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2016 Kirby Lecture in International Law

Australia's Increasing Enmeshment in International Law Dispute

Resolution: implications for sovereignty

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Introduction

The topic that I have chosen for the 2016 Kirby Lecture in International Law has both a practical and a theoretical bent. My concern is to explore the rich variety of ways in which Australia, like many other States, is being drawn increasingly into litigation and dispute resolution in the public international law space, and more importantly what this

involvement says about the concept of sovereignty.¹

I should first honour Michael Kirby himself. As we all know, over a period now approaching half a century, Michael has made an immense contribution to the internationalisation of the Australian legal system. I experienced first-hand as counsel in the NSW Court of Appeal and later the High Court the pleasure, and often the disconcerting challenge, of Michael's questioning. "That submission may be all very well counsel, but what are they saying in Strasbourg on this question?" "Or in the Supreme Court of the United States?" Such questioning would go on. Counsel learnt quick smart to incorporate available foreign and international material into their submissions. This is not to say that all of Michael's judicial colleagues were always as eager as he to travel foreign paths. It is fair to say, though, that almost a decade after he left the High Court, there is a renewed interest on that Court in approaching each novel legal problem with all the tools the law can draw upon – textual, historical, and comparative, international and so on. That is but one part of Michael's larger legacy of which he can stand proud.

Historical context

Let me put my remarks tonight in some historical context. The discipline of public international law can be traced back a long way. One can go back to the natural lawyers, such as Grotius and Vattel. One can examine the positivist principles of international law

¹ My thanks to Counsels Assisting Megan Caristo and Ryan Harvey for their assistance in preparing this paper and to Bill Campbell QC for his helpful comments.

developed in the late 19th century with the rise of the nation state. One can observe the gradual development of dispute resolution mechanisms. Arbitration can be traced back at least 200 years but was given shape by the 1899 and 1907 Hague Conventions which created the Permanent Court of Arbitration (**PCA**). The first heyday of the PCA was in the period before WWI but after the creation of the Permanent Court of International Justice (**PCIJ**) under the Covenant of League of Nations the PCA fell into relative disuse.² Between its inaugural sitting in 1922 and 1940, the PCIJ dealt with 29 contentious cases between States and delivered 27 advisory opinions.³ The PCIJ was dissolved in 1946⁴ and for much of the 20th century, diplomatic negotiation and ad hoc inter-state arbitration were relied upon.

The conclusion of WWII saw important new beginnings. The establishment of the United Nations (**UN**) in 1945 saw sovereign equality of States put at the center of its charter (**UN Charter**) in Art 2(1). The International Court of Justice (**ICJ**) was set up in 1946 as the highest judicial organ of the UN, with judges elected through the UN itself. States were provided the opportunity to refer particular disputes to the ICJ for resolution under Art 36(1) through compromissory clauses or agreements, or, as with the PCIJ, to provide general declarations of consent to the Court's jurisdiction under Art 36(2) of the Statute of the ICJ. Over 60 states have provided declarations;⁵ while in the last decade

² John Collier and Vaughan Lowe, *The Settlement of Disputes in International Law: Institutions and Procedures* (Oxford University Press, 1999) 36. The PCA has had resurgence in recent years.

³ International Court of Justice, *Permanent Court of International Justice*, available at: <http://www.icj-cij.org/pcij/?p1=9>.

⁴ Ibid.

⁵ Sixty Six States have made declarations under Art 36 (2) of the ICJ Statute (the so-called Optional Clause) accepting the jurisdiction of the Court. These countries include Australia and New Zealand.

more than half of the cases on the ICJ's agenda have come under Art 36(1).⁶

Seventy years have passed since the establishment of the ICJ. There has been a veritable explosion in the subjects, objects, sources and norms of public international law. Rules of customary international law are now covered in lengthy treatises. Australia is now party to over 2000 treaties, and estimates are that there are more than 55,000 treaties in force across all nations.⁷ The depth and variety of papers offered at this conference, and the pool of academic talent in this room, are testament to these facts. What is less often studied in the academy, yet profoundly important in the practical working and unfolding of public international law, is the variety of means by public international law disputes are actually resolved, and the significance this dispute resolution has for the sovereignty of nations.

These questions are of particular interest to me in my role as Solicitor-General of the Commonwealth and leader of Australia's legal team in its recent forays in this space. I was also privileged to be the representative of Australia at the celebrations for the 70th anniversary of the ICJ in The Hague in April of this year. A two day seminar investigated closely where the ICJ currently stands, and should in coming decades seek to stand, in the larger public international law dispute resolution space.

⁶ See Andreas Zimmermann et al, *The Statute of the International Court of Justice-A Commentary* (Oxford University Press, 2nd ed, 2012) 656-657.

⁷ Anthony Aust, *Modern Treaty Law and Practice* (Cambridge University Press, 3rd Ed, 2013) 1.

Australia's recent cases

Australia's involvement in public international law dispute resolution has expanded, perhaps exploded, in recent years. Let me illustrate this.

First, Australia ratified the UN Charter, of which the Statute of the ICJ is an integral part, in 1945. It made subsequent declarations of consent to ICJ jurisdiction in the 1940s, 1950s, 1975 and 2002. Of Australia's five appearances in the ICJ over that period, two have been within the last four years: the *Whaling Case*⁸ and the *Documents and Data Case*.⁹

Secondly, while Australia has over the years signed many treaties with advance consents to submit inter-state disputes to arbitration, it has been involved in relatively few inter-state arbitrations.

Leaving aside an Air Transport arbitration that settled in 1993,¹⁰ Australia's primary involvement is that in 2013, Timor-Leste initiated proceedings under the *Timor Sea*

⁸ *Whaling in the Antarctic (Australia v Japan: New Zealand intervening) (Judgment)* [2014] ICJ Rep 2014, 226.

