



ANZSIL Newsletter

April 2021

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Message from the President

Tēnā koe e hoa,

This time last year, when drafting my message for the April 2020 ANZSIL newsletter, I was coming to terms with the realisation that life had fundamentally changed as travel restrictions and national lockdowns were put in place. Today, compared with many other parts of the world, we should count our blessings ‘down under’ as life continues relatively but not entirely normally. Some things have changed however, and the Zoom meeting/ conference/ pub quiz will likely be a part of lives for some time to come. It is fitting therefore that ANZSIL 2021 will take place virtually (via Zoom) from 30 June – 7 July and I am looking forward to welcoming delegates to the opening President’s Panel on 30 June focusing on Indigenous voices in international law. We received a large number of panel and paper submissions for ANZSIL 2021 and will be contacting participants over the next few days. Information about panels and social events (including the ANZSIL quiz) will be going up on our website in the next few weeks. I would like to thank the 2021 Conference Organising Committee and ANZSIL Secretariat for all their hard work on the conference so far.

Notwithstanding (or perhaps because of) COVID-19 it is clear that our governments, practitioners and academics have been very busy over the last few months and I am grateful to An Hertogen and Tess Kluckow for producing another excellent newsletter providing an overview of all this activity for the benefit of our members. I would particularly like to congratulate Daniel Joyce, Esmé Shirlow and Carolyn Evans on their new books and Nengye Liu on his election to co-chair of ASIL’s IEL Interest Group. I encourage all members to share their news and events with the ANZSIL community.

Wishing members, friends and colleagues a restful Easter weekend.

Ngā manaakitanga,

ANZSIL President

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

Australia's Third Universal Periodic Review

On 20 January 2021, Australia appeared virtually before the Universal Periodic Review (UPR) Working Group for an interactive dialogue on Australia's implementation of its human rights obligations. The UPR is a United Nations (UN) Human Rights Council (HRC) process through which the human rights records of UN member States are reviewed every five years. As part of this process, member States assess Australia's record against a broad range of its international human rights obligations. The review is based on Australia's national report (available [online](#)), information from UN human rights treaty bodies and special procedures mandate holders, and stakeholder submissions from civil society and the Australian Human Rights Commission.

During Australia's appearance, 122 member States made statements and recommendations regarding Australia's international human rights obligations and their domestic implementation. Australia will consider all recommendations and respond to those recommendations in good faith through the reporting and appearance process. Australia will formally respond to recommendations at a plenary session of the HRC in July 2021 and will address progress of the recommendations received in 2021 in its fourth cycle UPR, which is expected to be scheduled for 2026.

Draft General Comment on the Rights of Children in the Digital Environment

In August 2020, the UN Committee on the Rights of the Child (the Committee) invited all interested parties to comment on its draft General Comment No. 25 on children's rights in relation to the digital environment (the draft General Comment).

Australia provided a submission to the Committee in November 2020. In its submission, Australia addressed matters relating to children's right to privacy, including encryption, access to data and consent, consideration of the best interests of the child in decision-making, and how international law on the jurisdiction of States should be interpreted and applied in the digital environment. Australia's submission can be viewed on the Committee's [website](#).

The Committee received 142 submissions in response to its draft General Comment from States, regional organisations, United Nations agencies, national human rights institutions and Children's Commissioners, children's and adolescent groups, civil society organisations, academics, the private sector, other entities and individuals.

Australia delivers statement at UN Security Council Arria-Formula meeting

On 24 February 2021, Australia delivered a [statement](#) in the UN Security Council Arria-Formula meeting 'Upholding the Collective Security System of the UN Charter: The Use of Force in International Law, Non-State Actors and Legitimate Self-Defence'. Australia's Deputy-Permanent Representative to the UN, Dr Fiona Webster, delivered the statement, which set out Australia's position on the right to self-defence against actual or imminent armed attacks, including in respect of armed attacks by non-state actors. Dr Webster stated:

Australia recognises that the right of self-defence is available in respect of an actual or imminent armed attack. The right of self-defence is not unconstrained: force used in self-defence must be necessary to address the threat or use of force and it must be proportionate to the threat that is faced.

Australia recognises that the right to exercise individual or collective self-defence is available against non-state actors in the territory of another State, where those actors are involved in carrying out an actual or imminent armed attack, and where the territorial State is unwilling or unable to prevent such attacks originating from its territory.

