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The Antarctic Whaling case: litigation in the international court and the role played by NGOs

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Australia, in 2010, commenced proceedings in the International Court of Justice against Japan challenging the international legal validity of Japan's conduct of its "scientific" whaling programme in the Southern Ocean. The case against Japan was argued in the International Court in June and July 2013. These proceedings were brought following a sustained campaign by the International Fund for Animal Welfare (IFAW) in Australia and internationally in which four Legal Panels were sponsored to consider the legality of Japan's whaling programme. The role played by IFAW in promoting international litigation strategies to challenge Japan's whaling in the Southern Ocean is considered, against a backdrop of similar and related environmental campaigns by other non-governmental organisations.

Keywords: Whaling; Southern Ocean; Australia; Japan; International Fund for Animal Welfare; International Court of Justice

Introduction

Non-governmental organisations (NGOs) have always had an active role in contemporary Antarctic affairs. Epistemic communities of scientists played a pivotal role in the exploration of Antarctica and in its early political affairs including in the lead up to the 1959 Washington Conference which culminated in the Antarctic Treaty.[1] The International Geophysical Year of 1957–1958 organised by the International Council of Scientific Unions was critical in developing scientific cooperation in Antarctica, which became a cornerstone of the Treaty and provided a bedrock upon which the subsequent Antarctic Treaty System (ATS) developed.[2] In addition to the scientific community, environmental organisations emerged as distinctive voices in Antarctic affairs from the 1970s onwards in tandem with the growth of the global environmental movement. The significance of NGOs in Antarctic politics was taken to additional heights in the 1980s during negotiations for a minerals regime that resulted in the 1988 Convention on the Regulation of Antarctic Mineral Resource Activities (CRAMRA),[3] rapidly followed by the abandonment of that convention in favour of

*Email: donald.rothwell@anu.edu.au
[1]Antarctic Treaty, United Nations Treaty Series 402: 71.
[2]See generally Julia Jabour and Marcus Haward, "Antarctic Science, Politics and IPY Legacies," in *Legacies and Change in Polar Sciences: Historical, Legal and Political Reflections on the International Polar Year*, ed. Jessica M. Shadian and Monica Tennberg (Ashgate, 2009), 101–24.
[3]Convention on the Regulation of Antarctic Mineral Resource Activities, *International Legal Materials* 27: 868.

the 1991 Madrid Protocol on Environmental Protection to the Antarctic Treaty (Madrid Protocol).[4] During this period, NGOs such as the Antarctic and Southern Ocean Coalition, the Australian Conservation Foundation, Greenpeace International, the Wilderness Society, and the World Wildlife Fund all gained national and international prominence for their Antarctic campaigns. While the ultimate aim for some of these NGOs was the recognition of Antarctica as a "World Park",[5] the decision by Antarctic Treaty parties to effectively walk away from CRAMRA and in its place adopt the Madrid Protocol with its moratorium on minerals activities and comprehensive measures for environmental protection of the continent and adjacent parts of the Southern Ocean was an overwhelming victory for the environmental movement and was seen to secure Antarctica's environmental protection and management.[6]

Notwithstanding these very significant NGO achievements in Antarctica, an ongoing issue of both regional and international concern has been whaling in the Southern Ocean.[7] Whaling has a long history in Antarctica and is not only closely linked with the first recorded human settlements across parts of the sub-Antarctic, but alongside sealing was also Antarctica's first activity conducted on an industrial scale,[8] and likewise the first human activity to have significant environmental impact. Southern Ocean whaling is also closely linked to legal regulation and management by those countries whose whalers were operating in Antarctica, and then by those countries who asserted Antarctic territorial claims.[9] There have likewise been successive attempts to globally regulate the whaling industry. In the twentieth century, the first real effort came with the 1931 Convention for the Regulation of Whaling,[10] followed in 1946 by the International Convention for the Regulation of Whaling (ICRW).[11] The ICRW, which remains in force, was not originally drafted with conservation objectives in mind but rather was intended to regulate the whaling industry so as to effectively ensure its ongoing sustainability in what were otherwise the unregulated waters of the high seas. Gradually, however, the operation of the ICRW changed and in the 1970s and ultimately the 1980s, the Convention began to

[4]Protocol on Environmental Protection to the Antarctic Treaty, *International Legal Materials* 30: 1461

[5]See discussion of this concept in Donald R. Rothwell, "A World Park for Antarctica ? Foundations, Development and the Future," *Antarctic and Southern Ocean Law and Policy Occasional Papers* (University of Tasmania), no. 3 (1990).

[6]For discussion of the issues associated with the transition from CRAMRA to the Madrid Protocol see Jorg G. Podehl and Rothwell, "New Zealand and the Convention for the Regulation of Antarctic Mineral Resource Activities (CRAMRA): An Unhappy Divorce?" *Victoria University of Wellington Law Review* 22 (1992): 23–50; Andrew Jackson and Peter Boyce, "Mining and 'World Park Antarctica', 1982–1991" in *Australia and the Antarctic Treaty System: 50 Years of Influence*, ed. Marcus Haward and Tom Griffiths (University of New South Wales Press, 2011), 243–73.

[7]There are multiple definitions of the Southern Ocean for legal, scientific and other purposes which is beyond the scope of this article to assess, however it can be observed that Southern Ocean whaling both from the perspective of conservation, management and regulation is subject to precise geographical limitations.

[8]See David Day, *Antarctica: A Biography* (Knoff, 2012), 53 who refers to the interest of American whalers in Antarctica by the 1830s.

