THE 1958 UNITED NATIONS CONVENTION ON RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS AND THE AUSTRALIAN CONSTITUTION

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There are indications that Australia may shortly accede to and ratify the United Nations 1958 (New York) Convention on the Recognition and Enforcement of Foreign Arbitral Awards. This Convention, which has recently been the subject of a study by UNCITRAL,[1] provides for the contracting parties to recognize and enforce awards made in the course of arbitration in foreign countries. Should the Government decide to ratify the Convention the manner of putting it into effect in Australia may pose some constitutional problems, and this comment discusses some alternatives open to the Government, bearing in mind the requirements of the Australian Constitution.

1. *Outline of the Provisions of the Convention*

By Article I paragraph 3 of the Convention a country wishing to become party to the Convention may declare that it will apply the Convention to the recognition and enforcement of awards made only in the territory of another contracting state. It may also declare that it will apply the Convention only to differences arising out of legal relationships whether contractual or not which are considered as commercial under the national law of the State making such declaration. Should Australia become a party to the Convention these limitations (especially the second) may be of importance in a constitutional sense.

The Convention requires that a contracting state shall recognise a written agreement under which the parties to that agreement undertake to submit to arbitration all or any differences which have arisen between them in respect of a defined legal relationship whether contractual or not.[2] Article II provides for recognition by each contracting state of awards and also obliges the states to enforce them. By Article IV the state in which recognition and enforcement is sought is obliged to recognize and enforce the award on production to it of the original agreement or a duly authenticated or a duly certified copy and the award. Once this has been done the award is entitled to recognition and enforcement unless the unsuccessful party in the arbitration establishes one of the grounds set out in Article V. These grounds are basically as follows:

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[1] UNCITRAL is the United Nations Committee on International Trade Law. See U.N. Document A/CN 9/64; UNCITRAL, Fifth Session, New York, 1972. (*International Commercial Arbitration,* compiled by Ion Nestor, Special Rapporteur.)

[2] (1958) United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, (hereinafter referred to as "1958 Convention"), Article II.

(a) that the parties are subject to an incapacity under the law governing the arbitration or the law governing the contract;

(b) that the award was made without the party having proper notice of the appointment of an arbitrator or of the arbitration proceedings or because that party was unable to present his case;

(c) that the award deals with a matter not contemplated by or not falling within the terms of the submission to arbitration or if that contains matters beyond the scope of that submission;

(d) that the composition of the arbitration tribunal or the procedure of that tribunal was not in accordance with the agreement between the parties or in the absence of such agreement, in accordance with the law of the place where the award was made and

(e) that the award has not yet become binding on the parties or has been set aside or suspended by a competent authority of the country in which or under the law of which the agreement was made.[3]

In addition recognition and enforcement of the arbitral award may be refused either on the application of the unsuccessful party or on the motion of the court of the country in which the award is sought to be enforced if it is shown that the subject matter of the difference is not capable of settlement by arbitration under the law of that country or that the recognition or enforcement of the award would be contrary to the public policy of that country.[4]

The general aim of the Convention is to ensure that awards made in international arbitrations can be enforced in any country without the courts of that country inquiring into the merits of the matter decided by arbitration. This is in contrast to the provisions governing arbitration in the various States and territories of Australia and in England. In these jurisdictions, where a point of law arises in the course of an arbitration, the parties have the right under the Arbitration Acts[5] to require that the arbitrator submit this point of law to the court for its decision in the form of a stated case. Therefore questions of law may be decided by the court, whose expertise is in the law, rather than by a body whose expertise is in a technical or commercial area. The jurisdiction of the courts to decide points of law is not ousted, and parties will not be subject to the inconvenience or embarrassment of points of law being finally decided by non-lawyers.[6] This is possibly one of the strongest arguments against ratification of the Convention. However it is suggested that the value of the Convention in providing a convenient means for businessmen to settle disputes outweighs this disadvantage. There are provisions in the Convention which safeguard parties against

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[3] *Id.*, Art. V.1.

