007. In 2021 both India and Russia (the latter with a veto) opposed a draft resolution that would have the Council incorporate the security implications of climate change in conflict management strategies, China abstained. This should not, however, prevent ATS-SCAR or SC-CCAMLR from incorporating scientific information on climate change in its work and recommendations on marine conservation in the Area. The implications that may arise from changes in the Area for the global climate are significant – the Southern Ocean absorbing some 10% of global CO₂ emissions.

(iii) *Policy: The Place and Role of Scientific Evidence in Policy-making*

A key question in the context of CCAMLR is the role of scientific enquiry. The text of CAMLR gives scientific information a special role and encourages a rational approach to policy design, with the Scientific Committee researching and analysing the best available information before designing recommendations for the Commission to consider. For its part, the Commission has two standing committees: on implementation and compliance, and on administration and finance. Figure 2 presents the basic institutional structure of CCAMLR and its regular decision-making process.

CCAMLR includes a Scientific Committee which meets annually providing the 'the best available scientific information' on harvesting levels to the Commission which must take account of its recommendations. The Committee includes five Working Groups. Several meet annually, including, the Working Groups on Ecosystem Monitoring and Management (WG-EMM), Fish Stock Assessment (WG-FSA), Statistics, Assessments and Modelling (WG-SAM), Acoustics, Survey and Analysis Methods (WG-ASAM). And one, the Working Group on Incidental Mortality Associated with Fishing (WG-IMAF), meets upon the request of the Scientific Committee.

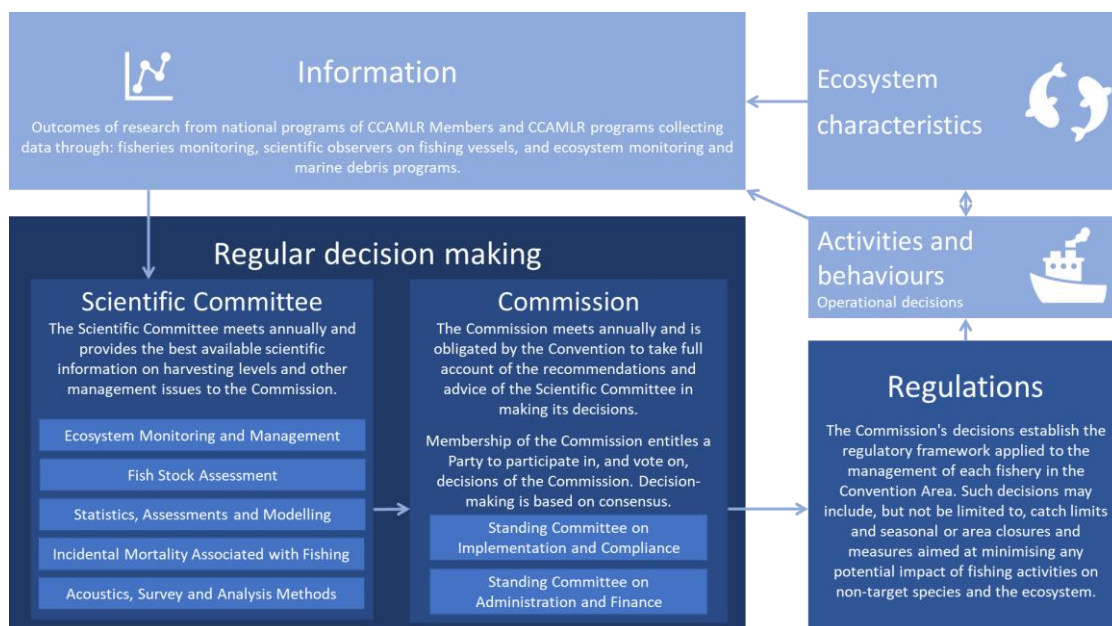


Figure 2 – Institutional Design of CCAMLR

Some of the tension in CCAMLR revolves around disputes over what constitutes the ‘best available science’. The 1995 FAO Code of Conduct for Responsible Fisheries stipulates that the absence of adequate scientific information should not be used as a reason for postponing or failing to take conservation and management measures. For its part, however, China contends that a broad, scientifically-based management framework is needed to quantitatively analyse how to achieve a balance between conservation and ‘rational use’. It queries whether the current CCAMLR science meets the required standards to that end. The fact of its fishing limits on some domestic rivers increases the importance of China’s distant water fishing. It then seeks to balance the global interests of conservation and food production in terms of its national action, conveying a frustration that its scientific work in this respect is not duly recognised.

In 2008 the 1st Review Panel concluded that, to a considerable extent, the quality and diversity of the expertise involved in Working Groups depended on the contributions and engagement of the Members. That had, to date been delivered to a high scientific standard, but its input had been provided by a relatively small number of Members. The Panel concluded that the scientists engaged in the work of SC-CAMLR were generally of high calibre, but the Panel was concerned at the decreasing number of scientists engaged in Antarctic marine science. The Commission needed to consider how it could provide enhanced support to the work undertaken by SC-CAMLR. CCAMLR Members should renew efforts to encourage their scientists to engage in SC-CAMLR and research in the Convention Area. This would require an increase in financial resources.

The 2017 2nd Review Panel recommended that the Scientific Committee, in consultation with ATS-SCAR, external experts and other organisations, deliver an initial assessment of the status, trends and possible future trajectories of Antarctic marine living resources, and the interactions of fisheries with them.

While the issue of ‘best available science’ is a legitimate matter for debate, it is important that the science does not become politicised. Perhaps a new and independent scientific panel, along the lines of the UNFCCC’s IPCC would enable Commission Members to receive a single document shared and ‘owned’ by them all, and could go some way towards de-politicising the ‘best available science’. Any refinement of CCAMLR’s SCIC procedures suggested in section (i) above could be related to such an independent panel.

(d) Institutional Standards: Accountability and Transparency

The issue of accountability has arisen for debate. There is concern that the Commission lacks full accountability, but a broader issue is the scope of accountability: does it apply to the 29 ATCPs and 26 CCAMLR Members towards other contracting parties or towards all 193 UN Member States? Accountability rests essentially on a commitment to transparency.

The issue of transparency has dogged the Commission. The questions arose, for example, whether the full reports of SC-CAMLR and the various working groups should continue to be translated into the four official languages (Chinese still being excluded in 2022). The 1st Review of 2008 was “strongly of the view” “that in the interests of transparency and broader participation” it was important that the full report of the Scientific Committee and Working Groups should continue to be translated into the four official languages. For this measure to achieve maximum effectiveness, there would need to be transparency amongst CPs in relation to the domestic legislative arrangements they enact. Loopholes available to nationals and operators to circumvent Conservation Measures will be minimised if CPs ensure that their domestic arrangements are not only greatly strengthened but also, to the extent possible, harmonised. The Panel judged that such transparency should reduce or eliminate opportunities for ‘unscrupulous operators’ to exploit different legal standards in domestic legislation. Good practice suggested that where infringements occurred, they should be reported in a timely manner to enhance transparency of operation and demonstrate that CPs are fully implementing their obligations. Readily available information on domestic legislation would further aid transparency.

The Panel also considered the role of observer groups within CCAMLR. It acknowledged CCAMLR’s efforts to engage with a wide range of observers and encouraged CCAMLR to continue its efforts to maximise its transparency and seek broader input to decision-making, particularly through the engagement of observers at annual meetings. It commended CCAMLR, and in particular the Secretariat, on the considerable effort that it has made to ensure that material, such as meeting reports, were being made available to members, observers and the public in a timely manner. The Scientific Committee, however, is still not open to observers, and the Commission itself has admitted few observers: confined to industry bodies associated with krill and toothfish harvesting plus one civil society body (ASOC).

The Review Panel encouraged CCAMLR to maintain its proactive approach of engaging with Non-Contracting Parties so as to ensure the effectiveness of its conservation measures. It also reiterated its suggestions made with respect to ensuring that new parties (or prospective parties) were made fully aware of their obligations.

An example of the effectiveness of transparency in marine conservation and fisheries management can be seen in the Southern Ocean fisheries for Patagonian toothfish between the late-1990s and early-2000s, where CCAMLR was unsuccessfully managing the abundance of illegal, unreported and unregulated (IUU) fishing. In light of this, industry and environmental NGOs established the International Southern Oceans Longline Fisheries Information Clearing House (ISOFISH), which successfully exposed many of the actors involved in the IUU fisheries and drew attention to the threat posed by IUU fishing in the Southern Ocean. This placed the onus on CCAMLR parties to take further action.

A number of Commission Members advocated for the adoption of measures to combat IUU fishing, including the introduction of a Catch Documentation Scheme to eliminate market access for IUU catches. In 2001 the Catch Documentation Scheme was adopted by CCAMLR. The Review acknowledged the efforts of CCAMLR to engage with a wide range of observers but concluded that its transparency could be improved, specifically, by making its reports public in a more timely fashion, streamlined reporting structure, website redevelopment and allowing a greater number and type of observers.

Similar narratives exist for other international fisheries, including the management of Atlantic bluefin tuna by the International Commission for the Conservation of Atlantic Tunas (ICCAT); these cases prove the necessity of maintaining stakeholder participation and the role of transparency in maintaining the efficacy of marine conservation and fisheries management. Documents are not immediately available, but instead have to be requested, giving an impression of some secrecy. In most international organisations, meeting documents are made available to the public, enhancing transparency. Other changes could also enhance scrutiny and public awareness of CCAMLR, for example, holding meetings outside of Hobart in various capitals around the world, and having senior officials attend.

In a broader context of reforming institutional standards, an unlikely role model for CCAMLR may be certain initiatives by UN Member States on Security Council reform. Following the 2005 World Summit, a group of five small states known as the S-5 (Costa Rica, Jordan, Liechtenstein, Singapore and Switzerland) launched an initiative to improve the Security Council's working methods. In 2012, the S-5 made a strong effort to put a draft resolution before the General Assembly which recommended that the P-5 consider refraining from using the veto on action aimed at preventing or ending genocide, war crimes and crimes against humanity. Following intense pressure from the P-5, the draft was withdrawn just hours before being put to the vote.

In 2013, a bigger group was formed known as the Accountability, Coherence and Transparency group (ACT). Composed of 25-member states, ACT proposed in July 2015 a 'Code of Conduct regarding Security Council action against genocide, crimes against humanity and war crimes'. The Code calls upon all members of the UNSC – elected and permanent – to not vote against any credible draft resolution intended to prevent or halt mass atrocities. On 23 October 2015, the Code of Conduct was officially launched at the UN by the Foreign Minister of Liechtenstein and submitted to the Secretary-General. The Code of Conduct has been signed by well over 100 member states, including France and UK.

In 2001, before the S-5 group was established; France first proposed a 'regulation of use of the veto'. This is a remarkable, and largely unacknowledged, example of the P-5 states thinking flexibly and constructively on Security Council reform. In 2013, France formally re-proposed the idea at the head-of-state level to the UN General Assembly. Under the proposal, the P-5 would voluntarily and collectively undertake not to use the veto where a mass atrocity has been ascertained. As France explains it, the veto "should not and cannot be a privilege; it implies duties and a particular responsibility to forestall and resolve international conflicts, ensure effective compliance with international law and protect civilian populations". In 2014, during the General Assembly session, France and Mexico co-chaired a ministerial meeting of member states including the four other P-5, with civil society attending. In January 2015 an international seminar was organised by the French Foreign Ministry in Paris. In July 2015 France, supported by Mexico, launched a Political Declaration on suspension of veto powers in cases of mass atrocity (genocide, war crimes or crimes against humanity).

