*Madelaine Chiam**

GOVERNMENT DECISION-MAKING AND INTERNATIONAL LAW: AUSTRALIA AND THE FRAMEWORK CONVENTION ON TOBACCO CONTROL

ABSTRACT

Questions about why and how the government relates to international law are fundamental to understanding Australia's relationship with the international system. This article explores the relationship between international law and Australian law by examining the government's treatment of a specific international instrument: the Framework Convention on Tobacco Control (FCTC). The article compares the negotiation of the FCTC with the government's attitude towards other international instruments and identifies a number of factors that influence government decision-making about international law: the degree of salience between the international norms and domestic regulation, the characterisation of the international norms and the substance of the international obligations.

I INTRODUCTION

In the complex web of interactions that characterises Australia's relationship with international law, little attention has been paid to the executive branch of government. Apart from the scholarly activity that followed the High Court's decision in *Teoh*,[1] the role of the executive has generally been glossed over in studies of the relationship between Australian and

* BA/LLB (Hons) (Melb), LLM (Toronto). Research Fellow and Lecturer, Centre for International and Public Law, Faculty of Law, Australian National University. This project is supported by the Australian Research Council. Thanks to George Williams, Ann Kent and especially Hilary Charlesworth for their comments on earlier drafts of this paper.

1 In *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, the High Court held that international treaties that have not been incorporated into domestic law can still give rise to a legitimate expectation in administrative law. For a time, this decision focussed attention on the executive's power to assume international obligations. See eg Margaret Allars, 'One Small Step for Legal Doctrine, One Giant Leap Towards Integrity in Government: *Teoh's Case* and the Internationalisation of Administrative Law' (1995) 17 *Sydney Law Review* 204; Anne Twomey, '*Minister for Immigration and Ethnic Affairs v Teoh*' (1995) 23 *Federal Law Review* 348; Wendy Lacey, 'In the Wake of *Teoh*: Finding an Appropriate Government Response' (2001) 29 *Federal Law Review* 219; Gavan Griffith and Carolyn Evans, '*Teoh* and Visions of International Law' (2001) 21 *Australian Yearbook of International Law* 75.

international law, which have instead focussed on judicial opinion[2] and on Parliament's role in scrutinising Australia's treaty activities, particularly since the introduction of reforms to Australia's treaty-making process in 1996.[3] The lack of academic interest in the executive government belies its importance in Australia's relationship with international law. Constitutionally, the executive government has sole power to assume international obligations[4] and, on a practical level, the executive is responsible for the day-to-day conduct of Australia's interaction with the international legal system.[5]

One explanation for the failure to examine the federal executive's role seems to lie in the perception that government attitude to international law is driven solely by political considerations and that there is consequently little for lawyers to learn from examining the interaction. Australia's two major political parties have traditionally approached international law from different perspectives. Ann Kent has described Labor governments' approaches as based on 'multilateralism with a focus on economic and social rights' and Coalition governments' approaches as 'more bilaterally focused, with a civil and political rights emphasis'.[6] These differences of approach were reflected, for example, in the debates over Australia's participation in the Australia–US Free Trade Agreement (AUSFTA).[7] While not disputing the important influence of policy perspectives on the federal government's interaction with the international system, this article attempts to broaden the picture by examining other factors that may affect the government's interaction with international law.

---

2 See eg Stephen Donaghue, 'Balancing Sovereignty and International Law: The Domestic Impact of International Law in Australia' (1995) 17 *Adelaide Law Review* 213; Penelope Mathew, 'International Law and the Protection of Human Rights in Australia: Recent Trends' (1995) *Sydney Law Review* 177; Anthony Mason, 'The Influence of International and Transnational Law on Australian Municipal Law' (1996) *Public Law Review* 20; Michael Kirby, 'Domestic Implementation of International Human Rights Norms' (1999) *Australian Journal of Human Rights* 109; Amelia Simpson & George Williams, 'International Law and Constitutional Interpretation' (2000) 11 *Public Law Review* 205.

3 These are described in Minister for Foreign Affairs and the Attorney-General, 'Government Announces Reform of Treaty-Making' (Media Release FA-29, 2 May 1996). The impact of the reforms is discussed in Hilary Charlesworth et al, 'Deep Anxieties: Australia and the International Legal Order' (2003) 25 *Sydney Law Review* 423.

4 *Australian Constitution*, s 61. See also *R v Burgess; ex parte Henry* (1936) 55 CLR 608, 644 (Latham CJ).

5 See Charlesworth et al, above n 3, 431–8.

6 Ann Kent, 'The Unpredictability of Liberal States: Australia and International Human Rights' (2002) 6(3) *The International Journal of Human Rights* 55, 63.

7 See part V of this article.

Questions about why and how the government relates to international law are fundamental to understanding Australia's relationship with the international system. What is the influence, for example, of Australia's domestic laws on its international stance? How important is the substantive nature of the obligations, as opposed to the symbolic value of the international instrument to government decisions about ratification? Does it matter how an international rule is characterised? Identifying a range of factors that underpin executive decision-making about international instruments can illuminate debate about whether Australia should become party to those international instruments and can help to shape recommendations for reform to the way Australia interacts with the international legal system.

With these questions in mind, this article explores the relationship between international law and Australian law by examining the government's treatment of specific international instruments. It does so in three parts. First, it analyses the actions of the Australian executive government in relation to the Framework Convention on Tobacco Control (FCTC). One factor that emerges from this study is that Australia's negotiation of the FCTC was influenced by its domestic tobacco controls. This is consistent with the theory of domestic salience proposed by international relations scholars Andrew Cortell and James Davis.[8] The second part of the paper tests the empirical evidence of the FCTC against the Cortell and Davis theory and suggests that the domestic salience of international law does play a role in executive decision-making.

The relatively positive story of Australia's involvement in the FCTC is in contrast to the reaction of the Australian federal executive to international instruments such as the Optional Protocol to the Convention Against Torture and the public reaction to the AUSFTA. The third part of this paper thus compares the reaction of the Australian government to these three instruments, suggesting limits to the theory of domestic salience and leading to the identification of other factors that may influence executive decision-making about international law.

One definitional note before proceeding: I use the terms 'executive', 'government' and various combinations of the two to refer to the same entity — the Australian government, including all Ministers and government departments.

---

8 Andrew P Cortell and James W Davis Jr, 'Understanding the Domestic Impact of International Norms: A Research Agenda' [2000] 2 *International Studies Review* 65.

II WHAT IS THE FCTC?

The Framework Convention on Tobacco Control (FCTC) is the first international convention to be negotiated under the auspices of the World Health Organisation (WHO).[9] The aim of the FCTC is to reduce tobacco-related deaths and disease around the world by regulating tobacco and tobacco-related industries. Negotiations on the FCTC began in May 1999 when the World Health Assembly (WHA) established the FCTC Working Group. The Working Group held two sessions, one in October 1999 and one in March 2000, before presenting its final report to the WHA in May 2000. The text of the convention was then negotiated over the course of six sessions of an Intergovernmental Negotiating Body between October 2000 and February 2003. The convention was adopted by the WHO member states in May 2003. When the FCTC closed for signature in June 2004, 167 states had signed the treaty and twenty-three of those states had also ratified it.[10] The FCTC requires 40 ratifications to come into force.