[9]For a general overview of the regulation of whaling see Patricia Birnie, *International Regulation of Whaling: From Conservation of Whaling to Conservation of Whales and Whale-Watching* (Oceana, 1985), 2 vols.

[10]Convention for the Regulation of Whaling, League of Nations Treaty Series 155: 349.

[11]International Convention for the Regulation of Whaling, United Nations Treaty Series 161: 72.

take on much more of a conservation focus, partly as a result of the influence of NGOs upon the domestic whaling policies of a number of key state parties to the ICRW.

The impact of the conservation movement upon the ICRW reached new heights in 1982 when the International Whaling Commission (IWC), the organisation of state parties that oversees the implementation of the ICRW, agreed to a global moratorium on commercial whaling from the 1985/1986 season. The effect of this moratorium was that with two exceptions, all whaling conducted beyond the 12 nautical mile territorial sea generated from the coastline of a state was prohibited for ICRW states parties. The two exceptions were narrowly cast. The first was with respect to whaling conducted for the purposes of scientific research, which under Article VIII of the Convention could be conducted by a state party following the issue of a "special permit". This form of whaling is often referred to as "scientific" or "special permit" whaling. The second exception concerned "aboriginal subsistence whaling" and is principally conducted by indigenous peoples in the Arctic and also the Caribbean. As there are no indigenous peoples in Antarctica, there has never been any "indigenous whaling" conducted in the Southern Ocean.

Notwithstanding the moratorium on commercial whaling, in 1987 Japan commenced its "Japanese Whale Research Programme under Special Permit in the Antarctic" (JARPA) which ran for 17 years during which time Japan annually took 300–450 minke whales. Japan justified the conduct of JARPA on the basis that it was "scientific research" whaling conducted consistently with Article VIII of the ICRW. A number of other state parties to the ICRW, including Australia, contested this position, which often resulted in diplomatic exchanges within the IWC. Japan concluded JARPA at the end of the 2004/2005 season and announced that it would commence a new programme of scientific research from the 2005/2006 season which Japan referred to as JARPA II. Under JARPA II, Japan's intention was to double the annual take of whales to 850 minke whales (within a ten percent range), 50 fin whales (within a ten percent range) and 50 humpback whales (within a ten percent range). This decision by Japan to commence JARPA II was effectively the last straw for NGOs that had up till that time been monitoring Japan's "scientific whaling" in the Southern Ocean and in some cases engaged in efforts to actively disrupt the Japanese whaling fleet.[12] One of those NGOs was the International Fund for Animal Welfare (IFAW) which between 2005 and 2010 engaged in a worldwide campaign of advocacy to convince certain governments of the merits of taking Japan before an international court or tribunal so as to challenge the legality of Japan's actions under international law. In 2010, Australia took the decision to commence proceedings before the International Court of Justice (ICJ) against Japan with respect

[12]The most active NGOs that have engaged in campaigns to disrupt Japanese whaling activities in the Southern Ocean have been Greenpeace International, and the Sea Shepherd Conservation Society. Greenpeace principally undertook campaigns in the early part of the 2000s, see "Greenpeace Chases Japanese Whalers in Antarctic Sanctuary," *Environment News Service*, January 11, 2008, http://www.ens-newswire.com/ens/jan2008/2008-01-11-02.asp; Sea Shepherd to the end of the 2012/2013 season conducted 9 "Antarctic whale defence" campaigns, see Sea Shepherd Australia "Sea Shepherd launches Operation Relentless, its 10th Antarctic Whale Defence Campaign," May 9, 2013, http://www.seashepherd.org.au/news-and-media/2013/05/09/sea-shepherd-launches-operation-relentless-its-10th-anatarctic-whale-defence-campaign-1516; for analysis see Anthony L.I. Moffa, "Two Competing Models of Activism, One Goal: A Case Study of Anti-Whaling Campaigns in the Southern Ocean," *Yale Journal of International Law* 37 (2012): 201–14.

to its conduct of JARPA II, and in June/July 2013 that case reached its oral phase with Australia and Japan both appearing before the court. In 2012, New Zealand indicated that it wished to intervene in the ICJ proceedings in its capacity as a party to the ICRW and consistent with the court's procedures. As a result, New Zealand also appeared before the ICJ in 2013 in its capacity as an intervening state.

This article assesses the role of NGOs in whaling litigation in both Australia and internationally before the ICJ. Specific reference will be made to the role of IFAW in its campaign to convince governments to challenge the legality of JARPA II, and the impact of parallel but distinctive litigation conducted by Humane Society International (HSI) before Australian courts. This analysis will also allow for some reflections upon the role played by NGOs in Antarctic politics, and Antarctic affairs more generally.

The development of the Antarctic Whaling case

The development of the Antarctic Whaling case for Australia has its foundation in the 1978 decision of the Liberal/National Coalition government decision to ban all whaling in Australian waters.[13] This set in train a process in which Australia joined an international campaign alongside other conservation-minded countries to halt commercial whaling. This process focused on the IWC, and pro-conservation members seeking to adjust the Schedule of the ICRW to reflect conservation objectives.[14] Under the ICRW, the state parties to the Convention meet annually at the IWC which is the principal forum with oversight of the ICRW and which also has capacity to make adjustments and modifications to the Schedule of the Convention. Over time, the ICRW Schedule has been subject to considerable adjustment by the IWC and has gradually become more conservation orientated. This is particularly reflected in two provisions found within the ICRW Schedule. The first is paragraph 10 (e) which provided for zero catch limits for the take of all whales for commercial purposes as from the 1985/86 pelagic season and the 1986 coastal season. This effectively creates a moratorium on all commercial whaling. The second is found in paragraphs 7 (a) and (b) which create an Indian Ocean Sanctuary and a Southern Ocean Sanctuary[15] within which all commercial whaling is prohibited.

