Australian and New Zealand Society of International Law

ANZSIL Newsletter

ANZSIL Newsletter
August 2016

Message from the President

In this *Newsletter,* the Editors Anna Hood and Amelia Telec have compiled a snapshot of the many and varied activities of ANZSIL over recent months. You'll find details of upcoming events, an update on the activities of ANZSIL interest groups, news on the movements and publications of ANZSIL members, reports from the Australian and New Zealand governments on recent practice in international law, and summaries of the presentations and ensuing discussion at the 24th annual ANZSIL conference. I thank Anna and Amelia for their efforts in Editing the *Newsletter*.

Tim Stephens
President
Email: tim.stephens@sydney.edu.au
Twitter: @TimStephens10

IN THIS ISSUE

Sixth Four Societies Conference – July 2016
Tim Stephens, President

In July, I attended the 'Four Societies Conference' in Waterloo, Ontario. This was the sixth iteration of these biennial meetings of the American Society of International Law (ASIL), Canadian Council on International Law (CCIL), Japanese Society of International Law (JCIL) and ANZSIL.

The purpose of the Four Societies Conferences is to bring early career scholars together from each of the four societies to present their research and to obtain feedback and mentoring from senior scholars. ANZSIL was represented by Justine Bell-James (UQ), Kerryn Brent (UTAS), Holly Matley (AGD) and Katherine Owens (USYD) following a competitive selection process. Joanna Mossop (VUW) and I attended the conference as the designated senior scholar representatives of ANZSIL.

L-R: Tim Stephens, Katherine Owens, Holly Matley, Justine Bell-James, Kerryn Brent, Joanna Mossop

The papers presented at the conference were of a very high standard, and each addressed different aspects of the conference theme: 'International Law, Innovation and the Environment'. Fittingly, the conference was held at the Centre for International Governance Innovation, an independent think tank engaged in research on international governance. Sara Seck from CCIL was the driving force behind the conference, and is now coordinating the publication of the conference papers. On behalf of ANZSIL I congratulate Sara for her efforts in convening such an engaging and well-run meeting.

Previous Four Societies Conferences have produced important monographs on contemporary developments in international law. The most recent is Holly Cullen, Joanna Harrington and Catherine Renshaw (eds), *Experts, Networks, and International Law* (Cambridge University Press, in press, 2016) and features contributions to the fifth Four Societies conference that was hosted by ANZSIL in 2014. The next Four Societies conference will be held in Japan in 2018.

24th ANZSIL Annual Conference and Postgraduate Workshop – 29 June – 2 July

The 24th annual conference of ANZSSIL was held at University House, ANU, from 30 June to 2 July 2016. The conference theme, 'The International Law of the Everyday', elicited a wide range of interesting and engaging presentations.

Immediately prior to the conference, ANZSIL hosted the Postgraduate Research Students Workshop. This workshop is an important way in which ANZSIL encourages the next generation of international law scholars and practitioners. The workshop was convened by Daniel Joyce (UNSW) and Petra Butler (VUW), and provided postgraduate students in international law with the opportunity to present their research to their peers, discuss their experiences of postgraduate research, and make academic and professional connections. Participants in the Postgraduate workshop kindly volunteered to serve as rapporteurs for the main conference, and their summaries of the conference sessions may be found below. I thank them for their contribution.

The 24th ANZSIL Annual Conference opened on 30 June. I was very pleased that the Conference Organising Committee decided that, wherever possible, panels would have a balanced gender representation. Keynote and plenary speakers at the 2016 Conference included Sundhya Pahuja (University of Melbourne), Anthea Roberts (Australian National University), Marco Sassoli (University of Geneva) and Richard Wilson (University of Connecticut). We also arranged a last-minute 'Brexit panel'.

L to R: Marco Sassoli, Fleur Johns and Richard Wilson

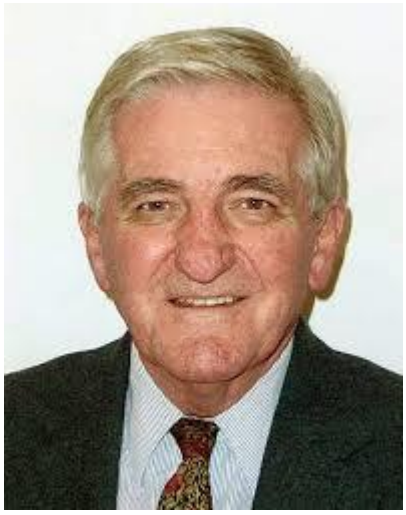
My particular thanks are extended to Fleur Johns who led the conference organisation and the planning of the program, to David Letts and John Reid (AGD) who served alongside Fleur as Co-Chairs of the Conference Organising Committee, and to Treasa Dunworth, Anna Hood and David Leary who served on the Program Committee. I would also like to acknowledge and thank all members of the Conference Organising Committee and Camille Goodman for setting up our first online registration system for the ANZSIL Conference. I am especially grateful to the following who undertook the duties of the 2016 ANZSIL Conference Secretariat (Lisa O'Farrell, Michael Palic, Tim Grainger, Nicole Harman and Claire Atteia). Of course the conference would not be possible without the generous financial and in-kind support from our sponsors and supporters: the Commonwealth Attorney-General's Department, Department of Foreign Affairs and Trade, New Zealand Ministry of Foreign Affairs and Trade, ANU College of Law, Springer, Hart Publishing and Edward Elgar.

ANZSIL Life Membership Award

At the ANZSIL Annual General Meeting on 4 July 2014, the Society awarded life membership to three of the most long-standing and distinguished members of ANZSIL : Professor Hilary Charlesworth AM, Sir Kenneth Keith and Professor Ivan Shearer AM. Professor Ivan Shearer was not present at the 2014 Annual General Meeting and so was presented with his life membership award at the 2016 ANZSIL Conference.

Professor Ivan Shearer AM is an Emeritus Professor of Law at the University of Sydney and Adjunct Professor in the School of Law at the University of South Australia. He previously taught at the University of New South Wales (1975-1993) and the University of Adelaide (1965-1972). He has held visiting positions at the Australian National University, the University of Melbourne, Indiana University, Bloomington, the United States Naval War College, Newport, and All Souls College, Oxford.

Professor Shearer is a member of the Bars of New South Wales, Victoria and South Australia, and has appeared in cases before the higher Australian courts including the High Court of Australia. Professor Shearer served as a Senior Member of the Australian Administrative Appeals tribunal from 2004 to 2008. He is a member of the Panel of Arbitrators of the Permanent Court of Arbitration, The Hague. He was judge ad hoc in two cases before the International Tribunal for the Law of the Sea, Hamburg, and continues to serve in international arbitrations. Since 2001 Professor Shearer has served as an elected member of the United Nations Human Rights Committee. In March 2007 he was elected Vice-President of the Committee for a term of two years.



Professor Ivan Shearer AM

2017 ANZSIL Conference: Save the Date

The 2017 ANZSIL Conference will take place in Canberra from Thursday 29 June – Saturday 1 July 2017. Further details about the conference will be circulated later this year.

Upcoming Events and Calls for Papers

Humanitarian Law & Policy Blog: Call for Contributions

The International Committee of the Red Cross is calling for contributions to its new blog: Humanitarian Law & Policy. Focusing on the interplay between international law and the policies that shape humanitarian action, this blog gathers academics, lawyers and aid workers concerned with how to better protect and assist those affected by armed conflict and other situations of violence. Humanitarian Law & Policy strives to gather committed authors and commentators in an open-minded and interactive environment where innovative ideas may be fleshed out and tested against the expertise of other academics, lawyers and practitioners.

To contribute to Humanitarian Law & Policy, contact the blog's editor Raphaël Dallaire Ferland at rdallaireferland@icrc.org. Your message should include a short abstract of your blog post (2-3 sentences), including the topic and your main point. For more information about contributions, please see the blog's guidelines.

New Appointments

This year, Ben Saul has been appointed the Challis Chair of International Law at the University of Sydney (a chair founded in 1920), and the Gough Whitlam and Malcolm Fraser Visiting Chair of Australian Studies at Harvard University and a Visiting Professor of Law at Harvard Law School for 2017-18.

Publications by ANZSIL Members

The Public Law of Gender: From the Local to the Global, an edited collection by Kim Rubenstein and Katharine Young that examines law's structuring of politics, governing and gender, was published by Cambridge University Press in May 2016. The book was launched at ANU by the Commonwealth Sex Discrimination Commissioner Kate Jenkins. More information about the book and the launch is available here.

ANZSIL Interest Group Updates

Inaugural meeting of the ANZSIL Oceans and International Environmental Law Interest Group

Members of the newly established ANZSIL Oceans and International Environmental Law Interest Group met for the first time in the margins of the 24th ANZSIL Annual Conference. The ANZSIL Oceans and International Environment Law Interest Group provides a forum for discussion and collaboration between ANZSIL members in all areas of law of the sea and international environmental law. Given the significant maritime interests and unique environments of Australia and New Zealand, these are important areas of international law which ANZSIL members have long been closely involved with and have made important contributions to. This group seeks to continue and actively encourage this tradition, by facilitating the exchange of information and ideas, and the development of professional networks between academics, practitioners, public policy makers and students of international law on issues relating to the law of the sea and international environmental law.

The Co-Chairs for the group are Camille Goodman, a PhD candidate at ANU College of Law, and Holly Matley, a Senior Legal Officer at the Australian Attorney-General's Department. The group discussed possible options for events and activities this year. In the short term, the group agreed that it would be timely to hold a workshop on the decision in *The South China Sea Arbitration (The Republic of the Philippines v the People's Republic of China)*, now that the now that Annex VII Arbitral Tribunal has rendered its Award. The Co-Chairs will look to organise a workshop to discuss the implications for Australia and New Zealand and the law of the sea more broadly.

In the longer term, the Group agreed that it would be beneficial to hold a symposium or workshop to discuss developments in the work of the Preparatory Committee established to develop elements of a draft text for an internationally legally binding instrument on the conservation and sustainable use of marine biological diversity in areas beyond national jurisdiction under the United Nations Convention on the Law of the Sea. This prospective treaty is shaping up to be a hugely significant development in the international law of the sea framework and international environmental law and fits well within the interest group's mandate. It was agreed that this event should take place after the second session of the Preparatory Committee, which is scheduled to take place in New York from 29 August 2016-9 September 2016.

Membership of the Interest Group is open to all ANZSIL members. To join and hear about upcoming activities and events, simply log in to the ANZSIL website and update your membership details. A reminder that if any members would like to be involved in steering the activities of the group (either as part of a small committee or as a vice-chair), please email Camille and Holly: Camille.goodman@anu.edu.au and holly.matley@ag.gov.au.

Recent New Zealand Practice in International Law
(Minister of Foreign Affairs and Trade)

>Review Conference on the UN Fish Stocks Agreement

The resumed Review Conference on the United Nations Fish Stocks Agreement 1995 (UNFSA) was held in New York, 23 to 27 May 2016. This was the third meeting of the Review Conference (Rev Con).

In 2006 and 2010, the UN convened conferences to review the effectiveness of the UNFSA in securing its conservation and management aims. These resulted in the adoption of recommendations aimed at improving the effectiveness of the UNFSA and served as a catalyst for a number of important processes designed to enhance the governance and coordination of regional fisheries management organisations (RFMOs). These included the need to improve the state of fish stocks, for RFMOs to revise their mandates for consistency with UNFSA, and for annual compliance assessments of RFMO members.

The Rev Con this year presented an important opportunity to take stock of progress to date and identify ways to further strengthen the effectiveness of the UNFSA and the RFMOs that operate under its umbrella, as well as to address specific global concerns which are of key interest to New Zealand and the Pacific – particularly illegal, unreported and unregulated fishing, participatory rights within RFMOs, and the compatibility of the UNFSA and a possible regime for the management of marine biodiversity beyond national jurisdictions, which is currently under negotiation in New York.

