REVIEW OF DEVELOPMENTS

IN

INTERNATIONAL TRADE LAW

COMMONWEALTH
ATTORNEY-GENERAL'S DEPARTMENT

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Index

A. INTERNATIONAL SALE OF GOODS AND RELATED TOPICS

I. UNCITRAL: U.N. Convention on Contracts for the International Sale of Goods 1980 ('Vienna Sales Convention')

Uniform legislation, finalised by the Standing Committee of State and Federal Attorneys-General in 1986, has been implemented in all States and Territories except the Cocos (Keeling) Islands, Christmas Island and the Ashmore and Cartier Islands, for which Ordinances will be made in the near future. A declaration was made at the time of accession stating that the Convention will not extend to those Territories. The declaration will be withdrawn once the relevant Ordinances take effect.

The Convention, which was adopted by a Diplomatic Conference in Vienna in 1980, provides uniform rules governing the formation and operation of international sales contracts including offer and acceptance, formalities of a contract, obligations of the seller and buyer, and remedies. Although limited in terms of the legal aspects it addresses, and the types of sales to which it applies, the Convention provides an international standard for dealing with many of the legal issues commonly encountered by parties to international commercial sales contracts.

The Convention is designed to achieve maximum flexibility in terms of its application to any particular transaction. Accordingly, (with one exception - Article 12 which enables a declaration to be made requiring contracts to be in writing), Article 6 of the Convention allows contracting parties to exclude the application of the Convention or to derogate from or vary the effect of its provisions. It provides a legal framework which will apply where the parties have not addressed an issue covered by the Convention.

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Following its opening for signature on 11 April 1980, a total of 21 countries signed the Convention. On 11 December 1986 Italy and the United States ratified the Convention and China deposited an instrument of approval. This brought the number of adoptions to eleven and, with only ten required for the Convention to enter into force, it entered into force on 1 January 1988. In addition to those already party to the Convention, a number of Australia's major trading partners are also understood to be considering adoption of the Convention including Canada and Japan.

II. Hague Conference on Private International Law: Convention on the Law Applicable to International Sale of Goods 1985

This Convention was adopted by an Extraordinary Session of the Hague Conference on Private International Law in October 1985 as a replacement for the 1955 Convention which had been implemented by only 8 countries, 7 of which were European civil law countries. The purpose of the 1985 Convention is to provide more universally acceptable choice of law rules for determining which system of national law is to apply to contracts for the international sale of goods. It is intended to complement the 1980 Vienna Sales Convention.

The crux of the 1985 Convention is contained in Articles 7 and 8 which together provide rules for determining the law applicable to a contract for the international sale of goods falling within the scope of the Convention. Article 7 enables parties to specify an applicable law. In the absence of such a choice, Article 8 provides a flexible means (recognising both the civil law and common law approaches to choice of contract law) of determining the applicable law. The general rule in Article 8 provides that the contract will be governed by the law of the seller's state. This rule, in turn, is subject to particular circumstances in which the law of the buyer's state will apply. Finally, the contract may be

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governed by another law altogether if the contract is manifestly more closely connected with a law other than the law of the buyer's or seller's state (akin to the common law proper law of the contract rule).

As a result of the lack of success of the 1955 Convention, there remains a lack of uniformity in the choice of law rules applicable to contracts for the international sale of goods The 1985 Convention is intended to provide an international standard in this complex area of law which will find broad acceptance internationally. To the extent that the 1985 Convention has not only been drafted with this object in mind, but also as a complement to the 1980 Vienna Sales Convention, greater uniformity in the area of international sales law seems more assured.

The Convention will enter into force (after the expiration of three months) when ratified or acceded to by five states. To date the Convention has been signed only by Czechoslovakia. The Australian delegation to the 1985 Extraordinary Session of the Hague Conference (which included a representative of the States) recommended that Australia consider adopting the Convention, particularly if a number of other states do so. Consideration will be given to the question of Australian adoption now that Australia is a party to the 1980 Vienna Sales Convention.

III. Unidroit: Convention on Agency in the International Sale of Goods 1983

The Convention is intended to provide uniform rules to govern agency contracts of an international character for the sale of goods. It is restricted in scope to the relationship between principals and third parties and between agents and third parties, thus leaving aside the more difficult area of the relationship between principals and agents. The Convention was adopted at a Diplomatic Conference in Geneva in 1983.

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In its report, the Australian delegation (which included a representative of the States) expressed the view that the Convention provides satisfactorily for the matters with which it deals, and should be acceptable to the business community. However, it also noted that the Convention presupposes the application of the 1980 Vienna Sales Convention.

The Convention will enter into force when ratified or acceded to by ten states. To date four states have become parties (Italy, France, South Africa and Mexico) and four more have signed the Convention.

Consideration will be given to the question of Australian adoption now that Australia has acceded to the Vienna Sales Convention.

IV. Hague Conference on Private International Law: Convention on the Law Applicable to Agency 1977

The Convention was adopted by a Special Commission of the Thirteenth Session of the Hague Conference on Private International Law in June 1977.

The purpose of the Convention is to provide rules for determining which national law is to apply to particular international agency relationships. The scope of the Convention is broad in that it applies to agency relationships with 'an international character'. The Convention encompasses both commercial and non-commercial agency and regular and casual agency. It is intended to include both the common law undisclosed principal and the civil law indirect agent. The Convention does not apply to questions of the capacity of the parties or formal requirements, nor does it apply to directors, officers and partners of corporations, associations and partnerships if their authority derives from law or from the constitutive documents of such organisations.

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Articles 5 and 6 specify the choice of law rules for the principal and agent relationship. Article 5 allows for complete party autonomy in the choice of applicable law (which may be express or implied) whilst Article 6 indicates the law to be applied where no choice has been made. Article 11 specifies the operative choice of law rules with regard to relations between the principal and third party, although Article 14 permits the principal and third party to make an express choice of law. Article 15 extends the applicable law, indicated by Articles 11 and 14, to the agent-third party relationship.

The Convention will enter into force three months after the third ratification, acceptance, approval or accession. It has been ratified by France and Portugal to date, and signed by the Netherlands. Australia is not presently giving consideration to adopting the Convention.

V. OECD: Consumers and international trade

An officer of the Department has regularly attended meetings of the OECD Committee on Consumer Policy which is examining the issue of international trade and the consumer as one of its agenda items. This examination has included the extent to which domestic consumer legislation may act as a barrier to trade. The topic remains a high priority within the Committee.

B. INTERNATIONAL CARRIAGE OF GOODS AND MARITIME LAW

I. UNCITRAL: U.N. Convention on the Carriage of Goods by Sea 1978 ('Hamburg Rules')

The Sea-Carriage of Goods Act (Cth) 1924 implements in Australia the 1924 International Convention for the Unification of Certain Rules Relating to Bills of Lading ('the Hague Rules'). Because of perceived limitations in the Hague Rules, two Protocols amending the Rules were developed, namely

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the Visby Protocol and SDR Protocol of 1968 and 1979 respectively. The Protocols do not alter the fundamental balance of rights and liabilities between shipper and carrier embodied in the Hague Rules, but rather, update the limitation of liability provisions in those Rules. The Visby Protocol has been adopted by over 19 states whilst the SDR Protocol has been adopted by 11 states. Neither Protocol has been adopted by Australia.

The United Nations Convention on the Carriage of Goods by Sea ('the Hamburg Rules') was prepared by UNCITRAL following pressure from developing countries for a new international legal framework to replace the Hague Rules which were regarded as favouring the interests of carriers. The Hamburg Rules were adopted at a Diplomatic Conference held in Hamburg in 1978 and will enter into force once adopted by 20 countries. To date only 13 (mostly developing) countries have done so.

The Hamburg Rules provide greater protection for shippers by increasing the liability of carriers. The rules were also developed to take into account modern methods of shipping and cargo handling and modern forms of shipping documentation.

Primary carriage of this matter is with the Department of Transport and Communications. In 1986/87 that Department undertook an extensive review of Australia's marine cargo liability law and issued a discussion paper on which industry views were sought. Earlier this year it was announced that Australia would accede to the Visby and SDR Protocols and the Sea-Carriage of Goods Act 1924 would be amended accordingly. In addition, the Act would be amended to implement the Hamburg Rules, but that part of the Act will be brought into effect at a future date if and when Australia becomes party to the Hamburg Rules. The legislation is expected to be introduced into Parliament in the Autumn Sittings.

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II. UNCITRAL: Draft Convention on the Liability of Operators of International Transport Terminals (OTT)

Pursuant to a request at the 16th session of UNCITRAL in 1983, the International Institute for the Unification of Private Law (Unidroit) transmitted its preliminary draft Convention on this subject to UNCITRAL for further consideration. The 17th session of UNCITRAL assigned work on the project to its Working Group on International Contract Practices which subsequently devoted four sessions to the matter. Australia participated in the first two, and the fourth, UNCITRAL working group sessions. At the fourth session it was decided that the draft rules, transmitted by Unidroit in the form of a Convention, should be adopted in that form. Work on the draft Convention was completed at this session. It is to be considered with a view to adoption at the 22nd session of the Commission in April/May 1989. Final comments have been sought from member states on the provisions of the draft Convention by 30 November 1988.

The draft OTT Convention is intended to complement the 1978 Convention on the Carriage of Goods by Sea ('Hamburg Rules') and the 1980 Convention on International Multimodal Transport. Those Conventions provide uniform rules governing the liability of carriers for loss or damage to goods, or delay in delivery in the international carriage of goods. The draft Convention is intended to govern the liability of non-carrying intermediaries in the same manner. At present their liability is governed by disparate national legal regimes.

As in the Hamburg Rules and Multimodal Convention, under the draft Convention the operator is presumed to be liable for loss, damage or delay in delivery, occurring during the period of his responsibility for the goods. The onus of proof is on the operator to establish that all reasonable measures were taken to avoid the occurrence and its consequences. There is also provision for apportionment of liability.

