AUSTRALIA'S ENGAGEMENT WITH THE INTERNATIONAL COURT OF JUSTICE: PRACTICAL AND POLITICAL FACTORS

BILL CAMPBELL*

While much has been written on the legal issues raised in cases involving Australia at the International Court of Justice ('ICJ'), the politics behind decisions to appear before the Court, the organisation of Australia's arguments and its style of case management have attracted much less attention. This article, written by a former government international lawyer who appeared as agent and counsel for Australia before the ICJ, describes both the political decisions behind, and the practical organisation of, Australia's encounters with the ICJ, focusing on the Whaling in the Antarctic case. It explains the way that cases develop and the way that the executive branch of government engages with them, all in the context of Australia's approach to international dispute settlement more generally. It concludes that Australia's approach to international dispute settlement is highly effective, including in its conduct of cases before the ICJ.

CONTENTS

I Introduction 2
II The Decision to Take or Otherwise Participate in a Case 2
  A Australia as Applicant 3
  B Australia as Respondent 6
  C Participation in Advisory Opinion Proceedings 8
III The Choice of Counsel and Other Members of the Australian Delegation 9
  A Agent and Counsel 10
  B Witnesses and Experts 11
IV The Choice of Judge Ad Hoc 12
V Responsibility for Case Strategy and the Formulation of Both Written and Oral Arguments 13
VI Interaction with the Court, the Registrar, Other States Involved in the Proceedings and NGOs 16
  A Interaction with the Court 16
  B Interaction with the Registrar and Court Registry 17
  C Interaction with Other States 17
  D Engagement with NGOs 18
VII Political Input during the Course of the Case 19
VIII Political and Legal Responses to ICJ Decisions 21
IX Conclusion 23

* Honorary Professor, Australian National University College of Law. Formerly General Counsel (International Law) and head of the Office of International Law in the federal Attorney-General's Department. Agent and/or counsel for Australia in a number of cases before the International Court of Justice and other international tribunals.

I INTRODUCTION

The global influence and importance of the International Court of Justice ('ICJ') go well beyond its formal status as the 'principal judicial organ of the United Nations'[1] and its primary function of 'decid[ing] in accordance with international law such disputes as are submitted to it'.[2] It is the 'only court with a general jurisdiction at the global level', and, as such, it can deal with all types of interstate disputes, subject to questions of jurisdiction.[3] Also, by reason of that status, its pronouncements carry particular weight in the interpretation and development of international law.[4]

Australian encounters with this important global institution, and dispute settlement more generally, have been characterised by Henry Burmester, Natalie Klein and Kate Miles as reflecting a 'high level of international engagement, its belief in the rule of law in seeking to protect and defend its interests, and its willingness to use the full range of processes available in its national interests'.[5] In this respect, they note that Australia 'has also been willing to use international litigation to try and resolve intractable disputes, particularly in the resource/ environmental area'.[6] Nevertheless, '[i]n appropriate cases, it will seek to avoid exposure to international litigation or, if that is not possible, it will strongly defend its interests'.[7]

A complex mixture of political, organisational and practical factors drives Australia's decision-making in this area, particularly in relation to the initiation, avoidance or defence of ICJ proceedings, as well as in relation to the actual conduct of those proceedings. These factors are covered below.

A matter of particular focus will be the degree of political involvement in Australia's engagement with the ICJ. Much of that involvement is not in the public eye, but it is all encompassing — stretching as it does from Australia's acceptance of ICJ jurisdiction under the *Statute of the International Court of Justice* ('*ICJ Statute*') and other treaties to its reaction to decisions of the ICJ involving Australia, and most stages in between.

II THE DECISION TO TAKE OR OTHERWISE PARTICIPATE IN A CASE

As a formal matter, all decisions concerning Australia's involvement in the ICJ and other international litigation are taken at the political level. The actual level within the Australian government at which that decision is made varies depending on the nature of the proceedings, including whether Australia is the applicant or the respondent in contentious proceedings or whether it is considering participation in advisory proceedings.

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1 *Charter of the United Nations* art 92.

2 *Statute of the International Court of Justice* art 38.

3 Yoshifumi Tanaka, *The Peaceful Settlement of International Disputes* (Cambridge University Press, 2018) 130.

4 James Crawford, *Chance, Order, Change: The Course of International Law* (AIL-Pocket, 2014) 216 [368].

5 Henry Burmester, Natalie Klein and Kate Miles, 'Australia and International Dispute Settlement' in Donald R Rothwell and Emily Crawford (eds), *International Law in Australia* (Lawbook Co, 3rd ed, 2017) 561, 586.

6 Ibid 587.

7 Ibid.

Government decisions concerning international litigation invariably are underpinned by advice from the public service, principally the Attorney-General's Department ('AGD'), the Department of Foreign Affairs and Trade ('DFAT') as well as the departments or agencies that have responsibility for the subject matter of the dispute.[8] Indeed, that advice may well be the first occasion that the possibility of recourse to an international court or tribunal is raised. Falling into this category is the advice to the then governments of Australia and New Zealand that led to the commencement of the *Southern Bluefin Tuna* cases before a *United Nations Convention on the Law of the Sea* Annex VII Tribunal in 1999[9] and the seeking of provisional measures from the International Tribunal for the Law of the Sea ('ITLOS').[10]

A *Australia as Applicant*

The possibility of commencing proceedings against another state in the ICJ will typically be the subject of consideration by the federal Cabinet, though the final decision may well be delegated to an individual Minister, or Ministers, in consultation with the Prime Minister. The most recent proceedings commenced by Australia in the ICJ, *Whaling in the Antarctic* ('*Whaling*'),[11] provide a good case study of the involvement of members of the Australian government in the commencement and running of an ICJ case and the factors at the political level affecting the conduct of a case.[12] This is not least because of the several changes of government that occurred during the course of that case, including at key moments. The action was commenced on 31 May 2010 during the time of the first Rudd Labor Government and continued during the Gillard Labor Government (24 June 2010 – 26 June 2014) and second Rudd Labor Government (27 June – 18 September 2013),[13] before a decision was delivered on 31 March 2014 in the period of the Abbott Coalition (Liberal–National) Government.

Public pressure was undoubtedly the catalyst for consideration by successive federal governments of the option of commencing legal proceedings against Japan over its whaling activities in the Southern Ocean. That option was front and centre in the representations received from environmental non-governmental organisations ('NGOs'), the academic community and the public at large.[14] During its tenure, the Howard Government sought a number of legal opinions concerning the prospects of success in international proceedings against Japan

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8 For example, the Department of Sustainability, Environment, Water, Population and Communities in the *Whaling* case.

9 *Southern Bluefin Tuna (New Zealand v Japan, Australia v Japan) (Award)* (2000) 23 RIAA 1.

10 *Southern Bluefin Tuna (New Zealand v Japan, Australia v Japan) (Provisional Measures)*, (1999) ITLOS Rep 280 ('*Southern Bluefin Tuna (Provisional Measures)*').

11 *Whaling in the Antarctic (Australia v Japan; New Zealand intervening) (Judgment)* [2014] ICJ Rep 226 ('*Whaling*').

12 The observations below stem from my involvement as agent and counsel for Australia before the international courts and tribunals, including before the ICJ.

13 The toppling of Prime Minister Gillard occurred during the course of the oral hearings in the *Whaling* case in June 2013: see 'Julia Gillard: After Office', *National Archives of Australia* (Web Page) <https://www.naa.gov.au/explore-collection/australias-prime-ministers/julia-gillard/after-office>, archived at <https://perma.cc/8FKN-VX9Z>.

14 This aspect is covered in more detail in Henry Burmester, 'Civil Society and the Instigation of International Court Litigation: The Australian Experience' (2021) 21(3) *Melbourne Journal of International Law* 772, 780–3.

over its whaling activities. It would be fair to say that the tenor of the advice it received was that those prospects were marginal.

The likelihood of commencing a case increased with the adoption of the Labor Party platform prior to the 2007 federal elections that included the following commitments:

> Labor will pursue a permanent end to all commercial and scientific whaling and the establishment of a global whale sanctuary. Labor will pursue legal action against whaling nations before international courts and tribunals to end the slaughter of whales for all time.[15]

One of the first meetings that now Justice Robert McClelland held with officials in Parliament House after being appointed Attorney-General in the first Rudd Government in late 2007 concerned the possibility of commencing a whaling case against Japan. The catalyst for that meeting was not only the Labor election commitment but also the recent departure of the Japanese fleet for the Southern Ocean. That departure gave rise to a good deal of public pressure to commence a case — as there was at that time every year — with an accompanying call for provisional measures to bring whaling to an immediate halt pending a final decision on the merits by the relevant court or tribunal.[16]

Mr McClelland requested an advice from then Whewell Professor of International Law at the University of Cambridge, James Crawford SC (later Judge Crawford of the ICJ), on the potential causes of action and prospects. Professor Crawford gave that advice in early January 2008, and it was followed by a meeting between him and the Attorney-General. The essence of Crawford's advice was that the prospects were reasonable, though it was likely that in the event of a decision adverse to Japan, Japan would seek to adjust its program in line with the decision of the Court.[17] In the intervening period prior to the commencement of the case on 31 May 2010, Professor Crawford, then Solicitor-General Stephen Gageler SC (now Justice Gageler of the High Court) and the Office of International Law within the AGD gave a number of additional legal opinions to the Government on the matter.