Notwithstanding the moratorium on commercial whaling, reference is made to the lethal take of whales in Article VIII of the ICRW which provides 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.

[13]The story associated with the ending of Australia's whaling industry told from an NGO perspective can be found in Chris Pash, *The Last Whale* (Fremantle Press, 2008).
[14]The Schedule is attached to the ICRW and contains technical provisions that relate to the manner in which whaling can be conducted, individual provisions regarding certain species, and provisions for closed seasons. Importantly for the present discussion, the ICRW is subject to simple modification via a three-quarter majority of ICRW member states present at an IWC Annual Meeting.
[15]Which became effective from the 1994/5 season. Whaling in the Southern Ocean is conducted during the southern summer and traditionally straddles a period between December and March.

Whaling conducted under Article VIII is commonly referred to as "special permit" or "scientific" whaling.

The introduction of the moratorium on commercial whaling proved to be controversial and was subject to objection by Japan, Norway, Peru and the then Union of Soviet Socialist Republics. Japan, however, withdrew its objection with effect from 1 May 1987 with respect to commercial pelagic whaling and in the same year announced its intention to commence JARPA in the 1987/1988 season. The conduct of special permit whaling following the introduction of the moratorium was the subject of a number of IWC Resolutions in 1986,[16] 1987[17] and during the 1990s in which the Commission continually expressed its concern about the issuing by Contracting Governments of special permits. In 2001[18] and 2003[19] the IWC called upon Japan to halt the lethal take of minke whales and revise its research programme to focus on non-lethal means of research. As JARPA was conducted in the Southern Ocean, issues were also raised within the IWC as to its consistency with the Southern Ocean Sanctuary.[20] However, as noted above, it was Japan's announcement that it intended to commence JARPA II as from 2005/2006 with its increase in sample sizes and expansion of the take to humpback and fin whales that proved to be the catalyst for serious consideration being given to litigation before international courts.

HSI and Australian litigation

While international litigation strategies were being developed to contest JARPA II, HSI used the Australian courts to pursue a claim against the company conducting "special permit" whaling in the Southern Ocean, Kyodo Senpaku Kaisha, a corporation holding a permit from the Japanese government to conduct whaling on behalf of the Institute for Cetacean Research. The HSI litigation was, however, brought under Australian law before Australian courts. Consistent with Australia's pro-conservation position at the IWC, Australian law has protected whales within Australian waters under the Whale Protection Act 1980 and the subsequent Environment Protection and Biodiversity Conservation Act 1999 (EPBC Act). A feature of both Acts has been the purported application of Australian law offshore the AAT, with the effect that any whaling activity within the Australian Fishing Zone,[21] the Australian EEZ,[22] and the Australian Whale Sanctuary offshore the AAT, is prohibited. However, unlike much law which is applied in Antarctica, the EPBC Act purports to apply not only to Australian nationals and Australian flagged vessels but to all persons and vessels.[23] As such, any whaling activity conducted in the waters of the Australian Whale Sanctuary by any person, corporation or government is subject to

[16]IWC Resolution 1986-1, "Resolution on Special Permits for Scientific Whaling."
[17]IWC Resolution 1987-1, "Resolution on Scientific Research Programmes."
[18]IWC Resolution 2001-7, "Resolution on Southern Hemisphere Minke Whales."
[19]IWC Resolution 2003-3, "Resolution on Southern Hemisphere Minke Whales and Special Permit Whaling."
[20]IWC Resolution 1996-7, "Resolution on Special Permit Catches by Japan"; IWC Resolution 1998-4, "Resolution on Whaling under Special Permit."
[21]The Australian Fishing Zone extends to 200 nautical miles offshore the Australian continent, islands and external territories; It is conterminous with the Australian EEZ: *Fisheries Management Act* 1991 (Australia), s 4.
[22]See *Whale Protection Act* 1980 (Australia), as amended by the *Maritime Legislation Amendment Act* 1994 (Australia).
[23]*Environment Protection and Biodiversity Conservation Act* 1999 (Australia), s. 229.

the provisions of the Act. This is the case irrespective of whether or not such activity is being conducted in purported reliance upon a permit issued consistently with the ICRW.[24]

Notwithstanding these provisions, Japan has conducted whaling activities offshore the AAT for over 20 years[25] as part of both JARPA and JARPA II. While the Australian Government has been fully aware of these activities, the position of successive Australian Governments has been that notwithstanding the EPBC Act considerable difficulties would be faced by any active enforcement of that law against Japanese whalers.[26] Nevertheless, in 2004 HSI contested this view and commenced proceedings in the Federal Court of Australia asserting that the activities of Kyodo were contrary to the EPBC Act.[27] Importantly for present purposes, HSI was able to commence these proceedings as it had standing before the court on the basis of section 475 (7) of the EPBC Act.[28]

Before the Federal Court from 2004 – 2008, declaratory and injunctive relief was sought concerning whaling alleged to have been carried out by Kyodo in the Australian Whale Sanctuary offshore the AAT. Following a series of legal proceedings, the Federal Court of Australia in January 2008 delivered its final judgment in the matter.[29] Satisfied that a "significant number of whales were taken inside the Australian Whale Sanctuary",[30] the court concluded that Kyodo had contravened a number of relevant provisions of the EPBC Act in relation to both minke whales and fin whales and issued orders that they be restrained from engaging in any such further acts.[31] HSI arranged for the Federal Court's judgment to be served upon Kyodo in Japan in late January 2008;[32] however, Kyodo continued with its whaling programme during that whaling season and in successive whaling seasons. Kyodo and the Japanese Governments have, therefore, ignored the decision of the Australian courts, confident in their assessment that Australia would not make any effort to enforce the Federal Court orders against the Japanese whaling fleet in the Southern Ocean due to significant question marks over whether Australia would have jurisdiction to do so.[33]