⁹ *Questions relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste v. Australia) (Provisional Measures)*, Order of 11 June 2015, ICJ Rep 11. The other three were *Australia v France; New Zealand v France (Jurisdiction)* [1974] ICJ Rep 253; *Certain Phosphate Lands in Nauru (Nauru v Australia) (Preliminary Objections)* [1992] ICJ Rep 240, 340; *East Timor (Portugal v Australia) (Judgment)* [1995] ICJ Rep 90. There are also three ICJ advisory opinions in which Australia has made submissions: *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion)* [2004] ICJ Rep 136; *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)* [1996] ICJ Rep 266, 226; *Legality of the Use by a State of Nuclear Weapons in Armed Conflict (Advisory Opinion)* [1996] ICJ Rep 66, 66.

¹⁰ Editors, "Aviation and Space Law: Australia - United States Aviation dispute" (1994) 15 *Australian Year Book of International Law* 487.

*Treaty*¹¹ (**TST**) between the Governments of Timor-Leste and Australia arguing that amendments made to that Treaty by the later *Treaty Between Australia and the Democratic Republic of Timor-Leste on Certain Maritime Arrangements in the Timor Sea*¹² (**CMATS**) are invalid and void ab initio. Relatedly, two years later, in 2015, Timor-Leste initiated arbitration proceedings against Australia concerning the interpretation of a provision of the Timor Sea Treaty relating to the jurisdiction of each party with respect to pipelines.¹³

Thirdly, Australia has signed over 20 Bilateral Investment Treaties (**BIT**) since 1988 when it signed a BIT with China,¹⁴ and currently has 10 Free Trade Agreements (**FTAs**) in force.¹⁵ Many of these contain clauses permitting investors of one State to take the opposing State to arbitration, under ISDS. The first such suit against Australia was in 2012 when Philip Morris Asia Limited (**PM Asia**) sued Australia under the 1993 Australia-Hong Kong BIT. That arbitration concerned whether the *Tobacco Plain Packaging Act* passed in the Australian Parliament in November 2011 contravened various promises in the Australia-Hong Kong BIT including the non-expropriation and the fair and equitable treatment promises. An award in Australia's favour, on

¹¹ *Timor Sea Treaty between the Government of East Timor and the Government of Australia*, Dili, 20 May 2002, 2258 UNTS 3 (entered into force 2 April 2003).

¹² *Treaty between Australia and the Democratic Republic of Timor-Leste on Certain Maritime Arrangements in the Timor Sea*, Sydney, 12 January 2006, 2483 UNTS 359 (entered into force 23 February 2007).

¹³ The Hon Julie Bishop MP and Senator the Hon George Brandis QC, 'Timor-Leste Arbitration' (Media Release, 25 September 2015) available at: http://foreignminister.gov.au/releases/Pages/2015/jb_mr_150925.aspx?w=tb1CaGpkPX%2FIS0K%2Bg9ZKEg%3D%3D.

¹⁴ *Agreement between the Government of Australia and the Government of the People's Republic of China on the Reciprocal Encouragement and Protection of Investments*, Beijing, 11 July 1998, 1988 ATS 14 (entered into force 11 July 1988).

¹⁵ Australia has 10 FTAs currently in force with New Zealand, Singapore, Thailand, US, Chile, the Association of South East Asian Nations (ASEAN) (with New Zealand), Malaysia, Korea, Japan and China.

jurisdictional grounds, was given on 17 December 2015 and made public in redacted form in May 2016.¹⁶

Fourthly, Australia ratified the United Nations Convention on the Law of the Sea (UNCLOS) in 1994. UNCLOS provides for a ratifying State to choose one or more or a range of dispute resolution mechanisms: the International Tribunal for the Law of the Sea (ITLOS) under Annex VI, the ICJ, or arbitration under Annexes VII or VIII.¹⁷ Also, with some categories of dispute, including maritime boundary delimitations, there is an option for an intermediate step of compulsory, but non-binding, conciliation under Annex V.¹⁸ Australia's ratification chose ITLOS and the ICJ.

The most recent matter involves Timor-Leste, who in April this year purported to initiate compulsory conciliation proceedings under UNCLOS in relation to its dispute about maritime boundaries in the Timor Sea. The conciliation commission is required to report within 12 months though its report is not binding.¹⁹

Fifthly, I mention proceedings before the World Trade Organisation (WTO). Australia is currently a respondent in proceedings before the WTO brought by five countries who argue that Australia's *Tobacco Plain Packaging Act* (and related laws) are inconsistent with Australia's obligations under articles in the *Agreement on Trade-Related Aspects of*

¹⁶ *Philip Morris Asia Limited v The Commonwealth of Australia*, PCA, Award on Jurisdiction and Admissibility, 17 December 2015.

¹⁷ UNCLOS, Art 287. The default mechanism is Annex VII arbitration.

¹⁸ UNCLOS Art 298(1).

¹⁹ UNCLOS, Annex V Article 7.1.

Intellectual Property Rights,²⁰ the *Agreement on Technical Barriers to Trade*²¹ and the *General Agreement on Tariffs and Trade*.²²

Sovereignty

It is necessary next to have a working conception of sovereignty, before looking more closely at Australia's recent cases.

One of the most prolific writers on sovereignty is the inestimable Professor James Crawford, who gave the inaugural Kirby Lecture in International Law in 2008 and who was elected in 2014 as Australia's second only ever judge on the ICJ.

Professor Crawford has made a number of arguments about sovereignty, some of which I will draw upon in this lecture.

The *first* argument is that sovereignty is an “evolving legal value”²³ and a “flexible legal concept that is adapting to globalization, consistent with a variety of often complex internal forms of government and with the evolution of international institutions”.²⁴

²⁰ *Agreement on Trade-Related Aspects of Intellectual Property Rights*, opened for signature 15 April 1994, 1869 UNTS 299 (entered into force 1 January 1995).

²¹ *Agreement on Technical Barriers to Trade*, opened for signature 15 April 1994, 1868 UNTS 120 (entered into force 1 January 1995).

²² *General Agreement on Tariffs and Trade*, opened for signature 30 October 1947, 55 UNTS 187 (entered into force 29 July 1948).

²³ James Crawford, “Sovereignty and Law” in *Chance, Order, Change: The Course of International Law, General Course on Public International Law* (Pocketbooks of the Hague Academy of International Law, 2013) [87].

²⁴ *Ibid* [123].