The Rev Con conducted a line-by-line review of the implementation of the recommendations of the 2006 and 2010 Rev Cons, and proposed means of strengthening the substance and implementation of the Agreement. The Rev Con adopted a consolidated list of strengthened and new recommendations covering everything from the application of precautionary and ecosystem approaches, to the provision and sharing of data, and appropriate RFMO governance arrangements. An advance report on the outcomes of the conference, including the recommendations adopted, can be found here.

>World Trade Organisation (WTO) panel to make rulings and recommendations on Indonesian restrictions on agricultural products

On 18 March 2015, New Zealand submitted a request to the Chair of the WTO Dispute Settlement Body for the establishment of a panel in the *Indonesia – Importation of Horticultural Products, Animals and Animal Products* (WT/DS/477) dispute. The decision to proceed to a WTO panel responds to New Zealand's concerns about Indonesia's import restrictions on agricultural products, which have had a significant impact on New Zealand's exports to Indonesia in recent years. For example, beef exports have fallen by over 80% in what was once a significant export market while trade in a number of horticultural products has been held back. A single WTO panel was constituted to hear New Zealand's dispute and the United States' dispute concerning the same Indonesian measures. Written and oral submissions have now been made by all parties, and numerous questions from the Panel have been answered. The Panel's report is expected before the end of the year.

>New Zealand participation as a third party in WTO disputes

Indonesia – Chicken Meat and Products (WT/DS484)

On 3 December 2015, a WTO dispute settlement panel was established to hear Brazil's complaint challenging Indonesia's restrictions on the importation of chicken products. A number of the measures challenged by Brazil, while focused on chicken meat, overlap with those regarding agricultural imports raised by New Zealand and the United States in their own WTO dispute with Indonesia. New Zealand has made submissions to the Panel in writing and orally at the third party hearing held in July this year.

United States – Tuna II (Mexico) (WT/DS 381)

New Zealand is participating as a third-party in the compliance phase of WTO proceedings bought by Mexico challenging the United States' revised regulations that set out when tuna products sold in the United States may be labelled as "dolphin-safe". New Zealand's participation reflects its commercial and systemic interest in ensuring that environmental labelling is pursued within the parameters of WTO Agreements. It also reflects New Zealand's systemic interest in matters related to compliance with the WTO Dispute Settlement Body's rulings and recommendations.

Korea – Import Bans, and Testing and Certification Requirements for Radionuclides (WT/DS495)

New Zealand is participating as a third party in WTO dispute settlement proceedings brought by Japan which challenge Korea's import bans and additional testing and certification requirements on certain food products from Japan. These sanitary and phytosanitary measures were adopted in 2011 in response to food safety concerns following the Fukushima nuclear disaster, and are still in place. New Zealand presented an oral statement at the third party session of the dispute on 12 July 2016, focusing on issues relating to the transparency of sanitary and phytosanitary measures, and provisional measures.

Recent developments with New Zealand's Free Trade Agreements

The Trans-Pacific Partnership Agreement (TPP) was signed on 4 February 2016 in Auckland. The TPP will liberalise trade and investment between 12 Pacific-rim countries: Australia, Brunei Darussalam, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, the United States and Viet Nam.

New Zealand's Foreign Affairs, Defence and Trade Select Committee completed its international treaty examination of the TPP and reported to the New Zealand House of Representatives on 4 May 2016. The TPP will be implemented in New Zealand through legislation and regulations.

New Zealand is also currently actively involved in negotiations in respect of the Pacific Agreement on Closer Economic Relations - Plus (PACER Plus), the Regional Comprehensive Economic Partnership Agreement (RCEP) and the Trade in Services Agreement (TiSA).

Recent Australian Practice in International Law
(Commonwealth Attorney-General's Department and the Department of Foreign Affairs and Trade)

> Philip Morris Asia v Australia – Bilateral Investment Treaty Dispute

As reported in ANZSIL Perspective No. 6, on 17 May 2016, the Arbitral Tribunal constituted under the 1993 *Agreement between the Government of Australia and the Government of Hong Kong for the Promotion and Protection of Investments* published its reasons for dismissing Philip Morris Asia's case on the PCA website. The Tribunal unanimously found that Philip Morris Asia's claim was an abuse of rights, concluding:

> … the initiation of this arbitration constitutes an abuse of rights, as the corporate restructuring by which the Claimant acquired the Australian subsidiaries occurred at a time when there was a reasonable prospect that the dispute would materialise and as it was carried out for the principal, if not sole, purpose of gaining Treaty protection. Accordingly, the claims raised in this arbitration are inadmissible and the Tribunal is precluded from exercising jurisdiction over this dispute.

In reaching its conclusion, the Tribunal rejected Australia's other preliminary objections and also rejected PM Asia's claim that it had controlled the Phillip Morris subsidiaries in Australia since 2001. As this concludes the arbitration in Australia's favour (subject to finalisation of the costs claim) the Tribunal did not consider the merits of Philip Morris Asia's claims. The tribunal in this arbitration was composed of Professor Karl-Heinz Böckstiegel (president), Professor Gabrielle Kaufmann-Kohler and Professor Donald McRae.

>Australia Participating in first conciliation under UN Convention on the Law of the Sea (UNCLOS)

Australia is participating in the first conciliation brought under the Annex V provisions of UNCLOS. The conciliation was initiated by Timor-Leste on 11 April 2016, pursuant to Article 298 of UNCLOS, to settle its dispute over maritime boundaries with Australia. Article 298 of UNCLOS provides a compulsory dispute resolution mechanism where parties to UNCLOS have made a declaration excluding maritime delimitations from

compulsory dispute resolution procedures entailing binding decisions under UNCLOS, and enlivens the Annex V conciliation mechanism.

The five-member Conciliation Commission was constituted on 25 June 2016 and is chaired by H.E. Ambassador Peter Taksøe-Jensen (Denmark). The other members of the Commission are Dr. Rosalie Balkin (Australia), Judge Abdul G. Koroma (Sierra Leone), Professor Donald McRae (Canada and New Zealand), and Judge Rüdiger Wolfrum (Germany). With the agreement of the Parties, the Permanent Court of Arbitration acts as Registry in the proceedings.

The Conciliation Commission held its first meeting with the Parties on 28 July 2016 to discuss procedural matters. The next step in the proceedings will be a hearing from 29 to 31 August 2016 at which the Parties will address the background to the conciliation and certain questions concerning the competence of the Commission.

Further information on these proceedings can be found here.

>Chester Brown International Law Commission (ILC) candidacy

As reported in a previous ANZSIL Newsletter, the Australian Government, together with the New Zealand and Canadian governments, announced in May 2016 Professor Chester Brown's candidature for election to the ILC. The election, which will take place at the UN in New York in November 2016, will see 34 international legal experts elected to the ILC for five year terms (2017-21).

As the UN body responsible for encouraging the development and codification of international law, the ILC plays an important role in upholding the rule of law internationally. Several pivotal international legal instruments have been developed through the ILC, including the Statute for the International Criminal Court, the Vienna Convention on the Law of Treaties and the Articles on State Responsibility.

Professor Brown is a highly accomplished international law expert, with a breadth of experience across government, academia and as a legal practitioner. He has made a significant contribution to the teaching and practice of international law, with work spanning international dispute settlement, State responsibility, State immunity, international environmental law, and trade and investment law. Professor Brown has represented and advised several governments, including the Australian Government, on a range of international law matters. He has a substantial record of service as counsel in international investment arbitrations, inter-State arbitrations, and proceedings before the International Court of Justice.

Professor Brown has been a visiting scholar at Harvard Law School and holds a doctorate from the University of Cambridge. Professor Brown currently serves as Professor of International Law and International Arbitration at the University of Sydney. He speaks English, French and German.

The last Australian member of the ILC was Professor James Crawford AC – now Judge Crawford of the International Court of Justice – who served from 1992-2001. New Zealander Bill Mansfield served on the ILC from 2002-06.

>Negotiations commence for a new implementing agreement to UNCLOS

In June 2015, the UN General Assembly agreed, in Resolution 69/292, to commence treaty negotiations for a new implementing agreement under UNCLOS on the conservation and sustainable use of marine biological diversity beyond national jurisdiction.

The negotiations will address possible global principles and standards on: access and benefit sharing for marine genetic resources; area-based management tools, including marine protected areas; environment impact assessments; and capacity building and technology transfer.

The Preparatory Committee (PrepComm), established by Resolution 69/292, held its first meeting from 28 April to 8 May this year. It will meet again from 26 August to 9 September, and twice more in 2017. The PrepComm's mandate is to make substantive recommendations, to the General Assembly and by the end of 2017, on the elements of a draft treaty text.

Discussions at the first PrepComm meeting were open and productive, with significant common ground among delegations on key principles. New Zealand, Australia and Pacific Island States were particularly active. Mr John Adank (New Zealand, MFAT) chaired the PrepComm's working group on area-based management.

The delegations of Australia and New Zealand will continue to work closely together towards our common goal of securing the establishment of an effective new regime for conservation and sustainable management of marine biological diversity beyond national jurisdiction. Such a regime must complement and harmonise relevant existing regimes, including at the regional level.

>Malaysian Airlines flight MH17 – Work on an accountability mechanism

Malaysia Airlines flight MH17 was downed on 17 July 2014 in eastern Ukraine near the Russian border – the scene of heavy fighting between Ukrainian government forces and Russian-backed rebels. The Australian Government has made clear that securing justice for the 298 victims of the downing, including 38 who called Australia home, continues to drive its efforts to achieve international accountability for this atrocity.

As a member of the UN Security Council (UNSC), in the immediate aftermath of the downing of Malaysia Airlines flight MH17 the Australian Government quickly pushed for and secured a strong response by the UNSC to this clear violation of international law and threat to international peace and security. UNSC Resolution 2166 of 2014, adopted on 22 July 2014, demanded that those responsible for the downing be held to account and that all States cooperate fully to ensure accountability.

Together with international partners (the Netherlands, Malaysia, Ukraine and Belgium), Australia garnered strong support for a UNSC-backed international tribunal: Russia's veto of this initiative in July 2015 was viewed as deeply disappointing for the Australian Government. Undeterred, Australia has worked since to establish an alternative prosecution mechanism.

The Department of Foreign Affairs and Trade has led negotiations with international partners to develop prosecution options that will ensure international criminal accountability and capture the harm done to all victims – a complex and difficult task given the multiple jurisdictions involved. Australia's objective is to agree with international partners on a prosecution mechanism before the end of 2016.

Achieving this result will deliver on the Australian Government's commitment to ensure accountability for the perpetrators of this crime, and underline Australia's fundamental commitment to the international rule of law.

>Developments in Regional Fisheries Management Organisations

Further to similar texts previously adopted within the Commission for the Conservation of Antarctic Marine Living Resources and the South Pacific Regional Fisheries Management Organisation, both the Indian Ocean Tuna Commission (IOTC) and the Meeting of the Parties to the Southern Indian Ocean Fisheries Agreement (SIOFA) have recently adopted instruments, proposed by Australia, encouraging States to take action to prevent stateless vessels engaging in illegal, unreported and unregulated (IUU) fishing. The IOTC adopted a Resolution to this effect at its 20th Annual Session in May, and the SIOFA Meeting of the Parties adopted a legally binding Conservation and Management Measure (CMM) at its 3rd ordinary meeting in July. For SIOFA, the stateless vessel CMM represented the very first CMM adopted by this relatively new fisheries regime.

The SIOFA Meeting of the Parties in July also adopted a number of other important instruments, each of which makes an important contribution to strengthening the substantive and administrative effectiveness of the agreement. These include formally establishing its Secretariat, approving the text of the Headquarters Agreement for the hosting of the Secretariat in St Denis, La Reunion, adopting Staff Regulations and Financial Regulations, and appointing its inaugural Executive Secretary. The Meeting also adopted CMMs on bottom fishing, gill nets, data standards, and Authorised and IUU Vessel Lists.