[4] *Id.*, Art. V.2.

[5] *E.g.* N.S.W. Arbitration Act, 1902-1957, s. 19.

[6] See the remarks of Devlin J. (as he then was) in *Peter Cassidy Seed Co. Ltd* v. *Osuustukkukauppa I.L.* [1957] 1 W.L.R. 273, 279-280.

breaches of the rules of natural justice, excess of jurisdiction by arbitration tribunals, etc. It may be that the country in which the award was made provides under its own law for lawyers to decide questions of law arising in arbitration proceedings.

2. *Possibilities for Australia*

Article XI of the Convention makes special provisions for federal or non-unitary states. It obliges a contracting party which is a federal state to implement the provisions of the Convention to the extent that the articles of the Convention come within the legislative jurisdiction of the federal authority. With respect to those articles of the Convention that come within the legislative jurisdiction of the constituent states but which are not within the constitutional jurisdiction of the federation, the federal government shall bring those articles to the notice of the appropriate authorities of the constituent states with a favourable recommendation.[7]

It is submitted that should Australia accede to the Convention, it would have constitutional power to enact legislation implementing the provisions of the Convention either under the trade and commerce power contained in section 51(i) of the Australian Constitution or within the external affairs power contained in section 51(xxix) of the Constitution. The Federal Government may prefer to treat the matter of arbitration as one falling within the jurisdiction of the various States. At present arbitration is a matter governed by the Arbitration Acts of the various States.[8] These Acts are basically similar and are based upon the 19th Century English Arbitration Act,[9] but no Australian State or territory has enacted provisions relating to the recognition and enforcement of foreign judgments, as has the United Kingdom.[10] This in itself is a reason why some measures, even if not in accordance with the Convention, should be taken to provide for the recognition and enforcement of foreign arbitral awards and arbitration agreements.

However this may be one area in which Australia should follow the example of the United States. In the United States the federal Arbitration Act of 1920 was in force before it was amended by legislation implementing the 1958 U.N. Convention.[11] In Australia there is no federal Act, but there seems no reason why one might not have been enacted in so far as it related to arbitration of disputes arising under trade and commerce between the States and with other countries. The problem of legislation and the Australian Constitution does arise however only if

[7] This is a fairly common type of provision in international conventions. See *e.g.* Art. XIX.7. of the Constitution of the International Labour Organisation.

[8] N.S.W. Arbitration Act, 1902-1957; Victoria, Arbitration Act 1958; S.A. Arbitration Act 1891-1934; W.A. Arbitration Act 1895-1970; Tasmania, Arbitration Act 1892; Queensland, Interdict Act 1876.

[9] The Queensland legislation is somewhat different from that in the other States and is based on an earlier English Act.

[10] Arbitration Act, 1950, Part II.

[11] See U.S. Public Law 91-368, amending Title 9, U.S. Code.

the federal government chooses to implement the Convention by its own legislation.

3. *Power to Legislate Under the External Affairs Power*

> No international agreement can of its own force establish rights or alter any existing law within Australia. Hence an international undertaking which requires for its performance an alteration in Australian law can be carried out only by legislation of an appropriate Australian parliament.[12]

This is the position established by the case of *Walker* v. *Baird*.[13] Mere accession to ratification of the 1958 Convention by the Australian Government would have no effect on the rights or duties of nationals or citizens of Australia. Further legislation would be required.

The Federal Parliament would have the power to put into effect the provisions of the 1958 Convention on Recognition and Enforcement of Foreign Arbitral Awards. The two leading cases in the High Court on the power of the Federal Parliament to legislate with respect to external affairs are both cases in which the legislation put into effect an international convention, relating to air transport. In the earlier case in which the High Court considered the power (*R.* v. *Burgess*; *Ex parte Henry*)[14] the Convention in question was the 1919 Paris Convention on Air Navigation. Subsequently in 1964-1965 in *Airlines of N.S.W. Pty Ltd* v. *New South Wales* [*No. 1*][15] and in *Airlines of N.S.W. Pty Ltd* v. *New South Wales* [*No. 2*][16], the Court considered the legislation implementing the 1944 Chicago Convention which also dealt with air navigation. In these cases the court found that the Parliament had power to legislate to put into effect the provisions of the respective Conventions.

