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Two declarations by Australia

Background[1]

4.1 This chapter contains the results of the Committee's review of two declarations by Australia to multilateral agreements namely:

- *Australian Declarations under Articles 287(1) and 298(1) of the United Nations Convention on the Law of the Sea 1982* (UNCLOS declarations); and
- *an Australian Declaration under Paragraph 2 of Article 36 of the Statute of the International Court of Justice 1945* (ICJ declaration).

4.2 These treaty actions have already been put into place prior to Committee consideration to avoid any other country pre-empting the declarations and commencing proceedings against Australia prior to the lodgement of the declaration. Both the treaty actions took place on 22 March 2002 with immediate effect.

4.3 On 25 March 2002 the Minister for Foreign Affairs wrote to the Chair of the Joint Standing Committee on Treaties advising the Committee that the treaty action had taken place.

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1 Unless otherwise specified the material in this and the following section was drawn from the National Interest Analysis (NIA) for the declarations relating to UNCLOS and the declaration relating to the ICJ. The full text of the NIAs can be found at the Committee's website on www.aph.gov.au/house/committee/jsct.

Treaty actions

The UNCLOS Declaration

4.4 The 1982 United Nations Convention on the Law of the Sea (UNCLOS) provides a universal legal framework for the rational management of marine resources and their conservation for future generations. The Convention is the central instrument for promoting stability and peaceful uses of the seas and oceans. It is not a static instrument, but rather a dynamic and evolving body of law.

4.5 Australia ratified UNCLOS on 5 October 1994 and in 1999 ratified an associated Convention on the conservation of straddling fish stocks. UNCLOS provides for the compulsory settlement of disputes between parties over the interpretation and application of the Convention. By means of a written declaration, a State is free to choose one or more of the means for the settlement of disputes concerning the interpretation or application of the Convention.

4.6 Under Article 287(1) states can nominate their preferred dispute resolution mechanism from the following choices:

a) the International Tribunal for the Law of the Sea (ITLOS) established in accordance with Annex VI of UNCLOS;

b) the International Court of Justice (ICJ);

c) an arbitral tribunal constituted in accordance with Annex VII of UNCLOS; or

d) a special arbitral tribunal constituted in accordance with Annex VIII of UNCLOS for specific categories of disputes.

4.7 By making this declaration under Article 287(1) Australia has selected its preferred means of dispute resolution under UNCLOS as ITLOS and the ICJ. The Australian Government chose this option because there are advantages in taking disputes to existing, internationally recognised forums.

4.8 The NIA states that the government considered that the procedures for arbitral panels are both time consuming and difficult and the parties to disputes have to pay the full cost of both the tribunal and the arbitration. The Committee notes that Australia already contributes to the cost of the ICJ and ITLOS and no additional costs are incurred by taking a dispute to the Court or the Tribunal.

4.9 Australia has chosen, however, not to accept any of the dispute resolution mechanisms with respect to disputes concerning the interpretation or application of articles 15, 74 and 83 relating to sea boundary delimitations as well as those involving historic bays or titles.[2] The NIA suggests that the Government has taken this action because it is of the view that maritime boundary disputes are best resolved through negotiation and not litigation.

The ICJ Declaration

4.10 The ICJ, also known as the World Court, was founded in 1946 as the principal judicial body of the United Nations. It decides disputes between nations which have agreed to accept its jurisdiction and gives advisory opinions. The Court is composed of 15 judges elected to nine-year terms of office by the United Nations General Assembly and Security Council sitting independently of each other. It may not include more than one judge of any nationality. Elections are held every three years for one-third of the seats, and retiring judges may be re-elected. The Members of the Court do not represent their governments but are independent magistrates.

4.11 On 1 November 1945 Australia ratified the Statute of the International Court of Justice and in March 1975 Australia entered a declaration that accepted the compulsory jurisdiction of the ICJ.[3] Under that very broad declaration countries could 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. Since becoming party to the ICJ statute Australia has come before the Court both as a defendant[4] and as a claimant.[5]

4.12 Australia is one of 63 countries out of the 189 members of the UN that have accepted the compulsory jurisdiction of the ICJ. Of those countries, the majority have made reservations of various types regarding its jurisdiction.

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2 Article 15 relates to the delimitation of the territorial sea between States with opposite or adjacent coasts. Article 74 relates to the delimitation of the exclusive economic zone between States with opposite or adjacent coasts, while Article 83 covers delimitation of the continental shelf between States with opposite or adjacent coasts.

3 This declaration replaced earlier declarations by Australia made in the 1940s and 1950s.

4 Portugal brought a case before the ICJ relating to the Timor Gap Maritime Delimitation Treaty negotiated between Indonesia and Australia in the early 1990s. In 1989 Nauru also brought a case before the ICJ against Australia over phosphate mining.

