

IMAS



translating **nature** into **knowledge**

INSTITUTE FOR MARINE AND ANTARCTIC STUDIES

Sovereignty

Dr Julia Jabour

*Master of Polar Law
University of Akureyri
Iceland
12 October 2011*



3 – Sovereignty

This seminar investigates the significant difference between the Arctic and the Antarctic – that of sovereignty. Seven countries have made claims to Antarctic territory and at the adoption of the Treaty in 1959 these claimants, plus the US and the Soviet Union, agreed to “freeze” their claims during the life of the Treaty. The resulting compromise, contained in Article IV, has been the means through which the world has witnessed 50 years of cooperation, peace and science in Antarctica.

Recommended Reading

Gillian Triggs (2010) “The Antarctic Treaty System: A model of Legal Creativity and Cooperation” in Berkman PA, Lang MA, Walton DWH and Young OR (eds) Science Diplomacy: Antarctica, Science and the Governance of International Spaces, Washington: Smithsonian Institution Scholarly Press, pp40–49.

Vladimir Golitsyn (2010) “Balancing Sovereign Interests beyond National Jurisdiction” in Berkman PA, Lang MA, Walton DWH and Young OR (eds) Science Diplomacy: Antarctica, Science and the Governance of International Spaces, Washington: Smithsonian Institution Scholarly Press, pp51–58.

Sovereignty

Antarctica was deemed *terra nullius* (ie. belonging to no state) and thus capable of being appropriated

BUT

- an act of discovery gives only an undeveloped title which must be perfected by later acts demonstrating an actual intent to exercise sovereignty over the discovered lands
- there must be actual and continuous intent to exercise sovereignty over a period of time

Island of Palmas Arbitration (Netherlands v. USA) 2 RIAA 829 ; Legal Status of Eastern Greenland (Norway v. Denmark) (1933) PCIJ Reports Ser. A/B No 53, 45-6.

Effective Occupation

- “legal possession” evidenced by
 - state activity
 - eg. acts of administration
 - “occupation” (not necessarily settlement and close physical possession)

*Island of Palmas Arbitration (Netherlands v. USA) 2 RIAA 829 ;
Legal Status of Eastern Greenland (Norway v. Denmark) (1933)
PCIJ Reports Ser. A/B No 53, 45-6.*

- except for overlaps, there is no dispute between claimants of Antarctic territory at this point in time
- proof of possession and proof of a better right (out of two or more opposing rights) will be required if disputing states seek resolution

“Proof” of sovereignty

Legal Status of Eastern Greenland (Norway v. Denmark) (1933)

- ‘ a claim to sovereignty based not upon some particular act or title such as a treaty of cession but merely upon continued display of authority, involves two elements each of which must be shown to exist: the intention and will to act as sovereign, and some actual exercise or display of such authority’ (p.45–6)
- intent and will must be by the state claiming sovereignty and no other, and certain forms of activity rank higher than others, eg. exercising criminal jurisdiction

