

Investor-State Dispute Settlement — A Cut Above the Courts?

Supreme and Federal Courts Judges' Conference

Chief Justice RS French AC
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Introduction

The High Court of Australia and the Egyptian Court that recently sentenced Al Jazeera journalists, including Australian Peter Greste, to long terms of imprisonment, have something in common. Along with many other courts, their decisions may be called into question in arbitral proceedings under investor-state dispute settlement ('ISDS') processes.¹ This paper concerns the use of those processes by private investors to bring claims against countries which are parties to bilateral investment treaties ('BITs') or free trade agreements ('FTAs'). Its focus is on the tension that can exist between those arbitral mechanisms and the legitimate functions of the legislative, executive and judicial branches of governments.

Arbitral tribunals set up under ISDS provisions are not courts. Nor are they required to act like courts. Yet their decisions may include awards which significantly impact on national economies and on regulatory systems within nation states. Questions have been raised about the consistency², openness and impartiality of decisions made in ISDS arbitrations. A briefing paper prepared by the European Parliamentary Research Service in January 2014³ pointed to a number of concerns raised by a range of observers which include:

- vague formulation of major treaty provisions leaving a wide range of interpretations open to arbitrators;

¹ As appears later in this paper there are arbitral proceedings pending in which decisions of both of those courts may be in issue — proceedings brought by Al Jazeera under the Egypt–Qatar Bilateral Investment Treaty of 1999 and proceedings brought by Philip Morris Asia Ltd under the Agreement between Australia and Hong Kong made in 1993.

² See eg D Jones, 'The Problem of Inconsistency and Conflicting Awards in Investment Arbitration' (Paper presented to German-American Lawyers' Association, Frankfurt, March 2011).

³ Marta Latek, *Investor-State Dispute Settlement (ISDS): State of play and prospects for reform* (21 January 2014) European Parliamentary Research Service Briefing; http://www.europarl.europa.eu/RegData/bibliotheque/briefing/2014/130710/LDM_BRI%282014%29_130710_REV2_EN.pdf

- loopholes which enable abuses such as nationality shopping by companies which create subsidiaries abroad specifically to take advantage of the agreements;
- lack of transparency with varying degrees of secrecy attaching to arbitral processes depending upon the institutions or rules which are applied;
- a relatively small pool of arbitrators — arbitrators appointed to ISDS arbitrations are said to be mostly male (95%) and from Europe and North America;
- role-swapping by arbitrators who appear from time to time as counsel in ISDS cases;
- the high cost of ISDS arbitrations — estimated by OECD as averaging about \$8 million each;
- associated with the high cost and potentially high awards, a growing phenomenon of third party funding of claims by banks, hedge funds and insurance companies in exchange for a share of the proceeds ranging from 20% to 50%;
- absence of effective review or appeal processes;⁴
- inconsistency in decisions on similar provisions.

Those concerns are reflected in an enormous body of literature on the topic of ISDS. Before considering that process further, it is useful to get some idea of the number of agreements and of investment disputes in which it is applied.

The agreements landscape

The international landscape is dotted with BITs and bilateral and multilateral FTAs. There are over 3,000 BITs currently in force. Australia is party to 21 of them in the form of Investment Protection and Promotion Agreements, all of which contain ISDS provisions. In addition, Australia is party to seven FTAs with New Zealand, Singapore, Thailand, the United States, Chile, the Association of South East Asian Nations ('ASEAN') and Malaysia. It signed an FTA with Korea in April 2014 and a Japan-Australia Economic Partnership agreement in July 2014. Those agreements will enter into force when necessary domestic processes have been completed. The Korea-Australia FTA has an ISDS provision. It appears that the Japan-Australia agreement does not. Australia is also currently negotiating a further seven FTAs, three of which are bilateral, with China, India and Indonesia and four of which are multilateral, being the Trans Pacific Partnership Agreement, the Gulf Cooperation

⁴ There is an annulment committee procedure available for arbitrations conducted under the aegis of the International Centre for the Settlement of Investment Disputes (ICSID).

