

Conservation at CCAMLR: Understanding Article II of the Convention on the Conservation of Antarctic Marine Living Resources

Delegations of Australia and the United States

Abstract/Summary

Article II has periodically been the subject of discussion in the Commission. As CCAMLR moves through its fourth decade of service as a vital part of the Antarctic Treaty system, the delegations of United States and Australia considered it was important to recall the development of the Convention and to articulate our views on what “conservation” means for CCAMLR. At its core, this involves taking a close look at Article II of the Convention to see how the term is applied and to consider its intended interpretation, as well as revisiting the background and context of the Convention. This examination consistently emphasizes that the central object and purpose of the Convention is conservation. It is clear to our delegations that the correct way to think about “conservation” in CCAMLR is that “conservation” is the Convention’s singular objective, and that any rational use must be consistent with that objective.

I. Introduction

A fundamental tenet of the Commission for the Conservation of Antarctic Marine Living Resources (CCAMLR or Commission) is that it focuses on conservation. This conservation focus is a direct consequence of the legal architecture of its constituent instrument, the Convention on the Conservation of Antarctic Marine Living Resources (CAMLRL Convention or Convention). While this is proclaimed through the use of the word “conservation” in the title of the Convention, the regime’s conservation DNA runs a lot deeper – the Antarctic Treaty parties that negotiated the Convention had very specific goals in mind related to how the Commission and the broader Convention regime would function. In particular, CCAMLR is a conservation organization. It was explicitly designed differently from most regional fisheries management organizations, which are established with the specific purpose of facilitating cooperation between States who fish for highly migratory and straddling stocks and ensuring the ongoing sustainability of these stocks. Rather, CCAMLR was established with a broader purview and function which allows for fishing within its conservation framework. This conservation focus is enshrined throughout the Convention’s text, and rightly shapes every aspect of the Commission’s work.

Article II (1) of the Convention unambiguously and unequivocally states that the objective of the Convention is the conservation of Antarctic marine living resources.¹ Article II of the

¹ Article II (1), CAMLR Convention.

Convention (Article II), along with Article I, provides the foundation and touchstone for the responsibilities and work of the Commission. As noted in this paper, the proper construction of Article II in light of its ordinary meaning; its relevant interpretive context; the historical context within which Article II was adopted; and how the Commission has given effect to the Convention make it clear that the singular objective of the Convention is the conservation of Antarctic marine living resources. In this paper, we articulate our views on what “conservation” means for CCAMLR.

II. Brief Background and Historical Context

The CAMLR Convention has its origins in the Antarctic Treaty, and forms an integral part of the Antarctic Treaty system. The negotiation of the CAMLR Convention involved a series of discussions among the Antarctic Treaty Consultative Parties (ATCPs) between 1975 and 1980. Understanding this history, as summarized in this section, is important to understand the objective of the ATCPs in establishing the CAMLR Convention and, through that, the intended interpretation of the Convention, particularly its Article II.

The negotiations were conducted within the legal and institutional framework governing Antarctic Treaty Consultative Meetings (ATCMs), established under Article IX of the Antarctic Treaty. That ATCM framework expressly provides for ATCPs to meet “for the purpose of [*inter alia*] formulating and considering ... measures in furtherance of the principles and objectives of the Treaty, including ... preservation and conservation of living resources in Antarctica.”² Seen in this context, not only were the negotiations always destined for an instrument with conservation at its core, the ATCPs were legally constrained from expanding beyond a primary purpose of “preservation and conservation” by virtue of the ATCM’s prescribed mandate in Article IX.

Thus, under the auspices of Antarctic Treaty Article IX, at the Eighth Antarctic Treaty Consultative Meeting (ATCM-VIII) in 1975, the ATCPs adopted Recommendation VIII-10 which recognized “the need to promote and achieve within the framework of the Antarctic Treaty, the objectives of protection, scientific study and rational use of [Antarctic] marine living resources.” The Recommendation went on to focus attention on scientific study as an essential basis for protection and rational use of Antarctic marine living resources.

