Australia and the International Court of Justice

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The 50th Anniversary of the International Court of Justice provides an opportunity to reflect on the close involvement of Australia with that Court throughout its history. Australia has long been a supporter of the Court and has been directly involved in one way or another in many of its activities. This involvement has included:

- applicant in the *Nuclear Tests* case against France;[1]
- respondent in both the *Nauru*[2] and *East Timor* cases;[3]
- applicant to intervene in the attempt in 1995 by New Zealand to reopen its *Nuclear Tests* case against France;[4]
- making submissions as a State in requests for advisory opinions, including those concerning *Certain Expenses of the United Nations*[5] and the World Health Organisation and General Assembly requests for opinions in relation to the legality of nuclear weapons; and
- providing a judge of the Court from 1958–1967, who also served as President for some of that period, and in the nomination of two Australians to serve as *ad hoc* judges.

Australia has also been involved in supporting the Court through nomination of candidates for election through the Australian National Group and in voting as a United Nations member to elect judges. Australian involvement with the Court is also reflected in the appearance of leading Australian international law practitioners as counsel in cases before the Court, both as Counsel for Australia and for other countries. In this latter role, Professor O'Connell[6] and, more recently, Professor Crawford[7] can be particularly noted.

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* Chief General Counsel, Attorney-General's Department. The views expressed are personal and do not necessarily represent the views of the Australian Government.

1 *Nuclear Tests (Australia v France), Interim Protection, Order of 22 June 1973*, ICJ Rep 1973, p 99; *Nuclear Tests (Australia v France), Judgment*, ICJ Rep 1974, p 253.

2 *Certain Phosphate Lands in Nauru (Nauru v Australia), Preliminary Objections, Judgment*, ICJ Rep 1992, p 240.

3 *East Timor (Portugal v Australia), Judgment of 30 June 1995*, ICJ Rep 1995, p 90.

4 *Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court's Judgment of 20 December 1974 in the Nuclear Tests (New Zealand v France) Case, Order of 22 September 1995*, ICJ Rep 1995, p 288.

5 *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter), Advisory Opinion of 20 July 1962*, ICJ Rep 1962, p 151.

6 O'Connell was born in New Zealand in 1924, but came to Australia in 1953 to take up an appointment at the University of Adelaide, where he remained until

Australia's commitment and support of the Court has been demonstrated over many years in a wide range of treaty negotiations by its advocacy of the inclusion of dispute settlement clauses providing for the Court to have jurisdiction in relation to disputes arising under the relevant treaties. As well, Australia has been one of the relatively few States which, under Article 36(2) of the Statute, has had in place a declaration accepting the optional clause jurisdiction of the Court. Australia's first declaration was made in 1929 in relation to the predecessor Court, the Permanent Court of International Justice.[8] Its most recent declaration, in force since 1975, contains a general submission to jurisdiction without substantive reservations.[9]

In this paper, I propose to examine some of the experiences of Australia in relation to the Court in greater detail. This examination can then serve as a basis on which to reflect about what should be Australia's future relationship and involvement with the Court. In particular, it may assist in considering how the Court can best serve Australia's national interests. Before doing that it is appropriate to set out the broad approach towards compulsory dispute settlement of international disputes, to which Australia has generally adhered.

Australia's Approach to Dispute Settlement

The consistent, largely bipartisan approach of Australia to settlement of international disputes is reflected in a statement in 1986 by Mr Hayden, then Foreign Minister:

> The Australian Government has consistently advocated that the United Nations systems, including the International Court of Justice, should be maintained as a force for peace and stability. The Government has not proposed any multilateral alternatives to the UN system and believes that what is required is for all states to observe their existing obligations. The Government has also encouraged resort to the International Court as a forum for the peaceful settlement of international legal disputes. It has done so by example, through acceptance of the compulsory jurisdiction of the court, and also by actively seeking to make the International Court the forum for settling legal disputes between parties to multilateral treaties when such disputes cannot be resolved by negotiation or other peaceful means.[10]

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taking up an appointment as Chichele Professor at the University of Oxford in 1972.

7 Professor Crawford held positions at the Universities of Adelaide and Sydney, before being appointed Whewell Professor at the University of Cambridge. He is the first Australian elected to the International Law Commission.

8 Declaration of 20 September 1929 was replaced by a new declaration on 21 August 1940. For texts of both see (1940–1941) 200 LNTS 494–97. A new declaration was made in 1954: see Aust Treaty Series 1954, No 8.

9 For text see, (1995) 49 *ICJ Yearbook 1994–1995*, p 80. For comment at the time, see Starke JG, "New Australian Declaration of Acceptance of Compulsory Jurisdiction of International Court of Justice, 13 March, 1975" (1975) 49 *Australian Law Journal* 499.

10 House of Representatives, *Debates,* vol 149, 5 June 1986, p 4878.

Australia's Experience as a Litigant

For a middle range power like Australia, involvement in litigation in the International Court is likely to be the exception rather than the rule. The recent regular appearances of Australia should be regarded as unusual and not a situation one should expect to continue. The Court has, however, played a number of important roles in Australia's management of its relations with the international community.

As well as the actual cases in which it has appeared, the threat or possibility of litigation in the International Court against Australia has been a relevant factor in a number of areas of Australian foreign policy throughout the 50 years of the Court's existence.