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The draft Convention establishes a monetary limit on the operator's liability, similar to that in the Hamburg Rules. It also specifies the operator's rights of security in the goods. The draft Convention has a wide scope, encompassing stevedores and transport terminal operations such as those at Australian seaports. The Attorney-General's Department has consulted with State government departments and a large numbe of firms with interests in the field of international termina operations with a view to formulating an Australian attitude towards the proposed regime. The potential relevance of the proposed regime to Australia is apparent from the high volume of trade which takes place between Australia and foreign countries each year by sea.

C. INTERNATIONAL FINANCE

I. Unidroit: Convention on International Financial Leasing; Convention on International Factoring

The International Institute for the Unification of Private Lav (Unidroit) has produced two Conventions relating to international financial arrangements which were adopted by a Diplomatic Conference in Ottawa in May 1988. The Conventions were drafted by two Unidroit committees of governmental experts, which met annually in Rome from 1985 to 1987. Australia was represented at all meetings and at the Diplomatic Conference.

The Convention on International Financial Leasing is concerned with situations where title and possession of property are vested in different parties, while the Convention on International Factoring concerns the assignment of 'book debts' to third parties, called 'factors'.

The origins of the Institute's work in this area date back to 1974, when the Unidroit Governing Council resolved to place these matters on the Institute's work programme, in view of

the growing importance of financial arrangements in international trade and the existing lack of uniformity between states in this field.

The aim of the two Conventions is to promote the use of leasing and factoring in international trade by providing a legal framework which sets out the rights and obligations of the parties to a leasing or factoring contract. As a general rule, the Conventions do not deal with the formation or validity of the leasing or factoring contract, nor the question of priorities of interest, these issues being left to be decided according to the applicable national law.

The subject matter of the two Conventions is international trade, and consumer transactions are excluded from their ambit There are other requirements in relation to the 'internationality' link which exclude purely domestic transactions.

D. INTERNATIONAL PAYMENTS

I. UNCITRAL: Convention on International Bills of Exchange and International Promissory Notes

The UNCITRAL Convention on International Bills of Exchange and International Promissory Notes has as its object the harmonisation of the civil and common law systems in their application to bills of exchange and promissory notes. It is hoped that the Convention, which is optional for the parties, will facilitate the circulation of these instruments in international trade.

The Convention was considered by the Commission at its 17th session held in New York in June/July 1984. The Commission decided that a revision of the draft Convention, taking into account discussions at the session and also written comments

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of governments and international organisations, should be undertaken by the Working Group on International Negotiable Instruments (of which Australia is a member).

The Commission, at its 19th session (1986), considered the draft Convention in some detail based primarily on the report of the working group's 13th and 14th sessions (1985). It was expected that the draft Convention would be finalised at the 19th session in preparation for adoption by a Diplomatic Conference. In the event, the 19th session was unable to complete its work on the draft Convention.

A further session of the working group was therefore held in February 1987 to consider drafting and other problems arising from the 19th session. The opportunity was also given at that time for the working group to consider final comments to be submitted by governments on the draft Convention.

The draft Convention was finalised at the 20th session of the Commission and was recommended for consideration by the United Nations General Assembly with a view to its adoption or any other action to be taken.

At the 43rd session of the UN General Assembly this year the Convention was adopted and opened for signature after deliberation on its text within the Sixth Committee. During these deliberations only minor changes to the text were made with the exception of the clause dealing with the scope of application of the Convention.

II. UNCITRAL and OECD: Electronic funds transfers (EFT)

(i) UNCITRAL

Following its adoption of the legal guide on EFT, developed by the secretariat in conjunction with the Working Group on International Negotiable Instruments, the Commission decided

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at its 19th session (1986) to undertake work on the formulation of model legal rules on EFT with a view to the harmonisation of national laws in this area. It was decided that the model rules:

- should be flexible and should be drafted in such a way that they did not depend on specific technology; and that

- they should deal with the relationship between banks as well as between banks and their customers.

The Commission assigned the task to the Working Group on International Negotiable Instruments, which it renamed the Working Group on International Payments for this purpose.

At its 16th session in November 1987, the working group (of which Australia is a member) began by considering a list of legal issues prepared by the secretariat. The working group decided, in furtherance of the objective of harmonisation of the law in this field, that the model rules should cover a wide range of banking and legal problems. On the basis of its deliberations, the group requested preparation of draft model rules by the secretariat.

The report of the 16th session of the working group was put before the Commission at its 21st session. The Commission agreed with the prevailing view in the group that the model rules should concentrate initially on international funds transfers although they would need to address both domestic and international aspects of such transactions.

The extent to which the rules should apply to domestic funds transfers was addressed at the 17th session of the working group in New York from 5 to 15 July 1988. However, no consensus was reached on the matter.

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A further revised draft of the model rules is to be prepared by the secretariat taking into account the decisions of the 17th session.

The next session of the working group will be held in Vienna from 5 to 16 December 1988.

(ii) OECD

The Committee on Consumer Policy (CCP) of the OECD decided in February 1985 to undertake a detailed study on consumer issues in banking. A working party was formed for this purpose and initially concentrated on new technologies such as EFT. A Departmental officer chaired the working party.

The report of the working party, "Electronic Funds Transfer Systems and the Consumer" was considered and approved by the CCP at meeting 36, Paris, 26-27 May 1988, subject to some minor amendments. It was agreed that the report should be submitted to the OECD Council for derestriction.

III. OECD: Work on international trade in information services

The OECD Committee for Information, Computer and Communications Policy (ICCP) through its Working Party on Trans-Border Data Flows (TBDF) considered the central policy question of how rapidly increasing international flows of information should be treated.

The OECD Declaration on TBDF, adopted by Ministers of OECD member countries on 11 April 1985, is an outcome of thi consideration. The Declaration sets forth the following objectives:

(i) promote access to data and information and related services, and avoid the creation of unjustified barriers to the international exchange of data and information;

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(ii) seek transparency in regulations and policies relating to information, computer and communication services affecting TBDF;

(iii) develop common approaches for dealing with issues related to TBDF and, when appropriate, develop harmonised solutions;

(iv) consider possible implications for other countries when dealing with issues related to TBDF.

The Declaration represents the first international effort to address economic issues raised by the information 'revolution'. It addresses the policy issues arising from TBDF such as flows of data and information related to trading activities, intracorporate flows, computerised information services and scientific and technological exchanges.

Member countries, in adopting the Declaration, also agreed to undertake further work on the main issues emerging from TBDF.

This work is being co-ordinated through the Committee on Information, Computer and Communications Policy, the parent body of the working party. The working party was disbanded in 1988, but a Working Party on Telecommunications and Information Services Policy is taking up issues related to international trade in information and telecommunications services.

Australia actively supports the work of the ICCP on international information flows. Issues touch on several areas of Government interest, in particular: telecommunications, privacy law, intellectual property law, customs and taxation, criminal law and financial services regulation. The Department of Transport and Communications has primary responsibility for co-ordination of Australia's input in relation to the work of the ICCP.

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E. COMMERCIAL DISPUTE RESOLUTION

I. UNCITRAL Model Law on International Commercial Arbitration 1985

The Model Law, which was adopted at the 18th session of UNCITRAL in June 1985, provides a uniform law for the regulation of international commercial arbitration, although it can also be used as the basis for purely domestic arbitration legislation. Unlike a convention, the Model Law may be adopted word for word, or adapted to meet local conditions. To date the Model Law has been adopted by Canada, Cyprus, Nigeria and California.

Legislation to implement the Model Law in Australia is currently before Parliament. The International Arbitration Amendment Bill 1988 will amend the Arbitration (Foreign Awards and Agreements) Act 1974, which implements the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention). As presently drafted, the Bill provides that the Model Law will apply to all international commercial arbitrations conducted in Australia, unless the parties agree otherwise. In addition, the Bill enables parties to choose to apply other provisions concerning such matters as interest and costs.

A number of legal issues are dealt with in the Model Law, including the form and validity of an arbitration agreement, the composition and jurisdiction of arbitral tribunals, the conduct of arbitral proceedings and enforcement of awards. It contains a number of provisions which govern the role of courts in the arbitral process. Article 5 of the Model Law, which defines the scope of court intervention, was formulated on the basis that court intervention in commercial arbitrations should be kept to a minimum with an emphasis, instead, on court assistance and supervision where appropriat

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In January 1986, the Attorney-General established a working group to review Australian arbitration laws in the light of the Model Law. Representatives from the States and the Northern Territory, the Law Council of Australia, and the Institute of Arbitrators Australia participated in the working group. In December 1986 the working group completed its report which recommended that the Model Law be adopted and implemented by Commonwealth legislation.

The report of the working group was considered by the Standing Committee of Attorneys-General in March this year. The Ministers agreed that Australia adopt the Model Law and that it be implemented by the Commonwealth for the whole of Australia, but leaving the States free to introduce 'mirror' legislation if they wished.

II. Review of Australia's commercial arbitration laws.

At the request of the Standing Committee of Attorneys-General the arbitration working group was reconvened in order to review the operation of Australia's uniform domestic commercial arbitration laws in the light of comments made by the group in its report on the UNCITRAL Model Law. The issues identified for examination included rights to legal representation, the need for consent of all parties to obtain consolidation of proceedings, issues of natural justice where an arbitrator holds a conference of the parties prior to the arbitration, inconsistencies between the State and Territory legislation, and inconsistency between Part VII of the State and Territory legislation (concerning enforcement of foreign awards) and section 12 of the Commonwealth Arbitration (Foreign Awards and Agreements) Act 1974. The report of the working group is currently being considered by the Standing Committee of Attorneys-General.

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III. ICSID: Convention on the Settlement of Investment Disputes between States and Nationals of other States 1965

The ICSID Convention, which was adopted in 1965 under the auspices of the World Bank, enables investment disputes between a state party and a national of another state party to be submitted for resolution by arbitration or conciliation conducted under the aegis of the International Centre for the Settlement of Investment Disputes, based in Washington, D.C. The Convention provides an additional option for resolution of an investment dispute - its use in any particular case requires the agreement of the parties.