The Working Group on Marine Living Resources which met from 21 September – 6 October 1977 in London, “agreed to include in its Report the understanding of the group that the word ‘conservation’ as used in the draft Recommendation includes rational use, in the sense that harvesting would not be prohibited, but the regime would exclude catch allocation and other economic regulation of harvesting. It was similarly the understanding of the Group that the word

² Article IX(f), Antarctic Treaty.

‘resources’ was not limited to commercially exploitable species.”³ While this statement from part-way through the Convention’s genesis may not comprehensively reflect the product finally agreed upon, it clearly shows that the *focus* and intent of the CAMLR Convention was never envisaged as enabling commercial exploitation, but rather that economic factors were at the very least subsidiary to the CAMLR Convention’s conservation goals.

ATCM Recommendation IX-2 (London, 1977) called on the ATCPs to contribute to scientific research on Antarctic marine living resources, observe interim guidelines on their conservation, and hold a Special Antarctic Treaty Consultative Meeting to set up a definitive conservation regime for such resources, which, given the urgency of the issue, was meant to be concluded by the end of the following year. In agreeing to hold this Special Antarctic Treaty Consultative Meeting the ATCPs agreed to take into account the following elements:

- “The regime should provide for the effective conservation of the marine living resources of the Antarctic ecosystem as a whole;
- The regime should cover the area of specific competence of the Antarctic Treaty;
- The regime should, however, extend north of 60° South latitude where that is necessary for the effective conservation of species of the Antarctic ecosystem, without prejudice to coastal state jurisdiction in that area;
- The regime should not apply to species already regulated pursuant to existing international agreements but should take into account the relationship of such species to those species covered by the regime.”⁴

A second Special Antarctic Treaty Consultative Meeting (SATCM II-1) was held from 27 February to 16 March 1978 in Canberra to elaborate a draft definitive regime for the conservation of Antarctic marine living resources. The Chairman’s draft⁵ prepared during the course of the meeting contained the current formulation of Article II (1) and Article II (2) to address some ATCPs’ concern that in their countries’ languages the word “conservation” in paragraph 1 of Article II would be translated to mean “preservation”.⁶ As such Article II (2) was formulated to make clear that commercial harvesting could take place within the definition of conservation. It is clear that such harvesting was intended to be subsidiary to the singular objective of the Convention.

One of the key items of the draft convention negotiated at the Buenos Aires Second Special Antarctic Consultative Meeting round 2 (SATCM II – 2) from 17 – 28 July 1978 was Article II (3). Negotiations on Article II (3) sought to further clarify that any harvesting and associated

³ Report of the Ninth Consultative Meeting, 19 September – 7 October 1977, London, Paragraph 10.

⁴ Recommendation: ATCM IX-2, ATCM IX, London, 1977 (emphasis added).

⁵ ANT/SCM/17/Rev 2, 15 March 1978, English.

⁶ CCAMLR-XXXIV/BG/25, 19 September 2015, *Implementing Article II of the CAMLR Convention*, submitted by ASOC, at 4.

activities in the Convention Area must be conducted in accordance with the Convention and with three specific principles of conservation (outlined in paragraphs 3(a) to 3(c) of Article II).

Despite having been unable to meet the 1978 target date for conclusion of a definitive regime for the conservation of Antarctic marine living resources, the ATCPs reaffirmed their commitment to the early conclusion of such a regime at ATCM X in 1979.⁷ The final text of the CAMLR Convention was adopted the following year at the Conference on the Conservation of Antarctic Marine Living Resources held in Canberra.⁸ The text for the CAMLR Convention was opened for signature on 1 August 1980. The CAMLR Convention came into force on 7 April 1982.

The preamble to the Convention and its Articles III-V clearly articulate the ATCPs' commitment to linking the Convention to the principles and objectives of the Antarctic Treaty, and to protecting and preserving the Antarctic environment. In particular seven of the ten preamble paragraphs clearly show the intention of the ATCPs negotiating the Convention to use it as an instrument to conserve the Antarctic ecosystem and protect the Antarctic environment.⁹ Further, Article V expressly acknowledges the obligations and responsibilities of ATCPs to protect and preserve the environment of the Antarctic Treaty area, and obliges Contracting Parties (to the Convention) that are not Parties to the Antarctic Treaty to observe relevant Measures relating to the protection of the Antarctic environment adopted by the ATCM.

