ANZSIL Postgraduate Workshop
Wednesday, 29 June 2016
ANZSIL Postgraduate Workshop 2016 Agenda

Location – The Garran Room at the Innovations Building, 124 Garran Road, ANU

9 am Registration, Welcome and Introductions

Allocation of Rapporteur Roles in Main Conference

9.30 am Session 1

Muhammad Abbas (QUT), “Dispute Resolution under Trans-Pacific Partnership and its Public Health Ramifications”


10.30 am Morning Tea

11 am Session 2


Genevieve Wilkinson (UTS), “What is the role of Australia in the debate about the relationship between intellectual property and human rights?”

Drossos Stamboulakis (Melbourne/University of the Sunshine Coast), “Can international commercial litigation compete? Analysing the recognition and enforcement “paradox” through the global judgments project”

12.30 pm Lunch

1.30 pm Session 3

Timothea Horn (ANU), “Disarmament diplomacy and international law-making”

Hamed Tofangsaz (Waikato), “The practical limits of the criminalization of terrorist financing offences”

2.30 pm Afternoon Tea

3 pm Session 4


Paul McGorrery (Deakin), “Cognitive Liberty: the oldest and newest human right”

Yujie Zhang (Macquarie/Shanghai Jiao Tong), “Will or Interest? – The Two Main Theories of Rights on Right to Life”

4.30 pm Final Reflections

5 pm Close
SESSION 1  9.30 – 10.30 am

1. Muhammad Abbas, QUT

Dispute Resolution under Trans-Pacific Partnership and its Public Health Ramifications

The Trans-Pacific Partnership (TPP) is an ambitious free trade agreement that the United States has negotiated with 11 other countries (New Zealand, Australia, Canada, Japan, Singapore, Brunei Darussalam, Chile, Malaysia, Mexico, Peru, and Vietnam). The Investor-State Dispute Settlement (ISDS) mechanism has been provided in the TPP as a dispute resolution mechanism. It is being criticized by public health activists as a pro-investor mechanism which empowers foreign corporations to sue governments for hundreds of millions of dollars in damages in a wide range of cases if they adopt any new law or regulation that negatively affects the profit rates of these corporations. This article seeks to answer the following questions. First, does ISDS mechanism maintain balance between public interest and corporate interest? Second, does ISDS mechanism restrict government’s law-making/policy-making space to deal with public health issues like tobacco control through plain packaging? Third, with no prospect of independent review by a national court, are ISDS arbitral proceedings transparent? Fourth, as half of the TPP member states are developing countries, are ISDS arbitral proceedings affordable for third world countries? Fifth, are ISDS arbiters independent, impartial, and aware of public health implications? Finally, what overall impact will the ISDS mechanism have on public health policy-making of TPP member states?

2. Peng Guo, UNSW

The Good Faith Principle in International Long-Term Relational Supply Contracts in the Context of Hardship

Long-term contracts, particularly long-term relational supply contracts, are often drafted and used in the trade of natural resources and other industries. Although the existence of long-term relational supply contracts is common, there are still many issues worth investigating. My research question is what is the role of the principle of good faith in long-term relational supply contracts in the context of hardship.

In this presentation I will particularly focus on the Australian position and the future way for the reform of Australian contract law. In Australia, good faith and hardship provisions of UNIDROIT Principles were discussed in 2012 to see if they could be introduced to Australian law. I would like to further address this issue particularly from a long-term relational contract perspective. I would like to argue that at least in long-term relational supply contracts there should be a role for the principle of good faith to play. I further suggest an approach on how to incorporate the rules in UNIDROIT Principles into Australian contract law. The arguments will be developed in following orders.