>Celebrating the 25th anniversary of the Antarctic Environmental Protocol

2016 is the 25th anniversary of the signing, on 4 October 1991, of the Protocol on Environmental Protection to the Antarctic Treaty. The Protocol is a landmark agreement within the Antarctic Treaty System that halted the entry into force of the Antarctic minerals regime, imposed an indefinite ban on mining in Antarctica, declared Antarctica as a natural reserve devoted to peace and science, and committed Parties to the comprehensive protection of the Antarctic environment. To mark this anniversary, Consultative Parties to the Antarctic Treaty adopted the Santiago Declaration during the 39th Antarctic Treaty Consultative Meeting, held in Santiago, Chile from 23 May to 1 June 2016. The Declaration reaffirms Parties' strong and unwavering commitment to the objectives and purposes of the Antarctic Treaty and the Environmental Protocol.

>Participation in WTO Dispute Settlement as a third party

Australia has actively participated as a third party in a number of WTO disputes in 2016, which has enabled Australia to make submissions to dispute settlement panels and the WTO Appellate Body on the operation of trade rules in support of Australia's commercial interests. Since April 2016, Australia has participated in two disputes:

- *Indonesia – Measures Concerning the Importation of Chicken Meat and Chicken Products* (DS484) – Australia submitted a third party submission, and participated in the July third party session before the Panel. Australia is involved in this dispute given the importance of transparent market access in Indonesia, which is Australia's 10th largest export market.
- *European Union – Anti-Dumping Measures on Biodiesel from Argentina* (DS473) – Australia submitted a third participant submission, and participated in the July hearing before the Appellate Body. Australia chose to participate in this appeal as it addresses the methodology used in anti-dumping investigations.

An overview of Australia's approach to WTO disputes, and copies of Australia's submissions to the WTO Panel and Appellate Body for the disputes listed above, can be viewed here.

The Department of Foreign Affairs and Trade has also been conducting outreach activities with industry, government, legal and academic stakeholders on Australia's use of the WTO dispute settlement system. Through outreach, Australia is aiming to provide better market access outcomes for Australian exporters. For further information contact trade.law@dfat.gov.au.

>Recent developments with Australia's Free Trade Agreements

FTA Implementation

Since entry into force on 20 December 2015, implementation of the China-Australia Free Trade Agreement (ChAFTA) has been broadly successful, building on the recent entry into force of both the Korea-Australia Free Trade Agreement (KAFTA) and Japan-Australia Economic Partnership Agreement (JAEPA). Trade data suggests strong uptake by business, with strong growth in exports of many Australian products where tariffs are being cut. Feedback from services suppliers and investors has also been positive.

DFAT and other agencies are taking forward with China, Korea and Japan the ambitious built-in agendas in each agreement. DFAT welcomes contact at any point on the operation of Australia's free trade agreements, including the recently concluded North Asian FTAs, particularly ahead of Joint Committee and other FTA implementation meetings.

The Joint Standing Committee on Treaties continued to consider the TPP, following its signing on 4 February 2016 in Auckland and the tabling of the TPP text and accompanying National Interest Analysis in the Australian Parliament on 9 February 2016. On 17 May 2016, Ministers from TPP countries met on 17 May 2016 to review progress on their respective internal processes to approve the agreement.

FTA Negotiations

In April, Australia hosted the 12th round of negotiations for the RCEP, with a further round held in Auckland in June.

On 6 May 2016, the substantial conclusion of the Third Review of the Singapore-Australia Free Trade Agreement (SAFTA) was announced. The SAFTA Review was an initiative of the Australia-Singapore Comprehensive Strategic Partnership and sought to update and modernise SAFTA in line with the outcomes achieved in the TPP, which included both Singapore and Australia. The SAFTA review delivers enhancements in areas such as trade in goods, services, investment and government procurement. Officials are completing legal review of the text, ready for approval by both countries consistent with their respective domestic processes.

Also in May, negotiations for the Indonesia-Australia Comprehensive Partnership Agreement (IA-CEPA) resumed in Yogyakarta, Indonesia, the first round since 2013.

In July, Australia chaired a negotiation round of the 23-party TiSA, which included a stocktaking exercise to chart a path to conclude in 2016. Australia co-chairs the negotiations with the EU and US. Australian service suppliers stand to benefit from new rules that will promote greater openness internationally, with TiSA parties collectively accounting for around 70 per cent of global trade in services.

Australia continues to be involved in active negotiations for the PACER Plus. A Special Pacific Islands Trade Ministers Meeting on PACER Plus is scheduled to take place in Christchurch on 26 August 2016 to advance further the negotiations. Preliminary work is being undertaken toward the launch of negotiations for the Australia-European Union Free Trade Agreement.

>ANZSIL Conference 2016

The ANZSIL Annual Conference was held this year from 29 June-1 July at ANU in Canberra. The day before the conference began the ANZSIL postgraduate workshop took place. It was organised by Daniel Joyce and Petra Butler with Daniel acting as Chair on the day of the workshop. The participants at the postgraduate workshop attended the ANZSIL Conference and very kindly acted as rapporteurs. Their reports, which provide a great summary of the panels that took place, are produced below.

Keynote Speaker: Marco Sassòli
Rapporteur: Paul McGorrery

Professor Sassòli delivered the first keynote presentation of the Conference. He outlined the difference between theory (optimism) and reality (pragmatism) in public international law, and made a case for the importance of maintaining that distinction. To do this, he employed examples from international humanitarian law. International humanitarian law, he said, increasingly over-promises and under-delivers. But this does not need to be a bad thing. Although Hume famously made the point that it is a fallacy to confuse "what ought" with "what is", Professor Sassòli contended that the law should always primarily be concerned with "what ought", as long as it does not lose sight of "what is". He drew on several examples to make the point: the difference between what diplomats say in New York and Geneva and what their countries do; the difference between states being in favour of liberalisation while enacting protectionist policies; and the increasing prevalence in common law countries for judicial activism, with judges creating new laws despite professing to be applying old laws.

Sassòli contended that scholars and international tribunals have developed coping mechanisms to deal with this gap between theory and practice. The first has been to take the stance that what matters is official practice, not actual practice, as has happened in both Nicaragua and Syria. Alternatively, some scholars have suggested that violations in fact *reinforce* the rule. On this point, Professor Sassòli did not agree: weaker rules would be preferable, he said, than strong rules that no one follows. Developing new rules, and increasing the number of violations of international norms, simply entrenches an attitude of not feeling the need to comply. He concluded his presentation with a few salient points: first, the gap between theory and practice is inevitable; second, the key is to not let that gap become too large; and third, in order to minimise that gap, the law should strive for an ideal state of affairs, while remaining realistic about likely compliance rates. This idealistic pragmatism, he said, would better protect the credibility of international law.

Keynote Speaker: Richard Wilson
Rapporteur: Paul McGorrery

Professor Wilson's presentation examined the prosecution of individuals for marginalising, persecuting, and disparaging others through hate speech, and inciting others to violence and genocide. The notion that hate speech could qualify as an international crime developed primarily in the post-World War II era, with the creation of the Genocide Convention (1948), Article 4(a) of the International Convention on the Elimination of All Forms of Racial Discrimination (1965), and Articles 19 and 20 of the International Covenant on Civil and Political Rights (1966). Despite these legal developments though, drawing on what Professor Sassòli pointed out in his earlier presentation, Professor Wilson noted that the law on the books did not become the law in practice until about fifty years later. It has only been in more recent years that there have been prosecutions for international speech crimes, with a relatively high conviction rate. Professor Wilson further pointed out the possibility of hate speech crimes being used as a preventive

measure. He noted, however, that this idea has yet to be realised with all cases of incitement to genocide coinciding with actual genocides.

This unrealised preventive opportunity could, he suggested, be due to the challenge of establishing causation in hate speech crimes. How can we tell whether particular hate speech is capable of inciting violence? One method is to point to the actual violence that follows it; as he puts it, "chronology proves causation". This, though, does not assist in prosecutions of hate speech *sans* subsequent violence. He suggested instead turning to social science, which would allow judges to move away from colourful metaphors for hate speech ("fire", "viral contagion" and "poison"), and instead offer a multifactorial combination of ten factors that increase the likelihood of proposed violence turning into actual violence. These include (1) the speaker having a position of authority; (2) the speaker being credible; (3) the speaker being charismatic; (4) the speaker using calls for vengeance or dehumanising references; (5) the speaker using intense graphic language; (6) the speaker being experienced by the audience as powerful; (7) the message being repeated across a variety of platforms; (8) the speaker having a monopoly on the means communications (or an ability to censor communication); (9) the emotional state of the audience being uncertain or insecure; and (10) the speech arousing fear by labelling direct identifiable threats (and not just instilling an abstract feeling of fear). Professor Wilson is intentional in proposing a probabilistic view of causation, citing Moore's discussion in *Causation and Responsibility* (2009) that "sparks are not sufficient for fires, nor are they universally followed by fires, but sparks do raise the conditional probability of fires". These ten factors from social science research are the sparks of hate speech that raise the conditional probability of the fire of actual violence.

Professor Wilson concluded by suggesting that international prosecutors should start charging for inchoate crimes and using hate speech crimes as preventive measures. He also said that the international judiciary should provide a clearer statement of the test for causation in hate speech cases and that there was a need for guidance on the admissibility of social science research on what makes hate speech more or less likely to lead to actual violence.

Richard Wilson

Keynote Speaker: Sundhya Pahuja
Rapporteur: Genevieve Wilkinson

Sundhya Pahuja presented a fascinating keynote address arguing that the most pressing task for the international lawyer of today is to practise international law and undertake international legal scholarship in ways which allow us to respect other laws and different accounts of the law. She used Nehru's letters to his daughter from prison and accounts from the Bandung Conference to present a view of international law distinct from European imperialism and post-war liberal internationalism.

In Bandung, rival visions of law co-existed, in contrast to the contemporaneous competing Eurocentric versions of international law. This Bandung approach permitted international law to have a role of encounter rather than a focus on the transformation of others. Nehru and Bandung teach us that in the 1940s and 1950s a multiplicity of laws and world views continued to exist in post-colonial countries. Sundhya used Nehru's story, accounts of Bandung and her personal story as a lawyer trained in the European legal tradition to reflect on the centrality of history to pedagogy. She argued that in that role she identified a responsibility to infuse European law with dignity and this should include respect for the fact that everybody is located somewhere and consideration and thought should be given to the importance of that location. This includes interrupting the idea that European visions of international law have, and have had, no rivals to that vision. In order to achieve this interruption Sundhya advocated adopting the approach of historically inflected jurisprudence, as opposed to jurisprudentially inflected history.

Keynote Speaker: Anthea Roberts
Rapporteur: Timothy Horn

Keynote speaker Anthea Roberts, who has taught international law in the US, the UK and Australia, discussed whether international law is indeed international. This core question lies at the heart of her ongoing research project for a future publication with OUP. The starting point for Roberts' interrogation was her personal observation of the differences in approaches and understandings that exist between the three seemingly similar western, Anglophone, common law countries where she has taught. In order to examine these disparities in more depth, Roberts outlined a series of questions which she addressed by turning to legal pedagogy and scholarship within the domestic settings of the five permanent members of the UN Security Council (China, Russia, the UK, the US and France). Roberts queried the nature of international law itself. Do different national versions of international law exist in different countries, and if so, could international comparative law emerge as a discipline of study? Or alternately, as is typically posited, does one body of law exist, an international composite like Esperanto, which is practised by an invisible college of lawyers? Or instead could international law be understood as a projection of domestic law onto the international sphere with English as its *lingua franca*?

