IV—JURISDICTION

Jurisdiction—Australian companies operating in the Philippines—subject to laws of that country

On 28 March 1984 the Minister for Foreign Affairs, Mr Hayden, provided the following written answer in part to a question on notice in the House of Representatives (HR Deb 1984, 890):

> Australian companies operating as private commercial undertakings in a foreign country are subject, no less than private citizens, to the laws of that country. This is particularly so regarding laws framed to guarantee certain basic levels of observance of fundamental and universally recognised human rights. I am informed that in the Philippines, a wide ranging labour code seeks to perform this function in the area of industrial relations, supported by the operations of the Philippine Ministry of Labor and Employment.
>
> The enforcement of Philippine labour law is clearly an internal matter for the Philippine authorities. At the same time Australia's reputation regarding our commitment to observance of universally accepted standards of human rights and to conformity to the rule of national justice is an important aspect of the Government's foreign policy. Accordingly, the Australian Government maintains an interest in the activities of Australian companies in the Philippines.

Jurisdiction—ex-enemy property—expropriated property—Australian legislation

On 12 September 1985 the Minister for Finance, Senator Walsh, provided the following written answer to a question on notice in the Senate (Sen Deb 1985, 514):

> The Office of Controller of Enemy Property was created under the National Security (Enemy Property) Regulations on 26 September 1939 to deal with all debts or other property held for or due to 'enemy subjects' as defined in the Regulations and the Trading with the Enemy Act 1939, as amended.
>
> The office has been formally kept in existence only to fulfil the residual role of responding to inquiries still received from time to time from persons seeking to trace particular interests in the property of former enemy subjects.
>
> No enemy property from World War II is now held or administered by the Commonwealth. Such property or the proceeds from its realisation has long since been dealt with in accordance with the provisions of the relevant International Agreements and Treaties of Peace.

On 11 October 1985 the Minister for Finance, Senator Walsh, provided the following written answer to a question on notice in the Senate (Sen Deb 1985, 1112):

> The Custodian of Expropriated Property administered the property rights and interests of German nations in the Territories of Papua and New Guinea which were expropriated in accordance with the Treaty of Peace (Germany) Act 1919. The Treaty of Peace Regulations (1920) enable the Governor-General to appoint a person to be the Custodian of Expropriated Property; the current appointee is a First Assistant Secretary in the Department of Finance.

The Custodian received approximately 600 properties, including plantations, virgin land, trading stations and town blocks, expropriated by the Australian Government from German nationals in Papua New Guinea in World War I. The regulations authorised the Custodian to dispose of the properties by sale.

The Custodian sold all the properties in the 1920's and undertook to give clear title to all purchasers.

The Custodian was faced with the task of registering all the lands under Torrens title and transferring the titles to the purchasers. The Depression delayed title surveys and during the Japanese occupation in World War II most of the evidence to support title claims was destroyed. There are five properties requiring further survey work, issue of Certificates of Title, registration of transfers or execution of indemnities before the Custodian can give proper title to the purchasers. The properties involved are:

(a) Beliao Island—Portion 634 and Lot 2, Portion 188;

(b) Malala Virgin Land;

(c) Lamussong Extended;

(d) Panaras Plantation; and

(e) Wangaramut Trading Station.

The Australian Government Solicitor, on behalf of the Custodian, has been negotiating with officials of the Government of Papua New Guinea to progress these matters.

Jurisdiction—service of process and taking of evidence—Australian practice in relation to requests from foreign States

In 1984 the Australian Embassy in Washington provided the following answers to a questionnaire submitted by the United States Department of State:

A.(i) **q.** Does host country law permit voluntary depositions of witnesses in the country for use in the United States without interposition of local authorities.

a. Generally yes. There are two qualifications which generally restrict the taking of voluntary depositions. Firstly, it is an offence for any person to administer or cause to allow to be administered or to receive or cause to be received, any oath, affidavit or solemn affirmation touching any matter or thing of which he has no cognisance by some statute in force although this does not extend to any oath, affidavit or affirmation required by the laws of any foreign country to give validity to written instruments to be used in the foreign country:

See:

Oaths Act 1900 (N.S.W.) Section 21 applying for the State of New South Wales, Australian Capital Territory, Australian Antarctic Territory, Heard Island and Macquarie Islands Territory and Coral Sea Islands Territory;

Evidence Act 1958 (Vic.) Section 151 applying in the State of Victoria;

The Criminal Code (Qld.) Sections 95 and 96 applying in the State of Queensland;

Criminal Law Consolidation Act, 1935 (S.A.) Section 242 applying in the State of South Australia;

The Criminal Code (W.A.) Sections 90 and 91 applying in the State of Western Australia;

Criminal Code Act 1924 (Tas.) Section 88 applying in the State of Tasmania;

Oaths Act (N.T.) Section 16 applying in the Northern Territory and the Territory of Ashmore and Cartier Islands; and

Oaths Ordinance 1960 (Norfolk Island) applying in Norfolk Island,

but see the enabling provision, in the Oaths Ordinance (Singapore) Section 3, applying in the Christmas Island Territory and Cocos (Keeling) Islands Territory.

