

11 October 2019

Committee Secretary
Senate Foreign Affairs, Defence and Trade References Committee
Department of the Senate
PO Box 6100
Parliament House
CANBERRA ACT 2600
AUSTRALIA

Dear Sir/Madam

Please find on the following pages a submission to the Committee in relation to its current inquiry into Australia's declarations made under certain international laws.

Yours faithfully

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Submission to the Senate Foreign Affairs, Defence and Trade References Committee

Australia's declarations made under certain international laws

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Summary: Australia's 2002 declaration under Article 287 of the United Nations Convention on the Law of the Sea specifying the International Tribunal for the Law of the Sea and the International Court of Justice as its preferred fora for settling disputes arising under that treaty is satisfactory and there is no case for its withdrawal or alteration. By contrast, the parallel declarations made at the same time in respect of maritime boundary disputes under Article 298 of the same Convention, and Article 36 of the Statute of the International Court of Justice, were never properly justified and enabled a course of policy action that has proved detrimental to Australia's interests. Withdrawal of both declarations, though welcome as an implicit acknowledgement of this error, cannot undo the damage that already has been done and would thus have largely a symbolic purpose.

1. Part XV of the United Nations Convention on the Law of the Sea (UNCLOS) creates a system for settling disputes concerning the interpretation or application of UNCLOS featuring compulsory procedures leading, with a number of exceptions, to binding outcomes. This Part is where both Articles 287 and 298 are found.

UNCLOS Article 287

2. The gist of the relevant paragraphs of Article 287 is as follows. By paragraph 1, when signing, ratifying or acceding to UNCLOS or at any time thereafter, a State may choose, by written declaration, one or more of the following means for the settlement of disputes concerning its interpretation or application:

- (a) the International Tribunal for the Law of the Sea (ITLOS);
- (b) the International Court of Justice (ICJ);
- (c) an arbitral tribunal constituted in accordance with Annex VII;
- (d) a special arbitral tribunal constituted in accordance with Annex VIII, for disputes about fisheries, protection and preservation of the marine environment, marine scientific research, or navigation including pollution from vessels and by dumping.

3. By paragraph 4, if the parties to a dispute have accepted the same procedure for the settlement of the dispute, it may be submitted only to that procedure, unless the parties otherwise agree. If they have not accepted the same procedure for its settlement, then under paragraph 5 it may be submitted only to Annex VII arbitration, unless the parties otherwise agree.

4. By paragraph 3, a State Party that is a party to a dispute not covered by a declaration in force is deemed to have accepted arbitration in accordance with Annex VII. This thus makes Annex VII arbitration the default option. Of the 168 parties to UNCLOS, nearly 50 have made declarations nominating their preferred dispute resolution procedure, though one has since been withdrawn: see www.un.org/Depts/los/settlement_of_disputes/choice_procedure.htm. It is possible to choose more than one procedure, either with or without a specified order of preference, and some States have done so, including Australia, which in its 2002 declaration chose both ITLOS and the ICJ as its preferred fora.

5. An advantage of *ad hoc* tribunals under Annex VII or VIII is that disputant States can jointly dictate the composition of the tribunal and, if they wish, its procedures. Each nominates one arbitrator and the other three are chosen by agreement. If the parties cannot agree, the President of ITLOS nominates any arbitrators not appointed by the primary procedure. That is not possible under ITLOS and the ICJ, as they have a fixed, periodically elected membership and procedures (although it is possible to create *ad hoc* chambers with members of the parties' choice drawn from among the existing judges), but the advantage of choosing either of them is that the parties do not need to pay the arbitrators' fees or for registry services; additionally, ITLOS, with its short docket, is likely to produce a relatively quick decision.

6. Australia's 2002 declaration under Article 287 has not in fact had any effect on the three dispute settlement proceedings under UNCLOS in which it has been involved. It postdated the 1998-2001 dispute with Japan over southern bluefin tuna, and was not relevant to the prompt release application made against Australia by Russia in respect of the fishing vessel the *Volga* in late 2002, as this is a special procedure operating outside Article 287. In the compulsory conciliation instituted by Timor-Leste in 2016, it was not the Article 287 declaration but the contemporaneous declaration under Article 298, considered below, that dictated that Annex VII arbitration as the ordinary default procedure was not available and was instead replaced by conciliation. Australia has not been party to any other UNCLOS dispute.

7. The choice of ITLOS and the ICJ was a sensible one; no demonstrable harm has come from it, and ITLOS in particular has in other cases (including the provisional measures phase of the *Southern Bluefin Tuna* case) shown itself worthy of the confidence placed in it by Australia and other States that have elected it as a preferred forum under Article 287. Thus no purpose is served by reopening that declaration. The same cannot be said, however, of the other declarations before the Committee.