5 Australia took action against France over the nuclear tests in French Polynesia during the mid-1970s.

4.13 The jurisdiction before the ICJ is based on three basic forms of consent:

1. where countries may enter into a 'compromise' (agreement) to refer a specific dispute to the Court; or

2. where a treaty to which both of the countries involved are parties may contain a provision referring disputes to the court; or

3. where a State may lodge a declaration under Article 36(2) of the ICJ Statute that they recognise as compulsory and without special agreement the jurisdiction of the ICJ.[6]

4.14 This 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:

- where the parties have agreed to other peaceful means of dispute resolution;
- where disputes involve maritime boundary delimitation or disputes concerning the exploitation of an area in dispute or adjacent to an area in dispute; and
- 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.

Evidence presented and issues raised

4.15 Whether Australia uses international judicial or arbitral bodies or chooses to negotiate a settlement of a dispute with the state or states in question became an important focus of evidence relating to both agreements under scrutiny. As the Attorney-General's Department representatives indicated, consent is fundamental to international adjudication and arbitration. While the Committee has noted that consent to dispute settlement mechanisms can be given in a variety of ways, it is important to acknowledge that in the absence of a state's consent it cannot be taken before an international court or tribunal.[7]

4.16 In the case of both these declarations Australia is consenting to the use of dispute resolution mechanisms with the proviso that in the case of

6 States can place conditions or exceptions on such a declaration under Article 36.2 – the optional clause. This declaration carries out this step for Australia.

7 Bill Campbell, *Transcript of Evidence*, 12 July 2002, p. 45.

maritime delimitation disputes Australia considers direct negotiation a much preferable option to *ad hoc* arbitral panels for the resolution of such disputes.

4.17 Evidence also confirmed that one of the reasons Australia adopted the ICJ and the ITLOS was because it had knowledge of both by appearing before them. Perhaps more importantly for Australia, they were both standing tribunals to which Australia had already contributed to their costs.[8]

4.18 The problems of arbitral panels have been mentioned earlier and the Attorney-General's Department noted in evidence that some arbitral tribunals had come up with unusual if not unsatisfactory decisions. Mr Bill Campbell highlighted a case in which:

> a boundary … was set by arbitration between Canada and France in relation to some French possessions very close to the coastline of Canada. These islands ended up with an exclusive economic zone which was 200 nautical miles long and 10½ nautical miles wide.[9]

UNCLOS declaration

4.19 Australia is familiar with the ITLOS process through a dispute with Japan on tuna fishing quotas. In the context of the declaration on the ICJ before the Committee this familiarity is significant because:

> we wanted to see how the International Tribunal for the Law of the Sea operated, not just in relation to our own case but generally ... We just wanted to see how that operated before Australia decided whether or not to accept its jurisdiction.[10]

4.20 Therefore, it was partly on the basis of this experience that Australia had decided to make the declaration and also because Australia has some of the largest maritime areas and boundaries in the world:

> It is the view of the government that the maritime boundaries ... are best resolved by negotiation and not through resort to third party dispute settlement. All the current maritime boundaries that we have settled with other countries have been agreed by negotiation. Negotiation allows the parties to work together to reach outcomes acceptable to both sides for the long term.[11]

8 Bill Campbell, *Transcript of Evidence*, 12 July 2002, p. 52.
9 Bill Campbell, *Transcript of Evidence*, 12 July 2002, p. 52.
10 Bill Campbell, *Transcript of Evidence*, 12 July 2002, p. 51.
11 Bill Campbell, *Transcript of Evidence*, 12 July 2002, p. 47.

4.21 Under the UNCLOS declaration if Australia is involved in a dispute with a country that has not accepted either of Australia's two preferred dispute resolution mechanisms (ie. ITLOS or the ICJ), then a default mechanism of an arbitration panel can be applied. This declaration is designed to ensure that Australia will not have to go to an arbitral panel, as it did over its dispute with Japan on tuna catches in particular, with respect to maritime boundary disputes. In future these will be negotiated between Australia and the other party directly.

ICJ declaration

4.22 Earlier in the chapter the Committee reviewed the purpose of the ICJ declaration indicating that the new declaration refocusses Australia's understanding of its ICJ commitments (made in earlier declarations on the ICJ Statute) by highlighting several qualifications to bring about consistency with the UNCLOS declaration, in respect to maritime delimitation disputes. The qualifications also bring about some commonality with declarations that have been adopted by a number of other countries in relation to their ICJ jurisdiction.[12]

4.23 Mr Campbell noted that earlier declarations were made before the UNCLOS agreement came into existence, and when the maritime boundaries were generally limited to the territorial sea only. This declaration acknowledges the developments under UNCLOS such as the advent of the Exclusive Economic Zone and the Australian Fishing Zone.

4.24 As indicated earlier Australia has been brought before the ICJ on the legality of the Timor Gap Treaty. Portugal argued that the treaty could not be legal because the occupation of East Timor by Indonesia was not legal.[13] In this case the Court did not decide in Portugal's favour but rather that:

> the action could not sensibly be decided in the absence of Indonesia's presence before the court. Ultimately, that was the basis on which the court said it would not exercise jurisdiction over the matter, and that was where the matter was left.[14]

4.25 Some concerns have been expressed by interested parties concerning the impact of these declarations on East Timor's current negotiations with Australia on petroleum resources. The Justice and International Mission Unit of the Uniting Church stated that they were:

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12 Bill Campbell, *Transcript of Evidence*, 12 July 2002, p. 46.