This has paid off. In 2021, the General Assembly adopted a resolution pushed by Liechtenstein requiring that, if a Security Council veto is cast, the matter must be taken up in the General Assembly within ten working days, and the P-5 State that has vetoed must explain its reasons. This has already been put into force.

International peace and security issues and regional conservation issues are entirely different, but the underlying geo-political forces affecting them are, in fact, common to all UN Member States.

3. CAMLR within the ATS Legal Framework

(a) Context: The Antarctic Treaty and Subsidiary Instruments

An understanding of CAMLR and its Commission requires historical placement within its parental framework, namely the Antarctic Treaty System (ATS), and more broadly again, within the universal framework of the UN system as a whole and associated other international organizations. No aspect of international law or decision-making exists in isolation. Any treaty or derivative instrument must be understood in terms of comparable legal documents, both historically and thematically. This chapter reviews the issue of CAMLR/ATS decision-making within the dual context of the international legal framework and national geo-political interests.

As a legal instrument, CAMLR was derived from and continues to operate as an integral part of, the Antarctic Treaty System, with the parent instrument being the Antarctic Treaty (1959/61). It is one of the three main ATS implementation measures, on the protection of seals (1972/78), conservation of marine living resources (1980/82) and environmental protection (1991/98). This is comparable to the manner in which legal framework texts governing other parts of the global commons have operated, with derivative instruments implementing the framework agreements governing outer space, the atmosphere and the oceans. There is thus an evolutionary dimension to the analysis through to the present decade.

In June 1958 the US hosted a twelve-nation negotiation for an Antarctic Treaty. The group was comprised of the seven territorial claimants and five others (US, USSR, Belgium, South Africa and Japan) which collectively were already maintaining 55 scientific bases on the continent as part of IGY. Four negotiating countries (US, USSR, UK, NZ) supported UN trusteeship over Antarctica, but other claimant States remained opposed. Argentina's proposal for a ban on nuclear testing proved controversial, being supported by Chile and USSR but opposed by the US until near the end.

Evolution Over Seven Decades

Consistent with the Treaty, a number of subsidiary instruments were negotiated in the 1960s and '70s, *viz.* the Agreed Measures on Fauna & Flora (1964; EIF 1982); the Convention for the Preservation of Antarctic Seals (1972; EIF 1978); and the Convention on Antarctic Marine Living Resources (1980; EIF 1982).

Unsurprisingly, the geo-political framework has altered over the seven decades since the 1950s. In that decade and the three following, there were two strategic blocs (led by US and USSR) entwined in a bilateral rivalry. Direct confrontation centred on Europe but also played out in Asia, Africa and Latin America. Matters were intense and dangerous but relatively simple. The 1990s witnessed a brief half-decade of unprecedented multilateral cooperation but a spate of crises in Africa and south-east Europe fragmented the nascent unity, while the intensification of non-state terrorism after 2001 further complicated global inter-relationships.

To date the 21st century has witnessed the following geo-political developments:

- **China:** The economic and technological rise of China, followed by a more assertive political and military role in the aspiration to recover what it sees as its former global prominence, more reflective of its population size.
- **Russia:** A reaction to its diminished post-Soviet role in global affairs, and an aspiration to recover its leading political role, akin to its technological and military strength of the 1950s/60s.
- **US:** A struggle to come to terms with two challenges: a diminished capacity to influence a global outcome plus internal convulsion arising from its 2020/21 domestic experience.
- **Europe:** The European Union struggling to come to terms with two challenges: the exit of one member and a series of judgements on which applicant members meet the criteria for membership.

Beyond this, the international community has yet to determine the appropriate position and role of India which is projected to become the largest country by population in 2023. The regions of Africa and Latin America also require due acknowledgement in terms of appropriate institutional positioning.

In a more specific sense, the geo-politics of Antarctica and the Southern Ocean are by no means identical, but the broader strategic background of global geo-politics applies equally to both.

Accession by China and India

In 1983, two major developments affected the ATS: India and China both acceded to the Antarctic Treaty, and the UN General Assembly finally agreed to include Antarctica as an agenda item.

India chose to join the existing Treaty and participate as a Consultative Party in 1983, relinquishing its previous effort to have Antarctica as a UN General Assembly item. For its part, the Peoples' Republic of China (PRC) remained outside the United Nations from 1945 to '71, with the Republic of China (ROC) being the accepted member during that period. The

PRC declined to participate in Antarctic research during the IGY because of Taiwan's involvement. In 1971, however, the PRC replaced the ROC as the UN Member State. It acceded to the Antarctic Treaty in 1983, becoming a Consultative Party with voting rights in 1985.

United Nations Consideration

Despite India's attempts in the 1950s, the Antarctic Treaty attracted little international attention through the 1960s and '70s, apart from the Seals Convention (1972/78). The 1980s, however, witnessed a renewed international focus on Antarctica with the entry into force of CAMLR in 1982. The same year, Malaysia renewed the attempt to inscribe 'The Question of Antarctica' on the UN General Assembly agenda:

"It is now time that the United Nations focused its attention on Antarctica. A number of countries have in the past sent expeditions there which have not limited themselves to mere scientific exploration but have gone on to claim huge wedges of Antarctica for their countries. ... those uninhabited lands do not legally belong to the discoverers ... Like the seas and the sea-bed, those uninhabited lands belong to the international community. The countries now claiming them must give them up so that either the United Nations can administer those lands or the present occupants can act as trustees for the nations of the world."

In 1983 the UN General Assembly included Antarctica on its agenda. For the next two decades, confrontation played out in the Assembly, the UN debate reflecting a 'philosophical' dispute between a majority of the 158 Member States and the 19 ATS Parties (16 consultative, three non-consultative):

- The majority argued for UN trusteeship; recognition of Antarctica as the fourth global commons to be managed in a similar manner to the other three (outer space, oceans, atmosphere); rejection of the idea of territorial claims; and exclusion of South Africa's apartheid regime from ATS participation.
- For their part, the ATS countries defended the Treaty as the first demilitarised zone of the Cold War era where scientific cooperation could flourish.

Notwithstanding these differences, a workable accord was agreed under which the General Assembly adopted a resolution (without vote) requesting the Secretary-General to submit a study on all aspects of Antarctica, taking into account the Treaty and other relevant factors and requesting those States undertaking scientific study to lend him whatever assistance may be requested. The SG's Report of 1984 was essentially a compilation of ATS activity with the views of the 54 Member States (of the 158 total membership which had commented, duly noted by the Assembly (without vote).

In 1985, however, with the commencement of negotiations by the 18 ATS consultative parties over a minerals regime in which they would have exclusive rights subject to their agreement, the debate intensified. The draft UNGA resolution invited the Secretary-General to expand his annual report to encompass the relationship between the ATS and UNCLOS, and to keep him informed about their mineral negotiations. It also urged the ATCPs to exclude the apartheid regime of South Africa from their meeting.

The ATS parties along with a few other countries did not participate in the voting. The rationale was advanced by Australia on behalf of the group that, "consensus offers the only realistic basis for General Assembly consideration of Antarctica". The ATS Parties "will be compelled to reconsider their further participation ... unless consensus can be restored". In doing so, these countries chose to apply the procedural method of consensus decision-making from the Antarctic Treaty System to the UN General Assembly. In fact, the Assembly's Rules of Procedure provide for a two-thirds majority of those present-and-voting on 'important questions' and a simple majority on all other issues.

With regard to South Africa, which was expelled from the General Assembly from 1974 to '94, the ATCPs advanced similar argumentation in the 1987 debate, expressing:

"continuing disappointment at the lack of consensus in the General Assembly ... Treaty Parties had decided to reflect their views in a way that did not affect their position on the successful functioning of the Antarctic Treaty. Treaty Parties reiterated their belief that the General Assembly's consideration of Antarctica could proceed usefully and realistically only on the basis of consensus. ... The decision of these Parties was based on their support for the principle of universality in the United Nations; on the importance they attach to the view that there is no valid basis under international law for limiting the exercise of a Party's right under the Antarctic Treaty; and that it is essential that all States Parties that undertake activities in Antarctica be bound by and carry out their obligations under the Treaty."

In terms of decision-making, this argument placed the Antarctic Treaty above the UN Charter (in violation of Article 103), and the ATS procedural rules above the UNGA's procedural rules. It also placed South Africa's treaty obligations in

Antarctica above *ius cogens*, based on the 1963 Declaration on the Elimination of All Forms of Racial Discrimination, the International Convention of 1985/68; and the identification by the International Law Commission of the prohibition of apartheid as a peremptory norm under customary international law.

From 1985 to '93 the confrontation continued. The General Assembly called for the Secretary-General to be invited to the annual ATCMs and repository of its deliberations and decisions; South Africa to be expelled from the ATCMs; the minerals negotiations to be halted until all UN Member States could participate; and a UN scientific research station to be considered. For their part, the ATCPs refused to agree to any of these requests or to participate in the vote on the annual resolution.

From 1994, a degree of cooperation developed, with the ATCPs adopting a policy of regularly sending a report on their annual meeting to the UN Secretary-General, and accordingly a collaborative role on the Meetings to the UNEP Executive Director. This was welcomed by the General Assembly in a resolution adopted without vote (consensus) for the first time since 1984, and with the Assembly deciding to return to the item every few years (1996 and '99; 2002 and '05), deciding thereafter simply to 'remain seized of the matter'.

Future Scenarios

A report containing future scenarios of the ATS in 2040 was developed by an expert group (Liggett et al, 2017) which envisaged political, economic, social, technological, legal and environmental change by 2040, as follows:

- "Growth in membership has the potential to stymie the effectiveness of the ATCM given its consensus decision-making provisions. Without renewed investment (political and financial), many of the key challenges facing the system may fail to be adequately addressed, bringing into question the effectiveness and relevance of the ATS.
- There is potential to see an increasing shift towards commercial exploitation of the region, including through terrestrial and marine bioprospecting, marine resource harvesting and land-based tourism as a result of the growing number of treaty parties, the majority of which favour an economic return (as opposed to a research / knowledge benefit) on their Antarctic investments. In the 2040s we may see some countries suggesting that they may call for a conference to review the Protocol (and its mining prohibition) after 2048.
- The dominance of tourism and fishing as the primary Antarctic activities in the 2020s may well lead to a growing social acceptance of a more commercial element to Antarctic activities. Despite ongoing advocacy by the e-NGO groups, society will potentially be less concerned about maintaining 'the last great wilderness' than it was in the 1980s. Discussions at Antarctic Treaty meetings are likely to focus more on access and benefit sharing of Antarctic resources as a result.
- It is possible that advances in information technology will allow treaty parties (individually and collectively) to have an improved understanding of climate and environmental change in Antarctica, and that modelling will provide a clearer indication of future anticipated change. This may provide an impetus to the political system to ensure it adequately responds to this new knowledge.
- There is a risk that Antarctic Treaty law becomes increasingly less valid or relevant. Membership growth means policy and management decisions are already taking longer to negotiate and even longer to enter into force.
- By 2040 the effects of a changing Antarctic climate will be significant across many parts of the continent and Southern Ocean (including through further ice-shelf collapse, warming seas, ice loss from the continent and changing native biodiversity). ATS decision-making processes may not be able to keep pace with these changes."