The *second* argument is that sovereignty “is a *description* of statehood and a normative analysis of the attributes of statehood”. Professor Crawford identifies the following as the five core legal characteristics of a State:

First, States have plenary competence on the international plane to perform acts, make treaties and so on ...

Secondly, States have exclusive competence in their internal affairs. ... [T]his does mean there are no international constraints on how they exercise that competence, but that their jurisdiction is *prima facie* plenary and exclusive ...

Thirdly, and importantly, States are not subject to compulsory international processes, jurisdiction or settlement without their consent, given either generally or in the specific case ...

Fourthly, States are regarded as “equal” ... [although] this equality is rather formal than substantive.

And *finally*, derogations from these principles will not be presumed ...²⁵

The *third* argument Professor Crawford makes is that “sovereignty does not mean freedom from law but freedom *within* the law”²⁶ and that “sovereignty is not an all-or-

²⁵ Ibid [90]-[94].

²⁶ Ibid [98]; James Crawford “Sovereignty as a Legal Value” in James Crawford and Martti

nothing quality: the question is the scope of the commitments made by States whose sovereignty extends to making promises binding in character”.²⁷

The *fourth* argument Professor Crawford has made is that that entering into specific and legal arrangements with other States (and withdrawing from those arrangements) is an attribute of sovereignty.²⁸ International governmental organizations may play a role in forming international treaties and tribunals but they cannot exercise authority to bind a State, at least not without a delegation from a State.²⁹

I now turn to five case studies thrown up by Australia’s recent involvement in the public international law litigation space.

Case study one: the *Whaling Case*

On 31 March 2014 the ICJ gave judgment in the *Whaling Case*. There, as is memorably known, by a comprehensive majority of 12 votes to four, the ICJ ruled that the special permits granted by Japan in connection with the whaling program known as JARPA II fell outside the provisions of Art VIII(1) of the Whaling Convention.³⁰ The special permits were held not to be for purposes of scientific research within the meaning of that provision. The ICJ applied a standard of review under which the program must involve

Koskenniemi (eds) *The Cambridge Companion to International Law* (University of Cambridge, 2012), 122.

²⁷ Crawford, above n 23, [98].

²⁸ Ibid [124].

²⁹ Crawford, above n 26, 118.

³⁰ *International Whaling Convention for the Regulation of Whaling*, opened for signature 2 December 1946, 161 UNTS 88 (entered into force 10 November 1948).

scientific research and further, in the use of lethal methods, the program's design and implementation must be reasonable in relation to achieving its stated objectives. JARPA II passed the first hurdle, but failed at the second.

The ICJ assumed jurisdiction in the *Whaling Case* because each of Australia and Japan had made declarations under Art 36(2) of the ICJ Statute. Japan's declaration was made in 2007. Australia's declaration of 1975 accepting the compulsory jurisdiction of the ICJ was modified in 2002 to exclude from the declaration disputes concerning the delimitation of maritime zones or arising out of the exploitation of any disputed area of or adjacent to any such maritime zone pending its delimitation. Japan argued that the ICJ did not have jurisdiction to hear the dispute because it fell within Australia's 2002 reservation. The ICJ, however, rejected Japan's argument.

Australia's success before the ICJ in 2014 against Japan must be tempered by the observation that in late 2015, shortly before it resumed a program of large scale lethal sampling of whales in the Antarctic, Japan imposed a new reservation upon its consent to the compulsory jurisdiction of the ICJ. The reservation concerns disputes over the exploitation of marine resources.³¹ That reservation denied Australia the opportunity, had it been so minded, to launch a fresh challenge on the merits against the Japanese lethal whaling program that resumed in the southern 2015-2016 summer. At best, Australia could have sought limited relief under Art 60 of the ICJ statute for an interpretation of the March 2014 judgment in the light of the fresh facts. Some public

³¹ In a letter dated 6 October 2015 to the UN Secretary General, Japan amended its declaration recognizing the ICJ's compulsory jurisdiction so as not apply to "any dispute arising out of, concerning, or resulting from research in, or conservation, management or exploitation of, living resources of the sea": see <http://www.icj-cij.org/jurisdiction/?p1=5&p2=1&p3=3&code=JP>.

commentators described such proceedings as facing significant difficulties.³² Suffice to say Australia has not brought them.

The *Whaling Case* is a good illustration of how States can exercise their sovereignty to bind themselves to promises which allow common interests to be advanced by co-ordination. The Whaling Convention was signed in 1946 by most of the nations who were engaged in the killing of whales in the Southern or Northern Oceans. It was a means to co-ordinate and limit the killing of whales which up until then was occurring indiscriminately by each nation having regard only to its own interests and threatening whale stocks.

While the Whaling Convention is a good example of the public international project at its best, it did not have its own in-built dispute resolution mechanism. It created a Scientific Committee to give advice to States parties, and a Commission to oversee the Convention, but neither body could issue directives to member States with the binding force of international law or sanctions behind them.

When Australia and Japan fell into dispute over what the Whaling Convention permitted in the hunt for whales in the Southern Ocean, the declarations by Australia and Japan meant that the ICJ had jurisdiction to rule on the application of the Whaling Convention and to issue a judgment with binding force of international law between those two States in respect to that dispute. Under Art 94(1) of the UN Charter, Australia and Japan

³² See, for example, International Fund for Animal Welfare, “Summary of findings: Second Sydney Panel of Independent Experts – the conformity with international law of Japan’s proposed research plan for scientific whaling in the Antarctic Ocean (‘NEWREP-A’)” (November 2015) available at: <http://www.ifaw.org/australia/resource-centre/ifaw-second-sydney-panel-summary>.

undertook to comply with the decision of the ICJ in the case, and further made clear that they would do so in the weeks leading up to the decision.

The choice by Australia and Japan of ICJ jurisdiction carried with it distinctive consequences. The ICJ operates as a judicial organ, sitting in public, with its proceedings available across the world on real-time video and its judgment read in full in public. The ICJ permits the parties to deploy a mix of civilian and common law methods of procedure in making its findings on fact and law, including cross-examination of the scientific experts called by the parties, albeit strictly time limited. The choice by Australia and Japan to submit to ICJ jurisdiction meant that the interested public in each country, and beyond, had a full opportunity to understand and follow these critical proceedings as they played out between their nations.