Secondly, the Foreign Proceedings (Prohibition of Certain Evidence) Act 1976 [1] provided that where the Attorney-General of the Commonwealth is satisfied that:

- a foreign tribunal is exercising or proposing or likely to exercise jurisdiction or powers of a kind or in a manner not consistent with international law or comity in proceedings having a relevance to matters to which the laws or executive powers of the Commonwealth relate; or
- the imposition of the restrictions is desirable for the purpose of protecting the national interest in relation to matters to which the laws or executive powers of the Commonwealth relate.

the Attorney-General may, by order in writing, prohibit, except with his consent in writing or as otherwise permitted by the order—

(a) the production in, or for the purposes of, a foreign tribunal of documents that, at the time of the making of the order or at any time while the order remains in force, are in Australia;

(b) the doing of any act in Australia, in relation to documents that, at the time of the making of the order or at any time while the order remains in force, are in Australia, with the intention that the act will result, or where there is reason to believe that the act will, or is likely to, result, in the documents, or evidence of the contents of the documents, being produced or given in, or for the purposes of, a foreign tribunal;

(c) the giving by a person, at a time when he is an Australian citizen or is a resident of Australia, of evidence before a foreign tribunal in relation to, or to the contents of, documents that, at the time of the making of the order or at any time while the order is in force, are in Australia; or

(d) the production of documents before a tribunal in Australia or the giving of evidence, whether in relation to the contents of documents or otherwise, before a tribunal in Australia, for the purposes of proceedings in a foreign tribunal,

and that order

1. See now the Foreign Proceedings (Excess of Jurisdiction) Act 1984 which repealed the 1976 Act and enacted substantially similar provisions.

- may be published in the Gazette, in which case it shall be deemed to have been served on the person or persons to whom it is directed on the date of publication; or
- may be served on a person to whom it is directed by serving the order or a copy of the order, on that person personally or by sending it by post to that person at the place of residence of that person last known to the Attorney-General or at a place of business of that person, or of a company of which that person is a director or officer.

(ii) **q.** Does the procedure vary for Americans?

a. No.

B. **q.** Cite the authority upon which response to question A is based.

a. See above.

C. **q.** Does the procedure vary in civil, commercial, administrative, domestic or criminal cases? If so in which way does it vary? Why?

a. So far as the question relates to A above the answer is No.

D. **q.** Please provide details of the procedure to be followed in the preparation of letters rogatory for the taking of evidence.

a. **Civil or Commercial proceedings**:
The requirements with respect to the authentication of Letters Rogatory are contained in the Foreign Tribunals Evidence Act 1856 (United Kingdom), an Imperial Act still in operation throughout the Australian States and Territories and the Rules of Court for the respective Court made thereunder. The following Courts exercise jurisdiction under the Act:
Supreme Court of New South Wales in the State of New South Wales;
Supreme Court of Victoria in the State of Victoria;
Supreme Court of Queensland in the State of Queensland;
Supreme Court of South Australia in the State of South Australia;
Supreme Court of Western Australia in the State of Western Australia;
Supreme Court of Tasmania in the State of Tasmania;
Supreme Court of the Northern Territory in the Northern Territory and the Territory of the Ashmore and Cartier Islands;
Supreme Court of the Australian Capital Territory in the Australian Capital Territory, Australian Antarctic Territory and the Heard Island and McDonald Islands Territory;
Supreme Court of Norfolk Islands in the Territory of Norfolk Island and the Coral Sea Islands Territory; and
Supreme Court of Christmas Island in the Christmas Island Territory.

Administrative Proceedings
There is no provision in Australian law for the taking of evidence in administrative proceedings pending in a foreign country.

Domestic Relations
There is no general provision in Australian law for the taking of evidence in proceedings relating to domestic relations as such.

