INTERNATIONAL LAW ASSOCIATION, VICTORIAN CHAPTER

News Bulletin

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President's Report

By Kelly Forbes

Welcome to the December edition of the International Law Association, Victoria Chapter newsletter, our final edition for 2013. The Chapter has had an excellent third year, having held a number of high profile events and the launch of our Public International Law Moot Competition. We've also seen a rise in membership and members' participation in the work of the Chapter, which I hope will continue into 2014.

This is my first newsletter as President, having succeeded our Acting-President Anna Hood in November. Our new executive committee was also confirmed in November and comprises Molina Asthana as Vice President, Lea Christopher as Treasurer, Georgina Wu as Secretary, Bronwen Ewens as Newsletter Editor and Fiona Lander as Moot Co-ordinator. The General Committee Members are Devon Whittle, Anna Hood, Peter Willis, Rick Liew, Laura Bellamy, Sophocles Kitharidis, Clare Miller, Valeria Coscini and Erik Dober.

With the end of the year approaching, I believe it's time to thank the executive members for their hard work in 2013. In particular, the Chapter's success would not have been possible without the tremendous work of our 2013 President Trina Malone who is now studying international law in Cambridge. Thanks also go to Anna Hood who stepped in as Acting-President in September, Devon Whittle who served as Vice-President in 2013, Bronwen Ewens for her efforts in producing the Chapter's newsletters and Laura Bellamy for her excellent work as Treasurer in 2013.

I hope you enjoy reading this edition which contains a number of interesting articles and updates on current issues in international law, a report on Professor Donald R Rothwell's presentation on The Law of the Sea and South China Sea Disputes and an interview with The Hon. John Fahey AC.

The year 2014 promises to be an exciting one for the Chapter, with a great range of international law events and our second Moot Competition.

I would also like to take this opportunity to invite all members interested in collaborating with the executive committee on ideas for Chapter events or becoming involved in organising any events, to contact our Chapter Secretary, Georgina Wu: georginawu@gmail.com

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Professor Donald R. Rothwell: The Law of the Sea and South China Sea Disputes

Donald Rothwell, Donald Robertson

By Bronwen Ewens, newsletter editor for the Victorian Chapter of the ILA (Australian Branch)

In January this year the Philippines, citing the *United Nations Convention on the Law of the Sea* ('UNCLOS'), took China to the International Tribunal for the Law of the Sea ('ITLOS') over the latter's 'nine-dash-line' — the maritime boundary it uses to mark its claim in the South China Sea. What are the political and commercial implications for the region, given that the area lies at the strategic intersection of a number of nations that object to China's claim?

The Victorian Chapter of the ILA held a presentation by Professor Donald R. Rothwell, Professor of International Law at the ANU College of Law on Monday, 2 September, at which Professor Rothwell elaborated upon the geopolitical and economic stakes at play.

The event was hosted by Herbert Smith Freehills. Donald Robertson, a partner at Herbert Smith Freehills, introduced Professor Rothwell. Mr Robertson noted that an understanding of the international law questions evoked by disputes over the South China Sea is important to clients' commercial interests, as instability in the region would disrupt Australia's trade with Japan and China.

Professor Rothwell explained how, to date, Australia has opted to take a hands-off approach towards four legal issues currently vexing the South China Sea. In addition to China' nine-dash line, which is contested by Vietnam, Malaysia, Brunei, Indonesia and the Philippines, three other international law questions dominate discussion of the South China Sea. The legal definitions of islands and rocks is another such question. One of the three grounds on which art 121 of the UNCLOS distinguishes between the two is that rocks – which are being unable to sustain human habitation or economic life – have no exclusive economic zone (EEZ) or continental shelf. One feature of EEZs is that they confer an exclusive right to construct and operate 'artificial islands' (art 60), including installations for extracting oil and gas.

The third public international law question highlighted by the South China Sea dispute is that of maritime boundaries. The International Court of Justice recommends a three-step approach to borders that entails first drawing a provisional median line; then considering relevant circumstances calling for the shifting of the line; and, lastly, assessing the proportionality of the share of maritime area granted to a party to the length of its relevant coasts.

The final subject highlighted by challenges to China's claim is the creation of an appropriate dispute resolution process. Professor Rothwell believes that the answer might be a South China Sea Commission, with each of the 15 states concerned appointing a member, and a mixed arbitration and conciliation process. However, China is unlikely to favour such an initiative.

WADA President on Doping and the Law

The Hon. John Fahey AC was appointed President of the World Anti-Doping Agency (WADA) in 2007 after his retirement from federal politics. As Premier of New South Wales in the early 1990s, he played an important role in the selection of Sydney to host the 2000 Olympic Games. He was interviewed by newsletter editor Bronwen Ewens.

In 2003, a panel of three experts in the fields of private international law, human rights law and international arbitration published a Legal Opinion on the Conformity of Certain Provisions of the Draft World Anti-Doping Code with Commonly Accepted Principles of International Law. Which principles of human rights and international law were at stake?

The objective of this legal opinion was to opine on whether certain key elements of the World Anti-doping Code (WADC) conformed to commonly accepted principles of international law and human rights such as the principles of proportionality, *nulla poena sine culpa* and the presumption of innocence. The elements of the WADC at stake were *inter alia* the concept of strict liability, the sanction regime and, in particular, the automatic disqualification of the athlete's results. The full legal opinion can be found via by clicking here.

