The annual subscription, post paid, is $8.00, and for members of the ILA (Australian Branch) is included in their annual subscription. Proposals for membership may be made on the form on page 30. In the case of students, the subscription is presently only $10.00; for full members $20.00.

CASENOTES

Administrative veto unconstitutional: A recent decision of the United States Supreme Court renders the use of the administrative veto unconstitutional. Of considerable importance in foreign relations, the administrative veto was a device to keep the President "on a leash". For example, in relation to foreign arms sales, the appropriate legislation would provide for a power of congressional review of administrative action taken by the President. Finding that this practice offended the consititional separation of powers, the Court rendered ineffective a number of statutory provisions which increased substantially following the presidency of Richard Nixon. (BBC World Service, 25 June, 1983; more information may be found in The Economist, 2 July, 1983, 33-35; The Australian, 5 July 1983, 7).

Sovereign Immunity: The United States District Court for the Northern District of Alambama has upheld a class action by the present holders of bonds issued by the Imperial Chinese Government in 1911. The action was brought against the present government of the Peoples' Republic of China. The bonds were denominated in sterling. Principal and interest were payable in various places. Service was effected under the provisions of the Foreign Sovereign Immunities Act, 1976, but China refused to appear, maintaining its absolute immunity from jurisdiction and declaring that the action was founded on the "odious debts" of the old regime. Judgment was

entered in an amount of US $41,313,083. Execution may now lie against Peoples' Republic which has lodged a strong diplomatic protest but, because it denies jurisdiction, will apparently not appeal: Jackson v People's Republic of China 550 F. Supp.869 (1983); 22 ILM.

Extraterritorial Jurisdiction: In British Airways Board and British Caledonian Airways Limited v Laker Airways Parker J. rejected an application to restrain Laker from continuing an anti-trust action in the United States against the plaintiffs. The action is against the two airlines, Pan Am, TWA, Lufthansa, Swissair and the manufacturer McDonnell Douglas. If Laker is successful treble damages will be awarded with no right of contribution between the defendants. Although Laker is in liquidation, it may bring the suit in the United States without providing security for costs. The anti-trust action will permit Laker to use the U.S. liberal discovery laws and trial by jury. The airlines argued that under the Anglo American Bermuda Agreement on Civil Aviation airline fares had been approved by the U.K. and U.S. civil aviation authorities. (It is said that co-operation between US and UK civil aviation authorities has since virtually broken down.) Laker claimed the airlines were guilty of predatory price fixing; the airlines reply that Article 12(2) of the Treaty permitted them to charge "innovative cost based tariffs". Of particular interest was the airlines' reliance, without the intervention by the Attorney General, on the proposition that the anti-trust action would be an invasion of U.K. sovereignty. Parker J. distinguished Re Westinghouse Uranium Contract: [1978] AC 547; the airlines were doing business in the United States and they had in effect acquiesced in U.S. laws governing their activities there. The Protection of Trading Interests Act, 1980 should not be read as a disapproval of the U.K. legislature of anti-trust actions in general: IFL Rev. June, 1983, 26. Orders restraining the airlines from producing documents or giving evidence in the U.S. action have since been made by the U.K. Secretary of

State for Trade under the Protection of Trading Interests Act, 1980. The orders apparently extend to the grand jury investigation into alleged price fixing on the North Atlantic Route: The Economist, 25 June 1983, 64, 65. An appeal to the Court of Appeal has been set down for 4 July 1983. It is expected that the Attorney General will intervene to state government policy.

