

CIL Fireside Chat Series
Whaling in the Antarctic (Australia v. Japan):
International Law, Science and the Environment
Friday 19 September 2014, 4:30-6:30 pm

International Law & Antarctic Whaling

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Part 1

Australia & New Zealand v Japan (International Court of Justice)

Institution of Proceedings

- 1 June 2010 - Australia instituted proceedings before the ICJ against the Government of Japan, alleging that:
 - “Japan’s continued pursuit of a large scale programme of whaling under the Second Phase of its Japanese Whale Research Programme under Special Permit in the Antarctic (“JARPA II”) [is] in breach of obligations assumed by Japan under the 1946 Convention

Basis for Jurisdiction of ICJ

- Basis of Jurisdiction is “Optional Clause Declarations” of under Article 36(2) of the ICJ Statute
 - Article 36(2) provides a State may make a formal declaration stating that it recognizes the compulsory jurisdiction of the ICJ over any dispute on an issue of international law between it and another State which makes a similar declaration
- Japan, Australia and New Zealand are among the 70 States that have made Optional Clause Declarations

Basis of Jurisdiction

- Australia argued that there is a dispute between the two States on the interpretation or application of the provisions of the 1946 International Convention for the Regulation of Whaling
- Since the 1946 Convention has no provisions providing for any other dispute settlement mechanism, the ICJ has jurisdiction under the Optional Clause Declarations
 - Note: Australia's Optional Clause Declaration states that it does not apply to any dispute in regard to which the parties have agreed or shall agree to have recourse to some other method of peaceful settlement

Challenge to Jurisdiction Rejected

- Japan contested jurisdiction of the ICJ, arguing that the dispute was excluded by Australia's reservation to its Declaration:
 - (b) any dispute concerning or relating to the delimitation of maritime zones, . . . or arising out of, concerning, or relating to the exploitation of any disputed area of or adjacent to any such maritime zone pending its delimitation;
- The Court concluded that Australia's reservation did not apply because there is no maritime delimitation dispute between the Parties in the Antarctic Ocean

Intervention by New Zealand

- 20 November 2012 – New Zealand filed a declaration of intervention in the case, contending that it has a direct interest in the construction that might be placed upon the Convention by the Court
- Considering the absence of objections from the Parties, the Court took the view that it was not necessary to hold hearings on the question of the admissibility of New Zealand's Declaration of Intervention
- 6 February 2013 - Court decided that the Declaration of Intervention filed by New Zealand was admissible
- New Zealand then submitted written observations as requested by the Court

KEY ISSUE in Case: Scientific Whaling Exception

51. Article VIII, paragraph 1, of the Convention:

- Notwithstanding anything contained in this Convention any Contracting Government may grant to any of its nationals a special permit authorizing that national to kill, take and treat whales for purposes of scientific research subject to such restrictions as to number and subject to such other conditions as the Contracting Government thinks fit, and the killing, taking, and treating of whales in accordance with the provisions of this Article shall be exempt from the operation of this Convention.

ICJ Decision of 31 March 2013

- ICJ found that Japan's Research Program in the Antarctic (JARPA II) involves activities that can broadly be characterized as **scientific research**, but
 - the evidence does not establish that the programme's design and implementation are reasonable in relation to achieving its stated objectives
- Court concluded that the special permits granted by Japan for the killing, taking and treating of whales in connection with JARPA II **are not "for purposes of scientific research"** pursuant to Article VIII, paragraph 1, of the Convention.

Reasoning on Use of Lethal Methods

- The Court finds no evidence of any studies of the feasibility or practicability of non-lethal methods, either in setting the JARPA II sample sizes or in later years in which the programme has maintained the same sample size targets.
- The Court also finds no evidence that Japan examined whether it would be feasible to combine a smaller lethal take and an increase in non-lethal sampling as a means to achieve JARPA II's research objectives.

