## UNILATERAL DECLARATIONS - AN AUSTRALIAN EXAMPLE?

A State may by a declaration accept legal obligations in relation to other States completely outside of the context of an agreement with those other States. The most celebrated recent example is that of Australia v. France (the Nuclear Tests Case 1974 ICJ Reports 253 at 267-271) where the International Court of Justice held that France was legally bound by certain public declarations not to hold after a certain date atmospheric tests at Tahiti. It is interesting to recall that at the time of the Egyptian Unilateral Declaration in 1957 concerning its acceptance of certain obligations relating to the Suez Canal, the French Government took the view that that Declaration had no legal effect and was therefore not adequate. The question has arisen in the context of the Foreign Proceedings (Excess of Jurisdiction) Bill, 1984. In the recent Report from the Joint Committee on Foreign Affairs Defence of the Australian Parliament, The Extraterritorial Application of United States Laws, the joint dissent by Senator R. Hill, Senator A.W.R. Lewis, Mr. W.P. Coleman, Mr. R.F. Shipton and Mr. S.A. Lusher, and in the separate dissent of the Hon. R.J. Groom, there is reference to a press release of the former Attorney General, Senator Durack. In the joint dissent, this is given as one of the reasons for not introducing further legislation, and in the sole dissent it is given as the only reason against the introduction of further blocking legislation. The Press Release, which we reproduce below refers to a statement made by the former Attorney General in negotiating the U.S. Australian Anti Trust Agreement 1982. Given the strong US view presented to the UK authorities during the debate on the Protection of Trading Interests Bill, 1980, it might well be that US authorities could seek to categorize Senator Durack's statement as a unilateral declaration. The persons who may make a binding international declaration would probably include the Head of State, Head of Government and Minister for Foreign Affairs. In the Nuclear Tests Case the Court also referred to a note from the French Embassy in Wellington, and a press conference of the Minister of Defence. The latter may have been cited as corroborative evidence of the interest of the French Government. An analogy may perhaps be seen between the power to make unilateral declarations and the power to adopt or authenticate a treaty:

> 1. A person is considered as representing a State for the purpose of adopting or authenticating the text of a treaty or for the purpose of expressing the consent of the State to be bound by a treaty if:
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> (*a*) he produces appropriate full powers ; or
>
> (*b*) it appears from the practice of the States concerned or from other circumstances that their intention was to consider that person as representing the State for such purposes and to dispense with full powers.
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> 2. In virtue of their functions and without having to produce full powers, the following are considered as representing their State:
>
> (*a*) Heads of State, Heads of Government and Ministers for Foreign Affairs, for the purpose of performing all acts relating to the conclusion of a treaty;
>
> (*b*) heads of diplomatic missions, for the purpose of adopting the text of a treaty between the accrediting State and the State to which they are accredited;
>
> (*c*) representatives accredited by States to an international conference or to an international organization or one of its organs, for the purpose of adopting the text of a treaty in that conference, organization or organ.

(Vienna Convention on the Law of Treaties, 1969, Article 7)

It is clear Senator Durack was authorised to negotiate and sign the agreement, on which his signature appears:(1982) 21 ILM 702 at 709. Presumably then, he had power to make a unilateral declaration. Was the declaration made to the US Attorney General in the presence of the Australian Charge d'Affaires a declaration from which one could draw the conclusion that Australia intended to accept a legal obligation viz-a-viz the US?

**PRESS RELEASE**

AUSTRALIA
THE SENATE

17/83

STATEMENT BY THE DEPUTY LEADER OF THE OPPOSITION IN THE SENATE AND SHADOW ATTORNEY-GENERAL, SENATOR PETER DURACK, Q.C.

The Government should not rush the introduction of more blocking legislation against the application of United States anti-trust laws to Australian companies respecting their conduct outside the United States.

It appears from comments made by the Attorney-General, Senator Evans, in Washington, that he is likely soon to propose what is commonly referred to as recovery-back or claw-back legislation by which an Australian company, forced to pay treble damages in an anti-trust judgment of a foreign court can sequester any assets in Australia of the successful plaintiff.

The Fraser Government introduced a bill for such legislation two years ago but did not proceed with it because of the success of subsequent negotiations with the United States Government to obtain a bilateral agreement for notification and consultation between the two Governments in regard to differences about the application of U.S. anti-trust laws.

An agreement between the two Governments was signed just a year ago today.

Senator Evans seems to accept that the Agreement is working reasonably well but at this stage it is probably too early to make any definitive judgments about it.

Among other things, the Agreement provides that a U.S. Court hearing a private anti-trust suit will be advised of any decision reached by the two Governments arising out of the conduct complained of in the suit. Hopefully the U.S. Court will give effect to it.

On behalf of the then Australian Government I assured the U.S. Government that we would not proceed with any further blocking legislation unless the Agreement proved less successful than we hoped.

Unless therefore there is some pressing need for the legislation to protect an Australian company or companies who are facing a treble damages judgment it would be better for the Government to let the Agreement work itself out for the time being.

The U.S. Government is sensitive about blocking legislation and we already have laws in place which can prevent Australian based evidence being given in U.S. Courts in these treble damage actions, and which can prohibit the direct enforcement in Australia of any judgments in these actions.

Senator Evans should not risk jeopardising a solution to the problem which so far has proved successful.

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CANBERRA
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