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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

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 aboard the offending vessel.

Non-Living Resources
- Coastal states also have exclusive right to build artificial islands and structures on the seabed in 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 'I'm Alone’ case-LOSCL 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 gov't 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 gov't 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—Plentitude 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(30 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
LOSChas 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.


**Freedom of the seas doctrine** - (17th C)-limiting national rights and jurisdiction over the oceans to a narrow belt of sea surrounding a nation’s coastline, remainder of seas free to all and belonging to none.

• Mid 20th C-impetus to extend national claims over offshore resources, concern of toll taken on coastal fish stocks by long-distance fishing fleets, competing demands over lucrative fish stocks between coastal nation and distant-water fishermen, the increased presence of maritime powers and the pressures of long-distance navigation and the threat of pollution and wastes from transport ships and oil tankers carrying noxious cargoes that plied sea routes across the globe, and seemingly outdated freedom of seas doctrine

**First major challenge to freedom of the seas doctrine**

• 1945, President Truman, responding to pressure from domestic oil interests, unilaterally extended US JURIS over all natural resources on that nation’s continental shelf Other nations soon followed suit.

• In late 1940s and early 50s, Argentina claimed its shelf, Chile and Peru, Ecuador-asserted sovereign rights over 200 miles zone, hoping thereby to limit the access of distant-water fishing fleets and to control the depletion of fish stocks in their adjacent seas.

• After WWII, Egypt, Ethiopia, Saudi Arabia, Libya, Venezuela and some Eastern European countries laid claim to a 12-mile territorial sea, thus clearly departing from the traditional three-mile limit.

• Later, the archipelagic nation of Indonesia asserted the right to dominion over the water that separated its 13,000 islands. The Philippines did likewise.

• The oceans were being exploited as never before

• Nations were flooding the richest fishing waters with their fishing fleets virtually unrestrained: coastal States setting limits and fishing States contesting them. The "Cod War" between Iceland and UK had brought about the spectacle of British Navy ships dispatched to rescue a fishing vessel seized by Iceland for violating its fishing rules.

• Offshore oil was the centre of attraction in the North Sea. Britain, Denmark and Germany were in conflict as to how to carve up the continental shelf, with its rich oil resources.

**The dangers were numerous:**

• Nuclear submarines charting deep waters never before explored
• Designs for antiballistic missile systems to be placed on the seabed
• Supertankers ferrying oil from the Middle East to European and other ports, passing through congested straits and leaving behind a trail of oil spills; and
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<td>Invalidity of claims of sovereignty over the high seas</td>
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</table>
2. Anti-Whaling Litigation in Australian Courts

- Anti-whaling litigation in Australian courts and Southern Ocean activism → ways in which domestic courts may and do exercise jurisdiction over actors and events that take place outside Australia (a concern of private international law)
- How foreign policy is translated into domestic law → potentially enforceable in domestic courts, via activism.
- The nature of the international legal regime relating to the Antarctic
- Non-state actors can also shape and change international law and bring about its implementation

The Antarctic Treaty 1959

<table>
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<th>Article</th>
<th>Description</th>
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<tr>
<td>Art 1</td>
<td>Antarctica shall be used for peaceful purposes only, establishment of anything of military nature is prohibited, military equipment/personnel allowed to be used for peaceful/scientific purposes</td>
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<td>Art 2</td>
<td>Freedom of scientific investigation in Antarctica and cooperation to that end</td>
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<td>Art 3</td>
<td>Contracting parties agree exchange information regarding scientific program plans in Antarctica, scientific personnel exchange, scientific results made freely available</td>
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<td>Art 4</td>
<td>Nothing in treaty shall be interpreted as renunciation by contracting party of previously asserted sovereignty rights in Antarctica, no acts or activities taking place while treaty is in force shall constitute a basis for asserting/denying sovereignty claim</td>
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<td>Art 5</td>
<td>any nuclear explosion and disposal of radioactive waste shall be prohibited.</td>
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<td>Art 6</td>
<td>nothing in treaty affects state’s international law rights in relation to high seas, area that treaty applies</td>
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<tr>
<td>Art 7</td>
<td>Contracting parties can designate observers to carry out any inspection, freedom of access to any Antarctica areas, all areas shall be open at all times by inspection for observers, aerial observations allowed</td>
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<tr>
<td>Art 8</td>
<td>Designated observers/staff accompanying such people, shall be subjected only to the JURIS of contracting party of which they are nationals in respect of all acts or omissions occurring while they are in Antarctica exercising their functions, if there is a dispute contracting parties should reach mutually acceptable solution through consultation</td>
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<tr>
<td>Art 9</td>
<td>Representatives of parties should meet regularly to exchange information and consult together on matters of common interests pertaining to Antarctica</td>
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<td>Art 10</td>
<td>Each party undertake appropriate efforts, consistent with UN Charter, to ensure no one does anything in Antarctica contrary to the purpose of present treaty</td>
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<td>Art 11</td>
<td>If any dispute arise concerning interpretation/application of treaty, contracting parties shall consult among themselves-have dispute resolved by negotiation/mediation/conciliation/judicial settlement/or peaceful means of their choice</td>
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<td>Art 12</td>
<td>Treaty may be modified/amended any time by unanimous agreement of contracting parties</td>
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<td>Art 13</td>
<td>Treaty subject to ratification by states, in accordance with state’s constitutional processes, deposited with USA,</td>
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<td>Art 14</td>
<td>present treaty, in English, French, Russian and Spanish-deposited in USA govt archives</td>
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Seas and Submerged Lands Act 1973 (Cth), ss6, 10A, 11

