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Proof Committee Hansard

SENATE

FOREIGN AFFAIRS, DEFENCE AND TRADE REFERENCES COMMITTEE

Australia's declarations made under certain international laws

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SENATE

FOREIGN AFFAIRS, DEFENCE AND TRADE REFERENCES COMMITTEE

Monday, 2 December 2019

Members in attendance: Senators Abetz, Ayres, Kitching, Lambie, Patrick, Sheldon.

Terms of Reference for the Inquiry:

To inquire into and report on:

a. Australia's declarations made under articles 287(1) and 298(1) of UNCLOS and article 36 of the Statute of the ICJ, including the question of whether those declarations should be revoked and new declarations made which submit maritime delimitation disputes to the jurisdiction of the ICJ or ITLOS; and

b. any related matter.

WITNESSES

FERNANDES, Professor Clinton, Private capacity

Committee met at 15:38

CHAIR (Senator Kitching): I declare open this public hearing of the Senate Foreign Affairs, Defence and Trade References Committee. This public hearing is for the committee's inquiry into Australia's declarations made under certain international laws. This is a public hearing, and a *Hansard* transcript of the proceedings is being made. We are also streaming live via the web, which can be found at www.aph.gov.au. I welcome everyone here today.

Before the committee starts taking evidence, I remind all witnesses that, in giving evidence to the committee, they are protected by parliamentary privilege. It is unlawful for anyone to threaten or disadvantage a witness on account of evidence given to a committee. Such action may be treated by the Senate as a contempt. It is also a contempt to give false or misleading evidence to a committee. While the committee prefers all evidence to be given in public, under the Senate's resolutions witnesses have the right to request to be heard in private session. If you would like any of your evidence to be heard in camera, please don't hesitate to let the committee know. If a witness objects to answering a question, the witness should state the ground upon which the objection is taken, and the committee will determine whether it will insist on an answer, having regard to the ground upon which it is claimed. If the committee determines to insist on an answer, a witness may request that the answer be given in camera. As noted previously, such a request may be made at any other time.

Professor Fernandes, thank you for your time. Information on parliamentary privilege and the protection of witnesses and evidence has been provided to you. We have received your supplementary submission, which has been circulated to committee members and provided to the other witnesses appearing later today. However, given the time frame, senators and witnesses may not have had a chance to review it. As such, senators may wish to place additional questions on notice to other witnesses following the hearing, and witnesses appearing later today may need to take questions on notice and may wish to respond by way of a supplementary submission. Do you have any comment to make about the capacity in which you appear?

Prof. Fernandes: I am at the Australian Defence Force Academy campus of the University of New South Wales, in Canberra. I am an employee of UNSW.

CHAIR: Thank you. Would you like to make a brief opening statement before we proceed to questions?

Prof. Fernandes: Yes, just briefly. My core proposition is that there is nothing common about our declarations that were made in March 2002. Of the 21 states which made declarations under article 298(1)(a) of the United Nations Convention on the Law of the Sea, only nine also made declarations under article 36(2) of the Statute of the International Court of Justice. Out of these nine, only Australia explicitly excluded sea boundary delimitation disputes from the jurisdiction of the International Court of Justice.

Translated into plain English, what that means is that, if you make a declaration under the law of the sea convention, you're still open to being taken to the International Court of Justice, because there is another article, article 282, which states that any agreement may be reached 'otherwise'. You've got to specifically make another declaration under article 36(2) of the ICJ statute. That's what we did, and then we furthermore explicitly excluded sea boundary delimitations. That makes us unique, and I take issue with submissions 3 and 10, by Rothwell-Arditto and DFAT respectively, who both say at various points that this is all quite normal. I provided in my supplementary submission an explanation as to why it's not normal, and I encourage you all to ask them to respond to that, because I only finished writing this up at 2 o'clock this afternoon.

The consequence of that decision was that the newly independent state of Timor-Leste, which was born on 20 May 2002, was confronted with those declarations that had been made in March 2002, and it was presented with a fait accompli. There was an oil and gas field called Bayu-Undan 135 nautical miles south of Timor's south coast. Timor needed the revenues from that gas field. I guess Australia understood that, once it received that gas from the Bayu-Undan field, it would have had funds to secure expert international law and geoscientific advice. Australia therefore warned that the oil and gas project in the Bayu-Undan field would not go ahead unless Timor-Leste signed the Timor Sea Treaty on the very day it came into existence, on 20 May 2002. Then Australia refused to ratify the Timor Sea Treaty unless the government of Timor signed an international unitisation agreement.

The consequence of that for Timor was that it had very few funds. It was reliant entirely on donor funds. But, broadly speaking, over the long term—16 years later—it's created an atmosphere of distrust and hostility and suspicion of Australia, despite the fact that Timor should be a natural ally in many ways, not only in defence but in foreign affairs, diplomacy and so on. Our conduct antagonised this potential ally. Furthermore, I believe that the interests of the Australian consumer were not considered, because the Bayu-Undan field and the oil and gas

from the Timor Sea were never connected to the Australian gas grid. Instead they were sold off on the spot market, and Japanese consumers now are paying less for Australian gas than we are. I believe this is contrary to our broader interests and the failure to consult domestic energy suppliers on long-term gas consumption projections was predictable in that it would leave a shortfall supply of gas in Australia which is in fact what has transpired since then. That is basically all I'd like to say by way of opening. I'm happy to take questions if I can help.

CHAIR: Senator Patrick.

Senator PATRICK: Professor Fernandes, Australia signed up to or ratified UNCLOS in 1994, I think. Is that correct?

Prof. Fernandes: Yes.

Senator PATRICK: So clearly there was a fair amount of time between when they signed on to UNCLOS and when they made the declaration. I note also that we didn't go through a normal JSCOT process, which would indicate that this was perhaps a rushed declaration. Is that your view?

Prof. Fernandes: It was actually revealed in the national interest analysis that was provided by the Department of Foreign Affairs and Trade. Alexander Downer, who was then the foreign minister, used the national interest exemption to push this withdrawal declaration through very quickly, and the Timor Sea Treaty and subsequent treaties were in fact short-term revenue-sharing agreements rather than real treaties. The only real treaty was one that happened in 2018. So that's the first part of the answer to your question. In fact, the national interest exemption was used and the justification was in the national interest analysis that other countries, if they got wind of this—this is my paraphrase—would be able to take us to court. They would be able to seek compulsory third-party dispute settlement provisions if they were made aware of our declaration in advance. To me, that is a reference to Timor, which would have gone to the International Court of Justice had it known in advance that that was happening.

Senator PATRICK: I guess by that stage they had been independent for a couple of years. Sorry—

Prof. Fernandes: No, for a couple of hours.

Senator PATRICK: Yes. So the conciliation was 1999—

Prof. Fernandes: The compulsory conciliation?

Senator PATRICK: Yes.

Prof. Fernandes: The compulsory conciliation is a process that was—

Senator PATRICK: No, excuse me; sorry. I'm just talking about the popular consultation.

Prof. Fernandes: Oh, the consultation. That was 30 August '99.

Senator PATRICK: So there wouldn't have been any time between that period and 2002 to have reacted. You're saying there was no real government, no ability to observe what was happening?

Prof. Fernandes: There was no government, real or otherwise. The fact is that the United Nations Transitional Administration in East Timor wasn't assisting the government of East Timor; it was the authority of East Timor. So Timor was not independent. It had no independent legal status. It was completely under UNTAET administration. From March 2002, when we made those declarations, it was not until May 2002, three months later, that Timor actually became independent. It was confronted by this declaration—namely, that it couldn't assert its rights under international law. It was claiming a median line. It said anything north of the median line in the Timor Sea should belong to Timor and anything south of the median line in the Timor Sea should belong to Australia.

Senator PATRICK: That's quite normal in international law, is it not?

Prof. Fernandes: Yes, in this case, because there are 260 nautical miles between Timor's south coast and Australia's north coast. For that reason, the law says it would be halfway in those 260 nautical miles.

Senator PATRICK: You wrote in your submission the comment of William Campbell of the Attorney-General's Department. He said:

I cannot really get into the motives of why the declaration was made.

Is it unusual in an international context that a government won't provide the motive for signing up to something?

Prof. Fernandes: Yes and no. Governments are of course used to doing their diplomatic work with a reasonable degree of discretion—you don't want to show your cards to everybody else—but that particular statement from Mr Campbell seemed unusual to me, which is why I highlighted 'I don't really know why we did

all this' or whatever the words are. It seemed like the obvious reason was Timor—that it was going to assert its rights. In my submission, I should add, I've drawn attention to the submission of Professor Andrew Serdy, who is an expert in international maritime law. He believes that Australia had a good case against Timor. He believed that the unique geology of the other half of the island of Timor, West Timor, and the island of Rote, which is Indonesian territory, would have given Australia a better chance than it feared. His view was that we should have taken our chances in the International Court of Justice. But for whatever reason—this is where DFAT has never actually explained why it made those declarations—it didn't want to go to the International Court of Justice.

Senator PATRICK: What transpired after the declarations—being a negotiation between Timor-Leste and Australia—didn't turn out well, did it? It was mired in controversy?

Prof. Fernandes: It just dogged the bilateral relationship for 16 years. It dogged the whole bilateral relationship. Timor was basically forced into one temporary revenue sharing agreement after the next. From the Timor Sea treaty to a treaty in 2005 to the International Unitisation Agreement. Then the CMATS, certain maritime arrangements in the Timor Sea 2007. Then there was another epic after that, which was the entire allegations of espionage and International Court of Justice proceedings to recover documents that were seized. The whole thing could have been avoided had we simply said, 'Timor, you have the right to take us to court if you believe that you have a good case. We believe in the rules based international order. Take us to court if you believe you have a good case.' If they win, they win. If they lose, they lose. That way the burden, or the blame for their loss, would have rested on the neutral umpire, the International Court of Justice, not on the Australian government. Sixty five per cent of Timor's population is under the age of 21. They remember this. This is not a good look for us.

Senator PATRICK: Moving forward—because you have, in some sense, described what happened in the past—the proposal here is to effectively make new declarations to restore Australia to the original position we were in when the UNCLOS treaty was signed.

Prof. Fernandes: Some of the people who have made submissions, I am not one of them, have said we should withdraw these declarations—those reservations we made on 298 and 362. To me, it would not matter either way because the only thing that is left is a small extension of the maritime border with France.

Senator PATRICK: That begs the question: why would we do that now? Why should we withdraw those declarations or replace them with new declarations?