The making of a treaty or the accession to an international convention by Australia, although itself an executive act, is an "external affair".[17] The mere fact that the Commonwealth has subscribed to a treaty does not necessarily attract the legislative power of the Commonwealth Parliament under s. 51(xxix) of the Constitution to regulate conduct within Australia. Whether this power applies is a question which must be worked out on each occasion on which it arises.[18] So far, only the Air Navigation Conventions[19] and the Treaty of Versailles[20] have been

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[12] Geoffrey Sawer, "The Execution of Treaties by Legislation in the Commonwealth of Australia" (1956) 2 U.Q.L.J. 297, 298. See also J. P. Nettl, "The Treaty Enforcement Power in Federal Constitutions" (1950) 28 Can. Bar. Rev. 1051, 1057.

[13] [1892] A.C. 491, adopted by Latham C.J. in *R.* v. *Burgess; Ex parte Henry* (1936) 55 C.L.R. 608, 644. See also *Bluett* v. *Fadden* (1956) 56 S.R. (N.S.W.) 254, 261.

[14] (1936) 55 C.L.R. 608.

[15] (1963-1964) 113 C.L.R. 1.

[16] (1964-1965) 113 C.L.R. 54.

[17] See Sawer, *op. cit.* 298 and cases referred to at note 13, *supra.*

[18] *R.* v. *Burgess; Ex parte Henry* (1936) 55 C.L.R. 608, 658, 669.

[19] *R.* v. *Burgess; Ex parte Henry* (1936) 55 C.L.R. 608; *Airlines of N.S.W. Pty Ltd* v. *N.S.W.* [*No. 1*] (1963-1964) 113 C.L.R. 1; *Airlines of N.S.W. Pty Ltd* v. *N.S.W.* [*No. 2*] (1964-1965) 113 C.L.R. 54.

[20] *Roche* v. *Kronheimer* (1921) 29 C.L.R. 329.

considered, but it is clear that conventions relating to other matters would attract this power.[21]

Windeyer J. in the *Second Airlines Case*[22] although not deciding the issue, does emphasise earlier statements that the Commonwealth Parliament's legislative powers are not enlarged simply by the making of a treaty between the Commonwealth Government and some other power. There are some limitations to this power.[23]

In *Burgess'* case, Dixon J. (as he then was) said

> I think it is evident that its purpose [i.e. the purpose of section 51(xxix)] was to authorise the Parliament to make laws governing the conduct of Australians in and perhaps out of the Commonwealth in reference to matters affecting the external relations of the Commonwealth. The Commonwealth might under this power legislate to ensure that its citizens did nothing inside the Commonwealth preparatory to or in aid of some action outside the Commonwealth which might be considered a violation of international comity, as, for instance, a failure on the part of private persons to behave as subjects of a neutral power during a war between foreign countries. If a treaty were made which bound the Commonwealth in reference to some matter indisputably international in character, a law might be made to secure observance of its obligations if they were of a nature affecting the conduct of Australian citizens. On the other hand, it seems an extreme view that merely because the Executive Government undertakes with some other country that the conduct of persons in Australia shall be regulated in a particular way, the legislature thereby obtains a power to enact that regulation although it relates to a matter of internal concern which, apart from the obligation undertaken by the Executive, could not be considered as a matter of external affairs.[24]

Starke J. defined "external affairs" as "matters which concern its relations and intercourse with other Powers or States and the consequent rights and obligations".[25] The other Justices expressed similar views, although all of them did express reservations: for instance, that the external affairs power could not be used by the Commonwealth Parliament to enact legislation which it would otherwise not have had the power to enact. In particular, it could not be used to empower the Federal Parliament to make legislation in conflict with other provisions of the Constitution.[26] Evatt and McTiernan JJ. took a view of the power which is certainly not open to the narrow interpretation which is possible under the last sentence of the passage in the judgment of Dixon J. which is

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[21] See *per* Latham C.J. in *R.* v. *Burgess; Ex parte Henry* (1936) 55 C.L.R. 608, 640-641.