Reasoning on Design of JARPA II

- Court observed that the resemblances between JARPA II and JARPA cast doubt on Japan's argument that JARPA II objectives relating to ecosystem monitoring and multi-species competition are distinguishing features of JARPA II that call for a significant increase in the minke whale sample size and the lethal sampling of two additional species.
- Court also noted that Japan launched JARPA II without waiting for the final review of JARPA by the Scientific Committee
- Court concluded that “the evidence does not establish that the programme's design and implementation are reasonable in relation to achieving its stated objectives”

Official Reaction of Japan to Ruling

- Japan is disappointed and regrets that the Court ruled that JARPA II by Japan did not fall within Article VIII, paragraph 1, of the ICRW.
- Japan will abide by the Judgment as a State that places a great importance on the international legal order and the rule of law as a basis of the international community.
- We will consider our concrete future course of actions carefully, upon studying what is stated in the Judgment
- It is to be expected that Japan will take account of the reasoning and conclusions contained in this Judgment as it evaluates the possibility of granting any future permits under Article VIII, paragraph 1, of the Convention.

2014 Decision to Resume Whaling

- On 4 September 2014, Japan announced that it seeking to resume Antarctic whaling in 2015 under a revised research program that would involve fewer killings and only minke whale
- Japan's Fisheries Agency will announce its intention and basic plan at the 15-18 September meeting of the IWC in Slovenia
- Japan's Fisheries Agency is working on a revised program to be submitted to the IWC's Scientific Committee around November.

Option of Australia & New Zealand

- Is Australia and New Zealand believe that the new programme of Japan does not meet the requirements in the Convention, will they go back to the ICJ?
- Article 60 of ICJ Statute:
 - In the event of dispute as to the meaning or scope of the judgment, the Court shall construe it upon the request of any party.

Part 2

The Case in the Broader Legal Context: IWC and Activist NGOs

1946 Convention & IWC

- 1946 International Convention for the Regulation of Whaling
- Preamble to the Convention states that its intention is
 - “to provide for the proper conservation of whale stocks and thus make possible the orderly development of the whaling industry”
- International Whaling Commission (IWC) is an international body established under the 1946 Convention
- Headquarters of IWC is in Impington, England

Membership of IWC

- Original members consisted only of the 15 whale-hunting nations
- Membership open to any State that formally accepts 1946 Convention
- Since the late 1970s and early 1980s, many countries which have no previous history of whaling have joined the IWC
- Bitter split in IWC between Limited-Whaling and No-Whaling Members
- As of July 2014, there were 89 members
- NGOs that maintain offices in more than 3 countries may also attend the annual meetings

International Whaling Commission

- Main duty - keep under review and revise as necessary the measures laid down in the Schedule to the Convention which govern the conduct of whaling throughout the world
- IWC is given the task of adopting regulations "to provide for the conservation, development, and optimum utilization of the whale resources"
- IWC regulations "shall be based on scientific findings"