Prof. Fernandes: If you wanted to give weight to the claim off a rules-based international order and our support for it then it will be worth doing, but the damage has been done.

Senator PATRICK: That was something that our foreign minister did at the UN this year didn't she? Just recently at the UN Marise Payne made some claims about us being model—

Prof. Fernandes: There was a speech made, yes, in the General Assembly debates, I believe—around September 2019. I just want to say that the decision to make these declarations is all legal. It's within the scope of the ICJ statute and the scope of the law of the sea convention that you can limit your exposure in this way. It's just that against an impoverished partner, who was treated like an adversary, like Timor-Leste, I think it was unnecessary.

Senator PATRICK: Firstly, are people in Timor aware of this? Is it something that is known amongst politicians, academics or the general population?

Prof. Fernandes: Yes.

Senator PATRICK: How do they think about this? You have been to Timor several times haven't you?

Prof. Fernandes: I was a former army officer. I was a major in the Army. I was in the Intelligence Corps. I've never served in Timor—I just want to express that.

Senator PATRICK: Sure. But you have been to Timor?

Prof. Fernandes: I have been there several times. The graffiti of 'we love you military INTERFET forever' disappeared and the kind of graffiti of a cartoon of a kangaroo hopping away with a barrel of oil appeared on several walls, including one near the Australian embassy in Dili. It is just not a good look. We don't need it. The country is no threat us to. It is a natural ally.

Senator PATRICK: Do you say that withdrawing these declarations would go some way to restoring—

Prof. Fernandes: I wouldn't affect the Timorese at all, because the treaty that we've signed provides for no compensation for past exploitation. I think about A$5 billion worth of revenues have been received by us from areas that we now say under the treaty would belong to Timor. So the declarations there wouldn't affect anything.

Senator PATRICK: DFAT's submission to the inquiry argues that undertaking negotiations to resolve maritime delimitation disputes is the best approach for achieving a stable maritime boundary. In some sense that seems at odds with your statement that we are unique. Do you have a view on what DFAT has said?

Prof. Fernandes: What they say is true, but it's trivially true. Negotiation is always the preferred option. Litigation is always the last resort. The question that they haven't answered in their submission is why in the case of maritime boundaries litigation is uniquely unsuitable. Yes, we always prefer to have negotiations but not just on maritime boundaries. They say in their conclusion that negotiation of maritime delimitation disputes is the best approach. Negotiations are always the preferred way of solving a dispute. It's not as though maritime boundary disputes are so complex that they are uniquely unsuitable for litigation. No, what happened here is we tried to exempt ourselves only from maritime boundary delimitation. We were still able to take Japan to the International Court of Justice on whaling. We didn't believe in limiting ourselves to only negotiations on whaling. So the next Attorney-General after the 2007 election—I think it might have been Mark Dreyfus, but it was someone in the Labor government—represented Australia at the International Court of Justice against Japan for the whaling case. That's litigation. It's only in the case of seabed boundary delimitation that we said, 'No, we aren't going to go to court.' That, to me, indicates that we are trying to block Timor from asserting its rights under international law.

Senator PATRICK: From memory, when that occurred, it went to JSCOT post facto.

Prof. Fernandes: The whaling case?

Senator PATRICK: No, I'm just going back to when the declarations were made. So it went to—

Prof. Fernandes: It was pushed through in haste subsequently because they needed to get the declarations made quickly and without telegraphing the punch. The declarations were made very quietly on 21 March 2002. It's just that what followed from that—the attempt to prevent Timor from asserting its rights—resulted in a chain of events which will culminate next year in a case in the ACT supreme court when Witness K and Bernard Collaery will wind up before the court. I am not going to get into that, but the point is that all of this could have been avoided if we'd refrained from making that unique two-declaration combination with a further specification of seabed boundary.

Senator PATRICK: Okay. In a recent visit I had to Timor-Leste, I went to the south coast, which is where they want to process the Greater Sunrise—

Prof. Fernandes: The Tasi Mane with Osaka, right.

Senator PATRICK: the Tasi Mane project. I noted that there were some Chinese camps and there is a 32 kilometres stretch of carriageway, a dual lane freeway, that the Chinese had built—indeed, there were some Chinese powerlines—and Indonesian power stations and the Indonesian airport. In my view, there is a risk that we will end up with a number of foreign entities on the south coast of Timor and, because of our sullied relationship with Timor we may not be there ourselves. Do you have a view on that at all?

Prof. Fernandes: Of course. I begin by saying that Timor-Leste is an independent stage, and it's up to it to choose who it wishes to choose as an ally. It is not simply us who will end up with another country being interested in Timor; it's the Timorese themselves.

Senator PATRICK: Sure, but Australia should be up there helping, I would have thought.

Prof. Fernandes: It should be up there as well. Timor is part of the Community of Portuguese-Speaking Countries, and they are well aware of Chinese economic domination of Mozambique and Angola. It is something that people in Timor, at a reasonably high level—I don't know the top people—have expressed their concern about. Timor might in fact wind up being dominated by China in the way that Mozambique and Angola happened to be at the moment. For them, the natural partner is Australia. It is just a difficult situation for everybody. Yes. But, in terms of China, I think it would be more of a 20-year period before there would be something like a naval base or anything like that, if at all. And that's if they start running out of money, and we continue the blood-from-stone experiments on them.

Senator PATRICK: So you'd say it's more the damage that was done by the declaration and what flowed from it that—

Prof. Fernandes: It's a consequence of everything. Since 21 March 2002, when the declarations were made, the chain of events continues still today and, in fact, till next year, in the ACT Supreme Court. But it's about the consistent determination to prevent Timor from asserting its rights under international law. We should have just said, 'Okay, if you want to take us to the umpire, we believe we've got a strong case. You can hire the lawyers you want, and we'll settle it.' But the blame, if they'd lost, would have gone to the independent umpire, the

International Court of Justice, or to their own leaders, who engaged in litigation strategy and then lost. It wouldn't have come on us.

Senator PATRICK: You said in your opening statement that Australians didn't really get an advantage by what happened, because, you said, the oil effectively came back from Bayu-Undan.

Prof. Fernandes: Bayu-Undan. So there's Bayu-Undan and there's a larger field, two fields, but they're collectively called Greater Sunrise. Bayu-Undan is 135 nautical miles south of Timor and it's got about three trillion cubic feet of gas, it's estimated, now it's almost finished. Had Timor been able to access that, then it would have been able to fund its own reconstruction after the Indonesian withdrawal and it would have been able to get legal advice to take us to court. But it was reliant at the time entirely on donor funds.

Senator PATRICK: The problem I'm trying to understand is that you said in your opening statement that Australians weren't advantaged by the fact that this oil came to Australia—

Prof. Fernandes: Yes, because the gas in Bayu-Undan was never connected to the national gas grid, and so we never benefited from it anyway.

Senator PATRICK: That begs the question: why did we do that? Who benefited?

Prof. Fernandes: I don't know why we did that. It's up to DFAT. A consortium and, more properly, its shareholders would benefit from any dividends that come out of that. At the moment, the most prominent and sometimes the principal operator has been Woodside Petroleum. That is 57 per cent owned by American based investors, according to the Bloomberg professional database. We own about 18 per cent of Woodside shares, so those are the dividends we would have been getting. But also, given that it was not connected to the gas grids, the consumers wound up paying more, because the gas was not connected to us but sold on the international spot market, whereby, as I said, Japanese consumers pay less for our gas. Although they pay for the shipping, they pay less for our gas than we do.

Senator PATRICK: It just seems extraordinary that Australia would make a declaration that, as you suggest, ensured that we got access to the oil and then not take advantage of it.

Prof. Fernandes: There has been a revolving door, in a way, between certain people in government departments and the energy companies. I prefer not to attribute or impute the most venal motives to people. It's up to them to explain why that's the case.

CHAIR: Professor Fernandes, Senator Abetz did have some questions. He estimates he's going to be probably about another 10, maybe 15 minutes down in the chamber. If it's not too inconvenient, would you mind waiting?

Prof. Fernandes: No, I don't mind.

CHAIR: We might have the next witnesses and then come back to you, probably in about half an hour or so, if that's okay.

Prof. Fernandes: I could go outside and come back in half an hour.

Senator PATRICK: Or you can sit in the back.

Prof. Fernandes: Okay.

CHAIR: Thank you very much.

ROTHWELL, Professor Donald, Professor of International Law, ANU College of Law, Australian National University

SERDY, Professor Andrew, Professor of the Public International Law of the Sea and Director, Institute of Maritime Law, University of Southampton

Evidence was taken via teleconference—

[16:06]

CHAIR: I welcome Professor Donald Rothwell and Professor Andrew Serdy. Thank you both very much for making yourselves available. Information on parliamentary privilege and the protection of witnesses and evidence has been provided to you, I understand.

Prof. Rothwell: Yes, that's right.

Prof. Serdy: Yes.

CHAIR: Would either of you like to make a brief opening statement before we proceed to questions?

Prof. Rothwell: Thank you, Senator, yes. Can I thank the committee for the opportunity to appear today. I especially acknowledge the assistance of the Tasmanian parliament in terms of being able to make this submission remotely.

Australia is one of 74 United Nations member states that have accepted the compulsory jurisdiction of the International Court of Justice and has appeared as both an applicant and a respondent in proceedings before the court. Most recently, in 2013, Timor-Leste commenced proceedings in the court against Australia over the seizure of certain documents and data. As a party to the 1982 United Nations Convention on the Law of the Sea, Australia has also accepted compulsory dispute settlement of law of the sea disputes, subject to certain permissible limitations under the convention.

Australia's practice with respect to the resolution of maritime boundaries has been to seek to settle those boundaries by way of negotiation. The delimitation of maritime boundaries by agreement is the primary means of maritime boundary delimitation, as reflected in articles 15, 74 and 83 of the law of the sea convention. Only if states are unable to determine their maritime boundaries in agreement 'within a reasonable period of time' do the dispute resolution provisions of part 15 of the law of the sea convention apply. The convention therefore assumes that the parties will be able to settle their maritime boundaries by agreement, and only in the absence of agreement will the procedures for part XV dispute settlement apply. Australia's consistently stated position has been that it prefers to settle its maritime boundaries by agreement, and this view has been asserted by Australian foreign ministers and Australian government legal officials. All of Australia's maritime boundaries have been settled by agreement over the period from 1971 to 2018. This includes, I would submit, the recently finalised 2018 Timor Sea Treaty, which resulted from the 2016-18 Timor Sea conciliation, which was overseen by the UN Conciliation Commission. Ultimately that treaty was negotiated by the parties with facilitation assistance from the commission itself.