IFAW and international litigation

The role of IFAW in promoting the development of an international legal strategy that pro-conservation governments could pursue through international courts was

[24]See generally, Donald K. Anton "Antarctic whaling: Australia's Attempt to Protect Whales in the Southern Ocean," *Boston College Environmental Affairs Law Review* 36 (2009): 319.
[25]See James Shevlin, "Japanese Whaling Activity Observed," *ANARE News* 69 (1992): 18.
[26]Ian Campbell, "It's not Research – Japan's Whale Slaughter is Commercial," *The Australian* (Sydney), May 23, 2005, 15.
[27]*Humane Society International Inc v Kyodo Senpaku Kaisha Ltd* [2004] FCA 1510.
[28]*Humane Society International Inc v Kyodo Senpaku Kaisha Ltd* [2008] FCA 3 [4] per Allsop J.
[29]*Humane Society International Inc v Kyodo Senpaku Kaisha Ltd* [2008] FCA 3.
[30]Ibid at [39].
[31]Ibid at [55].
[32]Peter Alford, "Aussie Judgment Served on Whalers," *The Australian* (Sydney), January 24, 2008, 7.
[33]For more detailed assessment of this case see Ruth Davis, "Enforcing Australian law in Antarctica: The HSI Litigation," *Melbourne Journal of International Law* 8 (2007): 142; Tim Stephens and Donald R. Rothwell, "Japanese Whaling in Antarctica: *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd*," *Review of European Community and International Environmental Law* 16 (2007): 243–6.

significant. It was a strategy that had both a global reach, but increasingly began to focus on Australia and New Zealand. That Australia decided in 2010 to commence proceedings in the ICJ against Japan, and New Zealand in 2012 sought to intervene in the proceedings in its capacity as a party to the ICRW, demonstrates how successful IFAW's strategy ultimately was. Between 2006 and 2009, IFAW sponsored four international legal panels to consider various aspects of the development of legal argument and legal proceedings against Japan regarding the conduct of JARPA II. They were as follows:

- Paris Panel of May 2006 resulting in the *Report of the International Panel of Independent Legal Experts On: Special Permit ("Scientific") Whaling under International Law*;[34]
- Sydney Panel of December 2006 resulting in a report titled *Japan's Special Permit ("Scientific") Whaling under International Law*;[35]
- London Panel of November 2007 resulting in a report titled *The Taking of Sei and Humpback Whales by Japan: Legal Issues Arising under the Convention of International Trade in Endangered Species of Wild Fauna and Flora (CITES)*;[36]
- Canberra Panel of January 2009 resulting in a report titled *Japan's "Scientific" Whaling Programme and the ATS*.[37]

The work of each of the four panels will now be briefly discussed.

The Paris Panel comprised a group of eminent international legal experts[38] who were asked by IFAW to assess what conditions a state party to the ICRW entitled to carry out scientific whaling should have regard to under Article VIII of the Convention and other international instruments, whether scientific whaling being carried out by some members of the IWC was consistent with the ICRW, and the consequences that would follow if the IWC were to adopt a resolution indicating that scientific whaling conducted by a member of the IWC was lawful. The Panel concluded that the whaling conducted by some members of the IWC did not meet the requirements of paragraph 30 of the Schedule and therefore did not meet the exemption provided for in Article VIII of the ICRW and as such was unlawful.[39] It was considered that there was "strong evidence" that the scientific whaling conducted by some members of the IWC was in violation of the moratorium on commercial whaling.[40] The Panel

[34]International Fund for Animal Welfare, *Report of the International Panel of Independent Legal Experts On: Special Permit ("Scientific") Whaling under International Law*, May 12, 2006).
[35]International Fund for Animal Welfare, *Japan's Special Permit ("Scientific") Whaling under International Law*, December 22, 2006 *(on file with author)*.
[36]International Fund for Animal Welfare, *The Taking of Sei and Humpback Whales by Japan: Legal Issues Arising under the Convention of International Trade in Endangered Species of Wild Fauna and Flora (CITES)*, November 1, 2007, www.ifaw.org/australia/node/1124.
[37]International Fund for Animal Welfare, *Japan's "Scientific" Whaling Programme and the Antarctic Treaty System*, January 12, 2009 *(on file with author)*.
[38]The members of the Paris Panel were Professor Laurence Boisson De Chazournes, Professor Pierre-Marie Dupuy, Professor Donald R. Rothwell, Professor Philippe Sands (Coordinator), Ambassador Alberto Székely (Coordinator), William H. Taft IV, and Kate Cook (Rapporteur).
[39]International Fund for Animal Welfare, May, 12 2006 [2].
[40]Ibid.