Roberts examined multiple sources of evidence, from legal textbooks, to the flow of students and teachers between regions, to the career paths of judges and lawmakers. Legal textbooks are a particularly rich resource to use in testing the international characteristics of international law. Roberts turned to the number of cases cited in national textbooks, from where she identified, for example, a bias to foreign relations cases in US syllabi with 70% of cases being US cases as opposed to Chinese syllabi where no Chinese cases were identified. The sources of textbooks also came up in Roberts' analysis, where she examined the provenance of texts used to teach international law. This revealed for example that in India, all textbooks are British, while in Senegal all textbooks are French. Roberts provided nuance to her examination by underlining the different connections to practice in common law and civil law jurisdictions, which treat jurisprudence differently.

As for the flow of academics, teachers and students, Roberts noted two forms of asymmetry – while students travel from the non-West to the West, knowledge flows from the core to the periphery. Missing here is the transmission of knowledge from the periphery to the core, as well as a lack of understanding from the West of how the rest of the world operates. Although anticipating that English will continue to grow in importance as the dominant language of international law, Roberts rounded out her discussion by concluding that a new era may be on the horizon, one of multi-polarity and un-like-minded states with competing visions and approaches to international law.

Anthea Roberts

Panel 1: International Dispute Resolution: Past, Present, Future
Rapporteur: Drossos Stamboulakis

Douglas Guilfoyle presented lessons about international law and history from the case of *Mauritius v UK*, decided by a five-member arbitral tribunal established under Annex VII of the UN Convention on the Law of the Sea. The tribunal was chaired by Ivan Shearer. The other members were ICJ Judge Sir Christopher Greenwood and ITLOS Judges Hoffmann, Kateka, and Wolfrum. The case involved questions as to the sovereignty of the Chagos archipelago, the alleged illegal excise of the archipelago from Mauritius' territory and undertakings in this respect prior to its independence from the UK, and the subsequent lease of the land and grant of a marine protection area by the UK for US military purposes. The question in the 2014 case was the extent to which the UK's unilateral declaration of a marine protected area violated the rights of Mauritius.

Mauritius succeeded in its argument that inadequate consultation occurred before the UK declared its marine protection zone around the Chagos Archipelago, contrary to the understandings arrived at on the independence of Mauritius from the UK. However, Mauritius failed (by 3 votes to 2) in its additional argument that a tribunal under the Law of the Sea Convention could decide questions of sovereignty over land territory.

Guilfoyle argued that the major lesson from this dispute is the way in which legal disputes are, and can be, used to remake historical events. This is because in disputes the primary truth that arises is that of the adversarial conception of a "trial truth", as presented by the parties. In this conception, the "truth" is what is agreed or argued between the parties, but it may not be a complete truth – particularly as the final award only reflects a fragment of the entirety of what is argued. Given the sheer volume of documentary evidence in this dispute, spanning decades and providing insights into daily decision making during the colonial era, this documentation could be used to shape the trial truth. This truth speaks to more than just the tribunal, and extends to rewrite history.

A major rewriting of history occurred by the tribunal finding that undertakings given pre-independence created legal rights for Mauritius and these had been arbitrarily affected by the UK's marine protected area declaration. This reflected the historical position of Mauritius, and its desire to address perceived wrongs that had occurred with respect to the original grant of independence. While this might seem a small legal victory, Mauritius was successful in rewriting by history by transforming what was at the time give not a legally enforceable promise into a set of presently enforceable legal rights in the archipelago.

Kanstantsin Dzehtsiarou posed the question: can the European Court of Human Rights (ECHR) prevent war? His answer was no because that the use of interim measures in inter-state cases before the ECHR is misconceived, and can have little or no impact on preventing war. In addition, the grant of ineffectual interim measures diminishes the overall efficacy of the ECHR in these cases. In this way, granting interim measures in inter-state cases is likely to be counter-productive. Because of its limited ability to prevent ongoing war via interim measures, the key role for the ECHR should be, it is argued, solely to address *post factum* claims by providing a remedy after violation.

While interim measures were purposefully not canvassed in the establishment of the ECHR, they have developed in the jurisprudence of the ECHR as it relates to individual applications. They have been developed to respond to two main scenarios: the need for immediate action in extradition cases, and to allow prisoners to seek necessary healthcare outside of prison. Interim measures for individual applicants are usually complied with by the State they are granted against, and are seen as very effective as their scope is clear, they are not expensive for States to comply with, and they only involve a single State. By contrast, none of these reasons are effective in State-to-State cases before the ECHR. Instead, interim measures in this context have an unclear scope, would be costly to comply with, are unlikely to be complied with, and add nothing (legally) to the existing obligations of States.

Ashique Rahman reviewed the rights to challenge arbitrators that parties to the ICSID Convention have, and argued that in a number of instances State respondents have used these challenge procedures in a manner constituting an abuse of practice. For example, a recalcitrant party that intends to thwart the progress of an arbitration may, as a litigation tactic, exercise its 'right' under Article 57 and Rule 9 of the ICSID Convention to trigger an automatic suspension of the arbitration, derail the procedural timetable for the arbitration and potentially delay an award in the arbitration by many months, if not years. This is a lacuna in the ICSID Convention and the Rules and arguably it is exploited by parties in investment treaty arbitration.

Rahman reviewed three cases involving Venezuela as a State respondent to International Centre for the Settlement of Investment Disputes (ICSID) proceedings, which he argued likely represent an abuse of challenge rights: *ConocoPhillips*, *Koch Minerals* and *Owens-Illinois*. At the same time, he noted that there is little scope for ICSID or the tribunal to respond directly to these abuse of challenge proceedings. It is exceedingly difficult to amend the ICSID Convention or its rules (absent complex, lengthy and expensive negotiations), and any agreement or tribunal order to press on with a hearing despite a challenge may provide a ground for challenge of any eventual award. Nonetheless, Rahman's case review also demonstrated that the institutional practice of ICSID is not static. Rather, it evolves in tandem with the increased use (or abuse) of challenge proceedings. ICSID in recent years has reformed its institutional practices to be able to respond much more quickly to any challenge applications, and hence limit the ability disputants have to engage in an abuse of challenge proceedings.

Panel 2: Land, Territory, Jurisdiction
Rapporteur: Genevieve Wilkinson

The speakers considered different notions of jurisdiction. Edwin Bikundo used Karl Schmitt and Goethe's Faustian imagery as a tool to provide additional clarity to the dispute about the South China Sea. He considered competing visions of the dispute and presented them as rival conceptions of legal orders and a local dispute. Bikundo considered Schmitt's vision of the land and sea as elements open to human choice and empowerment and the way in which this corresponds to the Faustian myth. He noted the changing role of the pirate in relation to the changing nature of sea as an element. He

reflected on the way in which the South China Sea dispute highlights the importance of judicial interpretation of jurisdiction, as well as enforcement and legislation. He suggested that in the absence of judicial interpretation, jurisdiction could find itself at the vanishing point of international law.

Camille Goodman focused on the links between sovereignty, territory and jurisdiction in her analysis of the continuing applicability of the *Lotus* decision to states' jurisdiction. She argued that despite the perceptions that the approach taken in the Lotus Case is contrary to state practice, that the judgment continues to reflect international law in relation to jurisdiction. The correct interpretation of the Lotus Case proposes that extraterritorial prescriptive jurisdiction, and its territorial enforcement, is permissible within the limits that international law places upon it. Camille used the example of 115.3 of the *Criminal Code* (Cth) to highlight the additionally important roles of both domestic law and diplomacy in everyday interpretations of the appropriateness of jurisdiction.

An Hertogen explored the concept of good neighbourliness as a way of alleviating friction that arises because of the everyday decisions of states. These acts can have impacts that are broader than mere physical effects and include the economic and psychological impacts of diverse policy decisions including exchange rates, fiscal policy and immigration policies. She considered the interest approach engaged by the concept of good neighbourliness, that States should not do anything in their territory that harms the interests of other states. Importantly states should expect to exercise tolerance. The type of impact and the nature of the impact are important to this process. Other relevant considerations are the duty to cooperate and the duty to assist. Although guidance can be found in the UN Charter and there has been development of basic rules of friendly relations and cooperation from the 1990s, there is scope for international development of the principle. Despite the current focus on environmental issues in the development of notions of good neighbourliness, there are clearly and importantly broader applications.

Panel 3: The International Criminal Court (ICC)
Rapporteur: Paul McGorrery

The general theme coursing through this panel's discussion was summed up rather aptly by the chair of the panel, Leonard Blazeby (Head of Mission for the International Committee of the Red Cross in Australia), at the conclusion of the presentations: "what do we do with troublesome heads of state?"

Jadrana Petrovic and VaskoNastevski were the first to present, discussing the South African government's failure to take Sudanese president Omar al-Bashir into custody when he attended the African Union summit in Johannesburg in 2015. Dr Nastevski began by discussing the charges against al-Bashir. The charges are based on his indirect perpetration and co-perpetration of events in Darfur, with over one million people displaced and hundreds of villages destroyed. The Sudanese government had enlisted local Arabic tribes, and they then went on to intentionally target civilians, engaging in rape, torture, and the forced disappearance of women. Al-Bashir was (and remains, given his outstanding warrant) wanted for five counts of crimes against humanity, two counts of war crimes, and three counts of genocide.

The problem arose, Dr Petrovic said, when al-Bashir attended the African Union summit and the government refused to arrest him, claiming he had "head of state immunity". The South African Litigation Centre commenced emergency proceedings in the High Court (Gauteng Division), contending that the government had failed in its duty to arrest al-Bashir. They succeeded, but too late, as al-Bashir had fled the country hours earlier. The South African Government appealed the decision, though, as it exposed them to considerable criticism, and raised the potential risk of criminal charges for those involved. In March 2016, the South African Supreme Court of Appeal affirmed the High Court's

decision, concluding that the government's failure to take steps to arrest and detain, for surrender to the ICC, the President of Sudan was inconsistent with South Africa's obligations in terms of the Rome Statute and unlawful. Whether the matter will be heard by the Constitutional Court remains to be seen, with appeal papers filed in April 2016. Both Dr Petrovic and Dr Nastevski commended the courts' conclusion that South Africa had both the power and duty to arrest al-Bashir.

The next presentation was a collaboration between Emma Palmer and Hannah Woolaver. Their focus was on the relationship between the Assembly of State Parties (ASP) and ICC. The ASP is responsible for management and oversight of the ICC, is composed of the member-states of the ICC, and meets at least once a year. The danger, they point out, is that this body responsible for oversight of the ICC, might exert undue power over the ICC to the extent of interfering with its independence. Independence is at the core of the ICC. Article 40 of the Rome Statute guarantees judicial independence in the performance of the judges' functions. Article 119 gives the judges of the ICC the exclusive jurisdiction to hear disputes about the functions of the court. And Article 42 guarantees the independence and separateness of the Office of the Prosecutor.

But, as Ms Palmer and Dr Woolaver point out, there are at least two potential circumstances in which the ASP could exert undue influence: first, in changing the rules on whether an accused needs to be present during proceedings (specifically noting the case in which the President and Deputy President of Kenya were excused, under new procedural rules, from attending their entire ICC trial); and second (in line with the adage that whoever holds the purse strings will always be the boss), the ASP can exert control through the budget approval process. Despite these potential areas of ASP control over the substantive work of the ICC, the ASP cannot be subjected to sanctions. In response to these not-so-theoretical risks, Ms Palmer and Dr Woolaver offered three potential options for safeguarding ICC independence. First, the Court itself could reaffirm its own independence using the *ultra vires* doctrine by ruling as unlawful any ASP activities that improperly fail to respect the court's independence. Second, the court could enforce a *sub judicae* rule that shields ongoing cases from external influences (most commonly, this is used to prohibit public comment about ongoing cases, but in this instance, it would operate to limit ASP activities). Third and finally, the court could rely on civil society organisations to protect its independence. This final factor forms the basis of a research project being conducted by Ms Palmer and Dr Woolaver funded by the Australian Research Council assessing the methods by which civil society actors seek to intervene in international criminal tribunals, the findings of which should be available in the near future.