In the early 1950s, when Australia was less confident in its international dealings, it avoided action being taken against it in the Court by Japan, in relation to jurisdiction over pearl fishing on the continental shelf, by qualifying its acceptance of the jurisdiction of the Court.[11] This and developments in the law of the sea leading to the 1958 Geneva Conventions[12] headed off litigation over the matter. In the late 1960s and early 1970s when consideration was given to enclosing the Great Barrier Reef and Gulf of Carpentaria as internal waters, the possibility of Court action being taken against Australia was certainly a relevant consideration. Australia, in 1964, had accepted the jurisdiction of the Court under the Optional Protocol on Dispute Settlement to the four 1958 Geneva Conventions on Law of the Sea.[13] The action of Canada, in 1970, of specially excluding from its acceptance of the Court's jurisdiction disputes in relation to marine pollution in order to avoid argument over measures taken to protect the Arctic,[14] was a reminder at that time of the need in maritime policy to take account of the possibility of actions being brought before the Court.

Australia's strong commitment to the Court, and the resultant acceptance of the jurisdiction of the Court through the optional clause means it needs to take account of possible Court action in determining how it acts in matters of concern to other States. This exposure to possible Court action serves, on occasion, to moderate the policy choices Australia makes, not just in the maritime area, but more generally. But, for the most part, Australia's general commitment to acting in accordance with international law means that the possibility of Court action is usually not of major concern.

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11 See below, p 31.

12 Convention on the Territorial Sea and the Contigious Zone, Aust Treaty Series 1963, No 12; Convention on the High Seas, Aust Treaty Series 1963, No 12; Convention on Fishing and Conservation of the Living Resources of the High Seas, Aust Treaty Series 1963, No 12; Convention on the Continental Shelf, Aust Treaty Series 1963, No 12.

13 Aust Treaty Series 1963, No 12.

14 For text of declaration of 7 April 1970 see: *International Court of Justice Yearbook 1970–1971*, p 48. This was replaced in 1985 see: *ICJ Yearbook 1985–1986*, p 64; and this in turn by a new declaration on 10 May 1994 see: *ICJ Yearbook 1994–1995*, p 85; excluding in particular disputes about measures taken by Canada in relation to high seas fishing.

Apart from the Court's role as a constraint on policy, the *Nuclear Tests* case showed the potential for a State like Australia to use the Court as a positive weapon to advance particular diplomatic objectives. The ability of Australia and New Zealand, in 1973, to get interim measures of protection from the Court, requiring France to refrain from any atmospheric nuclear tests pending a hearing on the merits, was clearly a significant diplomatic success.[15] The Court action clearly played a role in the subsequent unilateral undertaking by France to agree to cease atmospheric testing. This undertaking in turn provided the Court itself with a let out for its decision at the jurisdictional phase that the actions brought by Australia and New Zealand had become moot.[16] This enabled the Court to avoid pronouncing on the substantive legal issues.

The decision by Australia to use the Court to seek a ruling on a highly political issue was criticised by some at the time. Such an action as the *Nuclear Tests* case clearly does invite the Court to get involved in highly political issues. And such cases, particularly if brought against a State like France, will be fought hard politically both behind the scenes and more openly as a matter of litigation tactics. France stayed away from the actual Court hearings in 1973 and 1974 but nevertheless ensured its legal arguments were before the Court. France used a variety of weapons to put pressure on Australia in response to the litigation but the effect of the political impact of the case led ultimately to the unilateral undertaking by France not to conduct further atmospheric tests.

There have been other cases brought to the Court, including the *East Timor* case, which were highly political, in the sense that any determination of the issues raised directly challenged a critical national interest of one of the parties. While this may be said about most International Court cases, there are clearly some where the objective is more a vindication of a political position rather than resolution of some disagreement over the application of some legal rule. The *Nicaragua* case[17] was one case where the United States was very hostile towards the use of the Court. The *East Timor* case, while highly political, was fought professionally by both sides without the acrimony of the *Nuclear Tests* cases.

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15 By an 8:6 decision, the Court awarded interim measures of protection in favour of Australia and New Zealand requiring France to refrain from further atmospheric testing pending the hearing of the substance of the case. *Nuclear Tests (Australia v France), Interim Protection, Order of 22 June 1973* ICJ Rep 1973, p 99; *Nuclear Tests (New Zealand v France), Interim Protection, Order of 22 June 1973,* ICJ Rep 1973, p 135.

16 By a 9:6 decision, the Court decided that the unilateral undertaking by France not to conduct further atmospheric tests rendered a decision on whether there was jurisdiction moot. *Nuclear Tests (Australia v France), Judgment,* ICJ Rep 1974, p 253; *Nuclear Tests (New Zealand v France), Judgment,* ICJ Rep 1974, p 457.

17 After the finding by the Court that it had jurisdiction, the United States refused to take any further part in the proceedings. The Court went on and gave judgment on the merits. *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America), Merits, Judgment,* ICJ Rep 1986, p 14. The United States also withdrew its optional clause declaration. The American Bar Association, in 1994, recommended a revised declaration be lodged "Report on Improving the Effectiveness of the United Nations in Advancing the Rule of Law in the World" (1995) 29 *International Lawyer* 293 at 295–300.