[22] *Airlines of N.S.W. Pty Ltd* v. *N.S.W.* [*No. 2*] (1964-1965) 113 C.L.R. 54, 153.

[23] See *e.g. per* Evatt and McTiernan JJ. on *R.* v. *Burgess; Ex parte Henry* (1936) 55 C.L.R. 608, 687.

[24] *Id., per* Dixon J., 669.

[25] *Id.*, 658.

[26] *Id., per* Latham C.J., 642; *per* Evatt and McTiernan JJ., 687.

quoted above.[27] On this view, and subject to limitations of common sense, it would seem possible to say that where the Commonwealth has made some type of arrangement with a foreign power or powers on a subject which is properly international, then by virtue of that arrangement, the Commonwealth acquires the constitutional power to legislate. Legislation passed by the Commonwealth Parliament in pursuance of the external affairs power must go only so far as to put into effect the obligations of the Commonwealth under the treaty or convention or to enable it to obtain benefits thereunder.[28]

Even though the scope of this power remains vague, air navigation and matters relating to air safety are matters of international concern and fall legitimately within the external affairs power.[29] Air transport, which is a means of communication between Australia and other powers may be described as "an external affair". It is submitted that international trade and incidents thereof, at least so far as they are covered by international agreements are also "external affairs". Where Australia makes an agreement with another power or state in relation to trade this also could be described as an external affair and therefore is within the legislative power of the Federal Parliament under section 51(xxix). If international trade and the regulation of trade between nations and subjects of various nations is an external affair, and it is submitted that this is so, then arbitration as a means of settlement of disputes arising in the course of such trade is also either necessarily an external affair or an incident thereof; therefore, a convention dealing with international commercial arbitration is properly the subject of legislation by the Commonwealth Parliament under its external affairs power. Both in *Burgess'* case and in the *Airlines* cases, all the justices of the High Court have expressed the view that it is probable that the legislative power of the Commonwealth under section 51(xxix) is subject to the limitation that the subject matter of such litigation is properly a matter of "international interest and concern".[30] It would seem that, despite some doubts that have been expressed, for instance, as to whether the accession by Australia to certain conventions of the International Labor Organisation is an action which would attract the power to legislate under the external affairs power, international commercial arbitration is properly a matter of international concern, and therefore is properly the subject of Commonwealth legislation. Latham C.J. in *Burgess'* case did recognize that international commercial arbitration

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[27] *Id.*, 681-2.

[28] See *Airlines of N.S.W. Pty Ltd* v. *N.S.W.* [*No. 2*] (1964-1965) 113 C.L.R. 54, especially *per* Barwick C.J. 86, also 125, 153.

[29] For the most recent statements, *ibid.* See also P. H. Lane, "External Affairs Power" (1966) 40 A.L.J. 257; C. Howard, "The External Affairs Power of the Commonwealth" (1971) 8 M.U.L.R. 193.

[30] See *per* Latham C.J. (1936) 55 C.L.R. 608, 640; Dixon J. *id.*, 669; Evatt and McTiernan JJ., *id.*, 681. The view of Dixon J. was approved by Windeyer J. in *Airlines of N.S.W.* v. *N.S.W.* [*No. 1*] (1963-1964) 113 C.L.R. 1, 50, and see *per* the same judge in *Airlines of N.S.W. Pty Ltd* v. *N.S.W.* [*No. 2*] (1964-1965) 113 C.L.R. 54, 153.

n ight be such a proper subject,[31] and it follows that the Commonwealth d es have power under the Constitution to make laws implementing the provisions of the 1958 Convention. Accordingly, it is suggested that although no such provision as Article XI of the Convention has ever been considered by an Australian court, that Article imposes no restriction upon the constitutional power of the Commonwealth to give legislative force to the Convention.