Council, the Pacific Trade and Economic Agreement and the Regional Comprehensive Economic Partnership Agreement.⁵

The disputes landscape

Last year the United Nations Conference on Trade and Development ('UNCTAD') published its Annual Review of ISDS cases. 57 new cases were commenced in 2013. That was just below the number in 2012, which was a record year with 62. Most of the claims were brought against States by investors from developed countries and mainly by investors from the European Union and the United States. They involved challenges to a range of governmental measures including:

- measures relating to renewable energy;
- measures allegedly effecting expropriation of assets;
- revocation of licences and permits;
- regulation of energy tariffs, wrongful criminal prosecutions, land zoning decisions, invalidation of patents and sovereign bonds legislation.

It has not been unusual for investors to claim that decisions of courts in a Respondent State constitute a breach of a provision of the investment treaty to which the State is a party. As the UNCTAD review observed 'the growing number of ISDS cases and the broad range of policy issues they raise have turned ISDS into a "hot topic"'.⁶ That is so in Australia at present and particularly in relation to the proposed Trans Pacific Partnership Agreement.

A rule of law issue

The topic of investor-state dispute settlement has a regional significance for Australia because of the number of BITs and FTAs it has entered into or is negotiating with countries in the Asia Pacific. However, the significance of ISDS arbitral processes is global. They have general implications for national sovereignty, democratic governance and the rule of

⁵ Department of Foreign Affairs and Trade, Australian Government, *Australia's Trade Agreements* <<http://www.dfat.gov.au/fta>>.

⁶ United Nations Conference on Trade and Development, *UNCTAD publishes its annual review of investor-State dispute settlement cases* (7 April 2014); <http://unctad.org/en/pages/newsdetails.aspx?OriginalVersionID=718>.

law within domestic legal systems. Their long-term consequences for national judiciaries cannot be stated with confidence. They attract vigorous and articulate proponents and detractors, but their merits and demerits are not easy to assess. Moreover, those merits and demerits may vary according to the circumstances in which ISDS is applied and the scope and limitations of particular ISDS provisions.

Despite the difficulty in making broad judgments about ISDS, its long-term implications for national judicial systems as an aspect of wider concerns about democratic governance should be considered when decisions are being made on whether to include any and if so what kinds of ISDS arbitral provisions in BITs and FTAs. The importance of the topic can be brought into focus by reference to a home-grown case study.

A case study

On 5 October 2012, the High Court delivered a judgment in which it rejected challenges to the validity of the *Tobacco Plain Packaging Act 2011* (Cth).⁷ The plaintiffs were a number of tobacco companies supported by Philip Morris Ltd as an intervenor. They argued that the Act effected an acquisition of their intellectual property rights in trademarks, designs, copyright and get-up used on cigarettes and cigarette packaging. They argued that the acquisition, being uncompensated, was on other than just terms and so contrary to s 51(xxxi) of the Constitution. The Court rejected their contentions, holding by majority that the law did not effect an acquisition. Without exploring the reasoning in detail, it is perhaps sufficient to quote a line from the judgment of Gummow J:

The extinguishment, modification or deprivation of rights in relation to property does not of itself constitute an acquisition of property.⁸

Tobacco plain packaging laws had been on the public agenda for a long time when the High Court delivered its decision. As long ago as April 2010, the Australian Government announced that it would introduce the legislation from January 2012. On 25 February 2011, Philip Morris Asia Ltd, a company incorporated in Hong Kong, acquired a 100 per cent shareholding in Philip Morris Australia Ltd and thus an indirect interest in its subsidiary

⁷ *JT International SA v Commonwealth* (2012) 86 ALJR 1297; 291 ALR 669.

⁸ (2012) 86 ALJR 1297, 1331 [152] citing *Mutual Pools & Staff Pty Ltd v Commonwealth* (1994) 179 CLR 155, 185.

Philip Morris Ltd. That acquisition is said to have reflected a tactic used by private investors seeking to take advantage of bilateral investment treaties and is known as either 'nationality planning' or 'treaty shopping'. It appears to have been related to the existence of a bilateral investment treaty between Hong Kong and Australia.