The Court's response in such cases is normally a prudential one, namely to seek to avoid pronouncing, if possible, on the substantive legal issues. The Court was able to do this in the *Nuclear Tests* case by finding the issue moot. In the *East Timor* case it relied on the absence of a necessary party in order to decline to deal with the merits. These cases highlight the limits of what can be achieved through such litigation in terms of clarifying or advancing the legal position of the protagonists. But, as the *Nuclear Tests* cases showed, there are other tangible and significant diplomatic gains that may be possible from bringing such cases before the Court, whether or not the relevant legal position of the two protagonist States is clarified. The use of the Court by Australia and New Zealand in 1973, in relation to nuclear tests, did demonstrate that the Court can serve as a useful forum in which to publicly articulate the concerns of one State with the actions of another in a way that set piece speeches in purely political forums like the General Assembly do not. Portugal no doubt felt the same about the *East Timor* case. New Zealand obviously thought it worthwhile to seek to reopen the earlier *Nuclear Tests* cases in 1995, despite knowing its legal position for doing so was not strong. Australia considered its own position in relation to reopening its own *Nuclear Tests* case to be weak. When New Zealand sought to reopen its case, Australia, however, immediately sought to intervene in that matter. The Court dealt with this application to intervene by rejecting it at the time it rejected the New Zealand attempt to reopen.[18]

The use of the Court in highly political cases also has adverse consequences which should not be ignored. For instance, the actions by Australia and New Zealand in 1973 have certainly led to a complete refusal by France to have anything to do with the Court (except to insist on there being a French judge).[19] This French attitude may have had a wider impact on the attitude of States throughout the francophone community. The recent attempt by New Zealand to reopen its earlier case against France will, despite the rejection of New Zealand's application, have reaffirmed the French negative attitude to the Court. Unlike in 1973 and 1974 France did, however, turn up and appear before the Court in 1995 (although unofficially and not as Counsel). Few States are as thick skinned as Australia was when it allowed Portugal to bring the *East Timor* case against it, and then turned up to defend its policy approach to that particularly sensitive issue.

Australia's experience with the Court in 1973 and 1974 confirmed that, despite the highly politically charged nature of the Court's task in cases where the political stakes are high, the Court may also have a positive role as an alternative forum in which to raise bilateral issues of major concern to a particular State. This is a role that should be accepted as legitimate, even if in these cases the Court may rarely end up pronouncing on the merits of a dispute.

Australia's experience in other disputes shows that the Court can also be used effectively, in a strategic way, to assist in resolving lesser order disputes, even where litigation has not actually commenced.

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18 ICJ Rep 1995, p 288 at 307.

19 France withdrew its optional clause declaration in 1974 and has not replaced it. The withdrawal is recorded in (1974) 907 UNTS 129.

Australia cleverly did this in 1979 in relation to a dispute that emerged with the United States over diplomatic protection of Dillingham Mining Pty Ltd as a result of the refusal by Australia to issue export permits for mineral sands from Fraser Island. The United States sought damages for what it characterised as an expropriation and sought Australian agreement to go to a Chamber of the International Court over the matter. Australia had agreed not to invoke any "exhaustion of local remedies" defence or to invoke the "domestic jurisdiction" Connally reservation in the United States acceptance of the Court's jurisdiction. It insisted, however, that it would only agree to the case being heard by the whole Court and not by just a Chamber. The United States decided that its best interests were not served by an adjudication of such a case by the whole Court, with a significant third world component, and the matter was never litigated. A settlement was finally reached by an *ex gratia* payment in 1984.[20]

Australia's more recent experience with the Court has been as a defendant in both the *Nauru* and *East Timor* cases. Despite being aware in advance of the possibility of both actions being brought, Australia did not take action to prevent or hinder the actions by revising or withdrawing its optional clause declaration. Instead, it decided to defend both actions and participated fully in the Court processes at all stages. Its conduct in this regard can be contrasted with certain other defendant States.

The strategy adopted by Australia in the two cases was, however, different. This recognised that the ultimate objectives of the two plaintiffs were quite different. Nauru at the end of the day sought monetary compensation. Portugal essentially sought to advance its position in its negotiations with Indonesia under the auspices of the Secretary-General, in an action whose objectives can perhaps be seen as more akin to those of Australia in the *Nuclear Tests* case. In the *Nauru* case, Australia's interests were seen as best served by avoiding a decision on the substantive legal issues. Hence the approach of raising separate preliminary objections. To have these heard and determined took from May 1989 until June 1992. On the basis of the Court's jurisprudence in the *Monetary Gold* case,[21] at least one of the objections raised was seen as having a strong chance of success. However, the Court gave a narrow interpretation to this earlier decision and by 10:4 rejected its application to the facts of the *Nauru* case. It rejected all the other preliminary objections by Australia, except one in relation to an attempt by Nauru to expand the dispute covered by its application. The decision of the Court on its objection exposed Australia to further hearings on the substance, and disclosed the sympathy of the Court for Nauru, regardless of the strictly legal position. The existence of a Prime Ministerial visit to Nauru as part of the meeting of the South Pacific Forum served as a spur for a decision

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20 See Commonwealth Record 4–10 June 1979 (Press Release by Acting Minister for Foreign Affairs); for settlement, see Commonwealth Record 11–17 June 1984, p 1079; reproduced in Brown J, "Australian Practice in International Law 1984–1987" (1991) 11 *Aust YBIL* 162 at 332–3.

21 *Monetary Gold Removed from Rome in 1943 (Preliminary Question), Judgment of June 15th, 1954,* ICJ Rep 1954, p 19.

by the Australian Government to effect a settlement with Nauru, and to seek a contribution to that settlement by agreements between Australia and the other Trusteeship States, the United Kingdom and New Zealand.[22] This settlement with Nauru occurred in September 1993, by which time Australia had lodged its Counter-Memorial but before the second round of written pleadings on the merits. Despite the generous settlement which in total will provide Nauru with 100 million dollars, there is still no rehabilitation and Nauru's financial situation remains as precarious as ever.

