

CASE STUDY 1-WHALING CASE STUDY

Focus:

- **Structures and institutions of international law**, their regulatory reach and political contexts, and the different participants involved in global governance
- **Relationship between international law and domestic legal systems**
- **Nature and function of international institutions**-considering work of International Whaling Commission
- **Institutions and procedures for the settlement of international disputes**-ICJ judgment in *Case concerning Whaling in the Antarctic (Australia v Japan: New Zealand intervening)* (2014) and its aftermath.

1. The law of the sea-an overview

International legal regimes of the oceans, with a particular focus on the United Nations Convention on the Law of the Sea – a landmark instrument of public international law

Andrew Mitchell and Jennifer Beard, 'Law of the Sea', Chapter 12 in *International Law in Principle* (Thomson-Reuters 2009) 261-283

Development of the law of the sea-Over 95% of Australian international trade by volume travelled by sea, >99% of data traffic in and out of Australia travelled along submarine cables, value of fishing to Australia's economy is \$50 billion, and area of ocean and seabed subject to Aus JURIS is over 1.5 times the size of Australian continent

Introduction Grotius and Mare Liberum

- **Grotius**-Dutch international lawyer, motivated by Dutch reaction to Spanish and Portuguese division of the world- (1608)-argued that world's oceans incapable of being subject to sovereignty of any state, thus open to navigation, trade and fishing by all.
- **States couldn't claim dominium over ocean space** because they can't place ocean areas under permanent control, warships could only occupy an area on a temporary basis.
- **Jurisdiction at sea based on imperium-right of a ruler to control the actions of their subject.**
- **Grotian view of freedom of seas prevails**, and 18th C and 19th C, Europeans powers favoured freedom of seas

First Efforts at Codification of the Law of the Sea

- **Canon shot rule (1702, Bynkershoek-Dutch lawyer)**-proposed coastal state should be able to assert its sovereignty over the waters immediately adjacent to its coast, to the distance of the maximum range of its canons. (Most adopted **3-mile territorial sea boundaries**-Britain and US)
- **International conference on law of the sea at Hague in 1930-failed in its objective, complete lack of agreement on issue of width of territorial sea**, reflect desire of maritime states, like Britain, US and France, to have narrow territorial sea to permit their navies and shipping interests access to as great a high seas area as possible around the world, other states want to extend their offshore JURIS
- **UNCLOS I**-1958, there was adoption of four international conventions relating to Territorial Sea and Contiguous Zone, Continental Shelf, High Seas and Fishing and Conservation of Living Resources of the High Seas (**86 states**)
- **UNCLOS II-failed to pass resolution of six nautical mile territorial sea, with a six nautical mile exclusive fishing zone-failed by single vote.**
- **UNCLOS III**-Negotiations at UNCLOS I not included most of the emerging states in Asia and Africa which had yet to become independent in 1958, but were gaining independent in 1960s; intended to produce a single international convention as a CONS of the Oceans, package deal where states would adopt none or all of its provisions. Negotiations were slow, only until 1982-was a text finally adopted and open for signature.

UN Law of the Sea Convention

Was vast, 320 articles and 9 annexes, designed to deal with a wide spread of ocean activities, either in detail or as a framework for other regimes. **Adopted by 150 state parties** (can't be subject to reservation by states)

Maritime Zones

- Key feature of the LOSC is the manner in which maritime JURIS of coastal JURIS is defined and clarified.
- **Before UNCLOS III, regime of territorial sea provided for littoral state sovereignty immediately adjacent to the coast.**
- LOSC retains territorial sea, but provides also for a range of other maritime zones, with lesser JURIS for the coastal state, but covering a far wider area.

- **LOSC provides that land can generate maritime zone, and that land is a naturally formed feature**, clear of water at high tide, a state can extend and build up even the smallest feature, but unless in its natural form clear of water at high tide, the feature won't generate a maritime zone.