Illustrating some of Professor Crawford's points, Japan's exercise of sovereignty in its 2007 declaration resulted in it becoming subject to the binding order of the ICJ in 2014; equally, its 2015 reservation from future ICJ jurisdiction in like disputes was a re-exercise of sovereignty with a radically different set of legal consequences. There is in theory a correct answer available in international law whether Japan's resumed lethal whaling program is in breach of the Whaling Convention just as was its predecessor JARPA II, but it is possible there can be no final and binding ruling on that question because of Japan's reservation.

The current result – the existence of international obligations, but no conclusive means to determine their application to a given dispute – has always been one of the possibilities in

public international law that distinguishes it from domestic law. Domestic obligations can always be adjudicated upon by a court conferred with jurisdiction by the domestic Sovereign. International obligations can only be adjudicated on where the relevant States have exercised their sovereignty by consenting to a specific form of dispute resolution. Decisions by States whether to consent to binding dispute resolution or not, the form of that resolution, and whether it is in public or in private, can take on profound significance.

Case study two: *Documents and Data case*

Shortly before delivering judgment on 31 March 2014 in the *Whaling Case*, the ICJ on 3 March 2014 delivered its decision adverse to Australia in the *Documents and Data Case*. Again by a comprehensive of majority 12 votes to 4 (differently constituted), the ICJ ruled *first* that it had prima facie jurisdiction, under the declarations by Australia and Timor-Leste of 2002 and 2012 respectively, to hear the claim of Timor-Leste against Australia for provisional measures; and *second* that it would proceed to make an indication of provisional measures, as a binding obligation in international law.³³ Australia was to ensure that the content of certain material seized under domestic search warrant from the premises in Canberra of a person said to be a lawyer for Timor-Leste would be sealed up and not used to the disadvantage of Timor-Leste until the case had been concluded.

Australia complied with the provisional measures order. In doing so, Australia

³³ Interim measures create binding international law obligations *LaGrand (United States v Germany)* [2001] ICJ Reports 466, 501-506.

subjugated its domestic legal norms, specifically its rights under its national security law, to international legal norms. In 2015, Australia, with the ICJ's permission, returned the materials that had been seized. Timor-Leste subsequently discontinued the ICJ proceedings.

Sovereignty is relevant to understanding this case, both at the level of jurisdiction and merits. *First*, as in the *Whaling Case*, it was the exercise of sovereignty by each of Australia and Timor-Leste through their respective declarations which provided the foundation for the ICJ's jurisdiction. An added feature is that in the *Whaling Case*, the conduct of Japan at issue occurred in the Southern Oceans (although a great deal of Japan's conduct took place in Australia's declared Exclusive Economic Zone). In the *Documents and Data Case*, the generality of the relevant language of Australia's declaration meant that the ICJ could exercise jurisdiction to apply norms of international law to Australia's conduct performed in Australia under Australian national security law. Australia's exercise of sovereignty in agreeing to a broadly expressed declaration meant that the domestic aspect of Australia's sovereignty was correspondingly contracted.

Drawing on Professor Crawford's arguments this matter illustrates some of the tensions within sovereignty. Sovereignty is the exclusive authority over a territory. It encompasses the capacity to exercise, to the exclusion of other states, state functions on or related to that territory; as well as the capacity to make binding commitments under international law as to how those functions will be exercised. As such, international law may constrain how a State is to exercise its exclusive authority within its own territory, but only because of a past exercise of sovereignty by that State.

Second, as the substantive basis for its indication of provisional measures, the ICJ placed particular reliance upon the principle of sovereign equality of States as one of the fundamental principles of the international legal order reflected in Art 2(1) of the UN Charter. The equality of States must be preserved when they are involved pursuant to Art 2(3) of the UN Charter in the process of settling an international dispute by peaceful means. Australia and Timor-Leste were involved in various negotiations and arbitration of disputes related to the sharing of resources of the Timor Sea. The ICJ ruled that Timor-Leste had a plausible right to conduct arbitration proceedings or negotiations without interference by the other State, including a right of confidentiality of and non-interference in its communications with its legal advisors.

That is, the ICJ was prepared, at least on a *prima facie* basis, to view Australia's conduct performed in Australia under Australian national security law not as a proper expression of Australia's sovereignty, but rather as a wrongful interference in the affairs of, and a failure to respect the equality of, another sovereign, Timor-Leste.

Case study three: the *TST Arbitration*

As an alternative to dispute resolution before a public judicial organ like the ICJ or by diplomatic negotiations, States can consent to resolve their disputes through arbitration. Arbitration gives the States significant control over the composition of the tribunal, and of the process. It usually also carries with it privacy and confidentiality.

The *TST Arbitration* arose through the latter route.

Two features should be noted about the *TST Arbitration*. *First*, as is typical in these matters, the States have agreed to strict confidentiality obligations surrounding the arbitration. The registry for the arbitration is the PCA in The Hague. Its website goes no further than recording the existence of arbitration instituted by Timor-Leste against Australia on 23 April 2013 under Art 23 of the TST and the names of arbitrators and counsel. Virtually nothing can be gleaned from the PCA website as to the substantive factual and legal issues in the arbitration or its current status. While confidentiality is the norm in these matters, the consequences of it must be noted. The citizen body in each state, and indeed the interested wider legal and international community, have little means to obtain accurate or up to date information about the matter, at least prior to but potentially even after the delivery of a final award. The contrast between a very public televised hearing in The Hague in the ICJ or an open domestic court and a private interstate arbitration at an undisclosed location is stark. Again the differences come about due to choices in the exercise of sovereignty.

A second feature of the *TST Arbitration* is that the States have agreed that the decision of the Tribunal shall be final and binding. Unless the matter is amicably resolved beforehand, the award will create a binding obligation in international law which each of the States will be required to observe. An open question is what would be the sanctions against a State that failed to observe such a final and binding award?

Case study four: *PM Asia ISDS arbitration*

Next I turn to the December 2015 award of the Tribunal in the *PM Asia ISDS Arbitration*.