In the *East Timor* case, Australia wanted the matter disposed of completely as soon as possible. Despite this, it took over four years to achieve this, from February 1991 until judgment in June 1995. The worst possible outcome would have been a refusal by the Court at a preliminary stage to pronounce on the third parties issue (the principal procedural objection relied on by Australia) on the ground that that issue was inextricably linked to the merits. This would have led to delay and increased uncertainty as to the final outcome, during a period when operations under the Treaty were proceeding. For this reason, among others, the decision was taken not to raise separate preliminary objections. This decision had to be taken before the Court's judgment in the *Nauru* case was available and thus in a situation of uncertainty as to the Court's approach to the *Monetary Gold* principle. It was also a case where it was assessed that the procedural objections could be most strongly established and were likely to be more readily accepted by the Court if one could expose at the same time the complex substantive legal issues. In our assessment, this was a correct strategy, which was significant in achieving the favourable result for Australia in the case. The decision to deal with all aspects of the case in one go, however, meant that there were two rounds of written pleadings by each side. The case was ready for hearing following the completion of these written pleadings in July 1993. However, it was February 1995 before the Court heard the matter. The Court concluded 14:2 that it could not exercise jurisdiction because, as a prerequisite, it would have to rule on the lawfulness of Indonesia's conduct in the absence of that State's consent.[23] This problem of delay in securing a hearing is one matter which Australia, as a recent litigant, is concerned to see addressed by the Court.

Australia's experience is not only as a participant in contentious proceedings. Australia has also participated in a number of the advisory opinions given by the Court. It filed a written submission in 1948 in the *Conditions of Admission to the United Nations* advisory opinion[24] and in the

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22 For a note of the case see, Scobbie I, "Case Concerning Certain Phosphate Lands" (1993) 42 *International and Comparative Law Quarterly* 10. For text of settlement see, Aust Treaty Series 1993, No 26; (1993) 32 ILM 1471. For the settlements with UK and NZ, see respectively Aust Treaty Series 1994, No 9 and Aust Treaty Series 1994, No 17.

23 ICJ Rep 1995, p 90. Fitzgerald B, "Portugal v Australia: Displaying the Missiles of Sovereign Autonomy and Sovereign Community" (1996) 37 *Harvard International Law Journal* 260.

24 *Conditions of Admission of a State to Membership in the United Nations (Article 4 of the Charter), Advisory Opinion,* ICJ Rep 1947–1948, p 57. See *ICJ Pleadings,*

Interpretation of Peace Treaties advisory opinion in 1950.[25] It made both written and oral submissions in the *Certain Expenses* advisory opinion in 1962,[26] with Sir Kenneth Bailey appearing for Australia.[27] Most recently, it made written submissions in the World Health Organisation request for an opinion on the legality of nuclear weapons and was represented by the Foreign Minister and Solicitor-General at the oral hearings on that request and the separate related request made by the General Assembly,[28] the hearings on the two requests being combined.[29]

Australian Nominations for Election

One other involvement of Australia with the Court is through the nomination of candidates for election. In this way Australia can signal the sort of candidate it favours for election. The Statute of the International Court, however, provides for election of its members not from nominations made directly by governments but from nominations by the national groups within the Permanent Court of Arbitration.[30] Australia has had a permanent national group since 1960 which makes nominations for elections to the International Court. Before that *ad hoc* national groups were assembled to consider nominations. Over the years the Australian National Group has regularly made nominations of candidates that it considers worthy of elections. A list of nominations made by the Group since 1945 for regular elections to the Court is at Attachment A to this paper. In more recent years the Group has been more reticent in making nominations of candidates from outside its own electoral grouping or the Asian region.

The current members of the Australian National Group are Sir Ninian Stephen, Sir Anthony Mason, Dr Gavan Griffith and Professor Ivan Shearer. The Group has generally been constituted to include at least the Chief Justice, the Solicitor-General and an academic. This has served to enable the views of the judiciary and the academic community to be considered. The Solicitor-

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Conditions of Admission of a State to Membership in the United Nations (Article 4 of the Charter), pp 30–32 (written statement of Australia).

25 *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion*, ICJ Rep 1950, p 65. See *ICJ Pleadings, Interpretation of Peace Treaties with Bulgaria, Hungary and Romania*, pp 205–09 (written statement of Australia).

26 *Certain Expenses of the United Nations (Article 17(2) of the Charter), Advisory Opinion of 20 July 1962*, ICJ Rep 1962, p 151.

27 See *ICJ Pleadings, Certain Expenses of the United Nations (Article 17(2) of the Charter)*, pp 230–38 (written statement of Australia), pp 372–86 (Oral Statement of Sir Kenneth Bailey).

28 *Legality of the Threat of Use or Nuclear Weapons, Advisory Opinion of 8 July 1996* (1996) 36 ILM 809.

29 See Staker C, "Australia and the Nuclear Weapons Advisory Opinions" *ANZSIL Proceedings of the Fourth Annual Meeting 1996*, p 53; Bracegirdle A, "The ICJ Advisory Opinion on Nuclear Weapons — Substantive Issues" *ANZSIL Proceedings of the Fourth Annual Meeting 1996*, p 67.

30 Articles 4–6 of ICJ Statute. Rosenne S, *Documents on the International Court of Justice*, (1991), p 60. Articles 4–6 are at 61–63.

General is in a position to ascertain the views of government. The Group is, however, independent of government. Article 6 of the Statute of the Court recommends that each national group "consult its highest court of justice, its legal faculties and schools of law and its national academies and national sections of international academies devoted to the study of law". As a result of some criticism in the late 1970s about its lack of consultation, the Group has normally consulted the heads of Australian law schools before making its decisions.[31] The Head of the Office of International Law in the Attorney-General's Department has in recent years acted as Secretary to the Group.