Territorial Sea and Contiguous Zone

- **Territorial sea is closest maritime zone to the coastline-max. distance as 12 nautical miles**
- State have complete JURIS over activities taking place in the territorial sea, subject to limited exceptions, such as the right of vessels exercising a right of innocent passage.
- **Airspace over the territorial sea is national airspace**
- **The measurement of the territorial sea is calculated from territorial sea baseline, this is by default, the coastline, there are circumstances where a notional baseline can be used, include:**
 - Bays (providing they meet certain criteria based on their area, width, configuration or on historic practice)
 - Around fringing islands or deeply indented coasts
 - River mouths
 - Roadsteads
 - Ports and Harbourworks and
 - Low tide elevations within 12 nautical miles of land
- **Beyond territorial sea, a state may claim a contiguous zone under art 33, gives coastal state a limited additional JURIS of 24 nautical miles to allow for greater control over customs and immigration.**

Exclusive Economic Zone

- Derived from South America's concept of patrimonial sea, adopted by newly independent states of Africa as a way to secure national resources at the expense of their former colonial powers.
- **EEZ-defined as extending to a distance of 200 nautical miles from territorial sea baselines, and gives a coastal state exclusive JURIS over:**
 - Exploration and exploitation of living and non-living resources of the seabed, subsoil and superadjacent water column;
 - Preservation and protection of the marine environment
 - Establishment and use of artificial islands, structures and installations
 - Marine scientific research and
 - Other exploitation of the seabed or water column, including the generation of energy from waves, currents or winds
- **Unlike the territorial sea, the EEZ is not part of the sovereignty of the coastal state, but rather is an area over which the coastal state exercises sovereign rights.**
- The coastal state can only apply laws applicable to the subject matter of the EEZ, and other states' vessels have complete freedom of navigation, or freedom to lay cables or pipelines, without approval of the coastal state.
- **Airspace above EEZ is international airspace, so there is freedom of aerial navigation.**

Continental Shelf

- **A coastal state's rights over the continental shelf are more limited than the rights it has over its EEZ. The continental shelf gives a state exclusive JURIS over the seabed and subsoil, including the construction of installations and artificial islands, as well as over sedentary organisms.**
- If a state wishes to claim a shelf beyond 200 nautical miles, they are obliged within 10 years of becoming a LOSC party to submit data supporting their claim to the Commission on the Limits on the Continental Shelf.
- **Commission has experts in geology, geophysics or hydrology, doesn't have right to rule on legitimacy of national claim, negative ruling is unlikely to have other states recognize the claim. Australia data accepted in 2008.**
- **The definition of LOSC tried to accommodate states who have very wide and relatively shallow continental shelf, with states that want purely distance**

Art 76 of LOSC

- Continental shelf always extends at least 200 nautical miles from the territorial sea baseline, occupying the same seabed as the EEZ, although a state has a continental shelf as of right, but must claim an EEZ.
- If the physical shelf meets one of two formulae, then the shelf may extend beyond 200 nautical miles (extended continental shelf). (Sediment thickness/Hedberg formula)

Archipelagos

- **LOSC-permits archipelagic states to draw baselines around the outermost islands in their archipelago, assert their sovereignty over the waters inside.**
- The territorial sea, EEZ and continental shelf are all measured from the archipelagic baselines, length of baselines usually limited to 100 nautical miles and land to water ratio of archipelago must be between 1:1-1:9.

High Seas and Deep Seabed

- **Beyond the EEZ are waters beyond national JURIS, trad. referred to as high seas-represent 60% of area of the world's oceans, including the waters above the extended continental shelf.**

- **As no coastal state has JURIS over high seas, JURIS is exercised over ships and aircraft on the basis of national registration**-for ships this is the flag state JURIS
- **The high seas cannot be appropriated by any state and certain rights are guaranteed for all ships (LOSC, art 87)**

- freedom of navigation
- freedom of over-flight
- freedom to lay submarine cables and pipelines
- freedom to construct artificial islands and other installations permitted under international law
- freedom of fishing
- freedom of scientific research

• Beyond continental shelf, beneath the high seas is deep seabed-(LOSC calls it the Area)-beyond JURIS of any state, part of common heritage of mankind-If the seabed is exploited, all states should receive a benefit

• **The Area managed by International Seabed Authority (ISA)-responsibility for regulating exploration and mining of seabed. Technological difficulties and costs associated with seabed exploitation deterred any serious mining.**

Resource Exploitation

Living Resources

- The LOSC brought 90% of the world's fisheries under coastal state JURIS within the EEZ, in addition to giving coastal states control over marine living resources, it sets out basic guidelines on how state control might operate.
- **LOSC Art 61-Coastal states are obliged to set allowable catch levels for marine living resources in their EEZ-catch level should be maximum sustainable yield, qualified by relevant economic and environmental factors** (but this never produce the most economically efficient outcome)

A coastal state can regulate fishing in a variety of ways include:

- Licensing of fishers and boats
- Set species and catch quotas, including age and size limits
- Require fishing vessels to collect scientific and statistical data
- Place observers and/or trainees aboard
- Have technology transfer schemes and joint ventures
- Set catch seasons, gear types and locations
- Enforcement actions- coastal state can deploy marked govt vessels or warships to enforce their law
- **Highly migratory stock**, e.g. tuna, and straddling stocks are further regulated (those which extends out of the EEZ of a state into an area beyond its JURIS).
- **In the absence of an agreement with the flag state of an offending vessel, coastal state are not to have penalties including a term of imprisonment for fisheries offences**
- *M/V Saiga [No 2]* suggest use of force must not endanger life abroad the offending vessel.

