IV Jurisdiction

Jurisdiction over the continental shelf. Offshore legislation. Transfer of powers and resources from the Commonwealth to the States.

On 18 June 1981 the Minerals (Submerged Lands) Act 1981 was assented to (Act No 81 of 1981). The Act relates to the recovery of materials, other than petroleum, from the continental shelf of Australia and of certain Territories of the Commonwealth of Australia. Following is the text of the preamble to the Act:

> WHEREAS in accordance with international law Australia as a coastal state has sovereign rights over the continental shelf beyond the limits of Australian territorial waters for the purpose of exploring it and exploiting its natural resources:
>
> AND WHEREAS Australia is a party to the Convention on the Continental Shelf signed at Geneva on 29 April 1958 in which those rights are defined:
>
> AND WHEREAS, by the *Seas and Submerged Lands Act* 1973, it is declared and enacted that the sovereignty in respect of the territorial sea of Australia and in respect of the airspace over it and in respect of its sea-bed and subsoil, and in respect of certain internal waters of Australia and in respect of the airspace over those waters and in respect of the sea-bed and subsoil beneath those waters, is vested in and exercisable by the Crown in right of the Commonwealth:
>
> AND WHEREAS the Parliaments of the States and the Legislative Assembly of the Northern Territory have certain legislative powers in respect of the sea-bed and subsoil referred to in the last preceding paragraph and the Parliament of the Commonwealth has vested in the Crown in right of each of the States and the Crown in right of the Northern Territory certain proprietary rights in respect of that sea-bed and subsoil:
>
> AND WHEREAS it has been agreed between the Commonwealth, the States and the Northern Territory that —
>
> (a) legislation of the Parliament of the Commonwealth in respect of the exploration for and the exploitation of the mineral resources of submerged lands should be limited to the resources of lands beneath waters that are beyond the outer limits of the territorial sea adjacent to the States and the Northern Territory (being outer limits based, unless and until otherwise agreed, on the breadth of that sea being 3 nautical miles), and that the States and the Northern Territory should share, in the manner provided in this Act, in the administration of that legislation;
>
> (b) legislation of the Parliament of each State should apply in respect of the exploration for and the exploitation of the mineral resources of such part of the submerged lands in an area adjacent to the State as is on the landward side of the waters referred to in paragraph (a);
>
> (c) legislation of the Legislative Assembly of the Northern Territory should apply in respect of the exploration for and the exploitation of the mineral resources of such part of the submerged lands in an

area adjacent to the Northern Territory as is on the landward side of the waters referred to in paragraph (a); and

(d) the Commonwealth, the States and the Northern Territory should endeavour to maintain, as far as practicable, common principles, rules and practices in the regulation and control of the exploration for and the exploitation of the mineral resources of all the submerged lands referred to above that are on the seaward side of the inner limits of the territorial sea of Australia:

(Here follows the text of the Act.) For the second reading speech to the Bill, see HR Deb 1981, Vol 122, 2429-2431.

Continental shelf. Extension of legislation to off-shore installations.

On 25 March 1982 the Minister for Business and Consumer Affairs, Mr Moore, introduced the Off-shore Installations (Miscellaneous Amendments) Bill 1982 into the House of Representatives. He explained the purpose of the Bill in part as follows (HR Deb 1982, Vol 127, 1483-1485):

> This Bill is the main part of a package of Bills to extend taxing and control laws to rigs used in exploring or exploiting the non-living natural resources of the seabed of Australia's continental shelf. The package includes provisions extending the control and taxing aspects of Customs, excise and sales tax Acts and the controls available under immigration and quarantine laws. For constitutional reasons, amendments proposed to be made to the various taxing Acts will be the subject of separate Bills in the package. Certain collection and control provisions associated with those taxing provisions are, however, included in this Bill. It has been the Government's longstanding policy that the treatment to be accorded these off-shore activities should be no different, in principle, from the treatment accorded similar resources ventures being undertaken within Australia. The petroleum exploration and recovery activities taking place in Bass Strait and elsewhere around Australia for upwards of 15 years have been governed by the Petroleum (Submerged Lands) Act 1967. In that period, the only extension to off-shore activities of Commonwealth law outside the ambit of that Act was the application in 1968 of relevant income tax legislation.
>
> This package of measures has now become necessary as a result of developments on the North West Shelf of Western Australia. The previous practice was for all overseas sourced rigs, ships, equipment and materials for off-shore operations to be imported in the normal way through Australian ports. The massive scale of the North West Shelf developments, however, requires that a number of giant platforms be brought directly to the places on the shelf at which they are to operate. During the operation of the rigs there will necessarily be a constant flow of service craft, personnel and goods between the installations and the Australian mainland. There may be occasional movement between places overseas and an installation once attached. It is essential that these important activities should not provide an avenue for the entry into Australia of prohibited imports, such as drugs, or of exotic diseases or illegal immigrants. I know that both sides of the House support the Government in the importance that it attaches to the maintenance of Australia's security in matters of customs, quarantine and

immigration. The package of Bills provides a proper legislative basis for the exercise of customs, excise, immigration and quarantine powers to remove any degree of danger of illicit activities at these remote sites. The powers are necessary both for the arrival of those installations and for subsequent contacts between the installations and places overseas . . .

Continental shelf. Off-shore constitutional settlement. Completion.

On 4 February 1983 the Prime Minister, Mr Fraser, issued the following statement (Comm Rec 1983, 112-113):

> The Commonwealth, after extensive consultation with the States, has completed implementation of measures which achieve a significant adjustment of powers and responsibilities in the off-shore area. This was announced today by the Prime Minister, the Rt Hon. Malcolm Fraser.
>
> The remaining key elements of the Off-shore Constitutional Settlement reached at the Premiers' Conference in June 1979 have been proclaimed to come into effect on Monday 14 February 1983. From that date, the reordering of powers and responsibilities in the off-shore area, as agreed by the Commonwealth and the States, will be fully operative. The measures to commence on 14 February 1983 are:
>
> - the *Coastal Waters (State Title) Act 1980*
> - the *Coastal Waters (Northern Territory Title) Act 1980*
> - the *Petroleum (Submerged Lands) Amendment Act 1980* and associated Acts
> - the *Fisheries Amendment Act 1980*
> - new baselines from which the breadth of Australia's territorial sea is to be measured.
>
> These measures are additional to the *Coastal Waters (State Powers) Act 1980*, the *Coastal Waters (Northern Territory Powers) Act 1980* and the *Seas and Submerged Lands Amendment Act 1980* which came into force on 1 January last year. The settlement represents the completion of a most successful exercise in co-operative federalism.
>
> The High Court's decision in the *Seas and Submerged Lands* Case in 1975 meant that the Commonwealth could have exercised legal dominance in the off-shore area, denying to the States any say in the resources of the off-shore area and in the regulation of activities that take place in that area.
>
> The Government, however, adopted a course of consultation and co-operation consistent with its belief that the territorial sea is an area which has traditionally been a State responsibility and is best left for local jurisdiction except on matters of overriding national or international significance. Mr Fraser said:
>
> > The settlement will enable us all effectively to exercise our rights and responsibilities with regard to offshore Australia and will be of benefit to all governments and to the people of Australia.

For other material relating to the Australian Fishing Zone, maritime boundary agreements, etc., see below in Part VI "Law of the Sea".

Jurisdiction. Immunity from jurisdiction. Foreign state immunity.

Following is an extract from the transcript of proceedings before Chief Justice Gibbs in the High Court of Australia on 22 June 1983 in which the plaintiffs,

who appeared in person, claimed to have been illegally deported from Hong Kong by the Commonwealth of Australia and the Hong Kong Government (*Louis* v *The Commonwealth,* No S39 of 1983, 22 June 1983, pp 3-4):

> HIS HONOUR: . . . Yes, Mr Louis. There are two things I would like to point out to you. The first is that you have got here a claim against the Hong Kong Government. Now you cannot sue the Hong Kong Government in this Court. Whether you can sue it in Hong Kong is not a question I can advise you about, but it is quite clear you cannot sue it here, but what we are concerned with is your claim against the Commonwealth Government, the Government of Australia . . .

Jurisdiction. Immunity from jurisdiction. Foreign head of state.

On 21 November 1983 Mr Justice Kennedy in the Supreme Court of Western Australia delivered his judgment in the case *Kubacz* v *Shah* [1984] WAR 156 which concerned a claim of foreign sovereign immunity by the Sultan of the State of Selangor within the Federation of Malaysia in a matter concerning the performance of a contract for the sale of private property. Following is an extract from the judgment concerning the claim:

> On 27 October 1983, at Perth, Dato Mohd Yusoff Bin Haji Amin, who described himself as the private secretary to his Royal Highness, the Sultan of Selangor, deposed by affidavit that he was a citizen of Malaysia and the Constitution of the State of Selangor and that he was advised and verily believed that the defendant was the sovereign ruler of the State of Selangor which was one of the States that comprise the Federation of Malaysia. Furthermore, he deposed that, pursuant to the provisions of the Constitution of Malaysia and the Constitution of the State of Selangor, the defendant was recognized as the independent sovereign ruler of the State of Selangor, and in his personal capacity he was entitled to immunity from all proceedings in any court within the Federation of Malaysia. He also asserted that he was advised and verily believed that as the defendant was a foreign independent sovereign, he was entitled to claim sovereign immunity from process in the courts of Western Australia. Produced and shown to this deponent at the time of swearing his affidavit was a copy of Article 181 of the Constitution of the Federation of Malaysia and photocopies of extracts from the Constitution of the State of Selangor. The relevant extract from the Constitution of Malaysia consisted of the terms of s 181, which provides that subject to the provisions of the Constitution, the sovereignty, prerogatives, powers and jurisdiction of the rulers and the prerogatives, powers and jurisdiction of the ruling Chiefs of Negi Sembilan within their respective territories as hitherto had and enjoyed should remain unaffected and that no proceedings whatsoever should be brought in any court against the ruler of a State in his personal capacity. As this was the only section put into evidence, there is nothing to indicate the provisions of the Constitution to which s 181 is subject. The laws of the Constitution of Selangor, which antedate the Federal Constitution, do not appear to be of any assistance in the resolution of this matter. It is the Sultan's position under the Federal Constitution which is material.
>
> On 25 October 1983 the defendant himself swore an affidavit asserting that at no time had he "personally authorised the entering of an appearance

of the filing of a defence or counter-claim in this action''. He went on to add that ''as the Sultan of Selangor'' he was ''an independent foreign sovereign'' and he was advised and verily believed that he was entitled to claim sovereign immunity from process in the courts of Western Australia and that he thereby asserted and claimed immunity as a foreign sovereign and declared that he was unwilling to be sued in the action. Nothing was said as to the counterclaim, which remains on foot.

On 27 October 1983, Mr W. J. D. Jamieson swore an affidavit in these proceedings, the material parts of which are as follows:-

> ''1. I am employed by the firm of Messrs Stephen Chew and Co, Solicitors, 109 St George's Tce, Perth, WA.
>
> 2. I have the conduct of the above matter under the control and direction of the principal of the firm, Mr Stephen Chew.
>
> 3. The facts deposed to in this my affidavit are true to the best of my knowledge, information and belief.
>
> 5. My principal, Mr Stephen Chew, has a general retainer to act for the defendant and accordingly, when the writ of summons was served, a memorandum of appearance was entered to avoid any entry of judgment by the plaintiffs against the defendant in default of appearance. This step was taken on the basis that any prudent solicitor would enter an appearance to avoid a default judgment.
>
> 6. The statement of claim in this matter was received on or about 14 July 1983, and acting in the same way and without express instructions from the defendant, a defence and counter-claim was filed and served in this matter on or about 18 August 1983. I arranged for the drawing, filing and serving of the said defence and counter-claim in order to avoid the plaintiffs entering judgment against the defendant in default of a defence.
>
> 7. I have not had any written or oral communication from the defendant in this matter.
>
> 8. I am advised and I verily believe that the defendant is the Soverign Ruler of the State of Selangor. Produced and shown to me and marked with the letter 'A' is a true copy of a telex received at the office of Messrs Stephen Chew and Co on 26 October 1983 from Lim Taik Choon The High Commissioner for Malaysia at Canberra which states that the defendant is the Sovereign Ruler of the State of Selangor.
>
> 9. I am advised and I verily believe that as the defendant is an independent sovereign he is entitled to claim sovereign immunity from process in the courts of Western Australia.''

The telex, the reception into evidence of which was not objected to by the plaintiffs, asserted that ''His Royal Highness Sultan Sala Huddin Abdul Azia Shah Ibni Al-Marhum Sultan Hishammuddin Alam Shah is the Sovereign Ruler of the State of Selangor, which is a component of Malaysia''.

On 28 October 1983, Mr J. A. Chaney, a member of the firm of solicitors acting for the plaintiffs swore an affidavit, exhibiting a copy of a letter from the First Assistant Secretary Legal and Consular Division of the Department

of Foreign Affairs Canberra to the former solicitors for the plaintiffs in response to their letter enquiring as to the Department's "attitude as to the Sultan of Selangor", in particular in relation to his claim to sovereign immunity and whether the Australian Government considered him to be a Head of State. The response was that:

> "As one of the Rulers within Malaysia, His Highness is entitled to a special standing under the Constitution of Malaysia in any court proceedings in Malaysia. However, Selangor forms only part of the Sovereign State of Malaysia. The Sultan is not the principal representative of Malaysia in its international relations. Accordingly His Highness cannot be considered as the Head of a Sovereign State, as that term is normally understood in international diplomatic practice."