Since 2003, WADA has established and revised the 'Whereabouts' system so that elite athletes need to be available for an hour a day to drug testers where they will be available to provide samples. Is it arguable that this requirement infringes Article 8 of the *European Convention on Human Rights*, which concerns the right to privacy?

This question remains theoretical given that, to date, only two State courts (Almeria Provincial Court, Spain, and the French State Council) have reviewed the requirement. In a decision dated 12 January 2010, the Spanish Court considered that the Whereabouts system did not breach any of the rights safeguarded by the Spanish constitution. Indeed, this case concerned WADA's former Whereabouts system, which was much more stringent, as athletes had to be available on a 24 hour basis, compared with only one hour per day. Nonetheless, the Spanish Court considered that there was no breach of constitutional or human rights and, in particular, the rights of privacy.

The French State Council considered in a decision rendered on 24 February 2011 that the '*obligations to file whereabouts ... are justified by the objective of the general interest in the fight against doping and are proportionate to this objective*' (free translation). The French State Council expressly stated that the athlete's right of privacy was not breached: '*Articles 3 and 7 of the contested decree do not constitute any obstacle to the athletes' freedom of movement and, with regard to the right to the respect for privacy safeguarded by article 8 of the* European Convention on Human Rights, *as well as to individual freedom, the breaches are legitimate and proportionate to the aims of general interest pursued by the fight against doping, in particular the protection of athletes' health as well as the safeguard of*

equality and equity in sports competitions (free translation).

This year, the Australian Crime Commission said in its report *Organised Crime and Drugs and Sport* that 'organised criminal identities and groups are active in the trafficking of PIEDs (Performance and Image Enhancing Drugs) that are being used by elite athletes in Australia'. The involvement of organised crime shocked and surprised many – how is it explained?

Most countries do not have any legislation in place to combat the trafficking of performance enhancing drugs. As a consequence, this is not a risky business for criminal organisations, and it is very lucrative. This problematic issue is well known to WADA and we have raised it in many speeches and presentations internationally to alert the world of sport. See the report dated 2007 by clicking here.

The Australian-born, Oxford-based bio-ethicist Julian Savulescu opposes doping bans and instead argues for an 'open market in doping'. However instinctively many people might recoil from such a proposal, would it at least have the benefit of wiping out the black market for PIEDs?

Many of the doping substances used by cheats are legal and can be obtained relatively easily without the need for criminal intermediaries. We do not think this would be a solution. Further, the legalisation of doping products would go against the objectives of the World Anti-doping Programs for three reasons: 1) It would be detrimental to the athletes' health. 2) Clean athletes would have little or no chance to win competitions. 3) The more affluent athletes potentially would be at a competitive advantage over other athletes because they would be more likely to afford to adopt the latest doping practices.

The black market would continue nevertheless, as it is 'open' to all people, not just elite athletes.

The WADA Code has been accepted by the 145 governments throughout the world that have ratified the *UNESCO International Convention against Doping in Sport.* The *Convention* is a legally binding tool which entered into force in February 2007. However Australia, unlike New Zealand for example, uses a variety of Acts, rather than specific legislation, to combat trafficking in PIEDs. Does this weaken Australia's effectiveness in tackling the problem?

To date, 174 countries have ratified the *UNESCO Convention*. In principle, the existence of several Acts should not be detrimental to tackling the problem of trafficking provided that the necessary legal ground is covered and there are no loopholes. This said, WADA is not mandated to review State legislation on PIEDs trafficking. This is a matter for UNESCO to monitor pursuant to the *Convention* (refer to the full text here). WADA's mandate is to ensure the correct implementation and application of the World Anti-Doping Code (WADC) by WADC signatories. Governments are not signatories but have recognised the Code through ratifying the treaty.

As you are aware, earlier this year, Essendon AFL Club reported itself to governing body ASADA for violating the ban on PIEDS, with GHRP-6, also known as peptide 6, singled out among the substances cited. GHRP-6, though banned by the Anti-Doping Authority of Australia, cannot be detected by drug testing. How can regulation be effective when the science is not keeping up with doping schemes?

WADA has spent millions of dollars in research since its creation to develop new tests to detect doping substances.

However, some substances remain undetectable and new substances appear on the black market or on the legal market almost every day. For these reasons, testing itself cannot detect every cheat so an increasing emphasis is being placed on investigations to gather evidence of doping schemes. The Lance Armstrong case, as well as the Australian cases where athletes have been sanctioned based on cooperation between customs and ASADA, are good examples of what can be achieved in addition to testing.

UK sports lawyer Gregory Ioannidis, who argues for the criminalisation of doping, also claims that Lance Armstrong was denied due process because the USADA has jurisdiction only over investigations, and that sanctions are in the realm of the governing body − the UCI in the case of cycling. In your opinion, was Armstrong denied due process?

Based on the applicable rules (which reflected the WADC), USADA had jurisdiction to make findings on Lance Armstrong's use of prohibited substances. Further, and in accordance with the WADC rules, Armstrong was offered the opportunity to challenge the USADA findings before a panel of the American Arbitration Association (AAA). Any such AAA arbitral award could then have been appealed before the Court of Arbitration for Sport (CAS) and then even to the Swiss Federal Tribunal (albeit in this last case only on the basis of certain limited procedural grounds). Armstrong decided not to raise a defence to the allegations against him, and therefore accepted the sanction process set forth by USADA. There is no issue of lack of due process there. In addition, of course, Armstrong subsequently admitted to systematic doping throughout most of his elite cycling career.