The general aim of the Convention is to improve the international investment climate and thereby stimulate a larger flow of private investment between countries. To increase the likelihood of achieving this goal, agreement was reached at the 12th annual meeting of the ICSID Administrative Council in October 1978 for the provision of an Additional Facility whereby the facilities of the Centre may be used for conciliation or arbitration of investment disputes in which one of the parties is not a contracting state or a national of a contracting state. In such cases, however, unlike proceedings where the parties are a state party and a national of a state party, an award resulting from an arbitration under the Additional Facility cannot be enforced under the Convention.

To date, over 20 cases have been submitted to ICSID for resolution, with an increasing number of countries who have reformed their domestic law to promote the use of ICSID or entered into bilateral investment treaties nominating ICSID for use in the settlement of disputes concerning investments.

The Convention has been accepted by 89 countries. Although Australia became a signatory to the Convention on 24 March 1975 it has not yet ratified it. The Law Council of Australi

(in particular, the International Trade and Business Committee) and individual members of the legal profession have supported ratification. The Government is presently considering the question of ratification.

The Department of the Treasury has primary responsibility for World Bank (and thus ICSID) policy issues.

IV. MIGA: The Multilateral Investment Guarantee Agency

The World Bank's Multilateral Investment Guarantee Agency (MIGA) formally came into operation earlier this year. Membership of the convention which establishes the MIGA is open to all states that are members of the World Bank. However, the MIGA is both legally and financially independent of the World Bank. The MIGA's aim is to encourage investment in developing countries by providing insurance against non-commercial risks, and consultative and advisory services on request to member countries and investors.

The four main categories of non-commercial risks against which the MIGA offers insurance to investors are:

- restrictions on currency conversion;
- expropriation of property by legislative or administrative actions;
- breach of legal commitment by the host government in circumstances where the holder of a guarantee does not have reasonable access to a judicial or arbitral forum; and
- armed conflict and civil disturbance.

By agreement, coverage may be extended to other risk categories including terrorism, kidnapping and politically motivated strikes.

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Host countries are able to retain sovereign control over the MIGA's involvement in investment in their territory as their approval is required before the MIGA can issue a guarantee. In the event of compensation being paid, the investor's rights are subrogated to the MIGA, which as subrogee endeavours to settle any dispute it may have with the host country by arbitration.

The Department of the Treasury has primary responsibility for policy issues concerning the MIGA because of the Agency's special relationship with the World Bank.

F. INTERNATIONAL LEGAL PROCEEDINGS

I. Hague Conference on Private International Law: Convention on Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters 1965

This Convention seeks to overcome some of the difficulties which are experienced in the service abroad of judicial and extrajudicial documents, particularly between common law and civil law countries. Its object is to facilitate existing methods of effecting service abroad by establishing a uniform practice for contracting states. A number of Australia's major trading partners are parties to the Convention.

The Convention establishes a procedure that enables competent authorities in one contracting state to lodge requests for service of documents with a designated authority (or authorities) in the contracting state where the documents are to be served. When a request for service is lodged, the procedures followed in executing that request are normally those of the state addressed. There are other provisions in relation to matters such as mode of service, presumption of service and costs.

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In 1986 the Standing Committee of Attorneys-General agreed in principle to accession by Australia to this Convention The Standing Committee has continued its discussions and consultations with courts on the arrangements needed to be made before accession and the terms of proposed objections under the Convention (to be recorded when lodging the instrument of accession). In particular, the designation of a central authority to receive requests from abroad and certain arrangements regarding costs have now been settled. It has also been agreed that a request for service of extrajudicial documents abroad may be made only by the Secretary to the Commonwealth Attorney-General's Department. The identity of additional authorities and the extent of their competence will be announced when the ratification procedures are concluded.

There is provision in the Convention for documents to be served by post instead of through another contracting state's central authority. However, Australia proposes to object to postal service, so far as it relates to subpoenas or notices or demands requiring information to be given or documents to be produced. This will ensure that such documents coming from abroad are received by the Secretary to the Commonwealth Attorney-General's Department or a designated additional authority and that the Attorney-General can quickly consider the exercise of his powers under the Foreign Proceedings (Excess of Jurisdiction) Act 1984.

It is also proposed that Australia declare its opposition to service of judicial documents by another contracting state directly through its diplomatic or consular agents in Australia, unless the persons to be served are nationals of that other contracting state. Finally, it is proposed that Australia make a declaration to permit presumption of service as provided for in the Convention.

The Hague Conference, from time to time, reviews the operation of the Convention by convoking Special Commissions of the Conference. A Special Commission will be convoked for this

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purpose in the early part of 1989. The Special Commission may assist in resolving uncertainties about the operation of the Convention.

II. Hague Conference on Private International Law: Convention on Taking Evidence Abroad in Civil or Commercial Matters 1970

The Hague Evidence Convention is intended to provide a uniform procedure in relation to the taking of evidence for use in civil or commercial judicial proceedings, whether commenced or contemplated. It covers not only evidence obtained by examination of persons or the inspection of documents or property but also requests for the performance of other judicial acts such as the ordering of medical examinations or blood tests.

The Convention provides for a procedure whereby contracting states must designate a central authority to receive requests for the taking of evidence coming from abroad and may also designate and determine the competence of additional authorities to receive and deal with such requests.

Parties and their representatives may be present at the proceedings for the taking of evidence. The requested authority is to apply its own law as to compulsion.

In specified cases, and subject to certain declarations of the host state, a diplomat or consul may take the evidence of nationals of the state represented by him, or of other persons

The action under the Convention is initiated by a letter of request from a judicial authority. The letter of request must contain certain information prescribed in the Convention.

A Special Commission for the Hague Conference will be convoked in the first half of 1989 to discuss the operation of the Convention. The Special Commission may assist in resolving uncertainties about the operation of the Convention.

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A number of Australia's major trading partners are now parties to the Convention.

The Standing Committee to Attorney-General's has agreed that Australia should accede to this Convention. A review of existing legislation was undertaken in connection with this decision.

The Commonwealth is awaiting implementation by the States and Northern Territory of uniform legislation, agreed to by the Standing Committee of Attorneys-General, to authorise the issuing of requests under the Convention (and other matters). The legislation is modelled on Part IIIB of the Evidence Act 1905.

III. Australia/UK Agreement Providing for Reciprocal Recognition and Enforcement of Judgments in Civil and Commercial Matters

Australia is negotiating with the United Kingdom for an agreement on recognition and enforcement of judgments. The agreement is intended to protect persons habitually resident in Australia with assets in the United Kingdom from certain effects of Britain's accession to the European Economic Community Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, Brussels, 27 September 1988. Under the Brussels Convention the United Kingdom is required to enforce judgments given in other EC countries. Such judgments may be based on a jurisdictional ground regarded as exorbitant, such as the nationality of a plaintiff. Article 59 of the Brussels Convention allows a contracting state to agree in a treaty for recognition and enforcement of judgments with a third state to undertake not to enforce judgments based solely on exorbitant jurisdictional grounds.

IV. Tin Council Litigation

Since the collapse of the International Tin Council (ITC) in October 1985, there have been a significant number of cases brought before the English courts involving actions against the ITC itself and member states by banks and brokers, as well as an action between brokers concerning the LME rules The litigation arises out of the inability of the ITC to meet its contractual obligations incurred as part of its buffer-stock operations designed to maintain the price of tin. When the ITC could not find funds to maintain the price and meet its contractual obligations LME trading in tin was suspended.

This litigation has involved substantial court resources. It has also provided some interesting case law on the status of international organisations, the incorporation of international law into domestic law, sovereign immunity and justiciability of claims arising under treaties.

Some of the more notable cases are set out in the attached list. The following brief summary of some of the cases is provided to indicate some of the issues that have been raised in the litigation.

On 27 April 1988 judgments were handed down by the Court of Appeal, comprising Kerr, Nourse and Ralph Gibson LJJ, in cases involving:

- direct actions against member states based on their "constitutional" relationship with ITC
- receivership application against the ITC
- winding up application against ITC
- disclosure of assets of ITC.

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In the disclosure of assets case the Court held that, in exercise of its inherent power, the Court could order disclosure by the ITC of its assets to a creditor having an enforceable arbitration award against the ITC. The ITC subsequently gave disclosure of both its Administrative and Buffer Stock accounts. A Mareva injunction was also issued preventing disposition of assets except for certain limited purposes. This case has effectively put an end to the day-to-day operations of the ITC.

In the receivership case the Court of Appeal dismissed the application on the ground that the alleged obligations of member states to indemnify the ITC could only arise under the Tin Agreement and not under English law and the alleged causes of action were therefore non-justiciable and the appointment of a receiver served no purpose.

In the winding up appeal, the Court said that the ITC was not subject to the Companies Act and in any event it had immunity from suit and legal process other than enforcement of an arbitration award and this gave it immunity from any winding up order.

In the direct actions case brought against member states, two judges found that there was no case to answer by the member states and that the appeals should be dismissed. Nourse LJ reached the contrary conclusion and considered that English law and international law together provided a sound basis on which the defendant ought to be held liable. Before turning to examine the reasoning of the Court of Appeal it may be useful to briefly outline the basis of the causes of action. The primary issue was whether the members of the ITC could in some way be held liable for the debts of the ITC in respect of contracts made by the plaintiffs (banks and brokers) with the ITC and on which the ITC defaulted. Separate allegations against member states in tort and based on factual allegation of agency were left for separate argument and these actions

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have now been heard before Evans J at first instance. Judgment is yet to be delivered. The Plaintiffs' claims determined by the Court of Appeal were based solely on contract and any allegations of agency were based upon the relationship of member states and the ITC under the provisions of the International Tin Agreement. These actions might be characterised as raising the 'constitutional' relationship between the Tin Council and its member states, as opposed to claims based on conduct.

The plaintiffs advanced three principal arguments. First, they argued direct liability on the ground that the ITC had no legal personality distinct from its members; the ITC was no more than an unincorporated association which traded in the name of the ITC and the members were jointly and separately liable as trading partners. The second argument alleged that even if the ITC had legal personality, this was analogous to that of bodies in the nature of quasi-partnerships known in civil law systems, where both the entity and the members are liable to creditors e.g. a Scottish partnership. It was common ground that the ITC was not a body corporate but it merely had, pursuant to a UK Order in Council, the 'capacities of a body corporate'. The third argument was that if the ITC were to be regarded as a body corporate in the same way as a company with limited liability, the Tin Agreement demonstrated that in any contract with third parties the ITC acts as agent for its members as undisclosed principals.