The defendant raises the question as to his sovereign immunity simply in answer to the application for summary judgment.

The position is quite clear that the courts will act upon a statement from the appropriate Government Department and will not look behind the statement so given as to the status of a foreign sovereign: see *Dicey and Morris, Conflict of Laws* (9th ed), pp. 139-140 and the cases there cited. The Commonwealth Department of Foreign Affairs is clearly such a department; but its letter does not appear to me to answer the critical question. The question is not whether the Sultan of Selangor is the principal representative of Malaysia in its international relations. He would not assert that he was. The question is whether he is the sovereign head of a "foreign state" which constitutes an integral unit of the federation of the Malaysian States. On this question, I have the evidence from the High Commissioner for Malaysia — as to which see *Krajina v Tass Agency* [1949] 2 All ER 274 and *Baccus SRL v Servicio Nacional del Trigo* [1957] 1 QB 438 — together with the evidence of the defendant's private secretary. In neither case is the basis of the assertion clearly expressed. However, notwithstanding this, in all the circumstances, and in particular by reason of the conclusion which I have reached on the question of waiver, I am prepared to accept, that, for the purposes of the present application, within the applicable principles, the defendant is a "foreign sovereign" having the necessary attributes of independence and sovereignty: see *Duff Development Co Ltd v Government of Kelantan* [1924] AC 797 at 807 and 824. As to the position of States, see *Statham v Statham* [1912] P 92; *Mighell v Sultan of Johore* [1894] QB 149; *Sayce v Ameer Ruler of Bahawalpur State* [1952] 2 QB 390 at 394, and *Swiss Israel Trade Bank v Government of Salta* [1972] 1 Lloyd's Rep 497.

The judge found that in the circumstances of the case the immunity had been waived, and observed, (158-161):

> What, in the end, the consequence of holding that there has been a waiver will be, is by no means settled. It could be that the waiver extends only to immunity from having the question of liability determined and that it does not amount to a submission for the purpose of execution: see *Re Suarez* [1917] 2 Ch 131 and *Duff Development Co Ltd v Kelantan Government* [1923] 1 Ch 385, but see the decision in the House of Lords [1924] AC 797 at 810 and 830.
>
> Before departing from the topic of sovereign immunity, it is proper to

observe that, in view of my conclusion as to the waiver of any such immunity, it is unnecessary to explore the universality of the applicable rules: see *Sultan of Johore v Abubakar Tunku Aris Bendahar* [1952] AC 318 at 343-4.

The judge concluded by finding for the plaintiff.

Note: see now the *Foreign States Immunities Act 1985* (Act No 196 of 1985) which commenced on 1 April 1986: *Commonwealth of Australia Gazette* No S 128 of 26 March 1986.

Jurisdiction. Nationality of ships. Shipping Registration legislation.

On 26 February 1981 the Minister for Transport, Mr Hunt, presented the Shipping Registration Bill 1980 to Parliament. Part of his Second Reading Speech was as follows (HR Deb 1981, Vol 121, 250-252):

> On 22 May last I introduced the Shipping Registration Bill 1980 and proposed that it lie on the table of the House for comment. That Bill of course lapsed but many submissions were received in relation to it and these have resulted in the preparation of a revised Bill which I now introduce. In view of the fact that the Shipping Registration Bill is an important step forward in the development of Australia's status as an independent nation I propose to reiterate many of the points made when introducing the legislation in the previous Parliament.
>
> The right of a country to determine the conditions for the grant of its nationality to ships is fundamental to its national sovereignty. In international law the nationality of ships is determined by the flag they are entitled to fly. It is also customary to require at least the larger ships to be registered in order to secure the right to fly the national flag. The present law governing the registration of ships in Australia was enacted by the Parliament at Westminster 87 years ago. Indeed, it is contained in Part I of the Merchant Shipping Act 1894. Originally that law applied throughout the British Empire on the basis that a ship was a British ship if owned by a British subject or corporation in any part of the Empire. The Act required all British ships to be registered except certain small ships of less than 15 tons carrying capacity. Registration could be effected at any British port of registry throughout the Empire and this entailed the entry of particulars of the ship and of its owners and mortgagees in the register at the port. The registrar at the port was required to transmit returns at regular intervals to the Registrar-General of Shipping and Seamen at Cardiff and in that way a complete record of all British ships was built up. However this procedure has been abandoned in recent years.
>
> From the commencement of the Statute of Westminster 1931, the various member countries of the British Commonwealth were free to repeal the Merchant Shipping Act 1894 and to establish their own shipping registers. However, under an agreement negotiated in 1931 the laws of each country were required to adopt a common status of "British ships" and to follow closely the provisions of Part I of the Merchant Shipping Act 1894. By mutual agreement in 1978 the British Commonwealth Merchant Shipping Agreement 1931 was rescinded by all member countries. Australia is the only major independent member of the Commonwealth, other than Britain itself, to have continued to operate under the Merchant Shipping Act

system. The stage has now been reached where it is essential that we put an end to this anachronism. The Commonwealth countries have recently agreed on common principles for the future operation of their own shipping registers. In accordance with those principles the United Kingdom is expected to confine the Merchant Shipping Act system to Britain, to ships more than 50 per cent owned by residents of Britain or companies based in Britain. It is understood that the adoption by Australia of its own national system will simplify the task being undertaken by the British authorities.

The principles underlying the present Bill have been the subject of extensive discussion with the States and the Northern Territory in the Marine and Ports Council of Australia. Their views were taken into account in the framing of the legislation. In recent discussions in the Standing Committee of Attorneys-General, agreement has been reached on the form of the clause relating to the preservation of State and Territory laws and that revised clause relating to the preservation of State and Territory laws appears in the Bill.

I turn now to a description of the main features of the Bill. Firstly, the Bill repeals Part I of the Merchant Shipping Act 1894 insofar as it is part of the law of Australia, thus terminating Australia's reliance on the British legislation and clearing the way for the adoption of an appropriate Australian system. Secondly, the provisions spell out the ships that are eligible for Australian registration, either on a compulsory or on a voluntary basis. The main elements are: Defence Force ships are excluded and registration is compulsory only for Australian-owned commercial ships of 12 metres or more in length, other than certain government ships, fishing vessels and pleasure craft; Australian-owned ships for which registration is not compulsory may be registered on a voluntary basis and also ships under 12 metres in length that are owned or operated by Australian citizens or residents may be registered; and registration is also permitted in the case of foreign-owned ships that are demise chartered to Australian interests.

The process for registration, including the evidence of ownership required, the division of property in the ships into 64 shares, issuing of registration certificates and of provisional certificates, and the naming and marking of the ship have been made broadly comparable with the British system to ensure that the changeover from that system to the Australian system can be effected with a minimum of inconvenience for shipowners. The same can be said of the provisions of Part III of the Bill which deal with transfer and transmission of title and the registration and priority of mortgages.

The flag proposals for Australian ships were arrived at after considerable public discussion. In the Australian Merchant Navy there was strong support for the continued use of the Australian Red Ensign. Therefore it is proposed to declare the Australian Red Ensign the national colours for Australian merchant ships. Regarding other ships the general opinion was that they should be allowed to fly either the Australian National Flag or the Australian Red Ensign. This was accepted on the condition that the two flags would not be flown simultaneously. Complementary amendments to the Flags Act 1953 and the Navigation Act 1912 are necessary. The Flags

Amendment Bill and the Navigation Amendment Bill are being introduced for that purpose. Apart from these flags, which until now have been covered by a mixture of British and Australian laws, the British Admiralty has issued individual warrants to certain members of some 16 yacht clubs in Australia, authorising them to wear the British Blue Ensign, either undefaced or in a defaced form. The British Blue Ensign is similar to the Australian National Flag but without the stars. Approximately 400 Australian yacht owners have been issued with such warrants. This causes some difficulty as under the Geneva Convention on the High Seas 1958, to which Australia is a party, ships have the nationality of the country whose flag they are entitled to fly.

These international requirements apply particularly to the high seas. It is possible to permit departure from the Convention requirements in the Australian territorial sea and internal waters. In view of the concern expressed by yacht owners who presently have Blue Ensign warrants, the Bill will allow them to continue to fly that flag in Australian waters so long as British law allows them to fly the flag. The Bill also preserves the use of the flag of a State or Territory in Australian waters and contains provisions in respect of flag rights for unregistered Australian ships.

The provisions of Parts IV and V of the Bill set out the broad administrative arrangements for the establishment and operation of the Australian Register of Ships. In this area there are some significant departures from the present system. The proposed Australian system is basically a centralised system in that there will be only one register. The Bill provides that the Register and copies of the Register or such part or parts of the Register as the Minister directs shall be kept at such places as the Minister directs. It also provides that there shall be, at such a place in Australia as the Minister determines, an Australian Shipping Registration Office and such number of branch registration offices as the Minister determines. This is a flexible arrangement and it enables a certain amount of decentralisation. However, it does not suffer from the disadvantage of the present system in Australia under which there is a separate register at each of 20 ports of registry and the complete record of all ships registered in Australia is not available at any one place. One consequence of that change is that there will be no ports of registry as such. However, because of the importance of the port of registry concept for legal and other purposes, the Bill makes provision for the adoption of a concept of home port for each ship and the regulations will spell this out in greater detail including the practice of continuing to mark the port on the ship's stern.

The Bill was enacted as the *Shipping Registration Act 1981* (Act No 8 of 1981) and commenced on 26 January 1982: *Commonwealth of Australia Gazette* No G51, p 2.

Jurisdiction. Control over illegally exported material.

On 9 September 1982 the Attorney-General, Senator Durack, provided the following written answer to the respective questions (HR Deb 1982, Vol 128, 1339-1340):

(1) What legal means or agreements are available to the Commonwealth Government to recover goods of all types, including historic aircraft,

illegally exported from Australia to the United Kingdom, United States or other countries.

(2) If no legal means or reciprocal arrangements exist is the Government prepared to take action to establish such a legal means of agreement; if so, what action will it take.

(1) The legal issues involved in the question whether a foreign Court would enforce a claim by the Commonwealth based on the forfeiture provisions of the Customs Act 1901 are complex. The better view would appear to be that most foreign Courts probably would not enforce a claim by the Commonwealth to recover goods forfeited under those provisions. The Commonwealth is not a party to any relevant agreements.

(2) An Interdepartmental Working Group has been established to examine and report on the nature of cultural property of national or historical significance to Australia and means, including possible legislation, to control and protect that property. The States have been invited to make submissions to the Working Group which will report in due course.

On 13 October 1982 the Minister for Foreign Affairs, Mr Street, provided the following written answer to the respective question (Sen Deb 1982, Vol 96, 1415):

When will Australia ratify the Convention on the Means of Prohibiting and Preventing the Illicit Imports, Export and Transfer of Ownership of Cultural Property which entered into force on 24 April 1972. Why has it not been ratified to date?

The Government has the question of ratification of the convention, by Australia, under consideration. It is one of the matters which an Interdepartmental Working Group on Measures to Preserve and Protect Australia's Cultural Property has under examination. This body is expected to report to the Minister for Home Affairs and Environment shortly.

There have been several attempts to resolve the question of ratification of the convention but due to legal and policy considerations the matter has not been decided. As a result of this the matter was included in the terms of reference of the working group.

Jurisdiction. Status of forces. Australian and United States personnel.

On 26 May 1981 the Minister for Foreign Affairs, Mr Street, provided the following written answers to the respective questions (HR Deb 1981, Vol 123, 2585):

(1) Has Australia an operative Status of Forces agreement in respect of Australian Defence Forces personnel stationed in the United States of America?

(2) If an agreement does not exist, have negotiations to establish a Status of Forces Agreement been undertaken; if so, when were they taken and what stage have the negotiations reached?

(3) If an agreement does not exist, what is the legal status of these personnel?

Mr Street — The answer to the honourable member's question is as follows:

(1) No.

(2) Discussions concerning the establishment of a reciprocal Status of Forces Agreement between the United States of America and Australia are continuing.

(3) The status of members of the Australian Defence Force stationed in the United States is established by the applicable principles of International Law; by any arrangements made between Australia and the United States relating to the presence in the United States of particular members; and by a proclamation issued by the President of the United States on 10 October 1965 under the Service Courts of Friendly Foreign Forces Act. Whilst members of the Australian Defence Force are subject to the laws of the United States of America during their stay in that country, pursuant to Presidential proclamation, Australia has been permitted to exercise Australian jurisdiction within the United States in respect of offences committed by members of the Australian Defence Force in the United States.

(1) Are members of the United States of America forces in Australia covered by a Status of Forces Agreement or other form of arrangement?

(2) What will be the status of US military or civilian personnel associated with any

(a) US naval facilities established on Western Australia, or

(b) B-52 operations throughout Australia?

Mr Street — The answer to the honourable member's question is as follows:

(1) Members of the United States of America forces in Australia are subject to the 1963 Status of Forces Agreement.

(2)(a) The United States Government has not put forward a proposal for the home-porting of any United States naval units in Western Australia. The question is therefore hypothetical. However, the 1963 Status of Forces Agreement would be applicable to members of the United States forces in Australia, their dependants, and to civilian US nationals employed directly by the United States forces involved in such an operation unless other arrangements were concluded by the two governments.

(b) I refer the honourable member to Article IV in the agreements on the terms and conditions which will govern United States Air Force B-52 staging flights through Darwin which was tabled in Parliament by the Prime Minister on 11 March 1981 (page 666 of *Hansard* of that date). This provides that the 1963 Status of Forces Agreement will apply.