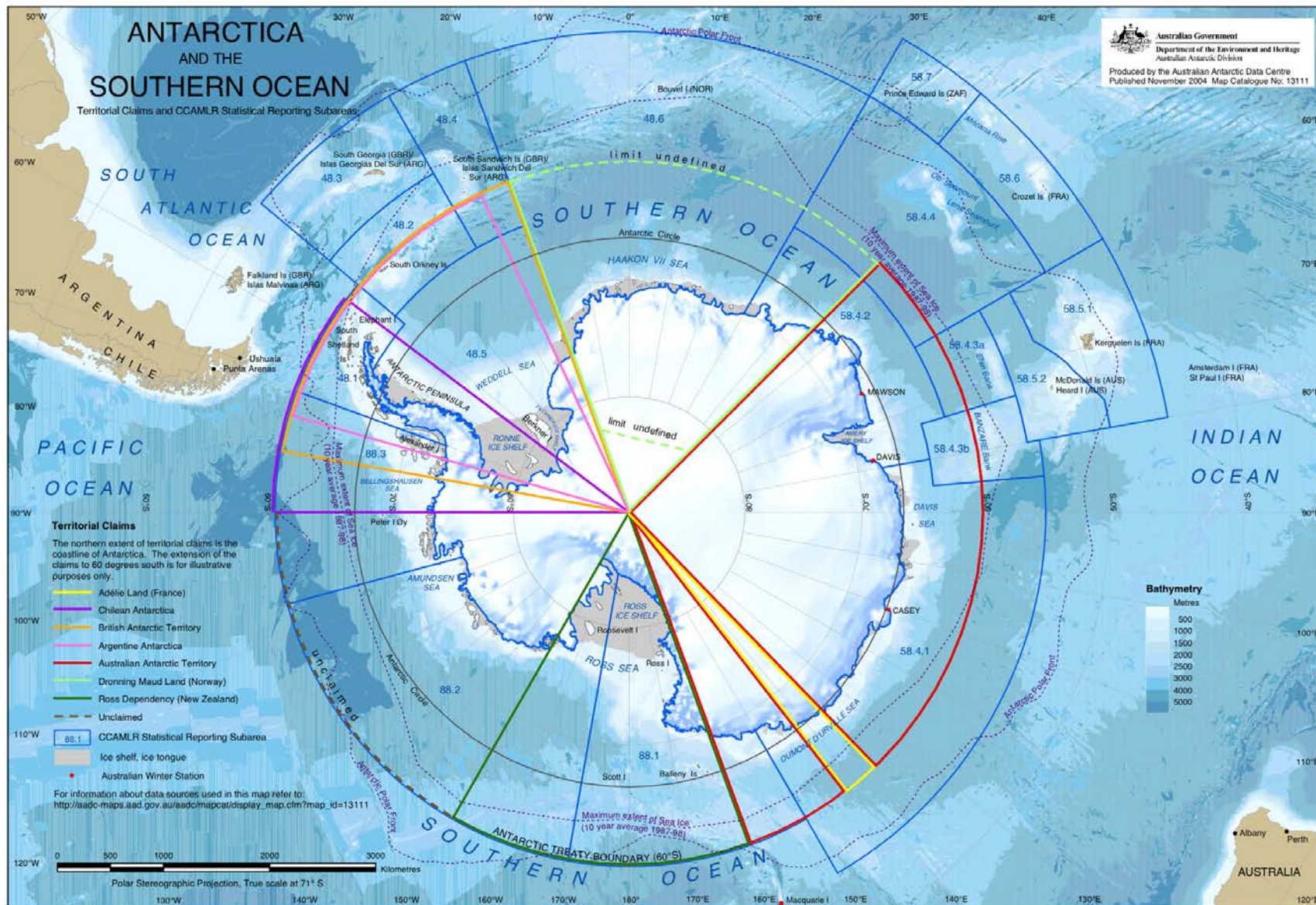
A better right...?

- a critical date would be chosen
- facts examined to see which claimant had displayed and exercised sovereign rights to a greater extent, eg. by
 - excluding the activities of other states (enforcement?)
 - maintaining a reasonable standard of administration
 - recognition?
 - etc.
- complex issue and no easy answers...might involve the development of new international law norms

ANTARCTICA AND THE SOUTHERN OCEAN

Territorial Claims and CCAMLR Statistical Reporting Subareas

Australian Government
Department of the Environment and Heritage
Australian Antarctic Division
Produced by the Australian Antarctic Data Centre
Published November 2004 Map Catalogue No. 13111



Antarctic Treaty Article IV

1 Nothing contained in the present Treaty shall be interpreted as:-

- (a) a renunciation by any Contracting Party of previously asserted rights of or claims to territorial sovereignty in Antarctica;
- (b) a renunciation or diminution by any Contracting Party of any basis of claim to territorial sovereignty in Antarctica which it may have whether as a result of its activities or those of its nationals in Antarctica, or otherwise;
- (c) prejudicing the position of any Contracting Party as regards its recognition or non-recognition of any other State's right of or claim or basis of claim to territorial sovereignty in Antarctica.

Article IV...

2 No acts or activities taking place while the present Treaty is in force shall constitute a basis for asserting, supporting or denying a claim to territorial sovereignty in Antarctica or create any rights of sovereignty in Antarctica. No new claim, or enlargement of an existing claim, to territorial sovereignty in Antarctica shall be asserted while the present Treaty is in force.



Article IV

- Preservation *status quo ante* of claims to territory and of rights to claim
- No acts assert, support, deny or create rights to sovereignty
- No new or enlarged claims during the life of the Treaty