Some of these changes are already underway. Others are essentially warning about potential problems that are currently identifiable but amenable to political solutions.

(b) Legitimacy: Geo-political and Legal Issues of ATS / CAMLR

While the ATS was a positive achievement in establishing peace, demilitarisation and scientific cooperation during the tense decade of the 1950s, the geo-strategic dynamic has, as noted above, fundamentally evolved over the subsequent half-century. Three phases can be identified in the AT /CAMLR evolution.

In the 1950s through to the '80s, the 'original twelve' defeated India's attempt to bring Antarctica onto the UN agenda and established the exclusive Antarctic Treaty System, refused to vote in General Assembly draft resolutions on Antarctica, and engaged the ROC rather than the PRC in the shared activities.

From the mid-1980s, two major powers, China (PRC) and India, dropped their opposition and joined the ATS. The item appeared on the UN agenda from 1985 to 1999, resulting in a degree of cooperation between the ATS and the UN (particularly UNEP and specialised agencies).

In the 21st century and particularly the past decade, an increasing geo-political tension has surfaced in CCAMLR meetings, which prompt concern over competing interpretations of the Convention's purpose and a resulting lack of consensus. The tension reflects the broader issue of global strategic rivalries, and the procedural problems play out in different priorities accorded to the precautionary principle towards ecosystem preservation, and the 'rational use' criterion for the sustainability of marine living resources to meet the needs of national and global food production.

If a breakthrough is to be made and effective progress achieved, the geo-political relationships among the major contracting parties to both CAMLR and the Antarctic Treaty need to be improved. This is not easy in the 2020s, a decade of unusually high strategic tension. Yet critical times offer opportunities to make qualitative moves in areas beyond the immediate realms of tension. While tension is high in Europe and Asia, the potential for a qualitative move in Antarctica exists. If the opportunity is seized and progress is made, this will not only have direct benefit for Antarctica and the Southern Ocean, but also indirect benefit elsewhere. The commercial interests of fisheries and tourism must be regarded as subordinate to the imperatives of biological diversity, ecosystem conservation and climate stabilization. To that end, the role of civil society in the discussions that surround official negotiations must be respected.

The Antarctic Treaty was a seminal and positive act of the early UN era, based on principles of peaceful cooperation and demilitarisation, with scientific progress as the portal to these goals. The ATS, however, is distinct in acknowledging historical territorial claims, and voting rights are confined to 29 out of 193 UN Member States, unlike comparable instruments regarding outer space, the oceans and the atmosphere. The relationship between global and national jurisdiction remains contentious. In his 2021 report, *Our Common Agenda*, the UN Secretary-General, based on advice from the UN Legal Counsel, made it clear that Antarctica is part of the global commons:

"The global commons usually refer to natural or cultural resources that are shared by and benefit us all. They include the four conventionally understood commons that are beyond national jurisdiction – the high seas, the atmosphere, Antarctica and outer space – all of which are now in crisis."

In 2022 some ATS members rebuked the Secretary-General for an 'inaccurate' report. In February, eight of the 29 Consultative Parties (the seven claimant states plus the US) wrote to the UN Legal Counsel to 'make some observations', namely, that:

"Whilst the concept of the 'Global Commons' has developed in political and economic writing, it is not a universally accepted term, nor is it defined in international law. We consider that the Report's description of the Global Commons to include some areas as 'beyond national jurisdiction' is not accurate in a number of ways. From a legal perspective, there are particularities about each of these areas, which account for the different legal regimes which govern them."

In April 2022 in advance of the 44th ATCM, the eight countries informed all 54 ATS Parties of their letter to the UN, which had 'erroneously' included Antarctica as part of the global commons. The 44th ATCM convened in joint physical/virtual session from 22 May to 2 June 2022. The public record currently has no reference to the item.

This raises the question of decision-making in the ATS. While the Antarctic Treaty requires implementation measures or treaty amendments to be unanimous (Art IX.4), it is unlikely that a group within the Consultative Party membership can speak in the name of the whole. What is clear that Australia and New Zealand, Chile and Argentina, the US, and three European countries one of which is an EU member) do not accept the UN legal advice that Antarctica is a part of the global commons. It is not clear, however, that all States within the ATS are within this category – Portugal, for example, hopes that "as part of the revision of the ATS in 2041, signatories can agree on the limitation (or prohibition) of manifestations of sovereignty over Antarctica's territory and of the maintenance of permanent military or civilian bases. Portugal notes however, and supports – the proliferation of scientific research missions as actually conducive to international cooperation and to Antarctica's statute as Reserve of Humanity /Global Commons -- to be protected and destined only to scientific studies."

The claimant states had previously made clear their opposition to the status of Antarctica as a global common, arguing that the Treaty ‘freezes’ disputes over claims rather than any claim itself and that, in fact, it preserves the claims, *viz*:

- In response to the original UN General Assembly request for States’ views on the matter, Chile made the following assertion: “In addition Article IV achieved the impossible – freezing the territorial disputes which had constituted another dangerous hotbed of tension. ... [c]ountries which are party to the Treaty and which claim sovereignty in the continent were thus able to express their willingness to accept-indefinitely, so as the Treaty remains in effect, a modus vivendi with respect to their territorial claims.. [The Treaty is] ... a unique juridical system.”
- For its part, New Zealand offered the following correction: “... the Antarctic Treaty does not, as is sometimes suggested, specifically ‘freeze’ or ‘set aside’ sovereignty. To the contrary, Article IV specifically preserves and protects the legal position of all parties.”
- In the Assembly debate the previous year, however, Australia had argued that the ‘common heritage’ was unacceptable for Antarctica since it was not beyond national jurisdiction because seven countries ‘maintain’ national territorial claims and national settlements: “There seems to be a desire, at least on the part of some delegations, to have Antarctic resources, whatever these are or may be, declared the common heritage of mankind, like those of outer space and the deep sea-bed, beyond national jurisdiction. Australia is, of course, in favour of this principle in the Law-of-the-Sea context, but we do not consider it relevant or appropriate in Antarctica. First, for Australia and six other countries that maintain national territorial claims and, let me add, national settlements, Antarctica is not beyond national jurisdiction. Antarctica has instead been the subject of exploration, settlement and claims to sovereignty by a number of countries over many years. So there can be no international consensus that a common-heritage approach to Antarctica is acceptable.”

The issue is contentious. To date there is no strict legal definition of a ‘global common’, which does nothing to facilitate political clarity among 193 UN Member States. The areas, moreover, that are generally recognised as the global commons (atmosphere, high seas and seabed, celestial bodies) have different physical characteristics. There is also an argument that universalising ownership or trusteeship of a large area can be deleterious to the efficiency of ecosystem conservation and management. And, whatever the merits of this view, national competition for exploiting natural resources on proximate celestial bodies (Moon, Mars) is already underway.

These considerations, however, remain subordinate to the principle of shared ownership of, or trusteeship for, any area of the planet that is not widely accepted as within national jurisdiction. As is often the case, arguments ‘against’ have counter-arguments ‘for’ – in favour of agreeing on a legal definition, for example, and agreeing on improved global procedures for efficiency.

This paper accepts the UN Secretary-General’s acknowledgement that Antarctica comprises part of the global commons. The political and legal implications of such a judgement are profound. Given the intrinsic importance of the issue, there is a compelling case for seeking an advisory opinion from the International Court of Justice.

The National Interest and Country-Specific Policies

One of the principal considerations arising from the analysis is the relationship between a state’s ‘narrow’ national interest, competitively pursued, and its ‘legitimate national interest’, shared with others in pursuit of the global interest, in full recognition of the difficulty of attracting agreement over the balance of considerations that ultimately comprise that. This is clear with respect to the ATS / CAMLR framework.

A summary of national policy towards the ATS framework by selected ATCPs is shown below, including three of the UNSC permanent five (listed in order by their adoption of the Treaty).

United States (1961)

The US initiated and guided the Antarctic Treaty to a successful conclusion, devoted to the non-militarisation and peaceful scientific cooperation in the Area. Although it proposed UN trusteeship for Antarctica in 1948, it oversaw the negotiated compromise of ‘freezing’ the territorial claims under the Treaty. It does not recognise any of the seven territorial claims and, although it had reserved the right to make a claim, the Treaty requires that no new claim will be made as long as it is in force.

Russia (1961)

In the 1950s the USSR was prompted by strategic rivalry with the US interest over Antarctica to indicate that it reserved the right to make its own territorial claim. It participated constructively in the treaty negotiations and, as one of the ‘original twelve’, maintains a similar policy as the US towards the Treaty. In the 2020s, with regard to CCALMR, matters have

evolved. Along with other international bodies, CCAMLR currently functions in the context of a complex global crisis, with Russia at the centre. From its policies and actions over the past decade, it is evident that Russia perceives the multilateral order in a fundamentally different way from most, if not all, of the other major powers. Because of the uncertainty and overall struggle this produces, it is not prepared to surrender these policies in response to demands from others. When it is accused of pursuing a ‘narrow national interest’, it responds with its own accusation of examples from others. Unlike China whose global economic influence enables it to seek rapprochement, Russia perceives itself to be struggling, unjustly, against greater odds – a foundational context for more explicitly aggressive policies and a disinclination to compromise. This extends to the farthest place on the globe – Antarctica and the Southern Ocean. Traditional diplomacy and evidence-based policy can facilitate compromise over conflicting national interests, but for universal agreement on an issue, a greater concession from the *demandeurs* may be necessary.

China (1983)

China (PRC) has a history of exclusion from Antarctic issues. In 1957, then a non-UN Member State, it withdrew from the IGY when it became apparent that the US was encouraging the ROC (the UN-MS) to participate. Neither entity was engaged in the AT negotiations, the PRC acceded in 1985 (having become the UN-MS in 1971). To this day, Chinese is the only UN official language that is not an authentic language of the Treaty, notwithstanding that it is an ATCP. It is also critical of certain of the science-based policy proposals advanced by some CCAMLR Member States.

Territorial claimant states

Seven UN member states maintain territorial claims over certain parts of the Antarctic continent, namely:

Group A: *Argentina, Chile*

Group B: *France, Norway, UK; Australia, New Zealand*

The claims, resting on historical rights of discovery and/or geographic proximity that pre-date the UN era, have attracted negligible recognition. Group A claimants have mutual recognition (i.e. one out of 192 other UN member states). The five Group B claimants have separate mutual recognition (i.e. four out of 192). No major State (US, China, Russia, India) recognises any claim. The Treaty does not imply a renunciation of a claim, or prejudice recognition or non-recognition thereof. No claimant has yet renounced its claim. Some (Argentina, Chile, Australia, NZ) have been vocal in ‘maintaining’ their claims.

UN Member States and the ‘Question of Antarctica’

India

In 1956 and 1958 (before and after IGY), India attempted unsuccessfully to persuade the UN General Assembly to consider the ‘Question of Antarctica’, encountering opposition from the AT ‘original twelve’ (particularly UK, Australia and NZ, Argentina and Chile). It then abandoned this approach and acceded to the Treaty as a consultative party in 1983.