Jurisdiction. Extraterritorial application of laws. United States antitrust laws. Westinghouse case. Settlement.

On 18 March 1981 the Attorney-General, Senator Durack, announced that arrangements had been concluded which would lead to the settlement of the Westinghouse antitrust proceedings against a number of defendants, including three Australian companies. Part of this announcement read (Comm Rec 1981, 262):

The Attorney-General said that the settlement agreement satisfied

Australian national interest considerations. In particular, the settlement agreement provided that no implications should be drawn from the settlement that there had been any wrongdoing by the Australian companies. There would be no waiver of jurisdictional objections to the proceedings by the Australian defendants as a result of the settlement.

On 10 June 1981 the Attorney-General provided the following written answers to the respective questions (HR Deb 1981, Vol 123, 3531):

(1) Has the Government abandoned defence of 3 Australian uranium suppliers in Courts in the United States of America.

(2) If so, does this render useless legislation designed to protect Australian interests in such cases.

(3) Have the 3 companies withdrawn their defence because of commercial threats to their future trade by Westinghouse or government authorities or companies subject to the influence of Westinghouse; if not, to what commercial pressures have the defendant companies yielded.

(4) Do these commercial pressures favour big companies in disputes with Australian companies, leading to more concentration of corporate power than the alleged cartel, on account of which Westinghouse initiated its action.

(5) What will be the prima facie loss to the Australian companies because of the settlement accepted due to the Westinghouse action.

(6) How much of this loss will be debited to the Australian Government shareholding in uranium mining and what would this amount have been if the Australian Government had not sold any of its uranium mining interests.

(1) No.

(2) The operation effect of the Foreign Proceedings (Prohibition of Certain Evidence) Act 1976 and the Foreign Antitrust Judgements (Restriction of Enforcement) Act 1979 remain unchanged by the settlement of the Westinghouse proceedings.

(3) and (4) Each of the companies has issued a press statement indicating its commercial reasons for having entered into settlement agreement with Westinghouse.

(5) The Australian companies have publicly disclosed their individual payments to the settlement.

Those payments were:

CRA Limited — $6,800,000; Pancontinental Mining Limited — $2,600,000; Mary Kathleen Uranium Limited — $870,000; Queensland Mines Limited — $878,000.

(6) The Commonwealth has a 41.6 per cent shareholding in Mary Kathleen Uranium (MKU). The payment made by MKU to Westinghouse will not be debited against particular shareholdings as such but, as with other items of expenditure, it will be reflected in the company's profit and loss account.

For further written answers, see Sen Deb 1981, Vol 90, 3305. For the revocation of an order under the Foreign Antitrust Judgments (Restriction of Enforcement) Act 1979 relating to the Westinghouse proceedings, see *Commonwealth of Australia Gazette*, No G28, 14 July 1981, p 4.

The Attorney-General provided the following further written answer on 16

September 1981 (Sen Deb 1981, Vol 91, 810-811):

> The Australian companies involved in the settlement of the Westinghouse proceedings informed the Government that, should they decide to enter into the settlement agreement, they intended to apply to the Reserve Bank of Australia for approval under the Banking (Foreign Exchange) Regulations for the movement of funds to enable the terms of the settlement to be carried out.
>
> The Australian Government indicated to the companies that it would not object to the granting of such foreign exchange approval, if the proposed settlement satisfied certain national interest considerations. These were that:
>
> (i) provisions be included in the settlement agreement —
>
> requiring that the final judgment on issues of liability given against the Australian companies on 3 January 1979, and the preliminary injunction given in favour of Westinghouse Electric Corporation against the Australian companies on 24 January 1979, be vacated:
>
> that there should be no implication from the settlement of wrong-doing on the part of the Australian companies;
>
> that the settlement of the proceedings should not be construed as a waiver by the Australian companies of their jurisdictional objectives to the proceedings or as a submission to the jurisdiction to the Courts of the United States; and
>
> (ii) none of the uranium to be supplied under the terms of the settlement agreement (which in addition to the Australian companies included other defendants in the Westinghouse suit) would come from Australia or Namibia or be supplied by an Australian company.
>
> The Government, upon being satisfied that these conditions had been met, indicated to the Australian companies, Conzinc Riotinto of Australia Ltd, Mary Kathleen Uranium Limited and Pancontinental Mining Limited on 16 March 1981 that it would not object to the granting of approval by the Reserve Bank pursuant to the Banking (Foreign Exchange) Regulations to any application made by those companies to the Reserve Bank for the movement of funds to enable the terms of settlement to be carried out.
>
> Queensland Mines Limited which subsequently decided to participate in the settlement agreement of 17 March 1981 was also informed of the Government's attitude prior to that decision.

Jurisdiction. Extraterritorial application of laws. United States laws. The ALCOA case.

On 24 February 1981 the Conservation Council of Western Australia commenced proceedings in the United States District Court for the Western District of Pennsylvania against two United States companies, including the Aluminium Company of America (ALCOA) in regard to their commercial activities in resources development projects in the State of Western Australia. On 24 April 1981 the Embassy of Australia presented a diplomatic note to the Department of State with respect to the proceedings. Part of the Note read as follows:[7]

7 Text attached to press release of the Attorney-General dated 9 June 1981.

The complaint contains allegations relating to the bauxite mining and alumina refining activities of the two corporations, their subsidiaries and joint ventures, in the State of Western Australia. The plaintiffs seek declaratory and injunctive relief which, if granted, would seek to interfere with this significant industrial development in Western Australia.

It is not clear from the complaint upon what basis, if any, the plaintiffs have for claiming the relief sought, although the complaint alleges that certain provisions of the Sherman Act, Federal Trade Commission Act and the Trade Marks Act have relevance to the proceedings. It is the Embassy's understanding that the complaint does not contain any actual allegation of an effect upon the United States or its inter-state or foreign trade and commerce. The two defendant corporations filed a motion to dismiss the complaint on 22 April 1981.

The Australian Government is concerned that the proceedings threaten to interfere with both bauxite mining and alumina refining in Western Australia and the smelting of aluminium metal elsewhere in Australia. Further, Australia is concerned that the proceedings could have implications for Australia's international trade and resource development in these products and a wide range of other resource and energy related areas. The United States authorities will be aware that this matter has been seen to be of such significance in the State of Western Australia that both Houses of that State's Parliament have passed resolutions expressing concern at the action taken by the Conservation Council of Western Australia Inc.

The Australian Government draws attention to certain United Nations Resolutions which recognise the principle of international law that every sovereign State has permanent sovereignty over natural wealth and resources situated within its territorial boundaries, see, for example, G.A. Res. 1803 (1962). Furthermore, the Australian Government notes that the guidelines recommended to multinational enterprises by the Governments of OECD member countries state, inter alia, that such enterprises should give due consideration to member countries' aims and priorities with regard to the protection of the environment.

Federal and State Parliaments in Australia have enacted laws with regard to the protection of the Australian environment which implement procedures that provide for the prescription and monitoring of approporiate conditions relating to the recovery and utilization of natural resources within their territorial boundaries. The projects mentioned in the complaint are being carried out by Australian subsidiaries and joint ventures of the defendant companies in accordance with such requirements. In these circumstances, the Australian Government is firmly of the view that it is for Australia alone to decide the appropriate conditions and whether there has been compliance with them.

It is urged that it is inappropriate that Courts of the United States should exercise jurisdiction in proceedings concerning the environment — clearly an internal activity — of Australia. Such interference would, in the Australian Government's view, amount to an unwarranted extension of the jurisdiction of the United States. The Australian Government would regard such interference in resource development projects within its territorial

boundaries as unacceptable and contrary to international law and comity, and would strongly resent it.

The Embassy of Australia has been instructed to request that the United States Government should file a "suggestion of interest", as provided for in 28 U.S.C. S517, with the Court urging it not to assume jurisdiction in the proceedings.

In its reply the Department of State notified the Embassy that "it has been determined that, at this preliminary stage of the proceedings, the question does not involve sufficiently direct or well-defined interests of the United States Government as to warrant the filing of a suggestion of interest."[8] Nevertheless, the Department of State encouraged the Government of Australia to present its own views to the Court. On 9 June 1981 the Attorney-General, Senator Durack, announced that the Government had filed an *amicus curiae* brief the previous day (Comm Rec 1981, 647-648). Extracts from the brief are as follows:[9]

I. *THE INTEREST OF THE AUSTRALIAN GOVERNMENT*

The complaint in this case is directed to matters that, under international and United States law, are exclusively within the jurisdiction of the Commonwealth of Australia and the State of Western Australia. If the United States Court were to exercise jurisdiction with regard to the complaint, it would constitute an infringement of Australia's sovereignty and give rise to the strongest objection by the Government of Australia. The pending proceeding also threatens to interfere with natural resource development of great importance to Australia and, potentially, to Australia's trading partners such as the United States, Japan, the Middle East, and South America. It is submitted that natural resource development and environmental protection within Australia are matters exclusively within the jurisdictional competence of the Australian nation.

II. *FACTUAL STATEMENT*

The defendants have made extensive factual presentations in support of their motions to dismiss this case. Accordingly, only a summary of the points that are salient from the viewpoint of the Australian Government will be offered here.

This case arises out of a complaint filed by the Conservation Council of Western Australia, an organization formed under the laws of the State of Western Australia, which purports to represent other Australian entities. The suit concerns mining projects carried on wholly within the territory of Australia by affiliates of the defendants (ALCOA of Australia, Ltd., and Reynolds Australia Alumina, Ltd.) and others. The gravamen of the complaint is that the environment of Western Australia will be harmed by these activities. No actions on the part of the defendants or their affiliates involving conduct in the United States are alleged, nor is there a claimed effect upon United States foreign commerce or upon the environment of the United States. As the defendants have pointed out in their briefs, certain United States Statutes are invoked in the complaint, but those Statutes bear no relationship whatsoever to the activities that the plaintiff seeks to enjoin.

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8 and 9 *Ibid.* (see footnotes omitted)

In order to appreciate the threat posed to the Australian national interest by this inappropriate lawsuit, it is necessary to recognise the importance to Australia of mineral development and exports.

Here the brief set out certain factual material. It then continued:

III. *ARGUMENT*

The Government of Australia urges the Court to dismiss this suit because, under well established standards of both international and United States law, subject matter jurisdiction is lacking. Moreover, the Government of Australia supports defendants' assertions that, even if the court were to conclude that such jurisdiction exists, it should decline to exercise it on the ground of international comity or under the Act of State doctrine.

A. *This Court lacks subject matter jurisdiction under international and United State law.*

The issue of jurisdiction involves the interplay of international and United States law. The Australian Government contends that an assertion of subject matter jurisdiction by the Court in this case would be inconsistent with well established principles of both sets of laws. This Court is required to apply principles of international law in ruling upon defendants' motions to dismiss. *The Paquete Habana,* 175 U.S. 677, 700 (1900).[10] Moreover, in construing the various statutes alleged by plaintiff to prescribe jurisdiction in this case, the Court must not accept a construction that would "violate the law of nations if any other possible construction remains . . ." *Murray* v *Schooner Charming Betsy*, 6 US (2 Cranch) 208, 226 (1804). *McCulloch* v *Sociedad Nacional de Marineros de Honduras,* 372 US 10, 21-22 (1963).

It is a long established principle of international law that one State "may not exercise its powers in any form in the Territory of another State." *The S.S. Lotus,* (1927) P.C.I.J., Ser. A., No. 10, at 18-19. Consequently, the U.S. Supreme Court has repeatedly held that "(t)he canon of construction which teaches that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States . . . is a valid approach whereby unexpressed Congressional intent may be ascertained." *Foley Brothers, Inc. v. Filardo* 336 U.S. 281, 285 (1949). See *Restatement (Second) of Foreign Relations Law of the United States* S. 38 (1965). No U.S. Statute relied upon by plaintiff evidences an intent by Congress to exercise jurisdiction in the situation presented by this case.

One aspect of territorial sovereignty relevant to the jurisdictional issues in this case is that each sovereign has permanent sovereignty over natural resources situated within its territorial boundaries. This fundamental principle is evidenced in several resolutions of the General Assembly of the United Nations including Resolution 1803 on "Permanent Sovereignty over Natural Resources", which was passed in 1962 by a vote of 104 to 6 with the United States voting in favour. Paragraph 5 of Resolution 1803 declares that —

"The free and beneficial exercise of the sovereignty of peoples and

nations over their natural resources must be furthered by the mutual respect of States based on their sovereign equality.''[11]

A related principle of international law is that a sovereign State has the right to develop its own resources pursuant to its own environmental policies and no other State has jurisdiction over such developments.[12]

These two related principles — permanent sovereignty over natural resources and sole jurisdiction over environmental policies — have been acknowledged and followed by U.S. Courts. For example, in *International Association of Machinists and Aero-Space Workers v. OPEC,* 477 F.Supp. 553 (C.D. Cal. 1979), the Court cited General Assembly Resolution 1803 and five other General Assembly Resolutions[13] and stated —

> ''The United Nations, with the concurrence of the United States, has repeatedly recognized the principle that a sovereign State has the sole power to control its natural resources.
>
> The control over a nation's natural resources stems from the nature of sovereignty. By necessity and by traditional recognition, each nation is its own master in respect to its physical attributes.''
>
> 477 F. Supp. at 567–68.