Further supporting the objective and in line with the ecosystem conservation approach, Article I specifies the Convention Area and defines it as including the Antarctic marine ecosystem.¹⁰ Article I (2) also comprehensively identifies that all living organisms are included in its scope – 'Antarctic marine living resources means the populations of fin fish, molluscs, crustaceans and all other species of living organisms, including birds, found south of the Antarctic Convergence'. The Antarctic marine ecosystem is described as the 'complex of relationships of Antarctic marine living resources with each other and the physical environment'.¹¹

The Convention's role in the Antarctic Treaty system, as expressly acknowledged in its preambular and substantive provisions, provides relevant context for interpreting its obligations. Indeed, as noted in the Secretariat's paper, *Information on CCAMLR and its links to the Antarctic Treaty*, the "relationship between the CAMLR Convention, the Antarctic Treaty and the Treaty's Protocol on Environmental Protection, as well as the conservation principles

⁷ Recommendation ATCM X-2 *Antarctic Marine Living Resources* (1979).

⁸ The Final Act http://www.ats.aq/documents/DCCCAMLR/fr/DCCCAMLR_fr001_e.pdf - Note: The text of the Convention attached to the Final Act contains the rectifications agreed subsequent to the Conference, but the Final Act is the unrectified version agreed on 20 May 1980.

⁹ Preamble paragraphs 1, 3, 5, 6, 7, 8, and 10 of the CAMLR Convention.

¹⁰ Article II (1).

¹¹ Article I (3).

embedded in the Convention itself, distinguish the CAMLR Convention from traditional Regional Fisheries Management Organisations, and reflect the CAMLR Convention's status as an integral part of the Antarctic Treaty system.”¹²

III. Article II: The object and purpose is conservation. Conservation includes and circumscribes rational use.

Article II is at the core of the Convention and, therefore, the Commission's responsibilities. The stated objective, and therefore object and purpose, of the CAMLR Convention is the conservation of Antarctic marine living resources. Although for the purposes of the Convention, the term 'conservation' includes rational use,¹³ the ordinary meaning of the Convention's terms as well as the Convention's context and the practice of the CAMLR Parties make it clear that there is a single objective of the Convention: conservation.

Firstly, in our delegations' view, the ordinary meaning of the terms in the Convention, in particular Article II, is quite clear. Article II (1) states unambiguously that “[t]he objective of this Convention is the conservation of Antarctic marine living resources.” Although the inclusion of the reference to 'rational use' in Article II (2) informs the overall interpretation of this provision, the structure of Article II as a whole places the two concepts on distinctly different levels. Notably, Article II does not state that conservation and rational use are dual objectives of the Convention. It is clear that “rational use,” as used in Article II of the Convention, is subsidiary to “the conservation of Antarctic marine living resources” and does not have equal standing in the application of the Convention. There is no suggestion in Article II or the history of the negotiation of the Convention that conservation and rational use are equally weighted. The purpose of Article II is to ensure the conservation of Antarctic marine living resources, wherein rational use is allowed but only in accordance with the principles of conservation identified in Article II (3). The chapeau of Article II (3) clearly states that ‘Any harvesting ...shall be conducted in accordance with the provisions of this Convention and with the ...principles of conservation’ [set out in the subparagraphs]¹⁴.

Article II (2) states “[f]or the purposes of this Convention, the term 'conservation' includes rational use” and the practice of CCAMLR confirms the point already evident from the text and

¹² Information on CCAMLR and its links to the Antarctic Treaty, https://www.ccamlr.org/en/system/files/e-linkages_1.pdf

¹³ Article II (2).