Malaysia

In 1983 Malaysia (with Antigua & Barbuda) persuaded a majority of the General Assembly to include the question of Antarctica. As noted above, this occasioned opposition from the ATCPs led by Chile and Australia (often speaking on behalf of the ATS group). Malaysia led the argument in the Assembly in the 1980s for universal interest in and responsibility for, Antarctica. Over two decades later, it acceded to the Antarctic Treaty as a non-voting NCP.

PART C Prescription

Part B reviewed the background of ATS / CCAMLR and analysed the contemporary problems and blockages. Based on this, Part C advances some progressive concepts for moving forward, assessing their potential merit and prospect for successful adoption. First, some new conceptual frameworks are developed, based on diagrams that facilitate a more nuanced understanding of the operational relationships within CCAMLR and its relationship with other international bodies. Secondly, the concept of Earth trusteeship is explored, and the implications this may have for State responsibility and ‘shared sovereignty’ of the global commons. Finally, regard is given to the potential application of a new concept – legal personhood for oceans – and particularly the Southern Ocean.

4. An Explanatory Framework for CCAMLR

Institutions provide frameworks for managing ecosystems and the activities of people, businesses and governments. Institutions form when people want to address issues affecting each other. With increased population, prosperity and technology, institutions emerge at multiple levels, from informal entities to formal international bodies.

(a) CCAMLR as an institution

Although CCAMLR shares some of the characteristics of being an RFMO (in dealing with ‘rational use’ for harvesting), the Convention should be compared with other marine conservation agreements. There are, however, no other directly

comparable agreements. This creates a bias in the literature, with numerous articles on CCAMLR in the context of RFMOs, while conservation literature rarely makes direct institutional or framework comparisons.

Not all decision-making is the same within CCAMLR and it is important to differentiate the types of rules within an institution and the types of decisions being made (Figure 3). It is possible to differentiate constitutional decision-making from collective decision-making as well as constitutional rules, from collective choice rules and operational rules. Constitutional rules and choices address issues such as governance arrangements, the actors that can make decisions, as well as the procedures for any changes to be made to the Convention including its scope. The term ‘collective choice rules’ refers to both policy and resource management. In contrast, operational rules regard the use of ecosystems and resources (i.e. appropriation) and allocations (i.e. provision rules) which together with monitoring and enforcement influence choices and activities that impact the ecosystem.

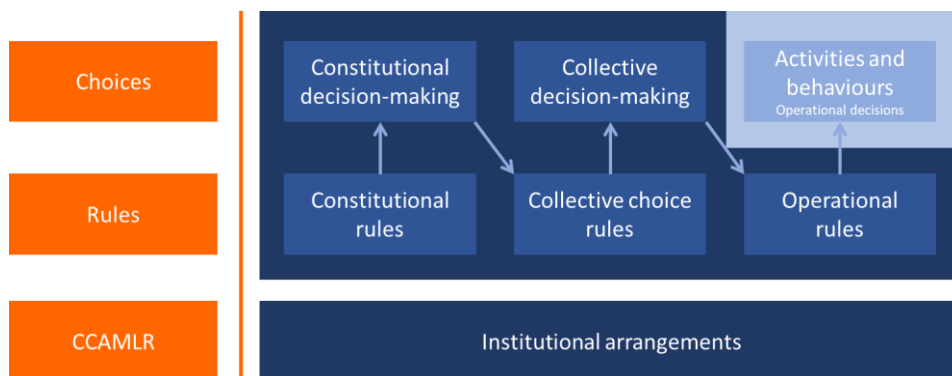


Figure 3 – CCAMLR: Rules and processes

From the interviews conducted, a picture emerged of an organization that had struggled to find its feet in its first decade (1982-1992), worked well for two decades (1992 to 2012) but has become less functional over the last decade (2012-2022) due to a lack of consensus among Members on a growing list of issues identified earlier.

Going beyond regular ‘collective choice’ decision-making, the Commission can also make constitutional decisions and change the rules and procedures by which decisions are made including regular decision-making (Figure 4). Constitutional decisions could include amendments to the CAMLR. Some respondents saw a need for change in procedural rules for decision-making in both the SC-CAMR and CCAMLR, away from consensus. Such changes in rules, procedures and decision-making depend on the national interests of Member States that make up CCAMLR. National interests are, self-evidently, an important part of regular decision-making along with information and the recommendations of the SC-CCAMLR. But national interests in regular decision-making should be more about making sure that no single contracting party is unduly affected by a decision, allowing for balanced judgement on the interests of all Members and of the Antarctic marine ecosystem itself.

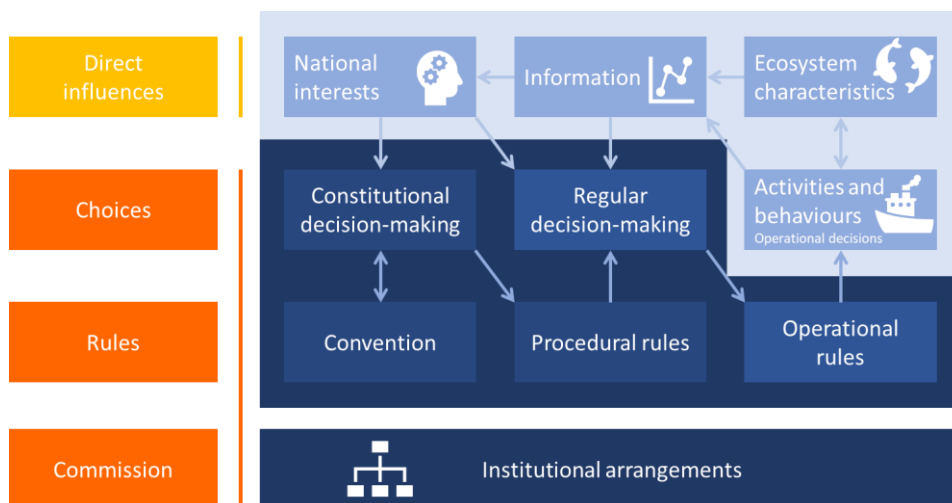


Figure 4 – Ostrom's model applied to CCAMLR

When it comes to constitutional decisions, national interests play a larger role. Constitutional decisions are fundamentally about how Members make decisions, protect their interests, and resolve disputes. When geographical circumstances help national interests align around an option such as the creation of a convention, or the amendment of a convention, it becomes possible for constitutional decisions to be made.

The basic institutional design of CCAMLR broadly follows the framework diagram from the UNCED of 1972. This included environmental assessment informing environmental management, and supporting measures including public information. Respondents expressed concern over transparency within CCAMLR, including the restricted public access to its documentation.

(b) Roles within CCAMLR: The Scientific Community and Civil Society

A key question in the context of CCAMLR is the role of scientific enquiry in policy-making. The text of the Convention gives scientific information a special role, encouraging the ‘rational approach’ to policy-design, with the Scientific Committee researching the best available information before designing recommendations that the Commission is obliged to consider. One useful framework for capturing the multiple ways in which policy is formulated is the hexagon (Figure 5). It shows that CCAMLR aligns the ‘rational approach’ to decision-making in the Scientific Committee with national interests advanced within the Commission. This suggests that there are other possible policy-making models that CCAMLR neglects, but which civil society could address.

Civil society, in fact, has a special role to play, addressing the public good through debate and creating legitimacy on problem-identification and solutions. Civil society can bring this into the official sphere through track 1.5 interaction. By linking solutions with national interests, relevant processes and quality information, it may be possible to subsequently have them formally negotiated by officials.

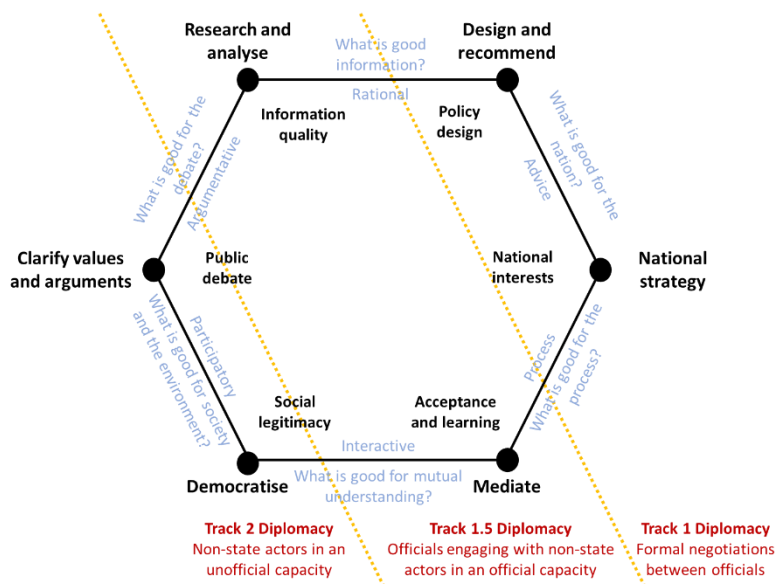


Figure 5 – Multi-track diplomacy for CCAMLR: Tracks 1, 1.5 and 2 in a hexagonal framework.

International institutions can create opportunities for Track 1.5 and Track 2 diplomacy, by allowing civil society and academia to hold side events coinciding with official negotiations.

(c) CCAMLR as a Complex Network

In the course of conducting interviews, reviewing the literature (in various languages), and comparing CCAMLR with other institutions, various issues and options emerged that go beyond CCAMLR and its internal institutional arrangements. Other influences on CCAMLR include ecosystem characteristics, behavioural activity, information and national interests, such as:

- environmental shifts (climate change, ocean acidification) were highlighted as having significant influence on Antarctic marine ecosystems;

- harvesting is not the only ‘rational use’ (i.e. economic activity) using Antarctic marine ecosystems; historically indigenous adventurers have visited the area, and ‘new adventurers’ visit, as do tourists;
- scientists and conservationists maintain a professional presence;
- information and technology for monitoring the Antarctic marine ecosystem continue to evolve; and
- national interests remain important but change over time, influenced by, *inter alia*, a growing awareness of global conservation.

Similarly, new ideas and ways of relating to the environment may also open new avenues of negotiation on how States achieve the objective of CCAMLR, for example, the possibility of conferring UN trusteeship and legal personality to Antarctica and the Southern Ocean. Figure 6 shows new elements that emerged from interviews and other research that are relevant in this respect.