Australia has nevertheless been a strong supporter of the part XV dispute settlement procedures under the law of the sea convention and, consistent with the expectation that it do so, has made a declaration under article 287 of the convention, indicating its preference for the International Tribunal for the Law of the Sea or the ICJ to settle disputes involving Australia. Australia can still remain subject to annex VII law of the sea convention arbitration if another party has not made an article 287 declaration. As an applicant or respondent, Australia is the unique position of having been engaged in all forms of expected dispute settlement under the convention, with one exception—that is, so-called annex VIII special arbitration. Here I refer to Australia's engagement in the southern bluefin tuna cases in 1999 and 2000, the *Volga* case in 2002 and, of course, most recently, the Timor Sea conciliation in 2016-18. As I said, Australia is the only party to the convention that has utilised these three means of dispute settlement for its law of the sea disputes, and along with Timor-Leste is the only country to have utilised annex V compulsory conciliation with respect to a maritime boundary.

Finally, I will say that Australia's article 36 paragraph 2 declaration in respect to the statute of the International Court of Justice and its declarations under articles 287 and 298 of the law of the sea convention are consistent with international law and Australia's entitlements as a sovereign state to be subject to various forms of compulsory dispute settlement. There is no evidence that other states have been completely barred from commencing international legal proceedings against Australia in the international court, as is evidenced by Timor-Leste's commencing proceedings against Australia in the 2014 documents and data case. Likewise, notwithstanding Australia's article 36 paragraph 2 ICJ declaration and article 298 law of the sea convention

declaration, Timor-Leste was able to commence compulsory conciliation proceedings against Australia in reliance upon article 298 paragraph 1(a), which facilitated the negotiation of the 2018 Timor Sea Treaty.

CHAIR: Thank you very much, Professor Rothwell. Professor Serdy, do you have an opening statement you would like to make?

Prof. Serdy: I do, Chair. Let me start by echoing Professor Rothwell's words of gratitude to both your committee and the Tasmanian parliament. I'm very pleased to have this opportunity to address the committee and assist its inquiry into Australia's declarations under the UN Convention on the Law of the Sea and the UN charter regarding compulsory jurisdiction over disputes.

As I often tell my students, although we tend to find it convenient to talk about the UNCLOS compulsory dispute settlement mechanism, in fact there is no such thing as compulsory jurisdiction in international law. There's no possibility of an unwilling respondent state being dragged before an international court or tribunal against its will. All jurisdiction is by consent of the states. So whenever a court or tribunal makes a decision on the merits of a case, it's always because both or all parties have at some point agreed to that. They may later regret it and wish they hadn't, or there may be, and often is, a kind of secondary or meta dispute about what exactly it is and under what conditions or circumstances to which they've agreed. Because courts are given the power to decide on questions of their own jurisdiction, it's at that point that respondents may feel hard done by if they think they shouldn't be having to defend themselves at all.

But the basic principle is clear: UNCLOS may have a system of compulsory jurisdiction with some exceptions, but there's nothing compulsory about becoming party to UNCLOS itself in the first place, or indeed to any treaty. So we have the paradox of an obligation to submit compulsorily to the jurisdiction of various dispute mechanisms under UNCLOS, voluntarily taken on. At this point we might remind ourselves that the terms of reference of this inquiry go well beyond UNCLOS to the whole of Australia's 2002 declaration accepting the jurisdiction of the ICJ on a reciprocal basis, with some qualifications, and also the declaration made by Australia under article 287 of UNCLOS expressing a preference for either of the two standing courts to settle its disputes, rather than arbitration, which is the default mechanism.

I think it's significant that most submissions, including mine, concentrate on the article 298(1)(a) declaration invoking the opt-out for maritime boundary disputes. Although my submission says what I think needs to be said, on reflection it doesn't say it in the right order. What comes almost as an afterthought at the end is really what should have been the central point—namely, that the invocation of the opt-out was never properly justified at the time, either in the national-interest analysis or, for that matter, [inaudible] that continues to the present inquiry. It is slightly disappointing that the DFAT submission is equally silent still, in 2019, on that point. They don't say what makes boundary delimitation at sea so unique that going to court even as a last resort should be ruled out. I'm disappointed, because the law is an open discipline. There is no point in having [inaudible] if you want a [inaudible]. In the same way, you may well have a right to do something perfectly lawful—and I'm certainly not suggesting otherwise with respect to the article 298 declaration—but if a [inaudible] is not willing to be open about why it is doing it, that's probably a strong warning signal that it shouldn't be doing it at all. If I could end with a semi-disclosure: [inaudible] in two stints [inaudible] on the Law of the Sea. [Inaudible] and it so happens that the 2002 declaration towards the end of the [inaudible] in those two periods. In fact, I had no involvement at all in it.

Senator PATRICK: Mr Serdy, we had a breakdown there. Can you repeat what you said when you started by saying that you wanted to make a declaration?

Prof. Serdy: I was talking about a semi-disclosure that I'm making. I spent 8½ years within the legal branch of DFAT in two separate stints working on the Law of the Sea. It so happens that the 2002 declaration came towards the end of the period between those two stints. So, it happened when I wasn't there and I had no involvement at all in it. I suppose that if I had argued against it internally at the time and lost, I don't think it would be right for me to turn to this committee to seek vindication for my view. But since I was absent at the time it frees me from that constraint and I will do my best to answer your questions about the time before and the time after. But it does limit my knowledge about what the NIA deliberately doesn't say as opposed to what it does say. Thank you, Madam Chair, that completes my opening statement.

Senator PATRICK: Professor Serdy, you have made a point a couple of times about the absence of reasoning. In fact, Professor Fernandes indicated in his submission that at JSCOT in 2002 Mr William Campbell of the Attorney-General's Department said:

> I cannot really get into the motives of why the declaration was made.

I think you said in your statement there that that is unusual, and without a reason one would wonder why you're making such a declaration.

Prof. Serdy: That is a very good question. As you say, Mr Campbell at the time wasn't prepared to go into that.

Senator PATRICK: Is that unusual? You have international experience in this space. Is it unusual when someone makes a declaration to withdraw from the element or some aspect of a negotiated treaty. I guess that that sometimes occurs at the ratification stage, I would imagine, so there would be lots of UNCLOS declarations that may have been made when signing the UNCLOS treaty. But wouldn't it be normal for a country to explain why it was doing that?

Prof. Serdy: Possibly at the second time of asking it is not unusual for governments to make declarations without immediately saying why they are doing it. But the point here perhaps is that this was a very politically controversial step and so naturally it raised questions at the time. It's then the government is asked, 'Why are you doing this?' and they still refuse to answer. That's what ought to put people on their guard.

Senator PATRICK: You said you weren't in the department. Do you have a view as to why they may have done what they did?

Prof. Serdy: Yes, I think I'm prepared to share that with the committee. It was done against the background—and I heard the last bit of the evidence of Professor Fernandes, as we were waiting to give evidence ourselves. He puts it in the context of Timor-Leste and that, I think, was clearly the underlying thinking at the time.

Senator PATRICK: Are you aware of any other international examples where such an approach is taken in a circumstance where a government is trying to achieve something against, or in relation to, another country and they very quickly withdraw from some element of a treaty? Is that usual?

Prof. Serdy: It's not usual, but it has been known to happen. There is a well-known example with Canada and the dispute relating to turbot in the North Atlantic, where just before they decided they would take enforcement action beyond the 200-mile zone, they withdrew, or at least they amended their declaration, accepting ICJ compulsory jurisdiction in a very narrow way to exempt themselves from jurisdiction in relation to the very action that they were about to take. That was perfectly lawful, but did raise eyebrows at the time.

Senator PATRICK: Sure. Professor Fernandes, in his late submission—I'm not sure if you've read it—talked about the unusual aspect of this particular declaration, in that there were three elements to it: the 298 element, the section 36 element and also then specifically withdrawing from the sea boundary element. He says that's the only instance where that has occur. Are you aware of any other instance where that has occurred?

Prof. Serdy: Do you mean the two things in conjunction?

Senator PATRICK: Three things. He says:

> The reality is that of the 21 States that made declarations under Article 298(1)(a) of LOSC, only nine also made declarations under Article 36(2) of the ICJ Statute. And out of these nine, only Australia explicitly excluded sea boundary delimitation disputes from the jurisdiction of the ICJ.

Prof. Serdy: Well, I haven't made that exact comparison between the two lists of states, but I'm not aware of any other state that has done things in that precise combination that Australia did.

Senator PATRICK: This declaration was done, in your view, based on your evidence, to enable Australia to advance its own cause in relation to East Timor. Moving forward, is there any reason, in your mind—I know you actually made some statements in your submission, but perhaps with you at the hearing now—as to why we should reverse that decision, either by withdrawing the declarations or making a new declaration to effectively neutralise the previous ones?

Prof. Serdy: I think the trouble is that you can't really neutralise things that are irrevocable. It is all water under the bridge now, so I would be very happy to see the declaration withdrawn, but I don't think we would actually achieve it. It was a mistake [inaudible]. A lot of people did [inaudible] at the same time but the past is the past and we can't really change it.

Senator PATRICK: Chair, I've been asked to go to the chamber.

CHAIR: If you don't mind, we might suspend briefly and we will come back to you, probably in about eight minutes.

Prof. Serdy: Thank you. That's fine.

Proceedings suspended from 16:25 to 16:34

Senator PATRICK: I think we were saying before the break that it's quite unusual, that combination of three. You haven't seen Professor Fernandes's final submission, have you—or supplementary submission?

Prof. Serdy: I've seen his original submission, but not any supplementary submission.

Senator PATRICK: I seem to recall that in your submission you were of the view that withdrawing the declarations would be a positive action in the context of our standing in the international community. I don't want to verbal you. I'm out of place; I walked away. But—

Prof. Serdy: I certainly wouldn't oppose withdrawing the declaration. In fact, I'd be quite happy to see it happen. I'd just caution, though, that it wouldn't actually achieve anything concrete. It would really be just of symbolic value. It would be to say, we made a mistake in 2002 and we're sorry and we won't do it again.

Senator PATRICK: All right. But do you think it would give us additional standing in the context of the rule based order regime or philosophy that we purportedly aspire to?

