Some Juridical Aspects of Australian Trade Agreements

By David R. Anderson,

Formerly Legal Officer, Attorney-General's Department, Commonwealth of Australia, Canberra.*

Introduction

The crystallization of workable principles of international law pertaining to trade, it was recently remarked, proceeds more rapidly and with more precision than in other relationships among States.[1] It is not surprising therefore that it was in commercial matters that Australia, in common with other parts of the former British Empire, was first recognized as having some form of separate international identity. Before Federation the Colonies were not recognized as having any standing in international law, and their lack of any right to act autonomously in the field of foreign affairs was clearly stated in a circular issued in 1894 by the then British Colonial Secretary:

> "A foreign Power can only be approached through Her Majesty's Representative, and any agreement entered into with it, affecting any part of Her Majesty's Dominions, is an agreement between Her Majesty and the Sovereign of the foreign State, and it is to Her Majesty's Government that the foreign State would apply in case of any question arising under it."[2]

Yet this statement of principle was not entirely in accord with actual practice, because not only, as the Colonial Secretary's circular went on to lay down, might a Colonial Government in some cases appoint a delegate to a negotiating mission "as a second Plenipotentiary or in a subordinate capacity, as Her Majesty's Government think the circumstances require", but also the practice of automatic application by the British Government of commercial treaties to all self-governing Colonies was discontinued after 1880; instead such treaties were expressed to apply to all parts of the Empire with the exception of

---

* Although the writer was formerly Legal Officer in the above-mentioned Department, the views expressed and the responsibility for any errors or omissions are entirely his own.

1 Almond, "The Anglo-Japanese Commercial Treaty of 1963" (1964), 13 I.C.L.Q. 925, at p. 939. Cf. Pound, *The Formative Era of American Law* (1938) 11-12: "As to the effect of expanding trade and commerce, Plato had noted that where there is maritime commerce there must be more law. Montesquieu, observing the phenomena of his time, says that in a trading city there are more laws. Jhering, in a characteristically eloquent passage, speaks of commerce as a pathfinder in legal history."

2 Despatches on Questions of Trade and Commercial Treaties, c. 7824, 15. Starke, "The Commonwealth in International Affairs", *Essays on the Australian Constitution* (ed. Else-Mitchell, 2nd ed., 1961), pp. 343-4.

self-governing Colonies although the latter might by special notice require a particular treaty to be applied to them. To the right of separate adherence was later added the correlative right of separate withdrawal. Thus at Federation, while in no way possessing full international personality, the Commonwealth did have in regard to commercial treaties a right of semi-independent negotiation with foreign countries and an independent right of adherence and withdrawal from British treaties, as well as a limited right of representation for trade purposes.

By the end of the First World War Australia and the other Dominions had emerged as independent States in the field of international law although this status was not exercised to the full for some time. For present purposes it need only be noted that they had obtained virtually complete power to negotiate commercial and technical treaties.[3] The 1923 Imperial Conference drew up and agreed to a resolution on the negotiation, signature and ratification of treaties which stressed the community interest of the various Dominions in negotiations that might be entered into by any one Dominion, and which in regard to signature declared that—

> "(a) Bilateral treaties imposing obligations on one part of the Empire only should be signed by a representative of the Government of that part . . . ."[4]

The resolution also referred to agreements between Governments "which are usually of a technical or administrative character" and exhorted Governments to consider the interests of other Dominions when negotiating such agreements. While not in itself constituting the source of the Dominions' right to conclude separate treaties or agreements, this resolution gave formal expression to an already established state of affairs that had resulted from World War I.

The first permanent Trade Commissioner representing Australia in a foreign country was Henry Yule Braddon, appointed in September 1918 to the United States.[5] For some time before this there had, of course, been a High Commissioner in London who handled Australian trade matters in Britain (and subsequently in France through a sub-office in Paris), but the special relationship with Britain in the early days of Australia's emergence on the international stage puts this office on a different plane from that of Trade Commissioners.

There followed in early 1921 the appointment of E. S. Little as Trade Commissioner in China, and other appointments were made in succeeding years. The Trade Commissioners Act 1933 provided for the establishment of an Australian Government Trade Commissioner Service. Thus the creation of a Trade Commissioner service preceded that of a diplomatic service proper, and it followed that sustained

3 Starke, ibid., p. 349. For a historical survey of the development of Australia's trading relationships and commercial arrangements with other countries, see D. F. Nicholson, *Australia's Trade Relations* (Melbourne 1955), pp. 1-35.

4 Keith, *Speeches and Documents on the British Dominions 1918-1931*, p. 320.

5 (1921) *Commonwealth Yearbook No. 14*, p. 490.

Australian activity in commercial matters should have manifested itself on the international level before any similar activity in matters of high state policy.[6] While Australia chose not to play any major part in foreign affairs generally, she saw that in commercial and trade matters—a field that vitally affected a primary-producing country—it would be desirable to play a more active role. And so it was that the inter-war period saw the conclusion of a number of trade agreements, both with other Dominions and with foreign countries. In 1922 an agreement was concluded with New Zealand; in 1925 one with Canada; in 1931 another with Canada; in 1932 the Ottawa Agreement with Britain constituting the basis of Imperial Preference; in 1933 another with New Zealand; in 1934 one with Belgium; and in 1936 three that came into force on 1 January 1937 with Czechoslovakia, France and Japan; while other agreements were also concluded during the inter-war period. Thus after the Second World War, Australia had already had some experience in the field of negotiating trade agreement, although this had tended to be concentrated with other British Commonwealth countries rather than with foreign countries.