In February, Cycling Australia discussed the option of having professional competitors sign statutory declarations in which athletes, staff and management would declare any past or present involvement in doping. False declarations would result in criminal charges − a revolution in the anti-doping fight. Can such a drastic and coercive measure be justified?

WADA does not have a role in the creation, implementation or enforcement of international criminal law given that the WADC and International Standards are of a civil nature. With that said, however, sanctioning the athlete and their entourage through the criminalisation of trafficking and administration of doping substances is an efficient means of cutting off the source of such activities, and is encouraged by WADA and UNESCO. Athletes who dope are sanctioned at a sporting level. The criminalisation of doping has proven to be effective also with regard to the information collected during the investigation phase. WADA is supportive of such efforts but unwilling to advise sovereign nations on how to legislate on such issues internally. That must remain the right of the individual nation and its legislative process.

The Treaty of Lisbon and Pressure for Policy Changes in EU International Investment Treaties

By Bronwen Ewens, newsletter editor for the Victorian Chapter of the ILA (Australian Branch)

When, on 1 December 2009 the Treaty of Lisbon, Amending the Treaty on European Union and the Treaty Establishing the European Community[1] (the 'Lisbon Treaty') became law throughout the European Union (EU), it broadened the scope of the EU's common commercial policy (CCP) beyond trade agreements to encompass foreign direct investment (FDI), thus bringing international investment agreements (IIAs) within the EU's exclusive competence.[2]

In addition to this change in EU jurisdiction, the Lisbon Treaty increased the role of the European Parliament and Council in the CCP, by making provision for the European Parliament to be consulted during CCP negotiations,[3] giving elected representatives an effective voice in the formulation of EU investment treaties.

In its 'Report on the future of European investment policy',[4] the European Parliament's Committee on International Trade highlighted its desire for changes in the traditional investment treaty model, suggesting that future IIAs include social and environmental standards.

The Parliamentary Committee endorsed the OECD's new *Guidelines for Multinational Enterprises* – the 'soft law' recommendations that the OECD has issued, following its failure to conclude a notably investor-friendly Multilateral Agreement on Investment in the 1990s.

A chart comparing the 2000 *Guidelines* with their 2011 revisions shows the inclusion of a new Chapter IV, dedicated in the main to human rights.[5] For example, Paragraph 38 states that investing enterprises should respect human rights regardless of whether the government of the state in which they are investing does so; paragraph 40 points out that such groups as indigenous peoples, ethnic minorities and women may require 'particular attention'.

The new Chapter V, on employment and industrial relations, expounds the virtues of equality of (employee) opportunity and of employer-employee consultation, while Chapter XI urges compliance with both the spirit and letter of the law of host countries' tax regimes.

In line with a general global rise in expectations that investors should be good corporate citizens, the Committee also called for corporate social responsibility (CSR) clauses to be included in both IIAs and Free Trade Agreements.

[1] *The Lisbon Treaty, Amending the Treaty on European Union and the Treaty Establishing the European Community*, signed 13 December 2007, 2007/C 306/01 (entered into force 1 December 2009) ('*Lisbon Treaty*').
[2] *Treaty on the Functioning of the European Union*, (2007) (consolidated version), 2012 O.J. C326/47 (entered into force 1 December 2009) art 207.1.
[3] Above n2, art 207.2, art 218.6.
[4] Committee on International Trade, European Parliament, 'Report on future European investment policy' (2010/2203(INI)) March 2011.
[5] OECD, *2011 Update of the OECD Guidelines for Multinational Enterprises - Comparative table of changes made to the 2000 text* (2012).

The Evolution of a Lawyer-Linguist

Christelle Santelli, Senior Associate in the Corporate & Commercial Group of Gadens Lawyers Melbourne (Mergers & Acquisitions, Private Equity and Financial Services), is qualified to practise law in France and Italy as well as Australia. Here she writes of her experience of relocating and requalifying, and of her evolution as a lawyer-linguist.

Introduction

I have travelled extensively and I have always felt like a citizen of the world, but I never thought life would bring me to become qualified as a lawyer in three different countries: France, Australia and Italy. I believe lawyers qualified in multiple jurisdictions will become more and more common as globalisation fully extends to legal services and I thought it would be opportune to share my personal and professional experience. After a brief summary of my background, I will invite you to reflect on the interaction between languages and the law through a short empirical analysis of my journey; in particular, I will examine how the relocation and requalification process has impacted on me as a legal practitioner, and how I have become a 'lawyer-linguist'.

Background

I am originally from France. I grew up in Paris and studied law at the University of Paris X - Nanterre and then the University of Paris I - La Sorbonne. After a period of eight months in Bologna as part of a student exchange program, I 'permanently' relocated there and decided to undertake a traineeship to become an Italian-qualified lawyer. During the four years I spent in Italy, I learned Italian to a professional level, I completed my traineeship in a local firm, I passed the bar exam, I practised corporate and commercial law and I worked with the University of Bologna. I then relocated a second time, to Melbourne, and decided to requalify as a lawyer. As part of the requalification process, I completed 15 academic subjects and the compulsory practical training to become admitted as an Australian legal practitioner.

My experience of the relocation and requalification process

Relocating to, and requalifying as a lawyer in, two new countries was an extraordinary experience, both challenging and enriching.