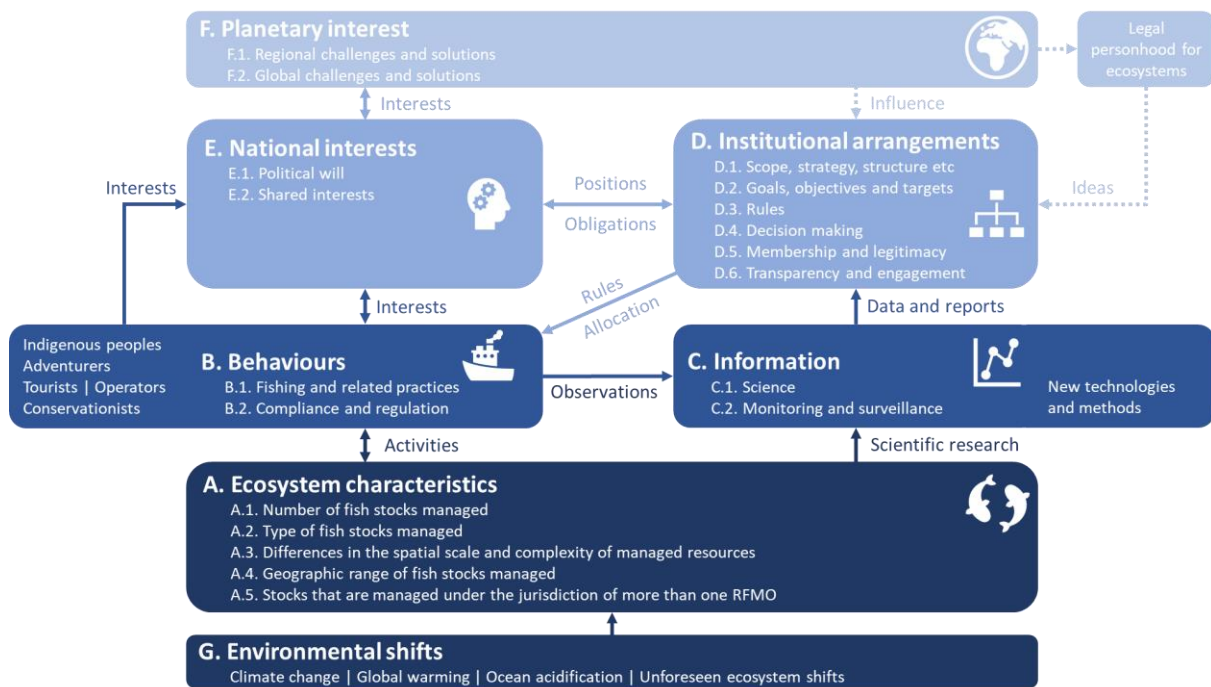


Figure 6 – Factors influencing Antarctic marine ecosystem conservation (updated)

As noted, there is a range of actors around Antarctica, many of which reside within CAMLR Member States. While a mix of conservationists, fishers and fishing authorities may have dominated discussions on marine ecosystems to date, other stakeholders may influence the national interests of Member States over marine conservation issues.

With guidance from the UN’s System of Environmental Economic Accounting, it is possible to unpack the ‘logic train’ of ecosystem services and related benefits (Figure 7). Antarctic marine ecosystems accord provisioning services (harvesting), cultural services (tourism), scientific services and regulating services (CO₂ sink). Figure 7 highlights the factors driving use and identified the users and beneficiaries. The main beneficiaries are high-income consumers, whether they are eating Patagonian toothfish, farmed salmon (fed on fish food made from krill), or using cosmetic products (that include krill oil). But as noted by respondents, the harvest of Antarctic marine living resources is less about food security than ‘luxury’ items.

In this regard, the extent to which the various services fit within the definition of ‘rational use’ is important. While rational use implies economic self-interest, it is unclear whether this is restricted purely to harvesting marine living resources. Ultimately it will be up to CCAMLR Member States to interpret what is meant by ‘rational use’ in light of an evolving understanding of their national interests and the wider planetary interest.

With regard to potential win-win scenarios, these might include linking changes in CCAMLR with other changes within the ATS – such as involving adjacent RFMOs, or decisions involving other international institutions.

Ecosystem	Ecosystem services	Factors determining supply to the economy			Factors driving use	Benefits	Main users and beneficiaries
		Ecological	Social				
			Institutional	Activities			
Southern Ocean	Provisioning services: (Patagonian Toothfish)	Ecosystem conditions	CCAMLR	Legal fishing	Demand from restaurants, fish markets, consumers	Seafood	Fishers, high income consumers
				IUU			
	Provisioning services: (Krill)			Legal fishing	Demand for fish food, cosmetics, skin care	Farmed salmon and other fish, beauty products	
				IUU			
	Cultural services: (adventure, tourism, docos)		Antarctic Treaty	Expeditions	Demand from adventurers, tourists and others	Experiences, novelty, interest	Adventurers, high income consumers
				Tours			
				Film / media			
	Regulating services: (carbon dioxide sink)		NA	NA	Carbon dioxide emissions	Slower increase in atmospheric carbon dioxide levels	Everyone

Figure 7 – Summary of ‘logic trains’ showing ecosystem services and related benefits

CCAMLR as an institution is part of a much wider network of influences. This includes changing climatic and marine ecosystems including fundamental shifts in environmental regimes. Figure 8 illustrates these complex influences through mapping the network of influences, actors and interests affecting CCAMLR while also differentiating constitutional rules and decision-making from ‘collective choice rules’ and ‘operational rules’.

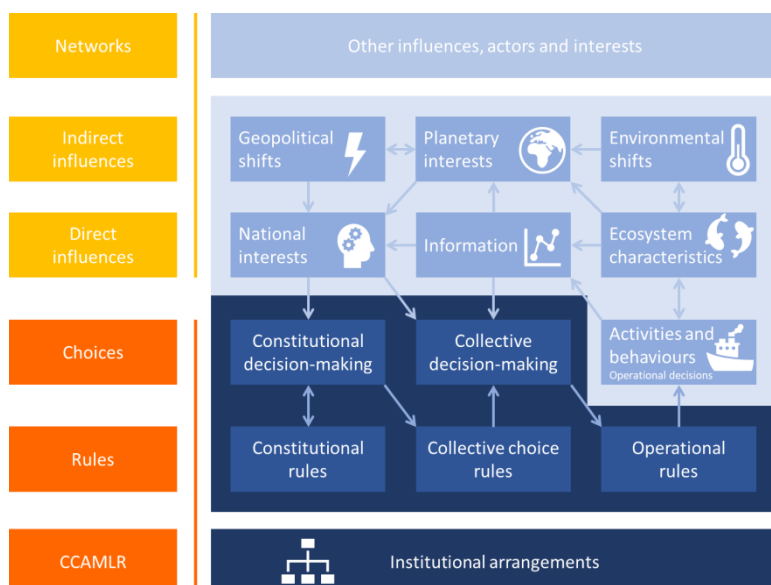


Figure 8 – The CCAMLR Network

Changes to constitutional rules and decision-making depends not only national interests but also geo-political shifts. Agreement of CAMLR in the late 1970s depended on a unique set of geo-political circumstances. Any changes to constitutional rules or constitutional decision-making procedures in this decade will depend, equally, on contemporary geo-political circumstances. Based on responses to the interviews conducted, it is difficult to imagine a change in constitutional rules or decision-make procedures without a fundamental shift in geo-political circumstances.

These new concepts and ideas allow members to renegotiate issues without the use of loaded terms and the baggage of the past. Instead, they can negotiate around fresh ideas. This is pursued below.

5. Global Legal Concepts for ATS / CAMLR

Based on the above interpretation of the institutional network, it becomes possible to consider how progressive concepts that reflect the global interest might encourage a solution to the current blockage over certain conservation goals. The two principal concepts in this regard are Earth trusteeship and legal personhood for the ocean.

(a) Earth Trusteeship: The Global Commons and State Responsibility

Critical to an understanding of the ATS / CAMLR system is the precondition of reaching agreement over the status of Antarctica and the Area, including the CAMLR Area. The UN's Secretary-General and an overwhelming majority of its Member States are of the view that it is a part of the global commons. Some, not all, of the ATCPs are of a different view. Universal agreement on this matter is essential. A paradigmatic shift in thinking is needed on who 'owns' Antarctica and the surrounding marine area, to resolve the current blockages and competitive pursuit of narrow national interests.

Common heritage of humankind

The concept of the 'common heritage' applies primarily to ownership of the ocean seabed. In 1970, the UN General Assembly Declaration established it in customary law by declaring the seabed and ocean floor and subsoil to be beyond national jurisdiction (the Area), noting that its resources "are the common heritage of mankind". The concept, subsequently enshrined in treaty law (Moon Treaty, 1979 and UNCLOS, 1982), rests on four principles: universal trusteeship in lieu of national ownership; resource management as a global public good; demilitarisation of identified territories; and inter-generational equity through ecosystem preservation.

A new legal regime was thus created in which States are charged with legal responsibility to act consistently with the common interests of humanity, and may not act solely in their individual national self-interests. The scope of this future regime is currently limited to marine biological diversity in "areas beyond national jurisdiction" (ABNJ). The concept does not undermine but rather redefines, state sovereignty. The ecological need for its application is becoming more urgent and apparent as the limited scope and trajectory of current discussions on marine genetic resources and area-based conservation measures re-enforce concerns about the deficiencies of contemporary international law.

Adopting an Earth System Perspective

Earth as an ecological system, has been the core concern of modern international environmental law since its conceptualization in the 1970s. But human rights and state responsibilities need to be more clearly defined concerning the role of the UN and Member States. The Earth Charter, adopted by UNESCO in 2003 and its most recent expression (Hague Principles, 2018) provides a coherent framework for this. A rights-based approach needs to be complemented by responsibilities. All humans and their institutions of governance such as States have responsibilities towards the Earth. Such calibration of responsibilities is not motivated by human-centred or state-centred concerns but by the larger concerns for the integrity of the Earth system, driven by non-anthropocentric ethics.

In law, such responsibilities can be captured by the concept of Earth trusteeship. Historically, states have kept their proclaimed responsibilities toward Earth abstract, non-committal and non-binding. This does not rest simply on lack of political will but also on habitual state sovereignty. States have frequently used sovereignty as a shield against global action. The 'no harm' rule expressed in the Stockholm and Rio Declarations has become a principle of customary international law whereby a State is duty-bound to prevent environmental harm to others. An obligation *erga omnes* to safeguard Earth is emerging, through declarations and agreements generated by civil society and professional bodies, endorsed by international organizations.

Concepts such as the global ecological footprint (1996) and the planetary boundaries (2009) have provided comparable frameworks for assessing the state of the ecosystem. The Earth Commission (2019) aims to scientifically define and holistically quantify a safe and just corridor for the inter-relationship between 'people and the planet', establishing boundaries for Earth's life-support systems, drawing on work by IPCC and IPBES. The Commission is due to publish its first report in 2023.

Human rights and responsibilities – and Earth

A coherent approach is thus required – one that reflects the way humanity is linked with the natural environment and the need for preserving the integrity of the ecological system. This will, as noted, require a shift beyond simple claims to human

rights, integrating responsibility, guardianship and trusteeship into international law. As a first step, the InterAction Council adopted the *Draft Universal Declaration of Human Responsibilities* (1996) which stated:

“Globalization of the world economy is matched by global problems, and global problems demand global solutions on the basis of ideas, values and norms respected by all cultures and societies. Recognition of the equal and inalienable rights of all the people requires a foundation of freedom, justice and peace – but this also demands that rights and responsibilities be given equal importance to establish an ethical base so that all men and women can live peacefully together and fulfil their potential. A better social order both nationally and internationally cannot be achieved by laws, prescriptions and conventions alone, but needs a global ethic.”

On 28 July 2022, the General Assembly adopted a resolution recognising the “right to a healthy environment” as an essential human right.

Earth trusteeship

One way of institutionalising Earth trusteeship responsibilities at the international level is to repurpose the UN Trusteeship Council. The Council suspended operation in the early 1990s but it has not been formally terminated. It was created to administer the transition to self-determination of colonies and occupied territories, which were placed under the trusteeship of the UN. Now that its original decolonisation mission is fulfilled, it could be given a new role.

