

Trade Law and the Australian Courts

Law Council of Australia 2014 International Trade Law Symposium

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Australia is enmeshed in a complex web of relationships, obligations and rights, conventions and practices which fall under the rather loose generic designation of international law. Part of that web, which cannot be disentangled from the rest, affects the exchange of goods and services across national borders. It is sometimes referred to as international trade law.

International trade law is a field in which public and private international law interact. It embraces relationships between sovereign states such as those defined by the agreements establishing the World Trade Organisation (WTO) and those comprising the General Agreement on Tariffs and Trade (GATT). It covers commercial relationships between non-state entities which attract rules developed by international organisations of states such as the United Nations Commission on International Trade Law (UNCITRAL), the International Institute for the Unification of Private Law (UNIDROIT) and the Hague Conference on Private International Law. It may also be taken as comprising rules derived from a host of bilateral and multilateral investment and free trade agreements and agreements between states creating international commercial dispute resolution mechanisms such as the International Convention for the Settlement of Investment Disputes between States and Nationals of other States.¹

There is a threshold question whether the word 'law' used in the term 'international trade law' is appropriate. I am reminded of the quotation erroneously but irreversibly attributed to Mr Spock in Star Trek on the observation of a new alien entity:

It's life Jim, but not as you and I know it.

¹ *Convention on The Settlement of Investment Disputes between States and Nationals of Other States*, opened for signature 18 March 1965, 575 UNTS 159 (entered into force 14 October 1966) (ICSID Convention); see generally Ronald A Brand, 'Semantic Distinctions in an Age of Legal Convergence' (1996) 17 *Journal of International Law* 3.

Perhaps we can adapt the misquotation and say 'It's law, ladies and gentlemen, but not as you and I know it.' Scepticism about the term 'international law' dates back to the 17th century writings of Hugo Grotius who spoke of those who 'view this branch of the law with contempt as having no reality outside of an empty name.'² Blackstone, a century and a half later from what today would be seen as a rather rose coloured perspective, wrote of it as 'a system of rules, deducible by natural reason, and established by universal consent among the civilized inhabitants of the world ...'³ Putting to one side those extremes, an important point of distinction between international law and domestic law persists in our time. It is the absence of a single legislature, executive and judiciary with compulsory jurisdiction. As H L A Hart wrote in *The Concept of Law*, reflecting similar concerns by one of the foremost international law jurists, Hersch Lauterpacht:

It is indeed arguable... that international law not only lacks the secondary rules of change and adjudication which provide for legislature and courts, but also a unifying rule of recognition specifying 'sources' of law and providing general criteria for the identification of its rules. These differences are indeed striking and the question 'Is international law really law' can hardly be put aside.⁴

There are of course, within what would today be described as the international legal system, rule-making bodies and rules for interpreting and applying the rules, in particular the Vienna Convention on Treaties and mechanisms for resolving disputes about their interpretation and application in particular cases. There are also a number of international and regional courts and tribunals including, importantly, the International Court of Justice and the Courts of the European Union.

It must be acknowledged that our domestic legal system frames our view of what is necessary for a working legal system. Professors Goldsmith and Levinson, writing in the *Harvard Law Review* in 2009, described defining features of domestic law:

Legal rules are promulgated and updated by a legislature or by common law courts subject to legislative revision. Courts authoritatively resolve ambiguities and uncertainties about the application of law in particular cases. The individuals to whom laws are addressed have an obligation to obey legitimate lawmaking authorities, even when legal rules stand in the way of their interests or are imposed without their

² Hugo Grotius, 'Prolegomena' in Hugo Grotius, *De Jure Belli ac Pacis Libri Tres* (trans Francis W Kelsey) (The Legal Classics Library, 1984) 9.

³ William Blackstone, *Commentaries on the Laws of England* (Clarendon Press, 1769) vol IV 66-7.

⁴ H L A Hart, *The Concept of Law* (Clarendon Press, 1961) 209.

consent. And in cases of disobedience, an executive enforcement authority, possessing a monopoly over the use of legitimate force, stands ready to coerce compliance.⁵

There is no reason to regard that concept of law as unduly narrow but it does not describe international law. It does not describe international trade law. Ultimately, the reflection of international trade law rules in rules of domestic law and their enforcement are to be effected under and in accordance with domestic constitutions. International law is not a universe of its own sealed off from the domestic laws and legal systems of the global community of nations.