Non-Living Resources

Coastal states also have exclusive right to build artificial islands and structures on the seabed n their EEZ and continental shelf, and to drill in that seabed to extract non-living resources such as oil and gas.

Such sea installations are not land, and thus don't generate a territorial sea.

LOSC does permit a 500m safety zone around such installations, in which navigation can be excluded.

Marine Rights

Freedom of Navigation-UNCLOS III-coastal state JURIS was only extended in return for guarantees of freedom of navigation.

Innocent Passage

- LOSC confirms that all ships have freedom of navigation through EEZ and high seas, such navigation is without restriction, and transiting vessels may stop or proceed in any fashion they wish, avoiding the JURIS of coastal state
- **For vessel to exercise a right of innocent passage, its passage must be continuous and expeditious.** A vessel may only stop and anchor when it is essential to safe navigation, or where it is necessary by force majeure, or to render assistance to ships, aircraft or persons.
- **Passage must be innocent-defined as not prejudicial to the peace, good order or security of the coastal state.**
- Example of prejudicial activities listed in art 19(2) of LOSC, including any exercise or practice with weapons of any kind, any fishing activities, the launching, landing or taking on board of any military device-full list on p273/274

- There is no civil JURIS or service of process over foreign vessels exercising a right of innocent passage

Transit Passage

- Many key points in trade routes are international straits-which a ship is obliged to use in order to pass from EEZ or high seas or vice versa, include Strait of Gibraltar, Malacca and English Channel

The transit passage regime operates like innocent passage, with added benefits for transiting vessels

1. **Transit passage can't be suspended or impeded by a coastal state, unlike innocent passage which permits a temporary suspension of passage through the territorial sea for security purposes**
2. Passage can be undertaken in normal mode for vessels-most states interpret it to mean a ship may navigate using its normal equipment and procedures→allow a ship to undertake normal drills and activities, and for most modern submarines to remain submerged
3. **Transit passage is available to aircraft as well as ships.**

Archipelagic Sealanes Passage

- **For vessels passing through an archipelagic state-only Indonesia has designated archipelagic sealanes (partial)**
- Analogous to transit passage in terms of rights available to transitioning vessels and aircraft, only along archipelagic sealanes, may be designated by the archipelagic state, in consultation with International Maritime Organisation, or in absence of a designation, along any routes normally used for international navigation.

Maritime JURIS (coastal state/flag state/port state/universal)

Coastal State Jurisdiction

Coastal state JURIS can be extended beyond maritime zones in certain circumstances

Doctrine of hot pursuit-confirmed at customary international law in the 'T.M. Alone' case-LOSC art 11-allows a coastal state to assert its JURIS over a vessel that has fled its JURIS provided certain criteria are met. These include:

- Coastal state has reasonable grounds to believe an offence against its laws have taken place in an appropriate maritime zone under its JURIS
- Vessel was hailed to stop before it had left the relevant maritime zone of the coastal state
- The order to stop was made by a visual or auditory signal from a govt vessel or aircraft of the coastal state
- The pursuit must be uninterrupted and
- Pursuit ends if the vessel enters the territorial sea of another state.
- **Pursuit can be maintained by more than one govt vessel or aircraft**
- Hot pursuit also permits the use of doctrine of constructive presence→a mothership to smaller vessels operating inside a maritime zone can also be pursued, provided the smaller vessels were not acting independently
- **Doctrine criticized as old-fashioned, takes no account of radio or satellite communication to initiate pursuit, not clear whether pursuit is terminated if a third state gives permission for it to continue upon vessels entering its territorial sea.**
- Australia and France, in dealing with number of pursuits in Southern Ocean, have reached agreement with respect to such consent through international treaty concluded in 2003.