The third presentation on this panel was by Monique Cormier, who examined whether the ICC has jurisdiction over nationals of states that are not members of the ICC, especially heads of state. If the ICC's powers stem from whatever powers the member-states delegate to the ICC, then by extension if a member-state would have jurisdiction, so too could the ICC. She posed the hypothetical scenario: could the ICC prosecute Vladimir Putin (president of Russia, a non-member state) for crimes committed in Georgia? Her answer was yes. She outlined a number of factual assumptions underlying her scenario: (1) there were crimes committed in Georgia that would fall within the ICC's ambit; (2) those crimes were committed by the Russian government; (3) those crimes were referred to the ICC by Georgia; (4) President Putin is criminally responsible for those crimes; (5) there is a customary exception to immunity for heads of state in certain situations; (6) the ICC is an international court; and (7) the ICC was able to actually get custody of Putin. As Ms Cromier persuasively contended, because Georgia would have judicial jurisdiction to hear allegations of crimes committed in Georgia, it could therefore delegate jurisdiction to the ICC.

The fourth and final presentation was by Joanne Lee. She described two predominant models of enforcing international criminal law. The first approach (horizontal) is modelled on the idea that states cooperate together to enforce international criminal law, and is entirely premised on state consent to the jurisdiction of international tribunals. The second approach (vertical) is modelled on the idea that international criminal law transcends state relationships and is enforced somewhat irrespective of state consent. Dr Lee suggested that the ICC regime reflects elements of both inter-state and supra-state enforcement, and thus coins the term 'verti-zontal'. She pointed to the relationship between the ASP and the ICC as an example, neither of which have complete authority over the other.

Panel 4: The Everyday of International Adjudicatory Technique
Rapporteur: Drossos Stamboulakis

This panel – constituted by Caroline Foster, Caroline Henckels and Joshua Paine, and chaired by Bill Campbell QC – involved a lively back and forth on the ways in which international adjudicators employ everyday legal techniques to resolve a range of international law issues.

Joshua Paine argued that international adjudicators strike a balance between certainty (stability) and change (the evolution of law to respond to new demands). Understanding this adjudicatory function is important as there are very few new treaties internationally, but a significant number of new cases to which international law must respond. The burden of dealing with change, particularly that concerning scientific knowledge and technology, thus falls on adjudicators resolving these disputes. Common techniques used to manage change include the negotiation of subsequent treaties (difficult in practice), further agreement on matters of interpretation (as in North American Free Trade Agreement), and the use of "soft law" (for example, when the WTO Appellate Body draws on the decisions of the Technical Barriers to Trade Committee to help determine the weight it should give to standards). Much of this adjudicatory change management is premised on interpreting treaty terms as having an "evolutionary" meaning: a meaning that changes over time, and should be interpreted each time a dispute arises. For example, as seen in the development of navigational rights in the International Court of Justice, and the WTO Dispute Settlement processes.

These arguments lead adjudicators into arguments over how custom has evolved and how it is to be managed in the adjudicative process. In particular, investment treaty disputes exhibit significant differences from others with respect to the adjudicators' ability to manage stability and change over time. While investment treaty arbitrators manage change within international legal norms, they must also consider the host States' regulatory environment, even when an international legal norm may not have changed. A distinct part of the everyday of investment treaty arbitration is deciding on the permissible degree of change within the host State's environment, which may differ from international custom. This requires adjudicators to consider the exercise of power by host states over individuals.

Caroline Henckels argued that the "standard of review" that international adjudicators use should normally defer to governmental decisions where these decisions relate to normative or factual uncertainty. The "standard of review", defined narrowly, refers only to the degree of intensity to which a court or tribunal scrutinises a government's justifications of its actions. Consistent with Paine, the emphasis is on the balance international adjudicators must strike: in this instance, the vertical relationship between state sovereignty on one hand, and State responsibility on the other. This balance is critical as an overly lenient approach to the standard of review may undermine the obligations states agree to in treaties. By contrast, an overly strict standard of review creates the risk

that states may consider this to be unwarranted intervention, and either refuse to comply with a decision or withdraw from a treaty or from the jurisdiction of the tribunal.

Henckels argued that deference is the dominant underpinning factor of the standard of review. Deference in this context refers to the exercise of "restraint" by adjudicators where uncertainty exists in either a normative (based on value judgements), or in a factual (epistemic or empirical) sense. In uncertain situations, Henckels argued, the views of government are more reliable, and adjudicators should defer to this. This is because of, in the case of normative uncertainty, the desire to promote regulatory autonomy in international law (as long as the State is not acting in breach of its obligations, or in a discriminatory manner). Deference to the government reflects the fact that adjudicators face an information asymmetry as they are unlikely to be embedded in the State and are also unlikely to be experts in the particular subject matter. Additionally, on an epistemic level, governments generally have more expertise and information on which to base their decision, and are in a position to better gather and assess complex information, and make complex decisions requiring expertise.

International adjudicators generally defer to governmental decision making bodies when epistemic or normative uncertainty exists. For example, the ECHR employs deference on the basis of normative and empirical uncertainty. By contrast, the WTO, which avoids the language of deference, also takes the same approach. However, Henckels argued, deference is not appropriate in all circumstances, particularly when there is no uncertainty.

Caroline Foster explored the concepts of deference and the standard of review in the context of international adjudicators increasingly being called upon to make decisions that were once exclusively within the domain of national governments. Foster noted that the concept of the standard of review is fictitious – along with Santa Claus and the Easter bunny. This is because international legal rules contained in treaties represent negotiated balances of interests; they are not the rules of one state about its compliance and domestic legal interests. As a result, adjudicators must be careful in determining the standard of review so that it is not unduly deferential to national interest.

Failing to take such care may result in damage to "flanking" international law, such as human rights law or international environmental law. Foster argued that the "regulatory" issues of one of the disputants, cloaked in an international dispute, are not new and have been around the international legal order for a long time (for example, in fishing rights, air pollution and minority treatment – all considered to be core "regulatory" matters by States). The difference now is that international investment law allows disputants to skip a lot of domestic steps — such as constitutional/administrative review — with matters being resolved by international adjudicators more directly.

Panel 5: Panel Discussion - Current Practice of the UN Security Council
Rapporteur: Timothy Horn

Three academics guided this panel discussion with three diplomats from the UK, New Zealand and Australia to shine a light on the work of the UNSC and the impact (or lack thereof) of friction, fieldwork and fairness in its. The view from the UK as a permanent member of the UNSC was contrasted with the views of New Zealand and Australia as elected members of the UNSC. The importance of the penholder was raised from the outset of the panel's discussion, with permanent members often holding this coveted role and benefiting from their institutional memory as permanent representatives in New York. On friction, the panel distinguished various sources of friction. Friction comes to the surface within the UNSC and between its different members (permanent and elected), between the UNSC and different UN agencies, and with other regional and international organisations. A specific example that was highlighted was the role of the elected members in advancing consensus or hindering progress, particularly when permanent

members do not speak with one voice. Panellists underlined that the Permanent five members of the UNSC includes a diversity of viewpoints, with the P3 grouping of the US, France and the UK more commonly united than not.

On fieldwork, the panellists contributed to a frank and rich discussion on the distance that exists between the UNSC and the operations in the field and the importance of bridging this gap in order to match needs on the ground to mandates crafted in New York. With 127,000 staff spread across 17 missions, narrowing the gap between policy and practice is crucial. In this regard, all three practitioners spoke of the impact of the UK-coordinated UNSC visits to Somalia and South Sudan. An expert in the audience, a senior official in the UN system whose mandate includes overseeing best practices in peace-keeping operations, added that these visits create a huge spike in interest and assist in drawing additional resources and attention to conflict situations and are therefore very valuable.

On fairness, all three practitioners conceded that the term is rarely referred to in the day-to-day activities of the UNSC and that this was, in and of itself, striking. Reform continues to be a difficult and thorny terrain for the UNSC, with sporadic advances occurring as a result of political pressure in response to crisis situations. From a law-making perspective, the panel did however highlight recent examples of the UNSC broadening its activities in the case of authorising cross-border transport of aid in Syria and overriding existing law to authorise maritime interdiction on the high seas of people traffickers.

Panel 6: International Trade and Investment Law
Rapporteur: Peng Guo

Zheng Lingli first outlined the sources of conflicts between the Carbon Emission Trade and the WTO, such as the conflict between trade and environment and uncertainty over Emission Trading under the General Agreement of Tariffs and Trade (GATT) and the General Agreement on Trade in Services (GATS). After introducing the concept of Carbon Emission Trading, she continued to address the conflicts between Emission Trading and the GATT. She examined whether Emission Trading could amount to a "good" under the GATT and the rationality of evolutionary interpretation of the term "goods" under the GATT. She then pointed out that states' protection measures in carbon trading may lead to the potential violation of the most favoured nation state principle and the national treatment principle under the GATT. She went on to identify the conflicts between Emission Trading and GATS by discussing whether carbon trading is a commercial, financial or environment service and the problems carbon trading would cause if it were to be considered as a type of service. At the end she proposed a feasible approach to harmonise Emission Trading and the WTO rules.

Elizabeth Sheargold gave a presentation on the evolution of Australia's approach to regulatory autonomy in bilateral investment treaties and preferential trade agreements. Australia has conducted a series of unilateral reforms to further open its market since the 1990s. However, Australia has kept expressing its concerns on domestic regulatory autonomy in the framework of international economic law. In Australia's recent free trade agreements and bilateral investment agreements, variety and inconsistency in the provisions of regulatory autonomy can be identified. For example, Australia has incorporated Investor State Dispute Settlement (ISDS) provision in its trade agreements with Korea and Japan but excluded ISDS provision in its trade agreement with Malaysia. She concluded that Australia's position on regulatory autonomy depends, to a large extent, on its domestic politics. Australia's concern mainly lies in the regulatory governance on intellectual property and investment. However, it is possible that Australia will trade off these concerns with other crucial benefits such as agriculture in future trade and investment negotiations.

Heng Wang stated that there was a convergence of mega-regionals reflected by regulatory disputes, dispute settlement (ISDS and State-to-State Dispute Settlement) and the relationship with the World Trade Organisation. Access to markets, stronger regulatory cooperation, reliance on World Trade Organisation law and the reshaping of trade rules are the main reasons for the emerging convergence. He then analysed the similarities and differences between China's Free Trade Agreements (FTAs) and Mega FTAs and further examined the reasons for their existence. The China-Australia Free Trade Agreement (ChAFTA) faces several challenges, such as interpretation and implementation, limited coverage and benefits, and its relationship with other agreements. For future negotiations, states should start with some issues such as Small and Medium Size Enterprises, SPS and Technical Barriers to Trade (TBT). They should consider dynamics with the RCEP and draft possible clauses to link with other FTAs. At the end he concluded that on the one hand, China would not join the TPP soon while on the other hand, China did not want to be an outsider.

Ofilio Mayorga first stated that foreign investors' property is vulnerable in territory where they have invested. In the case of military occupation and illegal annexation, the investors need to find feasible ways to obtain compensation for the investment in occupied territories. If the investors sue the occupants by invoking Bilateral Investment Treaties (BITs) in situations of occupation, such as the Ukraine-Russia case, there is a risk that the misapplication of the investment treaty regime may contribute to the validation of an unlawful annexation. By analysing the relationship between the law of occupation and international investment law, he suggested that foreign investors can use ISDS to protect their economic interests in occupied territories without undermining the sovereignty of the ousted sovereign. According to Article 43 of The Hague Regulations of 1907, occupants are bound by BIT's signed by the ousted sovereign. Foreign investors, therefore, can bring claims against an occupant by invoking BITs in force in the occupied territory prior to the occupation. The co-application of BITs and international humanitarian law is a method of systematic integration which can help avoid the risk of validation of unlawful annexation and which can reinforce the international legal principle that while an occupant does not assume sovereignty over occupied territory, it is still responsible for its wrongful acts.