Challenging and enriching because of the novelty of the experience and all the consequences associated with migrating to another country: applying for a visa, understanding a different culture, learning a new language, finding a house and a job, making friends, etc. It also made me reflect on my personal choices: who did I really want to be, away from my social and family context and outside of my comfort

zone? What were the real obstacles to my achievements? I started to rethink my whole life through the migration and integration process and came to the conclusion that the limits I had previously imposed on my personal and professional development (which sometimes resulted in a lack of confidence or a fear of failure) were largely due to my education, my social and cultural background and, sometimes, my ignorance. These questions became relevant to each of the personal, professional and financial challenges that came with migrating to a new country.

From a professional perspective, I asked myself many questions along the way, some practical and some more profound. Was I going to be a lawyer, an academic or do something completely different? If I decided to continue to be a lawyer, was I going to choose private practice or go in-house? Was it worth requalifying in each country, did I have to? How much of an obstacle would a foreign language be at a professional level? How different was the law of another country? Would the market accept me despite my unusual background and experience?

As I studied to requalify, and as I started to practise the law of a new country in a language different to my native language, I also looked back at my learning and professional experience in my country of origin and I realised that my understanding and practice of the law had also been 'contaminated' by my background and knowledge (or lack thereof!). It was like I was suddenly learning sweet from sour (with the surprise that comes with it). I was starting to understand more about the French legal system from learning about other legal systems. This process had already started during my Master in Comparative Law in Paris, however, it completely made sense as I fully experienced 'the law' of another country in that country, a bit like studying English in Paris but then speaking English when living and working in an English-speaking country.

As part of this process, I also started to fully appreciate the value of the interpretation of legal concepts and the distinction between words and denotation when practising as a lawyer. I realised that a fundamental part of my job was to interpret and use words to give effect to legal concepts. The relocation and requalification process meant that not only did I need to learn another language (the words), but I also needed to learn new legal concepts and rules of interpretation (i.e. I needed to understand another legal system).

This led me to ask myself: how does my knowledge of different languages at a professional level, as well as my legal knowledge and experience in three different countries, impact on my activities of interpretation and drafting as a lawyer?

Language(s) and the law(s) — 'translating the law'

I started reading articles written by translators and linguists about legal translation. I also found many comparative law studies which proposed to analyse and compare legal concepts from different legal systems. Some have also attempted to provide a systemic approach to comparative law and the role of languages in a suggested model. One question remained prominent in my mind

when thinking about the interaction between the law and languages, and it was well formulated and analysed by Dr Simone Glanert in *De la traductibilité du droit*:[6] is it at all possible to 'translate the law'?

Many academics have looked into this issue when discussing the meaning of words and their literal translation, the rules of statutory interpretation, the specificity of some legal concepts to certain legal systems and their absence in others, the seemingly identical words (legal *faux-amis*) attaching different legal concepts (eg: *crimes / délits and crimini / delitti*), or the common linguistic roots and legal history of certain countries (eg: Latin and civil law).

'Translating the law' is not only a theoretical issue for translators and comparatists. It is a practical issue for international couples when they deal with their estate or family law matters, for companies doing business internationally, for government and international bodies, and for dispute resolution bodies, courts and tribunals, whether international or national. For example, the case brought by Christian Louboutin against Yves Saint Laurent before a New York court[7] revealed some costly difficulties for the parties, some practical (eg, translating a large number of documents), some more academic (the interaction between the common law concept of 'discovery' and French privacy laws). I also considered with great interest the decision of the High Court of Australia in the Fortescue case[8] regarding the meaning of a 'binding contract'; although that case did not involve a legal translation, I believe it showed the difficulties associated with legal interpretation in an international context.

I will give you a couple of examples directly taken from my professional experience. How would you 'translate' 'établissement public à caractère industriel et commercial'? This legal concept refers to state-controlled entities of an industrial or commercial nature in France. It is specifically reserved to a limited number of French entities (about 40), including some research institutes and infrastructure entities. An 'établissement public à caractère industriel et commercial' operates under special laws which do not apply to entities that are subject to private company law, even when the capital of those companies is held by the state. Therefore, a word-for-word translation of 'établissement public à caractère industriel et commercial' would not be helpful to anyone interested in understanding the French legal concept. Similarly, a 'friendly society' regulated by the Australian Prudential and Regulatory Authority (APRA) in Australia could be translated literally as a 'société amicale' in French, which would be of little help to a lawyer, a court, a government body or a scholar who was trying to understand the Australian legal concept of 'friendly society'.

[6] Simone Glanert, *De la traductibilité du droit* (Dalloz, 2011).
[7] *Christian Louboutin, S.A. v. Yves Saint Laurent AM. Holding, Inc.*, 2012.
[8] *Forrest v Australian Securities and Investments Commission & Anor; Fortescue Metals Group Ltd v Australian Securities and Investments Commission & Anor* [2012] HCA 39.

Due to increasing demand in the public policy sector, particularly from the European Union institutions and countries with a multi-lingual and/or multi-jurisdictional system such as Canada, a new profession has emerged to fill the gap in skills and competencies required to assist with 'translating the law': lawyer-linguists. Lawyer-linguists can be defined as professionals who are able to translate legal texts (or revise translations of such texts), provide advice on legal terminology, and provide legal analysis in comparative law (i.e. a comparison of legal systems, legislations and legal concepts).

Since the emergence of lawyer-linguists as a recognised profession, particularly in countries such as China or Canada or legal systems such as the EU, which have developed a need for lawyer-linguists, the debate regarding the interaction and the right balance between translation and legal competencies has been revived. However, some countries or legal systems do not have an obvious need for lawyer-linguists and may not appreciate the difficulties in, the full extent of, and the true value in, attempting to 'translate the law'.