After the war a number of new agreements were concluded, some replacing earlier ones and others breaking new ground. At present trade agreements with the following countries are officially listed[7] as being in force: Britain, Canada, New Zealand, Federation of Rhodesia and Nyasaland,[8] Malaysia,[9] Japan, Federal Republic of Germany, Indonesia, South Africa, Brazil, Czechoslovakia, Iceland, Israel, France, Greece, Switzerland and the Philippines. Some of these are no more than the simplest of agreements exchanging most-favoured-nation treatment for the imports of each other. Mention should also

6 Australian participation in the Versailles Peace Conference was exceptional and was not continued in the post-war period. Generally speaking, Australia was content to leave the conduct of major foreign affairs to Britain, and preferred not to undertake an individual foreign policy. Reasons of economy as well as inclination were also probably motivating factors; and see Starke, *op. cit.*, p. 350.

7 *Commonwealth Yearbook* 1964, pp. 513-4. Although not yet listed in the *Yearbook*, a recently signed (1965) Agreement with the Philippines is now in force. This paper is not concerned with the General Agreement on Tariffs and Trade of 30 October 1947, GATT, to which special considerations apply. Australia is of course a party to GATT, and has also accepted, subject to reservation, the Protocol of 8 February 1965, adding a new Part IV on Trade and Development to GATT; these reservations, related to the new article 37, were to the effect that Australia could not bind itself to fulfil the commitments under the article to the same extent or in the same manner as other developed countries, and that it would discharge its obligations consistently with Australia's own development needs, policies, and responsibilities. As to the general position of Australia's relationship to GATT up to 1955, see Nicholson, *op. cit.*, pp. 166-270.

8 After the dissolution of the Federation in 1963, the agreement has been applied on a provisional basis to each of the three successor entities—Rhodesia, Zambia and Malawi.

9 This agreement was signed before the creation of Malaysia and by common consent it is applied only to that part of Malaysia that formerly comprised the Federation of Malaya.

be made of the important New Zealand-Australia Free Trade Agreement, signed 31 August 1965.

These introductory paragraphs show that Australia has made a fair use of the international trade agreement as an instrument in its overseas trading policies and that it was in this field that Australia first started to feel her way on the international plane. It is proposed in the following pages to consider against this background some juridical aspects of Australia's trade agreements that may be of interest to the international lawyer, as opposed to the international economist. This examination does not purport to be anything like an exhaustive analysis of the subject but rather consists simply of a few points that this writer has encountered in the course of some practical dealings in the field of the negotiation of trade agreements.

International and municipal law standpoints

Before proceeding to a consideration of the various aspects to be discussed, we may observe first that there are two standpoints from which these may be viewed, namely the international and the municipal; in other words we may consider trade agreements, or for that matter any type of treaty, from the point of view of international law and from that of their effect on municipal law. There can of course be no complete separation of the two, but for the purpose of classification it is convenient to bear the distinction in mind. Under the former heading there falls the rights and duties of the contracting parties at international law, and under the latter the manner in which undertakings are to be implemented in municipal law and consequentially how municipal law is affected. Trade agreements, as much as any other treaty, are binding contracts at international law that constitute directly the undertaking of international obligations the fulfilment of which may have important municipal repercussions. Elementary though such a proposition is, it is as well that it be restated for it should be borne in mind that trade agreements are not simply means of increasing a country's exports but are instruments to be interpreted in the light of generally recognized principles of international law and to which the principle *pacta sunt servanda* applies as much as to a solemn treaty on a matter of high policy.

Nature and scope of Australian Trade Agreements

It is appropriate to consider first precisely what kind of form the Australian trade agreements have taken. It was mentioned above that some of them are no more than simple exchanges of most-favoured-nation treatment for the imports of the other contracting party: for example, the agreement with Iceland is constituted by an exchange of letters between governments that state quite simply that goods of the one country on their importation into the other country shall receive treatment not less favourable than that accorded to like goods of the most-favoured-foreign country.[10] The note and the

10 *Australian Treaty Series 1952*, No. 15.

reply are regarded as constituting and evidencing the Agreement between the two Governments. Other agreements in similar form are those with Brazil,[11] Greece,[12] Israel,[13] and South Africa.[14] The others are almost all in the form of inter-governmental agreements, some being relatively simple most-favoured-nation agreements, others covering transactions in specific commodities and some dealing with more detailed questions such as state trading. There appears to have been only one agreement ever concluded in Heads of State form, that being the Agreement with Czechoslovakia in 1936, which is described as a Treaty of Commerce between the Commonwealth of Australia and the Czechoslovak Republic and which was concluded in the name of "His Majesty the King of Great Britain, Ireland, and the British Dominions beyond the Seas, Emperor of India, in respect of the Commonwealth of Australia, and the President of the Czechoslovak Republic".[15] This illustrates the fact, fairly common now in treaty practice, that the Heads of State form of treaty has in large measure given way to the inter-Governmental agreement.[16]

One significant point to be noted is that all the trade treaties are straightforward "trade agreements". It is true that the Czechoslovak treaty is described as a "Treaty of ***Commerce***" (although it is noticeable that the Act of Parliament approving it is entitled the Trade ***Agreement*** (Czechoslovakia) Act), and the Japanese treaty is described as an "Agreement on ***Commerce***"; however, the contents of these agreements disclose that they do not seek to go beyond the conventional type of trade agreement. Australia has therefore not entered into any full-scale commercial treaties of the type recently concluded between Britain and Japan or some of those between the United States and its trading partners. The Anglo-Japanese Commercial Treaty of 1963 is described as a "Treaty of Commerce, Establishment and Navigation" and it covers a number of commercial, company, property, shipping and such like matters that go beyond the description of "trade". Nothing of this nature, however, has been attempted by Australia. It would be difficult to say precisely why this should be so, but the obvious general answer is that hitherto Australia has not felt the need for the larger and wider type of treaty. Until the Second World War Australia traded mainly with Britain with whom it was not necessary to conclude treaties of establishment and navigation, and after the war hopes were placed in the abortive multilateral type of trade regulation envisaged in the International Trade Organisation (ITO), which would also have rendered treaties of establishment and navigation less necessary. However, with the changing pattern of Australian overseas trading and the present lack of any

11 *Commonwealth Acts 1901-1950* (1953), vol. 5, pp. 4440-2.

