Supplementary submission to the Senate Foreign Affairs, Defence and Trade References Committee

Australia's declarations made under certain international laws

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This second submission, supplementary to the existing submission 6, is intended to elucidate certain matters that emerged in the Committee's hearing of 2 December 2019, as well as expanding on my own answers to some of the questions I was asked. A few of the exchanges between Committee members and witnesses raise issues on which my institutional memory appears, somewhat to my surprise, to be stronger than that of DFAT witnesses and may, I hope, be of assistance to the Committee. I set them out in the order of their occurrence in the transcript, before adding a concluding point.

My answer to Senator Patrick's question on page 8 of the transcript regarding the motivation behind the 2002 declarations

I said in my evidence that the East Timor context was the underlying thinking within the Government at the time. I should perhaps have clarified that, as far as I recall, no colleague in DFAT or any other Department ever said to me, or in my presence, that this was the reason, but I never had cause to draw any other inference. With the Indonesian boundaries having been settled a few years earlier, the only other maritime boundary delimitation looming for Australia at the time was the one that fairly soon afterwards led to the 2004 treaty with New Zealand. At that time, i.e. in 2001-02, the threat of litigation unilaterally instituted by New Zealand against Australia or for that matter *vice versa* would have been a dramatic departure from past practice in settling trans-Tasman disagreements – it was not until 2007 that this happened, when New Zealand launched the WTO *Apples* case. So, while not altogether unthinkable, the New Zealand situation would be most unlikely to have been a significant factor in the decision.

Just as telling is what happened in the months following the 2002 declarations. The interest they generated in academic and other circles led, at several conferences and other public events I attended, to Government speakers privy to the decision-making being asked outright, when the floor was opened for questions after their prepared remarks, whether the fear of being taken to compulsory dispute settlement by East Timor was the reason for the declarations. The standard answer invariably given was "they apply across the board to all countries", or words to that effect, i.e. the senior officials concerned could simply have replied "No", if that were the true position, yet did not. In my experience public servants are at pains not to utter falsehoods on

such occasions, but sadly half-truths were then, and doubtless still are, an accepted and even subtly encouraged stock-in-trade in response to controversial questions, and the standard answer should be seen in that light.

My answer to Senator Patrick's next question on sudden withdrawals of consent to jurisdiction

The contrast with Canada is instructive, in relation to both the turbot dispute against Spain, and a similar earlier step in 1970 when Canada modified its declaration under Article 36(2) of the ICJ Statute in conjunction with the passage that year of the Arctic Waters Pollution Prevention Act, asserting an at that time unprecedented jurisdiction over foreign ships up to 100 miles offshore. While Canada can be criticised for lacking the courage of its convictions, to its credit, it did on both occasions at least candidly acknowledge that it would otherwise have been vulnerable to a legal challenge that might well succeed, a risk that it was not prepared to take. It is a matter of profound regret that Australia has chosen not to follow this Canadian example.

Questioning of me by Senator Abetz spanning pages 12 and 13 of the transcript in relation to the frequency of emergence of new countries

Having now read the transcript of the evidence of Professor Fernandes, and also a related question put to Mr Larsen of DFAT later in the hearing by Senator Abetz, I have gained a clearer understanding of the context of these questions. I thus take it that what Senator Abetz wished me to comment on was not whether the emergence of new countries as such is unusual, but rather whether it is unusual for them to sign an instrument as complex as the Timor Sea Treaty on the same day as gaining their independence, or so soon afterwards that there would clearly not have been time for any negotiation of it with the newly independent State. How often this occurs I cannot say, but plainly this was not a case of Australia springing on an unsuspecting East Timor a demand to sign a previously unseen document at the independence ceremony. Rather, the treaty and a preceding (2001) instrument not of treaty status, but of similar content, were both negotiated with the United Nations Transitional Administration in East Timor (UNTAET). To the best of my recollection UNTAET had gone to considerable lengths to ensure that these agreements as they took shape had the support of the representatives of the East Timorese people who would go on to become leading members of its first government. If anything, the 2002 treaty was then seen more positively by the new government of East Timor, which was keen for Australia to ratify it and thus bring it into force, than by Australia itself. This explains the disquiet, reflected in the passage quoted by Senator Abetz on page 13, caused by the delay in Australia's ratification of it because of the perceived linkage with the international unitisation agreement for Greater Sunrise, on which, as later came to light through the 2006 CMATS Treaty, East Timor was far less keen.

