ACTIVITIES

I. Activities of the International Law Association of Japan

THE TWENTY-SECOND ACADEMIC CONFERENCE
(2015)

Date: April 18, 2015
Place: Sanjo Kaikan, University of Tokyo
Morning Session:
Chair: Professor Masaharu Yanagihara, Kyushu University
Speaker: Professor Naoya Okuwaki, Meiji University
Afternoon Session: Law and Policy on Outer Space
Chair: Professor Toshio Kosuge, Digital Hollywood University
Speaker: Professor Takeo Horiguchi, Sophia University
Speaker: Ms. Motoko Uchitomi, Part-time Lecturer, Policy Alternatives Research Institute, University of Tokyo
Speaker: Professor Yasuaki Hashimoto, Director, National Institute for Defense Studies
Speaker: Professor Soichirou Kozuka, Gakushuin University

New Trends in International Law of Cooperation?: The Whaling Case Revisited

Naoya Okuwaki, Professor, Meiji University

The judgment of the International Court of Justice (ICJ) in the Whaling Case involves many interesting problems in view of its novelty, touching upon issues relating to international administrative law as well as the possible role of international courts in fostering cooperation among States in collaboration with treaty organizations. Therefore, in order to derive positive lessons from this Court decision, it is necessary not only to clarify individual points raised by the ICJ, using dubious logic and new concepts, but it is also necessary to understand them as an integral whole. From such a perspective, the reasoning set forth in the majority opinion of the Court is of special interest. First and foremost, the opinion focused upon whether JARPA II, Japan's research whaling program in the Southern Ocean, is recognized as an activity "for the purpose of scientific research," curiously without asking what constitutes "scientific research." This distinction may be criticized as artificial, but it is important to ask why the Court had to adopt such a distinction. To my understanding, the Court seems to have given much consideration to the role of the International Whaling Commission (IWC) that assumes primary responsibility to realize the objectives and purpose of the International Convention for the Regulation of Whaling (ICRW), that is, to preserve an appropriate balance of sustainable use of cetacean resources and their conservation using scientific bases. The consideration for inter-institutional comity seems to have played decisively in

the logic of the majority opinion.

Second, the ICJ characterized the ICRW, combined with the schedules that constitute integral parts of the convention, as an "evolving instrument." At the base of this ruling, there seems to be the Court's presumption that the balance between sustainable use and conservation of cetacean resources has changed overtime, and that the ICRW should manage this balance more and more in favor of conservation. This consideration would be especially true for a situation where a precautionary approach is required because the scientific knowledge is lacking, although the Court's reasoning did not explicitly mention this approach.

Third, as a result, the contracting States are required, in granting special permits under Article 8 of ICRW, to make their research programs more transparent, accountable, and consistent, so that research programs will constitute activities "for the purpose of scientific research." In the same vein, States shall inform the IWC in a timely manner when major changes in the original design of the special permit occur in the process of implementation. These requirements have developed recently through decisions of international courts, especially in environmental fields.

Fourth, this is especially true regarding the use of lethal methods, as the guidelines of the Scientific Committee recommend avoiding the use of lethal methods if the purpose of the special permit can be achieved by non-lethal methods. The Court recognized that contracting States are under a "duty to cooperate" with the IWC, and especially with the Scientific Committee, and they should give due regard to the guidelines, even if the guidelines have no binding force of law.

Fifth, the Court introduced the concept of a "standard of review" parallel to a "margin of appreciation" to deny the discretion arguments raised by Japan. Japan claimed in the proceedings that discretion in granting special permits is so broad that the Court can only review its decision to grant a special permit when a bad faith violation is involved. The Court denied this argument saying that whether or not the special permit is for purposes of scientific research does not depend simply on the State's perception, and that the Court may review whether an abuse of authority is involved in the design of the special permit and its implementation. Under that premise, the Court used the phrase "standard of review," which is quite novel in ICJ jurisprudence. It is true that this is a familiar phrase in dispute settlement procedures of World Trade Organization (WTO) and, with respect to the phrase "margin of appreciation," in the jurisprudence of the European Court of Human Rights where deference is given to the discretion of State parties, on certain occasions, in determining the reasonableness of measures taken domestically. In the Whaling Case, however, the Court used the phrase to scrutinize the design of the JARPA II program and the gaps between the program and its implementation in order to decide whether Japan fulfilled the "procedural" requirements for the activities to be recognized as activities "for the purpose of scientific research." The

Court did not use the phrase to objectively clarify the scope of discretion that contracting States may have in granting special permits within the structure and purpose of the IWC regime.