Australia ratified the FCTC on 27 October 2004. The convention had been tabled in the Commonwealth Parliament on 30 March 2004, along with a National Interest Analysis stating that no domestic changes were required in order for Australia to ratify the treaty and advocating Australia's ratification of the convention. The Joint Standing Committee on Treaties (JSCOT) recommended that Australia ratify the FCTC, after concluding that 'the Convention is in Australia's national interest'.[11]

The FCTC obligations represent a robust form of international law. They are a striking example of the reach of modern international law into areas traditionally considered the exclusive province of domestic governments.[12] For example, article 13 of the Convention requires that parties implement a comprehensive ban on tobacco advertising, promotion and sponsorship. This may directly affect the scope of government behaviour by, for example, preventing tobacco sponsorship of national events. Also significant, however, is that article 13 places an international obligation on governments to regulate an area of domestic commercial activity in a specified way. Article 11, which establishes rules about the size and nature of warnings on tobacco packaging, more closely resembles domestic regulation than

---

9 The World Health Organisation is empowered to negotiate international treaties under Article 19 of its Constitution: *Constitution of the World Health Organization*, signed 22 July 1946, 14 UNTS 185 (entered into force 7 April 1948).

10 World Health Organisation, 'The WHO Framework Convention on Tobacco Control on track to become law by the end of the year' (Media Release, 2 July 2004).

11 Joint Standing Committee on Treaties, Parliament of Australia, *Report 62: Treaties tabled on 30 March 2004*, 5 August 2004, chapter 3.

12 Not all of the FCTC obligations have a domestic focus. The treaty also governs more traditional subjects of international law like the illicit trade in tobacco products (article 15) and scientific and technical cooperation and communication of information (articles 20 – 22); see p 28.

international obligation when it sets out a specific requirement that the warnings 'should be 50 per cent or more of the principal display areas but shall be no less than 30 per cent of the principal display areas'. The subject matter of many of the Convention's other obligations is also more typically the domain of domestic rather than international law. For example, article 6 recommends measures be taken to control the taxing and pricing of tobacco products; article 8 requires the implementation of protections from second-hand smoke; and article 16 requires the regulation of the sale of tobacco products to and by minors.

The FCTC contains limits on the otherwise broad reach of its obligations, enshrining a degree of flexibility for states in their implementation of the convention. The tobacco advertising ban in article 13, for example, is to be undertaken 'in accordance with [a state's] constitution or constitutional principles' and taxation and pricing controls under article 6 are to be performed 'without prejudice to the sovereign right of the Parties to determine and establish their taxation policies'.

The FCTC obligations sit uncomfortably with traditional notions of state sovereignty. These notions have often been reinforced in Australia by executive reactions to international law, and particularly human rights law.[13] In an interview in 2000 about the concluding observations of the Committee on the Elimination of Racial Discrimination to Australia's periodic report, for example, Prime Minister Howard said,

> Australia decides what happens in this country through the laws and parliaments of Australia. I mean in the end we are not told what to do by anybody. We make our own moral judgements.[14]

Despite this rhetoric, concern about sovereignty has not prevented the government from accepting domestically transforming international obligations in selected areas. The AUSFTA, for example, has far-reaching implications for many areas of Australian domestic governance, including the regulation of prescription drug prices through the Pharmaceutical Benefits Scheme and local content rules for media.[15] The next section investigates the way that the Australian executive negotiates a treaty of this kind.

---

13 See eg Devika Hovell, 'The Sovereignty Stratagem: Australia's Response to UN Human Rights Treaty Bodies' (2003) 28(6) *Alternative Law Journal* 297.

14 ABC Radio, 'Interview with Sally Sara', *AM Program*, 18 February 2000, <http://www.pm.gov.au/news/interviews/2000/AM1802.htm> at 25 May 2004.

15 See eg Peter Drahos et al, 'A Submission to the Senate Select Committee on the US-Australia Free Trade Agreement', 5 May 2004 <http://www.aph.gov.au/ Senate/ committee/freetrade_ctte/submissions/sub159.pdf> at 25 May 2004; Media, Entertainment and Arts Alliance, Submission to the Senate Select Committee on the

III EXECUTIVE DECISION-MAKING AND THE FCTC[16]

The Australian government was committed to the negotiation of the FCTC from its initiation in the World Health Assembly in 1996. The government regarded the negotiation of the FCTC as an opportunity to promote in the international arena tobacco controls that Australia has long held domestically.[17] Australia sent representatives to the meetings of the FCTC Working Group and to all negotiating sessions. The federal government departments directly involved in the FCTC negotiations were the Department of Health and Ageing (DoHA), the Department of Foreign Affairs and Trade (DFAT), the Attorney-General's Department and, on one occasion, the Customs Service. Representatives from the states and territories were invited on to the negotiating delegation, but none accepted the offer. The Australian delegation to the second negotiating session also included the Chair of the National Expert Advisory Committee on Tobacco as a technical adviser.

The public health focus of the FCTC meant that the Department of Health (DoHA) coordinated the FCTC negotiations. DFAT, which, in the words of one interviewee, regards itself as the 'guardian' of international law in Australia,[18] normally acts as the lead agency in international treaty negotiations. It is not unusual, however, for a line department to take the lead where appropriate given the substance of the treaty. In the case of the FCTC, one interviewee suggested that the DoHA had to 'tussle' for its role as lead agency,[19] before being formally granted that status by the Minister for Foreign Affairs in March 2000. DoHA has overall responsibility for implementation and carriage of Australia's domestic tobacco controls and its officers brought that knowledge and expertise to the international negotiations. DoHA's position as lead agency also meant that the delegation had relatively efficient access to the Minister for Health, which in turn made it easier to address Australia's position on the many issues in the FCTC negotiation that were the responsibility of the Minister.

US-Australia Free Trade Agreement, 12 April 2004 <http://www.aph.gov.au/Senate/committee/freetrade_ctte/submissions/sub85.pdf> at 25 May 2004.

16 The case study of the FCTC involved interviews with participants in the negotiation of the convention on behalf of Australia. Interviews were conducted with current and former departmental officers of the Department of Health and Ageing, the Department of Foreign Affairs and Trade and the Attorney-General's Department, as well as with representatives of the Cancer Council of Australia. I am grateful for their participation in the project.

17 These are discussed in the next section.

18 Interview with officers of the Department of Foreign Affairs and Trade (In-person interview, 15 December 2003).

19 Interview with officer of the Attorney-General's Department, (Telephone interview, 9 December 2003).

A *Clarifying Australia's Domestic Position*

The DoHA entered the FCTC negotiations with the intention that the convention that emerged would be one that Australia could ratify. The DoHA thus sought to do two things: first, it wanted to be able to outline authoritatively the whole of the government's position on the FCTC at the international negotiations; and second, it wanted to locate the potential problem areas for all arms of the Australian government before negotiation of the treaty was complete. The FCTC delegation, led by the DoHA, accordingly put together a 'whole of government' mandate covering Australia's position on the issues that might be raised in the negotiations.