12 Ibid., pp. 4476-8.

13 *Australian Treaty Series* 1951, No. 20.

14 *Commonwealth Acts 1901-1950* (1953), vol. 5, pp. 4479-81.

15 Ibid., p. 4443.

16 "Australian Treaty Making Procedures" (1950), 26 *Current Notes on International Affairs* 150, 151n.

adequate multilateral system of regulation, it is not unlikely that in the future Australia may seek to enter into the more detailed and complex type of commercial treaty similar in form to the Anglo-Japanese Treaty of 1963.

It may also be observed that most of the trade agreements have certain basic similarities. The exact features naturally vary according to what is the aim of Australia in concluding a particular agreement and also according to what the other contracting party is prepared to accept, but it is nevertheless clear that Australian trade agreements are basically similar and are mainly designed to ensure markets for Australia's chief exports. Apart from the simplest ones in exchange-of-letters form, the agreements are concerned mainly with general most-favoured-nation treatment with respect to imports and exports, the use of commercial considerations by State-trading agencies, the limitation of restrictions on imports and exports and non-discriminatory taxation of imported as compared with like domestic articles; some agreements also provide for specific arrangements in regard to the export and import of certain commodities; and sometimes there is provision for "consultation", a vague term that is not normally defined with any degree of precision. These features all conform to the standard conventional type of trade agreement, and there has been no attempt to venture into any more sophisticated form of trade agreement—again no doubt because no such need has been felt.

Australian Trade Agreements and the Commonwealth of Nations

It is apparent that with the notable exceptions of Japan and the Philippines, the main trade agreements of a bilateral nature are all with British Commonwealth countries; the agreements with non-Commonwealth countries are, apart from that with Japan, of minor importance. This gives rise to the question of what the juridical nature of treaty relationships between Commonwealth countries is, and whether in any respect they are treaty relationships in international law, for the old *inter se* doctrine of the Commonwealth of Nations denied that agreements between Commonwealth countries constituted obligations at international law.[17] Such agreements were regarded as of a domestic nature within the Commonwealth and not subject to international law. Jennings has demonstrated quite convincingly that this is no longer a tenable argument and rightly concludes that treaties and agreements between Commonwealth countries "are operative in international law, and solely in international law; and therefore that the doctrine that *inter se* treaty relations cannot by their nature be international is no longer in accord with the facts".[18]

Australia's trade agreements with other Commonwealth countries must therefore be regarded as binding undertakings at international law just as much as any other agreement such as the one with Japan.

17 See generally Jennings "The Commonwealth and International Law" (1953), 30 *British Yearbook of International Law* 320, at pp. 330-340.

18 Ibid., p. 335. For a general discussion see also Fawcett, *The British Commonwealth in International Law* (1963), pp. 144-94.

Nevertheless there is still one important way in which the Commonwealth tie affects Australia's trade agreements. It is well established that favours granted between members of the Commonwealth do not bring into operation the most-favoured-nation clause, or, in other words, that Commonwealth preference is an exception to the most-favoured-nation clause.[19] This arose for historic reasons that need not be gone into here;[20] it is sufficient to note that they were based on the *inter se* doctrine, which as noted above is now no longer tenable. Yet despite the fact that the *inter se* doctrine has gone into desuetude, the exception of Commonwealth preference in most-favoured-nation clauses has remained by reason of specific stipulation in trade agreements. The General Agreement on Tariffs and Trade, GATT, provided for an exception from most-favoured-nation treatment of preferences in force exclusively between two or more of the territories of the British Empire and Commonwealth, and this has been followed in all current Australian trade agreements with non-Commonwealth countries. For example, article I paragraph 2 of the Agreement with Japan reads:

> "2. The provisions of paragraph 1 shall not entitle the Government of Japan to claim the benefit of any preference or advantage which may at any time be accorded by the Government of the Commonwealth of Australia to any member country of the Commonwealth of Nations including its dependent territories, or to the Republic of Ireland."[21]

The GATT exception provided for only ***existing*** preferences, whereas that in the Japanese agreement provided for preferences "which may ***at any time*** be accorded" to Commonwealth countries. Even the simple exchange-of-letters form of most-favoured-nation treatment agreement includes the exception; for example, the Icelandic Agreement provides that—

> "nothing in this Agreement shall entitle Iceland to claim the benefit of any treatment, preference or privilege which may at any time be in force exclusively between two or more of the Territories listed in Annex A to the General Agreement on Tariffs and Trade."[22]

---

19 Jennings, *loc. cit.*, p. 338.

20 "It may now be regarded as a settled principle that trade agreements between parts of the British Empire are to be considered as matters of a domestic character, which cannot be regarded as discriminations by any foreign power", Cmd. 5369 (1910) para. 122.

21 *Australian Treaty Series* 1957, No. 15. Other exceptions in agreements with other foreign countries are in similar terms, although in some cases the wording is slightly different; for example, the language of the exception in the pre-war British agreement reflects earlier concepts of the constitutional nature of the Commonwealth of Nations:— "It shall be understood that the foregoing provisions shall not entitle: (i) The Brazilian Government to claim the benefit of any treatment, preference or privilege which may at any time be granted in the Commonwealth of Australia exclusively to territories under the sovereignty of His Majesty the King of Great Britain, Ireland and the British Dominions beyond the Seas, Emperor of India or under His Majesty's suzerainty, protection or mandate."

22 *Australian Treaty Series* 1952, No. 15.