13 Bill Campbell, *Transcript of Evidence*, 12 July 2002, p. 49.

14 Bill Campbell, *Transcript of Evidence*, 12 July 2002, p. 49.

> deeply concerned that Australia's Declarations were motivated to stop the International Court of Justice from considering the maritime boundary between Australia and East Timor with implications for the exploitation of the oil and gas fields within the Timor Sea.

They go on to express a concern that:

> the Australian Declaration under Article 298(1) of the *UN Convention on the Law of the Sea 1982* is for the purposes of preventing East Timor from seeking dispute resolution regarding the maritime boundary through the *UN Convention on the Law of the Sea 1982* compulsory dispute resolution mechanisms.[15]

4.26 Rob Wesley-Smith suggested in his submission that:

> the Australian government, and Downer in particular, have and do seek to prevent East Timor gaining Maritime Boundaries other than JPDA ones, and certainly not in accordance with UNCLOS, as shown by its withdrawal on 19th March from the jurisdiction of the ICJ in relation to Maritime Boundaries for East Timor, PNG and Indonesia.[16]

4.27 In evidence provided by the Attorney-General's Department it was emphasised that Australia has yet to negotiate a maritime delimitation treaty with East Timor. Irrespective of this, in response to a specific question by the Committee on this issue, Mr Campbell commented that:

> East Timor has said that it is keen on negotiation as a means of resolving these disputes. Secondly, this [UNCLOS Declaration] applies to all our maritime boundaries; we are not just talking about our maritime boundaries with East Timor; we do have unresolved boundaries. Thirdly, it is the view of the government that maritime boundaries are best resolved by negotiation and not by resort to international arbitration or courts. To repeat another point: all our current boundaries with other countries have been negotiated.
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> Finally, the question of the acceptability of the boundary to both countries is very important, given that maritime boundaries remain in place for a very long period. You are much more likely to get acceptance of that boundary, and less tension over time, if it

15 The Justice and International Mission Unit of the Uniting Church, *Submission No. 4.1*, p. 1.

16 Rob Wesley-Smith, *Submission No. 7*, p. 1.

> is done by agreement as opposed to an international court or tribunal.[17]

4.28 The issue of maritime boundaries was raised in relation to the outstanding need to resolve with a number of countries agreed boundaries. The evidence indicated that Australia has:

> unresolved continental shelf boundaries beyond 200 nautical miles with France … both in relation to New Caledonia and its possession of Kerguelen, which is near Heard and McDonald Islands in the Southern Ocean. We also, of course, have an unresolved boundary with East Timor, but we have provisional arrangements in place. At the present time we are involved in maritime boundary negotiations with New Zealand, where we have maritime boundaries on four fronts, including between our Antarctic possessions. We also have unresolved boundaries with France and Norway in relation to where they abut the Australian Antarctic Territory.[18]

Conclusions

4.29 While the Committee acknowledges the concern of some Australians relating to the negotiation of maritime boundaries with East Timor, the general principle of direct negotiations of maritime boundaries between the parties involved is, in the Committee's view, preferable to litigation or arbitration. The Committee accepts the evidence that East Timor has indicated its keenness to negotiate as a means of resolving these issues and notes that the negotiation of boundaries apart from the Joint Petroleum Development Authority area are still to be done. The Committee considers the Government position that an agreed outcome is more likely to have long-term relevance for the parties involved, as opposed to an imposed decision that results in a win-lose situation for one of the negotiating parties, is fair to all interested parties. The Committee also notes the potential problems of arbitrated decisions highlighted earlier in this chapter.

4.30 The Committee understands the need to protect Austrtalia's interests in relation to both these treaty actions and therefore the need of the Minister for Foreign Affairs to take immediate action to bind Australia in the

17 Bill Campbell, *Transcript of Evidence*, 12 July 2002, p. 50.

18 Bill Campbell, *Transcript of Evidence*, 12 July 2002, p. 50.

declarations. However, in concurring with the Government's action in relation to these declarations the Committee is also cognisant of its responsibility to scrutinise all treaty actions by Australia.

4.31 The Committee is confident from the evidence provided that the actions taken by the Government to bind Australia to these declarations are in Australia's best interests and will enhance future negotiations on maritime boundaries. The Committee concurs with the Government's treaty action on both declarations.

4.32 While a majority of Committee members agree with the conclusions stated in 4.29, 4.30 and 4.31, Mr Wilkie, Mr Evans, Mr Adams, Senator Kirk, Senator Marshall, Senator Stephens and Senator Bartlett do not. Specifically these members believe that the ICJ declaration made by the Minister for Foreign Affairs damages Australia's international reputation and may not be in Australia's long-term national interests. The declaration may be interpreted as an effort to intimidate and limit the options of neighbouring countries in relation to any future maritime border disputes. It should also be noted that Australia has never had an adverse finding from the ICJ.