Extraterritorial Jurisdiction: In Compagnie Europeenne des Petroles v Nederland B.V., the Hague District Court was asked to enforce a contract entered into by Sensor to provide goods required in the construction of the pipeline from Siberia to Western Europe. Sensor, through another subsidiary, was totally owned by a Texas corporation and argued that it had to respect the export embargo imposed by President Reagan on 22 June 1982. Finding that the relevant contract was governed by Dutch law, the Court had to consider para.385.2(e) of the Export Administration Regulations (U.S.) which claims jurisdiction over corporations owned or controlled by citizens or residents of the United States, persons actually within the United States, or any corporations organised under the laws of the United States. Examining the claim of U.S. jurisdiction against both the nationality principle and the protective principle, as well as in the light of a specific provision in a treaty between the Netherlands and the United States, the Court refused to take the American embargo into account. Therefore Sensor's defence failed: (1983) 22 I.L.M. 66. The Export Administration Act, expires on 30 September 1983. A renewal bill proposes even more draconiar penalties for violators of U.S. embargoes: [June, 1983] ILF Rev. 40. The gas pipe line embargo disadvantaged at least one Australia company, Santos, and the renewal of the Act is said to be causing concern to the Australian Attorney General, Senator Gareth Evans.

IMF Agreement, Article VIII 2(b): One of the important aspects of

exchange control is the possibility that a contract in breach of exchange control law of any member state of the I.M.F. may well render that contract unenforceable in other member states by virtue of Article VIII Section 2(b). This provision has not yet been incorporated into Australia domestic law. In other countries the Article may well have direct effect under the constitution or relevant laws, or may have been separately incorporated, as is the case in the United Kingdom. In United City Merchants (Investments) Ltd. v Royal Bank of Canada, [1982] 2 WLR 1039 the House of Lords has had an opportunity to rule on the meaning of the Article which provides that:

> Exchange contracts which involve the currency of any member and which are contrary to the exchange control regulations of that member maintained or imposed consistently with this agreement shall be unenforceable in the territories of any member.

The case concerned an agreement to sell a plant for the manufacture of glass fibre to a Peruvian Company. In a collateral agreement clearly in violation of Peru's exchange control regulations, the sellers agreed to invoice the buyers in U.S. dollars at double the true sale price of the goods and to remit one half of each instalment payable to the buyer's dollar account at a bank in Miami. The House categorized this as an exchange contract in disguise, and was therefore unforceable because Article VIII 2(b) which had been incorporated into English law: Bretton Woods Agreement Order-in-Council, 1946. The entire contract for the sale of goods was not, however, struck down.

There has been a continuing debate as to the true meaning of exchange contracts under Article VIII 2(b). A wider interpretation would strike down not only the agreement to buy foreign currency, but all other parts

of what is essentially the same transaction. Thus when a foreigner buys real estate in Australia, the exchange contract would not be limited to the actual purchase of currency, but might extend to the real estate contract as well. Note however the validating effects of breaches of Australian-foreign exchange control in the Banking (Foreign Exchange) Regulations, Reg.45. Would this mean that a breach of Australian exchange control does not render an exchange contract invalid in Australia, but that the same exchange contract would be unenforceable in e.g. the U.K. and the U.S.A.?

The House of Lords in this case has thus confirmed a narrower interpretation of exchange contracts, but it should be noted that the courts in other countries have some times adopted a wider interpretation.

Judgements in a Foreign Currency: The impact of floating exchange rates on the law is a matter of frequent comment (see e.g., (1980) 54 ALJ 211). In Morgan Guaranty Trust v Urbis S.A. (IFL Rev. May 1982, 3) a Spanish court refused a claim to execution by summary proceedinges because the claim was denominated in U.S. dollars. The government proposes to amend the law: ILF Rev. June 1983, 48.

Foreign Sovereign Immunity, Act of State Doctrine: In Frolova v Union of Soviet Socialist Republics, 558 F. Supp. 358 (U.S. Dist. Ct., N.D. Ill. 26 January, 1983), the plaintiff brought an action based on the Soviet Union's refusal to allow her husband to emigrate, alleging that the loss of consortium fell within the tort exception in the Foreign Sovereign Immunities Act, 1976, and that the act of state doctrine did not apply. The Court dismissed the action.