Rules of international law, applicable to Australia as customary rules or otherwise by agreement, and the rights and obligations arising under them, will not take effect under Australian domestic law unless incorporated into the domestic legal system. That basic proposition derives from the dualism we have inherited from the United Kingdom and from our Constitution. As Justice Gummow put it succinctly 22 years ago in the Full Court of the Federal Court in *Minister for Foreign Affairs and Trade v Magno*:

if the international obligation involves enforcement in the courts which is not already authorised by municipal law, legislation is needed to make the necessary changes in the law or equip the Executive with the necessary means to execute the obligation; it is for the Parliament and not the Executive to make or alter municipal law.⁶

The preceding remarks relate to international law generally. There is, however, a particular tension between the traditional theories underpinning public international law and its convergence with international trade law. Professor Ronald Brand of Pittsburg University, writing in the *Journal of International Law* in 1996, made an observation which is still relevant:

International law retains notions rooted in concepts of second-tier sovereignty that allow only the sovereign to speak for the subject, and do not allow a relationship between the subject and international law unless and until the sovereign permits it. Economic theories dealing with free markets and political theories dealing with democratic systems require the participation of private parties; in fact, they are based on the fundamental assumption of such participation. Thus, theories of sovereignty borrowed from prior centuries can no longer accommodate economic and political reality at the end of the twentieth century. To the extent international law is built on those theories, it too runs the risk of being out of step with the world it purports to regulate.⁷

⁵ Jack Goldsmith and Daryl Levinson, 'Law for States: International Law, Constitutional Law, Public Law' (2009) 122 *Harvard Law Review* 1792, 1792.

⁶ (1992) 112 ALR 529, 534 (citations omitted).

⁷ Brand, above n 1, 4 (footnotes omitted).

That international treaties between nation states can confer rights on non-state actors has long been accepted and was recognised in the context of a bilateral investment treaty in a decision of the Court of Appeal of England and Wales in *Ecuador v Occidental Exploration and Production Co.*⁸ Mance LJ, delivering the judgment of the Court, observed:

That treaties may in modern international law give rise to direct rights in favour of individuals is well established, particularly where the treaty provides a dispute resolution mechanism capable of being operated by such individuals acting on their own behalf and without their national state's involvement or even consent.⁹

The Court referred, with evident approval, to the decision of an arbitral tribunal in *Gas Natural SDG SA v Argentine Republic* that:

The scheme of both the ICSID Convention and the bilateral investment treaties is that in this circumstance, the foreign investor acquires rights under the convention and treaty, including in particular the standing to initiate international arbitration.¹⁰

So far as a citation check discloses the occasion has not yet arisen in which the decision of the Court of Appeal has fallen for consideration in this country.

It may be noted that there was some disagreement reflected in the judgment with an aspect of the award of the Arbitral Tribunal in *Loewen Group Inc v United States of America*¹¹ on which Sir Anthony Mason, Judge Abner Mikva and Lord Mustill sat.¹² In that case the arbitrators said:

There is no warrant for transferring rules derived from private law into a field of international law where claimants are permitted for convenience to enforce what are in origin the rights of Party states.¹³

All that being said, the general observation by Professor Brand about the convergence of public international law with international trade law, has a resonance in recent contemporary debate about the concepts of national sovereignty and its place in international trade or economic law where non-state actors have standing and rights enforceable against states under investment treaties and free trade agreements, particularly in relation to regulatory

⁸ [2006] QB 432.

⁹ Ibid 449 [19].

¹⁰ Ibid 451 [20] citing *Gas Natural SDG SA v Argentine Republic* (ICSID, Case No ARB/03/10, 17 June 2005) [34].

¹¹ (2003) 42 ILM 811.

¹² Ibid 452 [22].

¹³ Above n 11, 849 [233].

action by states and the decisions of their domestic courts. Professor Brand's observation therefore forms an appropriate backdrop for my theme.

The rules of international trade, and the rights and obligations to which they give rise, are enforceable under the domestic law of the states only if the states to which they apply, or against which, or by which they are invoked, are willing and able to give effect to them. Whether or not a state or a private investor or trader can enforce, in a national legal system, a right or an obligation which has its source in international trade law will depend upon the constitutional framework which defines state power be it legislative, executive or judicial. In Australia the limits of those powers are ultimately determined by the courts.