All three judges rejected the first and third arguments. They differed on the second argument. While the judges reaffirmed that unincorporated treaties (such as the Tin Agreement) are not part of English law and cannot affect private rights, they differed over the extent to which one could refer to such treaties. There was no provision in the Tin Agreement which indicated whether member states were to be liable for the debts of the ITC and the treaty was, in any event, unincorporated. The question then was whether international

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law apart from treaty recognised that members of an international organisation such as the ITC were liable for the debts of the organisation. Kerr LJ considered that international law did not contain any clear rules on the matter. He was prepared to look at the Tin Agreement but did not find this conclusive. Ralph Gibson LJ found no recognised international law rule and considered that in the absence of express or implied terms in the relevant treaty imposing such liability, members were not liable. Even if the treaty did impose liability on members, he would, however, not allow recourse to the unincorporated treaty to determine the liability of members in English law, any liability arising on the international law level only.

Nourse LJ, dissenting, found that in the absence of a contrary provision in the relevant treaty, an international law rule existed that formed part of English law and imposed a secondary liability on member states in the event that the ITC failed to discharge its debts.

It is difficult in a brief summary to do justice to the detailed reasoning by the Court of Appeal. The judgments are lengthy and contain a wealth of learning. Their discussion of the role of international law within domestic law is particularly interesting. The last word on this subject may, however, have to await the House of Lords appeal.

Apart from actions against member states and the ITC, one of the cases at present being argued before Webster J in the English High Court involves a challenge by Shearson Lehman, a LME broker, against the LME and two other LME brokers over Rule M. This Rule was adopted by the LME in March 1986 to settle outstanding tin contracts at a fixed price of 6250 pounds per tonne. Hearing of the actual case commenced on 8 June 1988 and is expected to continue until the end of the year. The case has raised many interesting issues concerning UK commercial law including:

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- application of Arts.85 and 86 of the European Communities Treaty (Treaty of Rome) and the effects of the Rule on trade and competition.
- application of the Unfair Contracts Terms Act 1977;
- requirements of Restrictive Trade Practices Act
- restraint of trade.

The Court is hearing detailed factual submissions on the conduct of the LME and brokers and the justifications for adoption of Rule M. The outcome of this litigation could have a bearing on the total indebtedness of the ITC to brokers.

This case led at a preliminary stage to an intervention by the ITC concerning the inviolability of its archives. This issue went to the House of lords which held that once a document had been communicated to a member of the ITC or its representative the document no longer belonged to the ITC but to the member and hence the inviolability conferred on documents of the ITC was not possessed by such a document: Shearson Lehman Bros v Maclaine Watson [1988] 1 ALL ER 116. This case is relevant tc documents of other international organisations.

Tin Council - List of Principal Cases

1. Standard Chartered Bank v ITC [1987] 1 WLR 641 Bingham J

   - waiver of immunity by ITC.

2. In the Matter of the International Tin Council and the Companies Act (Amalgamated Metal Trading).

   Millett J, [1987] 1 All ER 890; [1987] ch.419

   Court of Appeal, 27 April 1988

   - winding up under Companies Act refused
   - leave to appeal to House of Lords refused.

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3 Maclaine Watson v ITC

Millett J, [1987] 3 WLR 508, [1987] 3 ALL ER 787

Court of Appeal, 27 April 1988

- appointment of equitable receiver

- on appeal to House of Lords.

4 Maclaine Watson v ITC (No.2)

Millett J, [1987] 3 ALL ER 886

Court of Appeal: 27 April 1988

- disclosure of ITC assets

- orders for disclosure, payment out of certain monies and a Mareva Injunction have since issued.

5. J H Rayner v Department of Trade and Industry and Others
Staughton J, 24 June 1987:

Court of Appeal, 27 April 1988

- direct action against Member States - 'constitutuional relationship' with ITC

- on appeal to House of Lords.

6. Maclaine Watson v Department of Trade and Industry
Millett J, 29 July 1987

Court of Appeal: Common judgment with Rayner, Case No.5

- direct action only against DTI

- on appeal to House of Lords.

7. Shearson Lehman v Maclaine Watson (No.2) (ITC intervening):

- inviolability of ITC archives. Webster J; Court of Appeal, 31 July 1987. House of Lords [1988] 1 ALL ER 116, [1988] 1 WLR 16

- trial of action now proceeding before Webster J.

8. Direct action against Member States by Six Banks and Nine Brokers: "conduct" cases

- argued before Evans J, September 1988. Judgment not yet delivered.

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G. INTERNATIONAL TRUSTS

I. Hague Conference on Private International Law: Convention on the Law Applicable to Trusts and on their Recognition 1985

This Convention, developed under the auspices of the Hague Conference on Private International Law, was adopted in October 1984 at the 15th session of the Conference. The aim is to ensure recognition of trusts and to assist civil law countries in dealing with problems created for their courts and practitioners by the common law institution of the trust, an institution which is unknown in civil law countries.

Other Hague Conference conventions deal, on the level of conflict of laws, with such areas as adoption, divorce and sale of goods. The Trusts Convention differs from these conventions essentially in that it deals with an institution which exists in some of the member states, but not in others. It is intended to bridge the gap between common law and civil law countries. It enables certain trusts, namely those created voluntarily and evidenced in writing, to be recognised in civil law countries and, further, provides rules to determine which law or laws are applicable to those trusts.

The Convention was opened for signature on 1 July 1985 and to date Canada, Italy, Luxembourg, the Netherlands, the United Kingdom and the United States have signed. Three ratifications or accessions are required for the Convention to enter into force. To date there have been no ratifications or accessions. Given that the Convention will be of most benefit to common law countries, it is not expected that many civil law countries will be interested in acceding until a sufficient number of common law countries have done so.

At the 13th International Trade Law Conference papers were presented on this topic and general support for Australian accession to the Convention was expressed. Following

consideration by the Standing Committee of Attorneys-General, it has been agreed that Australia will accede to the Convention and that it will be implemented by Commonwealth legislation, with a provision allowing States to enact mirror legislation if they so wish.

H. COMPANIES AND SECURITIES

I. Internationalisation of financial markets

Financial markets have continued to internationalise rapidly in 1987/88. Links between markets, multinational offerings and listings of stocks in more than one country showed strong growth. These trends offer immense opportunities to increase profit and spread risk and they must be expected to continue and accelerate.

Some significant international developments during the year were:

- The synchronisation of the timing and pattern of the October crash. Once prices on the New York Stock Exchange began to fall, all other markets moved in sympathy as soon as they opened.

- Over 100 multinational offerings were reported to the International Organisation of Securities Commissions (IOSCO). They create a growing pressure on national prospectus laws.

- The Brady Committee reported that the communications networks of the four largest international data providers now cover 100,000 equities, connect 110 exchanges and include 300,000 terminals in over 110 countries. A computer programming system is now available which allows traders to retrieve data from all these services on a single screen.

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- In the field of financial futures the Chicago Mercantile Exchange has linked with Reuters to provide a computerised future trading system that will permit international twenty-four hour dealing. The Sydney Futures Exchange is negotiating to bring that facility to Australia.

II. International negotiations and agreements

Over the past year, the National Companies and Securities Commission (NCSC) has stepped up its efforts to foster co-operation between itself and its counterpart regulatory agencies overseas.

The most important of the international forums within which discussions are taking place concerning companies and securities is the International Organisation of Securities Commissions (IOSCO). IOSCO's main objective is to enable Securities Commission members to meet to exchange information and experiences about the regulation of financial markets, enforcement, disclosure and accounting issues. The NCSC Chairman was elected to Chairmanship of IOSCO in 1987, and IOSCO's annual conference will be held in Melbourne in Novembe 1988.

IOSCO has established a Technical Committee consisting of representatives of the regulatory bodies in Australia, Canada, France, Germany, Hong Kong, Italy, Japan, The Netherlands, Sweden, Switzerland, UK and USA. The Technical Committee has identified six major areas for immediate study. To this end, working parties have been appointed to study:

- Emerging methods of offering equity securities on a multinational basis (including Euro equity offerings) and the problem of multiple listings and to define the regulatory problems encountered.

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- International accounting and audit standards. This work is being carried on in conjunction with the National Accounting Standards Committee.

- Capital adequacy of financial intermediaries.

- Clearing and settlement systems.

- International surveillance and enforcement issues.

- The regulation of off market trading.

It is expected that reports will be available on these matters for the annual conference to be held in Melbourne in November 1988.

The internationalisation of financial markets has provided opportunities for the exploitation of national frontiers by those seeking to avoid national financial regulation and regulators have increasingly found it necessary to seek the co-operation of their fellows in other countries in pursuit of investigations. In order to provide a firm basis for bilateral co-operation in the surveillance and enforcement area, regulators have been moving towards the signing of Memoranda of Understanding (MOUs). The USA has been the most active country in this area with detailed MOUs in place with the UK, Japan, Switzerland and with three Provinces of Canada - Ontario, Quebec and British Columbia. The UK, Japan, Canada, Switzerland and Brazil have also concluded other Memoranda.

The first series of MOUs was based on providing access to material in the files of regulators' agencies and information that could be readily obtained without the use of compulsory powers. During 1988 the US has concluded second generation MOUs with Ontario, Quebec, British Columbia and Brazil which provide for the use of compulsory investigatory powers by regulators on behalf of the other signatories.

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The NCSC is currently discussing MOUs with the USA, UK and the Canadian Provinces.

On the legislative front, the provisions relating to confidentiality in the Australian Securities Commission Bill 1988 have been amended to enable the ASC, which will take over the role of the NCSC under the new national companies and securities scheme, to disclose confidential information it holds to an overseas authority. Such disclosure will be allowed where it is necessary to assist an overseas authority to perform or exercise a power or function similar to any of the ASC's functions or powers.