Sixth, notwithstanding that the requirements of transparency, accountability, and consistency are taken primarily from international environmental law, it is curious that it was not the ICJ but Japan that specifically referred to the precautionary approach in justifying the decision to decrease the number of target whales in the process of implementation of the original JARPA II program. Additionally, when Japan increased the number of target whales in the design of JARPA II as compared to JARPA I, it was Japan that attempted to justify the increase from an ecosystem perspective, that is, to obtain sufficient and accurate data necessary to construct a multi-species competition model.

Seventh, the Court finally ordered suspension of JARPA II in its current form, because it is not being used for the purpose of scientific research. The Court neither denied that the test catch itself be exercised for the purpose of scientific research nor prohibited the use of lethal methods. The Court also did not label JARPA II as commercial whaling. In this sense, the decision of the Court in the Whaling Case primarily functioned as an injunction. This, again, seems in line with new developments in the field of international environmental law, where the ICJ, on certain occasions, indicate provisional measures. The Court decision also resembles, in another respect, the provisional measures under Article 290 of United Nations Convention on the Law of the Sea (UNCLOS), where the Court is authorized to prescribe such measures to prevent serious harm to the marine environment. If this is the correct understanding of the meaning behind the Court's actions, the Court could have done away with the issue of the applicant's *locus standi*, notwithstanding the Court's explicit but doubtful reasoning when it referred to the case of *Belgium v. Senegal*.

In the aftermath following the judgment of the Whaling Case, the IWC adopted Resolution 2014-5, in which State parties were prohibited from granting any special permits until the Scientific Committee reviewed the research program to ensure that it was able to provide advice to the Commission in accordance with the instructions stated therein, which is nearly a reiteration of the elements of "standard of review" that were indicated in the Court's judgment. The Resolution may have the binding force of law, in practice, either through the duty to cooperate with the IWC or through the obligation to consider with due regard to the recommendations of the Scientific Committee. If this is the case, the authority of the State parties to grant special permits under Article 8 of the ICRW will become wholly controlled by the IWC. But how can the IWC manage to achieve the objectives and purpose of the ICRW without identifying what constitutes "scientific research"? The Resolution seems to have the effect of spoiling the standard of review reasoning deliberately introduced by the Court, presumably for the sake of inter-

institutional comity. However, if this is not the case, the original issue concerning the scope of the discretion in granting a special permit will remain unresolved. In any event, the IWC seemingly endeavored to reestablish itself as a brand new political organization without the consent of sovereign states that had committed to the purpose of the ICRW, and, by so doing, it may lose the scientific base that barely endorsed its legitimacy thus far.

Intersection of International Environmental Law and International Space Law in Tackling the Issues of Space Debris

Takeo Horiguchi, Professor, Sophia University

Space debris or orbital debris, which is generally defined as defunct man-made objects in orbit around Earth, has been increasingly seen as a threat not only to Earth but also to operational objects in space, although the UN Space Treaties do not appear to contain any specific provisions to address the problem. While the international community has developed several legally non-binding instruments such as the UN Space Debris Mitigation Guidelines (2007) to fill or complement this "gap" in international regulations, authors have also frequently asked whether international environmental law (IEL) is able to be applied to prevent or repair damage to the space objects in orbit. This lecture focuses on and considers three basic issues, which may imply the difficulty of the application of IEL, but have not been necessarily subject to thorough examination. These issues can be summed up in the following three questions. Have any environmental norms acquired the status of becoming general international law? If so, can those norms be applied to protect outer space as well? If one can also answer the second question affirmatively, do they really fertilize international law so as to address this environmental problem in outer space?

After examining relevant state practices, international case law, and academic literature, it is first argued that an obligation to prevent transboundary damage is firmly established as a rule of general international law, whereas the precautionary principle can also be seen as a general principle that should at least guide the interpretation of the above rule. As to the second question presented, the Outer Space Treaty explicitly admits that space activities can be regulated by general international law. Moreover, any features of outer space, including the non-existence of living things and ecosystems, arguably do not prevent application of the above norms, as their existence has not been regarded as a necessary condition of application. Irreversibility or seriousness of possible damage to space objects or outer space can provide us a sufficient reason for prevention and precaution. This lecture also emphasizes that those environmental norms should be considered when we interpret the relevant provisions of UN Space Treaties. This is especially true for the interpretation of the obligation of due diligence, which is contained in Article 9 of the Outer Space Treaty, and it should be guided by the normative development of prevention and precaution in IEL. Existing international space "hard" law can be fertilized by systemic (interpretative) integration of the relevant norms of IEL, which is universally required today by the concept of sustainable development.