Panel 7: The Everyday in War and its Aftermath
Rapporteur: Drossos Stamboulakis

Solon Solomon argued that causing 'incidental' enemy civilian fear should impact on operational targeting in military exercises. This incidental fear, it is argued, must be weighed against — and likely triumph over — military advantage. This is because fear should be considered to be a form of incidental harm, and should play a role in the proportionality principle. Attack patterns do not need to be linked with causing intentional fear; they should be linked with incidental fear, which is an incidence of violent military action. Consideration of this principle in advance will allow military commanders to take appropriate actions where there is a risk of incidental fear being caused.

Solomon noted that according to the views of various international tribunals, the infliction of strong fear leads to terror, which is a war crime. For example, in the *Milosovic* case, the International Criminal Tribunal for the former Yugoslavia (ICTY) linked the causation of terror from fear with the occurrence of serious mental harm. Although it is natural for hostilities to create fear, when this fear surpasses a certain threshold (causation of impairment that is 'non-temporary' and impairs an individual's every day functioning), there is the risk of serious mental harm. As fear is a natural repercussion of force, and is not dependant on intention, civilians can feel fear even if not intended by military acts. As a result, a military commander should abstain from a military act if there is a risk of serious mental harm (including PTSD).

According to Solomon, the litmus test is not whether serious mental harm (or PTSD) will definitively be caused, but the probability of this occurring. For example, military commanders must be acutely aware of this risk in operations involving women and children, as women are more likely to develop PTSD. Indeed, if a military operation is going to take place before women and children, the entire operation should not be sanctioned. That is, the military commander should be aware about the risks of trauma, particularly as the causation of serious mental harm negates humanity. In these cases, it is not simply about military necessity; tensions between military advantage and humanity should always be resolved in favour of the latter.

Rain Liivoja explored the relationship between so-called "go-pills" and the ways in which medical military personnel are protected by international law. Go-pills refer to drugs that various States have started to test and use to try and assist with awareness and functioning of sleep or rest-deprived individuals. Lack of sleep is bad for human functioning, having a similar impact as intoxication. But in some lines of work, rest or sleep is not always possible, particularly in a military setting (for example, pilots in single-man aircrafts must maintain focus despite a lack of sleep over extended periods).

Thus, go-pills are increasingly relevant, and have been explored by a number of militaries. The US military routinely trials and prescribes two types of drugs to military personnel: (1) dexamphetamine; and (2) modafinil. Both France and India also provide the latter, and other States (such as Australia) are following this practice with interest. Because of the nature of these drugs, informed consent is required, as well as controlled dispensation, ground testing, and ongoing monitory and testing. This, Liivoja argued, is a responsible way of doing things; much more so than Vietnam where heavily addictive amphetamines were handed out easily, causing significant issues for military personnel.

Liivoja explored whether medical personnel administering these pills are likely to benefit from Article 24 of the First Geneva Convention, namely, whether the administration of these drugs counts as 'treatment' or 'prevention or disease', as opposed to enhancement. He concluded that there are difficulties in sustaining medical protection, as stimulants such as go-pills likely go beyond treatment, and constitute enhancement, resulting in the loss of protection for medical personnel. There is also an intersection with Article 21 of the Convention, as medical personnel administering go-pills may not be protected by the Convention, for acting outside of humanitarian medical duties, which is harmful to the enemy. This has increasing and ongoing relevance as many States are investigating the use of go-pills, and military medical personnel may not be protected under international law when they administer these drugs.

Cassandra Mudgway explored the concept of the "survival sex" gap in international humanitarian law. "Survival sex" refers to the abuse of unequal power dynamics between peacekeepers and the local populace. For example, where women are forced to have sex for aid or where women approach peacekeepers to trade sex for money. The focus of the presentation was on sex being exchanged for aid already owed, reflecting significant issues in the differential power imbalance (as recognised by the UN), and leading to significant emotional, physical and psychological harm on vulnerable women. Survival sex issues are of particularly significance in post-conflict states, and where institutional structures are possibly impaired, so inequalities are exacerbated and greater marginalisation occurs. For example, the UN stabilisation mission in Haiti demonstrated that violence against women increased particularly against displaced women after the 2002 earthquake. The victims of these abuses are overwhelmingly women and children.

A survival sex gap arises as survival sex is not covered by UN recommendations on abuse, is not required to be criminalised, and states face no legal obligations to exercise criminal jurisdiction in these instances. While the UN as an organisation has a zero tolerance policy for abuse, the UN has no criminal capacity; the most it can do is repatriate

individuals/contingents involved, or likely to be involved in, such abuse. As a result, Mudgway argued that there is an accountability gap for this violent act against women. Mudgway further argued that as survival sex is inter-sectional and structural, that the survival sex gap should be filled. In particular, human rights bodies, such as the UN Committee on the Elimination of Discrimination against Women, should consider taking steps. For example, as the Convention on the Elimination of Discrimination against Women is currently being reviewed, there is scope for survival sex to be covered in General Recommendation 19, which relates to violence against women.

Susan Harris Rimmer argued that in transition from post conflict situations the rights of local women are often overlooked or traded by the diplomatic elite. This lens arises from the peace versus justice narratives, which focus on stability as against accountability for previous crimes. However, this simply raises the questions of whose justice, and whose peace, is the relevant one. Traditionally there has been a dominance of male political elites in these debates. The concern is that the rights of women are traded away by these political elites. This, Rimmer argued, occurred in Afghanistan, as well as in Myanmar where extreme Buddhist monks in Myanmar's parliament constricted women's rights to marry and reproduce.

This concept of trading the rights of women is problematic, as human rights are generally not thought of as tradeable. Rimmer criticised "transition" as a term and the quality of justice the international community is willing to accept. Drawing upon two case studies from transitioning States — in Afghanistan and Myanmar — Rimmer argued that the traditional transition argument is too narrowly focused on institutions, peace processes and security sector reform. She said that there are other landmarks, particularly in criminal cases and status laws, for certain parts of the population such as women. If local women describe these issues as their key justice concerns, then our categories should yield to local realities and local lived experiences.

Panel 8: Law and Policy-Making Beyond the State
Rapporteur: Yujie Zhang

Ben Saul raised the importance of exploring the attitudes and practices of terrorist groups towards law, especially civil law, which has long been ignored by the international legal scholarship. His topic was "Terrorists as Law-Makers, Regulators, Mediators, and Adjudicators: Everyday Life and Justice under Non-State Rule". He believed this exploration will on the one hand help us revisit the philosophical question as how to recognise a law. On the other hand, it could still assist us to deal with practical problems regarding foreign affairs and activities with non-state agencies.

The topic of Peter Lawrence was "Representation of the Voiceless and the International Legal Order: Current Limitations and Future Possibilities". The voiceless was mostly referred to by Peter as the future generation. He believed that in the current legal arrangements regarding environmental protection, the interests of the future generation significantly lack representation. However, according to the fundamental principles of democracy and human rights, they ought to be represented. This representation could be carried out through the presence of environmental scientists in litigation and the work of non-governmental organisations. If the interest of the future generation is represented, then not only will the legal arrangements regarding environmental protection be reformed, but the whole legal order may be renovated.

John-Mark Lyi presented on "Falling through the Cracks: Boko Haram as a Non-State Armed Group and the Inadequate Reach of International Law". This paper focused on terrorist groups, or what Lyi referred to as "Non-State Armed Groups". It focused on finding an effective approach to hold those groups accountable. It argued that to date the

law has been inadequate to address the activities of cross-border groups such as Boko Haram. It suggested that the intervention of the ICC or other regional legal regimes are required.

Panel 9: Disputes over the South China Sea
Rapporteur: Chenxi Wang

Katrina Cooper offered an overview of the background to the disputes over the South China Sea. With six neighbouring countries claiming rights in the region, the disputes over the South China Sea are full of legal, geopolitical and economic controversies. China holds a negative attitude towards the case filed by the Philippines in the international tribunal. According to China, the case is a political provocation under the cloak of law. The award of the dispute between the Philippines and China will have both legal and political impacts on issues concerning the interest conflicts and different sovereignty claims of the two countries.

Donald Rothwell looked at China's claim in the South China Sea from a historical perspective. Starting from the 1910s, China has claimed rights in the region and in 1953 it put forward the claim of the nine dash line. In 2015, China restated the nine dash line to support its contemporary claim in the South China Sea. However, this historical term seems to be inconsistent with the recent international convention and state practice. The award of the disputes between the Philippines and China may clarify the status of China's historical claim of nine dash line.

Natalie Klein reviewed disputes over the South China Sea from the international environmental law perspective. The key issue was whether islands which were artificially transformed from rocks or reefs could be recognised as real islands under international law. Given the technological and economic gap between some powerful countries and other developing countries, the capacity of states to build artificial islands is disparate. Taking this fact into consideration, and the balance between the freedom of the sea and national sovereignty, is crucial to the maintenance of a more balanced international law framework.

Malcolm Jorgensen considered the disputes over the South China Sea from the perspectives of law and politics. The rule based international order is legal on the surface but is subject to political interests deeper down. The legal case between the Philippines and China in the international tribunal is doctrinal. China's claim on the South China Sea is political in the sense that it reflects China's historical view on Asian regional order and China's national interests. Given that China is growing, prosperous and influential, it is necessary to incorporate China into the international order.

Panel 10: Tobacco Plain Packaging Dispute
Rapporteur: Genevieve Wilkinson

This panel considered the *Tobacco Plain Packaging Act* and focused on the friction that can emerge when domestic policy is challenged by external actors.

John Atwood explained Australia's involvement in the arbitration between Philip Morris Asia and Australia. He argued that one of the reasons that the dispute had attracted so much attention was that Australia had never previously been the respondent in an investor

state dispute. He noted that there had been numerous developments in FTA practice since the commencement of the arbitration, including greater emphasis on public welfare clauses, a specific tobacco carve out from the investor state dispute settlement clauses in the TPP and the use of state-to-state discussions prior to the commencement of investor state disputes where certain public welfare matters are engaged. He emphasised that matters of transparency in relation to these proceedings could be nuanced. In the case of the Philip Morris Asia arbitration, the overlapping issues in the WTO dispute meant that there were some advantages for Australia in accepting the confidentiality regimes that were imposed.

Dilan Thampapillai considered the WTO plain packaging disputes in his analysis of the issues raised in that dispute surrounding the existence of implied use rights of trade mark owners. He argued in support of implied use rights in the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) and suggested that the plain packaging legislation did not meet the requisite level of necessity to establish that it was not an unjustifiable encumbrance on the rights of trade mark owners. Dilan raised concerns about the signal effect of plain packaging for intellectual property law, international law and contract law. He noted that the legislation and the surrounding disputes may have an unexpected impact on a large numbers of other fields involving sophisticated corporate actors and vulnerable consumers, where these interactions are usually protected through doctrines such as unconscionability and consumer protection regimes.

Patricia Holmes explained the approach taken by the Australian Department of Foreign Affairs and Trade in defending the WTO plain packaging challenges. Patricia emphasised that the evidence of the everyday effectiveness of the legislation was important to remember in the context of legal discussions. The novel aspects of the dispute included the length of time taken, a consequence of the number of disputes and third parties; the large number of third parties representing a range of interests, including the trade impacts of the legislation and the public health dimensions of tobacco regulation; and the interpretation of Article 20 of TRIPS. She highlighted both the importance of a whole of government approach to developing the legislation and the need to ensure that the case was supported by comprehensive evidence in support of the measure.