III. International securities fraud

During the bull phase of the market in 1987 the Commission became aware of numerous cases of unlicensed overseas operators promoting and selling shares in overseas companies by mail and/or telephone without complying with the prospectus and various other provisions of Australian companies and securities law. In most of the cases examined by the Commission the securities were sold to Australian investors at prices far in excess of any reasonable value, and when investors attempted to sell out they discovered that there was no market.

The NCSC issued several warnings to Australian investors about these illegal operations and, together with its delegates and some overseas regulators, took steps to ensure that the illegal dealers ceased operations in Australia. Some of the more active operators in Australia included Tower Securities B.V., United Consultants B.V., Consultant Brokerage Corporation B.V., First Commerce B.V., Financial Planning Services B.V. and Capital Venture Consultants B.V., all of which operated out of Amsterdam and all of which were closed down and had their files and documents seized by the Dutch Public Prosecutor. The Commission has been informed by the court-appointed trustee and liquidator of these companies that there is little likelihood that investors' claims will be satisfied.

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During the year the New Zealand Securities Commission alerted the Commission to a similar, but Australian-based, operator. Gresham Clarence Investment Services Limited, a company which had applied for but had not been granted an Australian dealer's licence, promoted and sold shares in an American "pink slip" company, Alan Jones Pit Stop (U.S.A.) Inc., to New Zealand residents. As a result of court settlements obtained by the NCSC and the New South Wales Corporate Affairs Commission the operator ceased this activity and New Zealand investors were able to annul their purchases and have their money returned.

IV. Foreign prospectuses

In September 1987 the Commission issued Policy Release 146, New Zealand Prospectuses, under which a company which has a New Zealand registered prospectus relating to the offer of shares (other than shares in an incorporated mutual fund or other investment company), may apply under section 215C of the Companies legislation to circulate the New Zealand registered prospectus in Australia. This policy is founded on a recognition of the similarity between the regulatory regimes in Australia and New Zealand and the commitments arising out of the Closer Economic Relations Agreement. Similar provisions apply in respect of the distribution of Australian-registered prospectuses in New Zealand.

V. Employee share schemes - New Zealand and SEC registered schemes

During the year the Commission established guidelines under which its delegates may exercise their discretionary powers under section 215C of the companies legislation to permit companies incorporated in the United States of America and New Zealand to allow employees of their Australian subsidiaries to participate in the overseas holding company's employee share scheme. In the case of a corporation incorporated in the United States of America the prospectus must be registered with

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the US Securities and Exchange Commission and in the case of New Zealand companies the prospectus must have been registered by the Registrar of Companies in compliance with the requirements of the Securities Act 1978.

Overseas employee share schemes for companies incorporated in other countries are considered by the Commission on a case by case basis.

VI. Settlement, transfer and registration of securities

The Attorney-General's Department continues to be represented on a consultative committee which is working on a computerised paperless settlement system based on the Taurus system currently being developed by the International Stock Exchange of London.

The settlement and registration of transfers of quoted securities of Australian listed public companies is acknowledged as being slow and inefficient with extensive delays at times of heavy trading.

It is hoped that when the above computerised system is fully operational, it will greatly speed up the settlement process. It is clear, however, that it will be expensive and will commit stockbrokers and company registries to the introduction of new recording systems which will take time to implement.

Pending the introduction of such a system, the Australian Stock Exchange Ltd, with the support of the Consultative Committee, has proposed the introduction of a flexible accelerated security transfer (FAST) system which will significantly reduce delays and will incorporate some features of the computerised paperless settlement system still being developed.

In essence, FAST will involve participating companies' shares registers being divided into two parts; one part identifying those shares held in uncertificated form and the other

identifying those continuing to be held by shareholders in certificated form. Shares held in uncertificated form will, in general, be able to be transferred by validation of a sponsoring broker and will not require the transferor's signature or a supporting share certificate. Appropriate warranties and indemnities will be provided by the broker involved and it is intended that shareholders have access to compensation from the National Guarantee Fund if their shares are transferred without authority.

The Australian Stock Exchange Ltd proposes to conduct a pilot scheme for FAST commencing in the first half of next year. The Exchange has sought legislative support for this pilot and draft legislation for this purpose will be exposed for public comment shortly.

I. INTERNATIONAL COMPETITION, EXTRATERRITORIALITY AND EXPORT TRADE MATTERS

I. Introduction

Since last year's paper, the Department has continued its work in the area of international competition, extraterritoriality and legal issues concerning Australia's international trade. The Attorney-General's Department has worked closely in these areas with the Department of Primary Industries and Energy, the Department of Transport and Communications, the Department of Foreign Affairs and Trade and the Department of Defence.

Besides providing legal and policy advice on international competition and extraterritoriality issues, the Attorney-General's Department administers the Australia-US Antitrust Co-operation Agreement and Australia's 'blocking legislation', the Foreign Proceedings (Excess of Jurisdiction) Act 1984. On 15 February 1988, the Attorney-General announced the revocation of the last two 'blocking orders' remaining from the Westinghouse antitrust proceedings that lasted from 1976 to

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1981. Since the Westinghouse case, the Government has not had to take any 'blocking' action under the Foreign Proceedings (Excess of Jurisdiction) Act 1984, or its predecessor Acts.

Since the Antitrust Co-operation Agreement came into force on 29 June 1982, United States authorities have notified Australia of ten antitrust investigations that they believed could affect Australia's laws, policies or national interests, and Australia has notified the United States of one trade policy having possible implications under US antitrust law (reported to the 1986 Trade Law Conference under the heading of 'Steel Export Restraint Arrangement'). The Co-operation Agreement continues to be a very effective mechanism for avoiding or resolving international antitrust conflicts between Australia and the United States.

II. Section 5 of the Trade Practices Act 1974

The 1986 Departmental paper reported on amendments to section of the Trade Practices Act ('the Act') to the effect that private litigants could not rely upon allegations of extraterritorial conduct without first obtaining the consent i writing of the Attorney-General. To date, the Attorney-Genera has received five requests, and after consideration has given his consent on each occasion, in actions seeking remedies unde sections 82 and 87(1) or 87(1A) of the Act, involving allegations of conduct in the United Kingdom, Canada and the United States giving rise to breaches of the Act.

III. Matters affecting Australia's international trade

The Department works closely with the Department of Primary Industries and Energy on matters related to the export of uranium and other mineral commodities from Australia. Legal advice is provided on all contracts between Australian uranium exporters and foreign power utilities, and on aspects of the Ministerial Uranium Sales Determination. Advice was also

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provided on the relationship between the 'foreign sovereign compulsion' defence under US antitrust law and the administration of export controls over mineral commodities under the Customs (Prohibited Exports) Regulations (Commonwealth).

The litigation in the United States relating to the ban on the enrichment of foreign uranium, pursuant to section 161(v) of the US Atomic Energy Act, which had the potential to close off the US market to Australian uranium exporters, was an issue of concern for the Government. This Department, with other Departments, has been involved in discussions of legal and policy issues, the lodging of Diplomatic Notes and the filing of amicus curiae briefs by the Australian Government in the US Supreme Court in Western Nuclear Inc, et al. v F, Clark Huffman et al. On 15 June 1988, the US Supreme Court handed down a unanimous decision based upon statutory interpretation grounds. Although the court chose not to rely upon the GATT and other arguments put forward in the Australian Government amicus curiae brief it was, nevertheless, favourable to our interest of maintaining unrestricted access to the US market for Australian uranium.

The Department worked with the Department of Defence on aspects of the revision of the Customs (Prohibited Exports) Regulations (Regulations 13E, 13G and Schedule 16) to set up a system of export controls over dual civil/military use high technology exports and on related enforcement issues. Also, the Department was involved in work leading up to the proposals announced by Defence Minister Beazley in June 1988 for a new Government policy to promote the export of defence equipment, previously prohibited by Regulation 13B and Schedule 13 of the Customs (Prohibited Exports) Regulations.

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IV. Extraterritoriality matters

The Department has continued its monitoring of US court decisions and legislation with extraterritoriality implications that could affect Australian business.

The US Comprehensive Anti-Apartheid Act of 1986, which allows a private right of action for a US national against anyone taking 'commercial advantage' or otherwise benefiting from the restrictions the Act applies to US business, has been of concern to the Department. A Bill to amend that Act, presently before the US Congress, provides for an extension of US boycott action against South Africa, as well as a wide extraterritorial operation in certain areas that has attracted protests from European countries. While Australia has a policy of supporting economic sanctions against South Africa that have an acceptable jurisdictional basis, the extraterritorial operation of the amending Bill has the potential to impose liabilities on Australian businessmen who have no valid jurisdictional connection with the United States. As it is unlikely that the Bill will pass through the US Senate before the present Congress completes its term, any consideration of Australian representations may therefore depend upon developments in the new Congress relating to the Bill.

The Department has also been heavily involved in the consideration of jurisdictional aspects of Australian legislation and policies. Advice has been given on jurisdictional aspects of the Closer Economic Relationship with New Zealand and on several aspects of the Trade Practices Act 1974.

The Department closely monitored the jurisdictional aspects of the Borthwicks case (Trade Practices Commission v Australia Meat Holdings P/L et al., Federal Court, unreported), in particular, the matter of personal jurisdiction over the UK-based Borthwicks respondents and the question of whether the

sub-section 81(1A) 'buy-back' remedy could be given an extraterritorial operation. It is noted that the United Kingdom Government made a 'blocking order' under sub-section 5(4) of the Protection of Trading Interests Act 1980 (UK) on 23 March 1988, which was commented upon in the Attorney-General's News Release of 24 March 1988.

The Department continues to provide legal advice and to assist the Department of Transport and Communications in relation to the proposed amendments to Part X of the Trade Practices Act 1974 (overseas cargo shipping). The advice has focussed on the extraterritorial reach of the Part IV (competition provisions) of the Act and on inwards liner cargo shipping issues.

