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The Compliance Evaluation Procedure of CCAMLR: Current Problems and Proposals for Improvement

Osvaldo Urrutia

ABSTRACT

The purpose of this paper is to present some difficulties faced by the Commission for the Conservation of Antarctic Marine Living Resources (CCAMLR) in the implementation of its Compliance Evaluation Procedure (CEP) and to propose possible solutions. The article is divided into two parts: the first presents some key definitions in compliance and implementation, together with a brief description of the work of the Standing Committee on Implementation and Compliance as a subsidiary body of CCAMLR. The second part describes the compliance procedure as important tool for promoting compliance and implementation with respect to CCAMLR members, identifying problems in their application and possible options for improvements. Behind the several difficulties identified looms one major issue that was once seen as a primary strength of CCAMLR: the rule of consensus.

Key Words

CCAMLR, Antarctic fishing, compliance evaluation procedure, implementation

Compliance and Implementation in the Context of CCAMLR

A) Basic definitions

Compliance and implementation go hand-in-hand. The Contracting Parties to the Convention for the Conservation of Antarctic Living Marine Resources (hereinafter referred to as the Convention)[1] assume the obligation to comply with its provisions and with the standards adopted under it by the Commission for the Conservation of Antarctic Marine Living Resources (hereinafter referred to as CCAMLR or Commission), which are binding in accordance with article IX number 6 letter (b). Implementation actions are those carried out by a State party in order to fulfill the obligations imposed by the Convention and the conservation measures dictated in accordance with article IX[2]. The "appropriate measures within its competence to ensure compliance with the provisions of this Convention" referred to in article XXI will be different depending on the national law of each country involved[3]. Of course, the fact that a State party[4] carries out implementation actions is no guarantee of compliance, as this depends on the appropriateness and effectiveness of such actions[5]. This is very much to be determined by the Commission through the work of its Standing Committee for Implementation and Compliance (hereinafter referred to as SCIC)[6].

The nature of the obligations emanating from environmental and natural resources management treaties or regimes, especially those addressing common areas and common concerns, makes the traditional dispute settlement mechanisms more often than not resisted by party States, and they usually do not achieve good results[7]. Like the vast majority of international multilateral organizations with competence in environmental subjects and fisheries matters, CCAMLR has developed its own system to oversee and encourage compliance with its rules[8]. Similarly, and like other multilateral environmental regimes, CCAMLR has opted for non-adversarial mechanisms or non-compliance mechanisms[9]. A good example of this is the work of the SCIC within CCAMLR and its Compliance Evaluation Procedure.

The reasons that explain the above are not new. Fundamentally, the violation of an international obligation, including those arising from a treaty, results in the international responsibility of the State. As Crawford recalls, in the event of a violation of a treaty, the Law of Treaties (Vienna Convention of the Treaty Law of 1969) and the general theory of State responsibility coexist[10]. In this regard, violations of CCAMLR norms, as they are attributed to a particular State, entail in principle the international responsibility of the State. The traditional tools that international law has available in the face of these cases are essentially unilateral actions that the affected States take against these violations, including countermeasures.

However, as Jutta Brunée puts it, the self-protection measures that one State adopts against another in cases of non-compliance have very limited effects when it comes to the protection of global or common goods—as is the case of Antarctic waters and their resources. There are several reasons for this, but it is sufficient to indicate, for example, the difficulties that arise in establishing causal relationships between non-compliance and injury, or how they could take countermeasures when it comes to obligations that have an erga onmes nature[11]. Moreover, measures of this kind are by definition confrontational and reactive[12], which is precisely something that should be avoided when

it comes to the protection and management of common goods. On the other hand, situations of non-compliance often occur due to the lack of capacity of the respective State, so that the mechanisms that facilitate or help their members to comply are likely to have more effective results than the confrontational mechanisms. Something similar can be said of international litigation. This is not to say that, as a matter of principle, traditional dispute settlement mechanisms should be dismissed[13].

What it has been said does not mean that non-compliance mechanisms are particularly effective. Its multilateral structure diminishes its effectiveness, and the implicit logic of reach agreement requires the formulation of concessions. CCAMLR also faces an additional difficulty: all of its decisions on substantive matters are adopted by consensus, including those on the subject of compliance[14]. It should also be highlighted that some inherent and intrinsic factors of the CCAMLR context add complexity as well. Achieving compliance with conservation and management measures in the Antarctic Ocean is not a simple task. Given the size and navigation conditions of the area, monitoring and control are particularly difficult, and inspections at sea are costly. As in practice the waters of CCAMLR are regulated as high seas, the promotion of compliance exhibits the typical limitations and challenges of the flag State jurisdiction, where there are ample disparities in terms of capacity, efficiency and determination in the exercise of such jurisdiction.

B) The Standing Committee on Implementation and Compliance (SCIC) as a specialized body within CCAMLR

As expressly acknowledged in article X of the Convention, it is for the Commission to adopt actions to improve compliance and implementation[15]. The Commission in turn delegates to SCIC the task of examining and evaluating the extent to which the Contracting Parties have complied with and implemented the existing conservation measures, and to make the recommendations accordingly.

Unlike the Scientific Committee, the SCIC is not an organ created by the Convention. The Convention does not expressly recognize the Commission's ability to create subsidiary bodies, and only the Commission Rules of Procedure do so (rule 36)[16]. The SCIC formally acts under the framework of the Commission, and of course all of its recommendations may be approved, amended, or rightly revoked by the Commission. In this sense, the SCIC strictly does not make decisions, but adopts recommendations that in practice translate into proposals that the Commission will evaluate to adopt as binding measures or other types of actions. This does not mean that the SCIC does not make decisions in a material sense: its recommendations are the result of a process of discussion, presentation of factual information and valuation that through consensus translates into written language (report) for consideration by the Commission.