In that same period, the Rudd Government considered the issue of Japanese whaling on several occasions, including at Cabinet level. That consideration covered the legal aspects of commencing a case, the diplomatic consequences of doing so, as well as the interplay between the possible commencement of legal proceedings and efforts within the International Whaling Commission ('IWC') to achieve its own compromise on so-called Japanese scientific whaling. These factors, in part, explain the delay in the commencement of proceedings. It would be fair to say that the final decision to commence a case largely was one made by Prime Minister Rudd himself with a view to giving effect to the

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15 Australian Labor Party, *National Platform and Constitution* (2007) 242 [112].

16 The International Fund for Animal Welfare ('IFAW') was one of the NGOs making such a call on a regular basis: see, eg, 'Japan's Whaling Program "Breaks International Law"', *ABC News* (online, 8 November 2005) <https://www.abc.net.au/news/2005–11–08/japans-whaling-program-breaks-international-law/2140764>, archived at <https://perma.cc/MQE8-K3H9>.

17 A somewhat prescient advice given that that is exactly what happened after the Court rendered its decision adverse to Japan on 31 March 2014: see below 22.

commitment made prior to the 2007 election.[18] As noted above,[19] Australia commenced its case in the ICJ on 31 May 2010.

On two other occasions over the past two decades, federal governments have considered whether to institute proceedings in the ICJ. Both concerned the imposition of the death penalty on Australian citizens for drug trafficking. The first matter involved the proposed execution by Singapore of convicted Australian drug trafficker Van Tuong Nguyen in 2005.[20] The then Minister for Foreign Affairs, Alexander Downer, was provided with a copy of a legal opinion prepared by Dr Chris Ward of the New South Wales Bar. The essence of the opinion was that Singapore, by carrying out the execution, would place itself in breach of the *Single Convention on Narcotic Drugs*,[21] with that treaty also providing a basis of jurisdiction for Australia to take an action against Singapore in the ICJ.[22] The Government's own international lawyers disagreed with that opinion, and after discussions between Dr Ward and Professor Donald Rothwell and those lawyers, Minister Downer sought an opinion from Professor Crawford. Professor Crawford advised that there was no basis to take the case to the ICJ and hence the Government did not proceed with the matter.[23]

The second occasion was the execution by Indonesia of two of the Bali Nine convicted drug traffickers, Andrew Chan and Myuran Sukumaran, in April 2015. Prior to those executions, Professor Rothwell of the Australian National University and Dr Ward prepared a legal opinion the essence of which was that the executions would be contrary to Indonesia's obligations under the *International Covenant on Civil and Political Rights* ('*ICCPR*').[24] Under that treaty, the death sentence could only be imposed for 'the most serious crimes',[25] and, in their view, drug trafficking did not constitute such a crime. They argued also that the treatment of Chan and Sukumaran in the lead-up to the proposed executions was 'cruel, inhuman and degrading treatment', contrary to art 7 of the

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18 See *National Platform and Constitution* (n 15) 242 [112].

19 See above n 13 and accompanying text.

20 See, eg, 'Govt Rules Out Nguyen Legal Challenge', *The Sydney Morning Herald* (online, 25 November 2005) <https://www.smh.com.au/national/govt-rules-out-nguyen-legal-challenge-20051125-gdmil6.html>, archived at <https://perma.cc/9BZ3-S8ZB>.

21 *Single Convention on Narcotic Drugs*, opened for signature 30 March 1961, 520 UNTS 151 (entered into force 13 December 1964).

22 'Govt Tries to Mount Case before ICJ on Behalf of Van Nguyen', *AM* (ABC Radio, 25 November 2005) <https://www.abc.net.au/radio/programs/am/govt-tries-to-mount-case-before-icj-on-behalf-of/748744>, archived at <https://perma.cc/824M-2T82>.

23 Evidence to Senate Standing Committee on Foreign Affairs, Defence and Trade, Parliament of Australia, Canberra, 16 February 2006, 133 (Rod Smith). Mr Smith of DFAT responding to Senator Hogg noted:

> The advice that we received at the time from senior government lawyers — advice that was confirmed by Professor James Crawford … was that there was no basis to take the case to the International Court of Justice. The point was that Singapore has not recognised the compulsory jurisdiction of the ICJ, except under a very limited number of treaties. None of those treaties were relevant in this case and neither was there a generally accepted rule of customary international law prohibiting capital punishment.

24 *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) ('*ICCPR*'); 'Law Experts Say Indonesian Death Penalty Is Illegal', *Australian National University* (News Post, 27 April 2015) <https://www.anu.edu.au/news/all-news/law-experts-say-indonesian-death-penalty-is-illegal>, archived at <https://perma.cc/FES5-4D2W>.

25 *ICCPR* (n 24) art 6(2).

ICCPR.[26] Leaving aside whether that view was shared by the Government's own international lawyers, the matter could only proceed to the ICJ if Indonesia consented to the jurisdiction of the Court. The then Australian Ambassador to Indonesia, Paul Grigson, sought Indonesia's agreement to submit the matter to the ICJ but did not receive a response from Indonesia prior to the executions taking place.[27]

B *Australia as Respondent*

When Australia is the respondent in ICJ proceedings, it is the actions of Australia, perhaps taken in conjunction with those of other states, which trigger the institution of proceedings by the applicant state — a relatively recent example being the *Seizure and Detention of Certain Documents and Data* case ('*Documents*')[28] commenced by Timor-Leste against Australia. The catalyst for that case was the action of Australian law enforcement officials in raiding the offices of a lawyer then advising Timor-Leste, Bernard Collaery, and the seizure of documents in the course of that raid.[29]

In most cases in which Australia is respondent, the federal government will have received prior legal advice on the possibility of a legal action being taken against it in an international court or tribunal and on Australia's prospects in such a case. Such advice would be sought either prior to embarking on the course of action that might give rise to the case, after a demand is received from the potential applicant state (usually through diplomatic channels) or in the course of negotiations with that state. One notable exception to that normal practice is that no advice was sought or given on the potential for international litigation prior to the search for, and seizure of, documents by Australian law enforcement officials that led to the commencement of the *Documents* case by Timor-Leste.

One example of following that normal practice is the advice that was sought and given after Australia received formal diplomatic protests from both Singapore and the United States concerning Australia's introduction in 2006 of a system of compulsory pilotage in the Torres Strait. Singapore and the US claimed that imposition of such a system would place Australia in breach of its obligations concerning the right of transit passage through international straits under the 1982 *United Nations Convention on the Law of the Sea* ('*1982 Convention*').[30]

After receiving legal advice from its own international lawyers on the substance of the matter as well as on the jurisdiction of various international courts and tribunals, the Government sought advice from Professor Crawford and Professor

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26 Michael Bachelard, 'Chan and Sukumaran Execution "Illegal", but Indonesia Ignores Australia Again', *The Sydney Morning Herald* (online, 2 May 2015) <https://www.smh.com.au/politics/federal/chan-and-sukumaran-execution-illegal-but-indonesia-ignores-australia-again-20150501-1my3z4.html>, archived at <https://perma.cc/9GGJ-KY98>.

27 Ibid.

28 *Seizure and Detention of Certain Documents and Data (Timor-Leste v Australia) (Provisional Measures)* [2014] ICJ Rep 147 ('*Documents (Provisional Measures)*').

29 Tom Allard, 'ASIO Raids Office of Lawyer Bernard Collaery over East Timor Spy Claim', *The Sydney Morning Herald* (online, 3 December 2013) <https://www.smh.com.au/politics/federal/asio-raids-office-of-lawyer-bernard-collaery-over-east-timor-spy-claim-20131203-2yoxq.html>, archived at <https://perma.cc/4D6X-QCH7>.

30 *United Nations Convention on the Law of the Sea*, signed 10 December 1982, 1833 UNTS 3 (entered into force 16 November 1994) pt III s 2.

Alan Boyle of the University of Edinburgh. While Australia vigorously defended its legal position, it did replace the possible arrest of a noncompliant vessel during transit passage with a system based on port-state control — that is, a vessel could be arrested if it subsequently entered an Australian port having failed to take on a pilot in the Torres Strait at any time prior to that port entry.[31] This seems to have satisfied the legal concerns of both Singapore and the US and avoided the prospect of international litigation by Singapore. The US is not a party to the *1982 Convention* and therefore was in no position to commence litigation against Australia over the matter.