also assessed the relevance of the 1982 United Nations Convention on the Law of the Sea (LOSC),[41] and identified 11 articles of that instrument where scientific whaling raised "serious questions of compliance".[42] Likewise, similar serious questions were raised with respect to compliance with the Convention on Biological Diversity,[43] CITES,[44] and 1980 Convention on the Conservation of Antarctic Marine Living Resources.[45] In light of those findings, it was considered that the conduct of scientific whaling by some members of the ICRW, including Japan, was not consistent with the ICRW. Particular reference was made to JARPA II.[46] Note was made of the failure by Japan to demonstrate to the IWC Scientific Committee that its special permit whaling had been authorised in exceptional circumstances. Finally, the Paris Panel concluded that a Resolution adopted by the IWC determining that such scientific whaling was lawful would not be capable of altering the legal obligations arising under the ICRW in relation to the prohibition of commercial whaling.[47]

The Paris Panel Report was initially distributed by IFAW to pro-conservation members of the IWC, and advocacy work was undertaken on the report during the 2006 IWC meeting in St. Kitts and Nevis. The Report was subsequently made available to the public, a copy was posted on the IFAW website and hard copies were printed for distribution. It provided a framework for the legal analysis undertaken by the later Legal Panels and laid the groundwork in identifying the key substantive legal issues that would be relied upon in seeking to contest the legality of Japan's conduct of JARPA II.

The Sydney Panel comprised a group of Australian international law experts,[48] and was asked by IFAW to consider the legality of Japanese whaling in Antarctica and the options available to Australia and New Zealand to pursue international legal action against the Government of Japan in relation to its Antarctic whaling activities under JARPA II. The Panel's report was concluded in December 2006, and delivered to the Australian and New Zealand Governments in January 2007. The Panel noted that the extension of JARPA II to humpback whales was especially significant to Australia given the annual migration of that species along the Australian coastline. The potential economic impact of the killing of humpback whales was also noted given the growth of whale-watching as a tourist and recreational activity.

In its Report, the Panel found that Australia and New Zealand had a number of international legal options open to them to challenge the ongoing conduct by Japan of JARPA II. The legal options canvassed extended from the sponsoring of meetings of scientific, legal and policy experts to review alternative options for the resolution of the dispute within the IWC, to potential international litigation before the ICJ. The Panel also found that it was possible to raise concerns about Japan's scientific

[41]United Nations Convention on the Law of the Sea, United Nations Treaty Series 1833: 397.
[42]International Fund for Animal Welfare, May 12, 2006 [2].
[43]Convention on Biological Diversity, United Nations Treaty Series 1760: 79.
[44]Convention on International Trade on Endangered Species of Wild Fauna and Flora, United Nations Treaty Series 993: 243.
[45]Convention on the Conservation of Antarctic Marine Living Resources, United Nations Treaty Series 1329: 47; see International Fund for Animal Welfare, May 12, 2006 [2].
[46]Ibid.
[47]Ibid.
[48]The members of the Sydney Panel were Dr Natalie Klein, Associate Professor Greg Rose, Professor Donald R. Rothwell (Chair), Professor Ivan Shearer, Dr Tim Stephens (Rapporteur), and Dr Christopher Ward.

whaling programme within other international forums, including the ATS. The principal conclusions of the Panel included:

(1) that Australia and New Zealand consider sponsoring meetings of legal, scientific and policy experts to discuss options to resolve the dispute with Japan and the future of whale conservation within the IWC.
(2) that Australia and New Zealand consider requesting Japan to agree to an ad hoc arbitration of the dispute on mutually agreeable terms.
(3) that Australia and New Zealand seek to raise their concerns over the conduct of JARPA II before the Antarctic Treaty parties, including at the Commission for the Conservation of Antarctic Marine Living Resources.
(4) that Japan's actions under JARPA II may be contrary to the requirement to undertake an environmental impact assessment under the provisions of the Convention on Biological Diversity.
(5) that Japan's authorisation of JARPA II may lead to breaches of CITES.
(6) that Australia and New Zealand consider commencing a legal claim before the International Tribunal for the Law of the Sea (ITLOS) seeking compulsory settlement of a dispute under the LOSC.
(7) that Australia and New Zealand also consider commencing a legal claim before the ICJ arguing that Japan's conduct of JARPA II was contrary to the ICRW.

In reaching these conclusions, the Sydney Panel noted that ultimately it was a matter for the Australian and New Zealand governments to weight up which were the most suitable for pursuing action against Japan in relation to JARPA II. However, the Panel did particularly note that Japan proposed under JARPA II to begin the take of humpback whales as from the 2007/2008 season and that with an apparent shift taking place within the IWC as to the merits of maintaining a moratorium on commercial whaling that Australia and New Zealand could face a diminishing period in which a successful international claim could be commenced and argued.

The London Panel comprised a group of eminent international lawyers[49] who were asked by IFAW to advise on a series of specific questions arising with respect to Japan's take of sei whales from the North Pacific and humpback whales from the Southern Ocean under the provisions of CITES and the remedies available to State Parties to CITES in the event that Japan's take of those whales were found to be illegal. The London Panel, which drew upon the work of the Paris Panel, concluded that the take of either sei or humpback whales would encompass international trade in the form of "introduction from the sea" under CITES, which would require the prior grant of a certificate.[50] If Japan were to issue such a certificate, given the "circumstances where the specimens were to be used for primarily commercial purposes", such actions would be invalid and Japan's actions would constitute a breach of CITES.[51] It was also found that there was evidence to suggest that the issuing of any such certificates would be "detrimental to the survival of the species", which raised separate issues as to Japan's compliance with CITES.[52] The London Panel

[49]The members of the London Panel were Kate Cook (Rapporteur), Peter H. Sand, Professor Philippe Sands, and Ambassador Alberto Székely (Coordinator).
[50]International Fund for Animal Welfare, November 1, 2007 [5].
[51]Ibid.
[52]Ibid.