The Tribunal ruled that the claims raised by PM Asia in the arbitration were inadmissible because the reliance by PM Asia on the Australia-Hong Kong BIT constituted an abuse of right. After a close examination of the factual record, including the cross-examination of lay witnesses and the testimony of an expert, the Tribunal found that PM Asia engaged in a corporate restructure to gain the protection of the Australia-Hong Kong BIT at a time when a dispute with Australia was foreseeable; foreseeable in the sense that there was a reasonable prospect that a measure that may give rise to a treaty claim would materialise; and that this abuse disqualified it from pursuing its claim under the Australia-Hong Kong BIT.

The *PM Asia ISDS Arbitration* illustrates a number of points. *First*, the PM Asia arbitration was, by reason of Art 10 of the Australia-Hong Kong BIT, conducted under the UNCITRAL Rules. Those rules required the arbitration to have a “seat”, which the Tribunal determined to be Singapore over Australia’s stated preference for London.³⁴ That choice carried with it that the domestic law of Singapore, specifically the *International Arbitration Act* (Cap 142A) (*Singapore IAA*), which was enacted in October 1994 and came into force in January 1995, became the supervisory law for the arbitration. The *Singapore IAA* in turn incorporates the UNCITRAL Model Law where the arbitration qualifies as an international commercial arbitration. There is authority from Canada that a BIT arbitration qualifies as such.³⁵

In an interesting aside, Art 16 of the UNCITRAL Model Law allows an appeal to the

³⁴ *Philip Morris Asia Limited v The Commonwealth Australia*, PCA, Procedural Order No 3 Regarding the Place of Arbitration, 26 October 2012.

³⁵ *United Mexican States v Metalclad Corp* (2001) 89 BCLR (3d) 359 at [49] (review of a NAFTA award is governed by the *International Commercial Arbitration Act*, R.S.B.C. 1996, c. 233).

domestic court of the seat from an award on jurisdiction where jurisdiction is upheld but not where jurisdiction is denied. Singapore amended the *Singapore IAA* in mid-2012, to allow a two way appeal on jurisdiction, an amendment to which came just too late for PM Asia.³⁶ But for that timing point, PM Asia might have brought Australia before the domestic courts of Singapore in a de novo appeal against the denial of jurisdiction. Equally, had the arbitration proceeded to the merits stage and Australia succeeded at that stage, PM Asia might have brought Australia before the domestic courts of Singapore on the application to set aside the award, albeit on the highly limited grounds available under the UNCITRAL Model Law.

These potential outcomes are striking. A BIT claim is conventionally regarded as a suit in international law, albeit a hybrid one in which a private party derivatively takes advantage of the promises between States in the treaty. It is rare to see one State brought before the domestic courts of another State, all the more so where the matter is one of international law. But the effect of a State agreeing to subject an ISDS arbitration to the UNCITRAL Rules is that the State has placed in the hands of the Tribunal the ability and indeed duty to select a seat for the arbitration, and thus delegated to the Tribunal the effective decision of which country's domestic law and courts may get to exercise jurisdiction over the State. To mitigate these consequences, a State could stipulate in advance a given seat in the agreement to arbitrate. Alternatively, it could choose a different arbitration mechanism, such as the ICSID. The ICSID does away with the concept of a seat of arbitration, and all appeal and review functions are handled by an *ad*

³⁶ See the *International Arbitration (Amendment) Act 2012*, see especially s 4 which repealed s 10 of the *Singapore IAA* and replaced it with a new s 10 permitting either party to appeal from a decision on jurisdiction.

hoc committee within the international tribunal itself and never come before a domestic court. Grounds for annulment of an ICSID award are procedural in nature and exhaustively listed in the Convention.³⁷ ICSID awards are not potentially subject to being set aside by a court on the grounds that the award is in conflict with the public policy of the State of the court, as arbitral awards may be under art 34 of the UNCITRAL Model Law.

The *second* feature of the *PM Asia ISDS Arbitration* is that, as with the *Documents and Data case*, it concerned domestic action taken by a State, here Australia, within its own borders, action which later becomes subject to examination under both domestic and international legal norms. PM Asia challenged the validity of the *Tobacco Plain Packaging Act* domestically under s 51(xxxi) of the Australian Constitution, as an acquisition of property on other than “just terms”. Our High Court rejected that application in 2012, essentially on the basis that, although there may have been a deprivation of PM Asia’s rights in its trade-marks which might be regarded as “property”, there was no taking to Australia of property, which is essential to attract s 51(xxxi).³⁸

Had the *PM Asia ISDS Arbitration* proceeded to the merits stage, PM Asia would have argued that, under the international law concept of expropriation, a deprivation without a taking is sufficient to constitute a *prima facie* expropriation; the dispute would then have devolved into whether the deprivation could be justified as a legitimate public health measure, and whether the treaty implicitly excluded such measures from the concept of

³⁷ Stephen Jagusch and Jeffrey Sullivan, “A Comparison of ICSID and UNCITRAL Arbitration: Areas of Divergence and Concern” in Michael Waibel et al (eds), *The Backlash against Investment Arbitration* (Kluwer Law International, 2010) 104.

³⁸ *JT International SA v Commonwealth* (2012) 250 CLR 1.

expropriation.

The result, as French CJ has pointed out in public speeches,³⁹ is that a State such as Australia now faces the prospect that a decision by its highest court that particular legislation survives constitutional challenge can effectively be out-flanked by an international tribunal ruling on a public international law claim that Australia has infringed the rights of an investor and must pay compensation.

That result may seem odd at first blush. But it is explicable once one attends to the multi-faceted concept of sovereignty, and to the interface between Australian domestic constitutional law and our international obligations.

Here there were three critical interlocking decisions.