However to the extent that those proceedings may be characterised as civil or commercial proceedings evidence may be taken under the provisions of the Foreign Tribunals Evidence Act 1856 (United Kingdom) referred to above in this answer. Further the Family Law Act 1975 and Family Law Regulations Part XVI—Overseas Orders make provision for the taking of evidence in Australia at the request of a foreign court exercising jurisdiction to confirm a provisional order or provisional variation of a maintenance order made in Australia and forwarded to that foreign country for enforcement.

Criminal Proceedings

Provisions for the taking of evidence in Australia for criminal proceedings pending in a court or tribunal of a foreign country are to be found in section 27 of the Extradition (Foreign States) Act 1966. Requests for the taking of evidence in Australia for criminal proceedings in a court or tribunal of a foreign state should emanate from that court or tribunal. The request should be addressed to the Commonwealth Attorney-General and be transmitted through diplomatic channels, that is, through the United States Embassy, Canberra. There is no specification as to the form the request should take and there is no need to specify a court in Australia for the taking of evidence as the Attorney-General will appoint a magistrate in accordance with section 27 of the Extradition (Foreign States) Act.

For the purposes of s.27, Extradition (Foreign States) Act the magistrate appointed by the Attorney-General to take the evidence serves merely a recording function. The evidence is taken orally, in open court. Any question relating to any fact, matter or thing may be asked.

There is no direct authority on whether an U.S. attorney could examine a witness at such an examination. The High Court of Australia has however held that it is permissible for judges (constituting a foreign court), who were present at a s.27 examination of a witness, to ask questions of that witness: *The Queen v Wilson; Ex parte Witness T* (1976) 135 CLR 179. The reasoning of the court in that case would suggest that s.27 should be interpreted to permit counsel from a foreign court to ask questions.

q. Does the host government require that letters rogatory and accompanied document be translated into the official language?

a. The official language is English.

q. Does the host government require that the letters rogatory be authenticated by consular officials of that government in the United States?

a. No.

q. Does the host country require that the letters rogatory be triple certified by the requesting Court?

a. No.

q. Does the host country have any special requirement for the format or type of information which must be contained in the letter rogatory or any other specific requirements concerning its preparation or transmission?

a. Yes. The letter rogatory should be in the form of a request and not in a mandatory form. See *Re Commission from the High Court of Justice, England* (1986) 2 QLJ 137.

E. **q.** Cite the authority for the above information concerning letter rogatory and transmit a written report to the Department as per question B.

a. See the authority stated in D. above, (and also the following): Extradition (Foreign States) Act 1966, section 27, Family Law Act 1975, Sections 74, 109 and 110, Family Law Regulations, Part XVI—Overseas Order, Foreign Tribunals Evidence Act 1856 (Imp), and the respective Rules of Court of the State and Territory Supreme Courts made under the latter Act.

F. **q.** What procedures are available for obtaining compulsion of evidence in the host country. If the method is letter rogatory, please respond to the specific questions posed in question D. concerning the preparation of letters rogatory.

a. See D. above.

G. **q.** Does a method exist whereby, pursuant to letters rogatory a court in the host country will immediately compel a witness to appear before a person commissioned to take the testimony?

a. Yes. See D. above.

H. **q.** If letters rogatory are the only method of obtaining evidence in the host country, please state host country's position as to the issue of judicial sovereignty should someone attempt to make a deposition in that country e.g. could person seeking testimony without interposition be gaoled? Fined?

a. Yes, in the circumstances indicated in A. above.

I. **q.** How may service of US judicial documents be effected in the host country? Is service by an agent, ie a private Attorney available? Is service by international registered mail available? If so, provide particulars as to the manner in which the letters rogatory should be prepared. (See question D). What is the host country's position on the issue of judicial sovereignty should someone attempt to effect service of process by some method other than by letters rogatory.

a. Australia does not recognise criminal process of a foreign country other than process submitted in accordance with the Extradition (Foreign States) Act 1966. That is to say a foreign warrant produced in proceedings under paragraph 17(6)(a) of the Extradition (Foreign States) Act. Reference in this regard should be had to that Act and the Extradition (United States of America) Regulations.

The Treaty on Extradition between Australia and the United States of America is contained in the Schedule to the Regulations. Australian Police do assist in obtaining local warrants in extradition proceedings.

Australian law does not recognize compulsory process of a foreign country. Compulsory process includes the service of a document where non-compliance with the requirements of that document renders the recipient to a sanction of a punitive nature which is enforceable independently of the outcome of the original action.