In Australian practice, mandates for negotiating international treaties require Cabinet approval, but this is of a general nature and, for practical purposes, delegations generally also seek approval from the relevant departments and the states and territories. The FCTC delegation accordingly conducted detailed consultations with all relevant government departments, with the states and territories and with industry and non-government organisations (NGOs). The aim of the consultations was to obtain cross-departmental agreement on the range of Australia's possible negotiating positions and to test the political acceptability of those positions with domestic constituencies, such as industry and NGOs.

The timing of the domestic consultations was largely determined by the timing of the international negotiations, with the domestic processes occurring both before and after each international negotiating session. The Australian delegation sought comment from each agency with an interest in the text and identified potential unintended consequences of the wording. Consultation with the states took place through the Intergovernmental Committee on Drugs under the Ministerial Council on Drug Strategy. As the FCTC negotiations progressed, and it became clear that consultations beyond the Intergovernmental Committee were necessary, the DoHA included other state departments, such as the Justice and Premier's Departments, in their consultations.[20]

Domestic consultations were also held with members of the tobacco and tobacco-related industries, as well as with non-government organisations focussed on tobacco regulation and health. These consultations gave the Australian delegation the opportunity to explain the latest text of the treaty, as well as to test the government position. They also gave industry and the NGOs the chance to engage in advocacy on issues raised by the draft of the treaty. As a consequence of the timing of the international negotiating meetings, only three large consultations of this kind took place.

---

[20] A detailed description of the FCTC consultations is contained in Attachment 1 of the National Interest Analysis on the FCTC, tabled 30 March 2004, <http://www.aph.gov.au/house/committee/jsct/30March04/index/Fctcnia.pdf> at 25 May 2004.

The consultation process on the FCTC meant that the Australian delegation attended the negotiating sessions aware of the limits that each relevant agency was prepared to accept on particular issues. The delegation established the boundaries of the positions it could take at the international negotiations, while still remaining consistent with government policy. The delegation thus ensured that it was in a good position to assert and preserve Australia's domestic position at the international negotiations.

B *Preserving Australia's Domestic Position*

The Australian delegation at the FCTC negotiations generally consisted of around six people. This contrasted with other delegations like the United States, whose delegations included up to 40 members. Not all government agencies with an interest in the FCTC participated in the negotiations. There is, for example, a customs element to the FCTC and, while Australia's Customs Service worked closely with the DoHA in Australia, the Service sent a delegate to the negotiations on only one occasion.

The FCTC delegation was keenly aware of the political and legal limits of its negotiating mandate and it worked hard to keep the boundaries of the FCTC obligations within those limits. The delegates interviewed for this article emphasised their role in attempting to negotiate a treaty containing obligations that Australia is willing and able to uphold. The FCTC delegation had to ensure that the final text of the convention did not contain commitments that other domestic agencies would consider beyond the scope of their policy positions or that required legislative changes that had not been previously agreed. The Australian negotiating mandate included resisting the incorporation of obligations in the FCTC that went beyond Australia's domestic position. If the delegation wanted to be able to state that Australia could ratify the FCTC, it had to pay careful attention to the degree to which the international obligations were consistent with Australian law.

The Australian delegation therefore focussed on ensuring that obligations beyond those in Australian domestic law were not included in the FCTC. The delegation had always to consider the ability of the Australian states to meet the FCTC obligations and, despite the comprehensive negotiating mandate for the FCTC, there were some circumstances in which advice had to be sought from Australia. For example, advice had to be sought from the federal Attorney-General's Department about Australia's existing legislative restrictions on the size of health warnings on packets in order to determine if Australia could agree to the precise obligations that were mooted for inclusion in the FCTC. While the FCTC negotiations were underway, Australia was reviewing its own stance on the size of health warnings on cigarette packets. If Australia's domestic position on warning size had shifted, there was a possibility that its international position would shift also. The Australian delegation considers that it preserved Australia's domestic

position by ensuring that the wording of the treaty accommodated the various standards in Australian domestic law.

The lawyers on the Australian delegation saw it as their role to give the FCTC the language of a treaty and to ensure that the Convention was not enshrining broad political obligations, rather than specific legal ones. The delegation considered this challenging in the initial negotiating sessions, as, in its opinion, the WHO lacked a coherent set of objectives for the FCTC and decisions about important legal and structural issues were not made until late in the negotiating process. One example was identifying the Convention as a 'Framework' convention. The title has no legal effect and was ultimately an inaccurate descriptor, as the Convention contains some very specific, non-'framework', obligations. The Australian delegation was prepared to accept the 'Framework' classification however, because it made no technical difference to the Convention and the delegation was not willing to waste valuable 'trading coin' on the issue.

Australia's domestic experience of tobacco control was influential in the treaty negotiating process. Australia's comprehensive negotiating brief, combined with its long history of tobacco regulation, meant that the Australian delegation saw itself as having a better grasp of the realities of tobacco control than most other delegations. Many delegates, for example, were seeking a total ban on tobacco advertising. Such a ban would include prohibiting the dissemination of information about tobacco, including information about where it can be bought and its price. Australia's experience has led it to the position that total bans are not feasible. Instead, it advocated a set of restrictions which acknowledges the practicalities of enforcing an advertising ban, for example by allowing the dissemination of descriptive information about the product. Australia's stance on advertising gave rise to the impression, at least amongst some anti-tobacco NGOs present at the negotiations, that Australia was 'going soft' on tobacco control. The Australian delegation thus spent considerable time explaining its approach to tobacco advertising to other delegates and to the NGOs. The FCTC eventually enshrined a comprehensive ban on tobacco advertising, along the lines of Australia's domestic position.

Another issue that caused negotiating difficulties was the question of whether the FCTC should include a clause stipulating that health obligations had primacy over all other international obligations. Some delegations and non-government organisations were concerned in particular about the interaction between the FCTC obligations and international trade obligations. The Australian delegation had objected to the inclusion of a primacy clause and instead supported the insertion of a 'savings clause': a treaty interpretation provision that specifies that the treaty is to be read consistently with existing international obligations. This provision was a major point of contention at the sixth (and last) negotiating session in February 2003. Some developing countries were not prepared to accept any alternative to a

clause giving primacy to health obligations and the disagreement became a north-south battle over the politics of tobacco control. Some international NGOs at the negotiations were surprised at Australia's stance on this issue, viewing the position as inconsistent with Australia's otherwise strict anti-tobacco regulations. The Australian delegation eventually resolved the impasse by assessing whether each article of the FCTC was consistent with Australia's international obligations, thus nullifying the need for a savings clause. Individual members of the delegation also consulted their superiors in Canberra, ultimately receiving instructions to approve the text of the treaty without either a savings clause or a primacy of health clause. The final text of the Convention contains neither.

IV DOMESTIC SALIENCE

The story of Australia's participation in the FCTC negotiations suggests that Australia's long-standing domestic tobacco controls were influential in the Australian executive's attitude to the convention. One important factor in the Australian government's decision-making about international law may therefore be the extent to which the international laws being negotiated are already reflected in Australian law. International relations scholars Andrew Cortell and James Davis have studied the influence of a state's domestic position on its international behaviour and propose the theory of domestic salience to explain the likely domestic effect of an international norm.[21] This section tests the theory of domestic salience against the story of the FCTC.