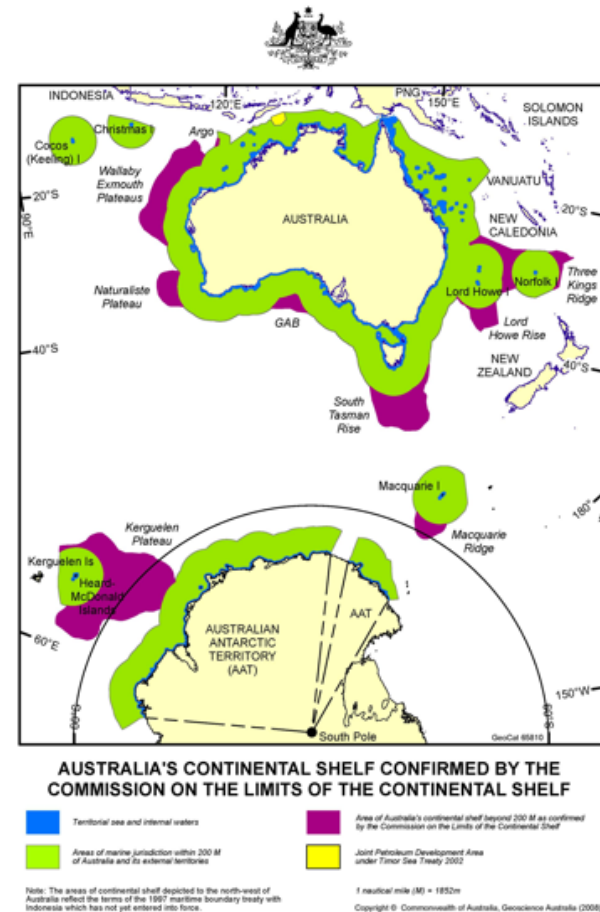
Australia

42% of Antarctic continent =
5,896,500 sq km

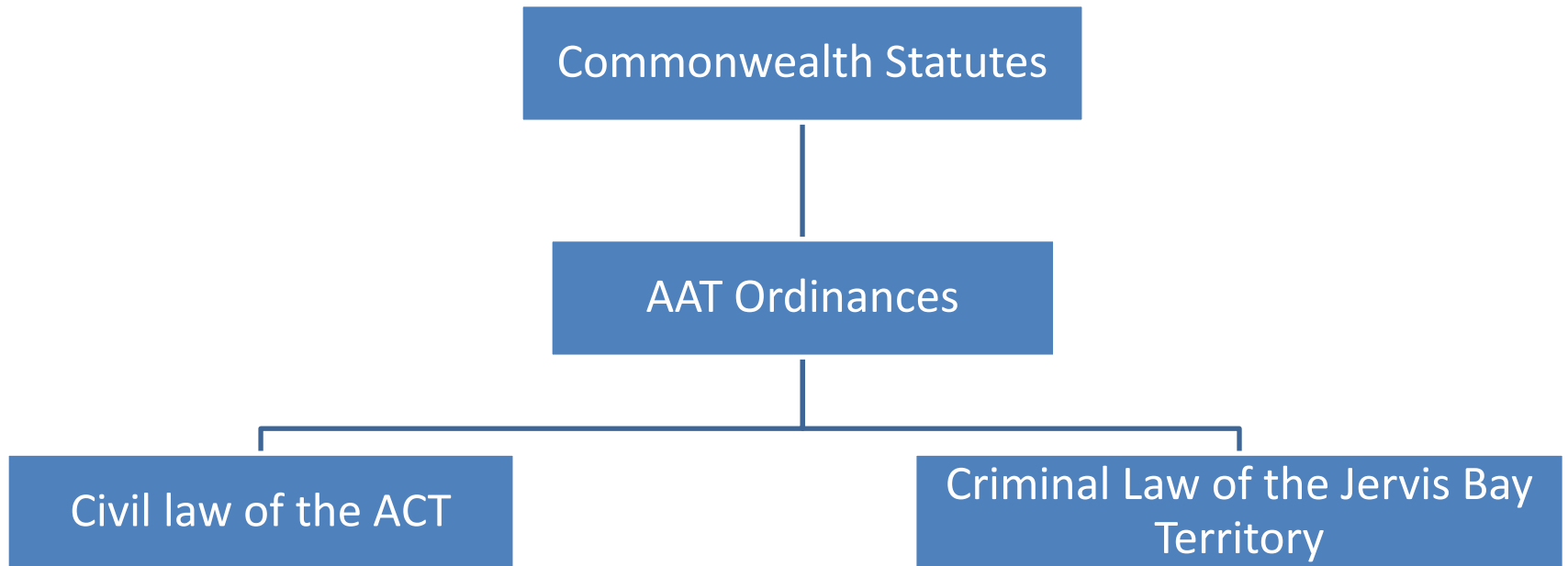
+ EEZ = **2,000,000+ sq km**

= **~8 m sq km**

+ Extended continental shelf
(Macquarie Is to 61° and
Heard to 64° South)



Australian Antarctic Territory Legal Structure



Information from presentation by
Prof Stuart Kaye, University of Western Australia

Australian Antarctic Territory

- No legal system put in place for the AAT upon acceptance in 1936, so adopted from elsewhere
- Australian Antarctic Territory Act 1954 (Cth)
 - Ordinances made by the Governor-General under section 11
 - Subject to Parliamentary scrutiny
 - Civil law of the Australian Capital Territory
 - Criminal law of the Jervis Bay Territory

AAT in the Courts

- In 75 years the AAT has been referred to by the High Court of Australia only three times
- In over 30 years, the AAT has been relevant in only one case before the Federal Court of Australia
 - Humane Society International litigation
- Only 4 AAT-related matters before the Administrative Appeals Tribunal