There are, of course, many more ways of enforcing a rule of international trade law than by state action under domestic law.¹⁴ In 2005, the WTO Appellate Body considered a complaint by Antigua that the United States was failing to meet its national treatment obligation under the General Agreement Trade in Services. The United States had sought to prosecute operators of Antigua Internet Gambling Services under United States domestic law and to require that they have a physical establishment in the United States. The Appellate Body found that the laws of the United States authorised '*domestic* service suppliers, but not *foreign* service suppliers, to offer remote betting services in relation to certain horse races.'¹⁵ The remedy accorded to Antigua was the right to suspend its obligations under the TRIPS agreement with respect to US intellectual property rights in an amount corresponding to its lost revenue from cross border horse racing. As was remarked in an article in the *Yale Journal of International Law* in 2009, Antigua was thereby accorded lawful status as a Pirate of the Caribbean.¹⁶

The program for this Symposium deals with a variety of topics all of which have some actual or potential interaction with Australian domestic law. They cover regional and free trade agreements, foreign investment, dispute resolution, anti-dumping measures, WTO

¹⁴ See Thomas Sebastian, 'World Trade Organization Remedies and the Assessment of Proportionality: Equivalence and Appropriateness' (2007) 48 *Harvard International Law Journal* 337; and Sungjoon Cho, 'The Nature of Remedies in International Trade Law' (2004) 65(4) *University of Pittsburgh Law Review* 763.

¹⁵ Anupam Chander, 'Trade 2.0', (2009) 34 *Yale Journal of International Law* 281, 290; and see Appellate Body, *United States: Measures Affecting Cross-Border Supply of Gambling and Betting Services*, WT/DS285/AB/R (20 April 2005).

¹⁶ *Ibid.*

disputes, the work of UNCITRAL, electronic commerce, environmental legislation and the impact of international human rights upon international trade and commerce. They all illustrate the proposition that international trade is not just a matter of private commercial law and practice writ globally large. It interfaces with public international law and, in Australia and beyond, has a constitutional, public policy and public law dimension. It is the constitutional and public policy dimension of international trade law in Australia that I want to highlight in connection with the current debate about investor-State dispute settlement not least because it is a useful vehicle for consideration of wider issues.

As already observed, international treaties do not have direct legal effect in Australia unless given effect by legislation. They can have an indirect effect upon the interpretation of domestic legislation. Parliament should be presumed as intending to legislate in accordance with, and not in conflict with, international law. Where a statute has adopted the language of a Convention, the provisions of the Convention may assist resolution of an ambiguity in the interpretation of the statute.

The High Court has original jurisdiction, conferred by s 75(i) of the Constitution in all matters 'arising under any treaty'. However, the scope of that jurisdiction remains to be explored.¹⁷ In *Ecuador v Occidental Exploration and Production Co*¹⁸, the Court of Appeal of England and Wales held that it had jurisdiction to interpret a bilateral investment treaty between Ecuador and the United States where a dispute under the treaty had been referred to UNCITRAL arbitration and London chosen as the place of the arbitration. In so holding, Mance LJ observed that it was necessary to interpret the agreement which had been made in order to determine the parties' rights and duties under domestic law, that is under s 67 of the *Arbitration Act 1996* (UK). Those constitutional and common law jurisdictions do not rest upon any premise inconsistent with the dualist approach to the relationship between international law and domestic law.

¹⁷ *Re East; Ex parte Nguyen* (1998) 196 CLR 354, 362 [18] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ); cf 382 [71] (Kirby J); Leslie Zines (ed), *Cowen and Zines's Federal Jurisdiction in Australia* (The Federation Press, 3rd edition, 2002) 23-31. See also John Goldring 'The 1958 United Nations Convention on Recognition and Enforcement of Arbitral Awards and the Australian Constitution' (1973) 5(2) *Federal Law Review* 303, 309-310 and G P J McGinley, 'The Status of Treaties in Australian Municipal Law: The Principle of *Walker v Baird* Reconsidered' (1990) 12(4) *Adelaide Law Review* 367, 374.

¹⁸ [2006] QB 432.

Australia's entry into investment treaties or free trade agreements is effected by executive action subject to constraints that might be imposed by legislation. A recent attempt to impose such a constraint was the Trade and Foreign Investment (Protecting the Public Interest) Bill 2014, proposed by a member of the Senate. The Senate, Foreign Affairs, Defence and Trade Legislation Committee has recently reported on it. The Bill would have imposed a prohibition against the Commonwealth Executive from entering into an agreement with one or more foreign countries that included investor State dispute settlement provisions.

Commonwealth laws giving effect to international trade treaties or conventions may be made under the external affairs power conferred by s 51(xxix) of the Constitution and/or according to their subject matter, under a variety of other heads of power set out in s 51. In relation to enforcement of rights and obligations, including arbitral awards, arising under such laws, jurisdiction may be conferred upon State and federal courts under s 77 of the Constitution. The conferral of jurisdiction is subject to parameters set by the separation of powers mandated by the Constitution as interpreted in *R v Kirby; Ex parte Boilermakers' Society of Australia*¹⁹ and the requirement that no functions be conferred on courts exercising federal jurisdiction which are incompatible with their institutional integrity as courts.