4. *The Exclusive Jurisdiction of the High Court in Matters Arising Under Treaties*

One further problem that might arise if the Convention were adopted is the question of its interpretation in proceedings in Australia involving the recognition or enforcement of a foreign arbitral award. Section 75(i) of the Constitution provides that the High Court shall have original jurisdiction in matters arising under any treaty. Section 38 of the Judiciary Act makes this jurisdiction exclusive. Therefore if in an action to enforce a foreign arbitral award the actual Convention came to be interpreted it is probable that this question is one which comes within the exclusive jurisdiction of the High Court. The only case in which this question has been considered is *Bluett* v. *Fadden*[32] where McLelland J. (as he then was) had to consider the international agreement on reparations which followed the Second World War. Pursuant to this agreement a regulation was made as a result of which the Commonwealth Treasurer made an order vesting in the Controller of Enemy Property certain shares owned by an Australian individual, who sought declaration from the Court that the order made by the Treasurer was invalid. The action concerned the interpretation of Article 6 of the greement which was adopted by Section 15A of the Trading With ie Enemy Act 1939-1952. McLelland J. decided that because of the rovisions of the Constitution and of the Judiciary Act he had no risdiction to deal with the matter, on the basis that a question arose n the interpretation of the treaty and that this was a matter "directly rising under a treaty". It seems that any question which involves the ctual interpretation of an international agreement or convention is uch a matter. In such a case only the High Court would have jurisiction to determine the issue. If the reasoning of McLelland J. is correct his may itself be a reason for the enactment of provisions by the Federal Parliament (rather than by the States) to implement the provisions of the 1958 Convention. If, however, as Cowen[33] and Howard[34] have rgued, the provisions of the Convention were themselves enacted as part of the act, or incorporated into the act in the form of a schedule, an interpretation of what would then be statutory provisions relating to the recognition and enforcement of foreign arbitral awards would not be the subject of the High Court's exclusive jurisdiction under

[31] (1936) 55 C.L.R. 608, 641.
[32] (1956) 56 S.R. (N.S.W.) 254.
[33] Zelman Cowen, *Federal Jurisdiction in Australia* (1959), 28.
[34] C. Howard, *Australian Federal Constitutional Law* (2nd ed. 1972), 224-225.

Section 75(i) of the Constitution. The act, and not the treaty, is what is being interpreted, and it could not be said that the matter arose directly under the treaty.

5. *Legislation Under the Trade and Commerce Power*

Section 51(i) of the Constitution gives the Federal Parliament power to legislate with regard to trade and commerce with other countries. It is quite clear that insofar as commercial arbitral awards are foreign they involve other countries.

It might be expected that most foreign arbitral awards whose recognition and enforcement was sought in Australia would be awards arising out of arbitration agreements made by Australians with other states or with nationals of other states. If such contracts were commercial within the meaning of Australian constitutional law, then legislation governing the enforcement of the awards made pursuant to them would fall within the power. However, there might be cases of awards made between persons who at the time were not Australians which the successful party might seek to enforce in Australia (*e.g.* against a person who had subsequently acquired a residence or valuable property in Australia). Possibly this situation would not fall within the trade and commerce power, and for this reason it might be preferable to found any legislation implementing the 1958 Convention on the external affairs power. Earlier in this comment it was suggested that when acceding to or ratifying the Convention, Australia should limit the application of the Convention to matters which by Australian law are commercial in nature. If it were sought to justify the legislation implementing the Convention under the trade and commerce power it is submitted that it is essential that such a limitation be placed on the accession and that this limitation be made clear in the legislation implementing the Convention. An international convention relating to foreign arbitral awards would have no application to arbitration made purely within the territorial limits of Australia between parties both of whom were Australian. While it may be desirable that the legislation should be extended to cover arbitration arising in the course of interstate trade and commerce it is not necessary that this be done to implement the provisions of the Convention, and that is not the subject of this comment.