In another case, the U.S. Court of Appeals for the Fifth Circuit held that the Marine Mammal Protection Act did not apply to the taking by an American citizen of marine mammals in the territorial waters of another sovereign State. The Court cited, inter alia, General Assembly Resolution 1803 and stated —

> ''When Congress considers environmental legislation, it presumably recognizes the authority of other sovereigns to protect and exploit their own resources. Other States may strike balances of interests that differ substantially from those struck by Congress. The traditional method of resolving such differences in the international community is through negotiation and agreement rather than through the imposition of one particular choice by a State imposing its laws extraterritorially.''

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10. ''International law is part of our law, and must be ascertained and administered by the Courts of Justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination.'' 175 U.S. at 700. *See generally* L. Henkin, R. Pugh, O. Schachter, and H. Smit, *International Law* 116-67 (1980).
11. G.A. Res. 1803, 17 U.N. GAOR, 2D Comm, 327, U.N. Doc A/C 2/5 R 850 (1962). *See* G.A. Res. 3171, 28 U.N. GAOR 30 (Vol 1) at 52, U.N. Doc. A/9030 (1973) (reaffirming inalienable rights of States to permanent sovereignty over natural resources)., G.A. Res. 3016, 27 U.N. GAOR, Supp. (No. 30), U.N. Doc, A/8730 (1972)., G.A. Res. 2158, 21 U.N. GAOR, Supp. (No 16) 29, U.N. Doc. A/6316 (1966).
12. See, *e.g.,* Charter of Economic Rights and Duties States, G.A., Res. 3281, Ch. II, Art, 30, U.N. Doc. A/Res/3281 (XXIX) (1974)., *Trail Smelter Arbitration* (United States v. Canada), 3 R. Int'l Arb. Awards 1905 (1941), 35 Am. J. Int'l L. 684 (1941). There may be an evolving concept to international relations that a State should not permit activities within its Territory that cause injury to the environment of other States or to persons located in other States. No such injury outside of Australia has been alleged. *See generally* Handl, *Territorial Sovereignty and the Problem of Transnational Pollution,* 69 Am. J. Int'l 50 (1975).
13. In addition to the General Assembly Resolutions cited in Notes 11 and 12 *supra*, the Court cited Declaration on the Establishment of a New International Economic Order, G.A. Res. 3201 (S-VI), S. 4(E), U.N. GAOR, 6th Spec. Sess., Supp. (No. 1) 3. U.N. Doc. A/9559 (1974). 477 .F. Supp. at 567.

United States v *Mitchell*, 553 F. 2d 996, 1002 (5th Cir. 1977).

Plaintiff alleges a cause of action under the Sherman Act, 15 U.S.C. s.s. 1 *et seq*, which has been construed by U.S. Courts to apply to conduct outside the United States. The Australian Government has consistently maintained that the extent to which the United States asserts extraterritorial jurisdiction pursuant to its antitrust law is not consistent with recognized principles of international law. Nonetheless, even under the American view of extraterritorial antitrust jurisdiction that "practices of an American citizen abroad having a substantial effect on American foreign commerce are subject to the Sherman Act", "*Mannington Mills, Inc. v. Congoleum Corp.*, 595 F. 2d 1287, 1292 (3d Cir, 1979), This Court lacks subject matter jurisdiction here because plaintiff has alleged no "substantial effect on American foreign commerce."

The Australian Government regards the plaintiff's allegations as a direct attack upon Australia's sovereign right to develop its national resources pursuant to those environmental safeguards and other limitations that have been imposed pursuant to Australian law. Because the complaint alleges no effect upon U.S. commerce, no effect upon the environment of the United States, and no injury to persons within the United States, an assertion of subject matter jurisdiction by the United States Courts would be inconsistent with international and United States law.

B. *This Court should, in any event, decline to exercise any claimed jurisdiction on the basis of international comity.*

If this Court rejects the Australian Government's preceding contentions that the Court lacks subject matter jurisdiction under international and U.S. law and also rejects the cogent contention of ALCOA that the Court "lacks enforcement jurisdiction to grant the extraterritorial remedies prayed for in the complaint",[14] nonetheless *Mannington Mills supra*, requires the Court to balance the following ten factors to determine "whether extraterritorial jurisdiction should be exercised". 595 F. 2d at 1297-98.

1. Degree of conflict with foreign law or policy;
2. Nationality of the Parties;
3. Relative importance of the alleged violation of conduct here compared to that abroad;
4. Availability of a remedy abroad and the pendency of litigation there;
5. Existence of intent to harm or affect American commerce and its foreseeability;
6. Possible effect upon foreign relations if the Court exercises jurisdiction and grants relief;
7. If relief is granted, whether a Party will be placed in the position of being forced to perform an act illegal in either country or be under conflicting requirements by both countries;
8. Whether the Court can make its order effective;
9. Whether an order for relief would be acceptable in this country if made by the foreign nation under similar circumstances;
10. Whether a treaty with the affected nations has addressed the issue.

14. ALCOA's brief in support of dismissal, at 26-36 (Apr. 22, 1981).

As is detailed below, the Australian Government contends that a fair balancing of these factors relating to international comity leaves no doubt that this Court should decline to exercise jurisdiction in this case.

1. *Degree of conflict with foreign law or policy*

If granted, the relief requested would place this Court in direct conflict with the internationally recognized right of Australia to develop its natural resources pursuant to environmental standards deemed appropriate by governmental authorities in Australia.

The extent of Australian Government's and Western Australian Government's involvement, and the conditions attached and approvals given in relation to these projects have been set forth in the factual statement of this brief and in detail in the exhibits attached to defendants' motions to dismiss. Moreover, the two Governments have expressed clearly, in a number of ways, including the attached Resolution of the Parliament of Western Australia, the attached Diplomatic Note, statements of high officials[15] and this *amicus curiae* brief,[16] their view that the exercise of jurisdiction by an American Court in this case would be contrary to international law and would constitute an unacceptable interference in Australian affairs. Note No. 132 from the Embassy of Australia to the U.S. Department of State (April 24, 1981 Attachment A hereto) concerning this case states in part —

> "It is urged that it is inappropriate that Courts of the United States should exercise jurisdiction in proceedings concerning the environment — clearly an internal activity — of Australia. Such interference would, in the Australian Government's view, amount to an unwarranted extension of the jurisdiction of the United States. The Australian Government would regard such interference in resource development projects within its territorial boundaries as unacceptable and contrary to international law and comity, and would strongly resent it."

2. *Nationality of the Parties*

Plaintiff is an Australian organization purporting to represent Australian entities in a dispute over projects to be carried out in Australia.

Defendants are U.S. citizens who are corporate parents of some of the companies involved in the projects.

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15. For example, on May 29, 1981, the Australian Attorney General, Senator Peter Durack, responding to a question in the Senate of Australia, said in part, "The Government is deeply concerned about the proceedings . . . We are concerned about the issues raised in the proceedings and the implications they have for the freedom of Australian Governments and Parliaments to determine their own policies in regard to resource development. That has been made clear, I think, on previous occasions. However, we are also concerned with the claims for extraterritorial jurisdiction that have been made under some American laws and by some American Courts . . ."

16. Reporters' note No. 6 to the *Restatement of Foreign Relations Law of the United States (Revised)* S. 403 (Tent. Draft No. 2 1981) states that in determining conflict with a foreign nation's policy, a U.S. Court —

> "may take into account expressions of interest by a foreign State, whether made through a Diplomatic Note, a brief amicus curiae, or a declaration by Government officials in Parliamentary debates, press conferences or communiques.:
> id at 111.

3. *Relative importance of the alleged violation of conduct here compared to that abroad*

All of the allegedly actionable conduct occurred in Australia and will allegedly cause injury only to Australians. The development of the challenged projects is of immense importance to the people and economy of Australia. The only connection with the United States is that the challenged conduct was engaged in, in part, by affiliates of U.S. firms.

4. *Availability of a remedy abroad and the pendency of litigation there*

At least since 1974, plaintiff commented upon, made representations concerning, and challenged aspects of the projects in various fora in Australia. These were given due consideration by the relevant Australian authorities in reaching decisions on the projects. The Government of Australia is not aware of any pending litigation in Australia challenging these projects.

5. *Existence of intent to harm or affect American commerce and its foreseeability*

Plaintiff has alleged no intent on the part of the defendants to harm or affect American commerce.

6. *Possible effect upon foreign relations if the Court exercises jurisdiction and grants relief*

As Note No. 132 details, the Australian Government has informed the Department of State that it would "strongly resent" an assertion of U.S. jurisdiction in this case. The Department of State's reply to Note No. 132 stated that "(T)he jurisdictional question which the Embassy's Note addresses is a serious one and deserves careful consideration by the Court." Department of State Note to Embassy of Australia, at 1 (May 21, 1981 Attachment B hereto).

7. *If relief is granted, whether a party will be placed in the position of being forced to perform an act illegal in either country or be under conflicting requirements by both countries*

If the Court were to grant the relief requested, defendants and/or their subsidiaries might believe themselves to be subject to conflicting requirements of U.S. and Australian law and therefore might abandon or reduce to unacceptable levels their participation in these projects in a manner inconsistent with the requirements of the Australian authorities. For example, plaintiff requests that defendants be required to reserve from development 220,000 acres of the forest land leased to them, a requirement that is in conflict with the agreements as approved by the Governmental authorities in Australia.

8. *Whether the Court can make its order effective*

If the Court were to grant the requested relief, it is conceivable that the Government of Western Australia might find it necessary to remove either or both defendants from the projects and to replace either or both with other entities prepared to meet the Government's objectives. This could be done, for example, by revoking the defendants' interests in the mining leases. Other types of legislative and executive action within Australia could also be undertaken to ensure that these projects go forward. Moreover, persons in Australia who have

17. Factor 10 is not applicable because there is no relevant treaty between the United States and Australia.

rights under the agreements might seek orders from Australian Courts prohibiting enforcement of this Court's order. Such a situation arose as a result of a U.S. Court's order that ICI, an English company, reassign British patents licensed to another English company, British Nylon Spinners (BNS), to Dupont. *United States v. Imperial Chemical Industries, Ltd.*, 105 F. Supp. 215 (S.D.N.Y. 1952). Two weeks later, an English Court issued an order ordering specific performance of the Patent License between ICI and BNS. *British Nylon Spinners, Ltd,* v *Imperial Chemical Industries, Ltd.*, [1953] 1 Ch. 19 (C.A. 1952).

9. *Whether an order for relief would be acceptable in this country if made by the foreign nation under similar circumstances*

It is not conceivable that the U.S. Government and the State of Pennsylvania would accept an order of an Australian Court enjoining significant economic development projects in Pennsylvania, which had been approved by the Pennsylvania and U.S. Governments, on the ground that the Australian parents of the companies engaged in the projects had violated Australian law by damaging the environment of Pennsylvania.

The Australian Government submits that the preceding analysis of the *Mannington Mills* factors[17] inescapably leads to the conclusion that the Court should decline to exercise jurisdication in this case.

Dismissal is also appropriate under the principles stated in *Natural Resources Defense Council, Inc. v. Nuclear Regulatory Commission* No. 80-1477 (D.C. Cir. Mar. 30, 1981), 15 Envir. Rep. Cas, 1857, where the U.S. Court of Appeals for the District of Columbia Circuit held that the National Environmental Policy Act did not require the Nuclear Regulatory Commission (NRC) to prepare an environmental impact statement with respect to potential environmental impacts exclusively within the Philippines caused by a nuclear reactor exported from the United States pursuant to a license granted by the NRC. In reaching its conclusions, the Court stated —

> "Regulatory coercion across national borders is plainly a possibility for the United States when we hold the cards. But when a foreign development program — the public provision of electricity — is at stake, we should not assign an insignificant place to the foreign political interest. Some balancing, or recognition of latent conflict of laws, would seem judicious to reconcile the separate *but not inconsistent* national interests to regulate reactors with an eye to health, safety and the environment.
> We ought somehow to accommodate the two separate national (U.S. and Philippine) regulatory interests with the 'extraterritorial principle'. We do honor to the sovereignty of national governments, our own included, when we respect foreign public policy by not automatically displacing theirs with ours. This calls for a thorough understanding of our interests as defined by Congress — we can then reasonably balance the scope of our own regulation alongside the rightful regulatory jurisdiction of the Philippines."
> 15 Envir. Rep. Cas. at 1867 (emphasis in original).

Nothing in the Statutes relied upon by plaintiff indicates a Congressional intent to displace Australian public policy on the fundamental issues of development of natural resources and protection of the environment. Moreover, the situation

presented by this case has a more remote connection, if any, with U.S. interests than did the export of U.S. nuclear reactors in *Natural Resources Defense Council.*

C. *This Court should decline to exercise any claimed jurisdiction because of the Act of State Doctrine.*

The Government of Australia supports the contentions of defendants in their papers that the Act of State doctrine applies to the activities challenged here and should lead the Court to abstain from exercising jurisdiction.