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<td>S6</td>
<td>Sovereignty in respect of territorial sea</td>
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<td>Sovereignty in respect of territorial sea, and airspace over it, and of its bed and subsoil-vested in and exercisable by Crown in right of Cth</td>
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<tr>
<td>S10A</td>
<td>Sovereign rights in respect of exclusive economic zone</td>
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<td></td>
<td>Declared and enacted that the rights and JURIS of Aus in its EEZ are vested in and exercisable by Crown in right of Cth.</td>
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<td>S11</td>
<td>Sovereign rights in respect of continental shelf</td>
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<td></td>
<td>Sovereign rights of Aus as a coastal State in respect of the continental shelf of Aus, for purpose of exploring it and exploiting its natural resources, are vested in and exercisable by the Crown in right of the Cth.</td>
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Anthony L I Moffa, ‘Two competing models of activism, one goal: A case study of anti-whaling campaigns in the southern ocean’ (2012) 37 Yale Journal of International Law 201-214

- In 2011, in midst of Japan’s research whale hunt, the Japanese Agriculture Minister called the whaling fleet home months ahead and hundreds short of its kill quota because of harassment by Sea Shepherd Conservation Society (NGO)
• In recent years, NGOs have played an increasingly important and well-recognized role in shaping IL and in focusing enforcement resources above demonstrates that environmental NGOs now have the ability to compel compliance with international commitments through unilateral action.

Over-simplistic view that this forced compliance is just private enforcement of IL.

New Haven School—theory of principal functions of international lawmaking—identifies 7 categories of actions: intelligence, promotion or recommendation, prescription, invocation, application, termination and appraisal.

Examining NGO paradigm through this is useful for three reasons:

1. DESCRIPTIVE ADVANTAGE—The theory’s well-defined, function-based stages better describe the effects of activism than simple, conventional designations that rely on the identity of the actors or the forum. NGO activism carries out four functions: promotion, prescription, invocation and application.

2. LEGAL REALIST PHILOSOPHICAL UNDERPINNINGS—fit for describing unorthodox, but increasingly legitimate role of NGOs in the international legal system.

3. LONGEVITY AND PROMINENCE—provide a credible, well-understood framework to facilitate continued scholarly debate.

Two competing models of NGO activism—protest and interventionist activism—

• Protest activism—consists of publicly organized, undoubtedly legal activities meant to put indirect pressure on the governmental or private entities that are purportedly violating.

• Greenpeace (protest activism) utilize consumer boycotts and protests to encourage divestment from the industry.

• Interventionist activism— involves either borderline- or illegal tactics to confront violators directly, generally includes law invocation and direct application of force to implement existing laws and policies.

• Sea Shepherds (interventionist activism) uses a fleet of ships to directly intervene in and obstruct whaling operations in the Southern Ocean.'

II History of Whaling Regulation and Ineffective Formal Enforcement Mechanisms

• The Japanese have been eating whale meat for more than 2000 years—generally regarded as a natural resource that could be exploited freely by any person with ability to hunt and kill them.

• The advent of efficient tracking and hunting technologies brought several whale species to brink of extinction by mid 20th C—led whale hunters to realize their industry’s survival depended on maintaining healthy whale stocks through managed conservation rather than unrestrained exploitation.

• Intelligence—Early efforts to diagnose danger of extinction—served intelligence function of New Haven School.