The bilateral investment agreement between Australia and the Government of Hong Kong ('the Hong Kong Agreement') had been in existence since 1993.⁹ It is typical of many such agreements in our region and around the world. Article 2 provides that the investments of investors of each Contracting Party shall at all times be accorded 'fair and equitable treatment'. That is a standard term. Article 6, again a fairly standard measure, protects against what is broadly called 'expropriation' — it provides that investors of either Contracting Party shall not be deprived of their investments nor subjected to measures having effects equivalent to such deprivation, in the area of the other Contracting Party, except under due process of law for a public purpose related to the internal needs of that party, on a non-discriminatory basis and against compensation. Article 10 provides for the resolution of investment disputes by their submission to arbitration under the UNCITRAL arbitration rules.

On 27 June 2011, Philip Morris Asia Ltd, which four months previously had become the holding company of Philip Morris Australia Ltd, served a notice of claim on the Australian Government under the Hong Kong Agreement.¹⁰ It said it had investments in Australia, being its two very recently acquired subsidiaries and their intellectual property. It said those investments were protected under the Hong Kong Agreement. A formal notice of arbitration was served on Australia on 21 November 2011 under the UNCITRAL Arbitration Rules.

According to Philip Morris Asia, Australia had breached its obligations under the Hong Kong Agreement by, among other things:

- expropriating its investments contrary to Art 6;

⁹ *Agreement between the Government of Australia and the Government of Hong Kong for the Promotion and Protection of Investments*, signed 15 September 1993 [1993] ATS 30 (entered into force 15 October 1993).

¹⁰ At that time the *Tobacco Plain Packaging Act* had not been enacted, but was the subject of an exposure draft.

- failing to provide fair and equitable treatment contrary to Art 2;

Philip Morris Asia sought an order from an arbitral tribunal to be established pursuant to Art 10, for the suspension of the enforcement of the plain packaging legislation and compensation for loss as a result of it. In the alternative, the company sought compensatory damages in an amount to be quantified, but of the order of billions of Australian dollars. The three member arbitration tribunal was set up on 15 May 2012. It convened in Singapore. On 14 April 2014, it decided to deal first with a jurisdictional objection raised by Australia. The hearing on that objection will proceed in February 2015.

If the claim survives the jurisdictional objection and proceeds on its merits, then a central question will no doubt be whether there has been an uncompensated expropriation of Philip Morris Asia's investment. As noted earlier, the High Court held that there was no acquisition within the meaning of s 51(xxxi) of the Constitution. It is conceivable that it will be contended that there is a relationship between the concepts of appropriation and acquisition. Professor Mark Davison of Monash University has observed that:

it is difficult to see how a conclusion could be reached that there has been expropriation if that term is interpreted, in essence, as involving an acquisition of property.¹¹

It is possible that the tribunal, in the context of an argument about expropriation, might be asked to form a view about the correctness of the high Court's conclusion that there was no acquisition within the meaning of s 51(xxxi) of the Constitution. There are therefore two issues of general significance illuminated by this particular case — the use of ISDS to challenge legislative and administrative acts by governments and its use to call into question the decisions of national courts.

ISDS and national regulatory measures

There is ample data to demonstrate that investors in countries which are parties to BIT and FTAs use arbitral processes to challenge regulatory change affecting their interests in

¹¹ Mark Davison, 'The Bilateral Investment Treaty Dispute between Australia and Philip Morris Asia: What Rights are Relevant and How Have they Been Affected?' (2012) 9(5) *Transnational Dispute Management*.

Respondent States. This is borne out by some of the cases mentioned in last year's UNCTAD Review.