Questioning of Professor Fernandes by Senator Abetz spanning pages 13 and 14 of the transcript in relation to the allegation that the declarations were made to further the interests of Woodside rather than of Australia

The mention at the hearing of the international unitisation agreement referred to in the previous paragraph, in whose negotiation I took part, reminds me that members of the Joint Standing Committee on Treaties, in advance of its hearing on that agreement, criticised the fact revealed in the National Interest Analysis that Woodside had been "provided with several opportunities to comment on drafts of the Treaty". What concerned them, if I remember rightly, was whether it

was appropriate to extend this abnormal privilege to a private party, yet not to their committee as representatives of the public. (It then fell to me to draft the response justifying this practice.)

From my perspective, the problem was not that the Government consciously placed Woodside's interests above Australia's own, but that senior officials at all times simply assumed – whether because of direction to that effect by Ministers or their offices I do not know – that the national interest was identical to Woodside's. That coincidence of interests did objectively exist for some issues arising in the course of the long-running negotiations with East Timor, but by no means all of them, the necessity of the unitisation agreement and its relationship with the Timor Sea Treaty being a prominent case in point.

Questioning of Mr Larsen by Senators Patrick and Abetz spanning pages 19 and 20 of the transcript as to which Department had carriage of the making of the 2002 declarations and supplied the policy rationale for it

The contact details at the foot of the National Interest Analyses for both declarations indicate that the Attorney-General's Department took the lead on this, as one would expect on an issue of international legal policy. Hence, to the extent that the rationale can be attributed to a single Department, that is where questions should be directed. In practice, however, on international law matters that Department and DFAT have always collaborated closely, and in my time no "compartmentalisation issue" ever arose. Both Departments would have been well aware of the reason for the declarations and, while record-keeping by 2001-02 no longer guaranteed as reliably full a picture as in the days when filing clerks still existed, nonetheless one would expect to find ample documentation of it in the files of both.

While I accept that the officials at the table had no personal memory of the events, the very subject-matter of the present inquiry made it predictable that Committee members would ask questions of this nature. It is therefore striking that, having taken the trouble to make a submission of their own, DFAT witnesses did not at the same time use the opportunity to acquaint themselves with these files before appearing, in order to be in a position to assist the Committee by answering such questions. This remarkable lack of curiosity, combined with Mr Larsen's reluctance on page 20 to offer anything beyond "documents that are already on the public record", invites the inference that there is a desire for the real reason to remain for ever shrouded in mystery. This is the inevitable effect of limiting the disclosure in this way, since it is precisely the deliberate silence on this issue of all the public documents, in line with Mr Campbell's reticence before the Joint Standing Committee on Treaties, that has ensured that the policy rationale has remained unknown. It really should not be necessary for Senator Patrick to have to resort to the Freedom of Information Act to obtain what he seeks, a state of affairs that is purely the consequence of the unforthcoming attitude adopted by DFAT.

The still unsubstantiated uniqueness of maritime boundary disputes

Lastly, I note that despite what I wrote in paragraph 14 of my original submission, neither Mr Larsen in his opening statement and ensuing dialogue with Committee members, nor any other Government witness, offered any explanation of what makes maritime boundaries so different from all other international disputes that it warrants ruling out litigation even after negotiation has failed. In view of this, I suggest that the Committee take this as implicitly conceding the validity of my point, and draw its own conclusions accordingly.