report considered a range of remedies available to States Parties to CITES, including requesting an investigation by the CITES Standing Committee of an alleged breach, negotiation and arbitration options available under the CITES framework, and potential dispute resolution options available before the ICJ and under the LOSC.[53]

The Canberra Panel comprised a group of Antarctic law and policy experts,[54] convened by IFAW to provide an independent strategic assessment of the options available to Australia, New Zealand and other likeminded states to effect scrutiny of Japan's Antarctic whaling operations through the ATS. The Canberra Panel was asked to examine methodologies, timelines and mechanisms for placing the environmental risks of Japan's Antarctic whaling programme on the agenda of future Antarctic Treaty Consultative Meetings (ATCM) and other ATS forums. The work of the Canberra Panel directly built upon the Paris, Sydney and London Panel reports. The central recommendation of the Canberra Panel was that the provisions of the Madrid Protocol were relevant to associated environmental impacts arising from the conduct of JARPA II and could be invoked against Japan. Specifically, it was found that the compliance provisions found in Article 13 of the Madrid Protocol oblige Japan to justify to other parties to the ATS that JARPA II does not have adverse impacts on the Antarctic environment, and also allow other parties concerned at such impacts to raise the issue for discussion in the ATCM. Such an approach would bring about increased international attention to the substantial environmental risks connected with JARPA II, hazards that were clearly demonstrated by the explosion and fire on board the whaling factory ship the *Nisshin Maru* in an ice-exposed area of the Ross Sea in 2007. The Canberra Panel took the view that the primary objective in turning to the ATS was to make Japan more accountable for its conduct of JARPA II. This could impose additional safeguards for the Antarctic environment in relation to JARPA II in line with improvements achieved in relation to ship-borne tourism operations, which raise many similar environmental concerns.

Conduct of the Antarctic Whaling case and NGOs

Significantly for the purposes of this analysis, Australia instituted proceedings against Japan in the ICJ on 31 May 2010 with respect to a dispute concerning Japan's JARPA II programme on "scientific whaling".[55] The commencement of this claim by Australia can be seen as a result of the role that was played by IFAW in the development of litigation strategies for Australia and other like-minded countries in contesting the legality of JAPRA II before an international court or tribunal. At this point in time, the precise impact of IFAW's advocacy on these matters is not possible to identify, and will most likely only be revealed once relevant government Ministers who were involved in the decision-making processes associated with the decision to commence the proceedings against Japan write their biographies, or when Australian government archives make available relevant government documents. Nevertheless, on the basis

[53] Ibid.

[54] The members of the Canberra Panel were Dr Alan Hemmings, Professor Stuart Kaye, Joanna Mossop, Professor Donald R. Rothwell (Chair), Dr Tim Stephens (Rapporteur), and Professor Gillian Triggs.

[55] *Dispute Concerning Japan's JARPA II Programme on "Scientific Whaling"* (Australia v. Japan) Application Instituting Proceedings, May 31, 2010; details on all the documents filed with the ICJ by Australia and Japan, and the proceedings to date can be found at www.icj-cij.org/docket/.

of the narrative above, the connection between the international legal options considered in the Paris and Sydney Panel reports, and the fact that three members of the Paris Panel were also members of the legal team that represented Australia in the ICJ against Japan,[56] it can be assumed that IFAW's work in developing and promoting the legal case against Japan not only influenced the Australian government to commence proceedings against Japan but also found its way into the actual legal argument that Australia developed and presented to the ICJ during the oral phase of the case in 2013. The discussion below will briefly discuss the actual legal proceedings that Australia brought against Japan in the ICJ, and the conduct of the case. It will then turn to assess and reflect upon the role of IFAW in the decision to commence the claim against Japan and the conduct of the legal proceedings.

Australia's 2010 application commencing proceedings against Japan primarily related to a dispute based upon the interpretation of the ICRW and addresses many of the points that have been noted above. In the Australian Application, it was noted that both Australia and Japan had accepted the jurisdiction of the Court by virtue of declarations of acceptance lodged under Article 36 (2) of the Statute of the ICJ [57] made, respectively, by Australia on 22 March 2002 and Japan on 9 July 2007. The Australian Application related the history of the IWC endorsed moratorium on commercial whaling and endorsement of the Southern Ocean Sanctuary. Japan's conduct of JARPA and JARPA II is noted and there is reference to the status of minke, fin and humpback whale stocks. Australia also makes reference to the refusal of Japan to accept IWC recommendations urging it to halt or vary the JARPA or JARPA II programmes. The Australian Application makes reference to the ongoing negotiations within the IWC for the so-called "reform" of the Commission and to the negotiations conducted by the "Small Working Group" between 2008 and 2010. As part of that process on 22 April 2010, the IWC Chair and Vice-Chair had produced a "Consensus Decision to Improve the Conservation of Whales"[58] which was the subject of intense discussions at IWC62 in Agadir, Morocco in June 2010. However, on 23 June 2010, it was announced that further discussions on this IWC agenda item would be suspended. The Australian Application, while lodged before the commencement of IWC62, nevertheless observed that "[i]t has become clear that current and proposed IWC processes cannot resolve the key legal issue that is the subject of the dispute between Australia and Japan, namely the large-scale "special permit" whaling under JARPA II".[59] The Australian Application concludes by asserting that Japan has breached and is continuing to breach the obligation under paragraph 10(e) of the ICRW Schedule to observe the zero catch limit in relation to the killing of whales for commercial purposes, and its obligation under paragraph 7(b) to act in good faith and refrain from undertaking commercial whaling of humpback and fin whales in the Southern Ocean Sanctuary.[60] The remedies Australia sought included that Japan cease implementation of JARPA II, that it revoke any authorisations, permits or licenses, and provide assurances that it will guarantee that any further action