A quarter of all the arbitrations commenced in 2013 involved challenges to regulatory action by the Czech Republic and Spain affecting the interests of the providers of renewable energy. Environmental laws in Canada were also the subject of ISDS processes. Lone Pine Resources Inc instituted a claim against Canada last year in response to a moratorium imposed by Quebec on hydraulic fracturing (fracking), which led to revocation of the claimant's gas exploration permits.¹² Windstream Energy LLC instituted a claim against Canada on the basis of a moratorium imposed by Ontario on offshore wind farms.¹³ The Swedish company, Vattenfall, is suing Germany under the Energy Charter Treaty over Germany's decision to phase out nuclear energy power plants.¹⁴

Judicial decisions

More significantly for our purposes, UNCTAD's Review observes that it is not unusual for claimants to challenge the decisions of domestic courts by characterising those decisions as breaches by the Respondent State of its treaty obligations.¹⁵ A leading case involves Canada. In a notice of arbitration filed on 12 September 2013 under the North American Free Trade Agreement ('NAFTA'), the pharmaceutical company Eli Lilly complained of Canadian judicial decisions which held that its patents for two drugs known as Strattera and Zyprexa were invalid for want of utility. The first drug is used to treat ADHD and the second to treat schizophrenia and related psychotic disorders. Eli Lilly alleged in its notice of arbitration that:

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

¹² *Lone Pine Resources Inc v Government of Canada* (Notice of Arbitration) (UNCITRAL, 6 September 2013).

¹³ *Windstream Energy LLC v Government of Canada* (Amended Notice of Arbitration) (UNCITRAL, 5 November 2013).

¹⁴ *Vattenfall AB and Others v Federal Republic of Germany* (Notice of Arbitration) (ICSID Case No ARB/12/12, 31 May 2013).

¹⁵ United Nations Conferences on Trade and Development, *Recent Developments in Investor-State Dispute Settlement (ISDS)* (No 1, April 2014)
http://unctad.org/en/PublicationsLibrary/webdiaepcb2014d3_en.pdf

The doctrine is said by Eli Lilly to be inconsistent with the utility standards embodied in Ch17 of NAFTA and 'significantly out of step with the law of utility in Canada's NAFTA partners.'¹⁶

What did Eli Lilly want the arbitrator to do about the wayward Canadian judiciary? It wanted damages estimated in an amount of not less than \$500 million together with recovery of any payment it or its enterprises was required to make arising from the improvident loss of its patents and its inability to enforce them.¹⁷

Court decisions refusing to enforce, or setting aside, arbitral awards in international commercial arbitration between private parties have been the subject of successful claims against States that they constituted breaches of BIT provisions. A leading example is a case decided under a BIT between Bangladesh and Italy in 2009, which held that a decision of a court in Dhaka, setting aside an award of the International Commercial Court, amounted to expropriation of the awardee's property without compensation, contrary to Art 5 of the BIT. The tribunal said:

The Bangladeshi courts abused their supervisory jurisdiction over the arbitral process.

Similar arbitral decisions have been made in relation to other courts.¹⁸

Of contemporary interest, a different concern about domestic court processes may be ventilated in the ISDS arbitration initiated by Al Jazeera Media Network against Egypt pursuant to a BIT concluded between Egypt and Qatar in 1999. Al Jazeera claims \$150 million compensation based on breach of that agreement by Egypt related to the harassment and imprisonment of its journalists working in that country.

Opinions about the desirability of ISDS processes may depend upon opinions about the judicial system whose decisions are in question — although *ad curiam* perspectives do not form a particularly solid foundation for considering questions of principle.

¹⁶ *Eli Lilly and Company v Government of Canada* (Notice of Arbitration) (12 September 2013) [9].

¹⁷ *Eli Lilly and Company v Government of Canada* (Notice of Arbitration) (12 September 2013) [85(a)].

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

Professor Brook Baker of North Eastern University School of Law in a note about the Eli Lilly case,¹⁹ posed a rather rhetorical question, but one which fairly arises when considering proceedings of that kind in relation to well-established, respected and independent judiciaries:

After losing two cases before the appellate courts of a western democracy should a disgruntled foreign multinational pharmaceutical company be free to take that country to private arbitration claiming that its expectation of monopoly profits had been thwarted by the court's decision? Should governments continue to negotiate treaty agreements where expansive intellectual property-related investor rights and investor-state dispute settlement are enshrined into hard law?²⁰

Relevantly to Australia, Professor Baker pointed to the proposed intellectual property and investment chapter of the Trans Pacific Partnership agreement currently under negotiation involving Australia as one of twelve prospective parties, including Japan, the United States, Singapore, Malaysia and New Zealand. That agreement is at the centre of current debate in Australia about the desirability of ISDS processes.