Consensus on OEWG report addressing responsible state behaviour in cyberspace

On 12 March 2021, Australia joined consensus with 192 other UN member States in the inaugural Open Ended Working Group (OEWG) on developments in the field of information and telecommunications in the context of

international security to adopt a [final substantive report](#). The OEWG, established by the UN in December 2018, presented an important opportunity to promote a peaceful and stable online environment and enhance international security. The adopted report represents a universal commitment to a rules-based cyberspace. Significantly from an international law perspective, States reaffirmed in the report that international law, and in particular the UN Charter, is applicable and essential to maintaining peace and stability and promoting an open, secure, stable, accessible and peaceful information and communications technologies (ICTs) environment. States also reaffirmed mechanisms by which States can seek the settlement of disputes by peaceful means, and recommended that States continue to voluntarily share national views on how international law applies to their use of ICTs in the context of international security. Australia's position on the application of international law to State conduct in cyberspace is available on [DFAT's website](#). Australia will continue to remain active on the UN's sixth [Group of Government Experts](#) on advancing responsible State behaviour in cyberspace in the context of international security (comprising experts from 25 countries), which is due to conclude in May 2021.

Australian Attorney-General's Department's Tenth International Law Colloquium

The Australian Attorney-General's Department (AGD)'s International Law Colloquium traditionally brings together leading international lawyers from the Australian Government, academia and private practice for a one-day conference to discuss emerging and cross-cutting international law issues. Due to COVID-19, the format of the tenth Colloquium was reimagined and consisted of a series of virtual thematic 'in conversation' sessions.

In the first session, 'International Law and Contemporary Security Challenges', Jesse Clarke (Assistant Secretary, AGD's Office of International Law) facilitated a discussion with Professor Dapo Akande, Professor of Public International Law at Oxford University and Co-Director of the Oxford Institute for Ethics, Law and Armed Conflict, and Professor Marko Milanovic, Professor of Public International Law at University of Nottingham School of Law. The session explored how international human rights law applies extraterritorially and in situations of armed conflict, and how rules of international law can be applied to 'grey-zone activities' that fall short of armed conflict, such as misinformation campaigns and foreign interference with domestic elections. The session also discussed establishing a consensus on what rules of international law apply to cyber, including the role experts and academics have to play in the process.



In the second session, Sir Daniel Bethlehem KCMG QC spoke with Sue Robertson (First Assistant Secretary, AGD's International Division) about contemporary international law issues including the increased entwining of international and domestic law and challenges arising from different sources of international law. Sir Daniel and Sue discussed new forms of lawmaking and the difficulty in identifying the point where soft law becomes international law. The conversation also included consideration of the importance of legal professional privilege and the duty of governments to explain the legal basis for their decisions to the public. To conclude, Sir Daniel reflected on the desirable qualities of a good legal adviser. Sir Daniel particularly noted the importance of situational awareness and having the trust of your principal.

In the final session, 'Australia and the International Court of Justice', Professor Hilary Charlesworth and Bill Campbell QC, facilitated by Stephanie Ierino (acting Assistant Secretary, AGD's Office of International Law) discussed Australia's historic and current relationship with the International Court of Justice (ICJ). The panellists explored the efficacy of the ICJ, Australia's role in recent ICJ cases in both an applicant and respondent capacity, and the role of civil society groups in shaping Australia's interaction with the ICJ. The panellists also explored the evolution of Australia's position on the Court's advisory jurisdiction, discussing the current stance with particular reference to the Court's recent *Chagos* opinion.

AGD has a proud history of engagement with the international law community. Now in its tenth year, the Colloquium forms part of that tradition of dialogue and engagement.

Participation in WTO Dispute Settlement

India – Measures Concerning Sugar and Sugarcane (DS580)

In light of the restrictions on travel due to COVID-19, in December 2020, the WTO Panel held the first hearing with the parties and third parties via videoconference. This was the first time Australia had participated in a virtual WTO hearing. In this dispute, Australia, and co-complainants Brazil and Guatemala, are challenging India's domestic support for sugarcane and sugar, including price support and export subsidies. Australia considers that India is acting inconsistently with Articles 3.3, 7.2(b), 8, 9.1, 10.1, 18.2 and 18.3 of the Agreement on Agriculture; Articles 3 and 25 of the Agreement on Subsidies and Countervailing Measures; and Article XVI of the GATT 1994. Australia's opening statement at the first hearing is available on [DFAT's website](#).

Australia filed its second written submission on 11 February 2021, which is also available on [DFAT's website](#).