As to the meaning of a matter of commerce under the Constitution, perhaps the most helpful statement that has recently come from the High Court is a negative one. It comes from the judgment of Barwick C.J. and Kitto, Taylor, Menzies and Windeyer JJ. in *Logan Downs Pty Ltd* v. *Federal Commissioner of Taxation*.[35]

> [W]e reject the somewhat surprising contention that Section 51(i) of the Constitution does not authorize the making of laws to permit or encourage trade between Australia and other countries. There is, of course, no authority to support such a contention; indeed, such authority as there is points the other way. Independently of

[35] (1965) 112 C.L.R. 177, 187-188.

> authority, however, we have no doubt whatever that laws for the promotion of Australia's international trade are authorised by the trade and commerce power.

Owen J. concurred with this statement.[36] One ground for supporting legislation which implements the 1958 Convention is that such legislation would clearly promote and encourage trade and commerce between Australia and other countries, since it would enable businessmen to provide the machinery for the settlement of their disputes in advance, knowing full well how such disputes could be settled and that if their agreements provided for such settlement by arbitration in other countries, the awards made would be recognized and enforced in Australia. This would assist frankness in trade relations. If Australia were to accept that the provisions of the Convention would be limited to disputes arising in commercial contexts the matter would be directly within the trade and commerce power.

What then is the "previous authority" to which the members of the High Court refer? The power has for a long time been constantly used to justify the exercise of legislative authority by the Commonwealth. Perhaps the best known example is the early case of *Huddart Parker Ltd* v. *Moorehead*[37] in which the constitutional basis of the Australian Industries Preservation Act was in question. It was later held, in *Australian Steamships Ltd* v. *Malcolm*,[38] that the trade and commerce power did authorize provision for the compensation of seamen engaged in interstate and overseas trade as a matter directly arising out of interstate or overseas trade or commerce. This reasoning has been followed in subsequent cases.[39] Yet it is suggested that arbitration of commercial disputes is even more closely related to the basic concept of trade and commerce as seen by the High Court. Perhaps one aspect of interstate trade and commerce to which the High Court has turned its attention is summarized by the judgment of Starke J. in *Crowe* v. *The Commonwealth*:

> Export, transport and sale, are all parts of that class of relation which constitutes trade and commerce. The subjects of legislation in the present case are the control of the export of Australian dried fruits, and the sale and disposition of such fruits after export. But those subjects are part of the concept of trade and commerce with other countries. The restrictions imposed by the Act and regulations are all connected with the exportation of dried fruits from Australia . . . [T]he legislative authority of the Commonwealth is thus attracted, and the legislation falls within the power . . . [40]

If regulations dealing with the sale of dried fruit after export fall within the trade and commerce power then the provision of a simple means for

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[36] *Id.*, 190-191.
[37] (1908) 8 C.L.R. 330.
[38] (1914) 19 C.L.R. 298.
[39] *E.g. R.* v. *Foster; Ex parte Eastern and Australian Steamship Co. Ltd* (1958-1959) 103 C.L.R. 256.
[40] (1935) 54 C.L.R. 69, 85-86.

the resolution of disputes arising out of contracts which are a part of trade and commerce with other countries should certainly do so as well.

In *Redfern* v. *Dunlop Rubber Australia Ltd*[41] Menzies J. spoke of matters being within the power if they are "directly related to interstate or overseas trade or commerce", and went on to say that the power is not restricted merely to the protection and development of such trade and commerce.[42] Adopting the reasoning of Dixon J. in *Bank of N.S.W.* v. *The Commonwealth,*[43] he said that there is a need to give a wide meaning to 'commerce', though possibly not so wide a meaning as has been given to that power in the U.S. Constitution.[44] The fact that trade and commerce within a state might be affected incidentally by the legislation did not necessarily invalidate it. Windeyer J.[45] and Owen J.[46] agreed that the power should be given a wide interpretation.