It is the position of the Government of Australia that the Act of State doctrine applies to the activities of Western Australia as well as to the activities of the Commonwealth of Australia. The U.S. Court of Appeals for the Ninth Circuit has stated that the Act of State doctrine "derives from the judiciary's concern for its possible interference with the conduct of foreign affairs by the political branches of the Government." *Timberlane Lumber Co. v. Bank of America*, 549 F. 2d 597, 605 (9th Cir., 1976). Thus an Act of State can be the act of a governmental committee or corporation, see. *E.G., Van Bokkelen v. Grumman Aerospace Corp.*, 432 F. Supp. 329 (E.D.N.Y. 1977; *D'Angelo* v *Petroleos Mexicanos* 422 F. Supp. 1280 (D. Del. 1976), *Aff d Without Opinion* 564 F. 2d 89 (3d Cir. 1977), *Cert. Denied,* 434 U.S. 1035 (1978)., or of a private entity acting as a governmental agent. *cf. Continental Ore Co.* v *Union Carbide and Carbon Corp.*, 370 U.S. 690 (1962). Moreover, under the related doctrine of foreign sovereign immunity, it is abundantly clear that the actions of a major political subdivision, such as those of the State of Western Australia, are to be treated as those of a "foreign State" for jurisdictional purposes. 28 U.S.C. S. 1603(B). Consequently, governmental actions by Western Australia also are entitled to Act of State protection. In any event, there have been ample actions of the Commonwealth of Australia in recognition or approval of the subject projects.

Plaintiff clearly seeks review of the considered policy decisions by the Commonwealth of Australia and the State of Western Australia. The Act of State doctrine should lead this Court to refrain from undertaking that review. This Court cannot inquire into the nature and efficacy of Australia's environmental protection laws, their application in this case, or the question of the compliance by governments or companies with their provisions. To do so would be a denial of the sovereignty of the Australian nation.

The Australian Government maintains that the assumption of exercise of jurisdiction by the Court in this case would be contrary to recognised principles of international law and respectfully submits this *amicus curiae* brief to this Court without prejudice to that position. The Government of Australia appreciates the opportunity to express its views on this matter to the Court.

Conclusion

For the foregoing reasons, the Australian Government urges the Court to grant the defendants' motions to dismiss.

On 9 July 1981 the District Court (Cohill J.) dismissed the complaint. The Court held that it did not have subject-matter jurisdiction over the complaint, that the complaint did not state a cause of action under the antitrust laws, and that the

complaint did not state a cause of action under Australian law. In the course of his judgement, Cohill J made no reference to the Australian *amicus curiae* brief. (see *The Conservation Council of Western Australia* v. *Aluminium Company of America (ALCOA)* 518 F Supp 270).

Jurisdiction. Extraterritorial application of United States laws.

For background on the problems experienced in Australia with the extraterritorial application of United States laws, see the report of the Joint Committee on Foreign Affairs and Defence entitled ''Australia-United States' Relations: The Extra-territorial application of United States Laws'' presented to Parliament on 1 December 1983 (PP No. 306/1983). The Committee's conclusions and recommendations were as follows (id., pp 65-66):

> 7.35 The Committee concludes that, because of the limitations in the scope of the Agreement concluded with the United States in 1982 and because of certain subsequent adverse applications of US laws to Australian interests, there is a need, notwithstanding the Agreement, for Australian residents and those doing business in Australia to be protected from the extraterritorial application of those laws.
>
> The Committee recommends that the Attorney-General introduce legislation into the Parliament:
>
> I (a) to prohibit compliance by Australian residents or those doing business in Australia with orders of a foreign country which might damage Australia's trading interests;
>
> (b) to enable the full recovery in Australia of damages paid by Australian residents or by those doing business in Australia pursuant to a foreign judgment which is declared to be unenforceable or not to be recognised under the Foreign Antitrust Judgments (Restriction of Enforcemnet) Act 1979;
>
> (c) to allow for the recovery of defendants' costs, even in unsuccessful defences provided the judgment is unenforceable or not to be recognised pursuant to the Foreign Antitrust Judgments (Restriction of Enforcement) Act 1979; and
>
> II the Attorney-General in drafting such legislation —
>
> (a) give emphasis to considerations such as the protection of Australian trading interests or national sovereignty; and
>
> (b) avoid dependence upon a prior finding that a foreign country or court has asserted jurisdiction contrary to international law.
>
> 7.36 If in future Australian interests are seriously threatened by foreign judgments, the Committee recommends that the Australian Government give consideration to entering into agreements with other countries for the enforcement in each other's jurisdiction of recovery back orders.

The Government's response to the Committee's report was given by the Minister for Foreign Affairs, Mr Hayden, on 5 April 1984 who said in part (HR Deb 1984, 1457-1458):

> The Committee examined thoroughly the problems experienced in Australia over the past few years and concluded that there was a need for Australian

residents and those doing business in Australia to be protected from the extraterritorial application of United States laws. The Committee recommended that legislation be introduced to deal with the problem. A week after the Committee's report had been tabled, the Attorney-General (Senator Gareth Evans) introduced in the other place the Foreign Proceedings (Excess of Jurisdiction) Bill 1983 and, in welcoming the report on behalf of the Government, noted that the Bill was consistent with the major recommendations of the report. The Bill completed its passage through this House on 7 March and will shortly come into force.

The Government agrees with the Committee's conclusion that the agreement between Australia and the United States relating to co-operation on anti-trust matters is a significant step towards resolving numerous difficulties that have arisen between the Australian and United States governments in the enforcement of the United States anti-trust laws. In his second reading speech, the Attorney-General reaffirmed Australia's commitment to the consultative approach of the agreement, and stated that it was the Government's firm belief that jurisdictional conflicts between the laws and politics of sovereign governments should be resolved if at all possible by consultation and not by unilateral legal or executive action. However, the Committee noted that the agreement did not deal with a number of important issues, including laws such as the United States Export Administration Act, and indicated its concern that the agreement could not provide a complete answer to the problem of private treble damages proceedings. It was against that background that the Committee decided to recommend the introduction of the legislation referred to.

I will not take the time of the House by going through the provisions of the legislation again. I am pleased to note that when it was passed, it did so with the support of honourable members on both sides of the House. Let me only stress that the enactment of this legislation as a defensive measure is not inconsistent with the Government's policy of consultation, co-operation and negotiation on anti-trust problems. This method of settling jurisdictional conflicts has always been foremost in the Government's approach. The Government is satisified, however, that the legislation will ensure the stable climate necessary for the development of fruitful trading relations which exist, and which I hope will continue to exist, with one of our major trading partners, on the basis of equality and mutual respect.

The Committee also recommended that the Government give high priority to ensuring active Australian participation in international attempts, such as those within the Organisation for Economic Co-operation and Development and the United Nations Conference on Trade and Development, to reach broadly acceptable arrangements to avoid or resolve conflicts in the application of national trading laws. We shall certainly be doing this.

Jurisdiction. Extraterritorial application of United States laws. Act of state doctrine. Principles of Comity. Shipping Conferences.

On 23 February 1983 the Attorney-General, Senator Durack, issued the following statement (Comm Rec 1983, 226):

The Attorney-General, Senator the Hon. Peter Durack, announced today

that the Australian Government had intervened in New York, by way of *amicus curiae* brief, in proceedings in the United States Court of Appeals for the Second Circuit.

This action relates to the antitrust investigation by the U.S. Department of Justice into Australia-U.S. ocean freight trade. Similar proceedings were taken by the Government last July in the United States Court of Appeal for the District of Columbia (Washington).

In that case a number of shipping lines challenged the decision of the District Court judge upholding the right of the U.S. Department of Justice to demand documents relating to shipping lines' contacts with instrumentalities of the Australian Government. The Court of Appeal has not yet handed down its decision in that case.

The New York appeal was initiated by the Department of Justice following a decision by Judge Brieant in a New York District Court which declined to enforce demands by the Department of Justice relating to the shipping lines contacts with the Australian Meat and Livestock Corporation and other agencies.

The Australian Government maintains that the inquiry by the U.S. Department of Justice is an intrusion into Australian sovereignty and that it may adversely affect the ability of the AMLC to carry out its statutory functions.

The *amicus curiae* briefs requested both the Washington and New York appeal courts to take into account the interests of the Australian Government, especially its concern that the investigation was in part directed at activities of the AMLC that were being carried out in accordance with Australian law and governmental policy.

In Australia's view the matter involves a consideration of the undermentioned legal arguments: the act of state doctrine; the principles of international comity; the Noerr-Pennington doctrine.

The act of state doctrine recognises that every sovereign state is bound to respect the independence of every other sovereign state, and the court of one country will not sit in judgment on the acts of government of another done within its own territory.

The concept of international comity is well established in U.S. law and one of its principal bases is respect of other nations' political processes.

The Australian Government has a continuing interest to ensure a free flow of communications with affected Australian, American and other businessmen. These persons should not thereby be exposed to the risks of U.S. antitrust investigation and prosecution.

The Noerr-Pennington doctrine in U.S. antitrust law safeguards the democratic right of citizens to petition governments and governmental instrumentalities to influence decisions made by those bodies, including decisions of a commercial nature. Although the doctrine is now accepted as applying to dealings with foreign governments, the question has arisen in the shipping proceedings whether it would prevent the U.S. Department of Justice from demanding information concerning contacts between the shipping lines and Australian instrumentalities.

The brief referred to was filed in the proceedings in *Associated Containers*

Transportation (Australia) Ltd., v. *United States of America* on 11 February 1983.

The briefs files in 1982 were filed in proceedings in *Australia/Eastern U.S.A. Shipping Conference* v. *United States of America* on 23 July 1982 and 23 September 1982.

For general background on the investigations into the Australian-United States Freight trade, see the Parliamentary Report on United States Antitrust Laws: PP No 306/1983, 27-29.

Jurisdiction. Extraterritorial application of laws. United States laws. Export Administration Act.

On 23 May 1983 the Embassy of Australia in Washington presented the following Note to the Department of State (PP No 306/1983, pp 83-84):

> The Embassy of Australia presents its compliments to the Department of State and has the honour to draw the Department's attention to the serious concerns of the Government of Australia in relation to certain extraterritorial aspects of the Export Administration Act, 1979, currently under review, which have the effect of asserting United States jurisdiction over persons and commercial transactions outside the United States.
>
> This Embassy has on a number of occasions expressed the view that the extraterritorial application of certain United States laws, particularly antitrust laws, are contrary to widely accepted principles of international law regarding the extent of national jurisdictional competence and to international comity. Consistent with this view the Australian authorities are unable to accept that the provisions of the Export Administration Act should apply to companies registered and carrying on business in Australia. Nor can they accept any interpretation of the Act which attempts to confer United States jursidictional competence over goods and technology of United States origin located in Australia and therefore subject to Australian laws and policies. Australia does not believe that the use of submission clauses is a legitimate exercise of national jurisdictional competence. In short, the Government of Australia would regard the extraterritorial application of such provisions of the Export Administration Act to companies registered and carrying on business in Australia, or to goods, technology or information located in Australia as an interference with matters within Australian jurisdictional competence.
>
> The Act as it is currently drafted also fails to recognise the important contribution of predictable trading laws to stable trade relations. Given the sensitive nature of international economic relations, the imposition by the United States of unilateral economic sanctions which may conflict with the laws and policies of allies such as Australia could impair those relations. The difficulties raised by conflicts and uncertainties of this sort also have implications for the ability of allies to adhere to the principle of national treatment of multinational enterprises embodied in the OECD Guidelines for Multinational Enterprises.
>
> Indeed, failure to provide in the Act for taking into account international economic factors and more particularly the primacy of the laws and policies of other States within their own territorial jurisdictions, may compel those

States to take remedial measures to restrict the impact of unilateral assertion of extraterritorial jurisdiction over enterprises registered and carrying on business in their territory. It may also serve to have a chilling effect on the environment for investment by United States companies in Australia and other States, and encourage Australian and other foreign companies to look to countries other than the United States for imports of high technology and related products.

The policy embodied in the Administration's proposed amendments to section 3 of the Act to minimize the impact of foreign policy controls on commercial activities in allied or friendly countries is noted. Other proposed amendments to the Act, however, do not adequately reflect that policy. They do not alleviate the concerns of the Government of Australia that companies registered and carrying on business in Australia may be seriously disadvantaged in the future if the Act and the Administration's proposed amendments remain in their present form. Nor do they contribute to the objective of achieving and maintaining a stable international trading environment. Indeed, the amendments represent a widening of the scope for the Government of the United States to impose unilateral restraints on international trade, which could adversely affect the international economic interests of Australia and other allies.

The Australian authorities are particularly concerned that the provisions of the Administration's proposed amendments dealing with sanctity of contracts do little to ease the unsettling effect of the Act on trade conducted in accordance with United States laws and regulations prior to the imposition of foreign policy controls. It is understood that the amendments, as they are currently drafted, provide that the guarantee of sanctity of contracts may be withdrawn in cases where the United States perceives that contracts might conflict with "the underlying purpose of the controls". The Embassy draws the Department's attention in this context to the refusal of the United States Government to exempt from the foreign policy controls of the current Act the supply of equipment for a major gas pipeline in Australia to Santos Limited, an Australian company. Within the scope of the present Act it should be possible to devise a mechanism that would enable exemptions to be made in the case of specific contracts, so that so far as practicable third parties outside the primary focus of the controls are not prejudiced. The Government of Australia believes that such a mechanism could go some way towards minimizing the potential conflict of the Act with the national interests of allies.

Mindful of the importance that the Government of the United States attaches for national security reasons to controls on exports of high technology and related products with military potential, the Government of Australia believes that consultation and cooperation between close allies, rather than unilateral action under the Act which may induce conflicts of jurisdiction, would be a preferable approach. As the Department of State will be aware, the Government of Australia has complemented United States measures by applying similar controls over exports.

The Embassy of Australia would be grateful if the Department of State would arrange for the contents of this Note to be conveyed to the

appropriate Congressional Committees which are conducting hearings on the review of the Export Administration Act.