1. The Functions of SCIC

The text of SCIC's mandate and organisation, which in practice serves as a real statute for this Committee, was adopted at the Commission's 21st meeting in 2002. SCIC replaced the former Standing Committee on Observation and Inspection (SCOI), which had been created in 1987 at the 6th meeting of CCAMLR[17]. Bearing in mind that paragraph 2 of the SCIC Terms of Reference and Organisation of Work, numbers i) and ix), it is possible to group and summarize its work in

three categories:

(a) Promote compliance and implementation of existing measures

The first and most important role has to do with the review and assessment of the extent to which the Contracting Parties fulfill and implement the conservation and management measures adopted by the Commission, the advice and formulation of technical recommendations to promote such compliance, and to adopt measures to prevent, discourage, and eliminate activities that undermine the objectives of the Convention. This attribution is essential in the work of SCIC and its main objective.

(b) Technical advice and recommendation of new measures or amendments to existing ones

The second is the formulation of recommendations to the Commission to improve those conservation measures —which are not clearly scientific, administrative or budgetary in nature, as in these cases they should be dealt with by a different subsidiary body—, concerning the management and regulation of fisheries. This does not preclude the recommendation of new measures. Some of these proposals come from previous deliberations where it was concluded that the best way to facilitate compliance is to modify the conservation measure itself, which can be attributed to its text being unclear and up for interpretation[18]. Coherent, accurate, and up-to-date conservation measures facilitate compliance, and connect this SCIC function to the previously mentioned.

Additionally, it is common for SCIC to be the first instance to discuss some of the proposals for new conservation and management measures. In practice, this requires using valuable time within the busy schedule of SCIC.

(c) International Cooperation

The third category is related to priorities for improving cooperation with other international organizations. While the importance of international cooperation should not be underestimated, the fact is that these matters do not occupy a predominant place on the agenda of SCIC. It is common for the Commission to delve deeper into aspects related to international or regional cooperation. This seems suitable as the aspects of cooperation involve decisions of political content that are in line with the Commission natural and most prominent role.

2. The Nature of SCIC's Role

Bearing in mind these stated functions, especially the first two, it should be concluded that the nature of the work of SCIC is essentially technical, in the sense that it requires the application of specific knowledge mostly of a legal nature with respect to fisheries, the environment, and even maritime regulation. It is therefore important that political considerations do not interfere with the work of identifying and evaluating cases of non-compliance, such as those relating to who the involved States are. Not only because they are intrinsically contrary to any impartial analysis of an incident of non-compliance, but also because it carries the risk of adopting inconsistent measures for similar cases.

That said, the SCIC is not a court or tribunal. Its functions do not resemble dispute resolution or adjudication. It is not a question of weighing the evidence or facts on the basis of judicial criteria, much less applying rights or standards proper of criminal law. SCIC's work consists of evaluating the degree of compliance, proposing corrective actions, and providing technical advice to achieve the state of compliance necessary. Additionally, SCIC should not lose sight of its systemic role in the proper functioning of CCAMLR: to identify general situations on non-compliance and difficulties of implementation beyond the particular case, in order to distinguish its causes and how to confront them.

Since each State is sovereign to choose the implementing mechanisms it deems necessary to achieve compliance—unless otherwise provided—, SCIC focuses mainly on considerable external results and objectivity. It is for this reason that the subjective motivation in cases of non-compliance—such as fault—should be irrelevant. Practice confirms this. This is not to say that SCIC is prevented from considering issues such as the nature of the offense, the extent of the damage or injury, or whether the situations are fortuitous cases or acts of God[19]. SCIC has considered these elements on more than one occasion and the Compliance Evaluation Procedure is not indifferent to these factors. SCIC decisions ought to consider and balance the importance to prevent situations on non-compliance in the future and to improve the implementation of existing measures, and the need to adopt actual remedial measures in those cases of non-compliance that deserve it.

The Compliance Evaluation Procedure as a tool of SCIC to promote compliance and implementation

The Compliance Evaluation Procedure (hereinafter referred to as CEP) is identified with the first two categories within the classification proposed in the previous section: its main objectives are the improvement of compliance and the identification of interpretation and implementation problems in the existing CCAMLR measures. Before analyzing its functions and dynamics, some preliminary questions will be addressed below.

A. Preliminary questions

1. Who holds the responsibility—the ship or the flag State?

Given the special legal status of the Antarctic continent[20], the jurisdiction in its waters is essentially that exercised by the flag State. The inherent jurisdiction of the port State is also relevant, and is exercised regularly by those conducting inspections on vessels that have operated in the Convention area. The same happens with measures that obligate members to exercise jurisdiction over their nationals if they are embarking on foreign-flagged vessels[21].

Most if not all the non-compliance cases that SCIC deals with are vessels operating in Antarctic waters under the flag of one of the members of the Commission. What must be evaluated then is whether there is infringement of the rules adopted by CCAMLR and whether the flag State –or the port State or the State of nationality, when appropriate— has exercised its jurisdiction accordingly and appropriately[22] The relevant point is that for the purposes of the compliance and implementation

mechanism of CCAMLR, the responsible entity for these obligations is not the fishing vessel, but the flag State. This is well understood by the Commission and SCIC. The Commission has pointed out that when considering the actions of its members, the implementation of the obligations on the part of a fishing boat is the responsibility of the flag State, and that the CEP is intended to assess the compliance of members considering their responses and the corrective measures taken to solve compliance problems[23]. Upon the recognition of a non-compliance situation, the corrective actions and technical advice are aimed at the flag State and not the ship: it is the duty of the first to implement such measures in respect of the latter.