¹⁴ The three principles of conservation set out in Article II (3) can be summarised to the following:

- Prevent decrease in size of harvested populations to levels below those which ensure stable recruitment;
- Maintain ecological relationships between harvested, dependent and related species; and
- Prevent ecosystem changes or risk of change which are not reversible in 2-3 decades and restore any depleted populations. (emphasis added).

structure of Article II, that any rational use is subservient to and circumscribed by the overriding conservation goals. The Commission has agreed that harvesting and associated activities are to be conducted in accordance with the following principles of conservation which is a summary of Article II¹⁵:

- (i) maintenance of ecological relationships;
- (ii) maintenance of populations at levels close to those which ensure the greatest net annual increment;
- (iii) restoration of depleted populations; and
- (iv) minimisation of the risk of irreversible change in the marine ecosystem.

The Commission also agreed that a useful extension of the principles set out in Article II and thus rational use involved *inter alia* the following elements:

- (i) that the harvesting of resources is on a sustainable basis;
- (ii) that harvesting on a sustainable basis means that harvesting activities are so conducted as to ensure that the potential for achieving the highest possible long-term yield is preserved, subject to the principles of conservation above; and
- (iii) that the cost-effectiveness of harvesting activities and their management is given due weight.¹⁶

In the Commission's deliberations it has 'reaffirmed that any harvesting and related activities within the Convention Area must be carried out in accordance with the provisions of the Convention. It [has] re-emphasised the need to ensure that no irreversible damage is done to the Antarctic marine ecosystem while comprehensive conservation measures are being further developed'.¹⁷ Article II was intended and has been proven to provide ample flexibility to satisfy a broad range of Members' interests in the Convention Area, while uniting the membership in the common purpose of conservation of Antarctic marine living resources.

The Commission has also undertaken various efforts to give specific consideration to Article II's conservation goal, including the establishment of the Working Group on the Development of Approaches to Conservation of Antarctic Marine Living Resources (WG-DAC) at the Fifth Meeting of the Commission in 1986¹⁸; agreement to include a new agenda item on the Commission agenda titled 'Consideration of the implementation of the objective of the

¹⁵ CCAMLR VII (1988), report, paragraph 139 agreed that this text set out in CCAMLR VI (1987), Report, Paragraph 114 was a summary of Article II and should not be accorded special status.

¹⁶ CCAMLR VI (1987), Report, paragraph 115 was amended by CCAMLR VII (1988), Report, paragraph 139. With the revisions as set out in CCAMLR VI (1987), Report, paragraph 115, the Commission agreed, that rational use involved *inter alia* the elements set out in this paragraph.

¹⁷ CCAMLR VI (1987), report, Paragraph 117.

¹⁸ CCAMLR X, Report, Paragraph 61-64.

Convention’ at its Fourteenth meeting in 1995¹⁹; and giving prominent attention to the issue in two CCAMLR Symposiums, held in 2005 and 2015.

IV. Importance of Article II to the current work of CCAMLR

The fact that Article II is at the core of the Convention and that the singular objective is the conservation of Antarctic marine living resources has obvious and direct relevance to the way the Commission, and its Scientific Committee, has approached and should approach the most salient Antarctic marine conservation and management issues, such as setting catch limits for established fisheries, considering research fishing, developing new and exploratory fisheries, accounting for climate change, and implementing spatial and ecosystem management regimes in the CCAMLR areas, such as Small-Scale Management Units and marine protected areas (MPA).

Furthermore, Article IX of the Convention is clear that ‘The function of the Commission shall be to give effect to the objective and principles set out in Article II of [the] Convention.’ To this end Article IX sets out a number of ways in which the Commission can do this including ‘identify conservation needs and analyse the effectiveness of conservation measures’,²⁰ and ‘formulate, adopt and revise conservation measures’²¹ including on the topics elaborated in Article IX(2).

The Commission’s functions manifested through the adoption of conservation measures clearly include the regulation of harvesting. This is to be expected in light of the intended interpretation of Article II discussed above, which allows for rational use provided it does not impede conservation. Indeed, the Commission’s mandate to regulate harvesting elaborated in the terms of Article IX (2), taken together with the conservation principles in Article II (3), reinforce the conclusion that harvesting is permissible only where it does not impede conservation. Critically, however, there is nothing in Article IX that implies, nor expressly provides for, a role for the Commission in *promoting* rational use, nor in regulating it in any manner other than within the overarching objective of conservation. Consequently, under the plain language of Article IX, read in conjunction with Article II, the Commission has no authority to balance, or reverse the primacy of the convention’s conservation objective against the rational use of resources, that is merely allowed within the convention mandate.