V. Organisation for Economic Co-operation and Development (OECD): Committee on International Investment and Multinational Enterprises (CIME) - 'Conflicting Requirements' study

This Department is responsible for the CIME's work on conflicting legal requirements affecting multinational enterprises. This work is undertaken by the CIME's Working Group on International Investment Policies. Conflicting requirement problems arise when an enterprise (or person) with links to two or more countries is subjected to differing legal requirements by the countries with which it is connected. In most cases, these problems arise where the extraterritorial regulation of business and commerce by one country (usually the USA or the EC), and consequent civil or criminal liabilities, clashes with the policies or laws of the country in whose territory the enterprise is located.

As part of its 1990 Review of the '1976 Declaration and Decisions', the CIME is presently undertaking a review of the OECD's '1984 Agreement' on conflicting requirements (paragraphs 23-34 of the 1984 review of the 1976 Declaration and Decisions), a study of member country laws relating to the

nationality of corporations, and has just completed a study of extraterritorial information requirements in the area of securities regulation.

The CIME also provides a useful forum for the notification and discussion of legislation with an extraterritorial application that might affect other OECD member countries, and as a forum for discussing experience under the practical approaches to conflict avoidance and resolution (paragraphs 29-30 of the '1984 Agreement').

VI. International competition issues - The OECD Committee on Competition Law and Policy

This Committee (known before 1987 as the Committee of Experts on Restrictive Business Practices) is the most important international forum for the discussion of issues relating to competition (antitrust) policy. Australia's competition law is embodied in the Trade Practices Act 1974, an Act which is acknowledged internationally to be one of the most sophisticated and effective regimes for the control of anticompetitive practices. Australia, through this Department, is one of the major contributors to the work of this Committee.

The Committee develops and monitors a range of competition policy recommendations for the OECD, with much of the detailed work being undertaken through the four Working Parties referred to below. As part of this work, it undertakes and publishes reports of case studies and in 1989 will be arranging a symposium on Competition and Economic Development with experts from selected non-OECD countries. Specifically -

> Working Party 1: International trade and competition - monitors the 1986 OECD Recommendation on trade and competition, which advances policy principles concerned with the improvement of competition in international trade and lays down procedural arrangements to resolve or

alleviate international conflict between trade and competition policies. It also undertakes case studies which are published (e.g. the effect of trade restrictions on competition in the international automobile industry - 1987, and predatory pricing in domestic and international trade - soon to be released). Its next study is likely to consider the relationship between competition laws and policies and anti-dumping legislation.

Working Party 2: Competition and deregulation - monitors the 1979 OECD Recommendation on competition and regulated sectors of economies, which calls for the review of regulatory regimes from a competition perspective. Its case studies cover the deregulation in the air passenger transport sector (published 1988) and telecommunications sector (nearing completion) while the next study will involve competition issues in the deregulation of the road transport sector.

Working Party 3: International co-operation - monitors the 1986 OECD Recommendation on international co-operation on restrictive business practices, which provides competition law enforcement authorities with principles and procedures to follow when their investigations and proceedings may affect important interests of other countries. It also serves as a forum to co-ordinate Group B (developed country) positions on competition issues arising within the UNCTAD Intergovernmental Group of Experts on Restrictive Business Practices (referred to in the next section).

Working Party 4: Competition and intellectual property rights - is studying the relationship between competition and intellectual property rights and the operation of the 1974 OECD Recommendation on patents and licences.

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VII. UNCTAD and competition policy

The UNCTAD Intergovernmental Group of Experts on Restrictive Business Practices (the 'IGE') was established in 1981 to monitor the operation of the United Nations' set of principles and rules for the control of restrictive business practices ('the Set'), and has since become a primary forum for the discussion of competition policy in the 'North/South' context. Six sessions of the IGE have been held since 1981, together with a United Nations' conference to review the operation of the Set. Apart from the useful exchange of views on competition policy issues, perhaps the most valuable work of the IGE has been its work on the development of a model law on restrictive business practices to assist developing countries in devising their own legislation.

The Department has been actively involved in the work of the IGE starting with the negotiation of the Set during 1979 and 1980, through to providing the co-ordinator for Group B (developed) countries for three of the IGEs and also the revie conference.

VIII. Closer economic relations with New Zealand

On 18 August 1988 Prime Ministers Hawke and Lange signed the principle documents giving effect to the review and extension of the trade relationship between Australia and New Zealand. The two main documents were the Protocol on Acceleration of Free Trade in Goods and the Protocol on Trade in Services. A third protocol on quarantine was also signed. In the lead up to 18 August several supporting documents, indicating the joi commitment to examine areas of further co-operation, were signed by various Ministers. The main documents in this grou were the Memoranda of Understanding on the Harmonisation of Business Law and on Technical Barriers to Trade.

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The Protocols amend the 1983 Australia New Zealand Closer Economic Relations Trade Agreement. The Protocol on Acceleration of Free Trade in Goods brings forward the date for full free trade in goods from 1995 to 1 July 1990. An aspect of this acceleration to integrated trans-Tasman markets is the review of anti-dumping procedures and proposed reliance on domestic policy remedies for predatory pricing conduct normally corrected by anti-dumping actions.

The Protocol on Trade in Services is a far reaching undertaking to provide services and service providers in each country with national treatment subject to foreign investment and tax policies. The only services excluded are those listed in an Annex to the protocol - typically those provided by statutory authorities. The list of excluded services will be reviewed regularly to ensure widest possible application of the Protocol.

The MOU on Harmonisation of Business Law provides a timetable for major business laws to be reviewed and possible areas of harmonisation identified. The MOU notes the significant progress already made in this area and the scope for continued input from State/Federal Committees and that contributions will be sought from the business community and other interested parties.

J. UNCITRAL: THE NEW INTERNATIONAL ECONOMIC ORDER (NIEO)

At the tenth session of the NIEO Working Group, held in Vienna from 17 to 28 October 1988, the working group commenced work on the topic of procurement. At that session the working group had before it for consideration the report of the Secretary-General on procurement. The report examined the definition of procurement, procurement law, possible objectives of procurement policy and the main features of national procurement laws.

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The working group was expected to outline the nature of any work that might be undertaken in the field, a possible recommendation being for the Commission to prepare and adopt a set of principles on public procurement to which states would be encouraged to conform in formulating their national procurement codes or regulations. The working group might also anticipate that, once an agreed set of principles had been established, the Commission might prepare a model procurement code based upon those principles.

A report on the outcome of the tenth session is as yet unavailable. The next session of the working group will be held in New York in April 1989.

K. INTELLECTUAL PROPERTY DEVELOPMENTS AFFECTING TRADE

I. Introduction

The growing importance which intellectual property has to world trade and commerce has led, in recent years, to increasing international attention being focused on improving the protection of copyright and other materials.

Intellectual property rights promote innovation and intellectual creativity. The protection and enforcement of these rights are essential to the expansion of international trade, investment and economic development. Strong protection improves and expands the 'industrial base' of developing as well as developed countries. Inadequate and ineffective protection and enforcement of intellectual property rights, on the other hand, results in 'trade distortions'.

Accordingly, the international legal framework governing intellectual property, which includes copyright, patents, design and trade mark laws, clearly has a close relationship to, and effect on, international trade. It is of course an enormous field and it would be neither possible nor appropriat

to deal with it in detail in this paper. However, it is becoming increasingly clear that intellectual property law, as applied in various countries (particularly those in Australia's region), is affecting international trade in a very significant fashion.

Various international conventions have sought to achieve uniformity in the field of intellectual property and thus to minimise distortion and discrimination which results from the different application of intellectual property laws between different countries. In particular, in the case of copyright, there is the Berne Union and the Universal Copyright Convention, while in the patent field there is the Paris Union.

The development of new technologies, in particular computer software and integrated circuits, has highlighted important issues arising in relation to international trade and intellectual property protection. There are at least two reasons for this. First, these new technologies have become very important products in world trade and very important for the economies of a number of countries. Another factor, which relates to intellectual property laws, is the difficulties encountered in 'fitting' these new technologies into existing forms of intellectual property protection. In the context of computer software, although the applicability of the international copyright conventions remains unresolved, the position internationally is now subject to a reasonable degree of uniformity. Copyright laws or (as in France) modified copyright laws have been applied to computer software, either by way of judicial decision or, as was the case in Australia, by the enactment of special legislation.

The absence of, or lack of effective, intellectual property laws can have a significant impact on international trade.

At least three situations can be identified in this regard. Most dramatically, the failure of some countries either to enact intellectual property laws or, where laws are enacted, to enforce those laws, can result in a major piracy problem. Piracy, especially of computer software and audio and video materials, is a significant problem in many areas of the world, deterring investment and trade in legitimate products. Piracy in a market can operate as an invisible barrier to legitimate export to that market.

The second situation arises where a country adopts a discriminatory practice and does not afford intellectual property protection to materials produced in other countries, or does so on a restricted basis. The general basis for intellectual property protection under the various international conventions is that protection is accorded automatically to other convention countries on the same basis as one's own nationals are protected. There have, however, been some moves to a situation of 'reciprocal' protection in areas of new technology, arguably not covered by the existing intellectual property conventions (e.g. France - computer programs; United States, Sweden and EEC countries - integrated circuits).

The third situation is where intellectual property protection can be used to establish barriers to the importation of legitimate products. The so-called prohibitions on parallel importation, while common in intellectual property laws throughout the world, nevertheless impinge on international trade.

These three aspects are considered in more detail below, especially having regard to Australia's involvement in relatio to them in recent years.

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II. Piracy

The pirating or unauthorised reproduction for commercial purposes of works and other subject-matter which are not adequately protected by intellectual property law can have a significant impact on international trade. This is especially the case with the illicit trade in computer software and audio-visual materials. With the development of new technologies, reproduction of these items has become quick and simple.

Australia's concern over the possible growth of piracy in this country resulted in the amendment in 1986 of the Copyright Act 1968 to strengthen the anti-piracy provisions in the Act by increasing the penalties for audio-visual piracy as well as altering the requirements for criminal prosecutions. The current indications are that these amendments are succeeding in that objective.