For present purposes, our interest is the role of the group in the nomination of Australian candidates. Sir Kenneth Bailey was nominated in 1951 and in 1966. In 1957, Sir Percy Spender was nominated in preference to Sir Kenneth Bailey. Spender at the time was Australian Ambassador to the United States and a former Minister for Foreign Affairs. In response to a parliamentary question in 1957 by Mr Whitlam, it is recorded that the then Chief Justice, Sir Owen Dixon did not participate in the decision of the Group in 1957. He indicated to the Attorney-General that "as I understand you are to put forward a nomination on behalf of the Government, I would not consider it appropriate for me as a Chief Justice to support or oppose the proposal".[32] The Group assembled for that purpose comprising the Attorney-General, the Acting Solicitor-General and the Dean of the Faculty of Law at the University of Sydney (with the Chief Justice not participating) nominated the preferred government candidate. The nomination of Sir Percy was clearly made by the Group as a result of the Government's indication that it had decided to support him as candidate rather than Sir Kenneth Bailey, and reflects the reality that without government support no candidature will succeed.

In 1966, on the expiry of Spender's term, Sir Kenneth Bailey was nominated by the Group and on this occasion his candidature was supported by government. Unfortunately, although he was excellently qualified, he failed to secure election. The reasons for this are considered later.[33]

The other time when interest in nominations of an Australian for election to the International Court arose was in 1978 when Mr Whitlam expressed interest in being nominated. The Government of the day decided not to support him. There was some comment at the time by Professor Starke in the *Australian Law Journal* about the role of the Group[34] but little other interest. In 1978 no Australian was nominated by the Group, which was made aware by the Department of Foreign Affairs, as on other occasions, of foreign policy considerations relevant to nominations.

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31 See "Australian Practice in International Law 1981–1983" (1987) 10 *Aust YBIL* 542–43.

32 House of Representatives, *Debates*, vol 15, 23 May 1957, p 1894.

33 See below, p 29.

34 See Starke JG, "Rules and Procedures Governing Election of Judges of the International Court of Justice" (1978) 52 *Australian Law Journal* 230; Starke JG, "Nomination by Australian National Group of Candidates for Election to the International Court of Justice in 1978" (1978) 52 *Australian Law Journal* 711.

Since then the question of a possible Australian candidate has been canvassed on a number of occasions informally within government and has occasionally been raised by professional legal bodies. The principal obstacle to such a nomination appears to be not the lack of suitable candidates but the fact that there is probably very little prospect of getting an Australian candidate elected. Nevertheless, the hope remains that it will be possible to get an Australian candidate elected in the future, which may however mean in the next 20 rather than 5 years. From Australia's perspective, greater adoption of a one term policy for judges would facilitate Australia's chances.

Australians on the Court

The only Australian to sit as a permanent judge of the Court has been Sir Percy Spender who sat from 1958 to 1967 and was President of the Court from 1964 to 1967. It was in that capacity that he was called upon to exercise a casting vote to overcome the equality of votes of the Court in the *South West Africa* case in 1966.[35] His vote led to the case being dismissed on jurisdictional grounds, despite an earlier 1962 decision in which the Court decided to hear the merits of the case.[36] The decision was controversial and had an adverse impact on support for the Court from Third World States for a considerable period afterwards, which only recently has been overcome. Sir Percy Spender's vote in another case apparently also caused Australia some diplomatic difficulties. In Sir Garfield Barwick's biography he recounts how his arrival in Cambodia shortly after judgment had been handed down in the *Temple of Preah Vihear*[37] case led to some awkward moments with Prince Sihanouk.[38] This is not the place to analyse the jurisprudence of Sir Percy, other than to note he was a conservative, traditional black letter lawyer like Fitzmaurice from the United Kingdom. He did not bring to the task of being an international judge the breadth of perspective of someone like Philip Jessup from the United States.

One consequence of the vote of Sir Percy in the *South West Africa* case was that any prospects Sir Kenneth Bailey may have had for election in 1966 vanished. As one member of Parliament who attended the 1966 General Assembly reported:

> No amount of argument could convince a large number of delegates that the opinion of Sir Percy Spender was not the opinion of the Australian Government and when we tried to argue objectively with them they merely replied with a very polite smile. We not only suffered the backlash of this decision in the matter of influence and prestige, but it was directly responsible for the defeat of our candidate when he stood for election to the World Court. Last year five vacancies occurred and Sir Kenneth Bailey, our High Commissioner in Canada,

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35 *South West Africa Cases (Ethiopia v South Africa; Liberia v South Africa), Second Phase, Judgment,* ICJ Rep 1966, p 6.

36 *South West Africa Cases (Ethiopia v South Africa; Liberia v South Africa), Preliminary Objections, Judgment of 21 December 1962,* ICJ Rep 1962, p 319.

37 ICJ Rep 1962, p 6.

38 See Barwick Sir G, *A Radical Tory* (1995), pp 193–95.

> stood for one of the vacancies. There were about twelve candidates, Sir Kenneth Bailey polled very well under the circumstances. He is a jurist of world-wide reputation and experience and his qualifications equalled those of any of the candidates offering. I happened to speak to some delegates before the election and they spoke very highly of Sir Kenneth as a man and of his qualifications, but some of them said: "He comes from Australia", then smiled and changed the subject. There is no doubt whatever in my mind that the decision of the Court was directly responsible for his defeat.[39]

Australia's recent involvement with and commitment to the Court certainly suggests its claim to a seat on the Court is better founded than that of many other States. However, having to compete for a limited number of seats available to members of the West European and others (WEOG) geographic grouping to which Australia belongs for UN electoral purposes makes the prospect of success difficult. The United Kingdom, United States and France claim a *de facto* permanent seat because of their Security Council Membership. Only two other seats are traditionally available for WEOG candidates so Australia has to compete with the major European States. Nevertheless, the possibility of an Australian candidate at an appropriate time should not be ruled out. Any such candidature will need, however, the full support of the government and a commitment by it of the considerable resources that are necessary these days for most United Nations election campaigns.