UNCLOS Article 298 and ICJ Statute Article 36

8. Article 298 of UNCLOS offers three optional exceptions to the applicability of compulsory procedures in the forum chosen under Article 287 leading to binding outcomes. Paragraph 1 provides that when signing, ratifying or acceding to UNCLOS or at any time thereafter, a State may declare in writing that it does not accept any one or more of those procedures with respect

to three categories of disputes. Only one of these was invoked by Australia in its 2002 declaration, namely (a) disputes concerning the interpretation or application of Articles 15, 74 and 83 relating to sea boundary delimitations, or those involving historic bays or titles. The text goes on to specify, however, that when such a dispute arises and no agreement within a reasonable period of time is reached in negotiations between the parties, the State must accept submission of the matter to conciliation under Annex V; this is how the conciliation with Timor-Leste came about.

9. Paragraph 3 ensures that such declarations are reciprocal in their effect: a State Party which has made a declaration under paragraph 1 is not entitled to submit any dispute against another State Party that falls within the excepted category of disputes to any procedure in UNCLOS, without the consent of that other party. By paragraph 2, a State Party may withdraw at any time a declaration it has made under paragraph 1, or agree to submit a dispute excluded by it to any procedure specified in UNCLOS.

10. At the same time as it made its Article 298 declaration, Australia also attached three qualifications to its 1975 declaration under Article 36 of the Statute of the ICJ. Such optional declarations function as a standing offer to settle any dispute in the ICJ, as they grant to the Court, in advance, subject to any qualification, jurisdiction over disputes brought to it by any other State that similarly accepts that jurisdiction. One of the new qualifications added in 2002 was to exclude jurisdiction over maritime boundary disputes.

11. The declarations under UNCLOS Article 298 and ICJ Statute Article 36 are now largely of historical interest only. The reason is that, since the conclusion of the 2018 *Treaty between Australia and the Democratic Republic of Timor-Leste Establishing Their Maritime Boundaries in the Timor Sea*, very few of Australia's maritime boundaries remain undelimited, even if one of the relevant treaties is not yet in force. The only boundary outstanding that revocation of these declarations is likely to affect is the potential short extension of an already existing boundary with France in the 1982 *Agreement on Marine Delimitation between the Government of Australia and the Government of the French Republic*, which may become necessary once the extent of France's continental shelf entitlements east of New Caledonia is confirmed by the Commission on the Limits of the Continental Shelf. This is unlikely to be problematic, as the boundaries in the 1982 Agreement are all median (equidistance) lines and there is no cause for either side to seek to handle the extension, if it proves necessary, in any other way. No maritime boundaries exist either off the two sectors of the Australian Antarctic Territory, but there has never been any appetite on the part of Australia's neighbours in Antarctica (Norway, France and New Zealand), to delimit these, and there is no reason to expect this to change in the foreseeable future.

12. Accordingly, withdrawal or amendment of these declarations would in reality change very little. That said, it would be a welcome acknowledgement nonetheless that the 2002 declarations were poor legal policy: by giving Australia a false sense of security in relation to Timor-Leste, they allowed political tensions related to the boundary to fester to such a degree that their resolution by the abovementioned 2018 treaty ultimately required much greater concessions than the most unfavourable outcome conceivable had the boundary instead been adjudicated on Timor-Leste's unilateral application by the ICJ or under UNCLOS dispute settlement. I made a similar point in my 2007 submission to the Joint Standing Committee on Treaties on the 2006

Treaty between the Government of Australia and the Government of the Democratic Republic of Timor-Leste on Certain Maritime Arrangements in the Timor Sea, where I noted that

The equal division of the upstream revenues [from exploitation of the Sunrise-Troubadour petroleum deposit] in this Treaty thus also has the incidental effect of highlighting just how high a price Australia has paid for its determination to avoid the jurisdiction of international courts and tribunals over the disputed boundary. For a number of reasons...it is inconceivable that any boundary produced by such adjudication would have placed 50% of the Sunrise-Troubadour deposit under East Timor's jurisdiction. Even under a worst-case scenario of a litigated boundary that left the entire JPDA [Joint Petroleum Development Area] in East Timor's hands, Australia would now be entitled to 79.9% of the Sunrise revenues, not 50%.

This conclusion is borne out by and applies even more forcefully to the 2018 treaty, given that the concessions it makes are much more far-reaching.

13. I would be pleased to expand on this reasoning if the Committee wishes, but do not do so here, partly in order not to lengthen this submission unduly, but mainly because the 2018 boundary is now permanent and any attempt to alter it would only compound the damage to Australia's interests, a step I would not wish to encourage by revisiting matters best left to rest.

14. One further and final point telling against these declarations lies in the threadbare justification for them offered at the time in the National Interest Analyses published by the Government in support of them. These set out

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...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.

This is unconvincing, not because it is wrong, but because exactly the same could be said of all international legal disputes, not just those concerning maritime boundaries; litigation should in principle always be a last resort. Yet no explanation was put forward in that or any other document as to why maritime boundaries were uniquely unsuitable to litigation, even as a last resort. The case for retention of the declarations is thus weak, even though in practice it is too late for anything significant to be achieved by withdrawing them.

15. I express no view on the other, more general changes made in 2002 to Australia's earlier 1975 declaration under Article 36 of the ICJ Statute.