A *What is Domestic Salience?*

In their studies of why states obey some international norms and not others, Cortell and Davis posit that a norm is more likely to be respected the more salient it is to the structure and discourse of a society. Cortell and Davis' thesis is about the legitimacy of international norms: the more domestically salient a norm is, the more likely it is to be regarded as legitimate by the government and by the population at large. Cortell and Davis take their definition of an international norm from Abram Chayes and Antonia Handler Chayes, for whom norms are 'prescriptions for action in situations of choice'.[22] The Chayes and Chayes definition is much broader than the category of treaty rules, encompassing everything from norms written in authoritative form to background, tacit norms. Cortell and Davis' theory applies across this broad definition of norms and could be tested against international

---

21 See eg Cortell and Davis, above n 9. Other writers use the term 'normative fit' to describe the same theory, see eg Darren Hawkins, 'The Domestic Impact of Human Rights Norms' (Paper Presented at the 42nd Annual Convention of the International Studies Association, Chicago, Illinois, 20–24 February 2001). See http://www.isanet.org/archive/hawkins.html

instruments ranging from the UN Charter to the recommendations of subject-specific regional conferences. The focus of this article, however, is on the Australian executive's approach to the obligations contained in the FCTC, and it therefore tests the Cortell and Davis thesis against only the 'international treaty' category of norms.

Cortell and Davis identify a number of factors that may influence the domestic salience of international norms. The most useful of these for present purposes are:

a) *Cultural Match*: the degree to which the norms 'resonate with domestic norms, widely held domestic understandings, beliefs, and obligations'.[23]
b) *Rhetoric*: 'Repeated declarations by state leaders on the legitimacy of the obligations' contained in the international norm.[24]
c) *Domestic Interests*: a norm is more likely to become salient if it is 'perceived to support important domestic material interests, whether economic or security'.[25]
d) *Domestic Institutions*: the degree to which the norm has been incorporated into domestic institutions.

All these factors concern the manner in which the international norm in question interacts with the domestic arena, either through perception or through institutionalisation. An international norm that becomes part of the domestic fabric is far more likely to be seen as legitimate and therefore to be respected.

Cortell and Davis' thesis examines the domestic salience of existing international norms, such as those relating to human rights or the use of force. The FCTC, on the other hand, represents a set of emerging norms: the Convention is not yet in force and its obligations are not considered a codification of customary international law. The domestic salience thesis is nonetheless a useful lens through which to examine Australia's participation in the FCTC. It allows an examination of the degree to which the pre-existing incorporation of a norm within domestic culture, rhetoric and institutions can influence a government's attitude to that international norm.

---

22 Abram Chayes & Antonia Handler Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements* (1995) 113.

23 Cortell and Davis, above n 9, 73. The other factor identified by Cortell and Davis is the capacity of relations with other states and participation in international organisations to act as 'socialising forces' and influence a state's willingness to conform with international principles. I have excluded this factor here because of its focus on international, rather than domestic, forces.

24 Ibid 76.

25 Ibid 77.

B *Is the FCTC Domestically Salient?*

Australia's domestic position on tobacco regulation shares a high degree of correlation with the FCTC. There is a strong cultural match between the aims and the obligations of the treaty and Australia's domestic position. Australia prides itself on being a 'leader in tobacco control in our region as well as globally'[26] and is recognised as having some of the strictest tobacco controls in the world.[27] Some of these controls include bans on cigarette sales to minors and on smoking in most public places, as well as the prohibition of tobacco advertising, including at international sporting and cultural events. There is clear public support for strict tobacco controls[28] and media coverage of tobacco issues has been considered 'generally positive for tobacco control objectives'.[29] In addition, the network of Australian anti-tobacco organisations is a powerful lobbying force that has achieved considerable success in promoting anti-smoking regulations in Australia.[30]

Government rhetoric also reinforces a strong anti-tobacco message. The media releases of previous and current Health Ministers emphasise Australia's 'world-leading position in tobacco control with the [anti-tobacco campaigns] providing national leadership for reducing the harm caused to all Australians by tobacco smoke'.[31] The Australian government saw the FCTC negotiations as a chance to showcase the success of its domestic tobacco policies and to raise the profile of tobacco as a global health issue. The DoHA's public information on the progress of the FCTC negotiations noted that 'Australia is committed to the [FCTC] process and believes it is an important international initiative through which Australia can

---

26 Department of Health and Ageing, 'Australia and the FCTC' <http://www1.health.gov.au/fctc/ta_fctc.cfm> at 4 April 2004.

27 See eg S Chapman and M Wakefield, 'Tobacco Advocacy in Australia: Reflections on 30 Years of Progress' (2001) 28 *Health, Education & Behaviour* 274; S Chapman, 'Reducing Tobacco Consumption' (2003) 14 *NSW Health Bulletin* 46.

28 See the statistics on 'Community support for drug-related policy' in Australian Institute of Health and Welfare, Drug Statistics Series, National Drug Strategy Household Survey 1998 – First Results (1998) 31; in the International Tobacco Control Policy Evaluation Project, 'Attitudes Towards Tobacco Industry and Government Intervention across Four Countries' (Presentation given to Society for Research on Nicotine and Tobacco, Arizona, February 2004).

29 R Durrant et al, 'Tobacco in the news: an analysis of newspaper coverage of tobacco issues in Australia, 2001' (2003) 12 *Tobacco Control* 75, abstract.

30 S Chapman, F Byrne and SM Carter, '"Australia is one of the darkest markets in the world": The Global Importance of Australian Tobacco Control' (2003) 12 *Tobacco Control* 1.

31 Minister for Health and Aged Care, 'World No Tobacco Day A Timely Reminder Of The Dangers Caused By Smoking' (Media Release MW46/01, 31 May 2001).

contribute to advancing tobacco control globally'.[32] When announcing in September 2003 that Australia would sign the FCTC, the Parliamentary Secretary to the Minister for Health and Ageing, Trish Worth, promoted the legitimacy of the Convention by stating that 'Australia was a major player in the negotiations and we worked hard to achieve a robust Convention that will lead to good tobacco policies across the globe'.[33]

Tobacco regulation is firmly entrenched in Australian institutions. Australia's comprehensive ban on tobacco advertising is implemented through a combination of federal, state and territory legislation.[34] For example, both the illicit trade in tobacco and the packaging and labelling of tobacco products are governed by federal legislation; packaging and labelling, for example, being subject to regulations made under the *Trade Practices Act 1974*. There is national coordination of tobacco controls through the Intergovernmental Committee on Drugs under the Ministerial Council on Drug Strategy and the National Tobacco Strategy incorporates action to limit exposure to tobacco smoke and to encourage individuals to quit smoking. One of the consistent themes in the Australian government's anti-tobacco message is the promotion of public health, and thus a reduction in costs to the health system, particularly through providing support and encouragement to those trying to stop smoking.[35] The regulation of tobacco is presented as serving both the public welfare and the economic interests of Australia.

