FOREWORD

Provisions in trade treaties and international investment agreements which confer rights of compensation upon investors when States act in ways which are proscribed by the relevant agreement create an unusual legal environment. Because the agreement giving rise to the relevant right is an agreement between States, the principles of public international law provide the framework for the resolution of any dispute. However, within that framework, provisions of this kind are unusual, because they confer rights upon private entities which are neither States nor parties to the agreement. Common law concepts of privity of contract are offended by legal structures of this kind. Further, an enforceable right of compensation conferred upon a private commercial entity has a closer affinity to private rights of a kind enforced by domestic courts than rights of and against States administered through the framework of public international law.

Disputes arising from provisions of this kind have created great political and public controversy. Very substantial awards have been made to investors pursuing the rights conferred by agreements of this kind. It has been asserted that the prospect of claims by investors inhibits the sovereignty of States party to such agreements, and diminishes the capacities of those States to adopt and implement public policies of benefit to their citizens in important areas like public health and the protection of the environment.

There have also been criticisms directed toward the Tribunals appointed to resolve disputes between investors and States. It is said they lack the appearance of legitimacy, consistency and a developed framework of jurisprudence because of the opacity of the process. Questions have also been raised with respect to the relationships between these Tribunals and the domestic courts of the host State.

Issues arising from agreements of this kind, and the claims made pursuant to their terms were considered at seminars jointly organised by the law schools of the University of Western Australia and Sydney, and which were conducted in Perth and Sydney in February and April 2018 respectively. The papers in this edition of the Review are revised versions of the papers presented at those seminars. Participants in

the seminars, and the authors of these papers were drawn from the academy, the judiciary and legal practitioners. The seminars, and the papers in this Review, tangibly illustrate the real benefits which can flow from collaboration between academic institutions, and the engagement of academic institutions with experts outside the realms of academy.

Kawharu and Nottage have analysed media and political responses to investor-State disputes (ISDS) in Australia and New Zealand viewed in the context of public concerns expressed in many other countries. Predictably enough, such concerns are invariably expressed by host States, their politicians and citizens, rather than the States of origin of investors (although in many cases the States in which concerns are expressed are home to investors prosecuting claims - Australia being one of many examples). Statistical analysis of media articles conducted by Kawharu and Nottage shows that inbound claims generate much greater public attention in the host State than outbound claims by investors in the same State.

Kawharu and Nottage draw upon the commonality of political and economic regulatory structures in Australia and New Zealand to support their proposition that those countries should work together and proactively in promoting "bottom up" reform to ISDS and the investment treaty system more generally. The authors note that New Zealand, Canada and Chile issued a joint declaration on ISDS on 8 March 2018 stating their common intention to work together on matters relating to the evolving practice of ISDS. The reasons for Australia's reluctance to join its trans-Tasman neighbour in this venture are not clear at this stage.

A paper by Dickson-Smith assesses the potential of a permanent international investment court to address and resolve many of the complaints that have been directed at ISDS. He uses the Chevron-Equador dispute as a case study for the analysis of the interaction between domestic courts and international Tribunals dealing with ISDS. As that case reveals, there is a real prospect of a perpetual loop, or of the dog chasing its own tail, in which the decision of domestic courts can give rise to a claim in an international Tribunal, which might, in effect, review the decision of the domestic courts for the purpose of ascertaining whether those decisions give rise to

compensable treaty infringement. However, if successful, the investor must often turn to the domestic courts of the host State for the enforcement of the Tribunal's award. A decision by the domestic courts to refuse enforcement of the award could generate another claim under the treaty, and so on, *ad infinitum*. Dickson-Smith concludes that the international investment court proposed by a number of States has the potential to address and resolve this and a number of other problems that have arisen from the current mechanisms for the resolution of investor-State disputes.

The paper by the Hon Robert French AC, former Chief Justice of Australia, analyses the role of municipal courts in the resolution of transnational disputes. He sets the context for that analysis by observing that ISDS engages with a body of law which has been described as "transnational" law, being neither exclusively public, nor exclusively private international law and which can engage domestic legal rules, contract law, competition law and choice of law and forum rules. He points also to the lack of transparency and the associated lack of the development of an international framework of jurisprudence for ISDS.

In that context, French refers to the capacity of municipal courts to address and resolve transnational disputes, if supported by appropriate international instruments, such as The Hague Conventions relating to service of process, the taking of evidence and choice of courts, the UNCITRAL model law on cross-border insolvency, and the ALI/UNIDROIT principles with respect to transnational civil procedure. He proposes that co-operation and convergence by States and their courts can provide effective mechanisms for the resolution of international disputes.

Dagbanja's paper takes as its starting point the observation that international investment agreements are invariably justified by the prospect which they offer for the development of the host State. Some agreements expressly recite that objective. However, in his view, international Tribunals trivialise or ignore this fundamental objective when assessing the range of investments which might give rise to a claim under the agreement.

Dagbanja argues that the capacity of an investment to contribute to economic or social development of the host State should be a pre-requisite to the protection

conferred on investors by the agreement, as a matter of construction of the agreement, at least where there is an express recital to the effect that contribution to the development of the host State is an objective of the agreement. He argues that international Tribunals have placed too great a focus upon the definition of "investment" in agreements, and insufficient focus upon the stated objectives of the agreement when assessing its scope.

Dr Luttrell focuses upon a particular aspect of ISDS claims in his paper - namely, the frequent objection made by respondent States to the effect that the Tribunal lacks jurisdiction because the investment giving rise to the claim did not comply with the laws of the host State - an objection generally known as an "illegality objection". The paper traces the source of this objection to the 2009 award in *Phoenix Action v Czech Republic* and follows the evolution of responses to the illegality objection, leading up to the decision in 2017 in *Kim & Ors v Uzbekistan*. Luttrell analyses the three-stage test applied in that case and concludes that it represents a major advance in the development of international investment law, applying proportionality analysis to the issue of illegality addressed from the perspective of each of the parties.

This edition of the Review also contains a review of a recently published book which provides an overview, and detailed analysis of key developments and themes in the rapidly evolving field of Asia-Pacific international investment treaties.

This edition of the Review contains papers addressing a wide range of issues which have arisen in the field of investor-State disputes by authors who are prominent in that field. The papers will be of interest to all who are concerned with the developing field of investor-State disputes.

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