Thus the Commonwealth preference system is reflected in Australia's trade agreements with foreign countries and has been accorded by specific treaty provision some standing in international law. That the Commonwealth preference system is important to Australia was clearly demonstrated by the concern shown at the possibility of its disappearance had Britain been successful with its application to join the European Economic Community (EEC), and therefore it is likely that Australia will want to do everything possible to retain it. The exception of Commonwealth preference, therefore, will presumably continue to occupy a place of some importance in Australia's future trade agreements with non-Commonwealth countries although of course Australia could, irrespective of the *inter se* doctrine, quite validly conclude a treaty with a foreign power granting most-favoured-nation treatment ***inclusive*** of favours granted within the Commonwealth; there is in fact a precedent for this in the case of such a Treaty of Commerce and Navigation between South Africa and Germany in 1928, although South Africa obtained release from the obligation after the Ottawa Conference in 1932. It seems unlikely that Australia would want to conclude such an agreement but she would have full capacity to do so if she wanted.

Settlement of disputes

One aspect of all types of treaties that is of interest to the international lawyer is the question of what provision is made for settlement of disputes or disagreements, such as differences of interpretation of the text. It is well known that difficulties of treaty interpretation can give rise to disagreements between contracting parties,[23] and it is desirable therefore that arrangements should be made for settling disagreements of this nature. This is more important in comprehensive multilateral treaties and also in the larger type of bilateral treaty, but it is none the less relevant in the more limited types of agreements that are concerned with fairly important international obligations, as, for example, trade agreements.

What then are the provisions in Australia's trade agreements for dealing with settlement of disputes? So far, very little provision has been made at all. The reasons for this seem fairly clear. As already noted, most of Australia's important trade agreements have been with other members of the Commonwealth of Nations, and under the influence of the *inter se* doctrine it was felt that disputes between member countries should be settled amicably within the Commonwealth structure. It was therefore not considered necessary to create any formal settlement machinery in agreements between members. This point is emphasized by the fact that, with the exceptions of Pakistan and Uganda, all Commonwealth countries that have accepted the general compulsory jurisdiction of the International Court of Justice have excluded from the Court's jurisdiction disputes between

23 On interpretation generally see McNair, *The Law of Treaties* (1961), 345-489.

members of the Commonwealth.[24] So far as agreements with non-Commonwealth countries are concerned, they have mostly consisted of the simpler form of agreement—with again the notable exception of Japan—and machinery for settlement of disputes seems less necessary in these relatively simple agreements. Such machinery as does exit in Australia's trade agreements has been confined to provisions for "consultation". For example, the Agreement with Canada provides in Articles 3 and 6 for consultation between governments in certain cases "for the purpose of seeking a mutually satisfactory adjustment" and "to consider measures to prevent further injury", and an attempt to provide a more comprehensive system of consultation is contained in Article 8, which reads as follows:—

> "1. The Australian Government and the Canadian Government shall consult together, at the request of either, regarding the operation of this Agreement or of any provision thereof.
>
> 2. The two Governments recognize that matters not otherwise dealt with in this Agreement, including instability in international trade in basic primary products, shipping problems and non-tariff obstacles to trade, such as agricultural protectionisms, import restrictions, surplus disposal transactions, other non-commercial trading practices and export subsidies, may have a marked effect on their trade. The two Governments shall consult together about any such matters at the request of either.
>
> 3. The two Governments shall establish the consultative procedures necessary to achieve the purposes of this Article."[25]

---

24 *Yearbook* of International Court of Justice 1963-1964, pp. 218-41; Australia, p. 219; Canada, p. 221; India, p. 226; New Zealand, p. 231; Pakistan, p. 233; South Africa (prior to its withdrawal from the Commonwealth), p. 235; Uganda, p. 238; Britain, p. 239. Kenya has also recently accepted the Court's jurisdiction with an *inter se* reservation. In an explanatory memorandum issued when Britain first accepted the old Court's jurisdiction in 1929 the following reason was given for the reservation of Commonwealth disputes: "Disputes with other members of the British Commonwealth of Nations are excluded because the members of the Commonwealth, though international units individually in the fullest sense of the term, are united by their common allegiance to the Crown. Disputes between them should, therefore, be dealt with by some other mode of settlement, and for this provision is made in the exclusion clause"; Keith, *op. cit.*, pp. 415-6. Putting it somewhat more bluntly, Sir Austen Chamberlain described such disputes as being of a kind "we ought to settle for ourselves without foreign interference": *The Times*, 28 January 1930.

25 *Australian Treaty Series* 1960, No. 5. Reference should also be made to the provisions for "consultation" in the recent New Zealand-Australia Free Trade Agreement, signed 31 August 1965. Art. 16 par. 1 provides that consultations are to take place if either party is of the opinion that any benefits conferred on it by the Agreement, or any of the objectives of the Agreement are not being achieved. The request for consultations is to be made in writing, and in the consultations the parties are to consider appropriate measures to remedy the situation prompting the request. Art. 16 par. 2 provides for consultations for reviewing the operation of the Agreement. There is also in Art. 15 significant provision that the parties are to "take appropriate measures, including arrangements relating to administrative co-operation, to promote the effective and harmonious application of the provisions of (the) Agreement". For the text of the Agreement, see 36 *Current Notes on International Affairs* (Dept. of External Affairs, Canberra, 1965) No. 8, pp. 471-80.

This is undoubtedly a genuine attempt to secure settlement of any differences that may arise by means of informal negotiation, but it is not really an adequate arrangement. Other than withdrawal of concessions by an "aggrieved" party, which is a poor solution indeed, there is no provision for any satisfactory settlement in the event of failure to agree in the consultations. Furthermore, what precisely does "consultation" mean? And what if one party prevaricates over time and place of consultation? No answer to these and other like questions is to be found within the agreement.