First, in 1974 the Australian Parliament legislated under Ch I of the Constitution to bring the 1958 New York Convention on recognition and enforcement of foreign arbitration awards into law under the *International Arbitration Act 1974* (Cth) (**Australian IAA**). In 1989, Parliament supplemented this by legislating to amend the Australian IAA to give provisions giving the UNICITRAL Model Law force of domestic law in Australia. This created the prospective situation whereby a future award under any ISDS arbitration which qualified as a foreign award or as an international commercial arbitration picking up the UNCITRAL Model Law would be recognised and enforced in Australia, subject

³⁹ See Chief Justice French, “Investor-State Dispute Settlement – A Cut Above the Courts?”, Supreme and Federal Courts Judges’ Conference, Darwin, 9 July 2014, available at: <http://www.hcourt.gov.au/assets/publications/speeches/current-justices/frenchcj/frenchcj09jul14.pdf>.

only to the limited exceptions set out in the New York Convention or the UNCITRAL Model Law. A prospective enforcement action against the Commonwealth under the *Australian IAA* could be brought in federal jurisdiction, as a matter against the Commonwealth under s 75(iii) and/or a claim arising under a law of the Commonwealth under s 76(ii).

Second, the Commonwealth Executive in 1993, presumably mindful of protecting Australian investors with the impending handover of Hong Kong to the People's Republic of China in 1997, chose to exercise its Chapter II functions by entering the Australia-Hong Kong BIT, and including within it very broad substantive promises and a generous ISDS arbitration clause including consent to the UNCITRAL Rules.

The *third* and critical step was that the Australian Parliament in 2011, many years after these two earlier developments, passed the *Tobacco Plain Packaging Act* as an appropriate public health legislative measure. Coincidentally, one of the express objects of the Act was “to give effect to certain obligations that Australia has as a party to the Convention on Tobacco Control” (s 3(1)(b)).

The result is that final word on the domestic constitutionality of *Tobacco Plain Packaging Act* rests with the High Court in federal jurisdiction under s 76(i) of the Constitution. But whether Australia is bound under international law to pay billions of dollars in compensation to the disappointed investor as the price for passing that legislation rests with an international arbitral Tribunal, by reason of the Executive's decision to enter the treaty in 1993 and the Parliament's earlier decisions in 1974 and

1989, illustrating the tensions within sovereignty and between its domestic and international expressions.

Several more general observations about the ISDS space can be made. *First*, this space is likely to engage Australia increasingly over the coming years. The Trans-Pacific Partnership Agreement signed in February 2016 (although not yet in force) contains detailed and substantive protections for investors, as well as detailed mechanisms for the bringing to arbitration of disputes. Of particular interest is that the Agreement exempts tobacco control measures from most of the lawsuits that investors may bring under the agreement.⁴⁰ By contrast, the China-Australia Fair Trade Agreement also entered into in 2016 subjects some but not all of the obligations in the treaty to arbitration.

Secondly, ISDS arbitration provisions operate in two ways. It is easy to focus on Australia as the potential defendant to such claims in the future. Equally, however, it may be Australian investors taking advantage of such protections in bringing ISDS claims against other States who are parties to the agreement.

Thirdly, it is becoming increasingly apparent that decisions by the Commonwealth Executive to assume ISDS obligations and submit to binding dispute resolution mechanisms may limit the ability of not just the Commonwealth, but also the States and Territories, to pass measures thought appropriate within their jurisdictions.

An example which has been flagged arises out of legislation of the NSW Parliament to

⁴⁰ See Article 29.5 “Tobacco Control Measures”.

cancel the coal licences held by *NuCoal* on the basis of certain findings and material before the NSW Independent Commission Against Corruption. *NuCoal* brought its own case in the High Court of Australia seeking to have the NSW legislation declared invalid on the ground that it was an impermissible exercise of judicial power by the State Parliament. That challenge was rejected.⁴¹ *NuCoal* has indicated publicly that it has foreign investors who would seek to have claims brought under the Australia/US Free Trade Agreement.⁴² The claim would be against the Commonwealth of Australia, if brought. The Commonwealth, if it were found liable, would be required to pay damages for the actions of NSW. Such a claim is an example of the way in which international law tends to aggregate the constituent elements of a federation; that is, on the international stage, Australia is treated as a single entity and not as a federation of States. If the Commonwealth were liable to pay damages then one could well imagine that it may seek to recover those costs from NSW. In response, NSW might seek to argue that it was the Executive of the Commonwealth and not of NSW that entered the Australia/US Free Trade Agreement.

Fourthly, a lesson for all of our Parliaments and Executives, Commonwealth, States and Territories, is that, before they resolve upon legislation or action in areas which may affect the rights or property of companies who have overseas shareholders, they should consider the content of the obligations which have been taken on by the Executive at the Commonwealth level and the availability of ISDS mechanisms to challenge such

⁴¹ *Duncan v NSW* (2015) 255 CLR 388.

⁴² See, for example, Patricia Ranald, "High Court the final authority? Think Again", *Sydney Morning Herald* (online), 8 April 2016, available at: <http://www.smh.com.au/comment/high-court-the-final-authority-think-again-20160408-go1edb.html>.

measures.

Case study five: public international law disputes agitated by opinion or proxy

I have noted earlier that a distinctive feature of public international law is the ability of States to exercise sovereignty by assuming substantive obligations under treaty or custom but choosing not to accede to any relevant binding dispute resolution mechanism in respect to future claims of breaches of them.

Australia, under successive governments, has consistently taken this course in the area of international human rights law. Australia was one of the early signatories to the ICCPR, which came into force in Australia in 1980,⁴³ and equally to the *Convention Relating to the Status of Refugees* and the *1967 Protocols Relating to the Status of Refugees*, which came into force in Australia in 1954 and 1973 respectively.⁴⁴ These international obligations operate primarily for the benefit of individuals or groups rather than States. There is no international body to whose jurisdiction Australia has submitted, unlike for instance the states of Europe submitting to the jurisdiction of the European Court of Human Rights. The UN Human Rights Committee (**the Committee**) has been established to consider complaints by individuals under the ICCPR if the respondent State is a party to the First Optional Protocol to the ICCPR⁴⁵ (**First Optional Protocol**) Australia has

⁴³ *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

⁴⁴ *Convention relating to the Status of Refugees*, opened for signature 28 July 1951, 189 UNTS 137 (entered into force 22 April 1954); *Protocol relating to the Status of Refugees*, opened for signature 31 January 1967, 606 UNTS 267 (entered into force 4 October 1967).