Firstly, I will consider the newly drafted or rephrased articles regarding long-term contracts in the UNIDROIT Principles of International Commercial Contracts. Then I will briefly outline the current status of long-term contracts, good faith and hardship in Australian law. Thirdly, apart from the theoretical discussion, the
Electricity Generation Corporation v Woodside Energy Ltd1 (Electricity) case from High Court of Australia will be further analysed to understand the High Court’s approach in the construction of the relevant “reasonable endeavour” clause in a long-term gas supply contract in the context of hardship and questioned why the High Court did not adopt the “good faith” approach to construe the “reasonable endeavour” clause and its potential implications. Fourthly, I will argue how the many manifestations, various levels and potential limits of the principle of good faith in the UNIDROIT Principles will help in tackling the issues in Electricity better and will propose a objective “double constructions” approach to incorporate the UNIDROIT Principles’ new articles into Australian law. Finally, I will conclude that although Australian law may not like the vagueness of the meaning and application of good faith, the principle of good faith and the various duties based on it should be recognized under certain circumstances, particularly in long-term relational supply contracts and that UNIDROIT Principles is a good model to follow.

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3. Chenxi Wang, UNSW

China’s Responses to Systemic and Institutional Issues in Its WTO Disputes

This article analyses China’s interaction with the WTO dispute settlement system. It highlights systemic and institutional issues arising from China’s WTO disputes, and it explores China’s subsequent domestic socio-legal changes in responding to these issues. The article reveals that most of China’s domestic policy changes were not recorded in the WTO system and were overlooked by previous studies. Importantly, the article demonstrates that China was responsive to the systemic and institutional issues identified in the WTO disputes. It has reformed its domestic system by enacting new rules, streamlining administrative organs, advanced reform agendas, and investing more political resources to improve institutional dysfunctionalities in its regulatory systems. In this sense, this article largely completes the current studies in the area of China and the WTO dispute settlement system.

The article demonstrates how China responded to the following issues:

*Systemic Issue 1: China’s legally unscrupulous tit-for-tat trade war mentality*

China normalized its domestic compliance procedure and streamlined the structure of related administrative organization after losing a series of WTO trade remedy cases.

*Systemic Issue 2: transparency in China’s legal system*

China imposed English translation obligations on trade-related legislation after being required to do so in several WTO disputes and moved a step further to comprehensively improve the transparency of its domestic governance.

*Systemic Issue 3: China’s censorship regime*

China’s was less active in addressing this issue, given that the WTO tribunal provided China with flexibility on this politically sensitive issue.

*Systemic Issue 4: China’s state-owned enterprises,*

China integrated the SOEs into a more market-oriented reform agenda in response to some WTO disputes which touched upon its SOE regime.

*Institutional Issue 1: China’s diffuse legislation power*

China established a system to review trade-related legislation after a large number of administrative documents issued by central agencies and local governments being dragged into manifold WTO disputes.

*Institutional Issue 2: Protectionism by Chinese central agencies to their subsidiary enterprises*

China’s was less liberal on this issue since that central agencies’ protection of their subsidiary enterprises’ market comparative advantage involved in some WTO disputes was conducted in the politically sensitive industry – culture industry.
Institutional Issue 3: Chinese local governments’ protectionism with the expression of local divergence from the central government’s economic policies

China invested significant political resources on initiating national political campaigns or central-local bargaining to improve central-local coordination in response to related WTO cases.

4. Genevieve Wilkinson, UTS

What is the role of Australia in the debate about the relationship between intellectual property and human rights?

This paper will consider the emerging international awareness of the intersection between international intellectual property law and international human rights law and consider the significance of this debate in relation to Australia.

Although the fields of human rights law and intellectual property have developed in isolation, there has been increasing awareness of interactions between them in international law. These interactions have been most visible in the Access to Medicines campaign, which questioned the impact of harmonised intellectual property laws through TRIPS on the human right to health in numerous developing and least developed countries. This example highlights the manner in which the two fields of law are perceived to conflict, although alternative viewpoints suggest that the mechanisms provided by TRIPS permit coexistence between intellectual property law and human rights law. Increasingly, conflicts between human rights and international law are acknowledged but responses to these conflicts focus on harmonising the two fields.