In general, the reference in the following sections of this paper to non-compliance is understood to refer to scenarios where the implementation is insufficient, but this doesn't always coincide. It is perfectly possible and it often happens that a CCAMLR member has properly implemented its obligations, but the ship operating under its flag simply fails to comply with the rules applicable to it. In these cases, the relevant things to consider are the actions that the flag State adopts to correct such instances and prevent them in the future.

2. The CEP is not the only tool to promote compliance

While this paper focuses on the CEP, this is not the only tool that CCAMLR and SCIC use to promote compliance. For example, the evaluation of some measures is carried out separately from the CEP such as the Catch Documentation Scheme for Dissostichus given its nature and complexity, and the revision of fishery notifications, as they are a prerequisite for carrying out operations in the CCAMLR area. In the latter case, such a review is not entirely detached from the application of negative consequences for non-compliance. The case of Hongjin707 is a good example and makes it possible to clarify this statement. This ship carried out illegal fishing activities in the exclusive economic zones of Atlantic countries in 2013. South Korea did not validate the respective certificates of Dissostichus catches, in addition to applying fines. As part of the process followed by the South Korean authorities, the ship was supposed to get rid of its catches in a way that would not be of financial benefit to the ship-owner[24]. However, several members—including the United States and Australia—pointed out in 2016 their discomfort by the fact that apparently the ship did not get rid of its illegal catches. South Korea had that year submitted a the notification for the Hongjin 707 so that it would in fact be active in the Dissostichus fishery in Subareas 88.1 and 88.2 during the 2016/2017 season. Members vehemently opposed this alleging that South Korea was not fulfilling its responsibilities as the flag State. The pressure on South Korea meant that the Commission—with the consensus of South Korea—finally agreed not to approve the fishery notification, which in this context could be considered as a punitive measure.

SCIC also has direct sanctions for cases of non-compliance. The best example is the inclusion in the list of vessels that have undertaken illegal, unreported and unregulated fishing, or IUU fishing, in the Convention area. CCAMLR has two lists: one for ships flagged to CCAMLR Contracting Parties and the other for non-party States[25]. Being listed carries negative consequences for the ship, the ship-owner and flag State, especially when it comes to members of the Commission.

The existence of the CEP has contributed to address the most serious cases of non-compliance or

illegality committed by vessels flagged to CCAMLR members through the adoption of corrective measures under the CEP rather than by including them on the IUU list according to measure 10-06. This is not necessarily positive. Of course, not every case of non-compliance or illegal action should result in a vessel being included on such a list, but it does not seem sensible to rule out this discussion under the premise of dealing with such cases purely in the CEP. CCAMLR's conservation measures and SCIC practice should be clearer about what type of illegal actions would merit the inclusion on the IUU list. Today this does not occur, since Conservation Measure 10-06 (2016), which currently governs the matter, is too broad in its criteria. True, there is always the possibility that under the consensus rule the member whose ship will be affected may block such a Commission's decision[26]. But these are different issues. It is perfectly possible to deal with cases of serious illegality under the CEP without excluding the possibility of listing a vessel if it engaged in serious illegal fishing. SCIC could also recommend the inclusion of a vessel in the Draft List pursuant to paragraph 6 of Measure 10-06 (2016), i.e. from one year to the following year's Draft List.

B. The Compliance Assessment Procedure (CEP): structure and implementation

At the XXXI meeting of the Commission held in 2012, Conservation Measure 10-10 (2012) establishing CCAMLR Compliance Evaluation Procedure was adopted. It entered fully into force in 2013. Its objectives are twofold. The first is to systematize and improve how relevantinformation is collected, which is necessary for SCIC to analyze the cases of non-compliance. The second is to identify such situations of non-compliance and facilitate, through an appropriate procedure and under objective parameters, the deliberations of SCIC and its recommendations to the Commission, which may include corrective actions targeted at a specific CCAMLR member.

The overall purpose and justification of the CEP is not to establish responsibilities or apply sanctions, although it is certainly something that will need to be done in certain cases, especially in the face of recidivism. The most important part of the CEP is its systemic virtue: a mechanism that allows the Commission to identify regulatory loopholes, problems that prevent one or more members from meeting their obligations, and difficulties in implementation or differences in interpretation of conservation measures. When SCIC spends more time the degree of responsibility of a particular member and less in providing tools so that the member in question improves its non-compliance condition, then the discussion is unlikely to be fruitful for the objectives of CCAMLR. In the same vein, it is essential that the SCIC prioritises the aspects it considers most relevant when evaluating compliance, otherwise the discussion runs the risk of becoming irrelevant. To determine priorities means to define those measures whose implementation is considered more important, and to do it depending on the number or the seriousness of the cases. These priorities can vary over time, which is perfectly legitimate. SCIC should consider and discuss such prioritisation in a timely manner.