Australia has also been represented on the Court through the presence of Sir Garfield Barwick and Sir Ninian Stephen as *ad hoc* judges in the *Nuclear Tests* and *East Timor* cases respectively. Sir Garfield served as *ad hoc* judge in both the Australian and New Zealand cases against France. When New Zealand sought to reopen its 1973 case against France, it obtained a letter from Sir Garfield indicating that he no longer wished to act in the position of *ad hoc* judge in that case. This enabled New Zealand to appoint a replacement *ad hoc* judge, Sir Geoffrey Palmer, to sit on the bench and hear the application to reopen the original 1973 case.[40]

Sir Garfield recalls his experience at the Court in his recent biography.[41] He refers particularly to three issues:

- the wearing of wigs by Australian counsel,
- the forecast by then Prime Minister Whitlam that Australia would win its interim measures claim, and
- the finding that the *Nuclear Tests* case was moot.

In relation to this latter matter he says "Perhaps I was the most vociferous in condemning as unjudicial what was being done, acting on a press report [by the French President] without giving the plaintiff parties an opportunity to be heard on the proper course to be taken".[42] It would seem clear that Sir Garfield's advocacy within the Court was a relevant factor in the fact that a strong joint

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39 House of Representatives, *Debates,* vol 54, 9 March 1967, p 523.
40 ICJ Rep 1995, p 288 at 291.
41 Note 38 above, pp 254–58.
42 *Ibid,* p 257.

dissenting opinion criticising the actions of the majority was given in that case by four of the strongest members of the Court: Onyeama, Dillard, Waldock and Jimenez de Arechaga.

In relation to the public prediction by Mr Whitlam, this caused Australia and Sir Garfield considerable embarrassment and the Court itself spent considerable time investigating the source of the prediction. Sir Garfield had no communication with the Australian Government before the judgment. Mr Whitlam maintained that the prediction was "purely speculative".[43]

Sir Ninian Stephen who sat in the *East Timor* case was part of the majority and saw no need to write a separate opinion, no doubt making his contribution to the drafting of the Court's opinion.

Australia did not nominate an *ad hoc* judge in the *Nauru* case, given Nauru's agreement to also refrain from making a nomination.

One other Australian involvement with the Court is the fact that the Registrar of the Court from 1966–1980, Stanislaus Aquarone, had Australian nationality.

Optional Clause Declaration

Australia has consistently had in place an optional clause declaration under Article 36(2) of the *Statute of the Court.* This allows another State, also making an optional clause declaration, to bring disputes with Australia before the Court without prior consent, provided the dispute falls within the terms of the declaration. Australia can, however, on a basis of reciprocity invoke any limit contained in the other State's acceptance of the Court's jurisdiction. Thus, a State's reservations to its acceptance both protects it but can also be invoked by any other State against which the first State may seek to bring an action.

Australia's current declaration dates from 13 March 1975. It contains only one exception from acceptance of jurisdiction, namely "any dispute in regard to which the parties have agreed or shall agree to have recourse to some other method of peaceful settlement".[44] This is a common reservation designed to avoid a duplication or conflict between dispute settlement mechanisms where a particular method has been previously specified. Australia sought to rely on this reservation in the *Nauru* case, but unsuccessfully, the Court holding that there was no alternative agreed method of settlement applicable in that case.[45]

At present, 58 countries accept the compulsory jurisdiction of the Court, and 27 of these have, like Australia, accepted the Court's jurisdiction without significant qualification.[46] Australia is under the terms of its current declaration

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43 For the considerable correspondence between Australia and the Court, see *ICJ Pleadings, Nuclear Tests*, vol 11, pp 381–82, 386–95, 401, 406–08, 410–13, 415–16. Whitlam told the Court the prediction was "purely speculative", made in course of an informal talk to lawyers and certainly not intended for publication.

44 (1995) 49 *ICJ Yearbook 1994–1995*, p 80.

45 ICJ Rep 1992, p 240.

46 The texts of declarations accepting the optional clause jurisdiction including Australia's are set out in the Annual Yearbooks of the ICJ.

vulnerable to contentious proceedings by other countries accepting the jurisdiction, but, as indicated above, it is on the basis of reciprocity entitled to avail itself of the benefit of any reservation that the State bringing proceedings against it has made.

The 1975 Declaration had been preceded by a 1954 Declaration[47] that contained a number of significant reservations. By 1975 these were no longer seen as of continuing relevance. For instance, the reservation that prevented disputes concerning the continental shelf from being taken to the Court, except where the parties had first adopted a *modus vivendi* pending the final decision of the Court, had been overtaken by developments in the law of the sea. It is to be noted that this reservation had not been worded so as to preclude all possibility of disputes on this matter being heard by the Court. It sought only to insist that there first be a *modus vivendi*, designed particularly to ensure that if Japan wanted to litigate the issue of pearl fishing, some arrangement was reached in advance to allow that fishing to continue to occur on an agreed basis. As already noted, the rapid evolution of the continental shelf doctrine soon made this reservation unnecessary.

Other reservations removed in 1975 were ones dealing with 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". The old notion that members of the Commonwealth resolved disputes *inter se* and outside the normal framework for settlement of interstate disputes had become inappropriate by 1975. The United Kingdom itself only maintains such a reservation in relation to disputes with members of the Commonwealth in relation to facts or situations arising before 1 January 1969. Certain Commonwealth countries do, however, maintain such a reservation, for example, Canada.