Prof. Serdy: I think it would certainly do no harm in that regard, and it might do a little bit of good. I wouldn't expect too much of it, though. Otherwise, I'd be more enthusiastic.

Senator PATRICK: Professor Rothwell, you're not quite so critical of us making the declarations back in 2002. You say that that's quite a normal process, simply to negotiate one on one.

Prof. Rothwell: I guess the position I take is that it's not exceptional, and the reason I say that is that I think the then Prime Minister, Alexander Downer, observed that Australia's preference has been to negotiate its maritime boundaries. That is something that is entirely consistent with the law of the sea convention. Indeed, the negotiated maritime boundaries that Australia has been able to achieve through those processes have in some cases been exceptional. They've set standards for the way in which maritime boundaries could be seen in terms of being very innovative, and here I reference the Torres Strait Treaty between Australia and Papua New Guinea. And even, it needs to be acknowledged, the original Timor Sea Treaty between Australia and Indonesia was considered to be a very innovative treaty in terms of joint development.

So, Australia has a very strong track record in terms of negotiating maritime boundaries by agreement with its neighbours using, as I've said, some very innovative means and mechanisms and, to that end, Australia's decision to say to the international community, 'Look, our preference is negotiation; we're therefore going to remove our acceptance of the jurisdiction of the international court in terms of maritime boundaries, because we prefer to negotiate.' Likewise, in terms of its article 298 declaration, I think that's perfectly consistent with the approach that Australia has sought to take in those matters.

Senator PATRICK: Some of those Indonesia negotiations took place well before we ratified UNCLOS, didn't they?

Prof. Rothwell: Yes, that's correct. But of course the negotiations during the 1980s with Indonesia vis-a-vis what was then the Indonesian province of East Timor were conducted against the backdrop of the law of the sea convention having been concluded in 1982.

Senator PATRICK: Yes, but at that stage not ratified by us.

Prof. Rothwell: We moved towards ratification during that process, but I'm trying to give the sense that the negotiations were being conducted against the spirit of the convention. And certainly by the time the treaty was negotiated Australia was well on track towards finally achieving ratification, although Australian ratification didn't occur until 1994 of the law of the sea convention.

Senator PATRICK: So, had we not made the declarations in 2002, could we not have still simply negotiated with the East Timorese?

Prof. Rothwell: Yes, we could have.

Senator PATRICK: So what was the purpose of the declarations, in your view, if that was the preferred method and these articles did not prevent that? Why do you think it was necessary for those declarations to be made?

Prof. Rothwell: I'll restate the point I made earlier, and that is that Australia's position is that they preferred to negotiate and not to have Australia's maritime boundaries settled by what's called third-party dispute settlement—that' is, either by an international court, an international tribunal, an international arbitral body. Australia preferred to negotiate its maritime boundaries, and to that end it pointed to its track record of having been able to successfully do so.

Senator PATRICK: The negotiation that took place after the declarations were made involved espionage activity, so that probably doesn't stand up as a model way of negotiating a treaty, does it?

Prof. Rothwell: It needs to be noted that there have been a number of negotiations. Soon after Australia made the declarations that we're discussing today, it was able to negotiate in 2002 and actually sign on the day that Timor became an independent state the first Timor Sea treaty. That is the baseline treaty.

Senator PATRICK: Do you really think it's acceptable in an international environment to sign a treaty with a nation that is one-day old, that they have the capacity to have properly considered the elements of those treaties? Does that seem normal to you?

Prof. Rothwell: I would acknowledge that it's exceptional, but it needs to also be understood that Timor was receiving very significant assistance from the United Nations and the international community to have this treaty concluded because of the significance that was seen to be associated with the treaty for Timor's economic prosperity. I think we need to be clear in terms of distinguishing between the 2002 Timor Sea treaty—I'm not aware of any questions being raised about the legitimacy of that treaty, as opposed to the subsequent treaty negotiations in 2005 and 2006, which are the negotiations that I believe you're referring to, which are the subject of the espionage charges.

Senator PATRICK: Moving forward, you can see, because we have the benefit of hindsight, the sequence of events where we withdrew from international arbitration, effectively saying to Timor that the only way you will be able to resolve this is by negotiating directly with Australia and, indeed, Australia then proceeding to spy on the negotiating team. I say that—I've got a comment from the head of the Attorney-General's Department—presuming that Witness K and Bernard Collaery are not facing charges in a court for revealing a fictitious operation. While the government neither confirms nor denies these things, I think it's pretty certain that something occurred.

Prof. Rothwell: I don't think I'm really in a position to comment on that. I know that these allegations are in the public domain, and you referred to observations that have been made. I would concede that, if these allegations were proven, that is not consistent with Australia's general aspiration to be a good international citizen and certainly not consistent with good international conduct in terms of negotiating a treaty with Timor-Leste or, indeed, any other country.

Senator PATRICK: The following action which did go to the ICJ—relating to data and data protection, I think were the words you used, but in a sense was to do with the raid on Timor's lawyer's office—turned out to be quite an untidy operation, and the court ruled against Australia in relation to that.

Prof. Rothwell: It needs to be noted that the court ruled in favour of Timor-Leste in terms of Timor's request for what are called provisional measures. Provisional measures are effectively a form of international injunction. After that ruling was made by the ICJ in 2014 and various undertakings were given by the Australian government Timor elected to discontinue those proceedings. The international court never finally ruled on the merits of the Timorese claim against Australia, but Timor was successful at first instance in terms of the provisional measures.

Senator PATRICK: They certainly made some orders in relation to Australia, didn't they?

Prof. Rothwell: Yes, they did. Those were the provisional measures orders, and the Australian government sought to abide by those.

Senator PATRICK: Do you recall what those orders were?

Prof. Rothwell: They related to the return of the documents and other undertakings that Australia was asked to give in relation to those matters—indeed, relating to questions in terms material that Mr Collaery had taken from him in his Canberra house.

Senator PATRICK: And not to spy on the conversations with the legal team was another order, I think, wasn't it?

Prof. Rothwell: I can't recall that point, Senator.

Senator PATRICK: Sure. In relation to that ICJ litigation: Australia resisted that as a method of litigation in the first place. Having read the submissions of the AGS in relation to that particular hearing, their view was to take that matter to the High Court or to Australian courts, wasn't it?

Prof. Rothwell: Just to clarify: you're referring to Timor's application before the International Court of Justice commenced in December 2013?

Senator PATRICK: That's correct.

Prof. Rothwell: Yes.

Senator PATRICK: The material before the court of arbitration was held in confidence, but there was a release of information under the ICJ hearings—a lot more information became available.

Prof. Rothwell: That's correct. It needs to be recalled that there were in fact a number of international litigations on foot at the time between Australia and Timor. Not only was there the matter before the international court that we're discussing but there was also a separate international arbitration that Timor had instituted under the 2002 Timor Sea Treaty which related to some of the matters we were discussing in terms of alleged espionage matters and also some technical matters under the Timor Sea Treaty. So we had these parallel litigations occurring at the time.

Senator PATRICK: Simply summing up what we've been talking about over the last five minutes or so: you're saying that we've been good negotiators and that negotiation has been a pathway that has worked well for us. But over the last five minutes we've talked about matters that really were very, very untidy and which have caused a lot of discomfort between both Timor and Australia. Would that be fair to say?

Prof. Rothwell: I'm not denying that, but I guess the Australian government would say that it was seeking to protect its position on various matters. No doubt, the then Attorney-General, Senator Brandis, made various observations about the conduct of the raids in Canberra in 2013. I respect that that was the Australian government's position on those matters. As I said, there was no final conclusive determination by the international court on the matters brought by Timor against Australia, other than the initial provisional measures determination in early 2014.

Senator PATRICK: Sure. Moving forward again: I note that we're the only state that has made declarations under 298(1)(a) and under article 36(2) of the ICJ, and explicitly excluding sea boundary delineation disputes. So we're an outlier—the only country amongst the 70-plus, I think it was, that have involved themselves in this treaty. In some sense, this is the point of this inquiry: from a rules-based international-order perspective, do you think it would be helpful if we were to reverse those declarations and put ourselves back into the situation of the international norm?

Prof. Rothwell: I guess the general position I've always taken is one in which I would prefer to see the Australian declaration with respect to the international court to be reverted back to that which existed in 1975, in which Australia said, 'We accept the jurisdiction of the international court without reservation, subject to some very technical matters.' That said, effectively, to the international community that Australia is open and willing to be taken to the international court by any particular state.

I think the point that needs to be noted is that that was back in 1975; it predated the conclusion of the very technical and detailed provisions for dispute settlement under the law of the sea convention. So Australia may well be entirely legitimate in saying, 'Well, yes, we're happy to be taken to the international court,' and we have been taken to the international court by countries which are very small, such as Nauru, and, indeed, Timor in terms of the matters that we've been discussing, 'but in terms of maritime boundaries and because of the core sovereign interest that we have there, our position is that we prefer to settle that by negotiation.' That's entirely consistent with the law of the sea convention. And even then, even under the law of the sea convention, if negotiation is not capable of reaching a settlement, as Timor-Leste has proven, there's still a process for compulsory conciliation, for Australia to be taken before a third-party process.

Senator PATRICK: I note your preference but, noting we don't have much in the way of sea boundary disputes at this point in time, is there any downside from withdrawing those declarations, that you can see?

Prof. Rothwell: If I could just correct you gently, we still have—

Senator PATRICK: You don't have to be gentle; it's all right.

CHAIR: We correct him ungently often!

Prof. Rothwell: There is an interesting outstanding issue in terms of the so-called Perth treaty between Australia and Indonesia. It was negotiated, I believe, in 1989.

Prof. Serdy: In 1997.

Prof. Rothwell: In 1997—thank you, Professor Serdy. It is yet to enter into force, because Indonesia has yet to ratify that treaty. If Indonesia were to say to Australia, 'Look, we're not going to ratify that treaty and, rather, we'd like to go back and renegotiate it,' that would throw a significant spanner in the works in terms of Australia's maritime boundary arrangements with Indonesia in that part of the Indian Ocean. So that's a very significant maritime boundary issue that remains outstanding.

The other boundary issues are principally ones in Antarctica, and the prospect of those being negotiated consistently with the Antarctic Treaty into the future, I would suggest to you, are rather remote. So I will come back to the fact that there is some potential issue in terms of the fact that Australia may still have a significant maritime boundary with Indonesia to be negotiated, subject to those matters with the Perth treaty being resolved.