The CEP is a complex process in the sense that it has several well-defined stages. After a few years of practical application, its dynamics have improved and the Commission has made progressive changes in the text of the relevant conservation measure (CM 10-10). To understand some of its difficulties, it is advisable to briefly explain the procedure, where each step plays a specific and justified role:

1. The Preliminary Report

The Secretariat prepares the preliminary report. This document contains all possible cases of non-compliance whose occurrence came to the attention of the Secretariat between August 1st and July 31st of the following year, for which it must consider the data from any relevant source. During the first years of implementation of the CEP, not all CCAMLR conservation measures were part of the process, which was understandable given the uncertainty as to the extension and complexity of the exercise. At present, breaches of any existing measure, as well as Part D of the International Scientific Observation System, must be included in the CEP.

Note that in this first step the Secretariat only informs the relevant member of its own incidents or possible violations, not those of other States[27]. This approach is appropriate because it allows ruling out factual errors before the incidents of non-compliance and their background are informed to all Commission members.

It is essential for the SCIC to have all the necessary information to allow its members, both intersessionally and at the annual meetings, to analyze each incident in its merit and to adopt recommendations. The Secretariat uses the means at its disposal to collect relevant information, including what the members themselves report. Pursuant to article XXIV, paragraph 2 (b) of the Convention, an implicit feature of the inspection and observation systems is the purpose of verifying compliance with CCAMLR conservation measures. The information that comes from both systems is vital to the success of the CEP and the deliberations of SCIC. They contribute to minimise situations where discrepancies attributed to different versions affect the assessment of non-compliance situations[28].

A relevant issue in this regard is to reinforce the work of the scientific observers. While the observer climbs aboard a ship for the purpose of collecting data, there is no reason to stop SCIC from considering the information provided by observers[29] and in fact this is done in practice[30]. In the same vein, the standard for refuting the observer should be especially high. It is also possible to think of other improvements that reinforce the work of inspectors and observers in order to obtain more and better information, which entails amendment of certain measures of CCAMLR. For example, the requirement to establish and operate video cameras on board while operating in the CCAMLR area should be explored, connected with the flag State and potentially with the Secretariat.

Another possible change that would reinforce the CEP procedure and help to prepare in advance the debates of the SCIC meetings is to support the intersessional involvement of the Chair of the SCIC. This would make it possible to understand in advance the sensitivities involved. For example, the Secretariat should immediately make the Chair aware of any relevant incident of non-compliance, so that the Chair can explore avenues of communication with the members' government agencies. This could include clarification of information in advance of the meeting and possible proposals of future actions by SCIC.

2. Disclaimers and self-qualification

The second step within the CEP is to give each member sufficient time to explain the possible situation of non-compliance, reject it or recognize it, and offer the means to endorse its position

regarding the possible qualification of the incident, including documental proof, photos, or other evidence. This self-qualification will determine the preliminary position of the respective member for the SCIC annual meeting, and predisposes other states to examine whether that qualification is correct or not[31].

The possible categories of compliance or non-compliance have not always been entirely successful in their application. The current version of Annex 10-10B reflects on the practical learning since 2013, where after five years (2013-2017) the text has improved on the basis of trial and error. Annex 10-10B includes the following compliance categories: minor non-compliant (Level 1); non-compliant (Level 2); seriously, frequently, or persistently non-compliant (Level 3). Three other qualifications are then included as well: additional information is needed; SCIC interpretation is required, or no compliance status assigned. All of these categories are given possible measures that SCIC should recommend to the Commission. In general, the text is appropriate and does not differ substantively from the practice of regional fisheries management organisations, where the logic of compliance assessment is exactly the same.

3. Summary report and discussion in SCIC

With the information provided by party States, the Secretariat must draw up a summary report, which contains explanations and disclaimers of CCAMLR members in relation to each of the possible incidents of non-compliance identified. It is on the basis of this summary report—available for the parties 42 days before the meeting—that SCIC must work during its annual session to discuss and adopt a provisional report; a document which in turn is to be considered by the Commission.

During its annual meeting, SCIC discusses on the basis of the summary report, with a view to adopt the provisional report. In general, the member whose possible breach is the subject of analysis presents facts that would contradict such a breach, or assuming the breach took place, indicates corrective actions or possible sanctions that already have taken place or the member intends to adopt. If the member accept the non-compliance situation SCIC is generally flexible in terms of corrective actions. If the member does not recognize the case as a situation of non-compliance the discussion expands to include aspects such as the available evidence, or possible interpretation of the measure in question.

An impartial observer is likely to experience some frustration by attending these SCIC meetings. It is increasingly common to witness extensive discussions on matters that are relatively simple to resolve, and listen to lengthy speeches of members seeking to justify breaches—total or partial—on the basis of dubious reasoning. In an organisation built upon consensus like CCAMLR, negotiation to address situations of non-compliance seems like an implicit risk—or a price—in exchange for maintaining the spirit of cooperation. Yet this is not sustainable over time: if compliance becomes a matter left to the discretion of member States, it no longer makes sense to take regulation seriously.

On top of this, it is not unusual to hear interventions from members who do not seem to understand the purpose of the CEP exercise. On the one hand, some prioritize the need to establish responsibilities and target those who present situations of non-compliance, even for minor infringements. On the

other hand, it is also worrying to witness others who endeavor to argue that they never do wrong or make mistakes, as if the whole issue is to avoid some sort of reputational stain. The truth is,in the logic of the CEP, it is less important the question of compliance itself than the reaction and measures adopted to deal with such a situation. As a result, a non-compliance status deserves a lower reproach than not taking appropriate measures to prevent similar situations from being repeated in the future. Of course, this is certainly different in situations of recidivism.

SCIC deliberates on the adoption of the provisional report, which must be adopted by consensus. The Commission then will discuss and adopt the final compliance report for the respective year.