• Promotion—Advocacy on part of whale hunters and their national govt—beginning of law promotion stage.

• Prescription—International Convention for the Regulation of Whaling (ICRW)—in face of strong scientific evidence and even stronger appeals to the public conscience, now has 89 state parties.

• Art VIII and the Schedule of ICRW relevant to this case study.

From 1986, ICRW included in Schedule a ban on commercial whaling of any type, setting and maintaining annual catch limits of zero in all regions for all types of whales.

The IWC established in 1994 a whale sanctuary in the Southern Ocean, specifically forbidding commercial whaling in that area.

• Japan conducted whaling operations in the Southern Ocean after 1986 under the guise of ‘scientific research’ or ‘special permit’ exception embodied in Art VIII of ICRW.

Article VIII provides in part that “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 . . . 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.”

Allows the whales taken under this exception to be processed and sold on the commercial market pursuant to the instructions of the country granting the research permit.

Even if Japan’s whaling activity falls under the Article VIII exception, based on the government’s statements, the customary international law principle of pacta sunt servanda, requires that Japan perform its treaty obligations in “good faith.” (Latin phrase means-agreements must be kept)

• Japan’s programs do not plausibly serve “purposes of scientific research” within the meaning of Article VIII of ICRW.

• Japan has produced very few, if any, peer-reviewed studies explaining the program’s scientific findings—and they have methodological problems, as well didn’t make full use of existing data.
Rather than promoting a certain policy or attempting to shift community expectations, this type of interventionist activism explicitly invokes and applies prescriptions already found in international legal agreements.

III Protest Activism

The protest model of activist pressure has had a substantial effect on Japan's whaling industry. Boycotts, demonstrations, and campaigns are generally permissible under IL, even when coordinated by NGOs.

In 2005, Nippon Suisan Kaisha Ltd of Japan, parent company of Gorton, was revealed to hold a 31.9% interest in Kyodo, one of the companies whaling under the Japanese special permits.

Greenpeace, in collaboration with Humane Society of US and Environmental Investigation Agency (EIA) that revealed this fact, called for consumer pressure on Gorton via email and letter writing campaign, advocated for a wholesale boycott.

The generally lawful nature of protest activism in both domestic and international contexts (organized consumer boycotts both legal in Japan/US and internationally)

Less than 6 months into Greenpeace's campaign, Nissui divested completely from Kyodo, donating its shares to public interest corporations but these were ultimately acquired by Japan govt who heavily subsidises the whaling operation.

Protest activism, though it serves law promotion and prescription functions, ultimately lacks sufficient force to effectively change behavior.

IV Interventionist Activism

More powerful and consequently more effective than its protest counterpart

Because many interventionist tactics themselves violate IL, their continued use threatens to compromise the international rule of law.

Balance of cost—Ultimately, the global community must decide whether the costs of such repeated violations to the international legal regime are outweighed by the successes of interventionist activists.

The Sea Shepherds, have harassed Japanese whalers by ramming their vessels, throwing bottles of foul-smelling butyric acid onto their vessels, temporarily blinding whalers with a laser device, deploying propeller fouling devices to disable vessels, and even boarding moving whaling vessels.

Rather than promoting a certain policy or attempting to shift community expectations, this type of interventionism activism explicitly invokes and applies prescriptions already found in international legal agreements.

Invocation function—When they choose the specific targets of their campaigns; interventionist NGOs specifically mark certain Japanese actors as violators of their international legal commitments.

Application function—When the activists engage their targets in this manner, they then serve the application function, because they pass final judgment on the offenders and attempt to use force to curb the illegal action.

The actions of the Sea Shepherds are likely illegal under IL because they constitute piracy, terrorism, or both.

The Belgian case of Castle John and Nederlandse Stichting Sirius v. NV Mabeco and NV Parfin held because their motivation was the achievement of the NGO’s goals, the seafaring environmentalists acted for “private ends,” and were therefore subject to the UNCLOS piracy laws.

Sea Shepherds certainly violated (SUA Convention). Under this, a person commits an offence if they unlawfully and intentionally perform violent act against a person on board a ship if that act likely to endanger the safe navigation of the ship.

Watson defends his actions by invoking the World Charter for Nature, which he contends allows private citizens to take direct enforcement action to “safeguard and conserve nature in areas beyond national jurisdiction.” But shaky legal footing—the Charter has no mention of enforcement, direct action, or penalties, moreover, UN resolutions have less legal effect than multi-national conventions UNCLOS and SUA

The general reluctance of any nation (including Australia despite repeated requests from Japan) to prosecute the Sea Shepherds for violations of IL suggests that the benefit of interventionist activism outweighs its costs in this case.