Perhaps the widest statement of the scope of the power, is that of Fullagar J. (with whom Dixon C.J. and Kitto J. agreed) in *O'Sullivan* v. *Noarlunga Meats Ltd*:

> By virtue of that power [the trade and commerce power] all matters which may affect beneficially or adversely the export trade of Australia in any commodity produced or manufactured in Australia must be the legitimate concern of the Commonwealth. Such matters include not only grade and quality of goods but packing, get-up, description, labelling, handling and anything at all that may reasonably be considered likely to affect an export marked by developing or impairing it. It seems clear enough that the objectives for which the power is conferred may be impossible of achievement by means of a mere prescription of standards for export and the institution of a system of inspection at the point of export. It may very reasonably be thought necessary to go further back, and even to enter the factory or the field or the mine. How far back the Commonwealth may constitutionally go is a question which need not now be considered, and which must in any case depend on the particular circumstances attending the production or manufacture of particular commodities. But I would think it safe to say that the power of the Commonwealth extended to the supervision and control of all actual processes which can be identified as being done or carried out for export.[47]

Even though this case concerned the regulation of conditions for the export of meat, it is submitted that his Honour's discussion of the principles upon which the Commonwealth may legislate to control the export process is relevant in this context, especially in view of his Honour's earlier remarks on the importance of the fact that the regulations could only apply to a process which was intended to lead to the export of

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[41] (1963-1964) 110 C.L.R. 194.
[42] *Id.*, 209.
[43] (1948) 76 C.L.R. 1, 381-382.
[44] (1964) 110 C.L.R. 194, 220.
[45] *Id.*, 221-229.
[46] *Id.*, 230; see also *per* Taylor J., 213.
[47] (1954) 92 C.L.R. 565, 598.

commodities.[48] It seems that the statement of Fullagar J. extends to cover a situation where the Commonwealth legislation claims to affect not only the actual processes of manufacture or selling but also includes the regulation of terms of contracts which deal with export or import of commodities, including terms which govern the settlement of disputes arising out of such contracts, between nationals of different states, by arbitration.

6. *The Incidental Power*

Even if, contrary to the above contentions it were held that the trade and commerce power itself would not support legislation implementing the 1958 Convention, then the power of the Federal Parliament to legislate with respect to "matters incidental to the execution of any power vested by this Constitution in the Parliament" contained in s. 51(xxxix) would certainly seem to cover commercial arbitration when this is a matter incidental to trade and commerce with other countries. Such legislation would be conducive to the success of the main legislation,[49] and so fall within the incidental power.

7. *Conclusion*

It is within the power of the Commonwealth Parliament to legislate to implement the provisions of the 1958 Convention on Recognition and Enforcement of Foreign Arbitral Awards, either under the trade and commerce power (provided that the acceptance of the obligations of the Convention are restricted by the Commonwealth in its acceptance to commercial matters); or under the external affairs power, as the orderly settlement of disputes between nationals of different countries is a matter of genuine international concern, and legislation implementing a treaty or convention on these matters is properly within the scope of the power. It is suggested also that, because of the convenience and the importance to Australia of maintaining its reputation in commercial matters, the legislation should be Commonwealth legislation; this would ensure uniformity throughout the Commonwealth and would obviate the possibility of idiosyncratic variations among the states. Finally, in view of the significance which UNCITRAL has given to the implementation of the provisions of the 1958 Convention, it is clear that if Australia wishes to be seen as having a genuine concern with the improvement of international trade regulations, speedy enactment of the Convention is desirable.

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[48] *Id.*, 596-597.

[49] See *Stemp* v. *The Australian Glass Manufacturers Co. Ltd* (1917) 23 C.L.R. 226.

Since this comment was written, New South Wales has passed the Arbitration (Foreign Awards and Agreements) Act, 1973, giving effect to the 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

Queensland has revised the whole of its statute law relating to Arbitration, and Part VIII of the Arbitration Act 1973 also gives effect to the convention. However, legislation of this type by the States does not affect the position of the Commonwealth as outlined above.

J. G.