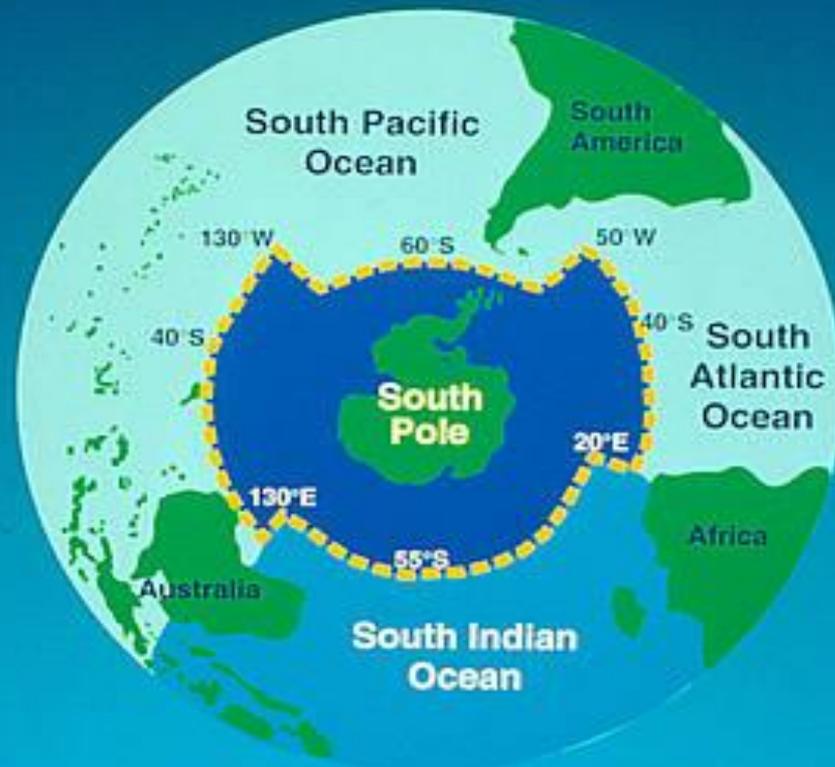
1982 Ban on Commercial Whaling

- On 23 July 1982, members of the IWC voted by the necessary three quarters majority (25-7-5) for a moratorium on commercial whaling
- Moratorium applies only to commercial whaling by countries that did not file formal objections
- Whaling under the scientific-research and aboriginal-subsistence provisions is still allowed
 - Norway has been whaling commercially since 1994
 - Iceland has been whaling commercially since 2006
 - Japan has been whaling under **scientific research permits** since 1986