Flag State JURIS

- **LOSC provides that a ship can only have one registration at a time.**
- Registration cannot be changed at sea, although a flag state may cancel the registration of a vessel in the event of some breach of its law.
- **An unregistered vessel is stateless, and while not illegal, this condition means ship lacks the diplomatic protection of a flag state, and may well not be able to raise insurance or other appropriate documentation.**
- A vessel will have the law of its flag state onboard at all times, even when in a foreign port.
- **Unless the vessel is sovereign immune, the port state may also have JURIS abroad, but by tradition will restrict its JURIS reach to matters that affect the coastal state, or matters at the request of the flag state or ship's master**
- Matters relating to the internal economy of the vessel, such as wages and working conditions of the crew, will generally not be dealt with by the port state, left within province of the flag state
- **Flag states set their own terms and conditions for registration, no real requirement as to what these contain save there should be a genuine link between the flag state and the ship, LOSC art 91.**
- States with low threshold for genuine link often described as open registries, include Panama and Philippines→relatively inexpensive measures for registration and lower standards for crewing and equipment.
- **Over 50% of world's shipping is in open registries-concern over maritime safety and effectiveness of regulation.**

Port State JURIS

Asserted by a state whose port is the next port of call for a ship → allows the port state to make acceptance of its JURIS a contingency for entry into the port. If the port state changes its itinerary, port state has no JURIS over it without some other basis. **(Least common)**

Essentially directed at environmental law-LOSC recognize it as a basis for JURIS under art 218-with respect to environmental harm in breach of international rules and standards outside the waters under the JURIS of the port state. (Targeting repeated vessels)

Universal JURIS

Art 110- deals with offences that permits a right of visit to vessels on the high seas (Include any waters outside the territorial sea), regardless of their nationality. **It identifies three offences that permit such a right of visit by warships and other appropriately marked government vessels:**

- **Vessels engaged in piracy**
- **Vessels engaged in the slave trade and**
- **Vessels engaged in unauthorized broadcasting-** reflects concern that offshore radio and TV stations might flout local broadcasting laws

Sovereign Immunity

- **For warships and govt vessels engaged in non-commercial services** → sovereign immune-in that they are not subject to any laws other than flag state, even when in a foreign port.
- **LOSC-indicates that if a warship's breach of the coastal state's law cause harm, there will be an obligation to pay compensation at a state to state level, but no right to arrest the vessel.**
- **Immunity doesn't extend to crew of warship,** if a crew member commits an offence in a port state, they may be arrested and dealt with by the state according to its law.
- **If the crew member returns to the ship prior to arrest,** there is no right of port state law enforcement on board without consent. Such consent is rarely given, although offending crew member might be removed from ship and handed over to police on shore.
- **Extends to other govt vessels, in addition to warships, but only when they are engaged in non-commercial voyages.**
- **Situation of changes in purpose during a voyage-dealt with by Privy Council in *Philippine Admiral Case*-high standard to demonstrate immunity was required.**

Protection of the Marine Environment

Art 192-general obligation to protect the marine environment, also recognition of rights of states to undertake development in waters subject to their JURIS- Plethora of regional and international agreements and non-binding instruments that fills out the framework below, include MARPOL, the London Convention which deals with ocean dumping.

Part XII. state have obligations to

- Protect the marine environment and to adopt measures to prevent, reduce and control pollution
- Cooperate on global and/or regional basis
- Notify affected states of imminent or actual damage
- Share scientific data and provide technical assistance
- Adopt laws to control various sources of pollution and
- Enforce regulations as both a flag and coastal state

Maritime Boundary Delimitation

- **The extension of maritime jurisdiction to 400 nautical miles and beyond from a coastal state has meant there are great many maritime boundaries in the world-**potentially determining ownership over valuable petroleum resources, methodology used was much greater importance.
 - ***Convention on the Continental Shelf***-provides equidistance method except where special circumstances apply (didn't define what special circumstances mean)
 - **North Sea Continental Shelf cases in 1969**-Court consider whether equidistance was applicable at customary international law in the context of the concave German coast fronting the North Sea. Court rejected equidistance as representing custom, but fixed upon notion that continental shelf was natural prolongation of land, the prolongation and configuration of seabed should determine where its boundaries ought to go.
 - **Principle not long lasting after not used by ICJ in a series of cases in 1980s**
- Equidistance was used, in the absence of agreement, for territorial sea boundaries in art 15, but wording for EEZ and continental shelf in arts 74(1) and 83(1) reflects lack of agreement on any specific method used.
- "The delimitation of EEZ/continental shelf between states with opposite/adjacent coasts shall be effected by agreement on basis of IL, as referred to in Art 38 of ICJ, in order to achieve an equitable solution"**
- **ICJ Cases don't give certainty to methodology, but instead list potential factors that may be relevant and irrelevant, E.g. None of cases since 1982 has used configuration of seabed or geology to determine a maritime boundary.**