The need to harmonise intellectual property law and human rights law is arguably increasingly important for Australia although the experience of Australia will often differ from the experience of other nations in matters of human rights law. This is because Australia is not part of any regional human rights system which has considered the intersection of these two areas of law. Further, unlike all other Western democracies, the Australian legal system contains no bill or statute of fundamental human rights. The paper will use the tobacco plain packaging dispute to consider ways in which the intersection between intellectual property and human rights is relevant to Australian law. Legislation motivated by health concerns can be in conflict with the restrictions posted by international, regional and bilateral restrictions on intellectual property. Conflicts of this nature are identifiable in the World Trade Organisation disputes about tobacco plain packaging legislation and in the bilateral investment treaty arbitration brought against Australia by Philip Morris regarding the same legislation. Although the dominant approach to analysing these conflicts considers the role of public health, rather than the role of the human right to health, this paper will argue that there are benefits to using a human rights approach.

The tobacco plain packaging disputes present potential conflicts between international intellectual property law and a number of human rights, most relevantly the human right to health and the human right to freedom of expression. As a human rights approach incorporates engagement with competing human rights, it is complementary to the public health discourse which has been adopted to date by the Australian government. The potential human rights conflicts posed by tobacco plain packaging legislation have been identified in the human rights parliamentary scrutiny documents produced in relation to the Tobacco Plain Packaging Regulation. This paper will argue that parliamentary scrutiny provides opportunities for increasing human rights literacy in Australia. Consequently, as plain packaging legislation demonstrates, the debate about harmonising human rights and intellectual property is becoming increasingly relevant.
5. Drossos Stamboulakis, Melbourne, University of the Sunshine Coast

Can international commercial litigation compete? Analysing the recognition and enforcement “paradox” through the global judgments project

Recognition and enforcement frameworks are key to the underlying dispute resolution mechanism’s utility and attractiveness to disputants in commercial matters. Unlike international arbitral awards, international judgments do not benefit from any global recognition and enforcement framework. As national courts often approach enforcement of foreign judgments with reluctance, disputants experience difficulties in enforcing judgments internationally relative to international arbitral awards. This leads to cost, fairness, and access to justice concerns for individual litigants, as well as system-level impacts on the quality of the international dispute resolution system generally. These concerns have become more pronounced as the need for effective methods to resolve international legal disputes has grown, concomitant with growth in the range and scope of commercial activities that take place across international borders. Additionally, whilst there is a strong push towards global cooperation in many other areas of international litigation, this has not extended to the recognition and enforcement of judgments. This work is important as ongoing negotiating efforts towards a broad-based global judgments pro-recognition and enforcement instrument, spanning many decades, are now at advanced stages at the Hague Conference on Private International Law.

Part I examines the relative recognition and enforcement frameworks across a select range of national States, regional bodies, and on a global level, and how they compare to and differ from the largely uniform international arbitration recognition and enforcement framework. This analysis shows the “paradox” or “anomaly” that it is much harder to recognise and enforce a judgment, than an arbitral award, internationally. This treatment is particularly anomalous given the widely adopted (in 156 States) pro-recognition and pro-enforcement approach accorded to arbitral awards, compared to the disparate and divergent approaches taken in national legal frameworks which often limit or restrict recognition and enforcement of foreign judgments. Consequently, despite difficulties in international negotiations and the fact that some States regularly give effect to foreign judgments, the drive for clarification and standardisation of these practices through a judgments convention has remained on the global agenda over the last five decades.

Despite this desire, however, global negotiations have been protracted and complicated. Part II analyses the nature of these difficulties – stemming largely from differences in legal tradition and approach between negotiating states. Efforts to overcome these differences have persisted for more than 50 years of international negotiation at the Hague Conference. I consider the lessons that can be drawn from this diverse and complex negotiating history. These ongoing negotiations have implications for the recognition and enforcement ‘paradox’: that is, the ability of commercial litigation to compete with arbitration as a viable international commercial dispute resolution mechanism.
Arms control and disarmament of conventional weapons play a crucial role in maintaining international peace and security. They have been permanent fixtures on the agenda at the United Nations. Yet with the world’s top five arms producers permanently sitting on the UN Security Council, little progress had been achieved until 1993. Since then, however, an increasing number of international legal instruments have been negotiated, creating new norms designed to regulate the production and trade of conventional weapons and to minimise their impact on civilians.