Senator ABETZ: My apologies for not being here earlier. There were divisions in the Senate. Thank you for your submission. Could I just ask a general question, which is: within the international community—right, wrong or indifferent—is it known that espionage occurs?

Prof. Rothwell: Chair, can I just clarify: is Senator Abetz asking the question of me or of Professor Serdy?

Senator ABETZ: Either of you, both of you—whoever wants to respond.

Prof. Serdy: Professor Rothwell has kindly given me first crack at the answer. Yes, it's well known that it occurs. There is a view that it's contrary to customary international law, but I think that's a minority view and most observers and academics would say that if all states engage in it then it can't really be unlawful.

Senator ABETZ: Thank you for that further explanation, but the point I'm trying to get to is: those countries that have signed up to UNCLOS without reservations on the matters that Australia has derogated from—do you think they engage in espionage from time to time?

Prof. Serdy: Which particular countries are you referring to?

Senator ABETZ: All of the countries that have signed up. The point I'm trying to get to is this: whether or not Australia engaged in espionage is, I would have thought, with respect, completely and utterly unrelated to whether or not you've derogated from a particular treaty or expressed a reservation to it, and that the linkage that my good friend Senator Patrick was trying to make is not one that is actually based on practical experience in matters of international relations. Espionage occurs irrespective of whether one has derogated from a particular treaty.

Prof. Serdy: I suppose you could say that those two things compound each other in causing damage.

Senator ABETZ: I can understand all that. But the fact that espionage occurred, one way or the other—if that is to be asserted—then if we had been part of the process that Senator Patrick suggests we should be, would that, as of necessity, have meant that no espionage could or would have been undertaken?

Prof. Serdy: That's a very interesting hypothetical question. It would probably have been slightly less likely, but only marginally.

Senator ABETZ: Yes, only marginally, because people have been known to seek to get information from the other side in court cases through surreptitious means, and one assumes that that might also occur in international court cases. I won't go further down that track; I will ask another question. How often do we get a new nation appearing in the world? That's a pretty unusual, rare, occurrence, is it?

Prof. Serdy: I'm treating this, Senator, as a sort of arithmetical exercise. Going back to 1945, the UN got going with, I think, 51 members and we're now up to 193 or so.

Senator ABETZ: But that's not new members. That's not new countries. That's existing companies signing up to the United Nations. What I'm asking you is: how often do we get a new country, like East Timor or South Sudan, appearing on the world scene? It's a pretty rare, unusual, event, is it not?

Prof. Serdy: That was more or less the point I was making. There were only 50 countries or so in 1945 and now there are approaching 200. So at the rate of roughly two a year we've been adding to that number.

Senator ABETZ: Are you saying that there were only 50 countries?

Prof. Serdy: Something like that, yes—in 1945. There were 51 founding members of the UN. There were a few—

Senator ABETZ: No; I am not talking about founding members of the UN; I'm talking about countries per se.

Prof. Serdy: The process hasn't entirely stopped, because we have, for example, Eritrea separating from Ethiopia in the early 90s, I think it was; and South Sudan a few years ago, which is the example you've mentioned. It's not something that happens every day but the number of countries is still increasing rather than decreasing.

Senator ABETZ: Yes, I accept that, but it's a pretty rare occurrence. So, when reference is made to whether something is the normal practice of engaging with a new or emerging country, we are in fact talking about a very unusual situation in any event, because we don't have a new country emerging as a matter of commonplace, do we?

Prof. Serdy: In my lifetime there have been quite a few new countries just in our vicinity. There's been Papua New Guinea, Vanuatu, the Solomon Islands and Timor Leste, obviously.

Senator ABETZ: That is about changing Papua New Guinea's status from a territory to independence, but it still had its geography integrity. Without asking you your age, how many new countries have emerged during

your lifetime? Without playing semantics, can we agree that a new country does not emerge every year, for example?

Prof. Serdy: There are many years that go by without any new country emerging.

Senator ABETZ: Thank you.

Senator PATRICK: My understanding is that as part of the 2002 agreement we agreed to enter into good-faith negotiations with East Timor in relation to the boundary. Is that correct?

Prof. Serdy: Yes, that's right. There was a whole series of documents signed in 2002. I'm not certain that that commitment to good-faith negotiations was in the Timor Sea Treaty, but it was certainly made as part of that suite of documents.

Senator PATRICK: Going back to Senator Abetz's questions about espionage, I understand that countries do engage in espionage, but would it be normal in circumstances where you have agreed to negotiate in good faith to then spy on the other side? Is that a normal moral approach to doing business, in your understanding of the way international negotiations work?

Prof. Serdy: I can certainly see the apparent disconnect between the two things.

Senator PATRICK: Thank you; that's all I need.

FERNANDES, Professor Clinton, Private capacity

[17:00]

CHAIR: We might move back to Professor Fernandes. Senator Abetz has some questions.

Senator ABETZ: Thank you very much for your submissions. In your first submission on page 2, at the third-last paragraph—

Prof. Fernandes: I haven't got a copy, but sure.

Senator ABETZ: Right. You said the words—and please trust me that I'm quoting you correctly:

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.

My first of two questions is: to which energy companies are you referring in that paragraph?

Prof. Fernandes: It was the consortia that were involved in the Timor Sea project in 2002, whichever they were.

Senator ABETZ: And what evidence do you have to support that assertion?

Prof. Fernandes: The Bayu-Undan field, which is 135 nautical miles south of Timor, would have gone to Timor. The oil and gas revenues from that field would have allowed the Timorese to develop their own country and also to get legal advice from the best international maritime law people as well as do bathymetric surveys and get geoscientific information in order to better assert their rights. Instead, Australia refused to agree to the Bayu-Undan field being developed unless Timor signed the Timor Sea Treaty and then also gave up its right to have a fair share of Greater Sunrise—and Greater Sunrise is where the real action was.

Now, why was it not in our national interests? For the first instance, Bayu-Undan was never connected to our national gas grid. It was sold off on the spot market so that consumers in, for example, Japan paid less for Australian gas than Australian consumers. That patently is not in our interests, but it is in the interests of the consortia which would have preferred to pay lower taxes in Australia than whatever taxes Timor—

Senator ABETZ: So Australia knew that it was going to be sold off?

Prof. Fernandes: What do you mean? I have no idea.

Senator ABETZ: Well, how can you make the assertion then if you had no idea?

Prof. Fernandes: Well, if it's not connected to the national gas grid then of course the oil companies will do what they wish with it.

Senator ABETZ: But, in the event it was going to be—

Prof. Fernandes: It was never connected to the national gas grid. How could it possibly have come to Australia unless the oil companies chose to make a loss by giving it to us—

Senator ABETZ: Yes, but this is an assertion you are making against the Australian government. Sure, I can see you are sort of theorising about it, but I'm asking for actual evidence.

Prof. Fernandes: Of what?

Senator ABETZ: That Australia made those declarations in order to protect the companies rather than Australia, which is a very serious allegation to make against any government, I would have thought.

Prof. Fernandes: Sure. Well, the declarations firstly prevented the oil and gas going to Timor. They did in fact benefit the oil and gas companies because it allowed them to get access to the gas rather than it go to Timor, which had a national petroleum company of its own. That prima facie benefits those oil companies rather than the national petroleum company of Timor.

Senator ABETZ: That something might benefit an oil company is one thing. You are asserting that they did it rather than benefitting Australia, which is a much bigger step than that

Prof. Fernandes: No, not at all; it's a very short step because Australia does not have a national petroleum company of our own. Timor does. So the alternatives are either we allow the Timorese to develop their own gas through the national petroleum company or we give it to the private oil companies. We don't have a company of our own. The only choice we had to make was to allow either the private consortia or allow the Timorese to develop the gas field themselves with the national petroleum company. It's not a deduction at all; it is basically quite obvious. It's either one or the other. We don't have a national petroleum company.

Senator ABETZ: Yes, but it's still a quantum leap—

Prof. Fernandes: Not at all.

Senator ABETZ: to assert that a government and those negotiating were doing something that was against our interests and in favour of somebody else's interests. This is getting into very, very serious allegation, I would have thought.

Prof. Fernandes: No, it's not a quantum leap at all. In fact, I make the point very clearly that it was either support the national petroleum company of Timor by allowing them the right to access the field and allowing them to take us to court if they chose to, or allow it go to the private oil companies which were in consortia. That's it. There was no other option.

Senator ABETZ: All right. Thank you.

CHAIR: Thank you, Senator Abetz. Are there any further questions for Professor Fernandes?

Prof. Fernandes: May I respond something to briefly that was asked of Professors Serdy and Rothwell about the alleged espionage?

CHAIR: Yes.

Prof. Fernandes: I have no idea that it in fact occurred, because these things are all top secret, but what I do have questions about is 9 September 2004, when the Jemaah Islamiyah terrorist group targeted the Australian embassy and attacked it with a car bomb. A few people were killed in that attack and the white paper on counterterrorism said in 2004 that our No. 1 effort is going to be extremist Islamic fundamentalism in Indonesia. Those phrases were used 150 times in the space of the 110-page white paper on counterterrorism, and yet, if there were in fact an espionage operation, it diverted scarce ASIS resources away from this war on terror and Jemaah Islamiyah towards Timor, which is 90 per cent Catholic and 95 per cent Christian, with no history of Jemaah Islamiyah. The negotiations on which the espionage allegedly occurred—I have no evidence of this—took place in September and October 2004 at the same time that Jemaah Islamiyah targeted the Australian embassy in Jakarta with a car bomb. So, to me, that is a question that cries out for an explanation. If in fact this espionage occurred, why is it that resources were being redeployed away from the war on terror towards Timor?

Senator PATRICK: You said you were a former intelligence officer.

Prof. Fernandes: I was a principal analyst for the East Timor desk, yes.

Senator PATRICK: Are you aware of any court proceedings against anyone for revealing a fictitious operation? I'm referring specifically to witness K and Mr Collaery.

Prof. Fernandes: No. In fact, the only thing that can be said is that the raids in December 2013 effectively confirmed that there was some credibility to the people who had been raided, because people make claims about espionage operations all the time, and I have no doubt that countries engage in espionage frequently. To me the question is, if in fact this occurred, why was ASIS targeting Timor, not Jemaah Islamiyah, the extremist Islamic terrorist group which the government said it was going after? It's not a simple matter. If you want to spy on a foreign government, you can't just leave your iPhone on in the room, hoping people talk from time to time. You've got to go in there and conduct a reconnaissance of the room that you're trying to spy on. Then you've got to map the geometry of the room to work out where the listening devices go in. You've got to work out a power

source for those listening devices. They could be there for months; how are they going to operate? Then you have to have a plausible story—in this case it appeared to have been refurbishing the cabinet rooms of the Timorese government. You've then got to go and actually refurbish those cabinet rooms and also install the listening devices. That's a labour-intensive operation. It requires a lot of skill, which ASIS patently does have, but it also means that you are redeploying assets away from this war on terror towards this labour-intensive operation. To me, that's what cries out for an explanation.