The Trans Pacific Partnership Agreement

The present position of the Australian Government on the TPP, as set out on the website of the Department of Foreign Affairs and Trade ('DFAT'), is that it will open new trade and investment opportunities for Australia in the Asia Pacific, further integrate our economy in this fast growing region and facilitate regional supply chains. Nothing in this paper is intended to gainsay those claims. It is important, however, for members of the Australian judiciary to be at least conscious of the issues which can be, and have been raised, in the context of the TPP about ISDS processes relevant to the decisions of Australian courts.

The possible inclusion of an ISDS provision in the TPP has become an issue of intense debate with some critics seeing it as a Trojan horse for the enhancement of the power of international corporations at the expense of national sovereignty and interests. There is presently before the Senate a Private Member's Bill entitled 'The Trade and Foreign Investment (Protecting the Public Interest) Bill 2014, which has been referred to a Senate

¹⁹ Brook K Baker, 'Threat of Pharmaceutical-Related IP Investment Rights in the Trans-Pacific Partnership Agreement: An Eli Lilly v Canada Case Study' (*Investment Treaty News*, 20 September 2013) <<http://www.iisd.org/itn/2013/09/20/threat-of-pharmaceutical-related-ip-investment-rights-in-the-trans-pacific-partnership-agreement-an-eli-lilly-v-canada-case-study/>>.

²⁰ Ibid.

Committee for inquiry and report by 27 August 2014.²¹ Many submissions have been made to the Committee. The Bill contains one substantive provision, cl 3, which provides:

The Commonwealth must not, on or after the commencement of this Act, enter into an agreement (however described) with one or more foreign countries that includes an investor-state dispute settlement provision.

Despite its critics, the use of ISDS has articulate and influential support. In a submission to the Senate Committee dated 2 April 2014, Professor Luke Nottage, who is the Professor of Comparative and Transnational Business Law at Sydney Law School, set out some salient points in favour of ISDS mechanisms. In short, they are:

- treaty based ISDS is important when dealing with developing countries where local courts and substantive rights may not meet widely accepted global standards;
- ISDS is increasingly accepted by Australia's major existing and potential treaty partners, including countries in the Asia Pacific region;
- Australia should keep engaging with the system by negotiating specific improvements in future treaties;
- rejection of ISDS mechanisms runs a serious risk of preventing or seriously delaying the conclusion of any future FTAs;
- there has only been one claim brought against Australia under ISDS and that is the Philip Morris claim;
- the apprehended threat of 'regulatory chill' from ISDS is likely to be minimal in Australia which is used to numerous public law challenges through its domestic courts.²²

The Law Council of Australia has also made a submission to the Committee opposing the proposed blanket prohibition. It calls for the inclusion of ISDS clauses in agreements to be evaluated on a case-by-case basis. It also points out that there are exceptions to ISDS

²¹ Senate Standing Committees on Foreign Affairs, Defence and Trade, *Inquiry into the Trade and Foreign Investment (Protecting the Public Interest) Bill 2014* (Parliament of Australia) <http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Foreign_Affairs_Defence_and_Trade/Trade_and_Foreign_Investment_Protecting_the_Public_Interest_Bill_2014>.

²² See also Shiro Patrick Armstrong, Jurgen Kurtz, Luke Nottage and LeonTrakman, *The Fundamental Importance of Foreign Direct Investment in Australia in the Twenty First Century: Refining Treaty and Dispute Resolution Practice* (Sydney Law School Legal Studies Research Paper No 13/90, 1 December 2013).

provisions which can be made along the lines of Art 20 of the GATT 1947, such as exceptions for the protection of human and animal health and welfare, the environment and public morals. The Council points out that the FTAs with Chile and Korea include safeguards to protect various public interests, including transparency of proceedings while retaining ISDS provisions.