[56]Those members of the Paris Panel who were also members of the Australian legal team were Professor Laurence Boisson De Chazournes, Kate Cook, and Professor Philippe Sands.
[57]Statute of the International Court of Justice, Australian Treaty Series (1945): 1.
[58]IWC 62/7 Agenda Item 3 (2010).
[59]*Dispute Concerning Japan's JARPA II Programme on "Scientific Whaling"* (Australia v. Japan) Application Instituting Proceedings, May 31, 2010 [29].
[60]*Dispute Concerning Japan's JARPA II Programme on "Scientific Whaling"* (Australia v. Japan) Application Instituting Proceedings, May 31, 2010 [36].

under JARPA II or similar programmes be brought into conformity with international law.[61]

An analysis of the role of NGOs in the processes leading up to Australia commencing legal proceedings against Japan in the ICJ needs to be set against the political backdrop of the relative positions on the then Howard Coalition (Liberal/National) government, and the Labor Opposition. Successive Howard Coalition Environment Ministers had been proactive in national and international debates critical of Japan's conduct of its JARPA programme and been vocal at the IWC in opposing the conduct of "scientific whaling".[62] However, Japan's 2005 announcement that it planned to commence JARPA II on an exploratory basis from the 2005/2006 season significantly changed the discourse with respect to Japan's Southern Ocean whaling programmes. This presented an opportunity for NGOs to develop new campaign approaches, and also for political parties to respond to that development. In this regard, the Howard Government did not significantly alter its position with respect to Japan's conduct of JARPA II, with the then Minister for the Environment, Senator Ian Campbell, indicating in 2005 that the government would not pursue international legal options to challenge the conduct of JARPA II.[63] The Labor Opposition, by that time lead by Kevin Rudd, was more open to considering legal options and in November 2005 indicated that "Australia must take Japan to the ITLOS to end the barbaric slaughter of whales once and for all".[64] Direct reference was made by the then Opposition spokesperson on the Environment to legal advice that this author had provided to IFAW in 2005 which outlined a number of legal options open to the Australian Government to challenge the legality of JARPA II.[65]

With the Howard Government refusing to commit to a JARPA II legal challenge during 2005–2007, further opportunities were presented to the Labor Opposition to directly rely upon the work of the IFAW Legal Panels as Labor began to settle upon a clear policy position in advance of the 2007 Federal election in Australia. Here, the work of the Sydney Panel would appear to have been influential. The Sydney Panel concluded its report in December 2006, and IFAW briefings were quickly given to both the Australian and New Zealand governments while the report remained confidential. The Sydney Panel report was then given a wider distribution, including to the then Labor Opposition Environment spokesperson, Peter Garrett, who on 7 May 2007 directly endorsed the advice from the Sydney Panel. Labor indicated that the report made "a forceful case for taking Japan to international courts to stop its illegal whaling".[66] The Sydney Panel's report received further

[61] *Dispute Concerning Japan's JARPA II Programme on "Scientific Whaling"* (Australia v. Japan) Application Instituting Proceedings, May 31, 2010 [41].
[62] See Ian Campbell "Whaling-Commercial Whaling," *Australian Year Book of International Law* 26 (2007): 395; Senator Campbell was Minister for the Environment from 2004 to 2007.
[63] AAP "Legal action won't stop whaling, says Campbell," *The Sydney Morning Herald*, November 8, 2005, www.smh.com.au/news/world/legal-action-wont-stop-whaling-says-campbell/2005/11/08/1131212030846.html.
[64] Anthony Albanese MP, "Howard Government can stop the whale slaughter, but refuses to act," November 8, 2005, www.anthonyalbanese.com.au/file.php?file=/news/870/index.html.
[65] Ibid.
[66] Peter Garrett MP, "Forceful Case to end Whale Slaughter," *Media Statement*, May 7, 2007 (on file with the author).

endorsement from the Australian Greens who issued a statement calling upon the Howard Government to pursue Japan through the "international courts".[67] These developments, especially throughout 2007, show how momentum was building in support of the IFAW Legal Panel reports and especially how the Opposition parties in Australia were able to use their endorsement of the work of the Sydney Panel in particular as a point of distinction from the then official government position that international litigation on this matter was not viable. There was also, in 2007, a brief period when the legal strategies being advanced by IFAW and the Australian domestic litigation strategies being advanced by HSI were joined when the Labor Opposition committed that they "would not stand in the way" of the HSI Federal Court litigation requesting orders against Kyodo for its whaling operations in the Australian Whale Sanctuary offshore the Australian Antarctic Territory.[68]

Throughout the period 2005–2007, IFAW was, therefore, able to build a sustained campaign in response to Japan's announcement that JARPA II would commence as a full–scale scientific research programme as from the 2007/2008 season. IFAW was able to highlight the distinctions between JARPA and JARPA II not only with respect to the anticipated take of whales but also Japan's announced intention to expand the take from minke whales to include fin and humpback whales. Given the annual migration of humpback whales along the eastern Australian coastline in particular, and the growth of the whale watching industry, Japan's intention to take humpback whales under JARPA II provided more of a direct link for the Australian public between Japan's whaling programme in the Southern Ocean and whales that are observed during the annual migration along the Australian coast. IFAW was able to skilfully use the media during this period to promote the work of the Legal Panels, especially the Sydney Panel,[69] to highlight the potential for an alternate approach towards the whaling issue other than the continuation of debates within the IWC. That IFAW's campaign was taking place in a volatile pre-election environment gave added oxygen to the campaign in the media, which was further enhanced by the position taken by the Howard Government of opposing international legal action against Japan in favour of a continuation of diplomacy.[70] The strong endorsement by Labor of the IFAW Legal Panel's work meant that following the November 2007 Federal election, there was a strong expectation that the new Rudd Labor government would honour its pre-election commitments and immediately commence legal action against Japan. Ultimately, a more conservative position was taken as reflected in the joint statement by the Minister for Foreign Affairs, Stephen Smith, and Peter Garrett as Minister for the Environment on 19 December 2007,[71] though the Rudd Labor government made clear that it was actively considering its legal options.