⁴⁵ *Optional Protocol to the International Covenant on Civil and Political Rights*, opened for Signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

been such a party from 25 September 1991, but under Art 5(4) the Committee can do no more than forward its 'views' to the State party concerned and to the complainant for their consideration.⁴⁶ Finally, unlike many other countries, Australia's absence of a bill of rights means that there is no direct means to enforce these international human rights obligations through domestic law claims unless the obligations have been enacted as domestic law as some have.⁴⁷

How then, if at all, are the legislative and executive arms of government held accountable in respect to this category of freely assumed international obligations? Only by fairly limited proxies. International bodies such as the Committee may be called upon to express their non-binding opinions, opinions which may operate as a form of persuasion upon the government.

Additionally, public international law claims can be repackaged as suits under domestic constitutional law. For example, claimants might try to mount arguments relying upon the constraints on legislative or executive power in the Constitution to achieve the kind of results which might be achieved if relevant international law norms could be enforced directly.

⁴⁶ There is also the ability under Art 41 of the ICCPR for an inter-state complaints mechanism, where both States have made declarations accepting the procedure. Australia has never made such a declaration.

⁴⁷ See, for example, the *Racial Discrimination Act 1975* (Cth) which implements aspects of the *International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 21 December 1965, 66 UNTS 195 (entered into force on 2 January 1969). See also the *Australian Human Rights Commission Act 1986* (Cth) which establishes the Australian Human Rights Commission (**AHRC**) and, among other things, empowers it to inquire into any act or practice that may be inconsistent with or contrary to any human right (see s 11(1)(f)). Of course though, the inquiries by the AHRC do not have the force of law in the same way that a court decision does.

Recent years have yielded a mixed bag with these proxies. Let me consider two examples, Australia's policies of indefinite detention and mandatory offshore processing.

First, a four to three majority of High Court in 2004 in the well-known decision of *Al-Kateb v Godwin (Al-Kateb)*⁴⁸ construed the provisions of the *Migration Act 1958* (Cth) as requiring the continuing detention of an unlawful non-citizen even if their removal from Australia was not reasonably practicable in the foreseeable future. The same majority held that this form of detention by the Executive of a non-citizen did not contravene Ch III of the Constitution. Justice Kirby was not among the majority, expressing the view that “[i]ndefinite detention at the will of the Executive, and according to its opinions, actions and judgments, is alien to Australia’s constitutional arrangements”.⁴⁹ His Honour’s judgment included a forceful case for why national courts, including the High Court, “have a duty, so far as possible, to interpret their constitutional texts in a way that is generally harmonious with the basic principles of international law, including as that law states human rights and fundamental freedoms”.⁵⁰ Attempts to re-open and overturn *Al-Kateb* have been made over the ensuing decade, so far with no success.⁵¹

A variant on the same question was the subject of an opinion delivered by the Committee under Art 5 (4) of the First Optional Protocol on 18 April 2016.⁵² The authors were five persons held in Australia immigration facilities. They had arrived by boat, without a

⁴⁸ (2004) 219 CLR 562,

⁴⁹ (2004) 219 CLR 562 at [146].

⁵⁰ (2004) 219 CLR 562 at [175].

⁵¹ See, for example, *Plaintiff M47/2012 v Director-General of Security* (2012) 251 CLR 1 and *Plaintiff M76/2013 v Minister of Immigration, Multicultural Affairs and Citizenship* (2013) 251 CLR 322.

⁵² Human Rights Committee, 116th sess, *Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 2233/2013*, UN Doc CCPR/C/116/D/2233/2013 (18 April 2016) (*FJ et al v Australia*).

visa, and held in detention for more than five years. Although recognised as refugees by Australia, they were refused visas to remain in Australia following adverse security assessments made by the Australian Security Intelligence Organisation. They were not given the reasons for the adverse assessments and have no merits review avenue available to them under Australian law.

The Committee opined that the claim was admissible under the First Optional Protocol. It rejected Australia's claim that there was an effective domestic remedy which had not been exhausted, namely the ability for the claimants to seek to persuade the High Court to overturn the ruling in *Al-Kateb*. On the merits, the Committee ruled that Australia had not demonstrated, on an individual basis, that detention for five years or more was justified. Australia had not demonstrated that other, less intrusive measures could not have achieved the same end of compliance with security. Additionally the authors ought to have been informed of the specific risks attributed to each of them. They were deprived of legal safeguards allowing them to challenge effectively the grounds for indefinite detention. The Committee concluded the detention of the authors was arbitrary and contrary to Art 9(1) of the ICCPR. It also found violation of other Articles.

Second, a question which has vexed much Australian law and policy over recent years is the re-introduction in 2013 of mandatory offshore processing in Nauru and Papua New Guinea (**PNG**).

Australia has suffered various adverse opinions from UN Committees on offshore processing as well from its own independent statutory bodies, such as the Australian

Human Rights Commission (**AHRC**). For example, the UN Human Rights Agency, the UNHCR, which undertakes regular visits to Nauru and Manus Island to monitor the situation of refugees and asylum seekers, has repeatedly criticised the conditions on Nauru and Manus Island as well as the systems in place for assessing refugee claims.⁵³ Similar criticisms have been made by Amnesty International and the AHRC in relation to children in detention.⁵⁴

In circumstances where those opinions are non-binding and have not induced Australia to modify its policies, we have seen over the last several years a series of cases in which persons affected have brought challenges in our High Court. In part those challenges have sought to establish, unsuccessfully, that the actions of the Australian Executive have gone beyond the statutory power available from time to time. In part, they have sought to challenge whether the Australian Executive's action can be supported as non-statutory executive power under Ch II of the Constitution, a point which the High Court has not had to resolve conclusively. More fundamentally however those challenges have sought to rely upon the structural implications arising from Ch III of the Constitution and the separation of powers embodied in the Constitution, urging the Court to rule that the relevant provisions of the *Migration Act 1958* (Cth) are invalid because they involve the Australian Executive in a form of punitive detention which is reserved, if at all, to the

⁵³ See, for example, UNHCR, *UNHCR monitoring visit to Manus Island, Papua New Guinea, 26 November 2013*, available at: http://unhcr.org.au/wp-content/uploads/2015/05/23Oct2013_ManusMonitoringVisit.pdf; UNHCR, *UNHCR monitoring visit to the Republic of Nauru 7 to 9 October 2013*, available at: <http://unhcr.org.au/wp-content/uploads/2015/05/2013-12-06-Report-of-UNHCR-Visit-to-Nauru-of-7-9-October-2013.pdf>

⁵⁴ See, for example, Amnesty International, *Nauru Offshore Processing Facility Review 2012* (released 23 November 2012); the Australian Human Rights Commission, *The Forgotten Children: National Inquiry into Children in Immigration Detention* (2014) available at: https://www.humanrights.gov.au/sites/default/files/document/publication/forgotten_children_2014.pdf

judicial arm of government.