Formal legal scope for this exists in the UN Charter (Art. 85). While this does not allude to the global commons, the environment or the Earth, neither did it explicitly refer to the physical ‘trust territories’ that were to be decolonised. Use of the term ‘area’ rather than ‘territory’ would allow a broadening into something new. As suggested by the UN Secretary-General (*Our Common Agenda*, 2021), it offers a possibility that the Council might be repurposed for intergenerational goals:

“[C]onsider making the Council available as a multi-stakeholder body to tackle emerging challenges and, especially, to serve as a deliberative forum to act on behalf of succeeding generations. Among other tasks, it could issue advice and guidance with respect to long-term governance of the global commons, delivery of global public goods and managing global public risks”.

The Secretary-General’s High-Level Advisory Board on Effective Multilateralism could examine the concept of trusteeship and provide the UN Trusteeship Council with a role that reflects the Hague Principles.

Sovereignty and trusteeship

Reconceptualising state sovereignty, then, is timely and necessary. Sovereignty includes not only fiduciary and trusteeship obligations towards a state’s own citizens but towards humanity and Earth as a whole. The underpinning motive is less of a moral nature but is driven rather by political interest. In general, political interests are short-sighted and narrow but they can change as morality broadens to include responsibility for all people (human rights) and the entire planet (sustainability). The agents of moral change are citizens and social institutions, not the state *per se*. At present, states pursue the national interest over the global interest. What, then, might it take for them to accept trusteeship responsibilities for the global commons?

In the context of global governance, trusteeship serves the common interests of states. Yet trustees are not states; a trust council might not even be an intergovernmental institution if it were comprised of individuals (such as, for example, The Elders) rather than drawn exclusively from states. This represents a less threatening intrusion into national sovereignty. Trust arrangements do not challenge sovereignty directly, for one of the advantages of trusteeship arrangements is the absence of sovereignty in the exercise of trusteeship functions—there is no transfer of sovereignty to the trust authority. Sovereignty and trusteeship must be seen as complementary and not mutually exclusive. The privilege of territorial sovereignty can be legitimised only insofar as universal interests of humanity as a whole are not severely affected. This argument is based not only on ecological realities defying national state boundaries, but also on the observation that boundaries of states do not necessarily coincide with boundaries of nationalities, or more generally, with the boundaries of the groups whose members commit to a conception of the common good and a shared legitimate national interest.

Framing Earth trusteeship

There is, then, a general obligation on nation-states to cooperate in order to protect the integrity of Earth’s ecological system. More than 25 international soft and hard law agreements contain specific reference to this obligation. The first was CAMLR, recognising the importance of ‘protecting the integrity of the ecosystem of the seas surrounding Antarctica’. Another is the Rio Declaration, ‘working towards international agreements which respect the interests of all and protect the integrity of the global environmental and developmental system’. Specifically, Principle 7 of the Declaration stipulates that: “States shall cooperate in a spirit of global partnership to conserve, protect and restore the health and integrity of the Earth’s ecosystem”.

The Planetary Integrity Project is developing the concept of Earth trusteeship governance in a report to be submitted to the UN General Assembly. Nation-states need to engage in a long overdue ethical dialogue on socio-economic development within the parameters of the Earth system. An Earth Trusteeship Council would be the most suitable platform for such a dialogue. It would enhance the legitimacy of nation-states and help attain the Sustainable Development Goals.

The concept of Earth trusteeship is far-reaching and might appear in the geo-political world of 2022 to be untenable. It is, however, precisely such times of tension that give the potential for a breakthrough. As the UN Secretary-General notes in his 2021 Report:

“We are at an inflection point in history. humanity faces a stark and urgent choice: a breakdown or a breakthrough. Increasingly, people are turning their backs on the values of trust and solidarity in one another – the very values we need to rebuild our world and secure a better, more sustainable future for our people and our planet. Humanity’s welfare – and indeed, humanity’s very future – depend on solidarity and working together as a global family to achieve common goals – for people, for the planet, for prosperity and for peace.”

Earth trusteeship is thus directly relevant to both the preservation of the Antarctic continent and the marine resources in the Southern Ocean.

(b) Legal Personhood: A New Juridical Concept for the Oceans

Comparable to, and generally associated with, the concept of Earth trusteeship is that of legal personality of specified parts of the natural ecosystem.

The basis of legal personality

‘Legal personality’ refers to the granting or recognition of independent legal status in natural features, whether they are lakes, rivers, trees, mountains, oceans or any other environmental feature. The modern development of legal personality is sourced in an article on whether trees could be accorded legal standing (Stone, 1972). But the idea of non-living objects being accorded legal personality such as the limited liability company has been a feature of the common law for centuries.

Legal rights are self-evidently not the same as human rights. A legal person does not have to be a human being. Looked at this way, recognising the legal personality of a natural resource is not a revolutionary thought. A 1972 US Supreme Court dissenting opinion by Justice Douglas was influenced by Stone’s article, and in 1991 the English Court of Appeal was prepared to grant standing to an Indian temple as a party competent to be represented before the Court.

Global developments

The idea of legal personality of natural features has been developed, albeit hesitantly and spasmodically, around the world in the 21st century:

- Ecuador (2008): The national constitution was amended to recognise the rights of nature.
- New Zealand (2013-14): Following negotiations between the Crown and Māori iwi (tribes), two legislative acts were passed by Parliament that accorded legal personality – in the first instance to an ancestral tribal homeland (Te Urewera) that had previously been declared to be a national park; in the second instance, to a river (Whanganui) that was declared a legal person with rights, powers, duties and liabilities, and subject to co-governance between the Crown and iwi.
- Colombia (2016): Constitutional Court of Colombia recognised the Atrato River as having rights to “protection, conservation, maintenance and restoration” and the rights of indigenous river communities as biocultural rights. It also established joint guardianship of the River between the government and indigenous people.
- India’s State of Uttarakhand (2017): A court declared two rivers to be legal persons with various rights, citing the Whanganui River precedent, but the decision was overturned by the Supreme Court.
- Colombia (2018): The Supreme Court recognised the Colombian Amazon as an entity, subject of rights, and beneficiary of ‘protection, conservation, maintenance and restoration’.
- Bangladesh (2019): The High Court recognised rivers as living entities, legal persons and juristic person.

These initiatives are of philosophical and jurisprudential significance. In the NZ experience, for example, the effect of using legal personality to resolve the status of Te Urewera and of Te Awa Whanganui was two-fold. First, it allowed the

government to avoid difficult discussions about ownership. Secondly, it allowed iwi to avoid a Western concept that did not fit an indigenous worldview (*Te Ao Maori*), with land as a living ancestor carrying a spiritual relationship with its people. The Western perception has difficulty comprehending this outlook, and its legal system has greater trouble trying to recognise it. An issue for negotiations was how to express in legislation this deep-seated and genuine expression of belief held by countless generations of Māori. It was the issue to which legal personality ultimately helped find an answer.

The above national experience has attracted significant interest elsewhere, not least in the US where the concept of legal personality is strong in the environmental movement. Various municipalities recognise legal personality in nature, such as Tamaqua (Pennsylvania) where the borough banned the dumping of toxic sewage sludge as a violation of the rights of nature. Initiatives across the US include campaigns for state constitutional amendments: voters in Toledo, Ohio, approved an amendment to the city's Charter (2019) recognising that "Lake Erie, and the Lake Erie watershed, possess the right to exist, flourish, and naturally evolve". This amendment attracted significant media and public attention, which may continue as it is subject to legal action.

There is, now, a growing movement among indigenous peoples around the world to utilise legal personality. Several US tribes have made customary laws recognising the rights of nature. In Western Australia, native title groups concerned about the impact of development along the Fitzroy River issued a declaration declaring that "The Fitzroy River is a living ancestral being and has a right to life. It must be protected for current and future generations and managed jointly by the Traditional Owners of the river." In 2018, legal personality was recognised in wild rice, a staple crop, by the White Earth Band of Ojibwe and the 1855 Treaty Authority in Minnesota. In 2019, the High Court of Punjab and Haryana in India declared all animals to be legal persons with corresponding rights, duties and liabilities of a living person.

Potential future uses

There are no limits on where the concept of legal personality could be taken. Any limits are political rather than conceptual. It is clear, however, that the concept looks set to expand, not only past environmental features but potentially outside of domestic law and into the international realm. It has been suggested that 'rights-of-nature' laws could help save endangered species, such as orca whales. In 2018, two Canadian lawyers considered applying legal personality model to the moon, other space resources and space habitats.

Whether or not the concept has extra-terrestrial applicability, there is certainly scope for further examination of how the model could operate on an international or supranational level. The range of possible usage reflects the promise and adaptability of the concept for different situations. The results of various legal personality regimes will undoubtedly be mixed, but there are a number of national benefits. It bridges the gap between incompatible world views within an existing legal system. It allows progress to be made on matters where there is agreement, while transcending issues where there will not be agreement (such as who owns something and what that means). It is capable of being implemented in legislation, rather than being left to the courts. It allows the exact scope of legal personality to be spelled out clearly, alongside how the legal personality will be represented practically, and for what reasons. It grants the natural resource full powers to be involved in environmental management policy development and decision-making, providing it with full powers to sue or take legal action where necessary. It is the result of the executive negotiating and agreeing arrangements with other interested parties (most notably, the local indigenous people) before the result is enacted. And it can be customised to fit a range of different situations.

These same benefits generally apply, with equivalent jurisprudential force, in an international context.

The oceans and legal personhood

Expanding the concept of legal personality to an ocean would be a natural next step, taking the origin of the idea in the rights of Nature and using it to confront environmental problems. This can be done on a trans-national basis (such as the Wadden Sea, where a proposal has been made in 2019 for the Dutch part) or at the global scale of a single ocean. It could give more impetus to the dry, legalistic content of treaties. The 'ocean personified' would have a greater chance of achieving public buy-in than simply a treaty model.

The suggestion has been made that the ocean could be awarded legal personality (Butler, 2021):

"Climate change and environmental laws are trying to protect the ocean. But can they protect the ocean efficiently if those laws are just concerned with regulating the environment and preventing climate change without regarding boundaries as 'erected' by states in the ocean, or trade and its laws on the ocean? Should there not be a reset of the ordering of the ocean? And would a starting-point not be to give the ocean legal personality?"

Expanding the concept of legal personality to an ocean would likely require international agreement and involve more political complexity than legislating at a national level. However, the time could be right to push the idea, particularly in light of the growing interest in legal personality as a concept. The inclusion of legal personality in an international treaty-making process does not seem to present any particular legal challenges beyond normal negotiation complexities. There are also other intermediate steps that could be taken. For example, the idea could be promoted by a single UN Member State legislating domestically to recognise legal personality in a part of the ocean or the ocean ecosystem within its exclusive economic zone.

6. Geo-Political Options: Crisis and Opportunity

The concepts of the global commons, Earth trusteeship and legal personality for the oceans have direct relevance to Antarctica and the Southern Ocean. They reflect, however, prescriptive thought, and remain contested at the political, legal and diplomatic levels. Universality at a practical level will depend upon constructive initiatives in the area of 21st c. geo-political negotiation.