Defining 'the law' is in itself controversial and does not have a universally accepted methodology. However, many would agree that it is possible to identify the following meanings of the word 'law': 'the law' as a general concept of law, the 'laws' of different countries as legal systems, and then the 'laws' of each country as the actual rules of a legal system. We can try and apply a similar approach to the word 'language', using the distinctions made by the Swiss linguist Ferdinand de Saussure, between '*langue*' as specific instance of a language system (English, French etc.), '*langage*' as an abstract concept of communication and '*parole*' as the concrete usage of speech in a particular language.

Therefore, the general (but probably not yet universal or harmonised) concepts of 'the law' and 'the language' can be distinguished from 'languages' and the 'laws' of different countries, however it is their interaction that is critical. What have they got in common? Words. For a legal practitioner and a lawyer-linguist, it is about bringing the concepts of 'the law' and 'the language' together and applying them to words (interpretation/advice), and vice versa (drafting), when analysing the laws and languages of a country or a legal system.

'Translating the law' is therefore inherently subjective and will depend on the lawyer-linguist, his/her knowledge of the legal systems and the languages involved, but also his/her professional, cultural and social background. Accordingly, 'translating the law' will never produce one uniform result; there will always be many different ways of bringing legal concepts to words, and the number of legal systems, laws, languages, legal practitioners and lawyer-linguists will be multiples of the findings.

Any conclusion that 'translating the law' is impossible is irrelevant when looking at the benefits of the process: whilst it might be a necessity for certain countries or legal systems (as well as a number of bodies or natural persons), I believe that, even for a country or legal system that does not have an obvious need for it, 'translating the law' has the potential to enrich that country or legal system by challenging it and

enhancing the interpretation of its laws. Raising awareness not only amongst academics and legal practitioners but also policy makers, government bodies, courts and tribunals, is fundamental.

In my view, 'translating the law' is sometimes a necessity, often a work of art and always a conundrum. As a lawyer-linguist, I provide my clients with a unique perspective on their transaction and with a better understanding of, and confidence in, the legal systems in which they decide to operate. Being able to 'translate the law' and communicate to my clients the meaning of the laws of a country or legal system which they are not familiar with, thereby bridging the divide between the different legal systems in which they operate, represents an undeniable value-add to them.

Final consideration: 'translating the law' and 'translating humour'

To fully appreciate the debate around 'translating the law', I invite you to put it into perspective and reflect on another question: is it possible to 'translate humour'?

First, not everyone gets a joke. The understanding of the joke, the interpretation of the words and the so-called sense of humour are of utmost importance to produce the desired effect: making the audience laugh. To do that, the stand-up comedian will need to take into account the cultural background of his/her audience (for example, a joke involving accents or sayings). Further, the language itself can be an obstacle to producing the desired effect where the joke is based on the multiple meanings of certain words (for example '*why do leopards have a hard time hiding? Because they are always spotted*'). If you are a French and English speaker, I recommend that you watch '*Bienvenue chez les Ch'tis*' ('*Welcome to the Sticks*') or '*MicMacs à tire-larigot*' ('*Micmacs*'): I find the translation of these French comedies into English quite fascinating**.**

Conclusion

To conclude, I will respectfully note that there are a few differences between translating humour and translating the law: as legal practitioners or lawyer-linguists, we do not have to make our audience laugh, we have more time to interpret and explain legal terms without bearing the risk that the desired effects will be lost in translation, and the consequences of an incorrect translation can be far more concerning and serious than being threatened with rotten tomatoes…

Want to contribute?

To contribute articles, opinion pieces, interesting cases or events and opportunities, please contact the editor, Bronwen Ewens, at

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Case Note - *Secretary, Department of Families, Housing, Community and Indigenous Affairs v Mahrous* [2013] FCAFC 75

By Stephen Tully

The judgment in *Secretary, Department of Families, Housing, Community and Indigenous Affairs v Mahrous* [2013] FCAFC 75 ('*Mahrous*') illustrates when a treaty provision can expressly override Australian legislation. It is a useful reminder for practitioners to adopt the correct approach when construing a treaty incorporated by reference into Australian law and to exercise care when referring to this material.

Background

Andro Mahrous is severely disabled. He was born in Egypt and, at three years old, emigrated to New Zealand to became a citizen. At eight years of age he moved to Australia. The Secretary determined that he did not satisfy the residence requirement for a disability pension. Section 94(1)(e)(ii) of the *Social Security Act 1991* (Cth) relevantly provides that a person is qualified for a disability support pension if they have 10 years qualifying Australian residence. A person has that if they have at any time been an Australian resident for a continuous period of not less than 10 years (s 7). Andro could not meet that requirement. The Secretary's decision was affirmed by the Social Security Appeals Tribunal and appealed to the Administrative Appeals Tribunal (AAT).

The *Social Security (International Agreements) Act 1999* (Cth) provides that the provisions of a 'scheduled international social security agreement' have effect despite anything in social security law (s 6), although only in so far as the provision is in force and affects the operation of that law. Such an agreement is an agreement between Australia and another country, the agreement relates to reciprocity in social security matters and its text is set out in a Schedule to the Act (s 5). The Agreement on Social Security between Australia and New Zealand (the Agreement) appears in Schedule 3. Article 2 of the Agreement provides that it applies to the Acts forming the social security law in Australia insofar as it affects a disability support pension. Article 12(4) provides that no person is entitled to claim a disability support pension under the Agreement unless he or she has accumulated an aggregate of more than 10 years of residence in Australia and/or New Zealand. The Secretary submitted that, properly construed, article 12(4) did not provide an alternative way to meet the residence qualification for a disability support pension.