The 1975 Declaration had been foreshadowed by the then Prime Minister, Mr Whitlam, in his report to Parliament in February 1975. On his return from an overseas trip during which he visited the Netherlands he said:

> I take this opportunity to inform the House that as an earnest of our respect for the Court, Australia proposes to forego her existing reservations and, in any dispute which we litigate before the Court, to accept its judgment unreservedly.[48]

Mr Whitlam had a longstanding interest in the Court and as early as 1961 had urged Australia to abandon the qualifications on its acceptance of the jurisdiction.

The 1975 Declaration has remained in place ever since and there has been very little public interest in Australia's acceptance. At the time of the decision in the *East Timor* case, there were a few comments from the mining and petroleum industry which in a low key way raised the question of why Australia had allowed itself to be exposed to action in that case. If the Court decision had gone against Australia, there may have been a much stronger negative reaction.

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47 For text see *ICJ Yearbook 1972–1973*, p 52; or Holder WE and Brennan GA (eds), *The International Legal System* (1972), p 922.

48 House of Representatives, *Debates*, vol 93, 11 February 1975, p 64.

Australia's Acceptance of the Court's Jurisdiction

For major States like the United States, acceptance of the jurisdiction of the Court under the optional clause exposes that State to the likelihood of all sorts of unwanted litigation from smaller States with a complaint against them. Only the United Kingdom among the permanent five members of the Security Council has made an optional clause declaration, and this is subject to a number of reservations.

In relation to most international issues, Australia is a middle level player. The risk of international legal action being taken unilaterally against it in this situation is low. Viewed regionally, however, Australia's position is rather different. It is the former colonial power in Papua New Guinea. As the *Nauru* case showed, its involvement in Pacific Island resource developments may expose it to legal actions by those seeking to secure financial assistance from Australia. Nauru can point to its very generous financial settlement with Australia as the outcome of its use of the International Court. Recent complaints about the conduct of Australian mining companies in Papua New Guinea also highlight the "big power" role Australia inevitably assumes in its immediate vicinity. These are all relevant facts if Australia wishes to reconsider the terms of its acceptance of the Court's jurisdiction under the optional clause.

Australia's commitment to the Court's jurisdiction reflects, however, its support for the international rule of law and the benefits that Australia and the whole of the world derive from it. The Australian interests which are benefited by this were recently set out in a paper by an officer of the Department of Foreign Affairs and I repeat the key elements of this:

> **First**, our acceptance of the Court's jurisdiction demonstrates our clear commitment to the primary role of international law in the conduct of international relations. Australia's policy has been to support and advocate a rules-based international system, not merely because of the inherent fairness of such a system for all States, but also because as a middle-sized power it is very much in our interest to do so. Our experience suggests that less powerful countries, such as Australia, are best able to advance their interests through rules-based systems of multilateral co-operation. The alternative, a sort of "law of the jungle" in which those with more economic, political or military power inevitably prevail at the expense of those with less, clearly has greater potential to raise international tensions. Australia commonly finds that multilateral negotiations aimed at binding and enforceable rules provide better chances for the advancement of our interests than would be possible with bilateral arrangements. An important example of how this approach has worked to our advantage is the Uruguay Round of GATT. Through our leadership of the Cairns group we were able, in connection with other members of the group, to win very important market access benefits for our agricultural exporters. Those achievements would not have been possible without collective action within an agreed framework of agreed principles and rules.
>
> Following the end of the cold war, the 1990s has seen the breaking down or attenuation of traditional alliances which formerly characterised international negotiations. Australia can no longer assume it can rely on coalitions with similar-sized Western countries to protect our interests, and that has been made

very clear to us in recent multilateral environment negotiations. It is more important now than ever before that we build opportunities for the settlement of disputes through mechanisms like the ICJ, for our own broad security purposes.

Our reputation as a country with a solid commitment to these goals has stood us in good stead in many fields, including in the recent Nuclear Non-Proliferation Treaty negotiations.

Automatic submission to some form of compulsory international dispute settlement mechanism has become increasingly common in multilateral conventions (eg, GATT/WTO or the United Nations Convention on the Law of the Sea). Australia has strongly supported this development, which encourages the resolution of international disputes by application of uniform and consistent rules rather than by recourse to political and economic strength.

Australia's acceptance of the Court's jurisdiction forms part of a broader peace-building strategy in which Australia supports, and encourages other States to support, international legal regimes and dispute resolution mechanisms.

Secondly, acceptance of the Court's jurisdiction is an important way in which Australia has been able to demonstrate its acceptance of the central role of the United Nations and its organs as a forum for the peaceful settlement of international disputes. In his key statement, *Agenda for Peace*, the Secretary-General of the UN urged all member states to accept the jurisdiction of the Court without reservation before the year 2000. And we believe that there *has* been an increased acceptance of the Court's authority and stature in the past few years. This is demonstrated by the significant increase in the number of cases lodged in the Court in recent years and by the acceptance of the Court's compulsory jurisdiction by countries which previously had not done so, including, it is pleasing to note, several from the former Eastern Bloc (since 1990, Poland, Hungary, Bulgaria, Estonia, Madagasca, Spain, Cameroun, Greece and Georgia). Although the numbers are still low, the trend is encouraging. The fact that there are many countries which do not yet share Australia's commitment to the ICJ should not, of itself, discourage us from exercising leadership in this area.