4. Critical analysis: positive aspects

There have been several positive aspects of the CEP. The flow of information has substantially improved, and the systematized analysis facilitates the assessment of non-compliance cases. This legitimises the discussion and the adoption of corrective measures since members are continuously given the opportunity to submit and present its explanations and disclaimers.

There are three characteristics that have contributed to the positive evolution of the CEP process, despite its inherent complexities . It is then advisable to insist that they should be observed by SCIC on its deliberations:

(a)Analysis of available information and contrast with the text of current measures

The analysis and assessment of cases of non-compliance must be carried out on the basis of the text of the conservation measures, their interpretation according to the Convention and to the general rules of international law, and bearing in mind the facts and information available for each case. If SCIC concludes that the situation is not clear because the norm in question supports more than one interpretation, then it should be recommended as one of the pertinent changes to the Commission.

(b) Focus on a specific case for consideration along with the member as a whole

As a general rule, discussions should focus and be limited to each incident of non-compliance. Broader questions to CCAMLR members should in principle be avoided. This is why the current practice of presenting and addressing non-compliance cases following the measures breached instead of State by State—as it was done in some past instances—allows for the avoidance of such general questions. Certainly, if there are cases of recidivism or an excessive number of non-compliant situations in a specific season, it is a SCIC duty to discuss and propose corrective measures accordingly.

(c) Objective responsibility

A fundamental aspect is that SCIC understands that when evaluating cases of non-compliance, a strict rule of objective responsibility must be applied. This means that the violation of a rule or measure is established independently of subjective aspects such as fault by those who made or participated in the actions[32]. This does not exclude situations of force majeure, which in fact are in

some way considered in Annex 10-10/B of Measure 10-10 (2017).

5. Difficulties in the adoption of the provisional report

(a) The excessive extension of the CEP

Discussions within the framework of the CEP occupy more and more time on the SCIC agenda, and therefore of CCAMLR. There are actions that would allow the CEP's deliberations to be more efficient, some of which have already been suggested. One of them is to reinforce the work of the Chair of the SCIC between meetings, giving the possibility to explore consensus solutions in advance of the annual discussion, and to guide the interventions in this way. Improving the flow of information prior to the SCIC meeting in order to shorten the discussions during the meeting would also help. This point will be mentioned again in the conclusions.

(b) Allow time for appropriate advice from the Scientific Committee

Some of the cases of non-compliance require clarification and advice from the Scientific Committee. This is an issue that goes well beyond the exercise of the CEP, and affects the work of the SCIC and even the Commission. In general, the advice that the Scientific Committee provides to the Commission and other subsidiary bodies such as SCIC should not be generated in tandem with the meeting of the SCIC and only a few hours before the meeting of the Commission. In terms of compliance, this has generated problems.

For example, one of the difficult issues during the 2013 meeting was the analysis of the catch per unit of effort (CPUE) of three South Korean ships from the Korean company Insung, which seemed anomalous. When this issue arose in the SCIC debate, some members wanted to deal with the issue in terms of compliance, while others were unclear because the Scientific Committee was still reviewing the issue (the following year it was confirmed that it was a serious case of non-compliance). The discussion was long and complex, because the advice of the Scientific Committee was not yet closed and therefore the Chairman of the Scientific Committee, when speaking to the SCIC, could not provide all the answers[33]. This kind of situation could be solved in a way that seems radical, but that in the practice of most regional organisations with competences like CCAMLR is already common: the meeting of the Scientific Committee should take place months in advance of the SCIC and Commission meetings. This would allow for a report from the Scientific Committee that is well settled in advance of the SCIC and Commission meetings, facilitating the work of the latter[34].

(c) The abuse of consensus

One of the most insoluble difficulties in the dynamics of the CEP is the fact that the recommendations for cases of non-compliance—even in serious instances—must always be adopted by consensus, which allows the member in question to have the ability to block or veto any attempt to take corrective action that it may dislike[35]. This could be due to legitimate discrepancies, but the possibility that a member may block consensus to the end is devastating to the procedure itself. There are several examples of the above, but the one that seems to be the most dramatic occurred

in 2017, where for the first time consensus was not reached in the adoption of the compliance report in SCIC and in the Commission (both provisional report and final). Paragraph 3.25 of the Commission report notes that the Commission adopted a report on Compliance (Annex 8) which includes the 18 cases considered by SCIC but without having assigned a compliance category in the case of China relating to MC 10-04. This is a procedural obligation, certainly far from the most important of the measure in question[36]. However, the discussion of whether or not China had breached this obligation took up an important chunk of the SCIC's time, generated unnecessary tensions, and finally did not have a satisfactory outcome. It is not the intention of this paper to enter into the background analysis of the case in question, but this situation confirms the apprehensions that have been formulated in this work.

The generic question that arises is whether consensus is desirable all the time. In terms of compliance, decisions by consensus are not always possible or desirable, as the party concerned can block the decision that the organization intends to adopt. There are fairly clear experiences in multilateral fisheries agencies that suggest more efficient approaches, such as the possibility of voting when consensus is exhausted[37]. However, it is highly unlikely that this will happen in CCAMLR, both because such a change must be made by consensus—and not everyone will agree with it—as for some States it is essential to maintain consensus as a decision making rule throughout the entire Antarctic Treaty System[38].