The question was whether, by virtue of s 6 of the International Agreements Act, article 12(4), read with other articles of the Agreement, effectively overrode s 94(1)(e)(ii) of the Social Security Act. The AAT, a single judge of the Federal Court and the Full Court all said yes.

The Full Court reasoned that Article 12(4) was part of the law of Australia by virtue of s 6.[9] Therefore, if a person had accumulated an aggregate of more than 10 years residence in Australia and/or New Zealand, then that person is entitled to claim a disability support pension and has satisfied the residence criterion. This interpretation was consistent with the language and assumptions in other parts of the Agreement. Andro had more than 10 years of residence in New Zealand and Australia, having been a resident of either country continuously since 1998, such that he could now claim a disability support pension in 2011.

Implications

Mahrous illustrates the importance of adopting an approach to the construction of an international agreement which is germane to the circumstances. The AAT derived assistance from *Teoh* such that where there is an ambiguity in an Australian statute, courts should tend towards a construction which is consistent with Australia's obligations under an international convention.[10] The primary judge concluded that this approach was not relevant because this was not a case which involved a controversy as to whether an Australian statute should be construed by reference to a treaty obligation to which Australia is a party but which treaty had not been incorporated into Australian law.[11] Here, the international agreement had been incorporated into Australian law via the International Agreements Act. In these circumstances, the principle to be followed was as summarised in *Russell*.[12] Where an international instrument has been adopted by, or referred to in, an enactment, the first step is to ascertain, with precision, what the Australian law is, that is to say what and how much of an international instrument Australian law requires to be implemented. The next step is to construe only so much of the instrument, and any qualifications or modifications of it, as Australian law requires.[13]

The primary judge then considered the question as a matter of statutory interpretation. Because the international agreement formed a schedule to an Australian Act, the primary object was to construe all of the provisions in a way which was consistent with the language and purpose of all of the provisions in the statute.[14] The unanimous Full Court's approach differed again, by giving effect

[9] *Secretary, Department of Families, Housing, Community and Indigenous Affairs v Mahrous* [2013] FCAFC 75 (19 July 2013) (Kenny, Flick and Kerr JJ).

[10] *Re Andro Mahrous and Secretary, Department of Families, Housing, Community Services and Indigenous Affairs* [2012] AATA 355, 129 ALD 24 (14 June 2012) at [29]-[30]; *MIEA v Ah Hin Teoh* [1995] HCA 20; (1995) 183 CLR 273.

[11] *Secretary, Department of Families, Housing, Community Services and Indigenous Affairs v Mahrous (No 2)* [2012] FCA 1275, 131 ALD 450 (31 October 2012), Logan J at [19]-[20].

[12] *Russell v The Commissioner of Taxation* [2011] FCAFC 10; (2011) 190 FCR 449 (4 February 2011), Dowsett J at [25]-[30]. In that case, s.6B(1A) of the *International Tax Agreements Act 1953* (Cth) relevantly provided that the provisions of an Australia-New Zealand Agreement contained in Schedule 4 to that Act, so far as those provisions affect Australian tax, have the force of law according to their tenor.

[13] *NBGM v MIMA* [2006] HCA 54; (2006) 231 CLR 52, Callinan, Heydon and Crennan JJ (with whom Gummow ACJ agreed) at 71 [61].

[14] *Secretary, Department of Families, Housing, Community Services and Indigenous Affairs v Mahrous (No 2)* [2012] FCA 1275 (31 October 2012), Logan J at [32], citing *Project Blue Sky v Australian Broadcasting Authority* [1998] HCA 28; (1998) 194 CLR 355, [69].

to the object and purpose of a bilateral agreement incorporated within Australian law consistent with Article 31 of the *Vienna Convention on the Law of Treaties*.[15] It was, however, unable to derive any assistance from the available preparatory work for the agreement as contemplated by Article 32.

Mahrous affirmed the principle that Australian law is determinative, and it is that which should be ascertained before attention is turned to a convention. Although a convention may be used to construe an Act, it is the words of the legislation which govern.[16] Invoking this fiction in the circumstances of this case softened the expressly-contemplated outcome that international law effectively overrode Australian law. The Full Court was careful to note that only certain provisions of the social security agreement – of which there are many to which Australia is a party - were enacted as part of Australian law. Thus, a provision of the agreement that did not affect the operation of a social security law, such as a provision solely directed to the obligations of State parties to one another in their capacity as such, was not enacted as part of Australian law.[17]

Of final note is that the primary judge derived no assistance from a report by the Joint Parliamentary Standing Committee on Treaties which preceded the making and incorporation of the agreement and relied upon by the Secretary to support its interpretation of an article.[18] Indeed, the Court did not consider itself entitled to consider that report because there was nothing to suggest that it had been used in making the regulation.[19]

Conclusion

The proper approach to construing legislation in light of a treaty to which Australia is a party depends on the circumstances: if not enacted into Australian law, the treaty may be construed to resolve legislative ambiguity so as to ensure consistency, and if incorporated, to give the treaty effect, but construe only so much of it as Australian law requires.

