

Supplementary submission to the Senate Foreign Affairs, Defence and Trade References Committee, Inquiry into Australia's declarations made under certain international laws, by Professor Clinton Fernandes, UNSW Canberra. 2 December 2019.

Submissions 10 and 3 (DFAT and Rothwell-Arditto) have a similar argument, and make the same error of omission.

Submission 10 by DFAT says, "It is common practice for States to make a declaration," that "many other countries have made similar declarations" to the Law of the Sea Convention and that "eight countries have made a reservation to the International Court of Justice statute specifically regarding maritime boundaries."

The reality is that of the 21 States that made declarations under Article 298(1)(a) of LOSC, only nine also made declarations under Article 36(2) of the ICJ Statute. And **out of these nine, only Australia explicitly excluded sea boundary delimitation disputes** from the jurisdiction of the ICJ.

If you make a declaration only under Article 298(1)(a) of LOSC, you are still open to ICJ jurisdiction because Article 282 of LOSC says that an agreement to submit a dispute to a specified procedure may be reached 'otherwise'. You have to specifically make another declaration under Article 36(2) of the ICJ Statute because "otherwise" includes a standing offer to settle disputes in the ICJ. And only Australia explicitly excluded sea boundary delimitation disputes from ICJ jurisdiction in our Article 36(2) declaration.

No other country had made both declarations and furthermore explicitly excluded sea boundary delimitation disputes. DFAT surely knows this: Anne Sheehan, now of the Office of International Law in the Attorney-General's Department, explained this in the University of Queensland Law Journal in 2005.¹

Submission 3 by Rothwell-Arditto make the same omissions in paras 8 ("Reservations to the jurisdiction of the ICJ of this nature are not uncommon") and 13 ("41 UNCLOS parties have made Article 298 declarations...").

DFAT says it "considers negotiation of maritime delimitation disputes to be the best approach" (Conclusion) and Rothwell-Arditto echo this five times (paras 1, 6, 9, 14, and in their Conclusion as well, para 22). What they both omit is that negotiations are **always** the preferred method of solving disputes; litigation is **always** the last resort.

What's so unique about maritime boundary disputes that rules out litigation entirely?
Could it be fear that Timor-Leste might have a strong case?

DFAT's reasoning is contradicted by a 1978 Cabinet Submission which states that the real problem is Indonesia's hostility to compulsory third party settlement of disputes:

¹ Anne Sheehan, "Dispute Settlement under UNCLOS: The Exclusion of Maritime Delimitation Disputes" [2005] UQLawJl 7; (2005) 24(1) University of Queensland Law Journal 165.

“Indonesia has not accepted and is unlikely to accept the compulsory jurisdiction of the Court because it shares the traditional antipathy of less developed countries to compulsory third party settlement of disputes.”²

Further: Australia resisted all attempts at Compulsory Conciliation. It challenged the Commission’s jurisdiction and lost. It then rushed to sign the Timor Sea Treaty two months before the Conciliation Commission could hand down its report – to maintain the charade that it was negotiating in good faith all along. Rothwell-Arditto (para 15) applauded this, saying it shows “how willing Australia was to negotiate the treaty in good faith.”

I don’t know if DFAT and Rothwell-Arditto shared their submissions with each other beforehand but that’s something the Committee might wish to establish.

To save time, I have provided written comments on paras 21 and 23 of Rothwell-Arditto’s Conclusion to highlight a few facts which go missing in their avalanche of applause.

Rothwell-Arditto para 21: Australia’s nomination and support for the election of Sir Percy Spender to the International Court of Justice (1958-1967).