Interventionist activist organizations are performing the costly, and often unfunded, invocation and application functions arising from obligations to international conventions.

By allowing interventionist activism to continue, either by explicitly recognizing its legitimacy or by refraining from condemning the activists’ illegal tactics, countries utilize private funding to monitor and enforce conservation laws, thus saving themselves considerable amounts of tax money and government resources.
Counterargument

- Interventionist activism suffers from the ethical fallacy that "two wrongs do not make a right," and thus its existence undercuts the international rule of law.
- If enough actors can ignore binding legal commitments without consequence, then the principle at the foundation of the IL system may be compromised beyond repair.
- This ignores reality of the situation in many circumstances in which IL are significantly under-enforced, such as the case of whaling in the Southern Ocean.
- Interventionist activism should be supported and permitted to continue because it is the best possible actualization of the international community’s environmental commitments.

V. Conclusion

- Whether its protest or interventionist form presents a better framework for NGOs and the international community at large.
- NGOs taking direct, abrasive action in defense of people's rights could resemble rebellion rather than activism. Such situations could even result in armed conflict, given that the United Nations Charter takes a firm line against "aggression."
- Furthermore, the rule-of-law costs could become more significant as interventionist tactics spread.
- In order to remain an effective tool, interventionist activism should be employed sparingly by social movements and aimed only at those causes with truly silent and undervalued victims.

Australia Antarctic Strategy and 20 year action plan (2016)

- Australia asserts sovereignty over 42% of the Antarctic continent—the Australian Antarctic Territory
- Australia is an original signatory to the 1959 Antarctic Treaty
- The Antarctic Treaty system has three pillars: Antarctic Treaty, the Protocol on Environmental Protection to the Antarctic Treaty and the Convention on the Conservation of Antarctic Marine Living Resources.
- The Antarctic Treaty system establishes Antarctica as a natural reserve devoted to peace and science and puts in place principles for the governance of the region. These include:
  - Freedom of scientific investigation
  - Free exchange of scientific information
  - Protection of the positions of Antarctic Treaty Parties on issues of sovereignty, and the
  - Non-militarisation of Antarctica and the Southern Ocean.

41 other countries have acceded to the Treaty

The result is a legally binding and comprehensive environmental protection regime tailored for the special environmental and geographical characteristics of the Antarctic region.

Convention on the Conservation of Antarctic Marine Living Resources

- First international agreement to apply an ecosystem approach to marine living resources conservation
- It requires that consideration is given to all species in the ecosystem and to conserving ecological relationships.
- Krill, finfish and all other living resources of the Southern Ocean, are treated as an integrated system where the effects on predator, prey and related species are considered, and decisions on sustainable harvesting levels are made on the basis of sound scientific advice.

Australia’s national interests in Antarctica

1. Maintain Antarctica’s freedom from strategic and/or political confrontation
2. Preserve our sovereignty over the Australian Antarctic Territory, including our sovereign rights over adjacent offshore areas
3. Support a strong and effective Antarctic Treaty system
4. Conduct world-class scientific research consistent with national priorities
5. Protect the Antarctic environment, having regard to its special qualities and effects on our region
6. Be informed about and able to influence developments in a region geographically proximate to Australia
7. Foster economic opportunities arising from Antarctica and the Southern Ocean, consistent with our Antarctic Treaty system obligations, including the ban on mining and oil drilling.

Antarctic Treaty

- The Antarctic Treaty→earliest of the post-World War II arms limitation agreements
- Demilitarized the Antarctic Continent and provided for its cooperative exploration and future use.
- **Treaty entered into 1959** provides that Antarctica shall be used for peaceful purposes only. It specifically prohibits "any measures of a military nature, such as the establishment of military bases and fortifications, the carrying out of military maneuvers, as well as the testing of any type of weapons."

- **(The Treaty does not prohibit the use of military personnel or equipment, however, for scientific research or for any other peaceful purpose.)** Nuclear explosions and the disposal of radioactive waste material in Antarctica are prohibited.

- The Treaty provides for designation of observers to carry out inspections in all areas of Antarctica, including all stations, installations and equipment, and ships and aircraft at discharge or embarkation points.

- Each observer has complete freedom of access at any time to any or all areas of Antarctica.