A critical perspective was offered by Dr Thomas Faunce of the Australian National University who argued in his submissions to the Committee that an ISDS in the TPP will undermine the substantial historical and continuing investment in the rule of law in Australia. He said that it is the existence of a transparent and non-corrupt judicial system that is one of the main reasons for investment in Australia. He made the following points:

- ISDS in the TPP will put Australia at a significant disadvantage against the economies of non-TPP nations such as Indonesia which plan to withdraw from existing ISDS obligations;
- ISDS will impact on federal/state relations. In Canada the Federal Government has become liable to foreign investors for policy and legislative actions taken by Provinces;
- no credible research shows ISDS is necessary to attract investment to Australia;
- ISDS in relation to intellectual property will inhibit the capacity of Australian governments to utilise the scientific cost-effectiveness system in the pharmaceutical benefits scheme;
- ISDS will make it harder for Australian governments to regulate the banking and finance sectors;
- ISDS will undermine Australian sovereignty by exposing the policy, legislative and decisional outputs of its politicians and judiciary to challenges by trader arbitrators with no clear obligation to take into account domestic or international governance arrangements beyond the requirements of narrowly focused investment obligations.

The preceding are some of the questions on which battle has been joined. Their answers will involve political judgments which judges are no more qualified to make than the other citizens. The judiciary can, however, form and express views about the need for

decision-makers to take into account any risks posed by ISDS provisions to the constitutional role of the judiciary.

A judicial call to arms

The National Centre for State Courts in the United States has urged the United States Trade Representative and Congress not to approve trade agreement provisions unless they:

recognise and support the sovereignty of state judicial systems and the enforcement and finality of state court judgments and to clarify that under existing trade agreements, foreign investors shall enjoy no greater substantive and procedural rights than US citizens and businesses.²³

That statement contrasted the position under the US/Australia FTA with other agreements to which the United States was party:

The so-called investor-state provision of each of the FTAs (except Australia) permits an investor to challenge a decision of a court by referring the dispute to an international arbitration tribunal. The Australia FTA does not contain such a provision because the Australians objected on the grounds that both Australia and the US have well-developed court systems that can provide fair decisions in disputes between investors and governmental entities.²⁴

The National Centre's statement appears to have been, at least in part, a reaction to the decision of an arbitral tribunal set up under the NAFTA in the case of *Loewen Group Inc v United States*.²⁵ The claimant, a Canadian company, complained about a decision made by a Mississippi State Court in proceedings before a civil jury in which it was the defendant. In the course of the proceedings the company was subject to allegations of management racism, references to its founder's wealth and a suggestion that his business practices resembled the Japanese bombing of Pearl Harbour. The contract in issue was worth less than \$5 million but the jury awarded an amount of \$500 million in compensation, of which \$400 million was by way of punitive damages.²⁶ The company complained that it was unable to appeal the verdict because, under Mississippi law, it was required to place a bond of \$625 million in order to

²³ National Centre for State Courts, *Free Trade Agreements* <<http://www.ncsc.org/services-and-experts/government-relations/international/free-trade-agreements.aspx>>.

²⁴ Ibid.

²⁵ *Loewen Group Inc v United States* (ICSID Case No ARB(AF)/98/3, 26 June 2003).

²⁶ Robert Ahdieh, 'Between Dialogue and Decree: International Review of National Courts' (2004) 79(6) *New York University Law Review* 2029, 2032.

stay performance of the judgment pending the appeal. The requirement could be waived for good cause by the Court, but the Court refused to waive it.

The NAFTA tribunal held that the provisions of NATFA applied to the actions, decisions and procedures of judicial institutions. It denounced the trial in the Mississippi court as a disgrace and the proceedings as infected by gross discrimination.²⁷ As it turned out, the company's claim for damages was denied on the ground that its post-bankruptcy reorganisation as a United States corporation meant that it had lost Canadian nationality and thereby standing to proceed under NAFTA.

In 2011, the Commonwealth Government, perhaps in response to the tobacco plain packaging arbitration instituted by Philip Morris Asia under the Hong Kong Agreement, said that it would discontinue the practice of seeking the inclusion of investor-state dispute resolution procedures in trade agreements with developing countries. Australian businesses, concerned about sovereign risk in Australian trading partner companies, would need to make their own assessments about whether they wanted to commit to investing in those countries.²⁸ The current Government, however, has indicated that it will consider ISDS provisions on a case-by-case basis.