Tobacco controls in Australia therefore rate highly on all four of the Cortell and Davis measures: cultural match, rhetoric, domestic interest and domestic institutions. Regulation of tobacco is firmly entrenched in government policy and in the 'hearts and minds' of the Australian people. In negotiating the FCTC, therefore, the executive branch was working from a solid base of regulatory experience and popular support.

---

32 Department of Health and Ageing, 'Australia and the FCTC' <http://www1.health.gov.au/fctc/ta_fctc.cfm> at 6 April 2004.

33 Parliamentary Secretary to the Minister for Health and Ageing, 'Signing of Convention Highlights Australia's Global Leadership in Tobacco Control' (Media Release TW/38 2003, 26 September 2003).

34 See *Tobacco Advertising Prohibition Act 1992* (Cth); *Tobacco Act 1987* (Vic); *Public Health Act 1997* (Tas); *Tobacco and Other Smoking Products Act 1998* (Qld).

35 See eg Minister for Health and Aged Care, 'Launch of the National Tobacco Campaign Evaluation Report: World No Tobacco Day' (Speech delivered at Parliament House, 31 May 1999, at <http://www.health.gov.au/mediarel/yr1999/mw/mwsp990531.htm).

C *The Impact of the Domestic Salience of Tobacco Controls*

What links can we draw between Australia's negotiation of the FCTC and the domestic salience of tobacco regulation? The strong cultural match between Australia's domestic policy and the FCTC seems to have facilitated Australia's active role in the Convention negotiations. There are few political risks in negotiating a treaty aimed at establishing, at an international level, standards that have long been held at a domestic level. Government rhetoric was firmly in favour of exporting Australia's system of tobacco regulation to the world and the Australian delegation appears to have succeeded to some degree in doing so, for example in relation to the ban on tobacco advertising. The Australian delegation's success in concluding a multilateral treaty that is consistent with existing domestic law and policy also seems to reflect the influential position from which the Australian delegation was able to negotiate. The long-standing incorporation of tobacco controls in Australian institutions meant that the Australian delegation could speak with authority about the impact and effectiveness of different kinds of tobacco regulation. This in turn appears to have generated respect for the Australian delegation, enabling it to be an important player in the negotiations.

The comprehensive consultations carried out over the course of the FCTC negotiations served Australia's domestic interests in at least two ways. First, they equipped the delegation with the information it needed to preserve Australia's domestic interests at the international negotiations. Second, they allowed the executive to appear to be taking into account the material interests of all domestic agencies with a stake in the FCTC. Transparency and accountability are the catchwords of Australia's treaty-making process.[36] For the Australian participants in the FCTC, the extensive consultation process ensured that there was, and was seen to be, a reasonable level of transparency and accountability in the negotiation process. The 'whole of government' negotiating mandate guaranteed that the delegation sought input from relevant government departments and the states and territories. The delegation would have been accountable to individual government agencies, and to government more broadly, for failures to negotiate within that mandate. The delegation's pattern of testing the political acceptability of its positions with industry and NGOs before international negotiating sessions and then briefing those same groups on the outcome of each session also ensured that the major interested non-government entities were aware of the important issues in the negotiating process. While the delegation was not directly accountable to non-government groups, the consultation fora did give those groups the opportunity to express opinions and advocate in favour of particular negotiating positions. There

---

[36] See Minister for Foreign Affairs and Attorney-General, above n 3; and Commonwealth, *Review of the Treaty-Making Process* (August 1999) <http://www.law.gov.au/agd/Attorney-General/Treaty-Making%20Process.htm> at 25 May 2004.

was a community element too in the DoHA's efforts at transparency. The DoHA made available through its website general information on the FCTC and the progress of the negotiations, as well as information on Australia's interest in the FCTC and the consultations being conducted by the DoHA.[37]

The transparency in the negotiation process did not however translate into willingness by members of the FCTC delegation to speak openly about their experiences. In the course of this case study, I had some difficulty convincing the individuals who had been involved in the FCTC negotiation to be interviewed. Indeed, two members of the delegation ultimately refused my requests. Even when I was given the opportunity to interview some of the delegation members, it was clear that most of them felt constrained in what they were able to say. While I do not think there was anything sinister about their constraint, it is striking that the standards of transparency and accountability that apply in the negotiation of a treaty do not appear to apply in recounting the story of that negotiation. Domestic salience, it seems, does not enhance public access to executive decision-making processes.

Domestic salience does, however, appear to have allowed the FCTC to transcend the intrusive nature of its obligations and have led to Australia's ratification of the Convention. The National Interest Analysis (NIA), prepared by the DoHA and tabled in Parliament alongside the Convention, echoes the themes of cultural match and export of Australian standards in its statements that 'Australia is seen as a world leader in its domestic efforts to reduce smoking and protect non-smokers' and that one of the benefits of Australia's ratification of the treaty would be 'promot[ing] the uptake of effective health and development tobacco policies by other nations'. According to the NIA, all of the obligations under the FCTC are consistent with current Australian policy and legislation and no domestic changes were required for Australia to ratify the treaty.

The story of the FCTC demonstrates that the political and popular image of international law as an intrusion on Australian sovereignty is inaccurate and simplistic. The reality is that the government engages strategically with international law, both in choosing the international instruments it negotiates and in its conduct of those negotiations. The FCTC example also shows how the domestic salience of an international norm can affect Australia's negotiating position. The authority that springs from experience in tobacco regulation appears to have given Australia considerable influence at the international negotiations, contributing to an outcome that is consistent with Australian law and policy. The domestic salience of

---

37 Note however the critical view of the government's NGO consultation methods in Gary Johns and John Roskam, 'The Protocol: Managing Relations with NGOs' (Report to the Prime Minister's Community Business Partnership, The Institute of Public Affairs, April 2004).

the FCTC seems to have resulted in a trouble-free run through the domestic treaty-making processes, with only one submission made on the convention to JSCOT[38] and barely a ripple of interest from the public. The federal executive has thus been spared the sometimes difficult role of convincing the Australian public that ratification is in the national interest.[39] Far from being a violation of Australia's sovereignty, the FCTC is an example of how the Australian government is able to assert its influence multilaterally in order to protect its interests domestically.

V OTHER INFLUENCES ON EXECUTIVE DECISION-MAKING

Despite the convincing support that Australia's negotiation of the FCTC gives to the theory of domestic salience, the Australian government's attitude to other international instruments highlights the limits of the usefulness of domestic salience as a measure of government behaviour. The Australian government has rejected apparently domestically salient instruments, like the Optional Protocol to the Convention Against Torture, and has supported other instruments that have low or mixed domestic salience, such as the AUSFTA. On one level, the government's varying attitudes towards these instruments simply reflects its policy priorities. The FCTC negotiations can be construed to substantiate the view that the government supports international law to the extent that international law concurs with or is able to further government policy. As I try to demonstrate below, however, there are factors in addition to its policy objectives that seem to play a role in the Australian government's decision-making about international law.