- **Currently there are 50 Parties to the treaty, of whom 28 are Consultative Parties that participate in decision-making at Antarctic Treaty Consultative Meetings (ATCMs).**

Natalie Klein and Nikolas Hughes, 'National litigation and international law: Repercussions for Australia's protection of marine resources' (2009) 33 Melbourne University Law Review 163-189

- **Override concern for national court is need for different branches of government to speak with one voice, and willing to defer to executive expertise in matters of international affairs.**

- **This approach has been questioned with advent of globalization**

- Author argues that whilst greater account could have been taken of Australia's international obligations in these cases, it is generally preferable that the courts avail themselves of non-justifiability doctrines in order to avoid causing international law disputes, despite any broader political goals for INS reform that may exist.

**Professor Benevenisti**

- National courts making of foreign and IL as means of empowering domestic democratic processes by shielding them from external economic, political and even legal pressures.

- **External pressure (ranging from cartels of powerful states, active NGOs and intergovernmental organisations) have reduced the ability of some governments to allow for national interests to be protected**

- The cases show Australian courts inconsistent in their willingness to address specifically rights and obligations arising under IL.

**National Litigation On Marine Resources: The Approach of Australian Courts Towards International Law**

**A HSI v Kyodo**

**Facts:** Challenge to Japan's scientific whaling program in Antarctic by HIS, on the basis that Kyodo, the company responsible for conducting the whaling program, was violating the EPBC Act. The objectives the Act include establishing Australian Whale Sanctuary for the protection of cetaceans in Australian marine areas and prescribed waters, and creating offences with regard to killing, injuring or otherwise interfering with cetaceans within the Australian Whale Sanctuary or within waters beyond the outer limits of it.

HIS, an interested person, sought a declaration and injunction against Kyodo for contravening ss229-30 of Act because at no time, it held a permit or authority as required under ss231, 232 or 238. The Act applied to areas 200 nautical miles within the AAT.

**Attorney-General's submission**

**INTERNATIONAL LAW ISSUE**

- Canvassed question relating to exercise of Aus JURIS in its claimed EEZ off the AAT under international law, taking into account the legal framework established by the Antarctic Treaty.

- Japan would consider any attempt to enforce Auslaw against Japanese vessels and its nationals, in the waters adjacent to AAT, to be a breach of IL on Aus’s part

**POLITICAL CONTROVERSY**

- Any purported exercise of JURIS against Japanese nationals in Australia's claimed EEZ adjacent to the AAT was reasonably expected to prompt a significant adverse reaction from other Antarctic Treaty Parties.

- Enforcement of EPBC Act in relation to the AAT would be contrary to Australia’s long term national interests.

- The Cth govt thus considered it was more appropriate to pursue diplomatic solutions in relation to this matter, and believed this should be a key consideration in the proceedings determining whether to grant leave for enforcement outside of the JURIS.
Legal Reasoning (Allsop J):  
-Acknowledged that executive’s concerns were non-justiciable matters, they are relevant considerations to be weighed when exercising judicial discretion.  
-Did not support the applicant’s effort to seek an injunction under the EPBC Act—those who were motivated in part to send a message disapproving of Japan’s whaling practices in Antarctica, because the issue is public law, cannot be expected Japanese courts would enforce the injunction.  
-Declined to exercise his discretion to grant leave to serve originating process in Japan.

Appeal Grounds  
-Applicant said Allsop J’s discretion miscarried because he erred in considering political and diplomatic issues incidentally associated with proceedings between private litigants.  
-International comity was not infringed because issues in the proceedings challenged neither the conduct of Japan in its own territory nor the validity of the Japanese Whale Research Program.

Full Court (Black CJ, Moore J, Finkelstein J):  
- Held that diplomatic and political considerations were irrelevant where P has provided that the action is justiciable in an Australian court.  
-The action was justiciable since applicants had standing under EPBC Act, and Court was explicitly empowered to grant an injunction to restrain person from engaging in conduct, whether or not the person intends to engage again in conduct of that kind, and even whether or not there is a significant risk of injury or damage to the environment.  
-To approach it another way would compromise the role of courts as the forum in which rights can be vindicated whatever the subject matter of the proceedings.  
-Allsop J erred in refusing leave.