Australia and New Zealand have been involved in the successful negotiation of two treaties in particular during that period: the Cluster Munitions Convention (New Zealand) and the Arms Trade Treaty (Australia). Three patterns are noteworthy:

(1) Through coalition building, strong political leadership and innovative diplomatic tools (such as fast-track conferencing), both countries stepped into the role of norm entrepreneurs at crucial moments during negotiations.

(2) During other moments in negotiations, their participation had the opposite effect, slowing down progress and hollowing out the substance of treaties.

(3) Both the substance and the tactics of negotiation positions were shaped by civil society actors.

Understanding the factors that have led to successful treaty-making can provide insights and lessons for future efforts to negotiate. My research will contribute to this understanding by answering my primary research question: “when and how do states such as Australia and New Zealand successfully push for codification of disarmament?”

By looking back at the previous generation of disarmament diplomacy, my research will identify the critical elements that led to successful codification of arms control. My research will shed light on the diplomatic tools that have contributed to and impeded success, in the context of foreign policy, security policy and more broadly in the conceptual space shaped by Australia and New Zealand during multilateral negotiations.

The aims of my research are:

(1) To examine the critical diplomatic roles played by Australia and New Zealand in the negotiation and development of three international treaties on disarmament

(2) To understand the parallel yet different negotiating tracks taken by both countries; and
(3) To propose a typology of diplomatic tools and approaches that have successfully led to the creation of new international legal norms on the use of conventional weapons.

7. Hamed Tofangsaz, Waikato

The practical limits of the criminalization of terrorist financing offences

This Paper analyses the criminalization provisions of the International Convention for the Suppression of the Financing of Terrorism, the backbone of the legal regime for the prevention of terrorist financing. It makes a detailed examination of the background of the Convention and the nature of the negotiation discussions that led to its adoption. The drafters of the Convention encountered two main problems: first, how to define terrorism, terrorist acts, terrorise purposes and terrorist groups, the financing of which would be criminalized; second, the precise scope of the offence, in particular, how to define the preparatory acts of financing as an independent offence. This article argues that the definition of the offence provided by the Convention is far too ambiguous and its application at a national level can often leads to an unjustifiable and unfair criminal law.
Maldives is often hailed as “the paradise on earth”. Yet, despite this fame, before the inception of the current Constitution in 2008, the fundamental rights and freedoms were a pious wish rather than a set of guarantees to all the people under the Constitution. Although the current Constitution heralded a new dawn of rights culture on the basis of Islamic constitutionalism and international human rights norms and standards, there has been a dearth of scholarship of empirically examining and analysing the clauses that recognise the Islamic theocratic character of the Constitution and its interaction with the international human rights norms and standards.

This talk will examine the status, effect, clashes and compatible interactions of Islamic-clauses and international human rights norms and standards under the Maldivian theocratic Constitution. It will explore the interpretative influence of international human rights norms and standards and Islamic Shari’ah and its broader norms on selected cases decided by the Maldivian courts. Identifying the similarities between the two sources of law, it will discuss how the courts harmonize the potential conflicts between the two and suggest further opportunities for harmonization through Islamic jurisprudence and other techniques.

Cognitive liberty: the oldest and newest human right

Freedom of thought – the right to have an idea, viewpoint, belief, or value regardless of other people’s views – is not frequently at issue in litigation. In large part, this is probably because until recently it was implausible to believe that we could read, or perhaps even alter, another person’s thoughts. Instead, freedom of expression has received the lion’s share of judicial and academic attention when in comes to protecting the supremacy of the individual conscience.

However, scientific advancements, particularly in neuroscience, are quickly forcing the legal community to increase its scrutiny on freedom of thought. Freedom of thought is, though – as argued in this presentation – only one part of a much wider notion: cognitive liberty, the right to do with our minds as we see fit, coupled with the right for our minds to be free from external interferences. The term cognitive liberty was coined in the 1990s by Richard Boire and Wrye Sententia, and is not entirely new. However, since its introduction the term has been used sporadically, and often in an inconsistent or narrow way. For example, it is often invoked to support
arguments in favour of free experimentation with narcotics, or the right to engage in neuroenhancement.