Questions of compatibility and separation of powers were raised in *TCL Air Conditioner (Zhongshan) Co Ltd v Judges of the Federal Court of Australia*.²⁰ The appellant argued that Pt III of the *International Arbitration Act 1974* (Cth) transgressed Ch III of the Constitution by preventing the Federal Court, in which enforcement jurisdiction was reposed, from reviewing an award for error of law on its face. Thus it was said the institutional integrity of the Federal Court had been compromised and the judicial power of the Commonwealth impermissibly delegated to arbitral tribunals. The Act gives the force of law in Australia to the UNCITRAL Model Law on international commercial arbitration. In their joint judgment, Hayne, Crennan, Kiefel and Bell JJ observed:

The exercise of judicial power is an assertion of the sovereign, public authority of a polity. Whilst it is 'both right and important to observe that the determination of rights and liabilities lies as the heart of the judicial function', parties are free to agree to submit their differences or disputes as to their legal rights and liabilities for decision by an ascertained or ascertainable third party, whether a person or a body. As will be

¹⁹ (1956) 94 CLR 254.

²⁰ (2013) 87 ALJR 410.

explained, where parties do so agree, 'the decision maker does not exercise judicial power, but a power of private arbitration'.²¹

That case was about Pt III of the Act concerning international commercial arbitration.

Part IV of the Act concerns investor-state arbitration under ICSID. It comprises ss 31 to 38. Section 32 provides that, subject to Pt IV, Chapters 2 to 7 (inclusive) of the ICSID Convention have the force of law in Australia. An award is binding on a party to the investment dispute to which the award relates and is not subject to any appeal or to any other remedy otherwise than in accordance with the Convention.²² Other laws relating to the recognition and enforcement of arbitral awards, including the provisions of Pts II and III of the Act do not apply to a dispute within the jurisdiction of the Centre or an award under Pt IV.²³ The Supreme Courts of the States and Territories and the Federal Court of Australia are each designated, for the purposes of Art 54 of the ICSID Convention.²⁴ An award may be enforced in each of those Courts 'with the leave of that court as if the award were a judgment or order of that court.'²⁵ Referring back to s 75(i) of the Constitution, s 38 of the *International Arbitration Act* provides:

A matter arising under this Part, including a question of interpretation of the Investment Convention for the purposes of this Part, is not taken to be a matter arising directly under a treaty for the purposes of section 38 of the *Judiciary Act 1903*.

Section 38 of the *Judiciary Act 1903* (Cth) provides that the jurisdiction of the High Court in matters arising directly under any treaty, shall be exclusive of the jurisdiction of the several courts of the States.

It may be noted that the provision for enforcement of an arbitral award under Pt IV is conditioned upon leave of the court. What informs the discretion thus conferred upon the Court would no doubt be debated in any contested attempt to enforce an ICSID arbitral award.

The application of the *International Arbitration Act* in relation to the enforcement of arbitral awards under the Model Law and under the ICSID Convention demonstrates the centrality of the domestic legal system in giving legal effect to international commercial and

²¹ Ibid 427 [75] (footnotes omitted).

²² *International Arbitration Act 1974* (Cth), s 33.

²³ *International Arbitration Act 1974* (Cth), s 34.

²⁴ *International Arbitration Act 1974* (Cth), s 35(1).

²⁵ *International Arbitration Act 1974* (Cth), s 35(4).

investor-State arbitral mechanisms. Where those disputes involve commercial issues joined between private parties, or between private parties and an executive government or its authorities, there would not ordinarily be a tension between the arbitral function and those of the courts. *TCL* is an illustration of constitutional compatibility in that respect.

Issues of a larger kind may arise if the arbitral function is in tension with the judicial function. The potential for this to occur exists in relation to investor State dispute settlement mechanisms under investment treaties and free trade agreements. Such mechanisms have been invoked outside Australia to call into question decisions of national courts.²⁶ In a current arbitration under the NAFTA, Eli Lilly complains of Canadian judicial decisions which have held invalid patents for Eli Lilly drugs for want of utility. The company claims in its notice of arbitration that:

The judiciary in Canada has created doctrine to assess whether an invention meets the condition of being 'useful' or 'capable of industrial application'.

Eli Lilly seeks damages of \$500,000,000 together with the recovery of any payment it or its enterprises were required to make arising from the improvident loss of its patents and its inability to perform them.