The following question is then how is it possible to limit the negative effects that the veto to consensus carries in the work of the SCIC? Unfortunately there is not much that can be done. Traditional responses exist: more and better negotiation and persuasion. But there is also a limit to negotiation when it comes to compliance issues. That is why consensus is not an end in itself, because there is a point at which negotiating the category or degree of compliance simply means altering the facts under consideration. This has other negative consequences, including the perception of the organization's effectiveness as a whole. Of course, this is not a desirable scenario and should be maintained as something strictly exceptional. The point here is that the lack of consensus seems better than altering the nature of the facts at the price of reaching an agreement. What remains for those members who maintain their discrepancies is simply to leave in writing in meeting report their reasons and positions. The report should account for the majority and minority positions, with express attribution to each member who so desires. This is close to what happens in practice.

Conclusions: Identifying improvements

The present paper has exposed several problems that affect the evaluation of compliance in CCAMLR from both procedural and substantive aspects, as well as proposed possible improvements. By way of conclusion, the following points summarise these proposals:

1. Access to information and efficiency in the procedure

CCAMLR members who face non-compliance situations should take a more active role in making available to the SCIC all possible information, including relevant questions and questioning, prior to

the annual meeting. In other words, after the summary report concerned CCAMLR members should concentrate on having everything necessary to facilitate the discussion under the CEP, avoiding gaps during the meeting and thus contributing to shorten the discussions. This exchange of information can be done both directly and through the Secretariat. In this, the Chair of the SCIC can also play a role.

Also, the access to the summary report should not be limited to the members of the Commission only. At this point it is not inconvenient that this information, although still preliminary, should be made available to non-governmental and fishing organizations that participate annually in the CCAMLR meeting, and in general to all those who have observer status. This would be an incentive to provide useful information if that is relevant or possible and to improve the transparency and legitimacy of the procedure as a whole.

2. Optimise advice from the Scientific Committee on compliance issues

The problems that may arise from holding the Scientific Committee meeting on the same date as the SCIC have been exposed. This paper postulates that the meeting of the Scientific Committee should be carried out a few months in advance of the SCIC and Commission meetings, so that the latter have all the relevant scientific information (even beyond compliance and implementation) in anticipation of their sessions. This would be important in facilitating deliberations in both the SCIC and the Commission. Moreover, itis usually common practice in several regional fisheries bodies and other multilateral environmental regimes.

3. Role of the SCIC Chair

It is desirable that the Chair of the SCIC should play a more active intersessional role, which can help to prepare the most complex cases of the annual meeting jointly with the members of the Commission that face non-compliance issues. By doing this the Chair may propose specific and bespoke solutions to the incident, and thus to optimise the use of time at the meetings. The same is perfectly applicable to the Chair of the Commission once the report has been adopted and the differences persist.

4. Prioritise

SCIC should prioritise its two main functions, as explained in this paper: to promote and evaluate compliance and implementation, and to improve existing measures. The agenda should be prepared with both tasks outlined clearly. In the same vein, prioritization within the CEP is equally relevant. Delegations at SCIC should be clear about the priority objectives and the importance of the CEP. Intersessional work is key, but the organisation across e-groups only seems insufficient. That is why the intersessional role of the Chairs of both the SCIC and the Commission can help in this regard.

5. Do not lose sight of the rules that guide the compliance evaluation

This paper has also proposed the following rules as a starting point for the consideration and analysis

of non-compliance cases in the CEP, which are confirmed by the practice of CCAMLR members: analysis of available information and contrast that information with the text of the actual measures; focus on the incident and not on the overallreview of the member as a whole, unless facts merit that; and draw conclusions on an objective responsibility approach leaving aside aspects such as fault.

6. The importance of consensus, but not as an end in and of itself

As a general rule of regulation, consensus is desirable and is one of the structural pillars of CCAMLR and the Antarctic Treaty System. However, this rule does not always work well in compliance and implementation. Although it would be desirable to have alternatives to the consensus in addressing situations of non-compliance—as in other organizations with CCAMLR-like competencies—, changes of this nature are highly unlikely. It seems realistic to assume that under the current scenario, for SCIC trying the best possible and persuasive approach is what should be done.. That said, consensus cannot be an end in and of itself. It is understandable that there are sometimes insurmountable differences in assessing and appreciating non-compliance cases, and there is not much left to do when despite all efforts the consensus is not achieved. CCAMLR members should not fail to express and record their positions and objections in writing for the meeting report. This points to a precedent that can be used in the future to ease positions in similar cases.

The CEP plays a key role in evaluating and promoting compliance with CCAMLR rules and standards. Its application has exhibited accomplishments and problems. CCAMLR has the tools, the experience, and the capacity to overcome the current difficulties and continue to refine this mechanism, in the future, for the better performance of CCAMLR itself.

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**LLM (London). Faculty of Law,P. Universidad Católica de Valparaíso (Chile), and Victoria University of Wellington (New Zealand). The author was the Chair of CCAMLR's Standing Committee for Implementation and Compliance between 2013 and 2016, and is currently the Chairman of the Commission for the South Pacific Regional Fisheries Management Organization (SPRFMO). The opinions expressed in this paper are exclusively personal and do not represent any institution, agency, or government.*

1- 1329 UNTS 47. Adopted on May 20, 1980, entered into force on April 7, 1982.

2- CCAMLR utilizes the word "execution" to refer to implementation. This paper uses the word "implementation" to refer to the same phrase.

3- Article XX number 1: "Each Contracting Party shall take appropriate measures, within its competence, to ensure compliance with the provisions of this Convention and the conservation measures adopted by the Commission which are binding in accordance with Article IX of this Convention." Paragraph 2 adds that "each contracting party shall transmit to the Commission information on the measures taken in accordance with paragraph 1 above, including the imposition of sanctions for any violation of this Convention."