Australia's regional Free Trade Agreements

Regional Free Trade Agreements to which Australia is party have ISDS clauses which vary between the agreements. The ISDS clause in the ASEAN–Australia NZ FTA applies to disputes between a party and an investor of another party concerning an alleged breach of obligations by the respondent party which causes loss or damage to the covered investments of the investor (Art 18(1)). The concept of a dispute is defined broadly in the Malaysia–Australia FTA. A complaint may be made by the complaining party concerning any measure affecting the operation, implementation or application of the agreement whereby any benefit accruing to the complaining party, directly or indirectly under the agreement, as being nullified or impaired, or the attainment of any objectives of the agreement is being impeded

²⁷ Ibid 2040.

²⁸ Department of Foreign Affairs and Trade, *Gillard Government Trade Policy Statement: Trading our way to more jobs and prosperity* (April 2011) 14.
<<http://www.acci.asn.au/getattachment/b9d3cfae-fc0c-4c2a-a3df-3f58228daf6d/Gillard-Government-Trade-Policy-Statement.aspx>>

as a result of the failure of the responding party to carry out its obligations under the agreement (Art 20.2(b)). The Singapore–Australia FTA appears to allow either disputing party to submit its dispute to the court or administrative tribunals of the disputing state (Art 16(2)) and, alternatively, to ICSID or UNICTRAL arbitration. There are rather elaborate provisions in the Korea–Australia FTA. Article 11 allows for amicus curiae submissions to be received from parties who are not disputing parties (Art 11.20(5)).

As the preceding examples indicate, ISDS provisions do not have to be identical; and may be tailored according to what is thought to be desirable in the circumstances of the particular treaty or agreement. They can differ in:

- the range of disputes covered;
- the nature of the investments protected;
- the arbitral options;
- the extent to which they preserve access to judicial proceedings in the Respondent State; and
- whether they require exhaustion of remedies in the courts of the Respondent State.

The interaction with the judicial system

The arbitral functions for which BITs and FTAs provide are carried out under the relevant arbitral rules. To be given effect in Australia, awards under ISDS processes require legislative support. Part IV of the *International Arbitration Act 1974* (Cth) provides that Chs II to VII inclusive of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States has the force of law in Australia. Section 33 provides that an award is binding on a party to the investment dispute to which the award relates. An award is not subject to any appeal or to any other remedy otherwise than in accordance with the Investment Convention. Investment Convention awards prevail over other laws relating to the recognition and enforcement of arbitral awards. There is provision in s 35 for an award to be enforced by the Supreme and Federal courts, with the leave of the courts, as though the award were a judgment or order. There is an ongoing issue in relation to the enforcement of awards to the extent that they might involve execution against State assets and raise questions of State immunity. These are questions which might arise before the courts in an appropriate case. Obviously some interesting questions would arise if an arbitral award were to be based

on a finding that the decision of an Australian court constituted a breach of the relevant treaty. That is one way, but not the only way, in which decisions of the Australian courts might be called into question, directly or indirectly, in the arbitral process.

So far as I am aware the judiciary, as the third branch of government in Australia, has not had any significant collective input into the formulation of ISDS clauses in relation to their possible effects upon the authority and finality of decisions of Australian domestic courts. This is an issue which presently is of small compass. It has the potential to become larger and it is desirable that it be addressed earlier rather than later. One approach would be to examine the possibility of including requirements in ISDS provisions in appropriate cases for:

- prior exhaustion of remedies in domestic courts of the Contracting State;
- preclusion of any challenge to the decision of a domestic court as constituting a breach of the relevant BIT or FTA provisions; and
- preclusion of any arbitral decision based upon a rejection of a decision on a question of law of a domestic appellate court binding on lower courts.

Those suggestions are offered merely to stimulate thought on the topic. It may be useful for the general question to be given consideration by all of us and perhaps specifically by the Council of Chief Justices. We are, I suspect, a little behind the wave-front of these developments. It is time to start catching up.