The establishment of the Australian Whale Sanctuary under the EPBC Act fell within the modern doctrine as to the scope of power conferred by external affairs—Dawson J in Polyukhovich v Cth, conduct prescribed by the Act regard to a place, person, matter or thing that lies outside the geographical limits of the country, fell within meaning of the phrase external affairs, thus constituted a sufficient constitutional fact, irrespective of any possible violation of both IL and international comity.  
Presumption that Parliament intends to legislate in conformity with international law subject to two qualifications:  
1. It applies only when the legislation is intended to give effect to an international instrument—when legislation is enacted after, or in contemplation of, entry into or ratification of the relevant instrument: Minister of State for Immigration and Ethnic Affairs v Teoh  
2. The Court may use the convention only in a case of ambiguity so as to favour a construction that accords with Australia’s obligation under international law. This enables a court to favour a construction that accords with Australia’s obligations under a treaty.  
If CONS provision is clear and if law clearly within power, no rule of IL and no treaty (Including one in which Australia is party to) may override the CONS or any law validly made under it.

Court taken narrow view of s15AB of Acts Interpretation Act 1901 (Cth), confirming where there is no ambiguity in the text of the legislation a doubt cannot be created by reference to the treaty itself: Hindmarsh Island Bridge Case  
Although Cth laws may contain an implication that they should be construed to conform to IL, legislature is not bound by the implication and may legislate in disregard of it.

The EPBC Act doesn’t express an intention to give effect to UNCLOS or Antarctic Treaty, nor does it make these treaties an operative part of the Act, makes no reference to it, nor mentioned in its second reading speech, hence can’t trigger s15AB of Acts Interpretation Act.  
EPBC Act effectively put Australian courts in a position of violating IL and triggering its international responsibility unless the courts are willing to recognise as much and seek to rely on non-justifiability doctrines → difficult given clear grant of JURIS to the courts under the Act.  
On question of futility of injunction being enforced, full Court say—requirement there must be an available remedy say nothing about the effectiveness of that remedy in a particular case.  
EPBC Act provided necessary judicially manageable standards as Australian P had created offences and penalties under the Act, no provision made for foreign entities to be excluded.
• By conferring standing, P had conferred JURIS because there was an immediate right, duty or liability to be determined by the Fed Court.
• Full Court didn’t consider it necessary or appropriate to address IL issues (as distinct from political or diplomatic considerations), allowed the appeal and set aside order that dismissed application for leave to serve the originating process in Japan.

Held: Applicants able to serve process outside juris, Allsop J considered views of Full Court, determined under the EPBC Act there was evidence that the respondent had violated the terms of the legislation and was likely to do so again. He decided Japan’s refusal to recognise Australia’s claim to Antarctica put aside, even though lack of wide international recognition of Australia’s claim to relevant part couldn’t be ignored. He issued injunction (But it hasn’t been enforced)

3. International Institutions and the case of the International Whaling Commission

• History, nature and functions of international (intergovernmental) institutions - fundamental principles of international institutional law
• Detailed examination of the powers and functions of the International Whaling Commission - treaty regime, the framework of functionalism and its limits, exploring the potential and limitations of the international legal order
• Evolving nature of the Commission’s work and the tension between those States which are committed to conservation (and opposed to commercial whaling) and those States which see sustainable commercial whaling as consistent with the Commission’s (original) goals.
• How political disagreements dealt through Commission → articulated as legal issues → transformed into international legal disputes that are transferred to international tribunals for settlement.

• Traditional, functionalist view: states create organisations in order to achieve common goals and perform certain specified functions
• States and their predecessors have established institutionalized forms of cooperation for many centuries
• E.g. Ancient Greeks - amphicytonic councils
• Regular organisation of conferences to address pressing political issues - two Hague Peace Conferences (1899, 1907)
• Hague Conference introduced the notion of non-binding instruments that could be adopted by the conference, giving a voice to the conference as a separate body and thereby paving the way for later institutionalisation. Such instruments, adopted by majority were later conceptualised as the way to reconcile state sovereignty with international organisation.
• Klabber's focuses on the tension between stability and flexibility (formality and informality, against a background of globalisation, in which international organisations play a role in global governance.
• Functionalism v Normative idea (acts of organisations ought to be subject to some form of control)

Functionalism and Its Limits
• International org often discussed and analysed in terms of their functions
• DECEPTIVE and SUBJECTIVE - e.g. World Bank's function can be seen as aiding development, but also as providing the framework for Western economic domination
• Doctrine of implied powers: the doctrine that organisations can engage in all sorts of activities, even those left unmentioned in their foundational documents, as long as these activities can contribute to the organisation’s functions (ICJ in Reparation for Injuries, ICJ Reports 1949, p. 174)
• Over time, the organisation may come to engage in all sorts of activities never envisaged by the drafting states but justified under reference to the functions of the organisation
• Doctrine of immunity: international organisations typically enjoy tax exemptions and also immunity from suit-theory that starting a lawsuit against an organisation would hinder its functioning, and would moreover allow the host state - the state where the organisation has its headquarters - to exercise undue political pressure.
• Drawback - immunity from prosecution often also means that organisations are free from judicial intervention and control, even where their behaviour is unacceptable.
• No good reason why an international organisation should be allowed to engage in sexual harassment with impunity, or refuse to take fair trial concerns into consideration, or flaunt environmental standards (Singer 1995).

