International Disputes Concerning Marine Living Resources:
Challenges to International Law and Way Forward

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Outline

1. Introduction
2. The *Lex Lata* and *Lex Ferenda* of the International Law on Protection and Management of Marine Living Resources
3. Disputes concerning Marine Living Resources
4. Challenges and Way Forward
1. Introduction

- Inspiration
- Ecological characteristics of marine living resources
  1) Reproducible
  2) Migratory
  3) Limited species
  4) Utility
2. The *Lex Lata* and *Lex Ferenda* of Int’l Law on the Protection and Management of Marine Living Resources

**The lex lata**

1) Customary International Law (ILC “guideline” as to the “proof” of customary int’l law)
   - Sustainable development, precautionary Principle …
   - Ecosystem approach? environmental Impact Assessment?

2) Treaties
   - Multi-lateral treaties: 1958 Geneva Conventions, UNCLOS, Post UNCLOS convention-FAO, IMO, CBD (GATT?)…
   - RFMO/As: ICRW/IWC
   - Bilateral treaties:

**The lex ferenda**

1) General principles of law
2) Resolutions by the int’l organizations: hard/soft laws
3. Disputes of Marine Living Resources

(1) Fishery disputes

- 1972 Iceland fishery jurisdiction case (UK v. Iceland)
- 1995 ICJ fishery jurisdiction case (Spain v. Canada, the Estai case)
- ITLOS Southern Bluefin Tuna case (New Zealand & Australia v. Japan)
- ITLOS/WTO Swordfish case (EU & Chile)

* Observations:

- Jurisdiction issue
- Application of the *Lex Leta*
3. Disputes of Marine Living Resources

(2) Disputes concerning species protection

i. Protection of seal
- The 1893 Bering Fur Seal Arbitration (UK v. US);
- The 2013 WTO Seal case (Canada & Norway v. EU, WT/DS400/R/Add.1, WT/DS401/R/Add.1)

ii. Protection of dolphin
- The WTO 1994 Tuna Dolphin I-II case

iii. Protection of sea turtle
- The 1998 WTO Shrimp-Turtle case (United States-import prohibition of certain shrimp and shrimp products, WT/DS58/AB/R)

iv. Protection of whale
- The 2010 ICJ Whaling case (Australia v. Japan)
Antarctic Whaling Case: Fact and Background

i. Background:
- 31 May 2010, Australia filed application instituting proceedings against Japan concerning the Second Phase of Japanese Program under Special Permit in the Antarctic (JARPA II)
- ICJ Order of 13 July 2010, 9 May 2011 and 9 March 2012 as the respective time-limits for Memorial of Australia and Counter-Memorial of Japan
- 20 November 2012, New Zealand filed the Declaration of Intervention
- 26 June and 16 July 2013, Public hearing
- 31 March 2014, Judgment

ii. Some observations:
(1) First occasion that Australia has instituted proceedings before ICJ since the Nuclear Test case in 1973 (last appeared as Respondent in the East Timor case commenced in 1991); Japan has not appeared before ICJ as applicant or respondent before.

(2) January 15, 2008, Federal Court of Australia issued declaratory relief and an injunction against Kyodo Senpaku Kaisha Ltd. (Kyodo); Kevin Rudd’s Labour Party, if elected in 2007, they would support bringing a legal claim against Japan.

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<tr>
<th>Criteria</th>
<th>Appendix I</th>
<th>Appendix II</th>
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<td>species threatened with extinction and are or may be affected by trade.</td>
<td>species not necessarily threatened with extinction, but may become so unless trade in specimens of such species is subject to strict regulation.</td>
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<td>Commercial trade in wild-caught specimens of these species is illegal (permitted only in exceptional licensed circumstances)</td>
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<td><strong>CETACEAS</strong></td>
<td>Balaenidae, Delphinidae Balaenopteridae, Eschrichtiidae, Iniidae, Physeteridae, Platanistidae, etc.</td>
<td>CETACEA spp.</td>
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Criteria for Appendix I: Species threatened with extinction and are or may be affected by trade. Commercial trade in wild-caught specimens of these species is illegal (permitted only in exceptional licensed circumstances).

Criteria for Appendix II: Species not necessarily threatened with extinction, but may become so unless trade in specimens of such species is subject to strict regulation.
II. Claims and Legal Issues

ii. Legal issues

(1) How to interpret *Australia’s declaration* of 22 March 2002 concerning its position on the jurisdiction of the ICJ? Whether the ICJ has jurisdiction?

(2) How to interpret Article VIII, paragraph 1, of the ICRW (*Article VIII Scientific whaling*)?

(3) Whether the design and implementation of JARPA II are *reasonable* in relation to achieving the programme’s stated research objectives?
Issue one. 2002 Australia’s declaration and the jurisdiction of the ICJ

-The Declaration, “The Government of Australia declares that it recognizes as compulsory *ipso facto* and without special agreement, in relation to any other State accepting the same obligation, the jurisdiction of the International Court of Justice… until such time as notice may be given to the Secretary-General of the UN withdrawing this declaration. This declaration is effective immediately.”

-This declaration does not apply to: *(b)* any dispute concerning or relating to the delimitation of maritime zones, including the territorial sea, the exclusive economic zone and the continental shelf, 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.” – Japan contested the jurisdiction of the ICJ

-ICJ decision: when interpreting a declaration accepting its compulsory jurisdiction, it “must seek the interpretation which is in harmony with a *natural and reasonable way of reading the text*, having due regard to the *intention of the declaring State*”

**press release** issued by *Foreign Affairs of Australia* on 25 March 2002

**National Interest Analysis** submitted to Parliament on 18 June 2002

Japan’s objection to the Court’s jurisdiction cannot be upheld
Issue two. Article VIII Scientific whaling

- 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. Each Contracting Government shall report at once to the Commission all such authorizations which it has granted. Each Contracting Government may at any time revoke any such special permit which it has granted.”

(1) Japan, special permit whaling under Article VIII is “free-standing”; ICJ, Article VIII is an integral part of the Convention.

(2) Relationship between Article VIII and the object and purpose of the Convention:
- “Any Contracting Government may grant ”
- “Special permit authorizing” - standard of review:
- “For purposes of scientific research”: how to define scientific research? What’s the meaning of “for purposes of”?
Issue three. design and implementation of JARPA II in relation to achieving the programme’s stated research objectives

(1) Key elements of the programme’s design: the research objectives, research period and area, research methods, sample sizes, and the expected effect on whale stocks.

(2) Lethal methods are central to the design of JARPA II:
- whether non-lethal methods are feasible as a means to obtain data relevant to the JARPA II research objectives;
- whether the data that JARPA II collects through lethal methods are reliable or valuable;
- whether before launching JARPA II Japan considered the possibility of making more extensive use of non-lethal methods
4. Challenges and Way Forward

i. Challenges

1) Protection of ecosystem v. commercial use of marine species
2) Protection of environment v. economic development
3) National interests & regional cooperation
4) New trends: animal welfare, marine living resources at polar regimes…
ii. Ways Forward

Impact of the Int’l Jurisprudence on the protection of marine species: Antarctic Whaling Case

1) The implications of the Judgment were discussed at the IWC Commission meeting in September 2014. Consensus could not be reached.

Resolution 2014-5 on this regard was adopted by vote:
-the ICJ decision is a highly authoritative guide and how Article VIII of the ICRW should be interpreted and applied.

2) State parties to the Convention have a duty to co-operate with the IWC and the Scientific Committee and thus give due regard to recommendations calling for an assessment of the feasibility of no-lethal alternatives.
Thank you for your attention!