Fortunately for Australia, there may not have been much need in the past to have had formal machinery for settling disputes, and the answer that might be given to the questions posed above might well be that situations calling for specific answers have never previously arisen. This is all very well, but we live in a world of flux and change, and what was good enough for the past may not be for the future, particularly when one considers the growing complexity of international trade, which is bound to raise countless difficulties and much room for dispute in the future. What then should be done?

There are two obvious anwers, although others could be suggested. One is to provide in future agreements for some relatively informal, though concrete and clearly defined, system of arbitration. Provision could be made in future trade agreements for the appointment of an arbitrator or a committee in the event of any dispute, the arbitrator or committee to be empowered to give a ruling that would be binding on the parties. A variation of this could be the adoption of a procedure whereby an agreement provided for the appointment of an arbitrator or umpire by the President of the International Court of Justice, a device adopted in numerous international loan agreements.[26] More use could also be made of the Permanent Court of Arbitration.

The other, and more formal, alternative would be to include in the agreement a provision conferring jurisdiction on the International Court of Justice; this would be suitable for the larger and more complex type of agreements. There is nothing very startling or novel in this suggestion for there are many treaties, both bilateral and multilateral, that confer such jurisdiction in disputes arising out of the operation of the treaty, provisions conferring such jurisdiction being known as compromissory clauses.[27] A notable recent example

26 For a complete list of existing instruments providing for such appointment (between six and seven hundred in number) see *Yearbook* of International Court of Justice 1963-1964, pp. 255-321.

27 The following are examples of commercial treaties that contain compromissory clauses conferring jurisdiction on the Court: Convention concerning the rights of nationals and commercial and shipping matters, 1933 (Canada-France); Treaty of friendship, commerce and navigation, 1964 (China-United States); Agreement concerning monetary and financial relations, 1948 (France-Lebanon); Treaty of friendship, commerce and navigation, 1948 (United States-Italy); the 16 Economic Co-operation agreements concluded in 1948 between the United States and mainly Western European countries; Treaty

Continued on p. 95

of this is to be found in Article 31 of the Anglo-Japanese Commercial Treaty of 1963 which reads as follows:

> "Any dispute that may arise between the Contracting Parties as to the interpretation or application of any of the provisions of the present Treaty shall, upon the application of either Contracting Party, be referred to the International Court of Justice, unless in any particular case the Contracting Parties agree to submit the dispute to some other tribunal or to dispose of it by some other procedure."[28]

This is a welcome step inasmuch as it contributes to the standing of the Court in the field of judicial settlement of international disputes. It must be admitted that the number of cases decided by the Court since its establishment after the Second World War has been small, but this has not been due to any shortcomings of the Court, whose integrity and impartiality cannot be questioned; it is due rather to the reluctance on the part of States to entrust settlement of disputes to the Court. In view of this, any increase in the willingness of States to confer jurisdiction on the Court is to be welcomed, and one field in which this could be done is that of international trade, the complexity of which, as already noted, is greatly increasing, thus leading to a greater likelihood of disputes arising.

Such procedures need not, of course, displace provisions relating to "consultation" which would remain in the texts of agreements and provide the very necessary machinery for discussions between officials of the contracting governments charged with the administration of trade agreements. These provisions could undoubtedly be improved on in various ways, such as defining with a greater degree of precision what precisely is meant by "consultation", but there is certainly nothing wrong with their basic purpose. Where they do fall short in a more fundamental way is in failing to provide any adequate means of settlement of disputes—whether disputes between Governments as to policy matters or disputes between nationals of the parties concerning actual transactions in international trade.

---

27 *Continued from p. 94*

concerning consular arrangements, navigation, civil and commercial rights and establishment, 1948 (Greece-Lebanon); Treaty of friendship, commerce and navigation, 1950 (United States-Ireland); Commercial Agreement, 1950 (Netherlands-Mexico); Treaty of friendship, consular services and establishment, 1950 (Greece-Philippines); Commercial agreement, 1950 (Benelux-Mexico); Trade Agreement, 1950 (U.K.-Norway); Treaty of friendship, commerce and navigation, 1951 (United States-Denmark); Treaty of friendship, commerce and navigation, 1951 (Israel-United States); Treaty of amity and economic relations, 1951 (United States-Ethiopia); Treaty of friendship, commerce and navigation, 1951 (United States- Denmark); Treaty of friendship, commerce and navigation, 1957 (Norway-Japan); Treaty of friendship and commerce, 1960 (Pakistan-Japan); and many other treaties of friendship, commerce and navigation between the United States and various countries. For a full list see *Yearbook* of International Court of Justice 1963-1964, pp. 242-54.

28 *U.K. Treaty Series 1963* No. 53, Cmnd. 2085.

Disputes between individuals

In regard to this latter category—international trade disputes between private individuals as opposed to disputes between governments—a whole new field of law is opening up which so far has not been given sufficient consideration in Australia, particularly in so far as trade agreements are concerned; existing trade agreements virtually ignore this aspect of international trade which may be due in part to a failure to appreciate the relative independence of the law of international trade from municipal commercial law. More attention should be paid to the possibility of creating special institutions to deal with disputes under this new law of international trade, and in this regard there may be something to be learned from countries of planned economy where permanent arbitration commissions have been established to deal with foreign trade disputes.[29]

It may be argued that this subject is not suitable for inclusion in trade agreements, which are intended to provide simply for exchange of most-favoured-nation treatment and a few related matters, and that arbitration questions should be dealt with separately in conventions catering specially for this matter. Up to a point this is true, and some effort has been made to develop a more general multilateral system of commercial arbitration. For example, the Convention on the Recognition and Enforcement of Foreign Arbitral Awards concluded at New York in 1958[30] deals in a limited way with the problem, and the European Convention on International Commercial Arbitration concluded at Geneva in 1961[31] covers the matter in some more detail. However, although represented at the negotiating conference, Australia has not yet acceded to the New York Convention, and the European Convention is not open to Australia's accession even if Australia wished to accede. In any event, the New York Convention does not provide—as does the European Convention—for a system of arbitration; it merely lays down a scheme for awards granted in one country to be enforced in other countries, and Article 7 specifically leaves the door open for further development by stating

29 "The reason for the remarkable fact that in all countries of planned economy the jurisdiction over disputes arising from international trade transactions is entrusted to special judicial institutions, i.e. the permanent arbitration commissions, finds its explanation in the training of jurists at the law faculties of the universities of these countries; the judges of State tribunals do now have the expert knowledge and experience to deal with foreign trade disputes. In the countries of planned economy, the disposal of disputes in specialist tribunals must tend to emphasize the relative independence of the law of international trade from other branches of municipal law." Schmitthoff (ed.), *The Sources of the Law of International Trade* (1964), p. 6.