A *The Optional Protocol and the AUSFTA*

The United Nations Convention Against Torture and Other Cruel, and Inhuman or Degrading Treatment or Punishment (Torture Convention) prohibits torture in all circumstances and requires states parties to set up domestic systems for the prevention and punishment of the use of torture.[40] Australia has been party to the Torture Convention since 1989 and some changes to Australian law were implemented through the *Crimes (Torture) Act 1988* (Cth). The prohibition on

---

38 The submission was prepared jointly by the Cancer Council Australia and the National Heart Foundation and supported by a number of other health-related organisations. The submission expresses 'strong support' for the ratification of the convention. 'Submission to Joint Standing Committee on Treaties' Parliament of Australia, <http://www.aph.gov.au/house/committee/jsct/30March04/subs/ sub1.pdf> at 25 May 2004.

39 Compare for example Australia's ratification of the Statute of the International Criminal Court, described briefly in Charlesworth et al, above n 3, 434.

40 *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987).

torture is highly domestically salient in Australia. The use of torture is abhorrent to Australian culture and a rejection of torture is reflected in the rhetoric of both government and other Australian elected officials. In May 2004, for example, the Prime Minister condemned 'absolutely and unconditionally'[41] the torture-like treatment of Iraqi prisoners by their United States captors and that same conduct inspired Parliamentary statements condemning torture.[42] The prohibition on torture is institutionalised both in legislation[43] and in actions such as the government support for the eight torture and trauma services in Australia, which provide recovery and support services for people who have experienced torture and trauma.[44] The Optional Protocol to the Torture Convention establishes a system of regular visits by international and national bodies to places where there is a high risk of torture. It also requires that states parties establish independent national mechanisms for the prevention of torture domestically.[45] While its procedures are not common to Australian law, in seeking to strengthen the enforcement of the Torture Convention, the Optional Protocol is consistent with the domestic salience of the prohibition against torture.

The federal government's reaction to the Optional Protocol, however, challenges the theory of domestic salience. The Australian government has steadfastly refused to become party to the Protocol, despite the support within Australia for the Protocol's ratification.[46] Further, the Australian government objected to the very existence of the Protocol by voting against its adoption by the United Nations

---

41 ABC Radio National, 'Prime Minister John Howard', *Breakfast with Peter Thomson*, 5 May 2004 <http://www.pm.gov.au/news/interviews/Interview843.html> at 25 May 2004.

42 See eg Commonwealth, Parliamentary Debates, Senate, May 2004, 22756–22765 ('Matters of Urgency: Iraq – Treatment of Prisoners'). See also Commonwealth Attorney-General's Department, *Australia's Second and Third Reports under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (1999); Attorney-General, 'Observations by the UN Committee Against Torture' (Media Release, 22 November 2000).

43 See eg *Crimes (Torture) Act 1988* (Cth).

44 Details of these services are at the Department of Health and Ageing, Mental Health and Wellbeing website, <http://www.mentalhealth.gov.au/programs/tt/ pastt.htm> at 25 May 2004.

45 *Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 4 February 2003, (2003) 42 ILM 26 (not yet in force).

46 For example, 17 of the 20 submissions made to the JSCOT inquiry into the Protocol supported Australia's ratification, as did a minority of the members of JSCOT. The submissions are available at <http://www.aph.gov.au/house/committee/jsct/OPCAT/subs.htm> at 25 May 2004; JSCOT report at <http://www.aph.gov.au/house/committee/jsct/OPCAT/report.htm> at 25 May 2004.

Economic and Social Council (ECOSOC) in 2002.[47] The government has justified its rejection of the Protocol on both procedural and substantive grounds. The substantive grounds relate to its concerns about the UN treaty body system in general. Procedurally, the Australian government objects to the right, given to the subcommittee created by the Protocol, to visit Australian facilities without prior approval, even though notice of such visits must be given.[48] The Australian government's position was echoed by the report of a JSCOT inquiry into the Optional Protocol, in which a majority of the Committee concluded that there was no immediate need for Australia to become party to the Protocol because 'as a State Party to the [Torture] Convention, Australia has already demonstrated its commitment to proscribing and preventing torture'.[49] The domestic salience of the Optional Protocol has apparently had no impact on the official attitude towards it.

The limits in the theory of domestic salience are also highlighted by the controversy surrounding the AUSFTA. The AUSFTA is a bilateral agreement between Australia and the United States designed to liberalise and create an environment that fosters trade in goods, services and investment between the two countries.[50] The Agreement is typical of modern free trade agreements in its coverage of a wide range of trade and trade-related interactions, including agriculture, customs administration, telecommunications and intellectual property rights. The Agreement will have significant domestic impact and will limit the executive government's ability to regulate in areas such as government procurement, intellectual property and the provision of drugs under the Pharmaceutical Benefits Scheme (PBS). The AUSFTA was signed on 18 May 2004.[51] It was passed by the United States House of Representatives and Senate in July 2004.[52] The Australian

---

47 See CNN.com, 'Australia Defends Torture Vote' (26 July 2002) <http://www.cnn.com/2002/WORLD/asiapcf/auspac/07/26/aust.torture.protocol/> (17 May 2004). Eight other countries voted against the adoption of the Protocol, including China, Libya, Cuba and Sudan.

48 Ibid.

49 Joint Standing Committee on Treaties, Parliament of Australia, *Report 58: Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, March 2004, 34.

50 *Australia-United States Free Trade Agreement*, signed 18 May 2004 (not yet in force).

51 See Minister for Trade, 'Vaile and Zoellick Sign Free Trade Agreement' (Media Release MVT34a/2004, 18 May 2004).

52 See Office of the United States Trade Representative, 'Statement of US Trade Representative Robert B Zoellick Following House Approval of Australia Free Trade Agreement (Media Release, 14 July 2004); 'US-Australia FTA Approved' *The Australian*, 16 July 2004.

Parliament passed the necessary implementing legislation in August 2004,[53] allowing the agreement to enter into force on 1 January 2005.[54]

The AUSFTA aroused interest in all sectors of the Australian public. The Agreement received a high level of media coverage and was the subject of not one, but two Parliamentary inquiries: the normal JSCOT inquiry and a separate Senate Select Inquiry.[55] The Senate Foreign Affairs, Defence and Trade References Committee also conducted a third inquiry into the Agreement while it was still under negotiation.[56] The inquiries received a total of nearly 900 submissions from industry groups, non-government organisations and individual members of the public, a remarkable number for a single instrument. Opinion on the Agreement was, and remains, divided. The executive government was firmly committed to ratification of the Agreement and its rhetoric consistently reinforced the message that the AUSFTA 'will provide enormous benefits to the Australian economy'.[57] After considerable internal debate, the federal opposition Labor Party also formally supported the Agreement, but demanded changes to the Agreement's implementing legislation.[58] The minor parties in the Australian Parliament, the Greens and the Democrats, opposed the Agreement.[59] The terms of the AUSFTA provoked a heated public debate about their potential impact, in particular in relation to the government's ability to control the price of prescription drugs under the PBS.[60]

---

53 The US Free Trade Agreement Implementation Bill and the US Free Trade Agreement Implementation (Customs Tariff) Bill were assented to on 16 August 2004, see House of Representatives, Parliament of Australia, *Daily Bills List*, 16 August 2004, 11.