Act of State: Perez v Chase Manhattan Bank, N.A., decided by the Supreme Court of New York, Appellate Division, First Department, on 5 May, 1983,

involved a claim based on certificates of deposit obtained from defendant's bank in Cuba prior to nationalization thereof. The jury found that the certificates could be presented for payment to any Chase branch in the world. "The jury herein found that Chase was obliged to redeem the certificate of deposit, defined as a written acknowledgment by a bank of the receipt of money with an engagement to repay it (9 N.Y. Jr. 2d Banks, Sec.267), for dollars upon presentment at "any branch of defendant Chase anywhere in the world, including New York and Marianao, Cuba." In view of the existing case-law authority, and considering the realities of commercial business practice, Chase's effort to escape its clear obligation to plaintiff cannot be sanctioned by this court. The act of state doctrine is simply not applicable to the situation with which this court is confronted."

Choice of Law: Where not expressed, United States Surgical Corporation v Hospital Products International Pty,Ltd. [1982] 2 NSWLR 766 (NSW S.C., McLelland J.).

Foreign Penal Law: A law, the Historic Articles Act, 1962 (N.Z.), prohibiting under pain of forfeiture the export of works of art is a foreign penal law and therefore unenforceable: A.G. (N.Z.) v. Ortiz [1982] 3 WLR 570 (C.A.).

Extradition and Political Offences: Eain v Wilkes 641 F.2d 504 (US Court of Appeals, Seventh Circuit, 20 February 1981) is of interest not only because of the Court's discussion of the political offence exception, particularly in relation to terrorist activities, but also because of its references to the work of Professor Ivan Shearer, of the University of New South Wales Law School.

SEC Policy on Breaches of Foreign Laws: M. Freeman and Werner Kornstein in an article, "SEC's Disclosure Policy After Citicorp", conclude that the post Watergate departure from the historic role of the U.S. SEC to require the disclosure only of information material to the economic and financial success or failure of the company has been restored. Thus the allegation that Citicorp may have violated the foreign exchange control laws of a number of countries through "parking transactions" was not a matter which should have been necessarily disclosed by the Corporation. The net payments involved were no more than 1 per cent of the corporation's earnings and therefore did not meet the traditional economic materiality standard (IFL Rev. June, 1983, p.18).

Unitary Taxation Constitutional: The taxation by state governments on the ratio of a transnational's business in the state to its worldwide activities - the so called unitary tax - rather than on the income earned in that state has been upheld by the U.S. Supreme Court: California v Container Corporation (a subsidiary of Mobil) (The Economist 2 July 1983, 34). The U.S. Senate had previously rejected a provision in the US-UK Double Tax Agreement whereby a rebate of British Advance Corporation Tax (ACT) would be granted only if state unitary tax would not be levied. A private member's amendment to UK fiscal legislation would remove the rebate - generally 5 to 6 per cent of the profits US companies earn in the UK. It is unlikely to have government support - at least this year: (The Australian 12 July 1983.) As with extraterritoriality, this is another example of the conflict of laws and policies between the US and its Western allies.

That conflict, which has simmerred for years, came to a head with the Siberian Pipeline Affair which had repercussions even in Australia - see above. The Reagan administration seems prepared to adopt unilateral measures affecting the allies, rather than seeking a Western consensus

This decision on internal American law cannot of course be attributed to the administration - it remains to be seen whether the administration and congress will remedy the anomaly to the satisfaction of foreign investors in the U.S., and incidentally its own large corporations.

State Contracts and Arbitration: The state owned Egyptian General Company for Hotels and Tourism has appealed to the French courts against an arbitration award of US$16 million under a clause in a state contract. The award was made by the Court of Arbitration of the International Chamber of Commerce in Paris. The claim had been brought by a Canadian-Saudi joint venture Southern Pacific Hotels: The Economist 2 July, 1983, 66. Awards of the ICC are confidential, but this appeal may make it public. French courts exercise little supervision over international arbitrations.