Accordingly, if there were a binding international dispute mechanism a person might bring a claim for arbitrary detention contrary to Art 9 of the ICCPR. However, in the absence of such a mechanism, persons have brought claims for the infringement of Ch III of the Constitution in Australian courts. In the most recent case, *Plaintiff M68*,⁵⁵ the court by majority of 6 to 1 rejected such a challenge. Notably however a parallel domestic constitutional challenge in the Supreme Court of PNG more recently succeeded with a ruling, that the detention in the processing centre there contravenes an international human right obligation incorporated into the PNG Constitution and ordered that detention cease.⁵⁶

Conclusion

When we consider Australia's recent and continuing involvement in the public international law dispute resolution space, it is easy to start with raw statistics, wins and losses, or simply to observe the principles established by individual cases. The *Whaling Case* gives us a clearer insight into the standard of review which the ICJ, and perhaps other international tribunals, will apply in adjudging whether a State has gone beyond the permissible limits of discretion in a treaty governing use of scarce resources in international waters or space. The *Documents and Data Case* is an important caution that a State's exercise of domestic police powers within its own territory may come unstuck

⁵⁵ *Plaintiff M68 v Minister for Immigration and Border Protection* (2016) 90 ALJR 297.

⁵⁶ *Namah v Minister for Foreign Affairs & Immigrations*, SCA No 84 of 2013, PNG Supreme Court of Justice, 26 April 2016.

on the higher international plane. The *PM Asia ISDS Arbitration* will be a leading case on the concept of abuse of right in ISDS arbitrations. The lessons of the unfinished proceedings with Timor-Leste, whether inter-state arbitration or UNCLOS conciliation, are yet to reveal themselves.

However the deeper point I have sought to draw out tonight concerns sovereignty. I have sought to illustrate, as Professor Crawford argued, that sovereignty is an evolving legal value which is being reconfigured. I have sought to show that sovereignty is a principle of international law but also an intensely practical matter with which Australia and Australians need to grapple.

As Professor Crawford acknowledged “sovereignty is not an all-or-nothing quality: the question is the scope of the commitments made by States whose sovereignty extends to making promises binding in character”.⁵⁷ Careful attention needs to be given, ultimately by the Commonwealth Executive, to the existence and terms of those commitments. For any given dispute or category of disputes, how far is Australia prepared to go, and in what terms, to submit itself to international dispute resolution? Will Australia bind itself in advance, or only after specific disputes arise? Will dispute resolution be binding or only advisory? Will it be resolution by open, judicial methods, or by private arbitration? How far is it necessary for Australia to bind itself, in order to achieve bilateral benefits, such as the protection of Australian companies investing in overseas States, or multi-lateral benefits such as the establishment of free trade zones?

⁵⁷ Crawford, above n 26, 75.

These decisions are critical because, on an ever increasing basis, domestic action, whether legislative or executive, and whether at Commonwealth, State or Territory level, will be constrained by multiple sets of norms; some deriving from domestic law, others from international law. Governments, before entering upon measures, need to think holistically about the range of norms which might be brought to bear upon their measures after the event and the range of dispute resolution mechanisms, binding or otherwise, to which they may be exposed. The Commonwealth Executive needs to contemplate when it enters into treaties, that its choices may have powerful implications – including significant financial ones – not just for the Commonwealth Parliament, but for State and Territory Parliaments and Executives.

Ministerial responsibility is critically important in this space as elsewhere. The actual practices of treaty-making by Australia will typically involve senior officials within the Department of Foreign Affairs and Trade and other relevant Government Departments. The relevant Ministers may sometimes be directly involved in the negotiations. Whether that is so, the Ministers are responsible to Parliament under ss 61, 62 and 64 of the Constitution for the work of their departmental officials. Typically, the negotiation of treaties and free trade agreements is done in confidence. The citizen body knows little until after the event about the terms of the treaties, including the substantive promises made or the choices of dispute resolution mechanisms. The importance of robust public discussion and questioning of Ministers within Parliament, about the choices being made, should be apparent.

In all this questioning, one fundamental question can never be escaped. Australia is a

nation proudly committed to international law and to the part many great Australians have played in the international law project. Among those remarkable Australians are Dr Herbert Vere Evatt, Sir Kenneth Bailey and Sir Paul Hasluck, who were instrumental at the 1945 San Francisco conference at which the UN Charter and the Statute of the ICJ were signed. As I have already mentioned, we currently have the inestimable James Crawford as our second only ever judge on the ICJ. We also have Michael Kirby with his long and distinguished career in international law that has included serving as the Special Representative of the Secretary-General of the United Nations for Human Rights in Cambodia between 1993 and 1996 and, more recently, leading a Commission of Inquiry on Human Rights in the Democratic People's Republic of Korea established by the United Nations Human Rights Council. The list does not stop there.

Every time we exercise sovereignty by assuming an international obligation, we have two further choices. One is to bind ourselves further to the international project by submitting to a binding dispute resolution mechanism, of the type which best suits the case. The other is to eschew the prospect of being able to be held to account for whether we have breached our international obligations. Do we turn the first way for trade obligations, in order to close the deal, but the second way for human rights obligations? Is that a principled way to proceed? What kind of future do we want for our country in our engagement with the international legal order? I leave you with those questions.