Relevant factors includes:

- Configuration of the coast and relevant physical geography: *Libya-Malta Continental Shelf case*
- Location of small islands (*Eritrea-Yemen Maritime Boundary Arbitration*)
- Existing economic activities (*Tunisia-Libya Continental Shelf case*)
- The ratio of relevant coastal lengths to the ratio of seabed areas apportioned (*Gulf of Maine case*), has been used in some cases as a mechanism to confirm the result as equitable.
- Number of cases used theoretical equidistance line as a starting point, and then varied it in place where the court considered it equitable to do so.
- **State practice in framing boundaries by treaty has produced a tremendous variation in methods and results, other approaches use art 74(3) and 83(3) of LOSC**, encouraging states to enter into interim arrangement of practical nature, created over 30 joint development zones, where states share resources, JURIS or both in a defined area that is in dispute, permanently or on a temporary basis pending final resolution of the boundary.

Maritime Security

In wake of 9/11 terrorist attacks in the US, increased concern over maritime security and risk of a large scale terrorist attack using shipping to deploy weapons of mass destruction.

International Ship and Port Facility Security Code (ISPS Code)

- **Provides for increased security checks, ship and port security plans, ID systems and increased international cooperation in dealing with security measures.**
- Failure of a state to meet ISPS Code requirements would significantly damage that state's ability to trade by sea with other ISPS Code compliant states

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

- **Provides a framework for dealing with terrorists and like acts against ships at sea**
- Parties to the Convention have wide JURIS to deal with offences against shipping, including seizing a ship, performing acts of violence against individuals on a ship, or damaging a ship or its cargo to endanger its safe navigation.
- **Principle focus of 2005 SUA Protocol is on weapons of mass destruction and their non-proliferation, but amendments also create additional offences of suing a ship as a platform for terrorist activities, and international movement of terrorists by sea**

Proliferation Security Initiative (PSI)

- Non-binding, informal international understanding that provides a basis for cooperative action at sea to deal with vessels suspected of carrying WMD or related equipment to non-state actors.
- **Operation of PSI somewhat shrouded in mystery, although PSI exercises are regularly and publicly held, only one PSI interception has been acknowledged by the US.**

Dispute Resolution

- **Part XV of LOSC-provides for a compulsory dispute resolution between states in a relatively wide range of circumstances.** Disputes that are subject to compulsory procedures are:
- High seas rights in EEZ
- Breaches of standards for protection and preservation of marine environment by a coastal state
- Marine scientific research (although not in relation to rights and discretions of coastal states) and
- Fisheries, although effectively not those involving coastal state rights in the EEZ

Other disputes which may be subject to compulsory procedures unless a state party makes a declaration otherwise. These are:

- Maritime boundary delimitation
- Military activities and law enforcement and
- Matters before the Security Council

LOSC has four methods of adjudication that are available to state parties:

- ICJ
- International Tribunal for the Law of the Sea (ITLOS)
- Arbitration
- Special arbitration

- The appropriate tribunal for any parti. dispute can be determined by agreement of the parties, or by the nomination of state parties. Each state may nominate a favoured tribunal to be used in the event of a dispute, and if the two parties to the dispute have nominated the same tribunal, this is used.
- **Where different selections have been made, the arbitral tribunal represents default selection.**

- **ITLOS has 21 judges elected by state parties for 9 year terms, and is in Germany, judges drawn on a geographically representative basis. The Tribunal has power to grant provisional measures, and its decisions are final and binding, with no appeal.**
- **Since 1996, ITLOS has sat on 15 cases prior to 2008, with majority being prompt release cases**→relate to LOSC provisions allowing for speedy release of a vessel apprehended for breach of coastal state law where an appropriate bond has been paid.
- Arbitration is default method of resolving disputes, and involves the establishment of ad hoc tribunal for a given dispute. Arbitrators can be selected by agreement, or drawn from a list of arbitrators nominated by all state parties.
- **Special arbitration can be used for parti. disputes involving certain subjects, allowing experts in those areas to be selected as arbitrators. It has never been used and no state has used it as its selection in the event of a dispute**
- **Conciliation**-available for certain type of disputes, compulsory for maritime boundary delimitation, marine scientific research and some fisheries dispute. If both states agree, it can be bypassed and to date, never been used.