External Affairs Power: The lengthy judgement in the Franklin Dam case, Commonwealth v Tasmania was handed down on 1 July 1983. This will of course require detailed analysis by both international and constitutional lawyers. The following matters might be of particular importance:-

- The meaning of "external affairs";
- The nature of international obligations compared to the precise obligations of domestic law;
- The status of what is sometimes termed "soft law" ... e.g. recommendations of the General Assembly;
- The "reserve" power of the court to reject a treaty and legislation thereunder which is a mere device to broaden jurisdiction;
- The role of the court in relating the legislation to a

treaty;

The reach of other sections of the constitution limiting the Commonwealth's exercise of the external affairs power.

The judgements of all judges, both of the minority and the majority need to be closely examined. Among the majority, it might be noted that Deane J. is the holder of the prestigious Diploma of the Hague Academy of International Law.

The decision, in favour of the Commonwealth was:-

1. Are any of the provisions of
   (a) Sections 6 and 9
   (b) Sections 7 and 10
   (c) Sections 8 and 11
   (d) Section 17

   of the World Heritage Properties Conservation Act valid?

Answer:

(a) (i) Subsections (1), (2)(b) and (3) of s.6 are valid. It is unnecessary to determine the validity of the other paragraphs of s.6(2).

(ii) Section 9(1)(h) is valid. The remainder of s.9(1) and s.9(2) are invalid. It is unnecessary to determine the validity of subsections (3) and (4) of s.9.

(b)(i) Section 7 is valid.

(ii) Subsections (1) and (4) of s.10 are valid. It is unnecessary to determine the validity of subsections (2) and (3) of s.10 independently of their application for the purpose of s.10(4).

(c) Sections 8 and 11 are invalid.

(d) Not answered.

2. Does the decision of the validity or invalidity of the Act, the regulations or proclamations made under the Act, or any of them depend upon the judicial determination of the disputed allegations or

any of them contained in the statement of facts and allegations?

Answer: No.

/X 5 3.

If no to question 2, are:

(a) the regulations

(b) the proclamations

or any of them invalid, and if so which?

Answer: The regulations are invalid to the extend to which they are made pursuant to Sections 8 and 11. The proclamations made pursuant to s.8 are invalid. Otherwise, no.

4. If yes to question 2, which of the allegations are necessary to be determined in order to enable a decision as to the validity or invalidity of the said Act, regulations or proclamations to be made?

Answer: Does not arise.

5. Do the agreed facts

(a) compel

(b) permit

the conclusion that the AHC is a trading corporation within the meaning of the Heritage Act?

Answer:

(a) Yes.

(b) Yes.

6. If yes to (a), (b) or (c) of question 1 and no to question 3, is the Gordon River Hydro-Electric Power Development Act 1982 (Tas) valid?

Answer: Valid, but ineffective unless the Commonwealth Minister consents.

If no to question 6, must the second defendant pursuant to Section 15b of the Hydro-Electric Commission Act (Tas) direct the third

defendant in writing to cease to construct the development specified in schedule 1 to the Gordon River Hydro-Electric Power Development Act 1982 (Tas)?

Answer: Not answered.

8. If the Hydro-Electric Commission is a trading corporation and if Section 10(4), is valid, is the commission carrying out any of the acts set forth in subsections (2) or (3) for the purposes of its trading activities?

Answer: Yes.

A Bill of Rights will be introduced into the Commonwealth Parliament later this year by the Attorney General, Senator Gareth Evans. It will rely on the external affairs powers: ABC, 7 July 1983.

PRACTICE NOTES

Australian Treaties Legislation

Australia/Papua New Guinea Air Services: Treaty Series 1980/no.29.

Asian Development Fund Act, 1982 authorises a further contribution for the purposes of the Asian Development Fund, assent, commencement, 31 December 1982.

Commission for the Conservation of Antartic Marine Living Resources (Privileges and Immunities) Regulations. S.R. 1983, No.22.

Preparatory Meeting to the Twelfth Antartic Treaty