That said, I have no knowledge of the operation and, if I did, I wouldn't discuss it in the open.

Senator PATRICK: So, back to my point: Bernard Collaery and witness K are on trial in relation to revealing an intelligence operation. I presume that you can't be tried for revealing a fictitious operation.

Prof. Fernandes: The charge against them is limited, as I understand it. It's article 39 of the Intelligence Services Act, which is disclosing any information about ASIS, including the number of paperclips. So, they need not be charged with actually revealing an espionage operation. They could be charged with something more innocuous. There is secret evidence—which of course I haven't seen; I've no idea who witness K is—but no, people are not normally raided and charged for making fictitious claims.

CHAIR: Thank you very much, Professor Fernandes.

HECKSCHER, Ms Julie, First Assistant Secretary, Southeast Asia Division, Department of Foreign Affairs and Trade

LARSEN, Mr James, Chief Legal Officer, Department of Foreign Affairs and Trade

SHEEHAN, Ms Anne, Assistant Secretary, Office of International Law, Attorney-General's Department

WHYATT, Mr Justin, Assistant Secretary (Legal Adviser), Department of Foreign Affairs and Trade

[17:11]

CHAIR: Welcome. Thank you for your time. Information on parliamentary privilege and the protection of witnesses and evidence has been provided to you. The Senate has resolved that an officer of a department of the Commonwealth or of a state shall not be asked to give opinions on matters of policy and shall be given reasonable opportunity to refer questions asked of the officer to superior officers or to a minister. This resolution prohibits only questions asking for opinions of matters of policy and does not preclude questions asking for explanations of policies or factual questions about when and how policies were adopted. Would any of you like to make a brief opening statement before we proceed to questions?

Mr Larsen: I have some very brief remarks. Australia has a strong and deserved reputation for supporting the international rule of law. Australia's declarations are fully consistent with international law, including the United Nations Convention on the Law of the Sea and the Statute of the International Court of Justice. Australia continues to accept the compulsory jurisdiction of the International Court of Justice and is in fact amongst a minority of states to do so. Only 74 out of a total of 193 states have accepted the compulsory jurisdiction of the International Court of Justice.

Like most countries accepting the compulsory jurisdiction of the International Court of Justice, including the United Kingdom, Canada and New Zealand, Australia does so with limitations. A number of countries have made similar reservations to Australia to the Statute of the International Court of Justice, specifically regarding maritime boundaries. These countries include India and Malta. Australia's declarations under the United Nations Convention on the Law of the Sea are also consistent with the practice of a range of other states, including France, Canada and Singapore.

Australia's declarations reflect the government's view that maritime boundary disputes are best settled by negotiation, not litigation. Australia's view is that negotiation allows for mutually acceptable outcomes for the long term and that acceptance by both countries is more likely through negotiation. Australia has settled all its boundaries by negotiation. The benefits of a negotiated outcome were clearly demonstrated through the successful conclusion of the maritime boundary treaty between Australia and Timor-Leste. Through this negotiation process, we reached an outcome which both sides see as fair, balanced and consistent with international law, and the government is not considering withdrawing or changing Australia's declarations at this time.

Senator ABETZ: Could you just confirm the number, in relation to the treaty, of countries that have actually signed up. I think you said it was 70 out of a hundred and—

Mr Larsen: Seventy-four out of 193 states in relation to compulsory jurisdiction.

Senator ABETZ: So that's less than 50 per cent?

Mr Larsen: Indeed. It's closer to 33 per cent.

Senator ABETZ: So one-third, in fact, have signed up. So, if people make an assertion about what is usual within the international framework, in fact two-thirds aren't even part of this arrangement?

Mr Larsen: Correct. In fact, the essence of dispute resolution internationally, of course, is that it has to be by consent between the states, and both the Statute of the International Court of Justice and the United Nations Convention on the Law of the Sea make specific provision for how states might expose themselves to different types of dispute settlement mechanisms.

Senator ABETZ: Then, out of the small number of one-third that have signed up, I understand there were nine that had either derogations or reservations. Is that correct?

Mr Larsen: I would need to check the number. Perhaps one of my colleagues knows.

Ms Sheehan: In relation to the International Court of Justice?

Senator ABETZ: Yes.

Ms Sheehan: Seventy-four states have accepted the compulsory jurisdiction of the ICJ, and 50 of those have made a declaration of limitations on their acceptance of the ICJ's jurisdiction.

Senator ABETZ: Is there one limitation that covers, let's say, 49 of those, or are they all different, with a particular perspective that each nation-state has expressed concern about?

Ms Sheehan: They vary.

Senator ABETZ: So there is not one particular limitation that covers the field?

Mr Larsen: That's correct. They vary according to circumstance. They may not be framed in terms of maritime boundaries. They could be framed more broadly and cover different issues.

Senator ABETZ: So, in response to the statement that Australia has a unique reservation or limitation, it would be fair to say that the vast majority of those that have limited their acceptance of the ICJ have, if you like, a unique reservation which they have sought to lodge?

Mr Larsen: I'd say that that there would obviously be similarities, but each state's declaration will reflect its particular circumstances. Of course, both UNCLOS and the Statute of the International Court of Justice expressly contemplate such arrangements, so we would strongly put the position that what Australia is doing is utterly unremarkable and a perfectly conventional way to protect our interests and make sure that we manage dispute resolution processes in ways which reflect our particular circumstances.

Senator ABETZ: Did you hear the evidence of Professor Fernandes, who made certain assertions about an aspect of our initial treaty with East Timor, that declarations were made in order to protect energy companies rather than Australia? I was wondering whether you would like to respond to that assertion.

Mr Larsen: As an official, contemporaneously, of course I don't have visibility of the particular thinking at the time. I'd refer to the record of the matter, the National Interest Analysis which was submitted in 2002. Evidence was provided by officials at the time and that certainly was not identified as a rationale for the position adopted by the government in 2002.

Senator ABETZ: Thank you.

Senator PATRICK: Just on that last question: Woodside was a beneficiary of the treaty negotiations, one would imagine?

Mr Larsen: I think—

Senator PATRICK: It's fair to say that they operated the field and presumably made money out of it in the end.

Senator ABETZ: Is it a question of coincidental benefit—the chance and what the motivation was for the actual decision?

Mr Larsen: I'd agree with that, but I'd also say that the responsibility of any Australian government in any treaty negotiation—and particularly in relation to a boundary negotiation—is to represent the sovereign interests of Australia. Part of representing the sovereign interests of Australia will of course be Australia's broader economic and other interests. It's the job of the government to ensure that Australian companies are not disadvantaged by our negotiations. But, fundamentally, they are Australia's sovereign interests that are at stake, and they are the driving factor in any negotiation mandate.

Senator PATRICK: I wasn't necessarily linking back to what Professor Fernandes said. It's reasonable to presume that Woodside made money out of the resultant processing of the fields—Undan and

Mr Larsen: I don't have those figures. I'm aware that those fields were commercially active but I don't have any visibility of the economic consequences.

Senator PATRICK: Who was the—

Senator ABETZ: Who negotiates these things? Does the minister sit down or do officials undertake the negotiations?

Mr Larsen: Ordinarily, you would have a mandate from the Prime Minister or cabinet, or ministers or the relevant minister. Frequently, such negotiations will be conducted by a cross-agency task force. There could be officials from the resources department or whatever the particular ministry is called at the time. Obviously, there would be the Department of Foreign Affairs and Trade, the Attorney-General's Department and other agencies. You would usually have a government mandate—a political mandate—to negotiate. The responsibility of officials is then to progress the matter in accordance with that mandate. But you'd appreciate it will always be case-by-case, so there will be occasions when a Prime Minister will directly engage with his or her counterpart in relation to a particular provisional clause, or even on a treaty itself. More ordinarily, it would be officials from relevant portfolios who are charged with the responsibility for taking forward the mandate given to them by the relevant political leadership.

Senator ABETZ: And is the mandate cabinet in confidence, or does that become publicly available? I should know that but I don't.

Mr Larsen: It's not required to be cabinet in confidence but, obviously, if it's a decision of cabinet then that would be cabinet in confidence unless the government chose, for whatever reason, to make aspects of it public.

Senator LAMBIE: Do you know if any of those petroleum companies at the time had access to ministers while this was going on—whether or not you can shed any light on that?

Mr Larsen: Personally, I don't know.

Senator PATRICK: Just going to the officials then: who was the secretary at the time of negotiations? Was it Dr Ashton Calvert?

Mr Larsen: I don't recall that precisely, but I think that was probably the case. It's highly likely.

Senator PATRICK: Right. And who did Dr Ashton Calvert go and work for immediately after he left the role of secretary of DFAT?

Mr Larsen: I don't know.

Senator PATRICK: If I told you it was Woodside, would that surprise you?

Senator LAMBIE: Oh, gee! Who would have guessed!

Mr Larsen: I don't have a view on that, Senator.

Senator LAMBIE: I bet you don't!

Senator PATRICK: Have you not heard that Ashton Calvert went to work with Woodside immediately after retiring from DFAT?

Mr Larsen: That's not something that I know, Senator.

Senator PATRICK: You have no knowledge of that?

Mr Larsen: I have no knowledge of that.

CHAIR: I think Mr Larsen has answered that question.

Senator PATRICK: Does anyone else at the table have any knowledge of that—where Dr Ashton Calvert went to and worked after he retired as the Secretary of DFAT?

Ms Sheehan: I don't know.

Mr Whyatt: No, Senator.

Senator LAMBIE: Maybe we could find out if anybody else at that time knew what was going on, so that I can get an answer as to whether or not those petroleum companies were stuck in lockdown with ministers during that period of time. That would be good. If I can get a diary or a definite no that they were not, that would be wonderful. Do you think that I can access that information? Yes or no, were they involved behind closed doors with ministers that were involved in this at the time?

Mr Larsen: I think my response to that would be that certainly officials from the Department of Foreign Affairs and Trade would not know that. I can't speak for other officials. Certainly, officials at this table, as far I am aware—unless one wishes to come forward—and to the best of knowledge we wouldn't know the answer to that question.