To give effect to the objective of conservation, the management approach taken by CCAMLR is therefore, as a general matter, characterised by:

¹⁹ CCAMLR XIV (1995), Report, Paragraph 15.12.

²⁰ Article IX (1) (e).

²¹ Article IX (1) (f).

- a ‘precautionary’ approach. This means that CCAMLR collects data as it can, then weighs up the extent and effect of uncertainties and gaps (i.e. ‘deficiencies’) in such data before taking a management decision.
- an ‘ecosystem’ approach. This takes into account the delicate and complex relationships between organisms (of all sizes) and physical processes (marine, terrestrial, and atmospheric) that constitute the Antarctic marine ecosystem.²²

CCAMLR established its precautionary approach when adopting the approach for setting catch limits for krill. The aim is to take account of uncertainties in knowledge when deciding how best to avoid or minimise risks and to ensure the objective of Article II will always be highly likely to be met. The Commission’s precautionary approach expressly allows for management decisions to be made despite the uncertainties in the underlying scientific evidence. It expressly does not require a delay in making timely management decisions, consistent with Article II on the basis of insufficient scientific evidence.

CCAMLR’s ecosystem approach not only focuses on regulating fishing for certain species, but it also aims to ensure that fishing does not adversely impact other species that are related to, or dependent on, the target species. This has led to CCAMLR conservation measures such as the reduction of incidental seabird mortality caused by longline fishing and managing impacts of bottom fishing on vulnerable marine ecosystems.²³

CCAMLR’s commitment to establish a representative system of Antarctic MPAs to conserve biodiversity in the Convention Area, as reflected in the General Framework for the Establishment of CCAMLR MPAs (CM 91-04), lies at the intersection of its ecosystem and precautionary approaches. The Commission recognized the role of MPAs in contributing to sustaining ecosystem structure and function, maintaining the ability to adapt to climate change, and reducing the potential for introduction of invasive species. These approaches are further manifested in the objectives for MPAs set out in CM 91-04, which are decidedly focused, with full consideration of Article II, on ecosystem conservation.

A key feature distinguishing CCAMLR from most RFMOs is that CCAMLR was not created to exploit fishery resources. While the primary objective of most RFMOs is to achieve maximum sustainable yield of target stock(s), CCAMLR, from the beginning, has clearly articulated the need for precautionary, ecosystem conservation in the Convention itself²⁴ and continues to

²² Information on CCAMLR and its links to the Antarctic Treaty, https://www.ccamlr.org/en/system/files/e-linkages_1.pdf

²³ Slightly amended from Information on CCAMLR and its links to the Antarctic Treaty, https://www.ccamlr.org/en/system/files/e-linkages_1.pdf

²⁴ Article II (3)

demonstrate the application of these approaches in addressing the key conservation and management issues that come before the Commission.

V. Conclusion

On the basis of the historical backdrop against which the Convention was negotiated, the negotiating history itself, (as highlighted in Section II), the text of the convention, the history of its implementation and the continued practice of the Parties while the Convention has been in force, the central object and purpose of the Convention is consistently and demonstrably conservation. It is clear to our delegations that the only way to think about “conservation” in CCAMLR is as its singular objective. From its inception, the Convention has distinguished itself from organizations set up with the objective of promoting and managing commercial fisheries. This distinction, intended by the parties that negotiated the Convention, is a hallmark of the Convention and of the Commission. CCAMLR is focused on managing resources based on an ecosystem and precautionary approach which rely upon the best available science at the time at which conservation measures are developed. The consensus nature of the Commission necessitates that Members work together to achieve the Convention’s objective. If the Members are clear on their agreement with respect to conservation as the core of the Commission’s mission and purpose, CCAMLR will be well placed to find common ground and succeed in its future efforts.