The *Loewen* case, mentioned earlier, involved an Arbitral Tribunal under NAFTA reviewing what was, on its face, an extraordinary decision of a United States State Court. Although the Canadian investor company, which was the claimant, lost before the Tribunal because it had reorganised itself under US bankruptcy law, the Tribunal was scathing in its denunciation of the State court's decision. In the event the Conference of Chief Justices passed a resolution in 2003 urging the United States Trade Representative to negotiate with the United States Conference to approve provisions in trade agreements that recognise and support the sovereignty of state judicial systems and the enforcement and finality of State court judgments. The Conference of Chief Justices passed a further resolution in 2012 in which they urged the US Trade Representative to adopt as its model for negotiating bilateral investment treaties and free trade agreements, an investor-State dispute resolution clause that would require foreign investors to choose between pursuing claims in the courts or through international arbitration.

²⁶ See for example *Frontier Petroleum Services v Czech Republic* (UNCITRAL, 12 November 2010); *ATA Construction International Trading Co v Jordan* (ICSID Case No ARB/08/2, 18 May 2010).

The Office of the United States Trade Representative published a fact sheet in March this year to dispel 'myths' about ISDS.²⁷ It stated that United States investment agreements provide no new substantive rights for foreign investors. It did not address the finality of US Court judgments nor the requirement for investors to choose between courts or arbitration. It is notable, however, that in 2012 the United States adopted a model bilateral investment treaty. That model would require a claimant for arbitral relief to waive any right to continue proceedings before administrative tribunals or courts under the law of either Party with respect to any measure alleged to constitute an arbitral breach. The model agreement does not appear to address the concern of the United States State courts about claims which complain about their decisions. At this time Australia does not have a model bilateral investment treaty or free trade agreement.²⁸

The possibility of an arbitral claim under ISDS complaining of a domestic court decision or seeking an award inconsistent with a domestic court decision raises potentially serious questions about the interaction of such an award with the domestic judicial system which may be called upon to enforce it. In the Australian context it is not really to the point to say that Australia has so far been subjected to only one ISDS proceeding, namely that brought by Philip Morris under the Hong Kong Australia Bilateral Investment Treaties. Bilateral investment treaties and free trade agreements can last a long time and resort to ISDS processes has increased significantly in recent years. The time to consider the implications of ISDS provisions for domestic judicial systems is when negotiating the agreements which will include them.

Those observations are not intended to suggest that ISDS clauses have no place in trade law agreements. They are not intended to argue for the exclusion of such clauses from agreements to which Australia is a party. In so saying, I recognise that there is a global debate about their effects upon the authority of national legislatures and executive governments and in particular the alleged phenomenon of 'regulatory chill'. My concern is with the judicial system and its authority and finality of its decisions which is indispensable to

²⁷ Office of the United States Trade Representative, *The Facts on Investor-States Dispute Settlement: Safeguarding the Public Interest and Protecting Investors* (27 March 2014) <
<http://www.ustr.gov/about-us/press-office/blog/2014/March/Facts-Investor-State%20Dispute-Settlement-Safeguarding-Public-Interest-Protecting-Investors>>.

²⁸ Luke Nottage, Submission No 21 to Senate Standing Committee on Foreign Affairs, Defence and Trade, Parliament of Australia, *Inquiry into the Trade and Foreign Investment (Protecting the Public Interest) Bill 2014*, 2 April 2014, 5.

the rule of law in this country. That concern can, in all likelihood, be met by careful crafting of such provisions. An approach designed to protect the finality and authority of domestic judicial decisions could consider a limitation on ISDS mechanisms applicable to Australia which would preclude any challenge to the decision of an Australian domestic court as constituting a breach of the relevant BIT or FTA clauses. Such an approach could also consider precluding the canvassing in an arbitral claim of the correctness of a decision of an Australian domestic court and in particular, decisions on questions of law binding on lower courts. There is no doubt a variety of ways of approaching the issue. The Senate Committee which recently reported upon the proposed prohibition of ISDS provisions in trade agreements received strong submissions on their risks and benefits.²⁹ The terms of such provisions require particular attention by the negotiators when considering any implications they may have for the authority of the Australian domestic judicial system.

It is encouraging to note that there are present among you and participating in this Symposium, people with considerable expertise and experience in the formulation and operation of this aspect of international trade law. It is my hope that they and the Law Council of Australia will ensure that this important aspect of international trade law is given appropriate attention by government.

²⁹ See Senate Standing Committee on Foreign Affairs, Defence and Trade, Parliament of Australia, *Inquiry into the Trade and Foreign Investment (Protecting the Public Interest) Bill 2014* (2014).