Senator PATRICK: I want to go back to the agreement that was signed on the day of independence for Timor. Is it usual on the day of independence—the day a nation becomes a new nation—for DFAT or Australia to turn up and say, 'We need you to sign this document' or 'We need you to sign this treaty'?

Mr Larsen: I don't know, Senator. I'm not in a position to say whether it's usual or not. It was done and it reflected the particular circumstances.

Senator PATRICK: But you can see how any legal document would require some level of due diligence for one to competently sign off on something?

Mr Larsen: Are you asking in relation to Australia?

Senator PATRICK: I am just saying that, as a general principle, in presenting someone with a legal document—in fact, it doesn't matter whether it is in regular everyday life or, indeed, for any arrangement that you might seek to enter into with a foreign country—it would be unusual to not give the other party an opportunity to seek legal advice and to carefully consider what was being offered to them. You don't—

Mr Larsen: Without going to the question of legal advice or what might or might not have happened in the particular circumstances—because I don't know the precise arrangements that were made by Timor Leste at the

time—if you look at history over the last 50 years where you have had newly independent states, it is not uncommon, I would argue, for newly independent states to enter into various treaty arrangements at an early stage after or indeed upon becoming independent.

Senator PATRICK: I'm talking about on the same day. So, on 20 May 2002, Timor Leste gained independence and Australia and Timorese representatives signed the Timor Sea Treaty. That seems really odd.

Mr Larsen: I can't comment on that, Senator. It was done and Australia had confidence at the time that that was a proper arrangement.

Senator ABETZ: Was East Timor, or Timor Leste, provided any assistance from other sources in the negotiations, such as the United Nations?

Mr Larsen: I don't know the answer to that. We could possibly find out, but I don't know the precise answer. I am aware anecdotally, and as a general matter, that, in the course of independence processes, Timor Leste had advice from, for example, Portuguese advisers and other international advisers. But precisely what the advice was in this particular negotiation or outcome, I do not know.

Senator PATRICK: Moving on from that, the declaration had been made slightly before that. We'd ratified the UNCLOS treaty back in 1994 and you said that it's been our view that the best way to establish a boundary is by way of negotiation. Do you have any knowledge as to why Australia, when it signed on to the UNCLOS treaty, didn't make a declaration on the day that it signed the treaty, if that was indeed its view?

Mr Larsen: I have no knowledge which goes beyond the evidence which was given to the predecessor of this committee, I think, at the time the 2002 matter was being looked into.

Senator PATRICK: We went from 1994 to 2002. That's eight years. It just seems a little bit strange that Australia, just as East Timor was to become independent, made these declarations. Was the signing of those declarations a normal action that just coincided with the independence of East Timor or were those declarations indeed motivated by the need to negotiate a boundary with East Timor—because that certainly would have been foreshadowed?

Mr Larsen: As I said, I'm not trying to obfuscate but I don't know. My evidence would rely on the contents of the national interest analysis which was made in relation to both the UNCLOS declaration and the ICJ declaration and of course the evidence provided to this committee's predecessor.

Senator PATRICK: William Campbell of the Attorney-General's Department gave evidence to the JSCOT in relation to those declarations and stated: 'I cannot really get into the motives of why the declaration was made.' I'm not asking you to understand what he thought about that, but it's clear that at the time he didn't want to get into the motives. We're now many, many years beyond that. Is the department able to provide, even on notice, what the motive for initiating those declarations was at the time?

Mr Larsen: In my view, anyway, not beyond what's already been disclosed in the national interest analysis or in other commentary. Of course, there was press commentary by relevant ministers at the time insofar as there were any other government positions, but, no, I don't have any particular insight into motivation beyond that.

Senator ABETZ: Mr Campbell was with which department?

Mr Larsen: He was the head of the Office of International Law of the Attorney-General's Department.

Senator ABETZ: Who would have been responsible for the policy and implementation of the treaty? It would have been Foreign Affairs?

Mr Larsen: It would have been the Department of Foreign Affairs and Trade, yes.

Senator ABETZ: So an official of the Attorney-General's Department would be charged with seeking to interpret a treaty and the international law to which Australia had signed up but would not have been aware of the policy considerations, because that's in the domain of the Department of Foreign Affairs and Trade and not Attorney-General's?

Mr Larsen: I can't conclusively answer that, of course, because I don't have visibility of the precise arrangements at the time.

Senator ABETZ: But it stands to reason, does it not, that an official in one department would not seek to traverse the ground of another department as to what had motivated the policy decisions if their task is simply to interpret?

Mr Larsen: It is highly likely, although, to be absolutely honest, there's not a hermetic siloing—

Senator PATRICK: In fact, I'd say you can't actually give legal advice without understanding the circumstances around which that legal advice is intended to be used. Most barristers will seek a brief that's—

CHAIR: We might not go into—

Senator PATRICK: Sure, okay.

CHAIR: But I'll give you back the call.

Senator PATRICK: Thank you. I wonder if you could take on notice then—perhaps even Ms Sheehan, noting it was the Attorney-General's—if there is any clarity, and noting what Senator Abetz said, particularly in relation to Foreign Affairs, essentially saying there may be a compartmentalisation issue? Could you come back and provide the committee with what the department's policy motive was in issuing the declarations?

Mr Larsen: I'm not sure I can do that. I would refer you to—

Senator PATRICK: I think you can take it on notice. You might not be able to answer it.

Senator ABETZ: The record speaks for itself with the NIA.

Mr Larsen: Correct.

CHAIR: Unless you can restrict that and rephrase it to something that is I guess more empirical, then I don't think you can ask for a motive. And as Mr Larsen and—

Senator PATRICK: Sorry—for policy reasoning.

Mr Larsen: I'm just not in a position—I don't think the Department of Foreign Affairs is in a position to re-litigate the policy reasoning.

CHAIR: I think the NIA does cover—because it explicates the case—

Senator PATRICK: I'm simply asking: beyond the NIA, and on notice—I'm not asking you to ask now, but I'm sure the department keeps very good records—whether or not you could provide the committee, if such information exists, with any policy motive for the declarations.

Mr Larsen: I'd look to the chair on this, but obviously the government, in its public documents—and I think there was some correspondence from the Minister for Foreign Affairs to the chair of the joint standing committee on 25 March 2002 which went into this to an extent—there's the national interest analysis, there's evidence that has been given by officials—

Senator PATRICK: To where?

Mr Larsen: To the joint standing committee—JSCOT.

Senator PATRICK: Back in 2002?

Mr Larsen: I don't think it would be proper of me to suggest that I could give you more information regarding the governance—

Senator PATRICK: I'm not asking for a commitment, just simply to take it on notice.

Mr Larsen: But if I take it on notice I'm giving you a commitment to come back to you.

CHAIR: Yes.

Senator PATRICK: And you could come back and say, 'We haven't found anything.'

CHAIR: I don't think it would be fair to start a precedent where departmental officers are asked to interpret or to reinterpret positions—

Senator PATRICK: It's okay; I'll FOI it, if the committee doesn't want to press that. It's not unusual for a committee to ask for documentation that may have led to a decision.

CHAIR: And I think documentation is fine, and if it is existent—

Senator PATRICK: Okay: can you provide any documentation—

CHAIR: That's good.

Senator PATRICK: that might describe—thank you, Chair—the policy rationale prior to entering into the declaration, please. If none exists, that's fine.

Mr Larsen: Yes, we will do that, subject to the caveat of cabinet-in-confidence and all the usual caveats.

Senator PATRICK: Of course. You can make any public interest immunity claim you like.

Mr Larsen: So, I think we're really talking about documents that are already on the public record.

Senator PATRICK: So, moving on: we now look at these declarations with the benefit of hindsight. We ended up with a declaration that led to a negotiation. It appears that during those negotiations there was some espionage involved on Australia's part. We have proceedings in the ACT court in relation to that, so one presumes that there's not a fictitious operation. Indeed, we then saw East Timor raise an application in the ICJ. In its

pleadings it made it very clear that it was of the view that Australia spied on East Timor during the negotiations. That's in the public documentation on the ICJ's website. There was another controversy in relation to the raiding of the lawyers of East Timor. That was heard in the ICJ, but it was there that we saw the documentation that had been raised in relation to the arbitration commission. Looking back on all of that, and the sequence of events, that wasn't a negotiation that went smoothly, was it? With all those things that happened, noting your statement about how negotiations are the best way to get a good outcome, that's not true in this instance, is it?

Mr Larsen: Respectfully, Senator, I disagree. I think the negotiated outcome was a very good outcome in this instance.

Senator PATRICK: We abandoned that treaty—the 2007 treaty. We abandoned that. I'm not talking about the current treaty. I think there's general agreement that that's in the right place. I'm talking about the previous treaty that flowed from negotiations back in 2004 in East Timor.

Mr Larsen: If you look at the history of the conciliation process that produced the treaty that is now in force between Australia and Timor-Leste, that reinforces our very firm view that the most appropriate way to resolve maritime boundary disputes or boundary disputes of any sort is by negotiation and then having a negotiated process. That really was the critical achievement of the conciliation process. In effect, it brought two parties, which were very much at odds with each other in relation to a very wide variety of matters, to a position where they were able, sensibly, to negotiate an arrangement that was mutually acceptable. Insofar as that arrangement deals with previous arrangements, that reflects where the party's landed as a consequence of the negotiation. I think the evidence supports the view that the end result is highly satisfactory for all sides.

Senator PATRICK: What effect do you think it has had on the relationship with East Timor?

Mr Larsen: My colleague Julie Heckscher may wish to comment on it, but having participated in the negotiations I can attest from personal experience that in the end it was a highly positive process. To be able to have concluded that treaty as part of the conciliation process, I think, laid the groundwork for a positive transformation of the relationship. But I defer to my colleague, who may wish to add to that.

Ms Heckscher: Senator Patrick, you've asked a question about the state of the bilateral relationship and I think you, too, may have been in Timor-Leste for the anniversary earlier this year.

Senator PATRICK: I was, yes—

Ms Heckscher: where the two prime ministers exchanged notes to bring the maritime boundary treaty into force. It was an incredibly positive event. It was welcomed by the prime minister of Timor-Leste and, broadly, in the Timor-Leste community. It was part of the reset of a bilateral relationship and, frankly, from the signing of the maritime boundary treaty sometime before, right through the quite complex process of putting in place all the transitional arrangements to bring the treaty into force, on both the Timorese side and the Australian side, and, following that, all of the steps that have been taken to provide additional capability support to put in place additional bilateral architecture, it has been a really significant and positive set of developments.