The foregoing analysis indicates that, while the surface debate in CCAMLR revolves around two operational aspects of marine conservation, the underlying source of contention derives from competing geo-political interests over Antarctica and Southern Ocean as a whole and, more broadly, an intensifying strategic tension over national influence at the global level. This section focuses on what geo-political options may be open to selected countries to find initiatives that are related to the ATS including CCAMLR, but which have regard to other global issues.

(a) Contemporary Crises

Of the multiple areas of strategic tension at the global level, two currently stand out as the most prominent: the Ukraine conflict and the status of the ROC. The former comprises outright conflict among two ATS / CAMLR parties. The latter does not. It is most appropriate to look for creative bilateral initiatives between leading states that are not engaged in direct conflict, and then expand these initiatives at opportune moments in the future. The most credible political-diplomatic route, therefore, may be to seek, in the first instance, a creative bilateral initiative between China and the United States, before broadening that to include other major countries, including Russia at the first appropriate moment.

(b) Preconditions of Progress

For any geo-political progress to be made in the current state of strategic tension, three preconditions will need to be met: political leadership at senior levels of certain major States; application of the diplomatic principles of mutual respect and reciprocal concession; and adoption of the theory and philosophy of a shared global perspective within which all legitimate national interests sit.

It was previously acknowledged that, in securing legitimacy for global governance over the existential risks of the 21st century, an agreed global interest and global policy on each risk needs to be recognised. This has been recognised for some time now. In 1993, The UN Secretary-General declared that “the first truly global era has begun”. This has been picked up in both a theoretical and philosophical context. The concepts of the ‘planetary interest’ and associated ‘legitimate national interests’ were developed in the 1990s (Graham, 1995, 1999) and the closely aligned concept of ‘planetary politics’ including the possibility of the US taking a lead in this was articulated recently (Stewart, 2022). The philosophical and ethical dimension has also recently been addressed, with a paradigmatic shift in global ethics toward the primacy of biodiversity (Grayling, 2022):

“Can we humans agree on a set of values which will allow us to confront the numerous threats that we and our planet face...? Or will we continue our disagreements, rivalries and antipathies, even as we collectively approach what, in the not impossible extreme, might be drastic global threats even to the risk of extinction? ... The planet is a single organism, an interconnected system forming a single ecology. ... Biodiversity matters because it maintains the system of interdependencies that link the chain of life....”

(c) Recent Initiatives

In fact, the terrain is not bereft of constructive policies, including speeches at the highest level. Both China and the US, for example, have in recent years advanced global visions at the United Nations that, at the theoretical level, are not incompatible.

In 2017, China's President advanced a proposal at the UN to "build a community of shared future for mankind". All countries should "jointly shape the future of the world", write the international rules and manage global affairs. We should make our world clean and beautiful by pursuing green and low-carbon development. Man coexists with Nature; any harm done will come back to haunt us. We must maintain harmony with Nature including clear waters and green mountains. China would endeavour to put in place a framework of relations with major powers featuring general stability and balanced growth. It will strive to build a new model of major country relations with the US, a comprehensive strategic partnership of coordination with Russia, a partnership among different civilizations with Europe, and a relationship of unity and cooperation with the BRICS countries. China was ready to work with all UN member states and international organizations to build a community of shared future for mankind.

The proposal was reiterated at the 75th and 76th General Assembly sessions in 2020 and '21: humanity needed to improve global environmental governance, actively respond to climate change and create a community of life for man and Nature. In August 2022 China, holding the UN Security Council presidency convened a briefing on 'Promoting Common Security through Dialogue and Cooperation'. In its Concept Note, China encouraged consideration of "the concept of security from a broader perspective", recalling, inter alia, the Secretary-General's proposal of 2003 for a "common security agenda which should reflect global consensus on the major threats to peace and security and our common response".

For its part, the United States has recently advanced a comparable declaratory vision at the UN. At UNGA-76 in September 2021, the US President envisaged the "dawning of what must be a decisive decade for our world — a decade that will quite literally determine our future". As a global community, we are challenged by urgent and looming crises wherein lie enormous opportunities if we summon the will and resolve to seize them. Humanity stands at an 'inflection point in history'. Instead of continuing to fight the wars of the past, it must devote itself to the challenges that hold the keys to our collective future: ending the pandemic; addressing the climate crisis; managing the shifts in global power dynamics; shaping the rules of the world on vital issues like trade, cyber, and emerging technologies; and facing the threat of terrorism.

The fundamental truth of the 21st century, said the US President, is that, within each of our own countries and as a global community, our own success is bound up with others succeeding as well. To deliver for our own people, we must also engage deeply with the rest of the world. The US is not seeking a new Cold War or a world divided into rigid blocs. It is ready to work with any nation that steps up and pursues peaceful resolution to shared challenges, even if we have intense disagreements in other areas — because we shall all suffer the consequences of our failure if we do not come together to address the urgent threats before us. We must again come together to affirm that the inherent humanity that unites us is much greater than any outward divisions or disagreements. We must choose to do more than we think we can do alone. These are the challenges that will determine what the world looks like for our grandchildren — what they will inherit. We can only meet them by looking to the future. We shall lead together with our allies and partners, and in cooperation with all those who believe that this is within our power to meet these challenges, to build a future that lifts all of our people and preserves this planet.

(d) Mapping a Path Forward

The challenge to the major powers, all UN Member States, and civil society around the world is to ensure that such constructive global visions, articulated by two of the highest global leaders within recent years can be channelled through diplomatic negotiation into a substantive bilateral agreement on Antarctica and the Southern Ocean. Such an initiative might be comprised of a four-step chronological process:

1. A bilateral US-China agreement.
2. Once established bilaterally, the agreement could be shared trilaterally with India.
3. The challenge would then be to ensure that, once the Ukraine conflict is settled, the substantive proposal is shared with Russia and the EU and, thereafter, the other BRICS (Brazil, South Africa).
4. The final step would be to ensure that other ATCP states (most particularly Argentina, Chile, Australia, New Zealand, Norway, UK) are brought into the agreement.

The two main areas of tension, Ukraine and ROC, ostensibly stand as a block to this.

- It is beyond the scope of this study to presume a settlement outcome of the Ukraine conflict other than affirm the call of the UN Secretary-General for a ceasefire, followed by a temporary truce negotiated under UN auspices and ultimately, an agreed Security Council mandate for peace-keeping and peace-building.
- Nor does this paper offer insight into the long-term settlement of the PRC/ROC relationship, other than to recognise the fact that the UN General Assembly decided in 1971 that the PRC was the "only legitimate representative of China to the United Nations". Resolution 2758 (25 October 1971) was adopted by 76 to 35

with 17 abstentions, sufficient to be binding. The ‘original 12’ ATCPs were divided, in an apparently strange cross-strategic grouping – with six supporting (Belgium, Chile, France, Norway, UK, USSR), five opposing (Australia, Japan, NZ, South Africa, US) and one abstaining (Argentina).

It is, however, of significance that three months before the UNGA decision the US President’s security adviser had secretly visited the PRC and, four months afterwards, the President made his own historic visit – the ‘week that changed the world’. It is also significant that, with regard to climate change policy, the successful bilateral China-US accord that underpinned the 2015 Paris Agreement followed a series of visits by the US Secretary of State to China. Many, perhaps most, historic diplomatic-political breakthroughs are underway without the global public’s knowledge. Ukraine and ROC in the 2020s may not be exceptions to this.

In mid-2022, however, both crises fall short of any display by rival sides of the diplomatic principles of mutual respect and reciprocal concession. Visits by US political leaders to ROC have heightened bilateral tensions, notwithstanding assurances that these do not violate its ‘One China’ policy as agreed upon in the bilateral US/PRC ‘Three Joint Communiques’ and ‘Six Assurances’. Strategic tension is also increasing in the two polar regions. The US is upgrading its diplomatic representation for Arctic governance from ‘co-ordinator’ to ambassadorial level, with the stated purpose of pursuing US ‘strategic interests’ in the northern polar region in light of Russian and Chinese activity there. Similar rivalry may be expected in the Antarctic. Whatever the nuanced dimensions of the various disputes currently occurring, it is clear that the missing ingredient is the twin diplomatic principles necessary for a peaceful settlement.

These two global crises would, on the face of things, appear to be the block to progress over conservation issues in Antarctica / Southern Ocean. Yet as noted elsewhere, the converse has perhaps even greater force: a joint initiative applied to the Antarctic / Southern Ocean Area would be not only of positive effect on marine conservation but could act as a beacon for a reduction of global tensions and thus the two major crises.

The question remains: what might comprise the various components of such a substantive proposal? Recommendations to this effect are advanced below.

7. Recommendations: Tiers of Potential Reform

Drawing from the above analysis and prescriptive thought, the following recommendations are advanced with a view to ensuring that the ATS, and CCAMLR as an integral part, proves fit-for-purpose in the 2020s. Three tiers of possible reform are used, reflecting an increasing level of importance and difficulty, but also perhaps necessity:

- Procedural change: on decision-making, scope, policy;
- Political-legal change: on dispute resolution through judicial settlement and treaty accession;
- Paradigmatic change: on issues of global interest, reflecting legitimate national interests.

A *Procedural change*

1. Decision-making by consensus

- (a) Potential refinements to the current consensus procedure within the ATS and CCAMLR include the following: that ‘consensus’ is interpreted as either a decision in which any opposition is recorded without veto or a recorded ‘block of consensus’ is recorded which reopens the debate until agreement is reached.
- (b) More far-reaching reform could include an amendment to CAMLR that allows binding decisions on substantive matters to be taken by majority vote (of either a simple majority or a three-quarters majority of those present and voting), or through amendments to the opt-out provisions.

2. Scope: New environmental issues

Subject to the above procedural reforms, the Commission should agree that the best available science is applied to research on the impact of global climate change on Antarctic marine living resources and the effect of such impact on the global climate.

3. Policy: The role of science

The science of marine living resources should no longer be confined to papers prepared by individual contracting parties that may reflect narrow national interests. Instead, a CCAMLR group of scientists could be appointed to act independently of their countries, in a manner similar to the UNFCCC-IPCC. An ‘Intergovernmental Panel on

Marine Living Resources' (IPMLR) could operate with the Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services, and produce its annual report to CCAMLR as an independent report. It would then remain for the Members at annual meetings to make decisions concerning future conservation measures, but only on the basis of a shared report.

4. *Standards: Accountability and transparency*

To explore the concerns over operational standards of the ATS / CAMLR framework:

- (a) A study could be made of relevant work in the UN since 2013 by a 25 member-state grouping *Accountability, Coherence and Transparency Group* (ACT) on Security Council procedural reform, and how this might be translated into the procedures of ATCM / CCAMLR concerning content and distribution of record of its meetings.
 - (b) Emulating the UNFCCC (Paris Agreement, 2015), a set of principles could be adopted by CCAMLR members and acceding States committing to their 'highest possible ambition' and adopting an Enhanced Transparency Framework.
 - (c) CCAMLR's Standing Committee on Implementation and Compliance could be re-purposed along lines that emulate the UNFCCC Paris Agreement to ensure non-adversarial relationships.
 - (d) To ensure greater global interest in Antarctic marine conservation, the annual CCAMLR meetings could be held, on occasion, in countries other than Australia.
5. Commission Members and acceding States could agree to amend the Convention to make Chinese an official language of the Commission's work, with an approved version of the Convention text.