China – Anti-Dumping and Countervailing Duty Measures on Barley from Australia (DS598)

On 16 December 2020, Australia requested consultations with China concerning measures maintained by the Government of China on barley imports from Australia. Australia claimed that China's anti-dumping and countervailing duties on Australian barley appear to be inconsistent with certain provisions of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, the Agreement on Subsidies and Countervailing Measures; and the General Agreement on Tariffs and Trade 1994. Australia's request for consultations is available on [DFAT's website](#).

On 15 March 2021, the Hon Dan Tehan MP, Minister for Trade, Tourism and Investment, [announced](#) that Australia would request the establishment of a panel to hear the dispute.

Recent Trade Law Initiatives

ISDS Reform Initiatives

Australia is actively involved in a range of investor-State dispute settlement (ISDS) reform initiatives.

On the multilateral front, the United Nations Convention on Transparency in Treaty-based Investor-State Arbitration, better known as the Mauritius Convention on Transparency, entered into force for Australia on 17 March 2021 and will apply modern transparency provisions to Australia's network of older-style bilateral investment treaties.

Australia continues to constructively participate in multilateral discussions on ISDS reform within Working Group III of the United Nations Commission on International Trade Law (UNCITRAL). In 2017, the UNCITRAL Commission entrusted Working Group III with a three-stage mandate to (i) identify concerns regarding ISDS; (ii) consider whether ISDS reform was desirable; and (iii) develop solutions, as appropriate, to be recommended to the Commission.

Working Group III, which is now in its third stage, met most recently from 8-12 February 2021 in a predominantly virtual format. The meeting focussed on potential structural reforms: the selection and appointment of adjudicators in a permanent investment court, and an appellate mechanism. The next WGIII meeting is scheduled for 15-19 November 2021.

Australia has also continued to substantively engage in the review of the International Centre for the Settlement of Investment Disputes (ICSID) Arbitration Rules. Most recently, Australia participated in discussions on 3-4 March 2021 regarding a draft Code of Conduct for adjudicators prepared jointly by the ICSID and UNCITRAL Secretariats.

Bilateral Investment Treaty Review

Australia has terminated five Bilateral Investment Treaties (BITs) in recent years, replacing them with modern investment chapters in free trade agreements (FTAs), as well as successfully renegotiating and updating its BIT with

Uruguay (yet to enter into force). In July 2020, Australia began a review of its remaining 14 BITs. DFAT called for submissions to inform the review, releasing a paper to prompt discussion. The detailed submissions made in response, and the discussion paper, can be found on [DFAT's website](#). While the formal submission period has ended, DFAT continues to welcome input to the review.

Recent Developments in Australia's Free Trade Agreements

Trade and investment relationships with other countries and the agreements that enhance them will play a key role to help Australia recover from the COVID-19 pandemic, as well as boost job opportunities and economic growth. Australia continues to progress the negotiation and implementation of a number of bilateral and regional FTAs. Input from stakeholders contributes to developing negotiating positions in respect of these agreements, and the Australian Government welcomes input on these discussions. The [DFAT website](#) has further information on these agreements, including contact points.

FTAs under negotiation

The fourth round of Australia-United Kingdom Free Trade Agreement (AU-UK FTA) negotiations was held virtually from 22 February - 5 March 2021, with progress made across chapter text for trade in goods, services and investment, legal and institutional, and cross-cutting issues such as digital trade. Australia and the UK remain committed to concluding a comprehensive and ambitious agreement as quickly as possible. A comprehensive program of intersessional meetings is planned, followed by the fifth round in late April/early May.

Negotiations for a FTA with the European Union (EU) are progressing well. The Australian Government is focused on securing a comprehensive and ambitious agreement with the EU. The tenth round of negotiations was held, virtually, in March 2021. The eleventh round is scheduled for June 2021. See [DFAT's website](#) for more information.

Australia remains committed to concluding a high-quality FTA with the Pacific Alliance (Chile, Colombia, Mexico and Peru). After a challenging year in 2020, we are examining options to re-establish a clear way forward in the negotiations and remain hopeful of concluding the negotiations in 2021. Since starting negotiations on 30 June 2017, there have been eight rounds of negotiations and substantial progress has been achieved. Chief negotiators last met in Colombia in October 2019.

FTAs concluded but not yet in force

The Regional Comprehensive Economic Partnership (RCEP) Agreement was signed on 15 November 2020. Entry into force will occur 60 days after six ASEAN member States and three non-ASEAN member States ratify the agreement. RCEP signatory States are working towards entry into force of the agreement by 2022. The Agreement covers trade in goods, trade in services, investment, economic and technical cooperation and has new rules for small and medium-sized enterprises, government procurement, intellectual property, competition, and electronic commerce.