30 U.N. Docs. E/CONF. 26/8/Rev. 1 and E/CONF. 26/9/Rev. 1, U.N. Publication Sales No. 58.V.6.

31 The text of the Convention is reproduced as an appendix to a note by Sarre, "European Commercial Arbitration" (1961), *Journal of Business Law* 352, at pp. 354-60. For a general discussion see Benjamin "The European Convention on International Commercial Arbitration" (1961), 37 *British Yearbook of International Law*, 478 and copious references therein cited.

that the Convention is not to affect the validity of other multilateral or bilateral agreements on the subject nor deprive interested parties of other rights allowed by the law or the treaties of the country concerned. It is submitted therefore that although there may be arguments for keeping the subject of commercial arbitration separate from trade agreements, nevertheless in view of the present virtually complete lack in Australia of any treaty provision in this field[32] and also the strictly limited nature of such provision that would still exist even if Australia were to accede to the New York Convention, there is room at least for considering the inclusion in future trade agreements of some relatively simple means of commercial arbitration in the field of international trade, especially if Australia were to enter into any of the more complex type of commercial treaty.

Again, it should be emphasized that, just because there may not have been any need for this in the past, there is no reason to suppose that such a system could not fulfil a very useful function as Australian overseas trade expands and becomes more diversified. Australia's future commercial relations with Japan provide an obvious example of an area in which commercial arbitration could play an increasingly important role. It is, of course, quite open to business men who are involved in trade disputes to resort to their own *ad hoc* arbitration—and indeed the European Convention, in line with general practice in international commercial arbitration, attaches importance to the autonomy of the parties' will—but it would be clearly preferable to have an established and well defined system, the existence of which

32 There has been some provision—although in a rather narrow and strictly limited field—for improving commercial relations by treaty between Australia and two other countries, but it is questionable if such provision as there is has been of very much use. These provisions are to be found in two old treaties originally concluded by Britain with France and Germany, the treaties having been extended to Australia by procedures in them authorizing such extension. The first is a Convention Respecting Legal Proceedings in Civil and Commercial Matters between Britain and France, signed in 1922 and extended to Australia as from 22 June 1928; it appears to be still in force—see *Australian Treaty List, 1956*, p. 53 and *Cumulative Supplement (No. 2)*, 1962, p. 7—the text is in U.K. *State Papers*, vol. 116, p. 452. This was supplemented by a Supplementary Convention signed in 1936 and acceded to by Australia in 1959—see *Australian Treaty Series, 1959* No. 18. These deal with matters such as the service of legal documents and taking evidence in the respective countries, and they also contain the nearest approach Australia has to "establishment" provisions (e.g. nationals of one country are to have free access to the courts of the other). The second of the two treaties is a Convention regarding Legal Proceedings in Civil and Commercial Matters between Britain and Germany, signed in 1928 and acceded to under Article 18 by Australia as from 3 January 1933; by agreement between Australia and Germany, it was re-applied between the two Governments as from 1 July 1954—it too seems to be still in force—see *Australian Treaty List 1956*, p. 57 and *Cumulative Supplement (No. 2)*, 1962, p. 8—the text is in U.K. *State Papers*, vol. 128, p. 302. This is the same as the Convention with France. These Conventions are of a very limited nature and do not provide anything like adequate scope for the development of commercial arbitration in the international field.

was known in advance by parties to any possible dispute. It is submitted that at least a start could be made in bilateral trade agreements towards the more distant goal of a general system of international commercial arbitration for Australia.

The Federal-State problem

An aspect of Australian municipal law that has to be taken into consideration when Australia negotiates treaties of any kind is the constitutional question common to all countries with a federal system of the extent of the obligations that can be undertaken at international law by the central or Federal Government when the implementation of these may involve the provincial or State Governments. The question is one of performance of an obligation constituted by a treaty, not one of the formation of the obligation, because there can be no doubt that at international law the Federal Government in Australia is free to enter into any international obligation it wishes. If, however, it undertakes an international obligation the subject matter of which falls within the competence of the States and the implementation of which depends on the States, and if the States decline to implement it or are positively opposed to its implementation, then the Federal Government may find itself unable to comply with its international undertaking. It therefore behoves the Federal authorities, when entering into an international agreement of any kind, to ensure that they are not committing the Federal Government to an undertaking it cannot fulfil. The problem is of long standing and has produced much discussion. For Australia it has given rise to particular difficulties in relation to International Labour Conventions,[33] and the Constitution of the International Labour Organisation (ILO) has endeavoured to accommodate member nations that have federal systems by providing in Article 19 (7) for the reference by Federal to State authorities of matters that are "appropriate under its constitutional system, in whole or in part, for action by the constituent States". Article 24 (12) of GATT also takes note of the difficulty and provides that—

> "Each contracting party shall take such reasonable measures as may be available to it to ensure observance of the provisions of this Agreement by the regional and local governments and authorities within its territory."