This presentation will be premised on an article (currently in progress) that attempts, for the first time, to outline the full contours of cognitive liberty, and in so doing hopes to place cognitive liberty at the forefront of rights discourse in the near future. In doing so, the presentation will include a brief historical overview of the roots of cognitive liberty – the Classical Period, the Golden Age, and the Age of Enlightenment – through to modern day examples of cognitive liberty found in almost every international human rights instrument. The primary and novel focus of the presentation will be to then apply Isaiah Berlin’s (1958) positive/negative liberty distinction in order to distinguish between the freedom to use our minds (positive cognitive liberty) and freedom from interference with our minds (negative cognitive liberty).

10. Yujie Zhang, Macquarie/Shanghai Jiao Tong

Will or Interest? — The Two Main Theories of Rights on Right to Life

There are many issues regarding right to life that have been left unsettled, for example the legitimacy of capital punishment, abortion and euthanasia. Although they could always subject to debate on the moral level, legally, they must be decided. Arguments for and against have been raised, but none of them seems able to provide a determined answer.

Nevertheless, those arguments could all be seen as implying certain notions of right to life. This thesis therefore takes the perspective of right, through the interpretation of it to understand the true strengths and weaknesses of each argument and tackle the issues accordingly. The methodology chosen here to interpret the right is the two main theories of rights.

Among varies accounts of a right, the will approach and the interest approach are the most representative two. The former refer to theories that define the nature of a right as a will or a choice carried out by a will. This approach was initiated by Immanuel Kant and Bernhard Windscheid as the Will Theory, and is advocated and developed until now by H L A Hart as the Choice Theory. Interest theories consider the nature of a right should be interests or benefits, and was insisted by Jeremy Bentham and John Stuart Mill as the Benefit Theory. It is revised and promoted by Joseph Raz, Neil MacCormick and David Lyons in modern times as the Interest Theory.

By interpreting existing arguments in their presumed theories of rights, an interesting phenomenon was found. That is unless we view a right, especially right to life, as a choice in a Hartian sense, a determined answer would still not be achieved. Neither the will, the benefit, nor the interest is able to tell us whether we should allow capital punishment, abortion, euthanasia or not.

Regarding specifically the issue of capital punishment, existing arguments for or against it could be classified into five basic groups: retributivism and anti-retributivism, deterrent effect, expenditure and irreversibility, public opinion and right to life. The retributivism argument was most prominently proposed by Kant and Hegel. It therefore shares the same basic view with the Will Theory.
Theoretically, this theory supports execution by death. However practically, it could not allow the existence of wrongful killing and prone to the attitude of the public opinion. Whether capital punishment should be allowed or not therefore reaches no conclusion.

The argument emphasizing the deterrent effect of capital punishment roots in the utilitarian thought insisted by Beccaria and Bentham. It therefore could be seen as presuming a right to life in the interpretation of the Benefit Theory. The concern on expenditure and irreversibility, if viewed as a kind of pleasure or pain, could be seen as presuming the right as benefits as well. However, this theory will lead us into endless and impossible calculation, evaluation and comparison. It is hard to get an answer to the admissibility of capital punishment.

The argument on deterrent effect, expenditure and irreversibility could be seen as presuming the Interest Theory as well, if the right to life argument considers the right as a unique interest that is different from other general benefits. However the problem with calculation, evaluation and comparison again exists here.

Only the Choice Theory provides us with a determined answer to the question whether capital punishment should be allowed or not. The right to life argument again may view the right as a choice, especially those that insist the right to life could be waived or forfeited. If right to life is a choice, then the control the right confers exactly makes its holder able to waive or forfeit his/her right to life by committing a serious crime. The state’s punishment by death, in this sense, violates no right, and thus is absolutely legal.