The Embassy of Australia avails itself of this opportunity to renew to the Department of State the assurances of its highest consideration.

Jurisdiction. Extraterritorial application of laws. Proposals for resolution of jurisdictional conflicts.

On 12 August 1981 the Attorney-General, Senator Durack, addressed a meeting of the American Bar Association in New Orleans. He put forward some tentative proposals for the solution of jurisdictional conflicts, and part of his speech is as follows (Comm Rec 1981, 974–976):

Now, in our search for a solution the fundamental point to note is that the conflicts were are dealing with are between sovereign nations. Let me endeavour to state the kind of role which I suggest may need to be established. I am not, of course, putting this rule forward in any formal sense on behalf of the Australian Government, but rather in the spirit of inquiry and discussion we are engaged in today. I suggest something along the following lines.

If the laws of a state when applied extraterritorially in a particular matter would conflict with or affect the operation of laws, giving effect to the national interest of the state where that conduct had taken place, the first state would be required by international law to: (a) consider in good faith abstaining from assuming jurisdiction in respect of the matter; and (b) in that regard, would (i) consider the connection and interests of each state with that matter and (ii) would afford to the other state a reasonable opportunity to engage in intergovernmental consultations on the matter, and if such consultations were requested, the courts of the first state would not assume jurisdiction until those consultations had taken place.

If a state agrees to abstain from exercising jurisdiction as a result of consultations the courts of that state would be obliged to recognise the agreement.

It would of course be necessary to work out the factors which should be taken into account in determining whether jurisdiction should be assumed or declined. There is also the need to consider in those intergovernmental consultations the relative importance of the national interests reflected in each states conflict laws and the relationship of those national interests to the matter in dispute. Regard would also have to be had to factors of a connective character with the jurisdiction.

Thus, in essence, I advance the view that any resolution of conflicts regime must be one of public international law. But it follows, if any such rule is to be carried into effect it must be reflected in national laws. That brings me to the matter of private suits in United States law in which the same extraterritorial jurisdiction is assumed as in the case of proceedings instituted by the government.

Let me put it to you quite bluntly. Whilst private suits, uncontrolled by adequate government intervention, remain, there will I believe be little chance of solution. If I may quote from my address to the Australian Parliament when introducing recovery back legislation, I then said:

> It is obvious that a private plaintiff is not, as such, concerned with question of sovereignty or jurisdiction. Likewise a foreign defendant is inevitably concerned with its own interests in resisting the claim. Questions of national interest are of incidental importance to a private plaintiff and to a private defendant. The essential point is that when there are problems of jurisdiction and the matter is left entirely in private hands there is no scope for resolving those conflicts by inter-governmental consultation.

An alternative to my proposal for a resolution of conflicts regime to be established under public international law is to rely upon the principle of international comity. That principle is important. However, because of the trend toward increasing conflict in national laws, comity based on custom would not in itself be sufficient.

By its nature there is no obligation to accord it. In the words of a decision of your Supreme Court, comity 'is the voluntary act of the nation by which it is offered and is inadmissable when contrary to its policy or prejudicial to its interests'. Furthermore, both the virtue and deficiency of comity is that it is a principle and therefore indefinite. The point is not that comity is unnecessary. To the contrary we need more of it. I would like to quote some words by former United States Attorney-General Bell. He said:

> Comity is a very small word that stands for a very large principle. Comity is a way of saying fair play — that each of two parties will yield to the one which has interests that are clearly paramount. It is a word signifying a concern for common decency in conduct towards others. Where conflicts arise between sovereigns, the sovereigns have an obligation to resolve the conflict with restraint, co-operation and good will. That is the essence of comity . . .

But comity is not in itself sufficient where there is a conflict of two national laws. A deference by one sovereign which is entirely discretionary is not sufficient. In the absence of a supranational authority there needs to be a rule of international law requiring good faith consideration in order to ascertain which law of each sovereign is the more appropriate.

This takes me to the Timberlane case — a decision, which in concept offered so much, but which has, I fear, fallen on stony ground. This is for a number of reasons. First, it has been suggested by some that it has led to a lessening of 'the effect upon United States commerce' which is required to found jurisdiction. Some commentators have stated that a mere de minimus effect is all that is necessary to enable jurisdiction to be assumed.

Secondly, the only qualification to the exercise of jurisdiction is an evaluation of the interests of the United States and the foreign country by a court of the United States. I must say quite frankly that it is unrealistic to ask foreign nations to accept that. In addition, it is impracticable for a court to conduct such an evaluation. It involves a judgment upon non-justiciable issues. I do not deny that there may be matters of an objective character which are capable of determination by a court. Those factors relate to the degree of connection between the matter in dispute and the laws of each State. But it is plain that no nation can accept the evaluation of its national interests by the courts of a foreign state.

Accordingly, I think that a solution must begin with a recognition that national interests are non-justiciable. That is the basis for the second aspect of the rule which I have proposed, namely, the requirement of intergovernmental consultation. The idea of such consultations with the United States Department of State or other appropriate agency which is a feature of the resolution of the International Law Section, is along these lines. Of course it is part of my proposal that if one state agrees to abstain from exercising jurisdiction as a result of consultations the courts of that state would also be obliged to recognise the agreement.

I believe that if we are to achieve a breakthrough with this problem that concept must be recognised. What must be borne in mind is that once proceedings are started it is extremely difficult for these problems to be satisfactorily resolved. It is not merely, as in the case of United States procedures, that the commencement of a grand jury inquiry or the issuing of civil investigative demands impose certain secrecy requirements on the United States Government. More fundamentally, once the wheels of justice have begun to grind, the prosecutorial discretion inevitably becomes circumscribed.

Finally, I do believe that if a regime of intergovernmental consultations were established the focus would be taken away from jurisdictional conflict. Such conflict would of course remain. Nevertheless, it would tend to be subsumed in the wider issues of the national interests involved and reflected in the conflicting laws and policies of each state.

On 23 April 1982 the Attorney-General, Senator Durack, addressed a meeting of the Australian Branch of the International Law Association in Sydney on the subject ''Foreign Antitrust Laws — Australian Policy and International Law''. Part of his speech was as follows (Comm Rec 1982, 427–430)

The question is often asked — why is it that the United States and Australia find themselves in such conflict over U.S. antitrust laws, when generally speaking both countries adopt attitudes of co-operation and reciprocal assistance consistently with our close links as allies? The answer to this question involves a combination of a number of inter-related factors. But for present purposes, I shall confine myself to two of the key considerations.

The first of these is the nature of what is known in the United States as the 'effects' doctrine. While it is a fact of life that some degree of extraterritorial operation of laws — and particularly economic laws relating to international trade — is claimed by many countries, the United States goes further than other countries in the extent to which it claims an extraterritorial application for its antitrust laws by virtue of the 'effects' doctrine. The landmark decision on the 'effects' doctrine was the *Alcoa Case* in 1945. There Judge Learned Hand stated that:

> Any state may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has consequences within its borders which the state reprehends.

The 'effects' doctrine as so stated has been carefully nurtured and encouraged by U.S. courts since that day. The point has long since been reached where, by virtue of that doctrine, conduct engaged in within a

foreign state by the nationals of that state in compliance with its laws and policies may be held to infringe U.S. antitrust laws if that conduct has some kind of adverse effect on the domestic or foreign commerce of the United States.

I should add that, in order to have such an effect, the conduct need not necessarily be related to trade with the United States — indeed it may relate to trade with a third country — provided that it has an ultimate effect of the necessary kind upon United States domestic or foreign commerce.

The second important consideration to which I referred is that international law has been found wanting in providing a regime for resolution of the conflicts between national laws and policies that must inevitably arise where, by virtue of the 'effects' doctrine, United States laws collide with the laws and policies of other nations.

You may ask why it is that international laws have failed to provide the means for the resolution of such conflicts. At the risk of oversimplifying the matter, I think the short answer lies in the fact that the greatly increased assertions of extraterritoriality — particularly in relation to economic laws — have not been accompanied by the development of rules of international law suitable for the resolution of conflicts of national laws that must necessarily follow. In this regard it needs to be borne in mind that assertions of extraterritorial jurisdiction in the field of economic law represent a comparatively recent development. That has, doubtless, been greatly hastened by the rapid development of communications and global trade since the Second World War, and the emergence of the transnational corporation.

For its part, Australia has found it necessary to assert a measure of extraterritorial operation for its own trade practices laws (see section 5 of the *Trade Practices Act* 1974). At the same time, however, Australia and most other states have recognised the need for restraint in the extraterritorial enforcement of their economic laws. The United States, on the other hand, has consistently claimed extensive extraterritorial application for its antitrust laws under its 'effects' doctrine. It is those claims in particular that have exposed the hiatus in international law.

Signing of antitrust agreement with the United States.

On 29 June 1982 the Attorney-General, Senator Durack, signed an antitrust co-operation agreement with the United States (for the text see Aust TS 1982 No 13, or TIAS 10365). Part of his speech on signing the agreement in Washington was as follows (Comm Rec, 818-819):

> Essentially the agreement we are about to sign provides a framework within which our two Governments will in the future be able to resolve differences between them arising out of the enforcement of United States antitrust laws and Australian Government policies which may have antitrust implications for the United States. It will, in addition, and very significantly, enable both countries to co-operate in dealing with restrictive business practices where national interests are not involved.
>
> The Australian Government's concern has been to protect its trading laws

and policies. But from the outset we recognised that if those laws or policies had antitrust implications for the United States some means had to be devised by which the United States could be apprised of them. And if conflict were to be avoided, there needed to be some regime of consultation by which each Government could take account of the other's concern and accommodate its position.

The agreement is between Governments and can only in any final sense provide a framework for the resolution of differences arising from government action. The important matter of United States Government participation in private suits is dealt with in the agreement and the provision included is significant but it cannot provide a complete answer to the difficulties which may arise from those proceedings. I should say that in regard to those difficulties we remain concerned.

The agreement does not involve on the part of our countries any derogation from their sovereign authority — either the adoption of a policy, in the case of Australia, or the initiation of an antitrust investigation, in the case of the United States. It recognises the right of each country ultimately to take whatever action it deems necessary to protect its interests. I would hope and expect the need for this to occur very infrequently. What the agreement does mean is that where there is a prospect of conflict it will ensure that early consultations can take place so that the exercise of each country's authority may be modified to take account of the other country's position.

The Antitrust Agreement is discussed by Mr H T Bennett, Deputy Secretary, Attorney-General's Department, in the Papers of the Tenth International Trade Law Seminar held in Canberra on 18–19 June 1983, which are published by the Attorney-General's Department (at pp 102-124).

On 26 January 1983 the Australian representative, Mr David Edwards, on Working Party 3 of the Restrictive Business Practices Committee of the Organisation for Economic Co-operation and Development, made a statement on the Agreement. As Mr J H Greenwell of the Attorney-General's Department noted in the Tenth International Trade Law Seminar papers (ibid, p 8): "The statement was concurred in by the United States delegate. Importantly, therefore, for the operation of the agreement, both countries have participated in its exposition to an international body." Mr Edward's statement was as follows:[10]

Negotiations for the Agreement commenced in September 1978 when the Australian Attorney-General Senator The Honourable Peter Durack, Q.C., had discussions with the previous U.S. Administration. The Agreement was signed on 29 June 1982, after a draft text had been settled at a meeting in May of officials from both countries. The high-level consideration the matter received is best demonstrated by the fact that it was discussed at a meeting between President Reagan and the Australian Prime Minister in June 1981.

Although this is not an appropriate time to trace in detail the history of the negotiations for the U.S./Australia Agreement, it is I think necessary to state briefly the Australian position on the need for the Agreement. This is

10. Text provided by the Attorney-General's Department.

probably the best way to illustrate the purpose served by this Agreement, compared with other international arrangements dealing with antitrust matters.

It is well known that the negotiations for the Agreement were commenced against the background of the so-called Westinghouse case, brought against 29 producers of uranium, including four Australian companies, in respect of arrangements for marketing uranium. The uranium marketing issue certainly occupied for some years a central role in Australia's concerns with, and reactions to, the extraterritorial assertion of United States antitrust jurisdiction.

However, while the *Westinghouse* case provides the most dramatic illustration of the difficulties giving rise to the needs from Australia's point of view for an Agreement of the kind negotiated, it is perhaps more useful at this point to focus on the broader issues which lie behind the Agreement.

In so doing it is necessary to refer to the importance to the Australian economy of exports of agricultural products and minerals. Australian exports of commodities such as iron ore, alumina, mineral sands, lead, bauxite, zinc, coal and nickel, as well as farm products such as wheat, wool and meat provide, to a significant degree, the basis for Australia's economic well being. The export of these commodities amounts to 76% of our total export income.

A fundamental objective of the Australian Government is therefore to support the maintenance of stable and equitable marketing conditions to secure fair and reasonable prices and market access for these commodities. However, for many commodities there is a high degree of government intervention and restrictive business actions which distort market forces. In response to these market distortions the Australian Government has, along with other Governments, introduced measures giving it the capacity to control these exports to ensure that its national interests are safeguarded. It will be recalled that this last point was of particular significance in the uranium case involving government approval on an international basis for marketing arrangements which were a necessary response to a U.S. embargo on uranium imports.

It is not difficult to see how jurisdictional conflict could arise between the United States and Australia. The description by the U.S. Attorney-General Mr William French Smith of "The United States' very firm commitment to vigorous antitrust enforcement against off-shore activities that jeopardise the welfare of American consumers" is matched by an equally strong commitment on the part of the Australian Government to protect the viability of its natural resource industries and to uphold its export laws and policies.