So far as trade agreements are concerned, the Federal authorities in Australia have not on the whole encountered very much difficulty because "trade and commerce with other countries" is one of the heads of power given to the Federal Parliament under the Constitution. However, the situation can arise in this context in relation to some aspects of the granting of most-favoured-nation treatment. For example Article 1 (1) of the Japanese Agreement provides for the granting of most-favoured-nation treatment in regard to, *inter alia*,

33 For a general discussion of the problem in this context see Bailey, "Australia and the International Labour Conventions" (1946), 54 *International Labour Review* Nos. 5-6.

"all laws, regulations and requirements affecting internal sale, offering for sale, purchase, distribution or use of imported goods". These are matters regulated mainly by State laws in Australia, and it could therefore happen that the Commonwealth might have some difficulty in implementing such an undertaking if State laws imposed any discrimination. An example of this kind of difficulty is seen in the United States in a case of discrimination against Japanese textiles proposed in certain Alabama and South Carolina laws; the United States authorities indicated in this case, as is their normal practice, the procedure by which the matter can be dealt with in the United States[34] where, by Article 6 of the Constitution, treaties are "the supreme Law of the Land" and where the Supreme Court has held that a treaty overrode the conflicting law of a State.[35] Treaties do not, however, have the same standing in Australian law,[36] and therefore a conflict between a treaty provision and a State law might cause great difficulty. In view of all this, it is desirable that Australia should make its position clear to its trading partners when negotiating trade agreements. To date, with the exception of the recent Philippines Trade Agreement, it does not appear to have been the practice to include any "Federal-State" clause in trade agreements, nor to advert to the subject in any "agreed minutes": for example, there is no reference to the matter in the Japanese Trade Agreement or in any of the accompanying published correspondence.[37] This may in part be due to the fact that there has not in the past been any noticeable conflict between State law and any particular international undertaking. Nevertheless, the possibility of such a difficulty arising should be borne in mind and Australia should state the problem by seeking to have inserted either in agreements themselves or in a minute annexed to the agreement some formula to the effect that nothing should be taken as imposing on the Australian Government any undertaking concerning matters that are appropriate under the Australian constitutional system for action by the constituent States; it would also be quite in order to add that

34 In reply to a Note from the Japanese Ambassador, the Secretary of State said: "With respect to the South Carolina law referred to in the Ambassador's note and the recently enacted law in Alabama, the United States Government must depend upon proceedings brought by interested parties in appropriate courts to uphold the validity of the Treaty of Friendship, Commerce and Navigation. The fact that this is the regular procedure under the constitutional system of the United States for securing authoritative determinations regarding the consistency of State laws with treaties is always pointed out by the United States representative during the negotiation of such treaties." The Secretary of State noted that he had communicated his "concern" to the Governors of the two States. 34 *Department of State Bulletin* 7280729, 1956.

35 *Ware v. Hylton*, 3 Dall. 199 (U.S. 1796)—see particularly per Chase, J., at p. 236.

36 For a discussion of the standing of treaties in Australian law see Alexandrowicz, "International Law in the Municipal Sphere According to Australian Decisions" (1964), 13 *International and Comparative Law Quarterly* 78, at pp. 86-92.

37 *Australian Treaty Series 1957*, No. 15 as amended by *Australian Treaty Series 1964*, No. 11.

the Federal Government would take all reasonable measures to reconcile any conflict between the provisions of an agreement and the practice of the States. The inclusion of this in the Agreed Minutes annexed to the recent Philippines Trade Agreement suggests that this practice may in future be followed.

Territorial application

The question of the territorial application of trade agreements so far as Australia is concerned may also be noticed briefly. Treaties normally apply to all the territory of a contracting party but, in the case of States with non-metropolitan territories, provision is often made to exclude such territories from the ambit of a treaty. For political and economic reasons, it may be felt desirable to exclude the external territories administered by Australia from the operation of trade agreements; for example, the exchange of letters dated 6 July 1957 annexed to the Trade Agreement with Japan states that the provisions of the Agreement "shall not apply to any of the external territories administered by the Government of the Commonwealth of Australia nor to any advantages which are accorded or which may be accorded hereafter between the external territories and the metropolitan territory of Australia". Apart from the recent Agreement with the Philippines, and the New Zealand-Australia Free Trade Agreement signed 31 August 1965 (see article 13 providing for the parties agreeing to the association with the Agreement of any territory for the international relations of which either is responsible), the other trade agreements contain no reference to territorial application.

It appears desirable that the question of territorial application should be more fully dealt with in the text of the trade agreement itself, because a matter of substance is involved. Most existing agreements are expressed to be in the name of "the Government of the Commonwealth of Australia", and the point may arise whether territories such as Papua-New Guinea come within the meaning of the term "Commonwealth of Australia". The Territory of Papua-New Guinea is a territory of the "Commonwealth of Australia", which is the designation of the contracting party in most agreements, and the Government of Australia is the "Administering Authority" in the Trust Territory of New Guinea. However, except as otherwise expressly provided in any Australian law, the Territory of Papua and New Guinea does not form part of the Commonwealth of Australia, and for legal as well as for political purposes the Territory must be thought of as an entity distinct from "the Commonwealth".[38] It could be argued therefore that the Territories are not included in the ambit of agreements. However, the position at international law throws a different light on the matter for there is a presumption that all territory of a State—whether it be metropolitan, colonial or any other kind—is included in the application of a treaty unless otherwise stated. This is illustrated by the draft articles on the law of treaties prepared by the International Law Commission, which provides in

38 *Faithorn v. Territory of Papua* (1938), 60 C.L.R. 772, at pp. 787, 792, 796.

Article 57[39] that "The scope of application of a treaty extends to the entire territory of each party, unless the contrary appears from the treaty", and the commentary on this observes[40] that—

> "State practice, the jurisprudence of international tribunals and the writings of jurists appear to support the view that a treaty is to be presumed to apply to all the territory of each party unless a contrary intention appears from the treaty."