Earlier political input affecting Australia's participation in international litigation occurs when determining the content of Australia's declaration of acceptance of ICJ jurisdiction under art 36(2) of the *ICJ Statute* (the 'optional clause'). It also occurs when deciding to become a party to a treaty containing a compromissory clause referring disputes to the ICJ and other dispute settlement bodies. For example, by reason of being a party to the *1982 Convention*, Australia has accepted the jurisdiction of multiple dispute settlement bodies under part XV of the Convention, including the ICJ, ITLOS and different forms of arbitration and conciliation.[32]

After Australia amended its optional clause declaration under the Whitlam Government in 1975,[33] Australia's acceptance of ICJ jurisdiction under that clause remained largely unqualified until 2002. While it was a political decision to amend Australia's optional clause declaration in 2002[34] by adding a number of qualifications,[35] one of which was to exclude maritime boundary delimitation from

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31 Royal Australian Navy, 'Compulsory Pilotage in the Torres Strait' [2007] (7) *Semaphore: Newsletter of the Sea Power Centre*.

32 Australia utilised dispute settlement under part XV of the *1982 Convention* in the *Southern Bluefin Tuna* case (an Annex VII arbitration) and also participated in an Annex V conciliation under pt XV commenced by Timor-Leste: *Timor Sea Conciliation (Timor-Leste v Australia) (Report)* (Permanent Court of Arbitration, Case No 2016-10, 9 May 2018).

33 Australia's 13 March 1975 declaration contained one standard exception to Australia's acceptance of ICJ jurisdiction. It concerned 'any dispute in regard to which the parties thereto have agreed or shall agree to have recourse to some other method of peaceful settlement': *Declaration by Australia Recognizing as Compulsory the Jurisdiction of the International Court of Justice, in Conformity with Article 36, Paragraph 2, of the Statute of the International Court of Justice*, 961 UNTS 183 (registered 17 March 1975). Australia's earlier 1954 declaration excluded disputes concerning the continental shelf, disputes occurring in a time of hostilities, matters within domestic jurisdiction and disputes with governments of any other member of the 'British Commonwealth of Nations': *Declaration by Australia Recognizing as Compulsory the Jurisdiction of the International Court of Justice, in Conformity with Article 36, Paragraph 2, of the Statute of the International Court of Justice*, 186 UNTS 77 (registered 6 February 1954). A full account of Australia's acceptance of ICJ jurisdiction under the optional clause prior to 2002 is contained in Henry Burmester, 'Australia and the International Court of Justice' (1996) 17 *Australian Year Book of International Law* 19, 30–1.

34 *Declaration Recognizing as Compulsory the Jurisdiction of the International Court of Justice, under Article 36, Paragraph 2, of the Statute of the International Court of Justice*, 2175 UNTS 493 (registered 21 March 2002).

35 The additional exceptions were expressed in the following terms:

> (b) any dispute concerning or relating to the delimitation of maritime zones, including the territorial sea, the exclusive economic zone and the continental shelf, or arising out of, concerning, or relating to the exploitation of any disputed area of or adjacent to any such maritime zone pending its delimitation;

the Court's jurisdiction over Australia, that decision was consistent with advice it had received from its officials.[36] That qualification was sourced in the view that maritime boundaries are best settled by negotiation rather than by resorting to third-party dispute settlement.[37]

Occasionally, suggestions are made within government that Australia either should withdraw completely its acceptance of ICJ jurisdiction under the optional clause or further qualify that acceptance — for example, in relation to matters concerning national security — but as yet, no government has seen fit to do so. In this respect, it is notable that the Senate Foreign Affairs, Defence and Trade References Committee of the Australian Parliament in its report on *Australia's Declarations Made under Certain International Laws* of February 2020 recommended against revoking Australia's 2002 declaration under the optional clause.[38]

C *Participation in Advisory Opinion Proceedings*

In recent years, Australia's participation in advisory opinion proceedings in both the ICJ and ITLOS has been the subject of ministerial approval as opposed to consideration by the full Cabinet. Such approval would normally involve the Minister of Foreign Affairs, the Attorney-General and other Ministers whose portfolio interests may be touched by the proceedings, as well as notification to the Prime Minister. This level of consideration reflects the fact that advisory proceedings generally do not engage Australia's interests as directly as contentious proceedings.

That is not to say that Australia's participation in advisory proceedings is without purpose. First, Australia's interests can be indirectly engaged by the subject matter of the proceedings, and while the resulting advisory opinion is not legally binding, it is not without legal effect. For example, many findings made by the ICJ in the *Legality of the Threat or Use of Nuclear Weapons* advisory opinion[39] had the capacity to affect Australia's future approach to the use of force and the principles to be applied in determining whether particular weapons and their use

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(c) any dispute in respect of which any other party to the dispute has accepted the compulsory jurisdiction of the Court only in relation to or for the purpose of the dispute; or where the acceptance of the Court's compulsory jurisdiction on behalf of any other party to the dispute was deposited less than 12 months prior to the filing of the application bringing the dispute before the Court.

Ibid.

36 At the time that the declaration was made in 2002, Australia was in the course of negotiating its maritime boundaries with New Zealand and Timor-Leste. Both of those countries expressed their displeasure at Australia foreclosing the possibility of subjecting the relevant maritime boundaries to some form of international judicial settlement. In relation to the position of Timor-Leste, see later comments by Peter Galbraith, who was the Director for Political, Constitutional and Electoral Affairs for the United Nations Transitional Administration in East Timor and a Minister in the first Transitional Government of East Timor: Mark Davis, 'The Timor Gap', *SBS News* (online, 23 August 2013) <https://www.sbs.com.au/news/the-timor-gap>, archived at <https://perma.cc/M2RW-GQSB>.

37 This position was confirmed by James Larsen (Chief Legal Officer, DFAT) in evidence to the Senate Foreign Affairs, Defence and Trade References Committee: see Foreign Affairs, Defence and Trade References Committee, *Australia's Declarations Made under Certain International Laws* (Report, February 2020) 19 [2.26].

38 Ibid 22 [2.41].

39 *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)* [1996] ICJ Rep 226.

are acceptable under international law. Moreover, Australia's participation in advisory opinion proceedings forms part of both its broader engagement in the development of international law and being a good international citizen.[40]

Secondly, Australian ministers have been concerned about the undermining of the principle of consent that underpins the contentious jurisdiction of the ICJ caused by advisory opinions being sought on what are, in fact, bilateral disputes. The most recent instance of this was the *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965* advisory opinion ('*Chagos*').[41] In reality, Mauritius, by sponsoring a UN General Assembly resolution requesting an advisory opinion, sought to resolve a longstanding dispute it had with the United Kingdom concerning sovereignty over the Chagos Archipelago in circumstances where the UK had declined to give its consent to the matter being heard by the Court in its contentious jurisdiction.[42]

III THE CHOICE OF COUNSEL AND OTHER MEMBERS OF THE AUSTRALIAN DELEGATION

An Australian delegation conducting a case before the ICJ consists of counsel (including the agent) appearing before the Court (seven), supporting counsel (two), lawyers from the AGD (seven), lawyers and diplomats from DFAT (five), experts (one), officers from the 'client' department (two) and personnel providing administrative and technical assistance, including translation (three). The figure after each category is the number of people within that category forming part of the 27-member Australian delegation before the Court in the *Whaling* case.[43] In addition to the criteria applied to the selection of members within a particular category, the preferred attributes of all members of the delegation are expertise, proactiveness and an ability to work as part of a team.[44]

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40 More generally on this role, see Alison Pert, *Australia as a Good International Citizen* (Federation Press, 2014); Donald R Rothwell, 'The Tasmanian Dam Case and Australia the Good International Citizen' in Michael Coper, Heather Roberts and James Stellios (eds), *The Tasmanian Dam Case 30 Years On: An Enduring Legacy* (Federation Press, 2017) 89, 99–101.

41 *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965 (Advisory Opinion)* [2019] ICJ Rep 95 ('*Chagos*').

42 The UN resolution requesting an advisory opinion and the subsequent oral submissions of Mauritius before the ICJ framed the purpose of the request as one of completion of the decolonisation of Mauritius and of reinforcement of respect for the fundamental principle of the territorial integrity of states: 'Verbatim Record 2018/20', *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965 (Advisory Opinion)* (International Court of Justice, General List No 169, 3 September 2018) 85 [35] (Mr Sands). However, in its written pleadings to the Court, Mauritius noted: 'sovereignty over the Chagos Archipelago is predicated on, and fully disposed of by, the Court's determination of the decolonisation issue. There is no basis for a separate consideration or determination of any question of the territorial sovereignty': 'Written Comments of the Republic of Mauritius', *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965 (Advisory Opinion)* (International Court of Justice, General List No 169, 15 May 2018) 56 [2.47].

43 *Whaling* (n 11) 231–2. Japan had a delegation of 36 members: at 232–3.