4- Although this article focuses on the members of the Commission, it should be remembered that Article X states that the Commission will call attention to any non-party State whose nationals and vessels affect the implementation of the objectives of the Convention. This is added to the provisions of Article XXII, in the sense that the Contracting Parties shall endeavor to prevent any activity contrary to the objectives

of the Convention. The latter rule does not distinguish between party States and non-party States, so both provisions are an appropriate starting point to substantiate the actions CCAMLR adopts against national and non-party States that undermine the objectives of the Convention.

5- Internal implementation acts are those necessary to comply with an international obligation. In some cases, it is sufficient to abstain in order to comply, such as when the vessels of a contracting party abstain from fishing using gillnets or when they do not use bottom trawling in areas where such equipment is prohibited. It is likely that in order to achieve such abstention, it's necessary to carry out certain acts at the national level by the flag State, such as the adoption of internal legislation, regulatory application, monitoring and surveillance, and changes in registry or of licenses, to name a few. Implementation is also necessary in other cases, especially when the execution of positive acts is required. Typical examples are the installation of vessel monitoring system (VMS) and the internal organisation of the Catch Documentation Scheme for toothfish (Dissostichus).

6- Standing Committee for Implementation and Compliance. The acronym SCIC is widely used in practice by CCAMLR, by both English and non-English speakers.

7- Article 33 of the Charter of the United Nations, those which assume the existence of a dispute: negotiation, investigation, mediation, conciliation, arbitration, judicial settlement, recourse to regional bodies or agreements or other peaceful means of their choice.

8- In the case of regional fishery bodies this is also common. For example, the Western and Central Pacific Fisheries Commission (WCPFC) adopted its compliance assessment procedure through measure 2010-03, and the Regional South Pacific Fisheries Management Organization (SPRFMO) regulates a similar process under its measure 10-2018. In multilateral environmental regimes this type of mechanism has been previously included. Although with very different levels of success, see for example the role of the Implementation Committee under the Montréal Protocol on Substances that Deplete the Ozone Layer of 1987 (decisions II/5 and IV/5 1990 and 1992, respectively), and the procedure for non-compliance under the Cartagena Protocol on Biosafety of 2000, adopted in 2004..

9- See for example: Jan Klabbers' "Compliance Procedures" in Daniel Bodansky, Jutt aBrunnée and Ellen Hey The Oxford Handbook of International Environmental Law (OUP, New York, 2008), Karen N. Scott, 'Non-Compliance Procedures and Dispute Resolution Mechanisms Under International Environmental Agreements' in D. French, M. Saul, and N.D. White (Eds) International Law and Dispute Settlement: New Problems and Techniques (Hart Publishing, 2010), Anna Huggins Multilateral Agreements and Compliance: The Benefits of Administrative Procedures (Taylor & Francis, 2018).

10- James Crawford's State Responsibility: The General Part (CUP, Cambridge, 2013), page 52. Article 12 of the draft article on State Responsibility for Internationally Wrongful Acts (United Nations General Assembly resolution 59/35 on December 2, 2001) states that if "There is a breach of an international obligation by a State when an act of that State is not in conformity with what is required of it by that obligation, regardless of its origin or character."

11- Jutta Brunée "Enforcement Mechanism in International Law and International Environmental Law" in U. Beyerlin, K. Stoll, and R. Wolfrum (Eds) Ensuring Compliance with Multilateral Environmental Agreements: A Dialogue Between Practitioners and Academia (Martinus Nijhoff Publishers, Leiden, 2006), pages 12-13.

12- Ibid.

13- Such as arbitration and judicial settlement. In any case, the possibility of resorting to these mechanisms is limited under the Convention, because it depends on the consent of all parties involved in the dispute, as provided for in article XXV. It is true that there are cases where disputes associated with marine natural

resources have reached international tribunals, but they are the exception and not the rule. Perhaps the most spectacular is the recent Whaling in the Antarctic Australia vs. Japan seen before the International Court of Justice (judgment on the merits in 2014).

14- Article XXI, paragraph 1 of the Convention.

15- Article X of the Convention states that "the Commission shall draw the attention of all Contracting Parties to any activity which, in the opinion of the Commission, affects the implementation by a Contracting Party of the objective of this Convention or the compliance by that Contracting Party with its obligations under this Convention."

16- Available at www.ccamlr.org/en/document/publications/rules-procedure-commission

17- It is interesting to recall that the SCOI was created with the main function of being the system for observations and inspection.

18- A graphic example that demonstrates this happens in practice. During the SCIC meeting of 2013, cases of non-compliance with paragraph 3 (xi) of the then Conservation Measure 10-02 (2011) were discussed. Paragraph 3 indicates that the flag State must inform the Secretariat of the licenses it has been granted for the CCAMLR area. Among such information should be if applicable, details of the requirements to prevent undue manipulation of the VMS on board, in accordance with the conservation measure 10-04. At that meeting in 2013, the interim report found that 19 ships of seven members of the Commission failed to comply with this rule. Since then, this high number of non-compliance is rare, and the SCIC agreed that this was caused by the ambiguity of the norm, and recommended that the words "if appropriate" be eliminated, so as to clarify in the future that compliance in the delivery of the aforementioned information is not option for the flag State. Measure 10-02 was amended in accordance with that recommendation.