• Some organisations have set up their own administrative tribunals to perform useful tasks in relations between the organisation and its staff members but only limited to that reach.

• Human rights courts, in turn, have so far been reluctant to intervene, but have at least come to accept that the acts of international organisations may have human rights ramifications (see, for instance, the judgment of the European Court of Human Rights (ECtHR) in Waite v. Kennedy, (1999) 118 ILR 121).

**Functionalism theory fails to rationalize the lack of control in real international organisations**

• Their member states cannot control them because acts can often be justified on the basis of the implied powers doctrine

• If all member states agree to engage in an activity, then this common agreement is hard to ignore: the *ultra vires doctrine*, prohibiting entities from acting beyond their competences, is for all practical purposes overruled when all relevant actors agree that an act is within the entity’s competences – and organisations themselves are considered best-placed to make this assessment

• Residual blunt control devices such as withholding contributions, or withdrawing from the organisation altogether, or trying to oust the organisation’s leadership from office. E.g. US and UN (former only willing to make compulsory contribution to the latter conditional on satisfaction of policy demands)

• Few organisations are structured in such a way that some representative body can exercise political control before decisions are actually taken: the European Union, with its European Parliament-exception

• Likewise, organisations typically cannot be sued before domestic courts, and organisations typically are not subjected to the jurisdiction of international tribunals either (other than tribunals to decide staff cases).

• Not only are international tribunals ill equip to adjudicate on international organisation’s responsibility, but there are few actual legal rules (because often discussion of organisation’s actions turns to discussion of member state’s actions)

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The bankruptcy of International Tin Council, in late 1980s - turning point in thinking about international organisation-collapse of council make it clear organisation could hurt innocent third parties, meant that many of the Council’s creditors lost considerable sums of money and aimed to retrieve these through the English Courts.

1. It is not always clear when exactly behaviour is to be attributed to an international organisation
2. Organisations are always and by definition both the aggregate of their member states and, simultaneously, independent from their member states.
   The ICJ declined to shed light on the issue when confronted with a claim brought by Serbia against ten individual NATO member states for their involvement in the bombing of Belgrade, in the late 1990s (the Legality of Use of Force cases, ICJ Reports 2004, 279), largely for want of jurisdiction.

Another puzzling example- why World Bank legally bound to respect human rights (often claimed)

1. **Customary international law** (including human rights law) → double standard → obligation basis in IL
   (states would need to express consent, but organisations would be bound without their consent) but organisations are independent actors in their own right, with a legal personality separate from that of their member states. Further, it would presume organisations can be bound by the customs not of themselves, but rather those of states → but underlying rationale of customary law-giving legal effect to everyday practices within the relevant political community.

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**Institutional Design**

**Tension between formality and informality also informs the design of organisations**

Organisations are set up, mostly, between states, on the basis of a treaty, with organs of their own and a will distinct from that of their member states (Schermers and Blokker 2003; Klabbers 2009)

Organisation for Security and Co-operation in Europe (OSCE), set up on the basis of a non-legally binding document and thus, according to formal criteria, not really an international organisation. (Legal ramifications → i.e. lack privileges and immunities, lack power to conclude agreements with states or other entities, and, most curiously perhaps, it may seem to lack the capacity to engage in wrongful behavior)

**Other entities of doubtful status includes:**

Permanent bodies set up under international environmental agreements (limited INS structure, i.e. annual conference)

Hybrid organisations-i.e.

**Public-private partnerships:** Swiss-based International Organisation for Standardisation) etc.
• Joint ventures between several existing entities: Codex Alimentarius Commission.

• Informal networks—ranging on a high political level from the G20 (the rich states) to the Paris Club (creditor states), but also those encompassing industry representatives, such as the International Accounting Standards Board (Slaughter 2004).

• It might be more functional to provide an entity with a loose structure, or even to try and keep it out of the realm of law altogether.

• Flexibility can be in various forms.