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[15] [1974] ATS No 2.
[16] *MIMIA v QAAH of 2004* [2006] HCA 53; (2006) 231 CLR 1, Gummow ACJ, Callinan, Heydon and Crennan JJ at [34].
[17] *Secretary, Department of Families, Housing, Community and Indigenous Affairs v Mahrous* [2013] FCAFC 75 (19 July 2013), Kenny, Flick and Kerr JJ at [40].
[18] *Secretary, Department of Families, Housing, Community Services and Indigenous Affairs v Mahrous (No 2)* [2012] FCA 1275 (31 October 2012), Logan J at [28]-[31].
[19] s.15AB, *Acts Interpretation Act 1901* (Cth).

International Economic Law Update – Regional and Global Governance 'Under New Management'?

By Kyle Dickson-Smith[20]

The Only Thing That Is Constant Is Change — Heraclitus

Change appears to be the constant theme this quarter: a change in direction; a change in management; and a change in regional and global attitudes.

Plain Packaging Dispute: Ukraine, Honduras revive dispute with Australia at WTO

Ukraine and Honduras are now reviving their dispute at the WTO, challenging Australia's plain packaging laws. These complainants effectively suspended establishing a WTO panel to determine the dispute late last year, around the time that the Australian laws came into force. Ukraine had previously asked for the process to be suspended while Honduras declined to formally proceed with the final step that would have triggered WTO adjudication, after Australia blocked its initial request.

The complainants maintain that Australia's laws breach international trade rules and intellectual property rights for brands in contravention of art 2.1 (not providing equal competitive opportunities to imported tobacco products/foreign trademark right holders, as compared to like domestic tobacco products/trademark right holders) and art 2.2 (constituting an unnecessary obstacle to trade and more trade restrictive than necessary) of the TBT Agreement, art III:4 of the GATT and the TRIPS Agreement.[21]

Honduras and Ukraine have reactivated their request to form a dispute settlement panel to determine the issue.[22] They have only now indicated plans to go ahead, asking for a WTO meeting on 25 September 2013, apparently to establish the panel.

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[21] *Australia — Certain Measures Concerning Trademarks and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging*, WTO Doc WT/DS434 (28 September 2012); *Australia — Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging,* WTO Doc WT/DS435 (25 September 2013). , http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds435_e.htm *Australia — Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging*, DS435

[22] Tom Miles, 'Ukraine, Honduras revive tobacco dispute with Australia at WTO', *Reuters* (online), 13 September 2013 <http://www.reuters.com/article/2013/09/13/australia-tobacco-wto-idUSL5N0H91RQ20130913>.

Honduras is joined by in the challenge by fellow cigar-producing nations, Cuba and the Dominican Republic, as Australia's legislation covers all tobacco products, not just cigarettes.[23] These two other countries launched similar WTO disputes against Australia, but their complaints remain at an earlier stage and neither tabled a request for WTO adjudication at the 25 September meeting.[24] Australia blocked the Dominican Republic's first request for a panel in December 2012, and the country has not yet made a second request. This is Cuba's first time as a complainant in a WTO case.

Indonesia has also now joined the fight, having filed a formal request for consultations in late September 2013. This made it the fifth state to challenge Australia's plain packaging legislation.[25]

The obvious question is: why have Honduras and Ukraine decided to revive this claim now? Is it to allow Indonesia, Cuba and the Dominican Republic the chance to catch up, so that the hearing of the claims can be consolidated? Further, does Indonesia's assertion of a claim appear contradictory in light of the *Cloves Cigarettes* claim against the United States for its ban on menthol flavoured cigarettes?

WTO Under New Management

The WTO is now under new management. In his inspiring inaugural speech to the WTO General Council, the new Director-General, Roberto Azevêdo, promised to play an active role.[26] Foreshadowing the negotiations in the Bali 9th Ministerial Conference in December 2013, the Director-General urged members to shake the current perception of the WTO.

'The perception in the world', according to Mr Azevêdo, 'is we have forgotten how to negotiate. Our failure to address this paralysis casts a shadow which goes well beyond the negotiating arm, and it covers every other part of our work. It is essential that we breathe new life into negotiations. We must send a clear and unequivocal message to the world that the WTO can deliver multilateral trade deals.'

He went on to emphasise the significance of the multilateral trading system, saying that it 'remains the best defence against protectionism and the strongest force for growth, recovery and development'.

Mr Azevêdo observed that many economies were still struggling to recover from the effects of the financial crisis, while others continued to emerge, forming new trading relationships and shifting the landscape of the global economy. He then noted that, against this context, the WTO has a more important role to play.

At a recent press conference, the Director-General explained that a success in Bali means negotiated outcomes of multilateral format could be reached. 'If we don't have a negotiated outcome in Bali, the first cost for the organisation and for the world is that we will not be cashing in on the gains that were potentially achievable'.

[23] *Australia — Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging;* WTO Doc WT/DS458 (3 May 2013); *Australia — Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging;* WTO Doc WT/DS441 (3 May 2013).
[24] *Proposed Agenda*, WTO Doc WT/DSB/W/513 (25 September 2013).
[25] *Australia — Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging*; WTO Doc WT/DS 467 (20 September 2013).
[26] Roberto Azevêdo, Inaugural Speech to the WTO General Council, Geneva, 9 September 2013.

Where Australia Stands Now

Where does the WTO's recent comments leave Australia and its position with respect to multilateral agreements? Is the new government's pre-election promise, of 'more Jakarta, less Geneva' with 'a much greater focus on our region',[27] going to be kept following the election?