Space Exploration and International Law

Motoko Uchitomi, Part-time Lecturer
Policy Alternatives Research Institute, University of Tokyo

Today, the human race is trying to go back to the Moon and even further, to Mars.

The International Space Exploration Forum (ISECG), consisting of 14 major space agencies including JAXA, produced the Global Exploration Roadmap (GER) in 2011 (revised in 2013). The GER defines the goal of manned space exploration as Mars via the Moon, by utilizing the International Space Station (ISS) existing in the Earth's orbit.

Unlike the "Space Race" in the Cold War era, manned space exploration is not affordable without international cooperation. Therefore, international agreement among the diverse participating nations is key. Balancing the costs and benefits for spacefaring nations and developing countries is one difficulty. Treatment of natural space resources is another, because of the emerging interests of commercial businesses. In order to achieve international agreement, it is indispensable to review existing international conventions for space activities such as the Outer Space Treaty and related "soft" laws produced by the United Nations Committee on the Peaceful Uses of Outer Space. However, the Moon Treaty, with more details regarding sharing natural space resources, is considered ineffective as only 13 states have ratified the treaty and major spacefaring states are not included. The Inter-Governmental Agreement for the ISS is another important model because it is a precedent for multilateral manned space cooperation.

Future space exploration is a common activity for all human beings, which should benefit all nations and all global citizens. At the same time, a nation's taxpayers and companies demand returns on their investments. Defining a common goal and setting agreeable conditions are other challenges to realize future space exploration.

Security in Outer Space and International Law

Yasuaki Hashimoto, Director
The National Institute for Defense Studies

Outer space is one of the global commons, such as the high seas, air space over the high seas, and cyber space, which are open to all nations. At present,

outer space is an essential province, especially for the national security of advanced nations.

During the Cold War Era, the fundamental purpose of space utilization was to monitor military activities and to find the targets of the opposing party. Though various military satellites were used by certain nations, the primary purpose was intelligence-gathering from outer space.

This situation drastically changed after the 1990s. For instance, some advanced nations have established a new style of military action that combines conventional military assets with new outer space assets. This change is known as the Revolution in Military Affairs (RMA).

For nearly 60 years, international law has attempted to effectively control space activities in various ways. The 1967 Outer Space Treaty established a principle that international law, including the United Nations Charter, shall apply to all nations' space activities. It also prohibited aggressive action and accepted the use of the right to self-defense. Additionally, some bilateral and multilateral treaties were successfully executed to control military activities in outer space.

However, recently, the United Nations was not able to establish a proper legal system for space utilization due to its consensus approach. On the other hand, some leading nations tend to prefer the coalition approach. For example, the USA proposes the Space Situational Awareness (SSA) concept, which aims to discover the orbits of space objects and debris as precisely as possible based on multilateral bases. The European Union proposed a code of conduct for establishing confidence building between spacefaring nations.

The Current Status of Private Law in Outer Space: The Space Assets Protocol to the Cape Town Convention

Souichirou Kozuka, Professor, Gakushuin University

On March 9, 2012, the Space Assets Protocol to the Cape Town Convention was adopted by the Diplomatic Conference held in Berlin under the auspices of the International Institute for the Unification of Private Law (Unidroit). It is the first binding instrument on space law since the Moon Agreement was adopted by the United Nations in 1979. It is also the first private law instrument ever adopted applicable to activities in outer space.

The Cape Town Convention refers to the family of international instruments consisting of the Base Convention (Convention on International Interests in Mobile Equipment) and the Protocols, each applicable to a specific type of asset. It provides for the International Registry to register the security interests in the asset, and it also includes some provisions on the procedures for exercising the registered interests in order to facilitate asset-based financing. The first Protocol relating to aircraft equipment achieved great success, attracting 58 State Parties within 15 years. Its success was due to the fact that it matched the shifts in the organization of the aviation industry caused by the "open sky" policy, the emergence of low cost carriers, and the increased use of aircraft leasing.

The space industry has also experienced not insignificant changes in the last few years, starting with the privatization of international organizations for telecommunication satellites, followed by the leveraged buyouts of privatized operators, and, more recently, the increased use of hosted payloads. In the future, new business entrants in the field of observation satellites in the Low Earth Orbit are anticipated. While it is not yet clear whether these developments will entail the financing that triggers the needs to be satisfied by the Space Assets Protocol, steps to bring it into force have steadily been taken. The regulations to implement the Space Assets Protocol are almost finalized, and the nomination of the Registrar is expected to take place soon. It is at least indisputable that the Space Assets Protocol has marked a new stage in the law of outer space.