• Typically, such ‘soft’ bodies take their decisions in informal manner (no need for long and compulsory consultation processes), and those decisions, while influential, are often said to be devoid of legal force (not binding, easily repealed/amended/replaced).

• A loose set-up, the very entity itself can easily be repealed or re-organised – more easily, so the argument continues, than their more institutionalised counterparts.

This drive towards deformalisation would seem to have natural boundaries, in a variety of ways

• E.g. the more active an entity is, the more it will recognise the need for a certain amount of formalisation.

• However, even non-binding decisions may harden over time and create legal obligations through formation of customary norms or through processes such as estoppel.

• If states execute non-binding decisions in good faith and incur expenses in doing so, they may resist attempts to change things overnight.

• ‘Soft’ organisations may ‘harden’ over time: E.g. highly flexible General Agreement on Tariffs and Trade (GATT) (originally created as a stop-gap solution when the more ambitious attempt to create an International Trade Organisation failed) which was slowly, over the years, given organs and an organisational structure, and eventually transformed into the very ‘legal’ World Trade Organisation (WTO).

Towards Accountability

• Attempts have been made in recent years to overcome the resulting accountability deficit, on the (not always articulated) basis that the governance of global affairs would benefit from increased legitimacy of international organisations (increase accountability → move away from functionalism).

• Attempt to posit the existence of a system of global administrative law (Kingsbury, Krisch and Stewart 2005). Based on the idea of actors taking decisions which have public effects, the existence of a global administrative space has been postulated where decisions, regardless of formalities, ought to be subjected to legal scrutiny.

• The tools would be derived from an amalgam of administrative rules and principles borrowed from domestic administrative legal systems, and would focus more on procedure than on substance: E.g. whether decisions are taken transparently, whether the proper procedures have been followed, whether all stakeholders have been consulted, whether decisions are proportionate to their stated goals.

• In this way the exercise of public power on the global level can be curtailed without insisting on the need for universal (substantive) values.

• Others argued that at least some international organisations being subject to the demands of constitutionalism.

• E.g. European Union, the United Nations or the WTO are claimed to be subject to constitutionalisation, which can be taken to mean that they are subject to a set of standards with a quality akin to constitutional law, on the basis that only constitutional authority is legitimate authority.

• Like global administrative law, would include procedural standards, but it would also cover more substantive standards, in particular human rights standards.

More Active, Less Glamorous

• SINGH—international organisation have come to be taken seriously as political actors, their work is informed by political considerations and has political effects, slowly subjected to some form of scrutiny, against background of general surge in controlling public power.

• Sanction issue ordained by the Security Council—terrorism concerns prompted the council to start employ sanctions against individuals and companies, and has created sanctions committees to oversee their implementation, conflict with human rights law—i.e. financial sanctions may be considered as impeding the right to property.

• The sanctions issue has given rise to heated debates about the possible law-making role of international organisations (Alvarez 2005).
• Although the Security Council comes dangerously close to assuming legislative powers, it was never created with this purpose in mind, and lacks any form of democratic legitimacy.

• In other organisations, law-making has come to be surrounded by certain guarantees; the WTO’s emphasis on being member-driven, and the explicit injunction that its dispute settlement mechanism shall not add to existing rights or obligations, suggests that organisations are less trusted, by their own member states, than they once were.

• More restrained use of the implied powers doctrine and the introduction of notions such as subsidiarity

• In some organisations, decision making process by consensus has became the norm, giving member states a virtual right of veto

• Amendment of constitutional documents has traditionally been difficult (Zacklin 1968), and is now often done by informal means that, in turn, provokes arguments concerning accountability, legality and legitimacy.

International Regulation of Whaling

International Convention for the Regulation of Whaling 1946 and Schedule

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International Whaling Commission, Whaling

The IWC recognises three different types of whaling.

• Aboriginal subsistence whaling to support the needs of indigenous communities-This is regulated by the IWC which sets catch limits every six years.

• Commercial whaling: This is also regulated by the IWC but has been subject to a pause or ‘moratorium’ since 1986. Aside from non-IWC member countries, the only commercial whaling conducted at present is by a small number of countries exercising an objection or reservation to the moratorium.

Although these countries share catch and related data with the Commission and its Scientific Committee, this whaling is not regulated by the IWC.

• Special permit (or scientific) whaling- International law on whaling separates this from IWC-regulated whaling. Countries are asked to submit special permit research proposals to the IWC for scientific scrutiny, but the permits are issued by individual countries, and the role of the IWC is advisory only.