Senator PATRICK: You were also at the—

Ms Heckscher: I was not there.

Senator PATRICK: Are you aware the president made a 40-minute speech?

Ms Heckscher: I am aware that there were multiple speeches.

Senator PATRICK: The president of Timor made a 40-minute speech in front of Prime Minister Morrison, and indeed in front of Foreign Minister Payne, and mentioned Australia once in the context of that speech. The context was that Australia is a place to which Timorese go to try to escape the economic downturn in East Timor. They made specific reference to countries that they thought helped them in their freedom fight. They mentioned Portugal, Indonesia and the United Nations. Do you have any reason why Australia wasn't mentioned?

Ms Heckscher: I don't have the transcript of the president's speech here. I can say that there were two anniversaries, as you know. The first was for the popular referendum. The second was for the INTERFET intervention. I can certainly say that there were multiple bilateral meetings that Prime Minister Morrison had during his visit for the first of those anniversaries, in August. In each of those meetings they were very positive. There were a lot of positive comments made about the strength of the relationship and the appreciation that the Timorese had for the support that Australia had provided. The focus of that event was very much the popular referendum and the Timorese people. At the second of those anniversaries, Prime Minister Taur Matan Ruak gave the speech. At that anniversary—that is, the 20th anniversary of INTERFET in September—he specifically said publicly that the success of the Timorese cause would not have been possible without the Australian contribution. So we can pick and choose various speeches, but I do think that there was a very significant recognition

bilaterally in the meetings and in various of the speeches—perhaps not the one you mentioned but certainly consistently throughout those processes—of the strength of the support that Australia had provided to Timor-Leste and was continuing to provide. I can't comment on the particular speech, which I don't have in front of me, but I can say there were plenty of other positive reflections upon the support that Australia had provided.

Senator PATRICK: Moving forward in relation to these particular declarations, I will perhaps just repeat what Senator Abetz was referring to. A supplementary submission we have received today—you may not have had the benefit of reading it—states:

The reality is that of the 21 States that made declarations under Article 298(1)(a) of LOSC—

and I presume that's 21 of the 54 I think you mentioned—

only nine also made declarations under Article 36(2) of the ICJ Statute. And **out of these nine, only Australia explicitly excluded sea boundary delimitation disputes** from the jurisdiction of the ICJ.

So in that sense we are unique. I accept what Senator Abetz said: there could possibly be other countries that are unique in the combinations of things that they have made declarations in relation to. When the foreign minister travels overseas and talks about an international rules based order, noting what happened in relation to East Timor and these declarations, would you concede that this may make it more difficult for Australia to stand up and say that we absolutely respect the rules based order and encourage others to do the same?

Mr Larsen: I wouldn't concede that. I think that the declarations that have been made by Australia are perfectly proper. They reflect our particular circumstances. They have been in place for a considerable period of time. Since they've been in place, we have had a very satisfactory negotiation with Timor-Leste to resolve our maritime boundary with Timor-Leste. So, no, I would not accept the proposition that those declarations in any way undermine Australia's standing in relation to the rules based order. Indeed, I think the capacity effectively to have arrangements which foreshadow how you will engage with other states in relation to disputed matters underscores our integrity as a nation. Clearly, the arrangements and declarations that we've made are entirely allowable under the relevant statutes and treaties.

Senator PATRICK: Many things are allowable but maybe not ideal.

Mr Larsen: I would argue that in this particular instance, in the case of Timor-Leste, yes, it did take a long time to come to a mutually satisfactory resolution, but I think in the end the fact that our two countries were able to have a negotiation which produced the result that it did underscores the motivation for putting those declarations in in the first place.

Senator PATRICK: Except we don't understand those motivations, you told us.

Mr Larsen: I understand the motivations on the basis of what's been declared in the national interest analysis, correspondence from the foreign minister and evidence from officials.

Senator PATRICK: Related to that, the Timor Sea Justice Campaign argued in their submission:

Because the Australian Government still does not recognise the full jurisdiction of the International Court of Justice and the International Tribunal for the Law of the Sea, Australian foreign ministers continue to have a serious credibility gap when they call on countries, like China, to follow international maritime law and heed various court rulings

Do you want to respond to that?

Mr Larsen: As the Chief Legal Officer of the Department of Foreign Affairs and Trade, I engage with legal counterparts, including those from China, frequently, and I would say that observation is not borne out in my experience.

Senator PATRICK: Professor Serdy argued in his submission that:

… 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.

Would you agree with his assessment?

Mr Larsen: I've read Professor Serdy's paper. I don't have a view on that, because in fact we reached a mutually satisfactory outcome by way of negotiation. Australia is certainly very satisfied with where we learned it in relation to the treaty that was negotiated under the auspices of the conciliation process. And, as we've just articulated, my understanding is that Timor-Leste is likewise very satisfied. So I think ultimately a boundary issue can only effectively be resolved by way of a mutually agreed negotiation and a mutually agreed outcome, and that's what we have in this instance.

Senator PATRICK: From the evidence we received today from multiple parties, the suggestion was made that, even in the circumstances where we had not made those declarations at all, negotiation was still perhaps the primary method by which we could have conducted the boundary resolution. Is that correct?

Mr Larsen: In a sense, from the submissions to the inquiry that I have seen, you have some submissions that say that the negotiation process was wildly in favour of Australia, and you have submissions that say that the process was wildly in favour of Timor-Leste.

Senator PATRICK: Sorry: my question simply went to the possibility of just carrying out a negotiation with Timor-Leste if those declarations had been in place. There was nothing that prohibited Australia from simply negotiating with Timor-Leste as a willing party to negotiations.

Mr Larsen: In my view the declarations that have been were appropriate—

Senator PATRICK: Sorry: I wouldn't mind if you just answered that question. Would it have been possible to conduct the negotiations with Timor-Leste, even without the declarations that were made?

Mr Larsen: In my view, no negotiation exists independent of its context, including its historical context. Its historical context will always inform how a negotiation is undertaken, and in this instance the declarations were made in 2002, and they were part of then a quite contested approach to these issues.

Senator PATRICK: But as a statement of legal fact, back in 2002, had we not made those declarations there would not have been anything that prohibited us from simply negotiating with the Timor-Leste government. I'm presuming that being subject to the jurisdiction doesn't prohibit you from conducting negotiations.

Mr Larsen: I would argue that being under the sword of Damocles of possible action in a court process or some other sort of compulsory dispute settlement process certainly would influence how a negotiation was undertaken.

Senator PATRICK: Sure.

Mr Larsen: So, as a pure question of fact, not law, could you have negotiated it regardless of the context or circumstances? Yes, of course you could.

Senator PATRICK: Okay. That's all I was trying to get to. Where I'm trying to get to is, moving forward, whether or not in withdrawing the declarations we would place ourselves at any disadvantage for future negotiations—albeit that there aren't many remaining.

Mr Larsen: Ultimately, that is a decision for a government at the political level. My recommendation would be not to withdraw those declarations.

Senator PATRICK: And you'd make that recommendation because—

Mr Larsen: For the rationale that has been given consistently in relation to them: that certainly the view of the Department of Foreign Affairs and Trade is that these boundary delimitation matters are better resolved through negotiation rather than litigation.

Senator PATRICK: However we know that you can negotiate even with those declarations not in place? That's a fact.

Mr Larsen: It is a fact.

Senator PATRICK: My understanding is that even if you were asked to go to the ICJ you still have to consent. That was the evidence that—

Mr Larsen: I'm not quite sure of the context of the question.

Senator PATRICK: If a country wanted to take us to the ICJ, the evidence I heard from the three professors today is that they can only do so if we were to consent anyway?

Mr Larsen: We have accepted the compulsory jurisdiction of the International Court of Justice in relation to a number of matters and the effect of our declaration is to exclude from that compulsory jurisdiction the certain matters we are talking about—the particular delimitation.

Senator PATRICK: But not compulsory conciliation. We elected to remain in that—

Mr Larsen: Not compulsory conciliation, that's correct, because in fact the compulsory conciliation, of course, did proceed.

Senator PATRICK: What is the motivation for not subjecting yourself to the ICJ in respect of the negotiations for the first element, yet you do submit yourself for the second element?

Mr Larsen: As I understand it, the effect—and my colleagues here will elaborate and probably correct me, I suspect—of those declarations was not to exclude the compulsory conciliation process. The question of

proceeding with the compulsory conciliation was a contested issue at the outset. But the Australian government respected the finding of the conciliation commission that it did indeed have jurisdiction in relation to the matter. My colleagues will correct me if I've strayed.

Ms Sheehan: It might be helpful just to briefly set out that there are two separate declarations that are made, one to the Statute of the International Court of Justice, and that's what we've been referring to as the article 36(2) declaration. That declaration, in essence, accepts the jurisdiction of the court but limits it in certain respects, which Australia has done. Then, under the United Nations Convention on the Law of the Sea, a declaration can be made under article 298 limiting the jurisdiction of the dispute settlement forums that are mentioned in part XV in relation to certain categories of disputes. To take a step back, part XV—I will refer to as UNCLOS, the UN Convention on the Law of the Sea—sets out a range of dispute settlement bodies that can hear a dispute. The ICJ is included, as is the International Tribunal for the Law of the Sea and a couple of different arbitral tribunals. Then, you can exclude from the jurisdiction of those bodies—so from ICJ or from ITLOS—a certain category of dispute. That is set out within the text of article 298. Australia has excluded one of those categories from the jurisdiction. The way that UNCLOS works is that the conciliation is not excluded from—countries cannot exclude conciliation.

Senator PATRICK: That's because you have all these available methods to negotiate and in effect you say 'Our preference is to negotiate directly.' Would there be an alternative to conciliation, assuming a negotiation failed?

Ms Sheehan: The declarations don't deal with negotiation; they deal with dispute settlement. Negotiations, of course, can continue and dispute settlement is separated from conciliation under the law of the sea convention. They are dealt with separately. States can limit their jurisdiction. As is provided for under the law of the sea convention, conciliation is not one of the categories that states can limit recourse to.

CHAIR: On behalf of the committee I thank all witnesses who have appeared today. The committee asks that any answers to questions on notice be returned by Friday, 24 January 2020. I'm sure you will be spending your Christmas and January answering those questions! Thank you.

Committee adjourned at 18:00