Here’s what they omit: Percy Spender’s role in supporting apartheid-era South Africa’s position at the ICJ was notorious.³ The International Tribunal on the Law of the Sea (ITLOS) was created precisely because developing countries stopped trusting the International Court of Justice, and the reason they didn’t trust it was Spender’s role in the 1966 case relating to South West Africa, today called Namibia. Spender held that that the ICJ lacked jurisdiction, “*on a theory not advanced*” even by South Africa.⁴ Described as “the most controversial judgment in its history,”⁵ one consequence was, as Henry Burmester, Chief General Counsel of Australia’s Attorney-General’s Department observed, “any prospects Sir Kenneth Bailey [Australia’s nominee to the ICJ] may have had for election in 1966 vanished.”⁶

An Australian MP stated in Parliament in 1967:

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

² Cabinet Submission 5261 - Australia-Indonesia maritime delimitation negotiations - Decision 10362, NAA: A14039, 5261, Barcode 31429247. Page 3, para 4.

³ South West Africa Cases (Ethiopia v South Africa; Liberia v South Africa), Second Phase, Judgment, ICJ Reports 1966.

⁴ Judge Jessup, Dissenting Opinion, South West Africa Cases, Second Phase, Judgment, I.C.J. Reports (1966), 328, emphasis in original.

⁵ John Dugard, *The South West Africa/Namibia dispute : documents and scholarly writings on the controversy between South Africa and the United Nations* (Berkeley: University of California Press, 1973), 292.

⁶ Henry Burmester, “Australia and the International Court of Justice,” *Australian Year Book of International Law* 1996, (Vol 17, pp 19-37).

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, 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.⁷

Rothwell-Arditto para 21: "proceedings have been commenced against Australia by two of the smallest states in the international community: Nauru and Timor-Leste. These two cases highlight the capacity of the court to provide an avenue for justice by some of the smallest states in the international community."

What they omit:

In 1993, Australia's overwhelming power saw it lean on Nauru to accept a \$57 million cash payment and an annual aid program of \$2.5 million in real terms over twenty years. In return, Nauru had to make an undertaking, confirmed by treaty, "that it will make no claim whatsoever, whether in the International Court of Justice or otherwise, against Australia in relation to any alleged liability on the part of Australia for any conduct during the period of the Mandate and Trusteeship over Nauru."⁸

The Timor-Leste case refers to the raids on the home of lawyer Bernard Collaery and his client, former Australian Secret Intelligence Service officer Witness K, in December 2013, and seizure of documents belonging to Timor-Leste in breach of diplomatic immunity and attorney-client privilege. When Australia refused to return the documents, Timor-Leste went to the International Court of Justice and obtained an order compelling Australia to seal the documents and not to interfere with Timor-Leste's lawyers. This was Australia's first-ever loss at the ICJ.

Rothwell-Arditto para 23: "There is no evidence that other States have been completely barred from commencing international legal proceedings against Australia in the ICJ as is evidenced by Timor-Leste commencing proceedings against Australia in the 2014 Documents and Data case."

What they omit: This was not a case about maritime boundary delimitation, and therefore completely irrelevant to the Committee's Inquiry.

⁷ Cited in Henry Burmester, "Australia and the International Court of Justice," pp 28-29. Original in House of Representatives Hansard, 9 March 1967, p. 523.

⁸ NAA: A14218. Cabinet Decision 2092 (Amended)– Nauru– International Court of Justice case, 5 July 1995.

Rothwell-Arditto para 23: “notwithstanding Australia’s Article 36(2) ICJ declaration and Article 298 UNCLOS declaration, Timor-Leste was able to commence compulsory conciliation proceedings against Australia in reliance upon Article 298(1)(a) which facilitated the negotiation of the 2018 Timor Sea Treaty.”

What they omit: Australia resisted this process all the way. It challenged the jurisdiction of the Compulsory Conciliation Commission and lost. According to an Answer to a Question on Notice in Senate Estimates (Foreign Affairs, Defence and Trade portfolio), as of 22 June 2018, the total legal costs for the Commonwealth's participation in the conciliation between Australia and Timor-Leste on maritime boundaries were \$3,507,228. Final accounts for costs incurred by the Conciliation Commission are yet to be issued.⁹

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⁹ Question on notice no. 17. Portfolio question number: 18. 2018-19 Budget estimates. Foreign Affairs, Defence and Trade Committee, Foreign Affairs and Trade Portfolio.