44 While the agent is responsible for choosing the delegation, some choices are beyond his or her control.

A *Agent and Counsel*

Australia appoints what may be termed a 'working agent', as opposed to a figurehead agent who only appears at the oral proceedings. The most important functions of a working agent are to coordinate, and be aware of, all aspects of the preparation and presentation of the case, as well as being the principal point of contact with the ICJ, the opposing side, counsel, witnesses and the Australian government. Australia's practice has been to appoint either a senior officer of the AGD or the Solicitor-General as agent for Australia in contentious ICJ proceedings.[45] The Australian Ambassador to the Netherlands is normally appointed co-agent and is the principal point of contact with the Court in The Hague in the lead-up to the oral hearings.[46]

In contentious cases before the ICJ, the Solicitor-General and one or more senior lawyers from the AGD almost invariably form part of the team of counsel appearing on behalf of Australia. The Attorney-General may also appear. In addition, Australia would likely engage one or more counsel from the international bar, including Professor Crawford SC before his election to the ICJ. In choosing counsel, criteria applied include eminence in the field of international law, expertise in the subject area of the case, a demonstrated capacity to engage with the Court[47] and Australia's experience in previously working with certain counsel.

By way of example, in the *Whaling* case, additional counsel briefed[48] included Henry Burmester QC because of his expertise and his experience in representing Australia in all of its ICJ cases since the *Nuclear Tests* case.[49] Professor Crawford SC recommended two counsel of foreign nationality, Professor Philippe Sands QC and Professor Laurence Boisson de Chazournes, because of their expertise in international environmental law as well as their general expertise and experience in appearing before the ICJ. This team of counsel was subsequently supplemented just prior to the oral hearings by Kate Cook of the British Bar[50] and Makane Mbengue from the University of Geneva as junior counsel.[51]

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45 The same practice applies to the appointment of Australia's formal representative in advisory opinion cases.

46 Successively Ambassadors Lydia Moreton and Neil Mules AO in the *Whaling* case.

47 In this respect, Australia would likely engage one francophone counsel.

48 Additional to the Solicitor-General Justin Gleeson SC, Bill Campbell QC from the AGD and Professor James Crawford AC SC.

49 *Nuclear Tests (Australia v France) (Judgment)* [1974] ICJ Rep 253 ('*Nuclear Tests*').

50 Sands, Boisson de Chazournes and Cook formed part of the 'Paris Panel' that provided a report to IFAW on 12 May 2006: Laurence Boisson de Chazournes et al, *Report of the International Panel of Independent Legal Experts on: Special Permit ('Scientific') Whaling under International Law* (Report, 12 May 2006).

51 In the *Documents* case, John Reid from the AGD was agent for Australia. Counsel were the Solicitor-General Justin Gleeson SC, Professor James Crawford SC, Henry Burmester QC, Bill Campbell QC and Professor Chester Brown.

In advisory opinion proceedings, Australia normally uses Australian Government counsel only. For example, in the *Chagos* proceedings, Solicitor-General Stephen Donaghue QC and Bill Campbell QC made oral submissions on behalf of Australia,[52] though it is interesting to note that five counsel of Australian nationality appeared for four other countries — Belize, Israel, the UK and Vanuatu.[53]

Australia has been criticised for the relative lack of female counsel that it has engaged in international cases and for preferring foreign counsel.[54] The second criticism is without foundation, as by far the majority of Australia's counsel have been Australian nationals, albeit some of these lawyers have been based in Europe. There is much more to the gender balance point in relation to counsel making oral submissions to the ICJ on behalf of Australia, and matters can only improve in that respect.[55] However, the gender composition of the Australian teams as a whole in recent ICJ proceedings, including junior counsel and the government international lawyers, is very much evenly balanced.

B *Witnesses and Experts*

Scientific evidence was a key element in the *Whaling* case. For this purpose, Australia needed to engage an eminent independent expert on marine populations, including marine mammals, who also had expertise in 'what is science' and proper scientific research methodology. In addition, the person must have had no connection with the IWC. There are, in fact, very few eminent practitioners in the area, the fundamental qualification being a high level of expertise in applied mathematics. The Australian Antarctic Division identified three such experts with a preference for Professor Marc Mangel of the University of California, and he was engaged.[56] Throughout the case, Australia was conscious of the need to maintain his independence, and at no stage did it seek to influence the substance of his evidence. Australia's second scientific witness was Dr Nick Gales,

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52 Bill Campbell QC and Stephanie Ierino of the AGD presented Australia's submissions to ITLOS in *Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission (SRFC) (Advisory Opinion)* (2015) ITLOS Rep 4 ('*Sub-Regional Fisheries Commission*').

53 Philippa Webb (UK Bar) appeared for the UK, Professor Robert McCorquodale and Jennifer Robinson (UK Bar) appeared for Vanuatu, Tal Becker (Legal Adviser to the Israeli Foreign Ministry) appeared for Israel and Ben Juratowitch QC (Freshfields) appeared for Belize: see *Chagos* (n 41) 104–6.

54 In his former capacity as General Counsel (International Law) responsible for the conduct of Australia's international litigation, this was one consistent theme of comments and questions to the author in the course of meetings touching on Australian international litigation practice, including annual general meetings of the Australian and New Zealand Society of International Law.

55 The gender balance of counsel appearing for Australia is better in relation to other international dispute settlement bodies. Female counsel appear regularly for Australia in World Trade Organization ('WTO') litigation. For example, Patricia Holmes (DFAT) and Anne Sheehan (AGD) recently appeared in the WTO Panel Hearing in *Australia — Anti-Dumping Measures on A4 Copy Paper* brought by Indonesia, and Tara Booth (DFAT) appeared at the Appellate Body stage of the *Australia — Tobacco Plain Packaging* proceedings. Rebecca Irwin (AGD) appeared as counsel for Australia before the Annex VII Tribunal in the *Southern Bluefin Tuna* arbitration, as did Stephanie Ierino of AGD in the *Sub-Regional Fisheries Commission* advisory opinion proceedings.

56 In the *Southern Bluefin Tuna* cases, Australia engaged an expert with those same qualifications: Sir John Beddington of Kings College, London.

then Chief Scientist with the Australian Antarctic Division, bringing decades of experience in the IWC Scientific Committee and, more importantly, decades of experience in non-lethal whale science.[57]

IV THE CHOICE OF JUDGE AD HOC

Each state party to contentious ICJ proceedings is entitled to appoint a judge ad hoc to sit on the matter if it does not have a judge of its nationality on the Court.[58] This is so, irrespective of whether the opposing party has a judge of its nationality on the Court. The person appointed does not have to hold the nationality of the state appointing them. If two or more parties have the same interest, they will, for the purposes of appointing a judge ad hoc, be reckoned as one party only.[59] The appointment of a judge ad hoc is an entitlement but not a requirement — for example, neither Australia nor Nauru appointed a judge ad hoc in *Certain Phosphate Lands in Nauru* ('*Nauru*').[60]

A person should preferably meet four criteria for appointment as a judge ad hoc by Australia. First, they should be an Australian national — not a requirement but invariably a government preference. Secondly, they should be a lawyer with a high level of competence in matters of international law. Thirdly, and equally importantly, they must have an ability to mix with other judges on the ICJ. In this respect, the role of a judge ad hoc is to engage actively with other members of the Court and to make sure that the arguments being put by their appointing state are well understood.[61] Finally, and in order to avoid any suggestion of a conflict of

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57 *Whaling* (n 11) 237.

58 *Statute of the International Court of Justice* art 31. In limited circumstances, judges ad hoc may be appointed in advisory proceedings — that is, when 'an advisory opinion is requested upon a legal question actually pending between two or more States': International Court of Justice, *Rules of Court* (adopted 14 April 1978) r 102(3).

59 *Statute of the International Court of Justice* art 31(5). See below n 92 and accompanying text, in relation to the potential application of this provision in the *Whaling* case. Article 31(5) was not applied to Australia and New Zealand in the conduct of their separate *Nuclear Tests* cases; nevertheless, each appointed the same judge ad hoc, being Sir Garfield Barwick: Kenneth Keith, 'New Zealand and the International Court of Justice' (2021) 21(3) *Melbourne Journal of International Law* 516, 526. Article 17(5) of the *Statute of the International Tribunal for the Law of the Sea*, forming Annex VI to the *1982 Convention* is similar to that of art 31(5) of the *ICJ Statute*. Australia and New Zealand were parties with the same interest in the *Southern Bluefin Tuna* provisional measures phase before ITLOS and jointly appointed a single judge ad hoc, being the late Professor Ivan Shearer: *Southern Bluefin Tuna (Provisional Measures)* (n 10) 283 [11]–[13].

60 *Certain Phosphate Lands in Nauru (Nauru v Australia) (Preliminary Objections)* [1992] ICJ Rep 240. If both parties to a case were entitled to appoint a judge ad hoc, it would be rare for only one of the parties to make such an appointment. Either both parties would or both parties would not.

61 A number of publicists support this legitimate role. For example, Sir Eli Lauterpacht, when sitting as a judge ad hoc in the *Crime of Genocide* case, noted the special obligation of such a judge to

> endeavour to ensure that, so far as is reasonable, every relevant argument in favour of the party that has appointed him has been fully appreciated in the course of collegial consideration and, ultimately, is reflected — though not necessarily accepted — in any separate or dissenting opinion that he may write.

Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Yugoslavia) (Order) [1993] ICJ Rep 325, 409 [6] (Judge ad hoc Lauterpacht). However, their role is not simply to vote in favour of the party appointing them.

interest, it is preferable they not have commented previously on the legality or otherwise of the actions that are the subject of the proceedings.

Appointment of a judge ad hoc by Australia would normally be the subject of a recommendation to the Attorney-General following consultations between AGD and DFAT and with counsel. That recommendation would usually, but not always, be followed.[62]

Past judges ad hoc in the ICJ appointed by Australia have been then Chief Justice of the High Court Sir Garfield Barwick (*Nuclear Tests* case), former High Court Justice and Governor-General Sir Ninian Stephen (*East Timor* case), Professor Hilary Charlesworth AM (*Whaling* case) and former High Court Justice the Hon Ian Callinan AC (*Documents* case).

V RESPONSIBILITY FOR CASE STRATEGY AND THE FORMULATION OF BOTH WRITTEN AND ORAL ARGUMENTS

Many choices are made with respect to strategy and the factual and legal arguments in any given case. It would come as no surprise that the factors bearing upon the choice of factual and legal arguments include the strength and persuasiveness of the argument, potential inconsistency of argument, confidentiality and potential adverse consequences, both political and legal, to name but a few. The manner in which Australia ran the *Whaling* case goes some way to explaining who bears responsibility for case strategy and the formulation of both written and oral arguments, though formal responsibility for all aspects rests with the agent.

The first step in the *Whaling* case was to seek legal advice on prospects, initially from the Government's own international lawyers, followed by advice from external counsel. Advice at that stage normally would address matters such as the most suitable forum, jurisdiction and admissibility, potential legal arguments, adequacy of the supporting facts as well as preliminary objections and provisional measures, if applicable.[63] The initial application in the *Whaling* case reflected the causes of action identified in the prior legal advice to the Government.

The next step in the *Whaling* case was to add to the team of counsel. It was at this stage that Professors Sands and Boisson de Chazournes were engaged. Simultaneously, a team of government international lawyers was formed within the Office of International Law to assist in running the case.[64]

In conducting an ICJ case, Australia holds a number of face-to-face meetings of counsel. In the *Whaling* case, the first meeting of counsel took place in the Hague to coincide with the first procedural meeting with the President of the Court. Subsequently, three meetings of counsel were held in Canberra, involving

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62 On one occasion, the Government requested that officials provide a list of three possible candidates, including one specified in the request. The Government did not follow the recommendation subsequently made by officials concerning a preferred candidate.

63 When Australia is respondent, such advice would cover prospects, but it would be more focused on identifying the arguments that might be used to defend the case. As noted elsewhere, if there is an argument to be made concerning jurisdiction and admissibility, then Australia, as respondent, will almost invariably rely upon the argument: Bill Campbell, 'International Dispute Resolution: Australian Perspectives and Approaches' (2018) 35 *Australian Year Book of International Law* 1, 6.

64 If Australia is respondent, the Office of International Law team would be formed when the application is served on Australia.

also the government international lawyers, other relevant government officials and the scientific experts.

During the period of the oral hearings, meetings of the whole delegation were held in The Hague in the period immediately prior to the hearings and daily on hearing days. The purpose of the latter meetings was to discuss that day's hearing and make preparations for the following hearing day. The meetings would generally last around 45 minutes.

Issues of strategy and the identification or discarding of causes of action and lines of argument to be relied upon would generally be the province of the meetings of counsel. For example, Australia's initial application to the ICJ included reliance upon arguments relating to the *Convention on Biological Diversity*[65] and the *Convention on International Trade in Endangered Species of Wild Fauna and Flora* ('*CITES*').[66] Ultimately, Australia's counsel decided not to rely upon these arguments. Agreement of all counsel on some issues was difficult to achieve, one of these being whether Australia should allege that Japan had committed an abuse of right in its conduct of so-called scientific whaling. After a good deal of discussion — some counsel were for, and some were against — Australia included an abuse of right argument.

An important strategic decision sourced in a meeting of counsel just after Japan had filed its counter-memorial was to oppose a second round of pleadings.[67] Counsel also made strategic decisions on other matters, such as the sequence of the Australian arguments in the oral hearings. In this respect, they decided that the question of jurisdiction should be addressed last because, having first heard the submissions of Australia on the substance of the dispute, the ICJ would better understand why Japan's jurisdictional argument was without foundation.[68]

Our international counsel suggested that the ICJ be approached to make the Australian position clear on certain procedural issues. For example, Australia made clear in writing that the Court should provide the parties with the opportunity to comment on any proposed appointment of an expert by the Court, and that the parties should be provided with a draft of the report from that expert to the Court for the purposes of comment. In the event, the Court did not appoint any experts.

Some issues were the subject of further detailed legal advice by one or more counsel involved in the case, not the least of which was whether Australia should seek provisional measures to prevent the continuation of the second Japanese Research Program in the Antarctic (JARPA II) while the case was being heard. Following receipt of that advice and with the support of all counsel, the Government decided not to seek provisional measures despite a good deal of public pressure to do so.[69]

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65 *Convention on Biological Diversity*, signed 5 June 1992, 1760 UNTS 79 (entered into force 29 December 1993).

66 *Convention on International Trade in Endangered Species of Wild Fauna and Flora*, signed 3 March 1973, 993 UNTS 243 (entered into force 1 July 1975).

67 See below Part VI(A).

68 'Verbatim Record 2013/11', *Whaling in the Antarctic (Australia v Japan; New Zealand intervening)* (International Court of Justice, General List No 148, 28 June 2013) 41 [2]–[3] (Mr Burmester).

69 Don Rothwell, 'Australia Limits Its Whaling Response', *The Sydney Morning Herald* (online, 3 January 2012) <https://www.smh.com.au/politics/federal/australia-limits-its-whaling-response-20120102-1pi7r.html>, archived at <https://perma.cc/987E-WF4E>.

The initial drafting of the memorial, including the detailed legal argument and factual analysis, was the responsibility of the Office of International Law lawyers. The drafting of each chapter was allocated to one or more of those lawyers and circulated to counsel for comment. This is consistent with past practice in Australia and is atypical in the sense that most countries rely upon their counsel to provide an initial draft of the pleadings.

A parallel detailed exercise concerned the drafting of the scientific statements to support Australia's case. Two scientific papers were attached to Australia's memorial — one being the report of Professor Mangel and the other being a report on relevant whale populations by scientists from the Australian Antarctic Division and the Commonwealth Scientific and Industrial Research Organisation.[70] In the lead-up to the hearing, individual counsel were allocated to work with our two scientific witnesses. Professor Sands (assisted by Kate Cook and Michael Johnson (AGD)) worked with Professor Mangel and conducted his examination in the course of the oral hearings. Professor Sands also had general responsibility for presentation of the scientific aspects of the Australian case. The Solicitor-General Justin Gleeson worked with, and examined, Dr Gales and took on the responsibility of cross-examining the Japanese scientific witness Lars Walløe.

Each counsel was allocated areas of the argument for which they would bear responsibility in the oral hearings and which they would develop largely independently. The areas allocated to each counsel can be discerned through an examination of the transcript. Generally, the allocated areas were followed through to the second round of oral pleadings.[71] This largely independent development of argument at the stage of the oral hearings can lead to the occasional hiccup in the presentation of argument. For example, this occurred during the presentation, in the course of the second oral round, of Australia's argument that Japan had acted in bad faith and committed an abuse of right.[72] An initial impression may have been gained that Australia was backing away from its good faith/abuse of right argument, but this was quickly dispelled. Nevertheless, given the time available in the course of the oral hearings and the expertise and experience of the counsel, a degree of independence in the development of argument is inevitable.

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70 'Memorial of Australia', *Whaling in the Antarctic (Australia v Japan; New Zealand intervening)* (International Court of Justice, General List No 148, 9 May 2011) vol 1, app 1 (William de la Mare, Natalie Kelly and David Peel, *Antarctic Baleen Whale Populations*, April 2011), app 2 (Marc Mangel, *An Assessment of Japanese Whale Research Programs under Special Permit in the Antarctic (JARPA, JARPA II) as Programs for Purposes of Scientific Research in the Context of Conservation and Management of Whales*, April 2011).

71 If possible, a draft of the arguments so prepared by each counsel would be circulated to the fellow counsel for comment either in writing or at one of the delegation meetings mentioned above. There can be circumstances where the step of circulating proposed presentations does not take place. For example, where there is a very short time between completion of the opponent's arguments and the subsequent making of the Australian response — as occurred in the second round of oral pleadings in the *Documents* case.

72 'Verbatim Record 2013/18', *Whaling in the Antarctic (Australia v Japan; New Zealand intervening)* (International Court of Justice, General List No 148, 9 July 2013) 21 [22]; 'Verbatim Record 2013/20', *Whaling in the Antarctic (Australia v Japan; New Zealand intervening)* (International Court of Justice, General List No 148, 10 July 2013) 28–9 [76], 33–42 [1]–[34].