B Political-legal change: Dispute resolution through judicial settlement and treaty accession

6. Based on the UN Charter principles of good faith (Art. 2.2) and of pacific settlement through respect for justice and the rule of law (Art. 2.3), the eleven ATCPs (including China, France, US and Russia) that do not accept the compulsory jurisdiction of the International Court of Justice (as provided for in Art 36 of the Statute), should do so.
7. Based on the principle of the primacy of global sustainability and conservation above national commercial interest, the United States should ratify two major conventions pertaining to global and regional conservation, viz. the UN Convention on the Law of the Sea (1982) and the Convention on Biological Diversity (1992).

C. Paradigmatic change: Matters of existential global interest

8. In light of the statement by the UN Secretary-General based on advice from the UN Legal Counsel, the General Assembly could request an advisory opinion from the International Court of Justice on whether Antarctica is a part of the global commons.
9. The CCAMLR member states could propose to the UN General Assembly that the International Law Commission, whose responsibilities include studies with recommendations for the progressive development of international law (UN Charter, Art. 13.1), undertake a study on whether according legal personality to oceans is compatible with current public international law and, if it is, what would be the appropriate body to accord such personality to the Southern Ocean.
10. Applying the principles of mutual respect and reciprocal concession, China and the US could commence bilateral negotiations, followed by adherence from India and subsequently other CCAMLR member and acceding States, leading to the following outcome:
 - All CCAMLR Member States, with voting rights, commit to agreeing upon catch limits on certain species for all designated zones, with voluntary national reports being submitted annually to the Commission.
 - Subject to the ICJ advisory opinion, ATCPs/NCPs amend the Antarctic Treaty in the following way:

- (i) Recognise Antarctica as a part of the global commons and agree that as such it should come under the jurisdiction of UN trusteeship.
- (ii) Allow universal accession to the Antarctic Treaty by all UN Member States without any criterion for membership beyond a declared interest in the preservation of Antarctica as part of the global commons; while the ATCPs could be recognised as the principal trustees acting on behalf of, and reporting to, the Trusteeship Council.
- (iii) The current claimant States declare that they no longer maintain any claim of national territorial jurisdiction, and Russia and the US declare that they no longer reserve the right to make any territorial claim.

Glossary

ABNJ	Areas beyond national jurisdiction
ACT	Accountability, Coherence and Transparency (group of UN member states)

ATS	Antarctic Treaty System (which includes CAMLR)
ATS-SCAR	Scientific Committee on Antarctic Research
ATS-SCATS	Standing Committee on the Antarctic Treaty System (provides advice to ATCM)
ATCM	Antarctic Treaty Consultative Meeting(s)
ATCP	Antarctic Treaty Consultative Party (Parties)
	Note: NCP in the Antarctic Treaty = Non-Consultative Party to the Treaty (non-voting)
	NCP in CCAMLR = Non-Contracting Party (i.e. not a party to the Convention)
BNJ	Beyond national jurisdiction
CCAS	Convention for the Conservation of Antarctic Seals (part of the ATS)
CEP	Committee on Environmental Protection (a body of the ATCM)
CAMLR	Convention on the Conservation of Antarctic Marine Living Resources (part of the ATS)
CCAMLR	CAMLR Commission
FAO	Food and Agricultural Organization
ICJ	International Court of Justice
IGY	International Geophysical Year (1957/58)
IPBES	Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services
MPA	Marine Protected Area
PRC	Peoples' Republic of China
RFMO	Regional Fisheries Management Organization
ROC	Republic of China
RP-1, RP-2	1 st and 2 nd Review Panels (two performance reviews of CCAMLR)
SCIC	Standing Committee on Implementation and Compliance (CCAMLR)
SDG	Sustainable Development Goals
SOOS	Southern Ocean Observing System
UNCLOS	UN Convention on the Law of the Sea
UNFCCC-COP	UN Framework Convention on Climate Change – Conference of the Parties
UNEP	United Nations Environment Programme
UNGA	United Nations General Assembly
UNSC	United Nations Security Council

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Bibliography

- Arpi B. et al., *The Antarctic Treaty System in 2021: Important Anniversaries but Challenges for Consensus Decision-Making* (Polar Perspectives No. 9; March 2022).
- Bosselmann, K., *The Sovereign Paradox: One global common without borders* (Interview, Planetary Press; 9 December 2020).
Human rights and responsibilities towards the Earth system, Environmental Policy and Law 52 (2022) 213–22.
Earth trusteeship and the sovereign state (forthcoming Palgrave Macmillan, 2022, Ch. 15).
'The Next Step: Earth trusteeship', Address to UN General Assembly's 7th Interactive Dialogue, (2017).
Earth Governance: Trusteeship of the global commons (Elgar, Cheltenham, UK; 2015).
- Bosselmann, K. et al., Eds. *The Earth Charter: A framework for global governance* (KIT Publ., Amsterdam; 2010).
- Butler, P., *The ocean and a question of legal personhood* Ideasroom (15 June 2021).
- Carlson, Palmer & Weston, *International Environmental Law and World Order* (West; St. Paul 1999).
- CCAMLR, 2022. CCAMLR History <https://www.ccamlr.org/en/organisation/fishing-ccamlr> (accessed 6.13.22).
- Currie, D., *The Oceans: The Law of the Sea Convention as a form of global governance* (VUW Policy Quarterly, Vol. 3.1; 2017).
- DESA, (UN) *Transforming our world: The 2030 agenda for sustainable development* (2016).
- Dayal, A., *A Crisis of Consent in UN Peace Operations* (International Peace Institute; 2 August 2022).
- Diaz, S. et al., *The global assessment report on biodiversity and ecosystem services* (SPM; 2019).
- Graham, K., *The Planetary Interest*, Occasional Paper No. 5, Global Security Programme (Cambridge University; 1995).
- Graham, K., Ed. *The Planetary Interest: A new concept for the global age* (UCL/Routledge; 1999).
 Ed. *Regional Security and Global Governance* (VUB, Brussels; 2006).
 Ed. *Models of Regional Governance for the Pacific: Sovereignty and the future architecture of regionalism* (Canterbury UP; 2008).
- Grayling, A., *For the Good of the World: Is global agreement on global challenges possible?* (One World Publ., London; 2022).
- Haas, B., McGee, J., Fleming, A., Haward, M., *Factors influencing the performance of regional fisheries management organizations*. (Mar. Policy 113, 103787; 2020).
- Hemmings A. et al. *Antarctic Security in the Twenty-First Century* (Routledge, UK; 2012).
- Hodgson, G.M., *What are institutions?* (J. Econ. Issues 40, 1–25; 2006).
- Hsu, J., *Effective Governance and Policy Implementation in Governing High Seas Fisheries: A Comparative Study of Three Regional Fisheries Management Organizations*. (Doctoral thesis, Victoria University of Wellington; 2018).
- IPCC, *IPCC Special Report on the Ocean and Cryosphere in a Changing Climate* (SPM; 2019).
- Liggett, D. et al., *Is it all going south? Four future scenarios for Antarctica* (Polar Record 53 (5): 459–478 Cambridge UP; 2017 p. 459 ff.).
- Lopez-Claros A. et al., *Global Governance and the Emergence of Global institutions for the 21st Century* (Cambridge UP; 2020).
- Ostrom, E., *Governing the commons: The evolution of institutions for collective action* (Cambridge UP; 1990).
- Patrick, S., *The International order isn't ready for the climate crisis: The case for a new planetary politics* (Foreign Affairs, Washington; Nov/Dec; 2021).
- Reid, W. et al., *Ecosystems and human well-being: Millennium Ecosystem Assessment* (Island Press; 2005).
- Saltman, A.N., 2015. *A Standardized Benchmarking Framework for RFMO Performance* (Masters thesis, University of Washington; 2015).
- Sand, P., *The Concept of Public Trusteeship in the Transboundary Governance of Biodiversity*, in *Transboundary Governance of Biodiversity*, eds., L. Kotze & T. Marauhn (Leiden: Brill; 2014).
- Saul B & Stephens T., Eds., *Antarctica in International Law* (Hart Publishing; 2015).
- Stone, C., *Should Trees Have Standing? Towards Legal Rights for Natural Objects* (Southern California Law Review 45; 1972, pp. 450-50).
- Swanson D., et al., Eds *Creating adaptive policies: a guide for policymaking in an uncertain world* (SAGE; 2019).
- Taylor, P. *The Common Heritage of Mankind: Expanding the Oceanic Circle*, in *The Future of Ocean Governance and Capacity Development* (Brill Nijhoff; 2019).
- World Commission on Environment and Development: *Our Common Future* (Oxford University Press; 1987).
- Webb, J.W., 2021b. *Exploring preconditions for effective global responses to climate change*. (UCL, London).
- Van Dyke J. et al., Eds. *Freedom for the Seas in the 21st Century: Ocean governance and environmental harmony* (Island Press, Washington; 1993).

Project Mandate

This paper is the product of a study undertaken by the NZ Centre for Global Studies (NZCGS) in response to a request by, and funding from, the Antarctica and Southern Ocean Coalition (ASOC).

NZCGS is a think-tank, registered with Charities Services as a charitable trust in New Zealand.
ASOC is a not-for-profit organization registered in Washington, DC, USA.

The requested project title was identified in the Grant Agreement (signed, 29 May 2022) as:
Fit for Purpose? Political and legal aspects of global-regional marine conservation frameworks

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Project Methodology

This Paper is the culmination of a Study that has relied on a variety of inputs.

The central theme agreed upon was the level of effective attainment of the objectives in CAMLR, and identification of the 'problem statement' as the departure-point for subsequent analytical and prescriptive content.

To this end, the methodology took the following form

- (a) An outline agreed by the Project Team, which was subject to change from the first to final draft;
- (b) A global approach to the global problem, consistent with the Centre's formal mission statement (*'inter-disciplinary research into global affairs in the 21st century including the relationship between environmental and economic goals in the context of an optimal global population reflecting Earth's carrying capacity and planetary boundaries, having regard to jurisdictional responsibilities over national territories and the global commons'*) (NZCGS Trust Deed; 2013).
- (c) A central focus on the political-legal dimension of the subject, with supporting conceptual and diagrammatic analysis to add value to what has already been researched and written on the subject
- (d) A recognition that the added value of the study required a combination of
 - (i) focused practical recommendations for improved effectiveness without necessarily resorting to changes in international law;
 - (ii) a diplomatic approach to the underlying geo-political difficulties that give cause to the current shortcomings; and
 - (iii) more progressive, free-ranging recommendations pertaining to 'thinking out of the box', employing existing concepts that do not yet reflect universal consensus.
- (e) A time-frame for prescriptive action that reflected the above practical and progressive approaches

To this end, the study relied on consultancies and student research as follows:

- (a) Five background papers from consultants (two of whom were the principal authors);
- (b) Twelve interviews with experts on the subject, based on a prepared questionnaire, each lasting between 60 and 90 minutes;
- (c) Two e-workshops, involving NZ-based experts and the project team, and then an international workshop consisting primarily of ASOC advisers;
- (d) A literature review of relevant documentation in English, Chinese, Russian, Spanish and Portuguese language, to gain insight into what certain Parties might be publishing beyond what is available in only English;
- (e) an extensive bibliography;
- (f) three peer reviews of the draft paper;
- (g) a formal edit of the final version