In June this year, the Department of Foreign Affairs and Trade released a report on an industry survey of trade-related problems in respect of intellectual property rights. The aim of the survey was, among other things, to develop an 'inventory' of trade problems experienced by Australian exporters of intellectual property products. In the copyright area, a major finding of the report was that the main 'problem markets' in the Asian region are the Philippines, Thailand, Singapore, Indonesia, Malaysia, China, Taiwan and ROK. Moreover, the principal categories of works and subject matter where piracy in the region is a particular problem appear to be books, sound recordings and cassettes, films and videos and computer software (at least at the small-scale, microcomputer end of the software market - the 'top end' of the software industry does not appear to be experiencing significant piracy problems).

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(a) Recent legislative developments in the South-East Asian region

In the South East Asian region, Singapore, the Republic of Korea, Malaysia, Indonesia and Thailand have all upgraded their intellectual property legislation in recent times. With the exception of the Republic of Korea and Thailand, none of these countries is yet a member of any of the major copyright conventions (although Indonesia has indicated that it is considering joining such a convention in the near future)

The upgrading of regional intellectual property laws has coincided with moves by the US to seek, on a bilateral basis, protection in the region for its intellectual property materials. Bilaterally, the US has secured retrospective protection in the Republic of Korea for its intellectual property materials and reciprocal copyright protection in Singapore, Malaysia and Indonesia. In view of their obvious relevance to the pirating of Australian intellectual property works, the Attorney-General's Department has been actively monitoring these regional developments.

(b) Pirated and counterfeit goods - initiatives in GATT, WII and OECD

(i) GATT

As indicated above, the issue of trade in pirated and counterfeit goods has, in recent years, assumed great significance in the context of the international trading poli of a number of countries, particularly the US. As a result, initiatives have taken place within a number of international organisations to introduce measures to overcome the problems this area.

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Largely at the initiative of the US Government, the issue of trade-related aspects of intellectual property rights (TRIPS) has been included in the agenda for the current GATT round of multilateral trade negotiations. The US Government's view is that a GATT-based approach to intellectual property protection on an international scale has the advantage of being able to draw on GATT dispute settlement and enforcement procedures. In the Ministerial Declaration on the Uruguay Round adopted on 20 September 1986 by Ministers representing the contracting parties to the GATT (including Australia), it was agreed that, in the current GATT round:

> negotiations should aim to clarify the relevant GATT provisions and elaborate 'new rules and disciplines as appropriate';
>
> . negotiations should aim to develop a multilateral framework of principles, rules and disciplines dealing with international trade in counterfeit goods, taking into account work already undertaken in the GATT; and
>
> this action should be without prejudice to other complementary initiatives taken in this area by WIPO and other international organisations.

In the initial phase of the negotiations, work centred around the development of a 'diagnostic paper', based on contributions from member countries, of trade-related problems arising from the protection (or lack of protection) of intellectual property rights. Attempts by the US to win early support in this phase for the acceptance of the principles enunciated in a 1982 draft counterfeit code relating to the counterfeiting of trade marks, developed in the context of early GATT work in this area, were largely unsuccessful. The US has, therefore, focused its attention on the development of a multilateral code covering all intellectual property rights. According to the US, such a code should deal comprehensively with both standards and

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enforcement of intellectual property rights. A number of other developed countries (including Japan and the EC) have expressed general support for the concept of the development of a GATT agreement on the subject. Such support has not, however, been forthcoming from the majority of developing countries, although there is some recent indication that this trend may be changing.

The Attorney-General's Department has had an active input into Department of Foreign Affairs and Trade briefing for GATT meetings, and also the informal meetings preceding them. Particular emphasis has been placed by the Department upon the role to be afforded WIPO in the negotiations, and the need to ensure that areas under consideration by WIPO, or already the subject of international conventions, are not prejudiced.

In March 1988, an officer of the Department, as a member of the Australian delegation, attended a meeting in Washington which was sponsored by the US Government to examine US proposals for standards in the intellectual property field. A similar meeting on enforcement of intellectual property rights was held in Geneva in June at which the Department was also represented.

(ii) WIPO

At its 8th session in 1985, the General Assembly of WIPO approved a decision to convene an intergovernmental group of experts to examine the relevant provisions of the Paris Convention in order to determine the extent to which those provisions adequately provide protection against counterfeiting where such counterfeiting involves the unlawful use of protected trade marks. The Committee held its second meeting in May 1987 to consider certain revisions to model provisions for national laws in this area considered at the Committee's first meeting in 1986. A third session of the Committee was held in April this year at which the Committee considered Paris Convention provisions and provisions of the Berne Convention relevant to copyright piracy.

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(iii) OECD

As a result of the general upsurge of interest in this area, intellectual property rights have also attracted increasing interest in the OECD, where a number of committees are currently examining intellectual property right related issues from varying perspectives.

In particular, the OECD Trade Committee has been examining trade-related aspects of intellectual property rights (including problems arising from counterfeiting), whilst the Competition law and Policy Committee is examining the relationship between competition law and policy and intellectual property. In recent times, the Trade Committee has examined standards and enforcement of intellectual property rights and has prepared an analysis of the economic arguments in favour of the effective protection of such rights.

Australian intellectual property legislation in this area (and other legislation such as the Trade Practices Act and Customs legislation) appears to provide a reasonable legal basis for protection against trade in counterfeit or pirated goods within Australia. However, given the growing importance that this issue has both for Australia's neighbours in the South-East Asian region and the United States, the issue continues to play an important part in the future development of policy in the area of intellectual property.

III. 'Restricted' protection of intellectual property

The application of domestic intellectual property law to foreigners on the basis of closely equivalent reciprocity is epitomised by the US Semiconductor Chip Protection Act 1984 ('SCPA') which came into force on 8 November 1984. Equivalent laws in Sweden and member States of the EC also now protect foreigners only on the basis of reciprocity.

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The SCPA and like laws can be seen as a new form of intellectual property protection. Its purpose is to provide the 'owner' of 'mask works' (i.e. designs for an 'integrated circuit' or a 'silicon chip') with certain exclusive rights for ten years from registration, or 'first commercial exploitation', whichever occurs first. Registration must occur within two years of first commercial exploitation.

However, until action was taken by the Australian Government in 1985, Australian owners could not apply to register their mask works under SCPA. This is because SCPA does not extend protection to foreign mask works on the basis of 'national treatment' (as, for example, is the case with copyright protection for computer programs in both the US and Australia), but only on the basis of reciprocity.

Reciprocal treatment is afforded on a permanent basis under a Presidential Proclamation or, on an interim basis, by an order of the Secretary of Commerce. A Presidential Proclamation may be issued where a foreign nation extends protection to US mask works - either on substantially the same basis as provided to works of its own nationals and domiciliaries (i.e. on the basis of 'national treatment'), or on substantially the same basis as provided in SCPA (mere 'reciprocity'). An interim order may be issued where the Secretary of Commerce is satisfied, amongst other things, that the foreign nation is making 'good faith efforts and reasonable progress' toward enacting legislation that would comply with the requirements for a Presidential Proclamation. The current interim order applicable to Australia expires in May 1989.

A draft treaty which will end these arrangements will be considered by a Diplomatic Conference in May 1989.

The Deputy Prime Minister and Attorney-General, Mr Bowen, has just introduced as part of his current copyright reform package the Circuit Layouts Bill 1988 which provides copyright style

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sui generis intellectual property protection for original integrated circuit layouts, along the lines of foreign laws and the WIPO draft treaty.

The Bill provides for protection of layouts made by eligible foreign persons, or first commercially exploited in eligible foreign countries, either on the basis of national treatment through membership of relevant convention, or on the basis of reciprocity where a country is not a member of such a convention.

In introducing the Bill the Attorney-General said:

> "The Australian computer chip industry is small but important and growing. Australian chips, for example, make 'bionic ears' and heart pacemakers work, detect messages from space and from the ocean and convert sunlight to power. Importantly, our specialised products have found valuable markets overseas."

He also said

> "If Australia is to obtain protection for its designs in the vital US and European export markets - either under the proposed Treaty or as a result of reciprocal arrangements - Australia must have a law, such as this Bill, in place as soon as possible."

IV. Parallel importation

In September 1988, the Copyright Law Review Committee, chaired by Mr Justice Sheppard of the Federal Court of Australia, reported to the Attorney-General on sections 37, 38, 102, 103 and 135 of the Copyright Act. (The Department is represented on the Committee and also provides research assistance through the Secretary to the Committee who is a Departmental Officer.)

Under these provisions, which apply to both pirate copies (i e those made without the permission of the copyright owner or hi licensee) and legitimate copies of copyright materials, a copyright owner (or his exclusive licensee) can prevent both the importation of copyright materials (such as books, records and films) and the sale of such materials.

By virtue of section 135 of the Act, a copyright owner can further restrict the importation of printed works into Australia. A copyright owner may give a notice in writing to the Controller-General of Customs that he or she objects to th importation of a particular work. In these circumstances the importation of the work is prohibited and any copies imported into Australia may be seized and forfeited to the Commonwealth

Following a wide-ranging enquiry which involved a large numbe of written submissions and public hearings, the Committee unanimously reached the conclusion that 'the sections should continue to apply to parallel imports', but said that 'their application to these imports should be relaxed in a number of respects':

- the importation of non-pirated copyright material should be permitted if -
  - the material is not available in Australia;
  - a customer places an order with the importer and declares in writing that the material is not required for the purposes of trade or commerce; o
  - the copyright material is a work comprised in a label or mark attached to a product or its packaging;
- an article should be taken to be unavailable if it cannot be obtained in Australia from the copyright owner (or agent or licensee) within a reasonable time, and

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. a person importing a non-pirated article ought not to be subject to criminal proceedings and sanctions, but civil proceedings only.

The Committee said in the report that its objective 'is not to deprive the Australian copyright owner of the right to supply articles to the Australian market but to ensure that the Australian community is able to obtain access to copyright articles within a reasonable time of their becoming available overseas'. That report is expected to be available in Australian Government bookshops in December this year.

Importation provisions which affect free trade in intellectual property are found in the laws of most countries. While there may well be justification for such laws, it is clear that they have a significant impact on international trade, constituting as they may a barrier to the import of legitimate foreign material otherwise than by an authorised licensee of the intellectual property owner.