The development and presentation of Australia's arguments in the past two ICJ advisory opinion proceedings in which it has made submissions have been simpler processes.[73] This is because Australia limited its contribution to matters of jurisdiction and to supporting the exercise of the Court's discretion to decline to render an opinion.[74] In the *Chagos* proceedings, the three counsel on the Australian delegation developed and presented the legal arguments.

VI INTERACTION WITH THE COURT, THE REGISTRAR, OTHER STATES INVOLVED IN THE PROCEEDINGS AND NGOS

In the course of proceedings, Australia has substantive interaction with the ICJ, the Registrar and staff of the Court registry, other states involved in the proceedings, non-governmental organisations and the media.

A *Interaction with the Court*

About one month after the filing of an application commencing proceedings, a meeting is called between the agents and the President of the ICJ. The then Solicitor-General Stephen Gageler SC and the agent for Australia attended such a meeting after the filing of Australia's application in the *Whaling* case. The principal purpose of the meeting was to establish a timetable for pleadings. The delegations of Australia and Japan met the night before and agreed that each party would have 10 months to file its pleadings. This agreement was conveyed to the President at the meeting the next day and accepted by the Court.

A further meeting was held with the President after Japan filed its counter-memorial some 20 months later. The purpose of that meeting was to decide whether a second round of pleadings was necessary or whether the case was ready for hearing. Australia argued against, and Japan for, a second round.[75] The ICJ decided against holding a second round, thus significantly shortening the overall duration of the case.[76]

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73 *Chagos* (n 41); *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion)* [2004] ICJ Rep 136.

74 Primarily on the ground that the rendering of advisory opinions on what were essentially bilateral disputes undermined the principle of consent underpinning the contentious jurisdiction of the Court.

75 Australia notified the Court and Japan of its views on a second round some weeks before the meeting with the President.

76 See International Court of Justice, 'Whaling in the Antarctic (Australia v Japan): Closure of Written Proceedings' (Press Release No 2012/18, 18 May 2012) <https://www.icj-cij.org/public/files/case-related/148/17024.pdf>, archived at <https://perma.cc/X7RT-KTMF>. Such procedural matters are frequently contested. Immediately after the closure of the oral hearings on provisional measures in the *Documents* case, President Tomka held a meeting with the parties on procedural matters. Australia requested that the Court stay the proceedings until the arbitral tribunal established under art 23 of the *Timor Sea Treaty* had rendered its decision on a separate but related dispute. In the absence of such stay, Australia requested nine months to file its counter-memorial. In line with the views expressed by Timor-Leste, the Court refused a stay and ordered successive periods of three months for the filing of the memorial and counter-memorial: *Seizure and Detention of Certain Documents and Data (Timor-Leste v Australia) (Order on 28 January 2014)* [2014] ICJ Rep 136, 137–8.

B *Interaction with the Registrar and Court Registry*

A number of meetings were also held with the Registrar and other Court officials. These principally focused on matters of evidence, notification of witnesses, provision of witness statements before the hearing and the intervention of New Zealand. For example, members of the Australian delegation had a lengthy interaction with Court officials over a period of days just prior to the hearing about the mundane but important matter of the manner in which the examination and cross-examination of witnesses should be conducted.[77]

The agent for Australia requested an urgent meeting with the Registrar in the course of the oral hearings, again on matters relating to the cross-examination of witnesses. Australia was required to give the ICJ and Japan a copy of the documents to be put before Japan's witness Lars Walløe in the course of his cross-examination some two hours before it was due to take place. This requirement had the capacity to reduce the effectiveness of the cross-examination. Australia therefore sought an undertaking from Japan that Mr Walløe would not be shown the documents before that cross-examination took place. The agent for Japan refused to give that undertaking. The agent for Australia sought the assistance of the Registrar. Following the Registrar's intervention, senior counsel for Japan gave that undertaking on behalf of Japan almost immediately.[78]

C *Interaction with Other States*

There were few direct dealings with Japan in the course of the *Whaling* case other than those mentioned above. The ICJ served most documents lodged by Australia on Japan soon after filing; though, on occasions, Australia did provide Japan with a courtesy copy through diplomatic channels. Australian officials did meet with Japanese diplomats in Canberra some weeks before the decision was handed down to discuss modus operandi for reacting to the decision of the Court given a forthcoming Prime Ministerial meeting,[79] but Japan soon declined to discuss that matter further.

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77 Prior to the *Whaling* case, there had been no examination of witnesses before the Court for a considerable period. The discussions focused on the need for two additional lecterns and their exact location in the courtroom during examination and cross-examination.

78 Another example of engagement with the Registrar occurred just before the commencement of the oral hearings. On 31 May 2013, Japan sought to introduce detailed comments by a former chair of the IWC Scientific Committee, Dr Judy Zeh, on the expert statements made by Professor Mangel and Dr Gales: 'Observations of Japan on the Statements Submitted by the Experts Called by Australia', *Whaling in the Antarctic (Australia v Japan; New Zealand intervening)* (International Court of Justice, General List No 148, 31 May 2013). Australia, by letter dated 5 June 2013, objected to that material being placed on the Court record on the basis that it was an attempt to introduce expert evidence via the back door without the opportunity for Australia to cross-examine Dr Zeh: 'Letter Dated 5 June 2013 from the Agent of Australia', *Whaling in the Antarctic (Australia v Japan; New Zealand intervening)* (International Court of Justice, General List No 148, 5 June 2013). After further correspondence, the Registrar, by letter dated 21 June 2013, conveyed the Court's decision on that particular matter. It held that the material prepared by Dr Zeh would 'not be treated as expert evidence but rather as any other observations of the Government of Japan': 'Extract of Letters Dated 21 June 2013 from the Registrar to the Agents of the Parties', *Whaling in the Antarctic (Australia v Japan; New Zealand intervening)* (International Court of Justice, General List No 148, 21 June 2013) — a rather fine distinction that still enabled the material to be used by Japan.

79 See below n 94 and accompanying text.

After New Zealand intervened under art 63 of the *ICJ Statute*, the Court provided it with a copy of the pleadings and associated material. Although Australia had discussions with New Zealand in the lead-up to the case, the pleadings of both countries during the written and oral stages stood on their own — indeed there were differences in approach that Japan sought to exploit in the course of the hearings. While New Zealand's arguments on the interpretation and application of the *International Convention for the Regulation of Whaling* ('*ICRW*')[80] were different to those of Australia, they were entirely complementary.

In the *Chagos* proceedings, Australia met and maintained contact with other states making submissions that the ICJ should exercise its discretion and decline to give an advisory opinion, in particular the UK and the US delegations.[81]

D *Engagement with NGOs*

Throughout the *Whaling* case, Australia maintained contact with the many anti-whaling NGOs, principally through the Cetacean NGO Forum convened by the Department of Sustainability, Environment, Water, Population and Communities. Principally, this was for the purpose of providing updates and explanations of Australia's approach to the case — for example, explaining the reasons why Australia was not making an application for provisional measures in the course of the case. The International Fund for Animal Welfare provided assistance in relation to some important documentation that Australia wished to use in the case.[82] In addition, Humane Society International helpfully did not launch contempt proceedings in the Federal Court against the Japanese whaling company Kyodo Senpaku Kaisha[83] until after the ICJ gave its decision in the *Whaling* case. To do so in the course of the ICJ proceedings would not have been helpful to Australia's case.

As noted below,[84] Japan sought to align Australia with the actions of the NGO Sea Shepherd Conservation Society ('Sea Shepherd'), many of which were unlawful as a matter of international law. This was not helpful to the prosecution of Australia's case. Australian officials did have some limited contact with Sea Shepherd to indicate how unhelpful their actions were (mainly through one of their lawyers in the US) but to no avail.[85]

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80 *International Convention for the Regulation of Whaling*, opened for signature 2 December 1946, 161 UNTS 72 (entered into force 10 November 1948).

81 That level of contact was minimal compared to the coordination that was taking place between members of the African Union and others supporting the Mauritian position.

82 The document in question was an open letter to the Government of Japan from 21 eminent scientists, including three Nobel laureates, criticising Japan's so-called scientific research whaling. It was published in the form an advertisement in *The New York Times* on 20 May 2002 and was for some time on the IFAW website: see Phillip J Clapham et al, 'Whaling as Science' (2003) 53(3) *BioScience* 210. IFAW returned the letter to its website prior to the oral hearings at the request of Australia, thus fulfilling the Court's 'readily available' test and enabling its use in the oral hearings. Documents not forming part of the written pleadings may only be referred to in the oral hearings if they are 'part of a publication readily available', which the Court interprets to mean available on the internet: *Rules of Court* (n 58) r 56(4).

83 *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd* (2015) 238 FCR 209.

84 See below n 88.

85 At one point, Sea Shepherd thought that it had been unfairly maligned by Japan in the course of the oral hearings. It sought Australia's assistance in what it saw as a correcting of the record before the Court. Australia declined to provide that assistance.

VII POLITICAL INPUT DURING THE COURSE OF THE CASE

The level of political input during the course of a case varies depending on the subject matter of the case, the ministers involved and the stage that the case has reached.