[67]Australian Green Party, "International Experts: Japanese Whaling Unlawful," June 1, 2006 (on file with the author).
[68]Australian Labor Party, "Government Must Stand Up And Stop Japanese Whaling," *Media Statement*, September 18, 2007, www.alp.org.au/media/0907/msenh180.php.
[69]International Fund for Animal Welfare, "Australian Govt can stop Japan Whaling," *News Release*, May 7, 2007 (on file with author); ABC Online, "Govt Urged to Take Japan to Court over Whale Hunt," May 7, 2007, www.abc.net.au/news/newsitems/200705/s1915705.htm.
[70]See Andrew Darby, "Court Fight Urged to Save Whales," *The (Melbourne) Age*, May 8, 2007, 7.
[71]Stephen Smith and Peter Garrett, "Australia acts to Stop Whaling," *Joint Media Release*, December 19, 2007, www.foreignminister.gov.au/releases/2007/fa-s002_07.html.

While the above analysis has focused upon Australia, it should not be forgotten that the IFAW campaign also included New Zealand and the work of the Sydney Panel in particular identified individual and joint legal options for both Australia and New Zealand.[72] While IFAW's campaign on this issue in New Zealand did not match the scale of the Australian campaign, nor was there the same political engagement during an election period, New Zealand was clearly supportive of Australia's approach in its exploration of international legal strategies and ultimately elected to intervene in the ICJ proceedings in 2012 in support of the Australian interpretation of the ICRW that Japan's conduct of JARPA II was not consistent with the Convention. Though it is not possible at this point in time to identify with any precision the influence or otherwise of IFAW's campaign upon the New Zealand government, it can at the very least be assumed that the work of the IFAW legal panels would have been studied and assessed by the New Zealand Government and were factored in to the eventual decision to intervene in support of Australia in the ICJ.

Concluding remarks

The commencement of international litigation by any government is not a step that is taken lightly. In addition to the legal issues, there will be significant geopolitical, including bilateral relations, to be considered in addition to domestic political issues. Any government would be careful to not be seen to have been influenced into making such a decision by external forces such as NGOs. In particular, a government would not wish to be seen to be completely adopting independent legal advice commissioned by an NGO advocating the merits of international litigation. This is especially the case when that advice deals with litigation involving a major trading partner. The caution then of the Rudd Labor government in how it ultimately responded to the advice of the IFAW Legal Panels is understandable. The Rudd Government considered that advice sought its own independent legal advice from within government, and explored a range of other diplomatic and practical responses to Japan's conduct of JARPA II in the period between December 2007 and May 2010 before the decision was eventually made to commence international legal action in the ICJ. As an NGO, IFAW was unable to commence any such claim itself before an international court. It, therefore, required a government, which has the standing to commence international litigation before an international court or tribunal, to take on that role. Australia had a strong track record of consistently opposing Japan's conduct of JARPA, and it also had a record as a country that was prepared to engage in international environmental litigation. In that respect, it needs to be recalled that Australia had instituted proceedings in the ICJ against France in the 1973 *Nuclear Test* case,[73] which notably was another case dealing with a significant environmental issue impacting upon Australia's region. Australia also relevantly had a track record of having worked pro-actively with New Zealand in matters of shared

[72]"Call for NZ Legal Action to Save Whales," stuff.co.nz, May 8, 2007, www.stuff.co.nz/print/4051324a7693.html.
[73]*Nuclear Tests Case*, (Australia v France) December 20, 1974, ICJ Reports, 253.

environmental interest, including as recently as the 1999 *Southern Bluefin Tuna* case before the ITLOS.[74] The separate but ultimately parallel efforts by HSI in the Australian courts to challenge the legitimacy of Japan's whaling in the Australian Whale Sanctuary also assisted in creating an appreciation that in addition to diplomacy, and direct action in the form of confrontation of the Japanese whaling fleet which NGOs such as the Sea Shepherd Conservation Society have vigorously pursued in recent years,[75] litigation was also an option and that both NGOs and governments could legitimately explore legal options in order to halt JARPA II. While at the time of writing the outcome of Australia's application against Japan in the ICJ is unresolved, this study highlights the role that NGOs can play in international litigation and ultimately adds to the rich history of a range of NGO engagement in Antarctic environmental affairs.

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[74] *Southern Bluefin Tuna*, (New Zealand v. Japan; Australia v. Japan) (Provisional Measures), *International Law Reports* 117 (1999): 148; for the parallels between the litigation between Australia and Japan over whales and tuna see Natalie Klein, "Whales and Tuna: The Past and Future of Litigation between Australia and Japan," *Georgetown International Environmental Law Review* 21 (2009): 143–217.

[75] See Donald K. Anton, "Protecting Whales by Hue and Cry: Is There a Role for Non-state Actors in the Enforcement of International Law?" *Journal of International Wildlife Law & Policy* 14 (2011): 137–45.

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