The subsequent discussion engaged with both the specific interpretation of TRIPS and broader reflections on the role of investor state dispute mechanisms and the risks associated with it for Australia.

Panel 11: Law of the Seas and Fisheries
Rapporteur: Timothy Horn

Rosemary Rayfuse highlighted two main challenges for the efficacy of the international fishing regime — institutional resilience and fish stock resilience — against the backdrop of inherent uncertainty around climate change. Institutionally, the robustness of transboundary fishing arrangements across arbitrary jurisdictions can be problematic as species distribution changes particularly with highly mobile stocks. On fish stock resilience, implementing an approach that incorporates "best scientific evidence" is very difficult and time consuming with the possibility that once processes come to an end, species have already disappeared. Rayfuse elaborated on recent developments in the Centre Arctic Ocean and the progress made by the Arctic 5 countries to address these challenges through the negotiation of a Polar Code on fisheries and a joint declaration by the Arctic 5 to cooperate on by adopting a precautionary approach to high seas fishing and agreeing to an indefinite prohibition unless authorised by regional or subregional organisations.

Zoe Scanlon presented ideas that indicate that a customary international norm may be emerging regarding stateless fishing vessels on the high seas and specifically the practice of

states to take action against these vessels in accordance with international law. Scanlon pointed to a succession of measures, resolutions and instruments that demonstrate consistent practice over time to support the development of this customary norm, particularly at the regional level within RFMOs. Scanlon noted that this evolution is occurring with increasing ease. Scanlon also importantly highlighted that when this norm appears in these measures, resolutions and instruments, it is expressed in general terms allowing for a universal and widespread application.

Phillip Ng explored in-depth how the existing measures on fisheries enforcement are creating a conducive environment for the emergence of technological enablers in the Pacific, with advances in monitoring and satellites, traceability and electronic monitoring in the air and on the water of both vessels and fish. Ng saw two areas where law and technology are intersecting. In the case of hot pursuit, Ng said that technology is leading the development of laws. In the case of the Niue Treaty Subsidiary Agreement, Ng argued that the law is leading technology and in particular the admission of new forms of evidence obtained by reliable technical means.

Ed Couzens rounded out the session by outlining anomalies between reservations in international law on shark listings in two multilateral conventions and domestic legislation on recreational fishing that exists in Australia. Couzens opened up for reflection the direction that Australia might pursue in future talks on the implementation of multilateral conventions given the discrepancies that he sees existing, and more broadly how Australia will reconcile these differences while remaining officially committed to worldwide conservation efforts.

Panel 12: Immigration Law, Refugee Law and Detention
Rapporteur: Chenxi Wang

Madeline Gleeson scrutinised three issues relevant to the findings of the High Court of Australia in the case of *Plaintiff M68/2015 v Minister for Immigration and Border Protection* for international law. The first issue was the scope of a state's legal obligations under international, where action and policy has an extraterritorial component. The second issue was the attribution of conduct of non-state actors to the state, specifically the private companies contracted to provide services and operate the offshore processing centres in Papua New Guinea (PNG). The third issue was the concept of joint state responsibility in the context of cooperative immigration control and refugee protection.

Bal Kama discussed the implications of the *Namah v Pato* (Manus decision) made by the PNG Supreme Court. The Manus decision suggested that Australia's actions in detaining asylum seekers in PNG could be illegal according to both domestic and international law. The Manus decision could have two likely implications for Australia. First, it casts doubt on the constitutional viability in PNG of the 'Pacific Solution' for Pacific Island countries. Second, it provides an opportunity to study the workings of Papua New Guinea's liberal constitution.

Chao Yi compared the practices of Australia and New Zealand around the issue of internal relocation/protection alternative in refugee status determination. Australia and New Zealand were chosen because they represent two different analytical frameworks in international refugee law and discourse. While Australia adopts the "relevance/reasonableness" framework, and New Zealand adopts the "internal protection" framework, both countries have similarly structured procedures for refugee status determination and face asylum seekers from similar countries of origins.

Panel 13: Cold War International Law
Rapporteur: Timothy Horn

This panel brought together an eclectic mix of case studies and research to illuminate the state of international law during the Cold War. Drawing on examples from the region, the panel highlighted that contrary to conventional wisdom, this period did produce innovations in disarmament and international law, at the multilateral level with the Convention on the Prohibition of Military or any hostile use of Environmental Modification Techniques (ENMOD), regionally and on nuclear issues under the impetus of New Zealand and domestically in debates on Australia's participation in Vietnam and its Southeast Asia Treaty Organisation (SEATO) obligations. These epiphenomena can be understood as manifestations of a broader system, through the lens of Schmitt's concept of katechon, where the bi-polar nature of hegemonic power during the Cold War provided stability and acted as a restraining force against uncertainty and chaos.

Emily Crawford underscored the precautionary approach taken when the UN General Assembly adopted the final text of 1976 ENMOD. ENMOD codified a ban on activities that at the time seemed possible but had not yet been achieved, and indeed have yet to eventuate 40 years on. Crawford pointed to political rather than operational motivations for the adoption of ENMOD by the international community, characterising the instrument as an unusual if accidental case of forward-thinking international humanitarian law.

Anna Hood focused on New Zealand's activism on nuclear matters and turned in particular to international law as a weapon during the Cold War. Hood contrasted New Zealand's strong belief in the international legal system with the wariness of political elites about whether it provided a neutral space to circumvent the Cold War or a conservative militant space dominated by the two super powers. Hood turned to two aspects in particular, international law-making and the ICJ's dispute settlement process. While New Zealand focused its attention on the former, participating in various treaties regulating specific aspects of nuclear weapons (testing and proliferation) and banning them from the South Pacific, it also used the latter channel.

Madelaine Chiam highlighted how the vocabulary and concepts of international law entered the public space in Australia during parliamentary debates on the participation of troops in Vietnam. Chiam identified in particular the invocation of alliance obligations under SEATO by then Prime Minister Robert Menzies in sending Australian troops, which he importantly framed in terms of moral obligations rather than in terms of legality. This line of argumentation entered the public discourse in the form of a pamphlet distributed to the general public by then Attorney-General Paul Hasluck. Chiam contrasted this to the public debate surrounding Australian military deployment in Iraq in 2003, when political leaders turned to practitioners of international law to couch Australia's participation in legal terms, rather than invoking these terms directly.

Richard Joyce examined the Cold War as katechon, bringing the discussion into the doctrinal realm to provide an abstract framework drawn from Schmitt's theories of law and politics where the Cold War acts as a restraining force on the uncertainty and chaos that might follow in the absence of the stabilising force of bi-polar hegemonic power.

Panel 14: The Daily Lives of Civilians in Wartime: The Role of International Law
Rapporteur: Chenxi Wang

Kevin Riordan ONZM reviewed the legality of siege. Since time immemorial forces at war have tried to encircle their enemies and deprive them of food and supplies in order to starve them into submission. The ensuing sieges of towns and cities have historically been conducted with little regard for the suffering of civilian inhabitants. Siege war is not, per se, an unlawful method of combat, nor is it prohibited by customary international law. However, the plight of the populations who are affected by sieges should be mitigated

under international law frameworks. Currently there are several international initiatives that could be applied to improve the protection of civilians in sieges. For example, in 2007 International Federation of the Red Cross adopted 'Guidelines for the domestic facilitation and regulation of international disaster relief and initial recovery assistance'.

Mary Crock discussed the issue of protection for persons with disabilities in armed conflicts. Article 11 of the Convention on the Rights of Persons with Disabilities obliges states parties to take all necessary measures to ensure the protection and safety of persons with disabilities in situations of risk, including situations of armed conflict. This provision advanced protections of disabled persons in armed conflicts. The language of 'rights' used in the Convention requires state parties to think about disabilities in armed conflicts. Therefore, the Convention conceptualises persons with disabilities as rights-bearing agents rather than as subjects in need of medical attention, welfare and passive protection.

Alberto Alvarez-Jimenez looked at letters to the UNSC by Israel and Palestine and found that both countries did not show regret for the other's civilian causalities. The 100 letters forwarded by Israel and Palestine from 2012-2014 depict a human tragedy of immense scale. However, none of these letters showed concern for the other's civilians. Alvarez-Jimenez argued that it is necessary to interpret international law in a way that alters adversaries' calculations and makes civilian tragedies visible. Based on the interpretation of the principle of proportionality in light of elemental considerations of humanity and the Martens Claus, countries have duties to provide an explanation after attacks with apparently excessive civilian causalities or significant risk to civilian populations. Furthermore, a proper assessment of 'war crimes' in the Rome Statute could also prompt countries not to ignore civilian causalities.

Yvette Zegenhagen analysed modern legislation that works against humanitarian principles. The humanitarian principles – humanity, neutrality, impartiality and independence – have come to characterise effective humanitarian action, particularly in situations of armed conflict. However, these principles are threatened by practice and law in the contemporary world. For example, modern counter-terrorism responses are posing significant challenges to humanitarian principles and the feasibility of conducting principled humanitarian assistance and protection activities.

Panel 15: Expression, Ethics, Rights and the Rule of Law
Rapporteur: Paul McGorrery

Catherine Renshaw began her presentation by reminding the audience that the heavy lifting of international law generally does not lie with high profile cases but instead with sharpening human rights and dealing with everyday concepts. And nothing is more everyday than sex. But how well does international human rights law deal with sex, especially with homosexuality, sodomy and pornography? There are a number of important human rights principles that arise in this area: the right to freedom of expression, the right to privacy, the guarantee of maximum liberty consistent with the rights of others, the need for limitations on a right not to undermine the purpose of that right, and most importantly for Dr Renshaw's presentation, the precarious status of morality as a limitation on rights. The notion of how far morality should act as a basis for criminalisation is particularly important in the context of South-East Asia, where various sex acts (sodomy, pornography, etc) continue to be subjected to extensive state regulation, sometimes in the extreme form of criminalisation. Dr Renshaw outlined three errors in the manner in which international courts and tribunals are handling the use of public morality as a justification for limiting rights. First, as the ECHR said in the 2012 case of *Stübing v Germany* about the criminalisation of incest, there is little clarity about how the

risk to society should be assessed. Second, referencing Professor Wilson's earlier keynote presentation on criminalising hate speech, she said that there is little social science informing the (currently) subjective judicial exercise of determining whether the risks of particular 'undesirable' conduct outweigh the benefits. And third, applying something like the *ultima ratio* principle to international human rights law, she said that there is currently insufficient recognition of the notion that any restriction on individual liberty must be shown to be necessary in that democratic society.

The second presentation in this panel was by Jingyi Li, offering an incisive comparison of the 2013 Marrakesh Treaty (a treaty to facilitate access to published works for print-disabled persons without violating copyright) and Australia's *Copyright Act 1968* (Cth). There are a great many people for whom access to copyrighted works remains a considerable issue, both as a result of visual impairments as well as physical impairments. Usually, reproducing copyrighted works will constitute a violation of copyright, but a number of exceptions have been developed to protect the rights of print disabled persons to access those works. The Copyright Act already provided a number of exceptions to copyright violations before the Marrakesh Treaty came into effect. It allowed reproduction of copyright works for vision-impaired persons, though an institution licence had to be obtained and this can be administratively difficult. There are special radio station licences for reproducing works for visually impaired persons and individual reproduction for research purposes does not require a licence at all. An interesting point Ms Li raised was that the Copyright Act, in some respects, provides more exceptions, for more beneficiaries, than the newly-ratified Marrakesh Treaty. In other respects the Marrakesh Treaty is broader. The ideal approach is to balance the already-existing protections with the newly-ratified protections to ensure best access. Ms Li made a number of recommendations to facilitate best access, including ensuring facilitation of cross-border exchange of works for print disabled persons, and improving access to text-to-speech versions digitally.