19- Concerning the nature of the violation, the case of the Chilean ship Antarctic Bay was a good example. The actions of this vessel on April 15, 2014 in contravention of the obligation to cast only at night, as required by MC 25-02 (2012), resulted in the death of 74 petrels (paragraph 13 of the SCIC Report, 2014). SCIC highlighted the extent of the damage caused by such an incident, which was recognized by Chile.

20- Article IV of the Antarctic Treaty of 1959. In the absence of agreement on the existence of coastal States in Antarctica, the freezing of claims of sovereignty under the Antarctic Treaty implies that in practice there are no coastal States, and the waters of the Convention are regarded as high seas.

21- See Conservation Measure 10-08 (2017) adopted by CCAMLR.

22- See articles 91, 93, and 94 of the United Nations Convention on the Law of the Sea (UNCLOS), and in particular the need for genuine linkage and ability to exercise control over ships flying its flag. There is no doubt about the application of UNCLOS rules and the right to the sea in the Convention area, in the context mentioned above in footnote 18. For example: Arthur Watts' International Law and the Antarctic Treaty System (The Burlington Press, Cambridge, 1992), page 163. Also see Christopher C. Joyner's "The Antarctic Treaty System and the Law of the Sea—Competing Regimes in the Southern Ocean?" (1995) 10 IJMCL 301.

23- Paragraph 131 of the SCIC Report (2013), approved by the Commission. Available at: www.ccamlr.org/es/ccamlr-xxxii

24- Paragraph 190, SCIC Report, Annex VI of the report of the Commission in 2013. Available at: www.ccamlr.org/es/ccamlr-xxxii, page 172.

25- Regulated by Conservation Measures 10-06 (2016) and 10-07 (2016) respectively.

26- It is what happened conspicuously in 2011 with the South Korean ship, Insung No. 7, which after being placed on the SCIC list of UII ships, Korea blocked the consensus in the Commission. Some members

stressed the need to rush the adoption of a compliance assessment procedure. See for example paragraph 9.16 of the CCAMLR Commission Report from 2011.

27- The Secretariat circulates to each Contracting Party its respective preliminary report no later than 75 days before the annual meeting of the Commission, paragraph 1 paragraph (ii) of the Measure 10-10 (2017).

28- While it is not the general rule, these situations can occur. An example was the case of the Norwegian ship Juvel, inspected by Chilean authorities in the port of Punta Arenas in March 2014. At the SCIC meeting in 2014, Chilean authorities noted that the ship did not comply with the sealing of the VMS antenna as required by Conservation Measure 10-04. Norway noted that "it had received confirmation from the ship that the original system was intact," and that it was a VHF antenna (paragraphs 35 and 36, and respective paragraphs of the compliance report). The problem was finally addressed as a matter of interpretation of the measure itself.

29- Mansi points out that while observers are not inspectors, they contribute to the work that inspectors, they contribute to the work that inspectors develop on board. Ariel R. Mansi's "The System of Inspection of the Commission for the Conservation of Antarctic Marine Living Resources," in Lilian del Castillo (ed.) Law of the Sea, From Grotius to the International Tribunal for the Law of the Sea: Liber Amicorum Judge Hugo Caminos (Brill, Leiden, 2015), page 224.

30- Annex I to the CCAMLR Observation System does not prohibit it either. On the contrary, the role of the observer is to observe or report on the operation of fishing vessels in the Convention area bearing in mind the objectives and principles of the Convention.

31- Each Contracting Party shall return its preliminary report to the Secretariat with any additional information of interest and the qualification of compliance suggested for each case of non-compliance no later than 45 days before the annual meeting of the Commission, paragraph 1 (iv) Measure 10-10 (2017).

32- See paragraph 70 of the SCIC report from 2015. Available at: www.ccamlr.org/es/ccamlr-xxxiv

33- See paragraphs 198 and 212 of the SCIC Report from the 2013 meeting.

34- The second evaluation of CCAMLR's operations contemplate various observations and proposals for changes in regard to the function of the Commission, but did not include proposals for changes in the current Scientific Committee meeting dates. Available at: www.ccamlr.org/es/system/files/s-cc-xxxvi-01-w-cp.pdf

35- In general, the problems and criticisms arising from the consensus rule are not new in CCAMLR. See for example Donald Rothwell's The Polar Regions and the Development of International Law (CUP, New York, 1996), pages 131 and 132. Some emphasize that for a while it could work smoothly, especially during the last decade of the last century. See Erik J. Molenaar's "CCAMLR and Southern Ocean Fisheries" (2001) 16 IJMCL 465, page 470.

36- This case refers to paragraph 6 of MC 10-04 (2015) on VMS, which states that each flag State shall notify the Secretariat of the name, address, e-mail address, telephone, and fax numbers of the relevant managers of its Fisheries Monitoring Center, and that each flag State shall, without delay, notify the Secretariat of any change in those details.

37- Article 16 of the Convention establishing the South Pacific Regional Fisheries Management Organization (SPRFMO) makes it possible to resort to the vote exhausted by consensus, and to make decisions for three-quarters of the members who vote effectively.

38- Especially by the complaining members for sovereignty in Antarctica. Bruce W. Davis's "The Legitimacy of CCAMLR" in Olav Schram Srokke and Davor Vidas Governing the Antarctic (CUP, Cambridge, 1996), page 237.

-Jutta Brunnée. "Enforcement Mechanism in International Law and International Environmental Law" in U. Beyerlin, K. Stoll y R. Wolfrum (Ed) Ensuring Compliance with Multilateral Environmental Agreements: A Dialogue between Practitioners and Academia (Martinus Nijhoff Publishers, Leiden, 2006).
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