The most direct form of political involvement is for a Minister, normally but not exclusively the Attorney-General, to appear during the course of the oral hearings. Appearances by Ministers on behalf of countries occur in many ICJ proceedings.[86] It demonstrates to the Court an interest in the case at the highest levels of government and the importance that a government attaches to the proceedings. Attorney-General Lionel Murphy QC appeared on behalf of Australia in the *Nuclear Tests* case; Attorney-General Mark Dreyfus QC appeared in the *Whaling* case; and Senator Gareth Evans QC, then Minister for Foreign Affairs, appeared in the *Nuclear Weapons* advisory opinion proceedings.[87]

Ministers appearing before the ICJ fully involve themselves in the conduct of the case at the oral hearing stage, including by participating actively in meetings of the delegation, settling their own submissions and commenting on the submissions of other counsel. In contentious proceedings, the focus of submissions by Ministers is on the importance of the issue at hand to the Australian government, diplomatic aspects, as well as the forthright rejection of the more egregious propositions put forward by the other party.[88]

While Attorney-General George Brandis QC did not attend, or appear, in the oral proceedings before the ICJ in the *Documents* case, he did play a key role in the strategy pursued at the oral hearing, particularly in relation to the undertakings that were given to the Court in the course of that hearing — aspects of which he drafted himself. Those undertakings were a central element of the Court's consideration of the matter. Senator Brandis also played a role in the Government's decision to return the seized documents to Mr Collaery, thus leading Timor-Leste to discontinue the ICJ proceedings.[89]

Written arguments in the form of a memorial or counter-memorial are sent to relevant Ministers for their information but not approval. However, ministerial approval may be sought on particular issues of strategy and on content of argument. For example, counsel for Australia met with Attorney-General Nicola Roxon and obtained her prior agreement to the Australian submission to the ICJ

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86 Ministerial involvement in the oral hearings in international proceedings is not confined to the ICJ. For example, Attorney-General Daryl Williams QC appeared before ITLOS in the *Southern Bluefin Tuna* cases in 1999.

87 The subject matter of those cases was a matter of longstanding interest for Senator Evans. He subsequently held the position of Co-Chair of the International Nuclear Non-Proliferation and Disarmament Commission.

88 Attorney-General Mark Dreyfus QC rejected some of the more outrageous propositions put forward by Japan in the course of the oral proceedings in the *Whaling* case in very forthright terms. For example, he described a suggestion by Japan that Australia outsourced its maritime duties in the Antarctic to Sea Shepherd activists as 'wholly untrue, and ridiculous': 'Verbatim Record 2013/18' (n 72) 15 [6] (Mr Dreyfus). In response to a suggestion that Australia was attempting to use international law as an instrument to impose its cultural preferences, he stated: 'This case is not about civilising missions or whether the Australian public like or dislike the consumption of whale meat … This case is about the failure of one country to comply with its international legal obligations not to conduct commercial whaling': at 16 [8].

89 Julie Bishop, 'Timor-Leste: ICJ Case Discontinued' (Joint Media Release, 5 June 2015) <https://www.foreignminister.gov.au/minister/julie-bishop/media-release/timor-leste-icj-case-discontinued>, archived at <https://perma.cc/9EVT-WNVR>.

that there should be no second round of written pleadings in the case.[90] Counsel were of the view that the law and the facts had been sufficiently canvassed in the first round and that a second round would unnecessarily delay the proceedings, and they also apprehended that Japan may well raise new arguments in its rejoinder, to which Australia would not have the opportunity to respond in writing. As noted above, the Court acceded to Australia's request and declined to order a second round of written pleadings, much to the displeasure of Japan.[91]

Ministers may also engage at a political level with counterparts in other countries to assist the conduct of the case. For example, Australian Ministers engaged with their New Zealand counterparts with a view to persuading New Zealand that it should intervene under art 63 of the *ICJ Statute* in the proceedings commenced by Australia rather than commencing its own case. If New Zealand had started its own case, the Court would have found that Australia and New Zealand were acting in the same interest with the consequence that Australia would not have been able to appoint a judge ad hoc. This was because a judge of New Zealand nationality, Sir Kenneth Keith, was a permanent member of the Court at the time. New Zealand acceded to Australia's request and intervened in the case commenced by Australia rather than commencing its own proceedings.[92]

While all Australian governments are concerned about the media aspects of ICJ proceedings involving Australia, the manner in which they engage with the media in relation to those cases depends on the government of the day. In relation to the *Whaling* case, the then Labor Government gave much more latitude to officials to

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90 See above Part VI(A).

91 Japan made this displeasure known to the Court on numerous occasions during the balance of the case. Indeed, Judge Greenwood in his separate opinion in the *Whaling* case noted in a diplomatic way: 'Japan made clear its disappointment with this decision': *Whaling* (n 11) 418 [32]. Including new arguments in the second round of written pleadings had become a relatively common practice. Judge Greenwood was critical of the practice in the *Whaling* case: 'A State should never hold part of its case — whether argument or evidence — in reserve for a second round': at 418 [35].

92 The Australian Prime Minister and the New Zealand Foreign Minister did set out their approach quite openly in a press release dated 12 December 2010, giving rise to some concern on the part of those responsible for the day-to-day conduct of the Australian case, who had counselled against such a release. That release included the following statement by then New Zealand Foreign Minister McCully:

> Australia has indicated that they would prefer New Zealand not to file as a party. Because New Zealand has a judge on the ICJ, Sir Kenneth Keith, the joining of the two actions would result in Australia losing its entitlement to appoint a judge for the case. New Zealand's decision to intervene will allow the case to proceed without delay.

Kevin Rudd and Murray McCully, 'Joint Statement: Australia and New Zealand Agree on Strategy for Whaling Legal Case' (Media Release, 12 December 2010) <https://www.beehive.govt.nz/release/joint-statement-australia-and-new-zealand-agree-strategy-whaling-legal-case>, archived at <https://perma.cc/9RY3-PL9R>. Japan subsequently used this press statement to support its allegation of Australian and New Zealand collusion over the New Zealand intervention. To a degree, this allegation was mirrored in Judge Owada's comment:

> It is regrettable that a State party to a case before the Court and a State seeking to intervene in that case … should engage in what could be perceived as active collaboration in litigation strategy to use the Court's Statute and the Rules of Court for the purpose of promoting their common interest.

Whaling in the Antarctic (Australia v Japan; New Zealand intervening) (Order on 6 February 2013) [2013] ICJ Rep 3, 12 [5] (Judge Owada). The Court (including Judge Owada) in its order of 6 February 2013 agreed that Australia had the right to appoint a judge ad hoc, that being Professor Charlesworth.

comment to the media in the course of the oral hearings than the Liberal–National Government did at the judgment phase of that case and during the *Documents* case.

There is a very real expectation on the part of the media that those present in The Hague will be able to answer questions on the case and give media interviews. The Australian agent was the media spokesperson in The Hague before and during the oral proceedings in the *Whaling* case, and he gave a number of radio and television interviews to Australian, Japanese, French, UK and US media, as did Attorney-General Dreyfus upon his arrival in The Hague. After each Court session a media pack is invariably present directly outside the Court door asking questions focused on what had happened that day. It is essential that a person with a deep knowledge of the case be able to engage the media in a meaningful way while, at the same time, avoiding commentary that subsequently might be used against Australia in the Court. In this respect, what is said to media one day is often cited by the opposing party to the Court in subsequent days.[93]

The answer is not to avoid media comment altogether or to confine such comment to Ministers or ministerial offices who may not have a deep knowledge of the case — this being the approach taken by the then Australian Government during the provisional measures phase of the *Documents* case. A lack of educated engagement with the media in The Hague will only give rise to reporting supportive of the opposing party, which is not helpful to the prosecution of Australia's case before the Court.

VIII Political and Legal Responses to ICJ Decisions

As a matter of logic, one would expect the reaction of the incumbent Australian government to be very positive in the event of an ICJ decision in Australia's favour and somewhat muted in the event of a loss. However, other factors are at play, as the reactions of the Abbott Government to the *Whaling* case and the *Documents* case illustrate.

The reaction of the Government to the decision in favour of Australia in the *Whaling* case was subdued. The primary reason for this stifled reaction was that Prime Minister Abbott had a pre-planned meeting with Prime Minister Abe of Japan just a few days after the ICJ handed down its decision.[94] The Australian delegation taking the judgment was instructed not to be 'triumphal' in the event of a judgment in Australia's favour. This downplayed reaction also is reflected in the statements to the media made by the Australian agent immediately following the Court handing down its decision:

> The Australian Government welcomes the decision. We note that both Australia and Japan have stated on a number of occasions that both countries will accept and respect the decision of the Court.

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93 See, eg, 'Verbatim Record 2013/12', *Whaling in the Antarctic (Australia v Japan; New Zealand intervening)* (International Court of Justice, General List No 148, 2 July 2013) 41 [5] (Mr Akhavan).