A **third** and related point is that a demonstrated commitment to a rules-based system also enables Australia credibly to make representations to other countries on matters of concern to which international legal principles are relevant, such as free and fair trade under GATT/WTO, environmental law, humanitarian law and the use of military force, the law of the sea and human rights. This credibility is of course dependent on our being seen to practi[s]e what we preach. [49]

Given these important benefits for Australia from its commitment to a rules based international system, of which its acceptance of the jurisdiction of the Court is one manifestation, the question is whether there are any negative consequences which cast doubt on the maintenance of a general acceptance of the Court's jurisdiction in terms such as at present. Certain possible risks of litigation arising out of Australia's regional role have been mentioned. But the existence of the risk does not require an immediate change to our optional clause declaration. None of the Pacific region countries have declarations in

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49 O'Sullivan P, "Australia and the International Court of Justice", *The East Timor Case in the ICJ* (1995), Martin Place Papers No 4. See also Burmester H, "National Sovereignty, Independence and the Impact of Treaties" (1995) 17 *Sydney Law Review* 127 at 142.

force, except for New Zealand. Nauru's declaration has expired, having only been made for a five year period from 29 January 1988. Papua New Guinea has never made an optional clause declaration. Indonesia has always opposed the compulsory jurisdiction of the Court and is unlikely to lodge a declaration unless there is a major change of policy.

The other thing to remember is that international disputes are not created overnight. There may not need to be a lengthy period of dispute but, in order to establish a "legal dispute" within the meaning of Article 36(2) of the Statute of the Court, a party wishing to bring proceedings will normally need to have communicated its legal claim to the defendant State in some form before commencing proceedings. For a State to be taken completely by surprise would be unusual. Australia may have been surprised at the actual timing of the *Nauru* and *East Timor* applications but was certainly aware of the possibility of litigation and could, if the government had wanted, acted in advance to amend its declaration.

There may be a case for including a reservation, such as that in the New Zealand declaration,[50] that precludes jurisdiction where a State has made an optional clause declaration only for the purpose of the particular dispute or less than 12 months before the filing of the application. A number of States have such a declaration. Such a reservation would ensure Australia was not taken by surprise by some State not previously a party to the optional clause. But, as I have indicated, complete surprise is in any event very unlikely.

Of course, even amending the declaration to include certain reservations will not prevent baseless claims from being brought by a State determined to use the Court for its own diplomatic purposes. A recent example of this was the dispute between Canada and Spain over the regulation of high seas fishing. Canada amended its declaration to avoid the jurisdiction of the Court in relation to disputes on such matters. But Spain still considered it worthwhile to commence proceedings and force Canada to argue the jurisdictional point.[51]

One other matter to remember is that in relation to many potential disputes, there may be other bases of jurisdiction in existence that may be able to be relied upon to bring a case before the Court, or to trigger some alternative dispute settlement mechanism. Under the United Nations Convention on the Law of the Sea, there is a detailed set of dispute settlement provisions. Australia can choose between certain tribunals including the Court for the resolution of disputes and can exclude jurisdiction over certain limited categories of dispute arising under the Convention. Australia has not so far made any declarations under that Convention.[52]

Australia is also party to many treaties providing for the International Court to have jurisdiction in relation to disputes arising under the particular treaty. Of note are the Optional Protocols to the Vienna Convention on Consular

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50 *ICJ Yearbook 1994–1995*, p 104.

51 *Fisheries Jurisdiction (Spain v Canada), Order of 2 May 1995*, ICJ Rep 1995, p 87.

52 Aust Treaty Series 1994, No 31.

Relations.[53] Australia also remains party to the 1928 General Act for the Pacific Settlement of International Disputes,[54] the principal source of jurisdiction relied on in the *Nuclear Tests* case, but there are now very few other parties to this treaty.

Conclusion

A review of Australian policy and practice shows a consistent commitment to use of the International Court as the best forum for the settlement of disputes between States. None of the supposed risks or disadvantages that are occasionally raised appear, in fact, to expose Australia unduly to litigation before the Court. As in the *Nauru* and *East Timor* cases, Australia's commitment to abide by the Court's processes and decisions probably furthers Australia's longer term and overall diplomatic interests better than would a decision to walk away or to seek to prevent the adjudication of the disputes. While acceptance of the Court's jurisdiction may involve some costs (for example, the cost of defending a case or reaching a financial settlement), in the overall scheme of things these seem a relatively small price to pay. Australia's commitment to the Court remains an important demonstration of its commitment to a rules based international system. Australia's significant involvement with and support for the Court over the last 50 years, provides a strong basis which Australia can use to seek reforms and improvements to the Court and to ensure it plays an active role in the settlement of international disputes in the next 50 years.

53 Aust Treaty Series 1968, No 3 and 1973, No 7.
54 (1929) 93 LNTS 343.

Attachment A

Nominations made by the Australian National Group for the Regular Elections to the International Court

1945

Bailey	(Australia)
McNair	(UK)
Hackworth	(USA)
Guerero	(Guatemala)

1948

No Nominations

1951

De Visscher	(Belgium)
Klaested	(Norway)
Hackworth	(USA)
Benegal Rau	(India)

1954

No Nominations

1956

Sir Percy Spender	(Australia)

1960

Jessup	(United States)
Klaestad	(Norway)
Koretsky	(USSR)
Zafrulla Khan	(Pakistan)

1963

No Nominations

1966

Bailey	(Australia)

1969

Khoman	(Thailand)
Stavropoulos	(Greece)
Jimenez de Arechaga	(Uruguay)

1972

No Nominations

1975

Hambro	(Norway)
Lachs	(Poland)
Oda	(Japan)
Onyeama	(Nigeria)

1978

Sette Camara	(Brazil)
Ago	(Italy)
El Erian	(Egypt)
Baxter	(USA)

1981

Tun Mohamed Suffian	(Malaysia)

1984

Elias	(Nigeria)
Ni	(China)
Oda	(Japan)
Sucharitkul	(Thailand)

1987

No Nominations

1990

Jennings	(UK)
Guilllaume	(France)

1993

Fleischhauer	(Germany)
Oda	(Japan)
Shi	(China)

1996

Schwebel	(United States)
Kooijmans	(Netherlands)