Moreover, does the result of the Australian election affect the position on regional agreements and investor-state dispute resolution? With the hype of the Australian election behind us, the question remains whether the new government will change Australia's stance on investor-state arbitration as a mechanism to resolve disputes under investment treaties and, in particular, the Trans-Pacific Partnership (TPP).

According to media reports, Tony Abbott favours investor-state arbitration. 'From today,' he pronounced, 'I declare Australia is under new management and is once more open for business.'[28] On the eve of the election, the Coalition released its trade policy,[29] which includes a commitment to 'remaining open to utilising investor-state dispute settlement (ISDS) clauses as part of Australia's negotiating position' in future trade deals. The policy also promises to expedite the conclusion of free trade agreements with China, South Korea, Japan, India and Indonesia, and to 'explore the feasibility of free trade agreements with other trading partners including the European Union, Brazil, Hong Kong, Papua New Guinea, South Africa and Taiwan'.[30]

That commitment has generally been honoured following the election, according to recent statements by the new Minister for Trade and Investment, Andrew Robb, who stressed that it was important for Australia to re-establish trust with major international investors, which he said had become concerned about 'sovereign risk' in Australia under the Labor government.[31]

However, Mr Robb recently stated that Australia's negotiating position on the TPP Agreement remains the same despite an election commitment to overturn the blanket prohibition on investor-state dispute settlement provisions.[32]

[27] Lenore Taylor, 'Ten things to know about foreign policy under Julie Bishop and Tony Abbott', *The Guardian*, 2 June 2013.

[28] Rowan Callick, 'Coalition launches sale of the century' , *The Australian*, 21 September 2013.

[29] *The Coalition's Policy for Trade* September 2013 < http://lpaweb-static.s3.amazonaws.com/Coalition%202013%20Election%20Policy%20%E2%80%93%20Trade%20%E2%80%93%20final.pdf>.

[30] Mike Seccombe, 'Abbott: Open For Business — And Multinational Lawsuits', *The Global Mail*, 20 September 2013<http://www.theglobalmail.org/feature/abbott-open-for-business-and-multinational-lawsuits/700/>.

[31] Sid Maher and David Crowe, 'Tony Abbott bid to lure back foreign investment', *The Australian*, 17 September 2013 <http://www.theaustralian.com.au/national-affairs/tony-abbott-bid-to-lure-back-foreign-investment/story-fn59niix-1226720519949?from=public_rss&utm_source=The%20Australian&utm_medium=email&utm_campaign=editorial&net_sub_uid=43400520.

[32] Peter Martin, 'Trade treaty stance the same despite promise', *The Age*, 23 September 2013 <http://www.theage.com.au/business/trade-treaty-stance-the-same-despite-promise-20130922-2u7wm.html#ixzz2fdxl5k26>.

International Law Events and Calls for Papers

International Seminar on Private International Law, Madrid, May 2014

A new edition of the **International Seminar on Private International Law** (Universidad Complutense de Madrid) organized by Prof. Fernández Rozas and Prof. de Miguel Asensio, will take place on the **8 and 9 May 2014**, at the faculty of Law of the Universidad Complutense of Madrid.

The seminar will give special attention to the legislative process of revision affecting the EU insolvency regulation, to the unification of private international law in matrimonial matters, to and the forthcoming implementation of the Brussels I bis Regulation. New trends outside Europe, with special attention to projects identified in America, will also be addressed.

The seminar is open to scholars from all countries. Papers can be presented in Spanish, English or French. Proposals, including both the title and a brief summary are to be sent as no later than **2 December 2013**, to Patricia Orejudo Prieto (patricia.orejudo@der.ucm.es).

Fourth Annual ICC Asia-Pacific Conference

From **19 to 21 May 2014**, the International Court of Arbitration of the International Chamber of Commerce will be organising 'International Arbitration - A Regional Journey', to be held in Seoul. The aim of this two-day conference is to spark a spirited debate among panelists and participants from both sides of the Pacific as they discuss trends in international arbitration practice in the Asia-Pacific Region. Please see the ICC website for more information: http://www.iccwbo.org/Training-and-Events/All-events/Events/2013/Fourth-Annual-ICC-Asia-Pacific-Conference/

The Inaugural Cambridge Public Law Conference, Cambridge, September 2014

The theme of the inaugural Public Law Conference is Process and Substance in Public Law. The conference will bring together scholars, judges and practitioners from a range of public law fields and a variety of common law jurisdictions. The intention is that the Public Law series will become established as a pre-eminent forum for the discussion of public law matters in the common law world.

The confirmed speakers include Prof. Mark Aronson (UNSW), Prof. Julia Black (LSE), Prof. Peter Cane (ANU), Prof. David Feldman (Cambridge), Lord Justice Laws (England & Wales Court of Appeal) and Prof. Cheryl Saunders (Melbourne).

Academics and doctoral students are invited to submit proposals to present papers addressing the conference theme. Abstracts of no more than 500 words should be submitted to the convenors at publiclawconference@law.cam.ac.uk as soon as possible, and by **31 December 2013**.

The 10th Anniversary Conference of the European Society of International Law

This conference, organised by the University of Vienna Law School's Section for International Law and International Relations, will take place from **4 to 6 September** in the Austrian capital.

In addition to the plenary sessions and fora featuring invited speakers, the program also includes 15 agorae. Agora speakers will be selected on the basis of abstracts submitted in response to this call for papers. Please consult https://esil2014.univie.ac.at/home/ for details.