V. United States law - implications for intellectual property and international trade

The importance of the United States in international trade makes its laws which involve an interaction of intellectual property and international trade of particular interest and relevance. It is apparent that US 'trade-related legislation' has important implications for the protection of US intellectual property rights holders.

Prior to the passage of the recent Omnibus Trade and Competitiveness Act 1988 (August 1988), section 337 of the US Tariff Act prohibited unfair methods of competition and unfair acts in the importation of articles into the US where the effect of such unfair practices was to destroy or injure an efficiently and economically operated industry, to prevent the establishment of a US industry or to restrain or monopolise

trade in the US. It is well established that the importation or sale of articles that infringe a valid US patent is a form of unfair competition under section 337. Patent infringement is, therefore, a common basis for action under the section. Other types of conduct claimed to be unfair under the section include trade mark and copyright infringements.

The Generalised System of Preferences (GSP) also represents an important instrument in the US Administration's efforts to secure adequate protection of intellectual property rights, with the Trade and Tariff Act of 1984 directing consideration of treatment of intellectual property rights in determining the level of benefits, and continued eligibility, of each beneficiary developing country.

Specific concerns relating to intellectual property rights in a beneficiary country can be raised each year in the context of the annual reviews of the GSP programme. The US Trade Representative has revised the regulations governing annual reviews to allow parties concerned to request a review of the country's GSP eligibility. (It is understood that the US Government has decided to 'graduate' Singapore, the Republic of Korea, Hong Kong and Taiwan from its GSP programme.)

Section 301 of the Trade Act empowers the US President to take retaliatory action in response to unreasonable or discriminatory practices by foreign governments which have the effect of restraining the ability of US companies to export goods to foreign countries which impose such restrictions The action that may be taken by the President under the section includes the withdrawal of benefits enjoyed by the discriminating country under trade agreement concessions or the imposition of restrictions on products exported from such country to the US. In 1984, the section was amended to expressly authorise Presidential action to protect US patent, copyright and trade mark rights in foreign countries.

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In keeping with the overall plan to curtail counterfeiting and piracy, there have been moves in the US over the last 18 months to upgrade the protection already available under US trade legislation to combat such activity. This has culminated in the passage of the 1988 Omnibus Trade legislation the general effect of which is to enhance the protection currently afforded to US intellectual property owners.

Principal amongst the amendments introduced by the legislation are:

- amendments of section 337 which, among other things, eliminate current requirements that injury to industry be proved and that domestic industry be 'effectively and economically operated'. This would relate to claims for patent, federally registered trade mark, copyright and mask work infringement.

- an amendment to the Trade Act 1974 to enable the USTR to identify 'priority foreign countries' which deny adequate or effective protection of intellectual property. The USTR is required to investigate such activities and, after doing so, may take retaliatory action which, presumably, could include the imposition of duties and the withdrawal of GSP concessions.

It is apparent that such legislation operates, in practice, as an effective bargaining tool in US trade relations with other countries. The latter is exemplified by the settlement in recent years of a section 301 action against the Government of the Republic of Korea on the basis of that Government's undertaking to revamp its intellectual property laws.

Significantly, the recent trade legislation also delineates US negotiating objectives for the current GATT round. It seeks to have established in the GATT obligations the implementation of substantive standards based on existing international

agreements or national laws if international standards are inadequate or do not exist. The legislation also seeks to include as GATT obligations effective enforcement measures (both internally and at national boundaries) and effective dispute settlement procedures.

1988 has also marked the passage of legislation designed to permit US adherence to the Berne Convention (again part of the overall US strategy against counterfeiting and piracy). The relevant legislation calls for certain changes in US copyright law to bring it into conformity with Berne standards.

L. INTERNATIONAL LEGAL PRACTICE

I. Globalisation of legal services

At the 13th International Trade Law Conference in 1986, support was expressed for the idea of establishing a working group to review present practices and proposals for improving the effectiveness of trade in Australian legal services.

In December 1986 the Attorney-General wrote to his State and Territory counterparts, the President of the Law Council of Australia and the Minister for Foreign Affairs and Trade, inviting them to nominate representatives to participate in the proposed working group. The working group met on three occasions and in May 1988 presented its report to the Standing Committee of Attorneys-General for consideration. The Standing Committee will be discussing the report at its next meeting in December 1988.

The working group considered issues connected with the export of legal services including practical impediments restricting Australian lawyers from opening branch offices overseas, the need for promotional activities and incentives to ensure achievement of potential for export of legal services, and the export of legal services in the wider context of the General Agreement on Tariffs and Trade (GATT) and trade in services generally.

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The working group also considered the issue of reciprocity for foreign lawyers wishing to practise in Australia. It examined the legal position of foreign lawyers in Australia and studied the question of whether guidelines are necessary to govern practice by foreign lawyers and, if so, what the content of those guidelines should be.

M. DECEDENTS' ESTATES AND WILLS

I. Hague Conference on Private International Law: Convention on the Law Applicable to Succession to the Estates of Deceased Persons

At its 16th Quadrennial Session in October 1988, the Hague Conference on Private International Law adopted the Convention on the Law Applicable to Succession to the Estates of Deceased Persons. Work on this topic was entrusted to the Special Commission on the Private International Law of Decedents' Estates in 1984. The Special Commission met on three occasions.

The purpose of the Convention is to unify conflicts of laws rules relating to succession. At present, some states provide that the law of succession should be governed by the national law of the deceased. Other states provide for the law of the deceased's habitual residence to be the governing law. Others, including common law countries, provide for the law of succession to be determined according to whether the property in the estate is classified as movable or immovable, with movables being governed by the law of the deceased's domicile, and immovables being governed by the law of the place where the immovable is situated.

These differences may result in more than one state claiming the right to apply its own substantive succession rules to the same assets; conversely, in other cases no state may claim jurisdiction.

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The Hague Conference's work on this topic complements its other work in the field of deceaseds' estates, in particular the 1961 Convention on Conflicts of Laws Relating to the Form of Testamentary Dispositions, to which Australia became a party in 1986, the 1973 Convention Concerning International Administration of Estates of Deceased Persons and the 1973 Unidroit Convention Providing a Uniform Law on the Form of an International Will.

II. Hague Conference on Private International Law: Convention Concerning International Administration of Estates of Deceased Persons

This Convention was adopted by the 12th session of the Hague Conference in October 1972. It will enter into force when three nations have ratified or acceded. To date, only Portugal and Czechoslovakia are parties to the Convention. The UK, Italy, Luxembourg, the Netherlands and Turkey have signed the Convention. No active consideration is being given to the question of Australian accession at present.

The purpose of the Convention is to facilitate the international administration of estates of deceased persons by providing a form of international certificate which will be recognised in contracting states and will authorise a designated person to administer the movable estate of the deceased person and indicate his powers.

III. Unidroit: Convention Providing a Uniform Law on the For of an International Will

This Convention was adopted at a Diplomatic Conference in 1973. It came into force on 9 February 1978. It has been adopted by eight countries including Canada, Belgium, Yugoslavia and Portugal. Signatory states include France, the UK, the USA and the USSR.

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The purpose of the Convention is to provide to a greater extent for the respecting of last wills by establishing an additional form of will to be called an 'international will' which, if employed, may dispense with the need to search for the applicable law. General support has been expressed by State authorities, the legal profession and other interested parties for Australia to implement the Convention. However, no positive action has yet been taken to that end.

IV. Hague Conference on Private International Law: Convention on the Conflicts of Laws Relating to the Form of Testamentary Dispositions 1961

Australia acceded to this Convention on 21 November 1986 Its provisions are implemented in the wills legislation of the States and Territories. Thirty-two countries are party to the Convention.

The principal effect of the Convention, and the Australian legislation, is to provide that a will shall be treated as properly executed if its form complies with the internal law of any of the following:

- the place where the testator made the will;

- the country of the nationality possessed by the testator, either when he made the will or at the time of his death;

- a place where he was domiciled either when he made the will or at the time of his death;

- the place in which he habitually resided either when he made the will or at the time of his death; or

- so far as immovables are concerned, the place where they are situated.

N. AUSTRALIA-CHINA TRADE DEVELOPMENTS

I. Investment protection agreement

On 11 July 1988, in Beijing, the Agreement between the Government of Australia and the Government of the People's Republic of China on the Reciprocal Encouragement and Protection of Investments was signed by the former Minister for Foreign Affairs and Trade, Mr Hayden, and the Minister for Foreign Economic Relations and Trade, Mr Zheng Tuobin.

It is Australia's first investment protection agreement. The Agreement entered into force on signature, and applies to investments made after 21 December 1972, the date on which diplomatic relations between the two countries were re-established.

The Agreement contains important guarantees relating to the reciprocal encouragement and protection of investments, non-discriminatory treatment, most-favoured nation treatment, transparency of investment laws and policies of each country, transfer of funds, compensation in the event of nationalisation or expropriation and the resolution of disputes.

II. Double taxation agreement

In September 1988 the text of a double taxation agreement was settled by Australian and Chinese officials after two years of negotiations. The contents of the agreement will not be publicly available until it is signed. Signature is scheduled for November 1988 in Canberra, during the visit to Australia of the Chinese Premier, Li Peng.

III. Joint Ministerial Economic Commission (JMEC)

Following discussions between Chinese leaders and the Prime Minister in 1986, it was agreed that a Joint Ministerial Economic Commission be established to discuss and co-ordinate

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matters concerning trade, economic co-operation and related scientific, technical and educational exchanges. The inaugural meeting of the JMEC was held in April 1987 and was co-chaired by Senator Button, the Minister for Industry, Technology and Commerce and Mr Lu Dong, the Chairman of China's State Economic Commission. A delegation of fourteen Chinese officials attended the meeting.

The second meeting took place in Beijing in March 1988. Major achievements included the signing of two Memoranda of Understanding, one on the provision of concessional finance by Australia to China, the other on the establishment of a working group on cooperation between machinery, electrical equipment and electronic industries.