ACTIVITIES OF OFFICE IN 2014

1. The General Meeting of the Japan Branch was held on April 19, 2014 in Sanjo Kaikan, Tokyo.
   a. With regard to fiscal year 2013:
      (i) The financial account of the Japan Branch for fiscal year 2013, audited by Mr. Masaki Orita and Mr. Akira Kawamura, Auditors, as prepared by Mr. Yoshio Kumakura, Treasurer, was submitted and approved at the Meeting.
      (ii) The general affairs of the Branch during this term were reported by Professor Kazuhiro Nakatani, Secretary General;
      (iii) The academic activities of the Branch during this term were reported by Professor Yuji Iwasawa, Director of Planning; and
      (iv) The publication of Volume 56 of the *Japanese Yearbook of International Law* was reported by Professor Koichi Morikawa, Co-Editor-in-Chief.
   b. With regard to fiscal year 2014:
      (i) The budget for fiscal year 2013, as prepared by Mr. Yoshio Kumakura, Treasurer, was submitted and approved at the Meeting;
      (ii) The general affairs scheduled for this term were presented by Professor Kazuhiro Nakatani, Secretary General;
      (iii) The academic activities scheduled for this term were presented by Professor Yuji Iwasawa, Director of Planning; and
      (iv) The progress of the editorial work for Volumes 57 and 58 of the *Japanese Yearbook of International Law* was reported by Professor Koichi Morikawa, Co-Editor-in-Chief.
      (v) The following 6 persons were admitted as new members of the Branch:

Nishimura & Asahi,
Mari Kawamura, Asociate Professor, Kyorin University,
Taro Hamada, Associate Professor, Kinki University
Yo Ota, Partner, Nishimura & Asahi
Yoshimasa Furuta, Partner, Anderson Mori & Tomotsune
Takamichi Inose, Associate Professor, Kitazato University

(vi) The following members were elected as Council Members, who would serve for 2 years.
Jun'ichi Akiba, Masahiko Asada, Masato Dogauchi, Kazuya Hirobe, Ryuichi Ida, Masafumi Ishii, Yuji Iwasawa, Atsuko Kanehara, Shigeru Kozai, Yoshio Kumakura, Yosiro Matsui, Shigeki Miyazaki, Koichi Morikawa, Shinya Murase, Kazuhiro Nakatani, Tsuneo Ohtori, Naoya Okuawki, Hisashi Owada, Shigeki Sakamoto, Yoshiaki Sakurada, Junko Torii, Kimio Yakushiji, Masaharu Yanagihara, Koresuke Yamauchi and Shunji Yanai.

(vii) It was decided that the Japan Branch would host the 79th ILA Conference in Kyoto from 23 to 27 August 2020, subject to the approval of the ILA Executive Council.

2. Council Meetings were held three times for fiscal year 2014 and dealt with the following matters:

a. At the first and second Council Meetings of 2014 held on April 19, 2014 in Sanjo Kaikan, Tokyo:

(i) The financial account of the Branch for fiscal year 2013 and its budget for fiscal year 2014 were reported;

(ii) The general affairs of the Branch for fiscal year 2013 and the program for fiscal year 2014 were approved;

(iii) The academic activities of the Branch during fiscal year 2013 and the program for fiscal year 2014 were approved; and

(iv) The publication of Volume 56 of the *Japanese Yearbook of International Law* and the progress of the editorial work for Volumes 57 and 58 of the *Japanese Yearbook of International Law* were reported.

(v) The Branch Officers, who would serve for two years, were elected as follows:
Chairman of the Council: Naoya Okuwaki
Vice Chairman of the Council: Masato Dogauchi
Treasurer: Yoshio Kumakura
Secretary General: Kazuhiro Nakatani
Editor-in-Chief: Koichi Morikawa
Director of Planning: Yuji Iwasawa

b. At the third Council Meeting held on November 18, 2014 in Gakushi Kaikan, Tokyo:

(i) The financial condition of the Branch was reported;

(ii) The general affairs of the Branch were reported;

(iii) The academic activities of the Branch were reported; and

(iv) The progress of the editorial work for Volumes 57 and 58 of the *Japanese Yearbook of International Law* was reported.

Kazuhiro Nakatani