54 The United States reserved its rights to object to the Australian implementing legislation, which may impact on the entry into force of the Agreement. See Office of the United States Trade Representative, 'Statement from USTR Spokesman Richard Mills Regarding Australian implementing legislation and amendments related to the FTA' (Media Release, 12 August 2004).

55 See Joint Standing Committee on Treaties, Parliament of Australia, *Report 61 – Australia-United States, Free Trade Agreement*, 23 June 2004; Senate Select Committee on the Free Trade Agreement between Australia and the United States of America, Parliament of Australia, *Final Report*, 5 August 2004.

56 See the report of the inquiry: Senate Foreign Affairs, Defence and Trade References Committee, Parliament of Australia, *Voting on Trade: The General Agreement on Trade in Services and Australia-USA Trade Agreement* (27 November 2003).

57 Minister for Trade, 'FTA Promises Huge Wins for Australian Economy' (Media Release MVT27/2004, 30 April 2004).

58 See eg 'Labor to Support FTA with US', *The Age*, 3 August 2004.

59 See eg Australian Greens, 'Greens Call for Senate Veto on FTA' (Media Release, 9 Feburary 2004); Australian Democrats, 'Democrats to Oppose USFTA' (Media Release 04/343, 5 May 2004).

60 For a small sample of the debate, see eg Tom Faunce, 'A Paucity of Vision and Courage', *The Canberra Times*, 9 August 2004; Minister for Trade, 'Australia-United States FTA No Threat to PBS' (Media Release MVT64/2004, 25 July 2004);

This difference of opinion reflected public opinion on the Agreement as a whole, which ranged from a coalition of business groups that was set up to promote the conclusion of the AUSFTA,[61] to economists who recommended against the Agreement on the grounds that it would bring few gains to Australia,[62] to individuals who objected to the Agreement in principle.[63]

The AUSFTA is thus an example of a treaty with mixed domestic salience. Government rhetoric has remained consistently and enthusiastically in support of the treaty, but this does not appear to have eased doubts about the Agreement, at least within sections of the public and the media. There is considerable public anxiety about the impact of the AUSFTA on icons of Australian culture, such as the PBS and local content rules for media. This anxiety makes the Agreement a weak cultural match with Australian society and contributes to a perception that the Agreement threatens elements of Australia's economic security.

B *Some Speculations on the Inconsistencies*

The contrasting examples of the FCTC, the Optional Protocol and the AUSFTA do not fit easily within the theory of domestic salience. Nor are they explained by simple notions of sovereignty. The three instruments demonstrate that the oft-expressed fear that international obligations dilute Australia's sovereignty has little impact on the executive government's response. The FCTC and the AUSFTA contain specific obligations with clear domestic ramifications for both the present and the future, while the Optional Protocol's obligations require little domestic reform and do not inhibit the government's ability to regulate. Nonetheless, the Australian government is willing to become party to the FCTC and the AUSFTA, and refuses to do the same with the Optional Protocol.

One common response to this apparently inconsistent approach to international instruments is that the government is driven largely by its policy objectives. Thus, just as the government supported the FCTC because of its correlation with Australian domestic policy, its attitude to the AUSFTA and Optional Protocol reflect foreign policy priorities. Indeed, the government's different reactions to the bilateral AUSFTA and the multilateral Optional Protocol seem to reflect the general

---

ABC Television, 'A Bitter Pill?', *Four Corners*, 2 August 2004 http://www.abc.net.au/4corners/content/2004/s1165435.htm at 10 August 2004.

61 AUSTA: The Australia United States Free Trade Agreement Business Group, see <http://www.austa.net/whoAreWe.htm> at 18 May 2004.

62 Evidence to Senate Select Committee, Parliament of Australia, <http://www.aph.gov.au/hansard/senate/commttee/S7528.pdf> at 18 May 2004, p 22 (Ross Garnaut) and following.

63 See eg the several hundred submissions made by individuals to the Senate Select Committee inquiry, <http://www.aph.gov.au/Senate/committee/freetrade_ctte/submissions/sublist.htm> at 25 May 2004.

attitude of Coalition governments to international law, one that 'in keeping with a more individualistic, contractarian political philosophy ... [is] more bilaterally focused'.[64]

It is true that concluding a free trade agreement with the United States has long been an integral part of the Howard government's foreign policy. More than just a trade agreement, the AUSFTA is seen to cement the political and strategic relationship between Australia and the United States and to have wider international ramifications. As the Australian Minister for Trade stated on signing the AUSFTA,

> This agreement puts our trade and investment relationship with the United States on the same footing as our well-established political and strategic relationship – this is the commercial equivalent of the ANZUS treaty.
>
> ...
>
> Just as we stand together in our fight against global terrorism, we stand together against protectionism, we both believe in the rights of the individual and their right to compete in open markets.[65]

Similarly, controlling Australia's engagement with the United Nations treaty system is an important aspect of Australian foreign policy. The Australian government decided in 2000 to retreat from Australia's previously high level of engagement with the UN system and to 'adopt a more robust and strategic approach to Australia's interaction with the treaty committee system'.[66] This new approach meant the adoption of a number of measures, including the decision that Australia would 'only agree to visits to Australia by treaty committees and requests from the Committee on Human Rights "mechanisms" for visits and the provision of information where there is a compelling reason to do so'.[67] It is clear from the Australian government submission on the Optional Protocol to the Torture Convention that this 'strategic approach' remains the guiding principle in Australia's interaction with the UN system. The submission reiterates the government's position on the UN treaty body system and cites the inconsistency of the Optional Protocol obligations with that position as the substantive reason for Australia's decision not to ratify the Protocol.[68]

---

64 Kent, above n 6, 63.

65 Minister for Trade, 'Signing of the Australia-United States Free Trade Agreement' (Speech delivered in Washington DC, 18 May 2004).

66 Minister for Foreign Affairs, the Attorney-General and the Minister for Immigration and Multicultural Affairs, 'Improving the Effectiveness of United Nations Committees' (Joint Media Release FA-97, 29 August 2000).

67 Ibid.

68 See Attorney-General's Department and Departments of Immigration and Multicultural and Indigenous Affairs and Foreign Affairs and Trade, 'The Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment', Joint Submission to the Inquiry of the Joint Standing

As important as government policy is to Australia's relationship with international law, however, the domestic salience of the FCTC demonstrates that policy is not the only, or even always the most important, factor. I now want to suggest two other factors that appear to have influenced the government's attitude to the treaties examined in this article: characterisation of international obligations and the nature of the substantive treaty obligations.

1 Characterisation of the International Obligations

An influential factor in the Australian government's attitude to international obligations appears to be the manner in which they are, or can be, characterised. For example, the government believes in the pursuit of economic growth through trade liberalisation and is committed to free trade as a good in itself.[69] The Foreign Minister has described the government's commitment to the World Trade Organization (WTO) as 'unswerving'[70] and the government has embarked on an ambitious program to conclude bilateral trade agreements with major trading partners.[71] In July 2003, the Prime Minister described how the AUSFTA 'will demonstrate the resolve of both Australia and the United States to liberalise our economic relations'.[72]

The government's belief in 'the rights of the individual and their right to compete in open markets'[73] has meant that the pursuit of the AUSFTA has been justified as much on ideological grounds, as it has been on the grounds of any quantifiable benefits that liberalised trade with the United States may bring. It has allowed matters which would normally require a complex resolution of competing interests at a domestic level, such as the length of copyright protection terms and the

---

Committee on Treaties, February 2004, 2–3. For further discussion of Australia and the UN treaty bodies see eg Hovell, above n 14; Spencer Zifcak, *The New Anti-Internationalism: Australia and the United Nations Human Rights Treaty System, Discussion Paper No 54* (The Australia Institute, 2003).