94 This determination not to affect in any way the subsequent meeting between the Prime Ministers is evidenced by the lack of an Australian Government press release on the Court's decision. (Indeed, earlier on when the Court conveyed to the parties its intention to render its decision on 31 March 2014, a suggestion was made that the Court should be requested to delay its decision due to the Prime Ministerial meeting, a suggestion that was quickly put aside.)

> The decision of the court today, important as it is, has given us the opportunity to draw a line under the legal dispute and move on.[95]

Nor was the Abbott Government inclined to move matters forward in the implementation of the ICJ's decision, leaving it to New Zealand to lead the consequential action to ensure that the IWC took account of that decision.[96]

Japan subsequently excluded its whaling activities from the jurisdiction of the ICJ on 6 October 2015[97] and commenced a new whaling program (NEWREP-A) in the Southern Ocean in the same year. Finally, on 26 December 2018, Japan made good its earlier threat to withdraw from the *ICRW* and the IWC. The Australian Government this time did react in a press release of the same date:

> The Australian Government is extremely disappointed that Japan has announced that it will withdraw from the *International Convention for the Regulation of Whaling* and its decision-making body, the International Whaling Commission, and resume commercial whaling … Their decision to withdraw is regrettable and Australia urges Japan to return to the Convention and Commission as a matter of priority.
>
> …
>
> The Australian Government welcomes Japan's announcement that it will stop whaling in the Southern Ocean as of next summer. This means that the International Whaling Commission's vast Southern Ocean Sanctuary, and our own Australian Whale Sanctuary, will finally be true sanctuaries for all whales.[98]

Contrast the immediate reaction of the Abbott Government to the *Whaling* case decision with its public reaction earlier in the same month to the decision of the ICJ on provisional measures in the *Documents* case. That public reaction,

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95 The quoted text was read by the agent when making a press statement to the assembled press outside the Court immediately after the case. A portion of the comments can be found in the following source: 'Japan Deeply Disappointed at Whaling Loss', *SBS News* (online, 31 March 2014) <https://www.sbs.com.au/news/japan-deeply-disappointed-at-whaling-loss>, archived at <https://perma.cc/D4ZB-QDW6>. This is to be contrasted with the reaction of the then Labor Opposition: 'The court has now upheld our arguments, and the international rule of law will be stronger for the action we have taken': 'Whale Verdict Won't Hurt Japan: Brandis', *SBS News* (online, 31 March 2014) <https://www.sbs.com.au/news/whale-verdict-won-t-hurt-japan-brandis>, archived at <https://perma.cc/455M-GCF2>.

96 In 2015, the IWC incorporated the major principles enunciated by the Court into what is known as Annex P, this being the annex under which the IWC Scientific Committee considers proposed programs of whaling for scientific purposes pursuant to art VII of the *ICRW*: New Zealand Government, 'NZ Whaling Resolution Passes' (Media Release, 19 September 2014) <https://www.beehive.govt.nz/release/nz-whaling-resolution-passes>, archived at <https://perma.cc/PRC3-3NLA>.

97 Japan amended its acceptance of ICJ jurisdiction under the optional clause by excluding from that jurisdiction 'any dispute arising out of, concerning, or relating to research on, or conservation, management or exploitation of, living resources of the sea': 'Declarations Recognizing as Compulsory the Jurisdiction of the International Court of Justice under Article 36, Paragraph 2, of the Statute of the Court: Japan', *United Nations Treaty Collection* (Web Page) <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=I-4&chapter=1&clang=_en>, archived at <https://perma.cc/D64M-JQ4J>.

98 Marise Payne, 'Japan to Exit from International Whaling Commission and Cease Southern Ocean Whaling' (Joint Media Release, 26 December 2018) <https://www.foreignminister.gov.au/minister/marise-payne/media-release/japan-exit-international-whaling-commission-and-cease-southern-ocean-whaling>, archived at <https://perma.cc/6LRA-TTAC>.

as evidenced by the following media release, managed to snatch victory from the jaws of defeat:

> The Australian Government is pleased with the decision of the International Court of Justice in *Timor-Leste v Australia*, delivered at The Hague overnight, refusing Timor-Leste's application for the delivery up of the documents taken into possession by ASIO, in execution of a search warrant in Canberra in December 2013.
>
> The order of the Court extended, until final hearing of the case, undertakings which were offered by Australia during the course of the hearing. These orders will, of course, be complied with. This is a good outcome for Australia.[99]

A cursory examination of the full text of the ICJ's provisional measures order of 3 March 2014,[100] or even just of the interim measures that it indicated, reveals an ICJ decision quite adverse to Australia — a decision that, as noted above, ultimately led to the return of the documents to the lawyer's premises from which they had been seized.[101]

The legal steps necessary to give effect to the ICJ's provisional measures order were, for the most part, taken before the Court made that order. They largely took the form of undertakings given by the Attorney-General to the Court on 21 January 2014[102] as well as the 19 December 2013 written undertaking given by the Attorney-General to an arbitral tribunal constituted under the 2002 *Timor Sea Treaty*.[103] A comprehensive description of the relevant undertakings given to the ICJ and the arbitral tribunal, as well as the associated implementing measures, is set out in the 3 March 2014 order made by the Court.[104]

IX CONCLUSION

The political, organisational and practical inputs outlined in this article have been highly effective in accomplishing the optimum achievable outcomes for Australia through the use of international dispute settlement mechanisms, including the ICJ. The use of the term 'achievable' is purposeful. Even the most meticulous preparation and conduct of a case may not overcome a body of relevant

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99 George Brandis, 'International Court of Justice Decision, Timor-Leste v Australia' (Media Release, 4 March 2014) <https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id:%22media/pressrel/3032482%22>, archived at <https://perma.cc/D2EL-KLXD>. Senator Scott Ludlum, the then Australian Greens security spokesperson, said that the statement by Senator Brandis was 'absolutely extraordinary … He should reconsider his very smug dismissal of this very serious legal censure': Tom Allard, 'George Brandis Pleased with Court Ruling in East Timor Spying Case', *The Sydney Morning Herald* (online, 5 March 2014) <https://www.smh.com.au/politics/federal/george-brandis-pleased-with-court-ruling-in-east-timor-spying-case-20140305-345ol.html>, archived at <https://perma.cc/58GZ-JZSR>.

100 *Documents (Provisional Measures)* (n 28).

101 The *Documents* case illustrates that a loss at a preliminary stage of an ICJ case can lead to settlement of the case. The loss by Australia on preliminary objections in the *Nauru* case is yet another example. Australia settled the proceedings by paying Nauru monetary compensation.

102 'Written Undertaking by Senator the Hon George Brandis QC, Attorney-General of the Commonwealth of Australia', *Seizure and Detention of Certain Documents and Data (Timor-Leste v Australia)* (International Court of Justice, General List No 156, 21 January 2014).

103 *Arbitration under the Timor Sea Treaty (Timor-Leste v Australia) (Termination Order)* (Permanent Court of Arbitration, Case No 2013-16, 20 March 2017).

104 *Documents (Provisional Measures)* (n 28) 155–7 [35]–[39].

facts and/or law highly adverse to Australia, particularly if coupled with a perception of wrongdoing on the part of Australia, whether justified or not. Also, in common with other countries, Australia may initiate or otherwise participate in a case for political reasons or to uphold an important point of principle, even though the prospects of success are low — the *Chagos* case being an example of Australian participation to uphold an important point of principle.

Whatever the prospects of success in any given case, Australia's experience is that those prospects will only be enhanced by a serious and sustained effort and attention to detail in the conduct of the case. The prospects of success in the *Whaling* case were assessed at most as 'reasonable'. Those prospects were certainly enhanced by detailed preparation, the choice of counsel and other members of the Australian team, and more generally by the level of resources available for conduct the case.[105]

Could Australia's approach to dispute settlement before international courts and tribunals be improved? At the margins, 'yes'. One improvement would be to ensure that legal advice is always sought by the government before any course of action is embarked upon that could conceivably lead to the initiation of international proceedings against Australia. As noted above, such advice was sought in the case of compulsory pilotage in the Torres Strait. As a result, the system of enforcement was changed, thus avoiding international legal proceedings. By contrast, advice on the possibility of international legal proceedings was not sought in relation to the actions that led to the initiation of the *Documents* case.

Secondly, the team responsible for the conduct of a case may on occasion need to explain more fully to relevant ministers the potential adverse consequences of not following a recommended course of action in the conduct of a case.

Thirdly, it would be helpful to have a central source of guaranteed funding for the conduct of international litigation involving Australia. The system of ad hoc funding that uses existing portfolio appropriations ignores the fact that participation in proceedings in which Australia is the respondent state is not optional, and it also leads to differences over which portfolio or agency should pay.

These and other potential changes of approach are at the margins and could only serve to improve the already highly effective approach taken by Australia to international dispute settlement, including in its conduct of cases before the ICJ.

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105 The Parliament appropriated just over AUD20 million dollars over a period of four years for the conduct of the *Whaling* case. While not all that funding was utilised, that level of the appropriation ensured that the conduct of the case was not constrained by inadequate funding. This was the last case in which the Parliament made a separate appropriation for the conduct of a case.