

Committee Secretary
Senate Foreign Affairs, Defence and Trade References Committee
PO Box 6100
Parliament House
Canberra ACT 2600

10 October 2019

Dear Secretary,

Thank you for inviting me to make a submission to the Committee in relation to its inquiry into Australia's declarations made under certain international laws. My submission is as follows.

The Committee should establish definitively:

- a. why the declarations were made, and
- b. why they were made in March 2002.

Without an understanding of the precise goals, it is hardly possible to assess whether the declarations have been of benefit, and if so, to whom.

In particular, the Committee should ascertain where the truth lies between competing claims as to motives and benefits.

On the one hand, William Campbell of the Attorney-General's Department gave evidence to the Joint Standing Committee on Treaties as follows:

“I cannot really get into the motives of why the declaration was made. [Emphasis added.] There was no actual threat that I have seen in any newspapers, or things like that, about Australia being taken to court over its maritime boundaries. There were certainly a deal of writings and papers being given by academics saying that it was a possibility East Timor would take Australia to the court over its maritime boundaries.¹

On the other hand, Professor Andrew Serdy of the University of Southampton, formerly a DFAT officer who helped negotiate the Timor Sea Treaty ([2003] ATS 13), has given evidence calling these declarations “suggestive of a persistent policy failure.” Had Australia not made those declarations, and had Timor-Leste then taken the maritime boundary question to the International Court of Justice, he says:

“... 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 in East Timor's hands, Australia would now be entitled to 79.9% of the Sunrise revenues, not 50% – though that

¹ William Campbell, Treaties tabled on 18 and 25 June 2002. Joint Standing Committee on Treaties, Transcript of Evidence, 12 July 2002, p. 50.

would be partly offset by 100% of Bayu-Undan and other fields in the JPDA going to East Timor.”²

I note that Professor Andrew Serdy is a jurist of international repute, whereas William Campbell is better known as the co-author, with DFAT officer Chris Moraitis, of a Memorandum of Advice by which the Howard government sought to justify its participation in the U.S.-led invasion in March 2003.³ On that occasion, the government's most senior international lawyer, Henry Burmester QC, Chief General Counsel of the Attorney-General's Department, did not add his name to the Memorandum. Also missing was the government's usual adviser and representative in international law, Professor James Crawford SC, Professor of International Law at Cambridge University. Mr Campbell, as they say, has form. His evidence of 12 July 2002 should be viewed with scepticism, especially in light of that infamous contribution to Australian public life.

My own view is that the Australian government could have agreed to a maritime border with Timor-Leste and refrained from making those declarations but it had a higher priority: to please certain energy companies by compelling the impoverished, newly-independent Timor-Leste to sign an International Unitization Agreement as a condition for ratifying the Timor Sea Treaty. It made those declarations in order to protect those energy companies rather than Australia.

I urge the Committee to determine, using the subsequent revenue split agreed to by Australia and Timor-Leste, just how high a price Australia has paid for its determination to avoid ICJ jurisdiction, and which entities have benefited.

The declarations now affect only the possible extension of the extant median line with France and the boundaries off the two sectors of the Australian Antarctic Territory. Neither of these is likely to be problematic.

Yours sincerely,

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² Submission to the Joint Standing Committee on Treaties, Treaty between the Government of Australia and the Government of the Democratic Republic of Timor-Leste on Certain Maritime Arrangements in the Timor Sea (Sydney, 12 January 2006)

³ B Campbell and C Moraitis, 'Memorandum of Advice to the Commonwealth Government on the Use of Force Against Iraq' (2003) 4 (Special Feature: Advice on the Use of Force Against Iraq) Melbourne Journal of International Law 178.