New FTAs in force

The Australia-Singapore Digital Economy Agreement (DEA) entered into force on 8 December 2020. The DEA replaces the Electronic Commerce chapter of the Singapore-Australia Free Trade Agreement (SAFTA) with a new Digital Economy chapter, providing modernised trade rules to assist businesses and consumers to engage with and benefit from digital trade and the digital economy. Key commitments include enhanced rules to prevent unnecessary restrictions on the transfer and location of data, improved protections for source code, and new commitments on interoperable e-invoicing and e-payment frameworks. The DEA also provides a platform for enhanced agency-level cooperation on emerging digital issues including data innovation and artificial intelligence.

The Pacific Agreement on Closer Economic Relations Plus (PACER Plus) entered into force on 13 December 2020. PACER Plus is a free trade agreement that was concluded on 19 April 2017. It covers Australia, New Zealand and nine Pacific island countries – Cook Islands, Kiribati, Nauru, Niue, Samoa, Solomon Islands, Tonga, Tuvalu and Vanuatu. A key objective of PACER Plus is to support the development of the Pacific Island countries through increased regional economic integration. Entry into force of PACER Plus will provide an additional source of

funding and program support through the Implementation Unit (AUD25.5 million) to improve trade practices in the long term.

FTAs under review

Under the Japan-Australia Economic Partnership Agreement (JAEPA), Australia has initiated the market access review and negotiation of specified priority agriculture products and is working towards the general review of the Agreement mandated for 2021.

The planned upgrade negotiations for the ASEAN-Australia-New Zealand (AANZFTA) are an opportunity to ensure AANZFTA remains a contemporary agreement, which contributes to the regional economic recovery post-COVID-19 and to further strengthen Australia's economic engagement with ASEAN.

Other Initiatives

The Australian Government's [FTA Portal](#) makes it easier for the public and businesses to access information about the operation of Australia's FTAs. Goods and services commitments under Australia's FTAs are added to the Portal as soon as possible after the agreements enter into force.

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

New Zealand and Singapore issue Joint Declaration to combat on trade in essential goods for combatting COVID-19

New Zealand and Singapore entered into a Joint Declaration on Trade in Essential Goods for Combatting COVID-19 in April 2020. The Declaration ([accessible here](#)) includes voluntary commitments to remove tariffs on certain goods that are essential for combatting COVID-19 (including medicines, PPE and medical equipment), to show restraint in the imposition of export restrictions and to expedite and facilitate the flow and transit of essential goods. The Declaration recognises the significant contribution of trade liberalization in essential goods for combating the COVID-19 pandemic and protecting public health, and reflects both countries' commitment to maintaining open and connected supply chains amidst the COVID-19 pandemic. It builds on a Joint Statement issued in March 2020, which has since been joined by over 19 countries.

Internship Report

Project Expedite Justice (Rosie Fowler)

Between July and October 2020, I undertook a legal internship with Project Expedite Justice (PEJ). I worked remotely from my home in New Zealand, as COVID-19 precluded the ability to go to the field. I feel very fortunate to have been supported by ANZSIL for this experience.



PEJ is an international law NGO that seeks justice for victims of mass atrocities via a three-step model of training, mentoring, and providing independent legal consulting. As it is fairly recently established, I had the privilege of working at the task level of a Junior Legal Consultant, and relished the deep-dive into important accountability and empowerment work.

My work was largely defined by the surrender to the International Criminal Court (ICC) of Ali Kushayb, a militia leader during the 2003 atrocities in Sudan. Since his surrender, many victims have come forward, seeking justice. There is, however, a disconnect between the ICC's international law and Sudanese law; so, I helped to design and deliver an international criminal law training programme for Sudanese lawyers. The project made survivors aware of their right to participate and be eligible for reparations, and equipped local lawyers to represent victims in the upcoming trial.



While I enjoyed the granular aspects of the work, it was also immensely gratifying on a conceptual level. International law needs to be accessible in order to be effective. It is crucial that these victims and lawyers can fully engage with the trial that they have waited seventeen years for; but, as the ICC is overstretched through its enormous mandate, NGOs like PEJ play a key role in bridging the informational and cultural gap between The Hague and Sudan. The project has had extremely positive feedback, and has made a significant contribution to the community's perceptions of justice.

COVID-19 has been particularly devastating for this field which relies on grants and donors to continue. I am grateful that ANZSIL could support me to support PEJ, which has played a vital role in combating human rights abuses in communities made more vulnerable by the pandemic. It was an enriching experience which affirmed my appreciation for the importance of this work, and will no doubt influence my career path ahead.