The importance seen by Australia in seeking to resolve these conflicts is evidenced by the close personal interest and involvement throughout the negotiation of the Agreement by the Australian Attorney-General, Senator The Honourable Peter Durack, Q.C. The major aims of the Agreement were summarized by the Attorney-General at the signing of the Agreement last June in a speech from which it would be useful to quote here. He described the Agreement as:

> "a framework within which our two governments will in the future be able to resolve differences between them arising out of the enforcement of United States antitrust laws and Australian government policies which may have antitrust implications for the United States. It will, in addition, and very significantly, enable both countries to co-operate in dealing with restrictive business practices where national interests are not involved."

Before I comment on particular provisions of the Agreement, it might be useful if I were to make a brief observation about its scope of operation.

The Agreement does not attempt to provide a comprehensive panacea to cure all problems which have arisen from the extraterritorial enforcement of antitrust laws. Rather it is an agreement in which two nations, respecting and understanding each other's differing positions on important issues, have committed themselves to consultations and related conduct that will enable potential conflicts to be squarely faced at the earliest possible time, and to be resolved in a spirit of accommodation and compromise, according to the principles of comity and equality of sovereignty.

I turn now to the particular provisions of the Agreement.

Article 1 provides for two kinds of notification. First there is a form of optional notification provided for in paragraph 1 that gives the Australian Government the option of notifying the United States Government of a policy which the Australian Government has adopted and which may have antitrust implications for the United States. The United States can then identify potential difficulties that the policy might have under its antitrust laws, and, pursuant to Article 2 request that these concerns be the subject of consultations. The Australian Government and exporters can thereby become aware of difficulties before exporters are committed to a particular course of conduct that might otherwise become the subject of concern or investigation under United States antitrust laws.

Ultimately, it is a matter for the judgment of the Australian Government whether a policy will be notified under this paragraph. I should add that, while the provision is concerned primarily with new policies prior to their implementation, its terms also allow the notification of an existing policy in appropriate cases.

The second kind of notification under Article 1 concerns decisions by the Justice Department of the Federal Trade Commission to undertake an antitrust investigation. The Department and the Commission are obliged to notify the Australian Government of any such decision that may have implications for Australian laws, policies or national interests. This provision is along the lines of the requirements of the 1979 OECD Recommendation on Antitrust Co-operation, although I would suggest that it is more specific in the obligations it imposes.

The acceptance of the notification obligation and, in particular, the requirements of paragraph 3 of Article 1 that such notifications be effected promptly and, to the fullest extent possible, before the issuance of any compulsory process such as a civil investigative demand, or the convening of a Grand Jury, is particularly welcomed by Australia. It is our hope that, by reason of these provisions, full consultations will be conducted well in

advance of the issuance of compulsory process. In this way, it will be possible for consultations to take place before both countries become committed to a particular course of action. It may also enable some of the difficulties that have arisen with respect to the confidentiality requirements of United States law to be avoided.

It is difficult to overstate the importance we attach to the provision of full information with respect to an antitrust investigation which has implications for our national interest. In the absence of this information it is simply not possible for a proper assessment to be made of any detriment to this national interest.

With respect to matters that are the subject of notification and consultations, the Agreement contemplates that in appropriate cases, while the policy on action in question may raise U.S. antitrust issues, the U.S. authorities will determine, after the relative interests of the two countries are fully considered and comity considerations taken into account, that no enforcement action will be taken.

Reference has been made to the optional nature of the notification provision in respect of Australian policies raising antitrust implications for the U.S.

As mentioned earlier, the essential problem in the antitrust area has been one of actual and potential conflicts between the extraterritorial enforcement of U.S. antitrust laws and the laws and policies of the Australian Government. The scope of the antitrust laws has caused problems on occasions for Australian companies seeking to implement Government policies.

The option for Australia to notify policies under the Agreement is aimed at providing a mechanism whereby the Government may become aware of potential problems of this kind before they arise in the context of a specific antitrust investigation. Where Australia makes use of this facility to notify a particular policy the aim would be for consultations to be held in respect of any antitrust difficulties perceived by the U.S. and for an agreed position to be reached.

It should be noted that the notification system is not in any sense a clearance of Australian policies. Rather it provides an opportunity, where the Government considers it appropriate, to draw attention to particular policies with a view to ensuring, through the processes of the Agreement, that antitrust difficulties do not arise at a later point.

I turn now to Article 2 of the Agreement which provides a framework for the holding of consultations. This provision is, in our view, of crucial importance. I say this because of our very firm conviction that it is only through such a process of consultation that there can be a mutual understanding of each country's position and thus a basis established for solutions to be found to particular difficulties.

Under paragraphs 1 and 2 the Australian and United States Governments accept mutual obligations to communicate their concerns arising out of notifications under Article 1. Consultations may be requested by either country in respect of a notified matter that is of concern to it and, when requested, the other is obliged to engage in such consultations.

Paragraph 3 is indicative of the co-operative spirit underlying the Agreement. It enables each Government to seek consultations with respect to potential conflicts even when there has been no notification under the Agreement.

Under paragraph 5 both Governments commit themselves, not only to seek earnestly to avoid possible conflict, but to do so with due regard to each other's sovereignty and to considerations of comity.

The OECD Secretariat paper asks, most pertinently, what meaning should be ascribed to the word "comity" in the context of the Agreement. While it is not possible or perhaps even desirable to give this word a precise meaning I think I can best address this issue in general terms by citing some oft-repeated words by former United States Attorney-General Bell, who said:

> "Comity is a very small word that stands for a very large principle. Comity is a way of saying fair play — that each of two parties will yield to the one which has interests that are clearly paramount. It is a word signifying a concern for the common decency in conduct towards others. Where conflicts arise between sovereigns, the sovereigns have an obligation to resolve the conflict with restraint, co-operation and good will. That is the essence of comity . . ."

The significance of paragraph 6 cannot be overstated for it contains a recognition by each country of the need to give the fullest consideration to the matters at the heart of each other's concerns and, most importantly, to the taking of modifying action where possible.

For its part the Australian Government places considerable importance on the recognition by the United States of the need to have regard to Australia's interests in the circumstances described in sub-paragraphs (1) to (4) of paragraph 6. These sub-paragraphs describe four major areas relating to Australian exports and the actions of Australian Government authorities concerning exports in which conflicts between United States antitrust laws and Australia's laws and policies can have far-reaching consequences for Australia's sovereignty.

It is useful to refer briefly to each of these sub-paragraphs to illustrate why these situations were regarded as worthy of special mention.

Three of the four situations concern actions or policies involving the Australian Government or an Australian authority. Sub-paragraph (1) is concerned with cases where permission or approval is required under Australian law with respect to an export. In such cases the Australian Government may make use of its powers with respect to exports to apply a particular trading policy. It is therefore appropriate that due regard be had to the legitimate interest of the Australian Government in the regulation of its exports.

Alternatively, conduct which is sought to be investigated may be conduct by an Australian authority which is vested by law with responsibilities in respect of exports of particular commodities. Sub-paragraph (2) recognizes, similarly, that there is a particular interest in ensuring the proper functioning of these Government bodies in carrying out their responsibilities.

Sub-paragraph (4) deals with situations which have given rise to concern

in the past where Governments have wished to have discussions with private traders in the course of implementing or formulating a particular policy. At times there has been an evident reluctance on the part of private traders to make representations or to engage in consultations because of the fear of possible antitrust action. This provision recognizes the Government's interest in holding such discussions or receiving represention with respect to the formulation or implementation of Government export policies.

Finally, sub-paragraph (3) refers to a situation where there are Australian exports to a third country. Because of the potential reach of U.S. antitrust laws under the "effects" doctrine, action taken by exporters with regard to trade with a third country may run the risk of breaching U.S. antitrust laws, notwithstanding the absence of a direct link with the U.S.

I should emphasize that, although these four cases have been identified as being of particular interest to Australia, the provision expressly recognizes that they are not to be read as limiting the requirements in Article 2 for consideration to be given to modifying or discontinuing antitrust actions in other situations where an Australian Government interest may be involved.

Article 3 of the Agreement provides that both countries will do their utmost, subject to relevant laws, to maintain the confidentiality of documents and information provided by the other. There was concern that Australian exporters should not be prejudiced in any antitrust proceedings by information that the Australian Government had provided for the purpose of notification or consultation. The United States Government has therefore agreed not to use information or documents provided under the Agreement as evidence in judicial or administrative proceedings under its antitrust laws, without first obtaining the consent of the Australian Government.

Paragraph 1 of Article 4 provides that, following consultations in relation to a notified Australian policy, the Australian Government will have the option of seeking from the United States Government a written record or memorialization of a conclusion that a notified policy should not be a basis for action under its antitrust laws. In addition, the United States Government undertakes to give expeditious consideration to the issuance to Australian exporters of statements of enforcement intention relating to proposed private conduct pursuant to a notified policy that has been memorialized in this way. These statements would be provided under the existing procedures of the Department of Justice or the Federal Trade Commission, as the case may be.

Paragraph 2 of Article 4 amounts to formal acknowledgment of each party's rights to protect its own interests in the event that a conflict cannot be avoided. I think I can confidently say that both countries would see that very much as a last resort which, hopefully, will not need to be relied upon.

Article 5 is a very significant provision. In looking for solutions to the very difficult issues which have arisen in the field of extraterritorial enforcement over the last few years, it has been possible to lose sight of the important area of common ground which countries share in combatting restrictive trade practices. International co-operation can, as has been shown over many years in this forum, be a most important element in the control of business practices which improperly restrict trade. Paragraph 1 of

Article 5 represents a commitment to mutual co-operation and assistance in all cases where the proposed investigative or enforcement action by one country does not adversely affect the laws, policies or interest of the other.

In addition, under paragraph 2 of this Article, the mere seeking by legal process by either party of information or documents located in the territory of the other shall not be regarded in itself as adversely affecting its significant national interests, or as providing a basis for blocking action. This is subject, in the case where the document or information is located in Australia, to the proviso that prior notification shall have been given of the issuance of legal process.

The importance of Article 6 for Australia lies in the commitment of the United States to participate in private litigation in certain circumstance. These are first, where the litigation relates to conduct pursuant to an Australian policy that has been the subject of notification by Australia and subsequently of consultations under the Agreement, and, secondly, where the ligitation relates to conduct that has been the subject of a notification by the Justice Department or the Federal Trade Commission and consultations.

The significance of this undertaking by the U.S. is best explained by brief reference to the background of involvement by foreign governments in private treble damages suits in the United States.

The practice of foreign governments participating directly in private suits in the U.S. which were felt to affect their interests has been followed, at the request of the U.S. Courts and the U.S. Administration, for several years.

A number of countries, including Australia, have availed themselves of this procedure in recent years, notably in the *Westinghouse* proceedings. Australia has also lodged amicus brief in the proceedings brought in 1981 by the Conservation Council of Western Australia against Alcoa and, more recently, in litigation brought by certain shipping conferences in relation to the current Department of Justice Pacific shipping investigation.

With the lodging of briefs directly by foreign governments the United States Government has until now generally declined to become involved itself in particular proceedings. This practice of direct participation by foreign governments has long been regarded by Australia as unsatisfactory. Its unsatisfactory nature was highlighted by the efforts made in the *Westinghouse* case to bring to the courts' attention the foreign relations implications of an exercise of jurisdiction by U.S. courts. The argument was put in those proceedings, based on the *Timberlane* and *Mannington Mills* cases, that jurisdiction should not be exercised on foreign relations and comity grounds. Leaving to one side the question whether such matters should be left to the courts, rather than the Governments involved, there is in our view, a compelling need for U.S. courts to be informed of the expert views of the U.S. Executive on these issues — issues which are at the very heart of the conduct of Government, but which are correspondingly alien to the judicial process.

Indeed this point was recognized in the *Westinghouse* case where, with reference to the proposition that the court should "balance the vital interests of the United States and the foreign countries to see which interests predominate", Marshall J. stated that "the judiciary has little expertise, or

perhaps even authority, to evaluate the economic and social policies of a foreign country'', (480 Fed. Supp. 1138, 1140 (Northern District of Illinois 1979)).

Against this background it will be seen that it was a matter of major importance for Australia to secure an undertaking that the Executive would put its views before U.S. courts in cases where a decision had been made that conduct on which a private suit was based was not to be the subject of official enforcement action.

It would be our hope that, in cases where article 6 applies, the U.S. administration will report to the court at the first available opportunity so that the court might, at the instance of the parties and with the intervention of governments, take action to dismiss the proceedings before discovery and the build up of costs takes place. Discovery proceedings and associated costs would in themselves defeat any agreement reached in consultations.

Conclusion

It will be clear from my statement that the Agreement does not alter the existing law of each country, although it may affect its operation having regard to particular circumstances.

Thus, from Australia's point of view, problems do remain in this area and in particular I have in mind the potential difficulties of the private treble damages suit available under U.S. antitrust law. I have already referred to the very significant provision for participation by the U.S. Administration in certain circumstances in these suits. However, as has been noted on other occasions, there are, of course, limits to the extent to which an Agreement of this sort can go in ensuring that parties do not proceed with private litigation contrary to the acknowledged interests of a foreign government.