69 The government's commitment to trade liberalisation has led a Senate Committee to criticise the Department of Foreign Affairs and Trade for an approach that could be perceived as 'brute propaganda'. See *Voting on Trade*, above n 56, 104.

70 Alexander Downer, 'Security in an Unstable World' (speech delivered at the National Press Club, Canberra, 26 June 2003). See also Alexander Downer, 'Globalisation: Global Opportunities and Global Responsibilities' (speech delivered at the launch of the Monash Institute for the Study of Global Movements, Melbourne, 24 July 2003).

71 These are described at Department of Foreign Affairs and Trade, *Free Trade Agreements: Australia's Approach*, <http://www.dfat.gov.au/trade/negotiations/australias_approach.html> (24 August 2004).

72 Prime Minister of Australia, 'Address to the Sydney Institute' (Speech delivered in Sydney, 1 July 2003).

73 Minister for Trade, above n 65.

preservation of local content in media, to be included in the AUSFTA and to be defended on free trade grounds. One factor in the government's willingness to accept the AUSFTA obligations thus appears to have been its ability to characterise those obligations as part of a broader agenda to achieve open markets and freer world trade.

A similar motivation can be argued to have affected the government's attitude to the FCTC. The FCTC has, from the outset, been regarded as an important international health initiative. It was negotiated by members of the World Health Organisation; the DoHA was the lead negotiating agency for Australia; and public discussion of the treaty centres almost wholly on the advances that the treaty will make in addressing a global health concern.[74] Characterising the FCTC as an international health-related initiative has allowed it to sidestep the negative preconceptions that afflict other kinds of international obligations in Australia, in particular human rights obligations. The Australian government's suspicion about international human rights standards[75] has meant that their potential application in Australia usually generates government rhetoric appealing to notions of Australian sovereignty and calling for the rejection of outsider voices.[76] It is not always clear that these appeals to sovereignty are genuine because, as the reaction to the Optional Protocol shows, they have been made even when the actual domestic impact of the obligation is minimal.

It is interesting then to wonder if the Australian government's approach to the FCTC would have been the same if, rather than a health-initiative, it had been the creation of a UN human rights body. The FCTC could have been framed, for example, as a protocol to the International Covenant on Economic, Social and Cultural Rights, implementing the right to the highest attainable standard of physical and mental health[77] or the right to an adequate standard of living[78] or it could have enshrined a new human right to be free from all forms of tobacco and related products. Australia has a policy of 'indirect' implementation of economic

---

74 See eg Department of Health and Ageing, 'World Health Organisation Framework Convention on Tobacco Control – National Interest Analysis', 30 March 2004; the World Health Organisation website on the Convention, <http://www.who.int/tobacco/areas/framework/en/> at 25 May 2004.

75 See eg Ann Kent, above n 6; Hilary Charlesworth, *Writing in Rights: Australia and the Protection of Human Rights* (2002).

76 See eg D Hovell, above n 14; Commonwealth, *Parliamentary Debates*, House of Representatives, 25 June 2002, 4353 (Bronwyn Bishop, MP, on the International Criminal Court).

77 *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 999 UNTS 3, art 12 (entered into force 3 January 1976).

78 Ibid art 11.

and social rights,[79] meaning that the rights themselves are not protected in legislation, although some benefits under the rights might be. For example, social security is available to specified groups within Australian society, but individuals do not have a personal right to social security or to an adequate standard of living. If the FCTC had been framed in economic or social rights terms, it seems unlikely that the government would be supporting it in the same open and enthusiastic manner. The government's reluctance to enshrine individual rights in domestic legislation, combined with the specific nature of the obligations in the FCTC, suggest that the government would instead have been resisting participation in the Convention as a whole.

2 Substantive Obligations

The second factor that the varied stories of the FCTC, the AUSFTA and the Optional Protocol suggest is that the substance of the international obligations affects the Australian executive's willingness to accept them. There is a distinction here between the fact that an international obligation will have a domestic impact, which arguably has little effect on the executive government's attitude, and the actual substance of that impact. For example, one explanation offered by the government for its rejection of the Optional Protocol to the Torture Convention is that it 'would constitute a standing invitation for the Sub-Committee to visit, specifically, Australian prisons and other facilities'.[80] Presumably this means that if the Optional Protocol enshrined a different mechanism, one that required the consent of the parties for example, the Australian government might have been prepared to consider it.

It is also possible that part of the reason for the FCTC's unproblematic run through Australia's treaty processes arises from the substance of its obligations. Even putting aside the fact that Australia claims already to be compliant with the Convention, many of the obligations in the Convention affect the rights of one industry — the tobacco industry. States parties are obliged to regulate various aspects of tobacco use within their territory, but these regulations affect state behaviour much less than they affect the conduct of the tobacco industry. It is, after all, the tobacco companies that will be most affected by the obligations relating to the content of tobacco products, tobacco product disclosures, packaging and labelling of tobacco products and sales to and by minors. This is in contrast to other treaties affecting individuals, such as human rights treaties, where the obligations apply to, and require the commitment of resources by, the state. Thus, another reason the Australian government appears willing to take on the

---

79 Dianne Otto and David Wiseman, 'In search of 'effective remedies': Applying the International Covenant on Economic, Social and Cultural Rights to Australia' (2001) 7 *Australian Journal of Human Rights* 5.

80 Attorney-General's Department, above n 68, 3.

domestically intrusive obligations in the FCTC may be that, unlike human rights treaties, most of the obligations in the FCTC do not fetter the government's conduct in any meaningful way.

VI CONCLUSION

Examining the detail of the Australian government's relationship with international law allows us to begin to discover some of the complexities and contradictions within that relationship. The differing stories of the FCTC, the AUSFTA and the Optional Protocol to the Torture Convention highlight the multifaceted nature of the government's interaction with international law. The manner in which an international instrument is characterised can make a difference to the Australian government's approach to it, and the instrument's domestic salience can determine both the attitude of the executive government to that instrument and the ease with which it is accepted by the Australian public.

Exploring the complexities of the relationship between international and domestic law also raises normative questions about the way in which the Australian government interacts with the international system. Those suspicious of the domestic impact of international standards may be placated by the example the FCTC provides of Australia's strategic involvement with the international system. Equally, however, there are those who regard as deeply cynical the Australian government's view that international law is useful only in as far as it advances the perceived national interest. On this view, Australia should have participated in the negotiations of the FCTC aiming to enshrine international best practice standards for itself, as well as other states parties, rather than enshrining only those standards that Australia had achieved to date. While it is unclear whether these normative tensions can, or should be, resolved, the continued unpacking of Australia's relationship with international law at least enables the questions to be asked.