Calls for Papers

ANZSIL Postgraduate Workshop

The [call for abstracts for the 2021 ANZSIL Postgraduate Workshop](#), which will be held virtually on 7 July 2021, will close on 1 April. The Workshop aims to provide postgraduate degree research students with an opportunity to present their research to their peers, to discuss their experiences of postgraduate research and to make academic and professional connections. Participants will give presentations on an aspect of their research for approximately 10 minutes, followed by a roundtable discussion of each paper. To facilitate this discussion, participants will be required to submit short papers (no more than 1000 words) for distribution in advance of the Workshop. Participants will also be expected to engage as discussants of other papers. There is no registration fee for the workshop and workshop participants may also attend the ANZSIL conference free of charge. The deadline for the submission of abstracts is **1 April 2021** and successful applicants will be notified by mid-April.

The Potential of Public Interest Litigation in International Law

A workshop on the *Potential of Public Interest Litigation in International Law* will be held at the University of Exeter, UK (and/ or virtually) on 11–12 November 2021. The call for papers is available [here](#).

Events

The Politics of International Law Seminar Series

Dr Ntina Tzouvala at the Centre for International and Public Law (CIPL), ANU College of Law, has organized a virtual seminar series entitled “The Politics of International Law”. Recordings of the first two seminars are available online, as are the topics for the next seven seminars to be taking place between now and August 2021. More information can be found [here](#).

IHL Book Club

The Victorian IHL Advisory Committee of the Australian Red Cross and Readings Bookshop are excited to announce the launch of an IHL Book Club. Discussing books that focus on the laws and impact of war, the group will meet online on the last Wednesday of every second month throughout 2021.

The inaugural meeting of the Book Club is being held at 7pm AEDT on 31 March and will feature Philippe Sands’ book, *The Ratline: Love, Lives and Justice on the Trail of a Nazi Fugitive*. Philippe will be interviewed by Rebecca Barber, before the floor is opened up for discussion.

Advice about how to join the event and future IHL Book Club meetings can be found on the [Readings website](#).

ANZSIL Member News

ASIL International Environmental Law Interest Group

Associate Professor Nengye Liu, Director of the Centre for Environmental Law at Macquarie University, Sydney has just been elected as the Co-Chair of the American Society of International Law's (ASIL) International Environmental Law Interest Group. Nengye's term will be three years (2021 - 2023). Established in 1906, ASIL is one of the most important international law societies with nearly 4000 members globally, including 350+ academics, practitioners and policy-makers in International Environmental Law IG.

Recent Books

Informed Publics, Media and International Law

Daniel Joyce’s book considers the significance of informed publics from the perspective of international law. It does so by analysing international media law frameworks and the “mediatization” of international law in institutional settings. This approach exposes the complexity of the interrelationship between international law and the media, but also points to the dangers involved in international law's associated and increasing reliance upon the mediated techniques of communicative capitalism – such as publicity – premised upon an informed international public whose existence many now question. The book argues that international law depends on informed global publics to function and to address the complex global problems which we face. This draws into view the role media plays in relation to international law, but also the role of international law in regulating the media, and reveals the communicative character of international law. More information can be found [here](#).

Judging at the Interface: Deference to State Decision-Making Authority in International Adjudication

Esmé Shirlow’s book explores how the Permanent Court of International Justice, the International Court of Justice, the European Court of Human Rights, and investment treaty tribunals have used deference to recognise the decision-making authority of States. It analyses the approaches to deference taken by these four international courts and tribunals in 1,714 decisions produced between 1924 and 2019 concerning alleged State interferences with private

property. The book identifies a large number of techniques capable of achieving deference to domestic decision-making in international adjudication. It groups these techniques to identify seven distinct “modes” of deference reflecting differently structured relationships between international adjudicators and domestic decision-makers. These differing approaches to deference are shown to hold systemic significance. They reveal the shifting nature and structure of adjudication under international law and its relationship to domestic decision-making authority. More information can be found [here](#).

Towards a more accountable United Nations Security Council

Reform discourse about the United Nations Security Council gives every reason to believe that flaws in its legal and institutional design prevent the Council from adequately meeting its responsibility to maintain or restore international peace and security - in part by allowing the Council to act in an ad hoc and unprincipled manner.

In her new book, Carolyn Evans argues that enhanced accountability of the Council, and corresponding evolution of practice, are feasible, salutary changes towards the Council better answering its *raison d'être*. Discussion proceeds by probing the why, to whom, for what, and how, of Council accountability — four corners of concerns central to seeing any actor held accountable. More information is available [here](#).



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