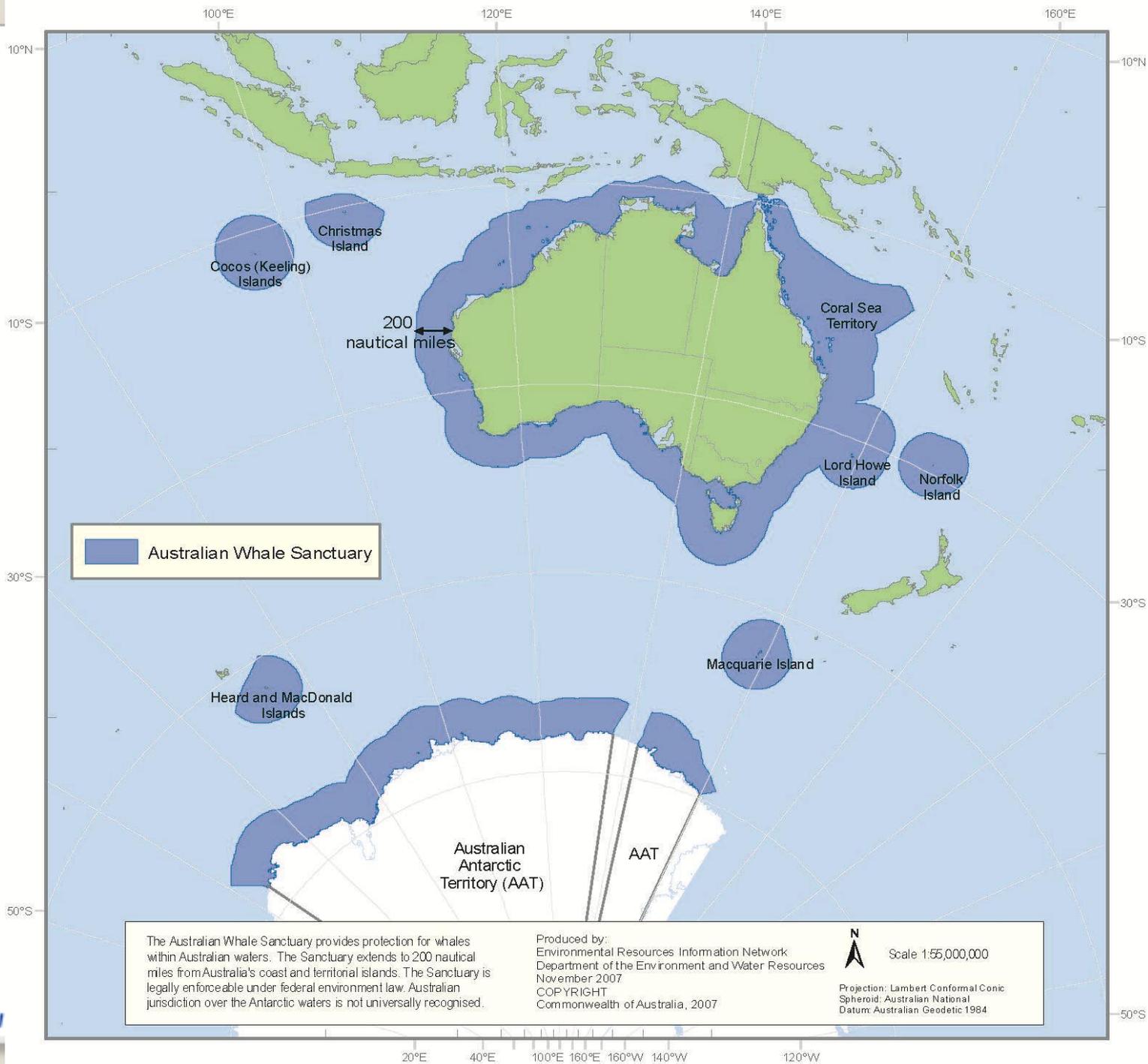
Southern Ocean Whale Sanctuary

- In May 1994, the IWC voted to create the 31,000,000 km² Southern Ocean Whale Sanctuary where commercial whaling is prohibited
- Vote to adopt the sanctuary resolution was 23-1-6 (Japan opposed)
- Japan lodged a formal objection to the sanctuary with regard to minke whales – effect was that the terms of the sanctuary do not apply to its harvest of that species within the sanctuary
- Japan's Institute of Cetacean Research (ICR) has continued to hunt whales inside the Sanctuary
- Japan's position is that while some whale species are threatened, many species such as the Minke whale are not
- Anti-Whaling States maintain that Japan's whaling under the scientific research exception is simply disguised form of commercial whaling

The Southern Ocean Whale Sanctuary



- Boundary of Southern Ocean Whale Sanctuary
- Southern Ocean Whale Sanctuary
- Part of Indian Ocean Whale Sanctuary



Is a Compromise within IWC Possible?

- Japan official statement:
 - “Japan joined the IWC more than 60 years ago; and despite the deep divisions within the IWC, and its inability in recent years to function effectively, Japan has stayed within the IWC and tried to find generally-acceptable solutions to its problems”.
- Can a compromise be reached by IWC that will allow Japan, Norway, and Iceland to continue commercial whaling on the condition that the overall catch is limited and based on sound scientific principles?

Role of Sea Shepherd

- The Sea Shepherd Conservation Society (SSCS) is a non-profit, marine conservation organization based in the United States and headed by Paul Watson
- Sea Shepherd uses aggressive actions to disrupt Japanese whaling activities in the Antarctic
- Officials of the American, Canadian, and Japanese governments have accused them of being eco-terrorists.
- Paul Watson and American members of Sea Shepherd are currently prohibited by US courts from approaching or harassing Japanese whalers



Dangerous waters: Japanese whaling vessel Yushin Maru No. 3 (left) and Sea Shepherd's the Bob Barker collide in the remote, icy seas off Antarctica in this

US Court of Appeal Ruling

- In February 2013 the US Court of Appeal for the 9th Circuit (California) ruled that Shepherd's acts constituted **PIRACY** under international law:
 - You don't need a peg leg or an eye patch. When you ram ships; hurl glass containers of acid; drag metal-reinforced ropes in the water to damage propellers and rudders; launch smoke bombs and flares with hooks; and point high-powered lasers at other ships, **you are, without a doubt, a pirate,** no matter how high-minded you believe your purpose to be.

UNCLOS Article 101. Definition of Piracy

- Piracy consists of any of the following acts:
 - (a) any illegal acts of violence . . . ,
committed for private ends
by the crew or the passengers of a private ship . . . ,
and directed:
 - (i) on the high seas [or in the exclusive economic zone],
against another ship . . . ,
or against persons or property on board such ship . . . ;

1988 Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (SUA)

Article 3.

- 1. Any person commits an offence if that person unlawfully and intentionally:
 - (b) performs an act of violence against a person on board a ship if that act is likely to endanger the safe navigation of that ship; or
 - (c) . . . causes damage to a ship . . . which is likely to endanger the safe navigation of that ship; or
 - (d) places or causes to be placed on a ship, by any means whatsoever, a device or substance which is likely to . . . cause damage to that ship or its cargo which endangers or is likely to endanger the safe navigation of that ship; or

Potential Issues if Japan Resumes Whaling & Challenged by Sea Shepherd

- If Sea Shepherd engages in similar tactics in 2015, Japan could exercise legal options:
 1. Pressure Flag State of Sea Shepherd vessels to take action for violations of Collision Regulations
 2. Order its Coast Guard to arrest Sea Shepherd vessels
 3. Demand that State where Sea Shepherd ship takes refuge take captain & crew into custody and either “extradite or prosecute” them as required by 1988 SUA Convention

Thanks for your attention

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