The Agreement does not purport to provide specific solutions to the difficulties arising from conflicts between U.S. antitrust laws and policies and Australian laws and policies. Rather it provides a bilateral framework, whereby conflicts can be addressed and a solution sought, having regard to the principles of comity and sovereignty. At its heart is the notification and consultation procedure which is based on an acceptance of the need for both countries, in appropriate cases, to accomodate their policies, having regard to each other's interests.

With the evident spirit of compromise and goodwill on both sides we are confident that the Agreement will prove a major step forward in what has been an area of considerable difficulty for our two countries.

Jurisdiction. Extra-territorial application of laws. Australian legislation to protect national interests.

On 7 December 1983 the Attorney-General, Senator Evans, introduced the Foreign Proceedings (Excess of Jurisdiction) Bill 1983. The purpose of the Bill was to consolidate and expand Australian laws which protect Australian trading interests and policies against the extra-territorial enforcement of foreign laws. Part of his second reading speech was as follows (Sen Deb 1983, Vol 101 3358-3363):

The Present Position

When the Labor Government came into office in March this year, the

general climate between Australia and the United States in relation to the extra-territorial enforcement of U.S. antitrust laws had improved significantly, in no small measure due to the fact that both countries were trying to abide by the spirit and the letter of the Agreement.

The Labor Government has thus been able to formulate its policy on the protection of Australian trading interests and policies against the extra-territorial enforcement of foreign laws in the light of this much improved relationship between the two countries. In reaching its decision to introduce the Bill at this time, the Government has also had regard to my discussions with Government representatives during my visit in June to the United Kingdom and the United States. As I said then to U.S. officials, it is better to introduce protective legislation now, during a period of improved relations, than to leave it until some crisis arrives and so heighten what would be at that time a public perception of conflict between our two countries. I would anticipate, on the basis of the responses I received in Washington, that the United States Government would understand the need for Australia to have protective legislation.

At this point, I would like to welcome, on behalf of the Government, the report of the Parliamentary Joint Committee on Foreign Affairs and Defence on "Australian-United States' Relations: the Extraterritorial Application of United States' Laws" which was tabled last week. The Government is pleased to note that one of the Committee's major recommendations was the introduction of legislation to deal with problems arising from the extraterritorial application of foreign laws. The present Bill is consistent with that recommendation.

The essence of the Labor Government's policy in this area, which has already been explained to the United Kingdom and United States Governments, is as follows.

First, in line with the conclusion of the Parliamentary Joint Committee that both countries should seek to implement both the letter and the spirit of the Agreement, the Government reaffirms Australia's commitment to the consultative approach of the Antitrust Co-operation Agreement between Australia and the United States. It is the Government's firm belief that jurisdictional conflicts between the laws and policies of sovereign governments should be resolved if at all possible by consultation and not by unilateral legal or executive action. The Government will advocate this approach vigorously in its dealings with individual foreign countries and in relevant international fora. I note that the Parliamentary Joint Committee recommended that Australia participate actively in international attempts, such as those within the O.E.C.D. and U.N.C.T.A.D., to reach broadly acceptable arrangements to avoid or resolve conflicts in the application of national trading laws.

Secondly, notwithstanding the protection afforded by the Antitrust Co-operation Agreement, the Government cannot ignore the fact that the underlying jurisdictional threat to Australian sovereignty and to our export and other trading policies still remains. There has been no siginficant change in U.S. domestic antitrust laws to take account of foreign government interests, and no modification of their wide jurisdictional

claims. Article 4.2 of the Agreement recognizes that if after consultation, no means of avoiding conflict has been found, each Party "shall be free to protect its interests as it deems necessary".

While articles 4 and 6 of the Agreement also make some progressive steps forward in providing protection against private antitrust proceedings, our central concern remains. That is, private plaintiffs, who account for about 95 per cent of U.S. antitrust actions, are under no obligation to consider the national interests of other countries when they initiate their actions or in the conduct of the case. The U.S. Deputy Secretary of State, Mr Kenneth Dam, in a speech earlier this year acknowledged that private treble damages actions are not within government control and as a result are often referred to in this context as "rogue elephants". I note that the obligation in the Agreement on the U.S. authorities to intervene in private proceedings is at best a limited and indirect restraint on private plaintiffs and in any event the weight to be given to the U.S. Government's intervention is left to the court to decide.

Thirdly, since Australia first came up against the vexed issue of the extra-territorial enforcement of foreign laws, it has become apparent that the problem goes very much wider than the antitrust field. The serious conflict between the United States and European countries within the Atlantic Alliance over the measures taken by the United States under the U.S. Export Administration Act with regard to the construction of the Soviet gas pipeline has focused attention on the wider implications of the problem of extra-territoriality. As the Parliamentary Joint Committee concluded, a number of important questions relating to the extra-territorial application of U.S. laws such as the Export Administration Act have not been affected or resolved by the signing of the Agreement. The problem can extend into many areas such as companies and securities regulation, banking, commodity futures market regulation, taxation, and laws related to enforcing national security or foreign policy controls over trade.

Accordingly, consistently with the recommendation of the Parliamentary Joint Committee, the Government believes that Australia should have available to it a comprehensive arsenal of defences which it could use as a last resort, should the resolution of conflict through the consultative approach fail. It is unacceptable to the Government that at the present time Australian businesses, unlike their counterparts in countries like the United Kingdom, have inadequate protection against the crippling damages and costs awards that are usually made in foreign antitrust private treble damages suits. Nor have they means of protection against the extra-territorial effect of judicial and executive orders made under other foreign laws which may be inimical to Australia's national interests. I wish to emphasize, however, that in line with the Government's firm belief in the consultative approach in this area, the substantive provisions of the proposed legislation will only operate when activated by an Order made by the Attorney-General.

When in Opposition, the present Government gave broad bi-partisan support to the legislative measures that were introduced by the Fraser Government. The Government in a real sense is completing the task that

was begun by the former Government. Indeed, when the former Attorney-General, Senator Durack, introduced the Recovery Back Bill he said:

> "It is also designed to underline the seriousness with which the Commonwealth Government and the Parliament continues to view this problem. For here, I believe that I express, in a complete sense, a national voice. The two previous Acts were enacted by the Parliament with bi-partisan support and, whatever differences in nuance may emerge, the Opposition has been at one with the Government in its concern."

I would certainly hope for the reasons I have outlined above, that the present Bill will receive the support of the whole Parliament.

Content of Bill

I will briefly mention the major provisions contained in the Bill.

Prohibition of the Giving of Evidence

Division 2 of Part II of the Bill replaces the Foreign Proceedings (Prohibition of Certain Evidence) Act 1976. The purpose of the provisions, like the earlier Act, is to enable the Attorney-General to make orders to prohibit the production of documents located in Australia and, in certain circumstances, the giving of evidence in foreign proceedings. The Attorney-General may make orders where he is satisfied that the making of the order would be desirable for the protection of the national interest. The Attorney-General may also make orders where he is satisfied that the assumption of jurisdiction by the foreign court or the action taken by the foreign authority is contrary to international law or is inconsistent with international comity or international practice.

Enforceability of Judgments Given in Foreign Antitrust Proceedings

Clause 9 of the Bill replaces the Foreign Antitrust Judgments (Restrictions of Enforcement) Act 1979. These provisions, like the earlier Act, which are confined to foreign antitrust judgments, will enable the Attorney-General to prohibit the enforcement of such judgments in whole or in part. This gives the Australian Government the flexibility to respond to the foreign judgment according to the circumstances. Thus, if an adverse decision given against an Australian defendant in U.S. antitrust proceedings appeared to be justified, but the enforcement of a treble damages award in Australia would be contrary to the national interest — the treble damages award may for example threaten the financial stability of the Australian enterprise — then the Attorney-General could allow enforcement in Australia of only the compensatory (non penal) part of the treble damages award. The grounds upon which such orders may be made are broadly similar to those enabling the Attorney-General to prohibit the production of evidence under Division 2 of Part II of the Bill.

The Parliamentary Joint Committee recommended that, along with the earlier legislation, the Government should introduce legislation to enable Australian residents, or those doing business in Australia, to recover back damages enforced against them under a foreign antitrust judgment. This is done in the "recovery-back" provisions which are contained in clause 10 of the Bill. This right of action, given to an Australian defendant to recover

back damages enforced against that defendant, is given only where the Attorney-General has made an order that a foreign antitrust judgment should not be enforceable in Australia in whole or in part. The right of recovery-back, which is given only to Australian defendants as set out in sub-clause 10 (4) of the Bill, is for any amount obtained by the foreign plaintiff from the Australian defendant in excess of the amount specified in the Attorney-General's order. The "recovery back" provisions are based on the provisions contained in the 1981 Recovery Back Bill although they have been refined to avoid the complexity of the earlier Bill. A series of examples illustrating the operation of the recovery-back provisions is contained in the Explanatory Memorandum.

In line with the recommendation of the Parliamentary Joint Committee that Australian defendants should be able to recover the costs of defending a foreign antitrust action, clause 11 of the Bill gives a right to an Australian defendant (including an Australian statutory authority) to recover reasonable costs and expenses incurred by it in defending private antitrust proceedings. This right of action is severely restricted —

(a) it is conditional upon an order being made by the Attorney-General either on national interest grounds or on the ground that the assumption of jurisdiction or the manner of exercise of jurisdiction by the foreign court or the exercise of power or the manner of exercise of power by the foreign court, was contrary to international law or inconsistent with international comity or international practice;

(b) it is confined to private proceedings for multiple damages where it is possible for the foreign court to assume jurisdiction simply upon there being an adverse effect on that country's trade or commerce; and

(c) it is further restricted to foreign proceedings where a successful defendant is not entitled to recover costs. This is peculiar to private antitrust proceedings in the United States.

Clause 11 of the Bill can be justified on three grounds:

> An Australian defendant with no physical tie with the territorial jurisdiction of the United States can be put to considerable expense because s.12 of the U.S. Clayton Act (which provides for service on a corporation wherever found) enables a United States plaintiff to draw the Australian defendant into United States antitrust legislation.
>
> United States antitrust law does not allow a successful defendant his costs. This, when coupled with the widespread use of contingency fees, encourages United States plaintiffs to bring specious actions in the hope that the huge costs burden alone will compel the defendant to settle out of court.
>
> The costs burden in large United States antitrust cases is of a magnitude unknown to our legal system and it is not uncommon for costs to amount to millions of dollars.

I should also mention that for both recovery-back and recovery costs, orders would not in general be made where conduct, in respect of which a foreign judgment was given, took place entirely within a foreign country. We cannot discount, however, the possibility that situations may arise where it would be appropriate for an order to be made where conduct did

take place entirely within a foreign country. An example would be where the costs or damages awarded in a private suit against an Australian defendant were considered to be so high as to be contrary to the national interest, e.g. they might threaten the solvency of an Australian company, with consequences for the enterprise in which it was engaged and for the employment of Australian workers.

Clause 12 of the Bill provides for the enforcement of a "recovery-back" judgment on a reciprocal basis after agreement with countries that have "recovery-back" provisions that correspond with those in the Bill. The United Kingdom has shown considerable interest in developing the concept of reciprocal enforcement with Australia and has made provision for such a system in Section 7 of the Protection of Trading Interests Act 1980 (U.K.). The Parliamentary Joint Committee recommended that consideration be given to reciprocal enforcement of recovery-back judgments, only if Australian interests are further threatened or damaged by foreign laws. The Government considers it prudent, however, to deal comprehensively with the problem of extra-territoriality, rather than to introduce additional legislative proposals at a later stage if Australian interests should come under active threat from foreign laws. In this way, we avoid heightening what I said earlier would be a public perception of conflict between Australia and the foreign country.

The Parliamentary Joint Committee recommended that the legislation should prohibit compliance by Australian residents or those doing business in Australia with orders of a foreign country which might damage Australia's trading interests. This is dealt with by clauses 13 and 14 of the Bill. Clause 13 is concerned with foreign executive orders, and clause 14 with foreign judicial orders.

Actions and Decisions of Foreign Governments Affecting Australia

The purpose of Clause 13 of the Bill is to counteract the problem created by foreign laws relating to trade or commerce that would enable foreign governments or their agencies to impose obligations upon persons or corporations in Australia. Clause 13 of the Bill will enable the Attorney-General to make an order prohibiting the performance of the obligation where he is satisfied that the act or decision of the foreign government or agency would or might adversely affect the national interest. The topical example of such a foreign law is the U.S. Export Administration Act. A provision similar to this clause (s.1 of the U.K. Protection of Trading Interests Act 1980) enabled the United Kingdom Government to counter U.S. executive orders which were directed at U.K. companies with the purpose of blocking the construction of the Siberian Gas Pipeline, contrary to the national interests of the United Kingdom and the other European States.

Prohibition on Giving Effect to Certain Foreign Judgments

The purpose of clause 14 of the Bill is to enable the Attorney-General to block judgments or injunctions of a foreign court (but not money judgments) where the object of the judgment is to require the doing of an act or thing in Australia, or to prohibit the doing of such a thing, or to require a

person to refrain from conduct in Australia. The Attorney-General may make an order based on national interest grounds similar to those in clause 13 of the Bill. Possible instances where this clause could be called into operation could include divestiture orders and "cease and desist" orders made under U.S. antitrust laws.

Miscellaneous

Part V of the Bill contains the general provisions relating to parliamentary disallowance of orders and instruments made under the Act, jurisdiction of the Federal Court, service of notice of orders, offences and regulations.

The Bill passed through Parliament and became the *Foreign Proceedings (Excess of Jurisdiction) Act* 1984, assented to on 21 March 1984 (as Act No 3 of 1984).