The third presentation was by Sherif Elgebeily, discussing Article 25(b) of the International Covenant on Civil and Political Rights (ICCPR), which grants citizens the right and opportunity to vote and be elected at genuine periodic elections which are to be universal and equal. As of 1976, Hong Kong was subjected to a reservation from full compliance with Article 25(b). One of the primary problems that persists in Hong Kong is the notion that candidates are pre-vetted behind closed doors before being voted for by the people, a pre-screening measure with significant potential to undermine the democratic process. Despite policy objectives stated as far back as 1995, and re-enlivened in 2013 by the UN Human Rights Committee, to improve Hong Kong's compliance with fundamental democratic principles, no changes are yet to take force. Dr Sherif offered two recent examples of social movements — the Occupy Movement (2014) and Fishbowl Revolution (2015) — that demonstrate an increasing desire by the population for Article 25(b) to be given full effect.

The fourth and final presentation in this panel was by Chester Brown, on how the doctrine of "clean hands" — a concept familiar to any lawyer from a jurisdiction using equitable principles — is applied in international law. He outlined two decisions by international tribunals offering diametrically inconsistent approaches to the use of the clean hands doctrine in international law. In *Hulley Enterprises Ltd (Cyprus) v The Russian Federation* (2014) a tribunal said that there is no general principle of unclean hands in international law. But in *Hesha Al Warraq v Republic of Indonesia* (2014) another tribunal accepted that a party's conduct fell within the clean hands doctrine. There are also conflicting opinions in scholarly works. Professor James Crawford argues that the principle of clean hands is too vague to apply to international law, while Professor John Dugard more recently said that it could be relevant to the merits of a case. Professor Brown offers a more nuanced approach, suggesting that the problem lies in the generality of the clean hands doctrine, while there are distinct and useful principles within the

doctrine. Specifically: (1) no one can be allowed to take advantage of their own wrong; (2) an unlawful act cannot serve as the basis for an action in law; (3) the effects of law will not be recognised by law; (4) where two parties enter into an obligation, a non-performing party cannot make a claim based on the non-performance of the other party, and (5) the principle of good faith (which even Professor Crawford conceded should remain). In conclusion, said Professor Brown, there is only limited support for a general clean hands doctrine at international law, but that could change if claimants make more precise claims along the lines of one of the specific equitable principles under the broad umbrella doctrine of clean hands.

Panel 16: International Law: Critique and Prognosis
Rapporteur: Chenxi Wang

Tamas Hoffmann pondered the meaning of the international lawyer. International lawyers are people who identify themselves as international lawyers and are equipped with professionalism. Traditionally, international lawyers contain two groups of people. The first group consists of academics who share a common sensibility of international law. The second group contains government lawyers who are in contact with the academy, attend academic conference and publish works. More recently, domestic lawyers such as criminal lawyers and constitutional lawyers increasingly engage with international law. The role of the international lawyer is therefore becoming more and more blurred. It is necessary to set up a more professional club of international lawyers with exclusive membership. Differentiation needs to be made between international lawyers and non-international lawyers who are engaging in international legal work. Only people who have self-identification and professionalism should be labelled as international lawyers.

Irene Baghoomians introduced her teaching experience in public international law in the past decades. Public law teaching as an introductory course in the law school can undermine the emancipatory commitment in some disciplines of public international law. Teaching of public law often further entrenches the dominant socio-political and/or economic narratives at the cost of marginalised interests and voices. Students seldom make political connections with what they are taught in the class and what is happening in the real world. It is not likely that the teaching of public international law in the law school can produce a more fertile generation who challenge the regressive hegemony of realpolitik. However, the solution of improving the predicament of the public international law education as an introductory course is yet to be found.

Toby Hanson discussed the fate of the multilateralism in the contemporary world. Unlike the post-World War II period which witnessed the proliferation of multilateral treaties, multilateral negotiations have not progressed well in the current period and are gradually being superseded by plurilateral and bilateral negotiations. States nowadays prefer the flexibility of non-binding arrangements to address issues of international concern. Therefore, informal international law may be more prominent to the international law framework in the near future.

Panel 17: Brexit
Rapporteur: Yujie Zhang

Panel 17 was a late but timely addition to the programme on the topic of "Brexit".

Christopher Ward mainly analysed the structural issues in the withdrawal process. First, regarding the decision to withdraw on the EU level, the UK is entitled to do so since the Article 50 of the Lisbon Treaty allows its members to leave freely. There therefore is no international legal issue raised. However, second, as to the decision on the domestic level, the referendum to withdraw may still need the recognition of the parliament to take effect.

Chester Brown considered what will happen once the UK has left the EU. For example, will the official language of EU change? How will the UK deal with the trade deals signed with other countries within the EU as well as those signed in the name of the EU with countries that are not EU members? Will the UK still subject to the jurisdiction of the EU Courts?

Jesse Clarke looked at what the relationship between the UK and the EU could like going forward. He considered a number of models. One was the Norwegian model which would entitle the UK to full access to the EU regime but also allow it to rule out the application of free movement. A second was the Swiss model in which the UK would have to renegotiate with EU members one by one.

Marco Sassòli addressed the relationship models as well. He guessed that the final deal may be legally the Norwegian model while *de facto* the Swiss model would prevail. He said that issues that still need to be worked out include the freedom of movement of people and the defence law of the UK. More than that, he deemed that the withdrawal of the UK may be a turning point of the history of the EU for a domino effect may take place. Europe may enter into a weakened and fractured era where war is again possible. A last point he raised was the psychological influences of the withdrawal.

Panel 18: Legal Design for A Changing Climate
Rapporteur: Peng Guo

Sussanah Leslie first introduced the need for a global price on carbon and a rise in Emissions Trading Schemes as well as the challenges to a global linking agreement. The differences in scheme designs reduce environmental integrity of linkage. Top-down rules or frameworks are not preferred, therefore, some alternative model are emerging. She then discussed several advantages of an alternative model, such as no control over indirect linkage, timing and greater convergence. In addition, there are three types of mutual recognition of allowance which are high-end (uniformity of standards), middle-end (harmonisation) and low-end (objective only). It is argued that the low-end recognition is preferable in light of the existing scheme, its lower cost and different legal systems. An umbrella treaty is considered as a better way to have a linking agreement as it can provide certainty and predictability by stipulating key elements and at the same time it can offer flexibility by adding details in a non-binding technical arrangement. Moreover, parties can adopt other mechanisms to ensure the treaty is effective, such as notification, a safeguard clause, use of international standards and joint bodies.

Michelle Podmore stated that climate change is a global problem that requires a global solution and a legal design for a fair and ambitious agreement. She first introduced the road to Paris agreement and the key challenges in the negotiations. Then she outlined the outcome of the Paris conference including the Paris Agreement, the Intended Nationally Determined Contributions (INPCs) post 2020 targets and the Conference of Parties (COP) decisions. She continued to discuss specific legal design on different issues: mitigation and adaption. As to mitigation, she discussed the legally binding obligations for all parties to take action, set long-term goals, set expectations, make progress, act transparently, and ensure accountability, compliance and guidelines. For adaption she discussed the fact that the agreement raises the profile of adaption providing political parity, the long-term goal of strengthening resilience and reducing vulnerability. It is also agreed that support should be provided to developing countries including financial support. To sum up, the Paris Agreement is a successful outcome and a delicate balance.

Jonathan Pickering's topic was about hard law, soft law and reflexive climate governance. He first introduced legal form and eco-systemic reflexivity and how hard/soft law legal norms can enhance reflexivity. He described the Paris Agreement as a crème brûlée legal form: hard law on the top, soft law underneath. He argued that the Paris Agreement

provided a framework for universal participation which demonstrates a capacity for the UN framework to learn from and partially overcome the divisiveness and the limited participation of the previous agreement. In addition, the Paris Agreement achieved a balance between long-term procedural predictability and flexibility to respond to changing economic and environmental circumstances. Moreover, the Paris Agreement encourages compliance with facilitative compliance mechanisms. The Paris Agreement's ability to catalyse a more reflexive approach to climate governance is limited, not least because the non-binding nature of pledges shifts greater responsibility for the success of the Paris Agreement onto domestic policy settings and informal accountability mechanisms.

Howard Bamsey listed the differences between the Kyoto Protocol and the Paris Agreement. The former was aimed at developed countries while the latter imposed obligations on both developed and developing countries. In addition, the former offered no solution whereas the latter offered a basis for a solution. Moreover, the former employed a top-down model while the latter adopted a bottom-up model. Mr Bamsey also pointed out two key aspects of the Paris Agreement. Both developed and developing countries participate universally in mitigation, and mitigation commitments to climate change are perceived as an opportunity not a burden. Australia's leadership to achieve universal participation in mitigation was analysed in detail.

Panel Discussion: The Everyday Lives of Antipodean International Lawyers
Rapporteur: Genevieve Wilkinson

Ivan Shearer, Sue Robertson, Penny Cumming and Penelope Mathew considered different descriptions of their everyday lives in respect to the words cyclical, ritualised, rhythm and unseen. In reflecting on their diverse experiences as international lawyers, they also emphasised other descriptions: diverse, intellectually challenging, fun and frustrating. The chair, Madelaine Chiam, observed a unifying theme amongst the observations of the panel of a belief in international law.

Year in Review
Rapporteur: Peng Guo

Katrina Cooper discussed Australia's success in negotiating multilateral treaties and co-operative endeavours. Her speech covered the Paris Agreement, trade and investment agreements, the TPP, the ChAFTA and the international investment bank. She mentioned some existing institutions of international law and Australia's role in forming international law. As to the co-operative side, she introduced Australia's current negotiations with other countries on maritime resources and fisheries. She also discussed frictions including the South China Sea and military actions in Iraq and Syria and Australia's corresponding actions. She also covered the challenges and implementation of international humanitarian law. At the end she highlighted UN's resolutions including compliance mechanisms for international law, detention issues, and North Korea nuclear sanctions.

John Reid covered three main topics: Australia's work in Universal Periodic Review (UPR), litigation work and legal diplomacy in Iraq and Syria. For the UPR, the session held in Geneva was productive. States' engagement with the process is increasing. He also introduced Australia's human rights record and UN Guiding Principles on Business and Human Rights. As to dispute settlement, he discussed Australia's activities on investor-state arbitration. Also, he outlined Australia's disputes with East Timor regarding the maritime border and the development of its potential settlement. In the end, he explained Australia's legal views on the situations in Iraq and Syria. He introduced the complexity of the issues. He then introduced Australian activities in Iraq and in Syria and Australia's attitude to the use of force.

John Adank introduced New Zealand's activities on international treaty negotiations and on UN dispute settlement. There was a lively debate on the value of international law and whether the government should take action. He discussed New Zealand's activities in making the Paris Agreement on climate change and stated that it would join the agreement. He then mentioned the Food and Agriculture Organization of the United Nations' report on fisheries and the TPP agreement. International humanitarian law and the UNSC's activities were discussed. In addition, he discussed the challenges faced by New Zealand regarding dispute settlement and WTO dispute settlement. He observed that WTO members were not as co-operative as in the past and mentioned the challenges in the appointment and reappointment of the Appellate Body. He hoped that panel reports would be released without delay.

Alison Todd introduced New Zealand's domestic litigation in relation to international law. She focused in particular on extradition law cases. She discussed cases regarding extradition for the crimes of money laundering and murder. At the end, she stated that a lot of challenges were emerging.

Australian and New Zealand Society of International Law

ANZSIL Newsletter
April 2016

Editors:

> **Amelia Telec**
Commonwealth Attorney-General's Department
> Dr Anna Hood
University of Auckland

Published by:

> ANZSIL Secretariat
Centre for International and Public Law
ANU College of Law
Australian National University
Canberra ACT 2600

> +61 2 6125 2906

> anzsil@anu.edu.au

> www.anzsil.org.au