

**AUSTRALIAN DECLARATION UNDER PARAGRAPH 2 OF
ARTICLE 36 OF THE STATUTE OF THE INTERNATIONAL COURT OF
JUSTICE 1945, LODGED AT NEW YORK ON 22 MARCH 2002.**

Documents tabled on 18 June 2002:

- **National Interest Analysis**
- **Text of the proposed treaty action**

Australian declaration under paragraph 2 of Article 36 of the Statute of the International Court of Justice 1945, lodged at New York on 22 March 2002.

NATIONAL INTEREST ANALYSIS

Proposed binding treaty action

1. Australia's declaration under Article 36(2) of the Statute of the International Court of Justice was withdrawn and replaced with a declaration containing different terms.
2. This action terminates the application of Australia's previous declaration under Article 36(2). The new declaration applies from the date it was lodged.

Date of proposed binding treaty action

4. The notice advising the withdrawal of the previous declaration and replacing it with a new declaration was signed on 21 March 2002.
5. The declaration was lodged and entered into force on 22 March 2002.
6. The Minister for Foreign Affairs wrote to the Chair of the Joint Standing Committee on Treaties on 25 March 2002, advising that the treaty action took place on 22 March 2002 with immediate effect. The reason for taking the treaty action prior to tabling and consideration by the Committee relates to its sensitivity. If it became known that the Government intended to take this action before the new declaration was lodged, then another country may have been able to pre-empt the Government's decision and commence proceedings against Australia prior to Australia's lodgement of the declaration.

Date of tabling of the proposed treaty action

7. 18 June 2002.

Summary of the purpose of the proposed treaty action and why it is in the national interest

8. The purpose of the treaty action is to place some limitations on Australia's acceptance of the compulsory jurisdiction of the International Court of Justice (ICJ). The changes are in line with the Government's view that countries like Australia that have a broad and long term acceptance of the jurisdiction of the International Court of Justice are not exposed to the possibility of litigation by countries that only accept the compulsory jurisdiction of the Court for a short time or for a specific purpose. It is also the Government's view that maritime boundary disputes are best resolved through negotiation and not litigation.

Reasons for Australia to take the proposed treaty action

9. Only States can bring contentious matters before the ICJ for adjudication. The jurisdiction before the ICJ is based on consent. There are three basic forms of consent. First, the countries may enter into a 'compromis' (agreement) to refer a specific dispute to the Court. Secondly, a treaty to which both of the countries involved are parties may contain a provision referring disputes to the court. Thirdly, a State may lodge a declaration under Article 36(2) of the ICJ Statute ('the optional clause'). That article provides that States may at any time declare they recognise as compulsory and without special agreement the jurisdiction of the ICJ. States can place conditions or exceptions on such a declaration. If the dispute in question is covered by the optional clause declarations of the countries involved, then the Court has jurisdiction to hear the dispute. (This is known as the 'compulsory jurisdiction' of the Court). The Declaration that was lodged on 22 March relates to this third form of consent to the jurisdiction of the Court.

10. Australia is one of 61 countries out of the 189 members of the United Nations that has accepted the compulsory jurisdiction of the ICJ. Of those countries the majority have made reservations of various types to the jurisdiction of the ICJ.

11. Australia's acceptance of the compulsory jurisdiction of the ICJ under its previous 1975 declaration was very broad. It enabled countries to bring an action against Australia notwithstanding the fact that those countries may not have demonstrated a commitment to the process of compulsory jurisdiction of the ICJ. For example, they could lodge a declaration and then almost immediately commence an action against Australia.

12. The new declaration limits Australia's acceptance of the compulsory jurisdiction of the ICJ. This means that an action cannot be commenced against Australia in the following circumstances:

- (a) where the parties have agreed to other peaceful means of dispute resolution;
- (b) where disputes involve maritime boundary delimitation or disputes concerning the exploitation of an area in dispute or adjacent to an area in dispute; and
- (c) where a country has accepted the compulsory jurisdiction of the court only for a particular purpose or has accepted the compulsory jurisdiction of the court for a period of less than one year.

13. The first listed exception, where parties have agreed to other peaceful means of dispute resolution, was included in Australia's previous declaration accepting compulsory jurisdiction of the ICJ lodged in 1975. The purpose of this exception is to ensure that where countries involved have chosen another means of dispute resolution in relation to a particular type of dispute that choice is respected and cannot be disregarded. More than half the States that have accepted ICJ jurisdiction have made this exception including the United Kingdom, Canada and Japan.

14. The exclusion of maritime boundary disputes from the declaration of acceptance of the compulsory jurisdiction of the ICJ is consistent with the Government's concurrent action of excluding sea boundary delimitation from the compulsory dispute mechanism procedure under the United Nations Convention on the Law of the Sea.

15. The exception concerning maritime boundary disputes is consistent with the Government view that such disputes are best resolved through negotiation rather than by a Court or Tribunal. Negotiation allows the parties to work together to reach an outcome that is acceptable to both sides. The Government is, and remains, committed to the peaceful settlement of disputes.

Australia, as an island continent, has some of the longest maritime boundaries in the world. It has maritime boundaries with many countries and the Government is concerned that every endeavour should be made to reach an agreed resolution of any maritime boundary disputes through peaceful negotiation.

16. The purpose of the third exception is to ensure that countries like Australia that have a broad and long term acceptance of the jurisdiction of the International Court of Justice are not exposed to the possibility of litigation by countries that only accept the compulsory jurisdiction of the Court for a short time and for a specific purpose.

Obligations

17. The declaration means that Australia accepts the jurisdiction of the ICJ over a dispute with another country that has also made a declaration accepting jurisdiction over that type of dispute. However as noted above, the Australian acceptance is subject to a number of exceptions:

- (a) where the parties have agreed to other peaceful means of dispute resolution;
- (b) where disputes involve maritime boundary delimitation or disputes concerning the exploitation of an area in dispute or adjacent to an area in dispute; and
- (c) where a country has accepted the compulsory jurisdiction of the court only for a particular purpose or has accepted the compulsory jurisdiction of the court for a period of less than one year.

18. Australia's acceptance of the compulsory jurisdiction of the International Court of Justice in relation to other disputes remains unchanged.

Implementation

19. No new implementing legislation or amendment to legislation is required.

Costs

20. Australia will incur no additional costs through making this Declaration.

Consultation

21. There was no consultation outside Federal Government. The Declaration falls within the sensitive treaty action exception to the normal processes of tabling treaties prior to their entry into force. The action was not made public prior to it being taken to ensure the effectiveness of the declaration was maintained. Public knowledge of the proposed action could have led other countries to pre-empt the declaration by commencing an action against Australia in the International Court of Justice that could not be brought once the new declaration was made.

Regulation Impact Statement

22. No Regulation Impact Statement is required.

Future treaty action: amendments, protocols, annexes or other legally binding instruments

23. It is open to Australia to modify its acceptance of the compulsory jurisdiction of the ICJ under article 36(2) by withdrawing and replacing its declaration at any time.

Withdrawal or denunciation

26. Australia can withdraw its declaration accepting the compulsory jurisdiction of the ICJ under article 36(2) at any time.

Contact details

Public International Law Branch
Office of International Law
Attorney-General's Department.