Commonwealth Statutes (examples only)

- Antarctic Treaty Act 1960 (Cth)
- Antarctic Treaty (Environmental Protection) Act 1980 (Cth)
 - Applies to Australians throughout all Antarctica and to foreigners within the AAT
- Antarctic Marine Living Resources Conservation Act 1980 (Cth)
- Environment Protection and Biodiversity Conservation Act 1999 (Cth)

AAT Ordinances

- Endangered Species Ordinance 1980 (AAT)
- Migratory Birds Ordinance 1980 (AAT)
- Medical Practitioners Registration Ordinance 1985 (AAT)
- Poisons Ordinance 1985 (AAT)
- Poisons and Narcotic Drugs Ordinance 1985 (AAT)
- Weapons Ordinance 2001 (AAT)
- Criminal Procedure Ordinance 2003 (AAT)

Establishing Sovereignty

- Overt attestations of sovereignty
- Administrative action
 - Stamps
 - Ordinances
 - Telephone dialing prefix

**Raising the flag
(in this case the Union Jack!)**





Australian coins



Enforcement

- Enforcement of law is an important element of demonstrating sovereignty
 - Limited by the Antarctic Treaty
 - Difficulties in respect of recognition and third States
 - Risks of unenforceability
 - Whaling litigation before the ICJ

***Humane Society Int. v
Kyodo Senpaku Kaisha Ltd (2008)***

- Litigation brought by HSI in 2005 before Federal Court of Australia
- Sought enforcement of Australian law in the AAT EEZ with respect to whaling
- Government originally opposed the application preferring diplomatic solution
- New Government removed the objection
- Court gave judgment in January 2008



HSI Litigation cont...

1. THE COURT DECLARES that the respondent has killed, injured, taken and interfered with Antarctic minke whales (*Balaenoptera bonaerensis*) and fin whales (*Balaenoptera physalus*) and injured, taken and interfered with humpback whales (*Megaptera novaeangliae*) in the Australian Whale Sanctuary in contravention of sections 229, 229A, 229B and 229C of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth), and has treated and possessed such whales killed or taken in the Australian Whale Sanctuary in contravention of sections 229D and 230 of the Act, without permission or authorisation under sections 231, 232 or 238 of the Act.

HSI Litigation (Cont)

2. THE COURT ORDERS that the respondent be restrained from killing, injuring, taking or interfering with any Antarctic minke whale (*Balaenoptera bonaerensis*), fin whale (*Balaenoptera physalus*) or humpback whale (*Megaptera novaeangliae*) in the Australian Whale Sanctuary, or treating or possessing any such whale killed or taken in the Australian Whale Sanctuary, unless permitted or authorised under sections 231, 232 or 238 of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth).

Challenges

- Maintaining signs of sovereignty
 - Applying Australian law to the AAT
 - Fisheries
 - Whaling
 - Environmental protection
 - Law of the Sea issues
 - Extended continental shelf
 - Territorial sea baselines
 - EEZ Claim



Recognition

- Not essential, but...
- Only 4 other States recognise Australian sovereignty in Antarctica
 - UK (which gave Australia its claim in 1933)
 - NZ (also granted their claim by UK)
 - Norway (Antarctic neighbour)
 - France (Antarctic and Pacific neighbour)

Persistent objections

In 2004 when Aus made its submission to CLCS, *note verbales* were received from

- USA
- Russia
- France
- Japan
- Germany
- India
- the Netherlands
- (Timor-Leste, re Joint Development area)



**all denouncing claims
to sovereignty in
Antarctica**

(“an unresolved land dispute”)



Article VI – High seas

The provisions of the present Treaty shall apply to the area south of 60° South Latitude, including all ice shelves, but nothing in the present Treaty shall prejudice or in any way affect the rights, or the exercise of the rights, of any State under international law with regard to the high seas within that area.



Article VII

- Establishes observation/inspection system from within Consultative Parties
- Observers have free access to all stations, installations, equipment, ships, aircraft
- ATCPs to provide advance notice of:
 - Expeditions by its nationals or from its territory
 - Stations occupied by its nationals
 - Military personnel or equipment



Article VIII

- National jurisdiction over:
 - Observers
 - Exchange scientific personnel
 - Support staff(without prejudice to a Party's right to jurisdiction over all other persons)
- Disputes over jurisdiction handled by consultation between involved Parties



Article XI

- Disputes over interpretation or application to be resolved by any peaceful means
- Alternative is ICJ
- No dispute should remain unresolved

Tutorial Topic

In 200 words, give your interpretation of whether Australia's acts of proclaiming an EEZ, judging the HSI case, and surveying and submitting—but asking the CLCS not to consider—Antarctic continental shelf data are all acts permitted and encouraged under the Antarctic Treaty's Article IV or forbidden and in contravention of it. Explain your answer.