In view of this, a clear statement of intention regarding territorial application should be made in all agreements, particularly if Australia should conclude any treaties of the larger commercial variety.

The type of provision commonly used is to be seen in the Anglo-Japanese Commercial Treaty. Article 1 provides:

> "The territories of the Contracting Parties to which the present Treaty applies are:
>
> (a) on the part of the United Kingdom, the United Kingdom of Great Britain and Northern Ireland, and any territory to which the present Treaty has been extended in accordance with the provisions of Article 32; and
>
> (b) on the part of Japan, the territory of Japan."

The term "territory" is defined in Article 2 as meaning, "in relation to a Contracting Party, any territory of that Contracting Party to which the present Treaty applies". Article 32 lays down a detailed procedure by which the United Kingdom may extend the treaty to "any territory for the international relations of which the United Kingdom is responsible" and by which such extension may be terminated. This is perhaps a more elaborate arrangement than Australia may require, but the general import of the Article on territorial application could usefully be adopted in Australian agreements; in particular, the portmanteau expression, "any territory for the international relations of which the United Kingdom is responsible" (admittedly a trifle inelegant but none the less conveniently all-embracing) could usefully be borrowed by Australia in view of the slight differences in status of some of the territories. This could be applied also to exceptions in favour of dependent territories of other British Commonwealth countries that are used to cover Commonwealth preference.[41]

Conclusions

The discussion in the preceding pages does not purport to be an exhaustive consideration of all juridical aspects of Australian trade agreements. There are a number of other points, such as the provisions in some agreements relating to State trading that present problems of considerable interest to lawyers, but it is not possible within the short compass of this paper to enter into a full discussion of these. The foregoing discussion consists simply of a number of points that have occurred to this writer in the course of some practical experience of

39 Report of the International Law Commission on the Work of its Sixteenth Session (1964), U.N. Document A/5809, p. 19.

40 Ibid., p. 20, and reference cited.

41 For a general discussion as to dependent territories in relation to the most-favoured-nation clause, see McNair, *Law of Treaties* (1961), pp. 291-4.

the interpretation of trade agreements. Furthermore a consideration of the General Agreement on Tariffs and Trade, GATT, has deliberately been omitted from the discussion as the purpose of this paper has been to deal only with Australian bilateral trade agreements.

However, in conclusion, a brief mention must be made of the position of trade agreements in relation to GATT, since, as McNair observes, GATT has taken over much of the traditional field of most-favoured-nation clauses and, amongst other things, amounts to a multilateral version of these clauses.[42] In view of the fact that all members of GATT, including Australia, automatically exchange most-favoured-nation treatment,[43] the need for simple trade agreements exchanging such treatment is now much less and may in future tend to be confined to agreements with States not members of GATT. Trade agreements with States that are members of GATT will normally stipulate that GATT obligations are not to be infringed by the agreement.[44]

What conclusion may be drawn from this replacement by GATT of much of the field of traditional trade agreements? One possibility is that in future apart from some minor agreements with non-GATT States, agreements on commercial matters will deal less with the tariff aspect of most-favoured-nation treatment and look more to the development of "establishment" provisions. It has already been pointed out that Australia has not previously entered into any full-scale treaties of "Friendship, Commerce and Navigation" on the pattern of the Anglo-Japanese Commercial Treaty, but this may well be the field for future development. The establishment provisions contained in Articles 3 to 14 of the Anglo-Japanese Treaty are certainly more significant than other aspects because these are precisely the kind of things that are ***not*** covered in GATT—e.g. rights of nationals of one party to reside in the territory of the other party for trade purposes, non-discrimination against companies of one party in the territory of the other party in such fields as equal treatment in courts of law, and so forth. Australia should, therefore, look to this aspect of commercial agreements as a fruitful source of development[45] because

42 McNair, *Law of Treaties* (1961), p. 274.

43 Unless the Article 35 procedure for excluding a particular signatory is invoked, as Australia formerly did in relation to Japan.

44 For example Article 4 of the Agreement with Japan provides: "Nothing in this Agreement shall be construed so as to derogate from the rights and obligations that either country has or may have as a contracting party to the General Agreement on Tariffs and Trade, so long as both countries are contracting parties to the General Agreement on Tariffs and Trade."

45 "The bilateral commercial treaty may then begin to intensify its concern with the establishment provisions, these being supplemented in turn by more effective means to reach restrictive practices, to accommodate at least in part the State trading economies, to overcome the exclusive preserves of government procurement, and to meet the special needs of the developing countries and, in a more sophisticated way, to satisfy the somewhat related adjustment needs in the developed economies, of their genuine infant industries, new enterprises or depressed areas;" Almonds, "The Anglo-Japanese Commercial Treaty of 1963" (1964), 13 I.C.L.Q. 925, at pp. 952-3.

these can contribute to the creation of a legal basis on which nationals and companies of one party may trade with the other party and operate within the latter's territory. This is all the more important when it is realized that today international trade is concerned to a much greater extent than previously with the legal rights of nationals within other States and with trade generally within other States.

Finally, in conclusion, it may be said that the way in which trade agreements or commercial treaties of the future are operated is of as much importance as their technical and detailed provisions. In other words the principle of mutuality and good faith plays an important part in their success. As an American publicist once put it:—

> "A mere study of texts of treaties . . . does not serve adequately to indicate their potentialities. The effectiveness with which they can be made to serve their purpose will, of course, be affected by the exigencies in which the parties find themselves. . . . In the final analysis, the usefulness of the treaties will naturally depend not merely upon the adequacy of their provisions in the technical sense, but upon the goodwill and good faith with which the parties undertake to live up to them."[46]

46 Wilson, "Postwar Commercial Treaties of the United States" (1949), 43 *American Journal of International Law*, 262, at p. 287.