Australia does not countenance a foreign country, or its tribunals, applying punitive sanction (involved in compulsory process) to persons in Australia. An Australian court would quash foreign process of a mandatory nature sought to be enforced directly here as a violation of the sovereignty of Australia. Subpoenas fall into this class of process, as do judicial documents in the nature of execution or enforcement of the judgment and orders of a foreign Court. Such judicial documents have no force in Australia and the judgment of the foreign Court must first be registered in Australia. There are broadly two conditions to registration, firstly the judgment must be a money judgment of a superior Court of record and secondly there must be reciprocal arrangements between the Australian jurisdiction and foreign state for enforcement of their respective judgments. Each State and Territory is a separate jurisdiction for this purpose. The Commonwealth of Australia looks to the reciprocal arrangements between Australian States and Territories and a foreign State to enable enforcement of judgments of the High Court of Australia, the Federal Court of Australia in a foreign state in appropriate cases. In the absence of specific arrangements to the contrary each State, Territory and the District of Columbia in the United States of America is a separate jurisdiction with which reciprocal arrangements for enforcement of judgments must be made. At present there are no arrangements for the reciprocal enforcement of judgments between any Australian State or Territory and any American State, Territory or the District of Columbia.

J. **q.** Give the authority of the host country by which the answer to question I was ascertained . . . .

a. Attorney-General's Department.

K. **q.** Does the host country require host country clearance prior to the travel of an official of the US government to that country for the purpose of conducting informal interviews. Taking of voluntary depositions, or conducting inspections of records or facilities? Cite authority per question B.

a. Notification of travel to Australia by an official of the United States Government for the purpose of taking depositions, or conducting inspections of records on facilities should be made to the Department of Foreign Affairs by the United States' Embassy in Canberra. Entry to Australia is, of course, subject to the normal requirements of the Department of Immigration and Ethnic Affairs relating to the admission and temporary stay of short-term visitors.

L. **q.** Does host country law permit production of document in pre-trial discovery stage of a proceeding. Cite authority as per question B?

a. In certain circumstances yes. This is a matter for the appropriate tribunal to decide. However a letter rogatory in the nature of pre-trial discovery is outside the scope of the Foreign Tribunals Evidence Act 1856 (Imp) and so cannot be acceded to by an Australian court.

M. **q.** Does the host country permit the service of a federal (or state?) criminal subpoena upon a U.S. citizen by consular officers? Cite authority per question B. if not, what method should be used?

a. No. There are no arrangements between Australia and the United States with respect to the service in Australia of a subpoena issued in criminal proceedings pending in the United States of America. Australian law does not provide for such service and in the absence of an arrangement such service would be regarded as a breach of Australia's sovereignty. However evidence may be taken in Australia for use in criminal proceedings in the United States. The procedure is outlined in the answer to question D (sub nom criminal proceedings) above. The authority for this answer is Attorney-General's Department.

N. **q.** Are commercial court report services available in the host country for the purpose of transcribing the testimony in a voluntary deposition?

a. Each court has its own arrangements for the taking of transcripts of evidence which are available for use where the court so orders.

Jurisdiction—service of documents in a foreign country

In *Re Trimbole; ex parte Deputy Commissioner of Taxation*, (1984) ALR 625, decided in the Bankruptcy Division of the Federal Court of Australia on 31 October 1984, Sheppard J held that although the Court had jurisdiction to give leave for a bankruptcy petition to be served outside Australia, in the circumstances it was better to send the debtor more notice of the fact that a petition had been presented. His Honour's reasons were as follows (at 626):

> I am satisfied, having considered some authorities and texts overnight, that it was inappropriate to order than an official copy of the petition be sent even by post to the debtor in Ireland.
>
> The recognized course, so it seems to me, is to send notice of the fact that the petition has been presented. The reason for this is that it is inappropriate, as a matter of international comity, to send to a place outside Australia (except perhaps another part of the British Commonwealth) unless there be a relevant convention—there is none affecting Ireland—an official copy of originating process which bears the seal of this court and which may be thought to contain a command for the appearance of the person to whom the originating process is addressed in default of compliance with which he may suffer prejudice or disadvantage—in this case, prejudice or disadvantage to his status—because he will not be heard.

Jurisdiction—foreign States—immunity—Australian legislation

In June 1984 the Australian Law Reform Commission submitted its Report on Foreign State Immunity to the Attorney-General (ALRC Report No 24). The present position of foreign State immunity in Australia was set out in pages 14 to 22 of the Report, which recommended that legislation be enacted on the

subject. On 11 July 1985 the Attorney-General, Mr Bowen, announced that new legislation would be enacted by Parliament as recommended by the Law Reform Commission: see Comm Rec 1985, 1091. On 21 August 1985 he introduced the Foreign States Immunities Bill 1985 into the House of Representatives, and explained the purpose of the Bill: see HR Deb 1985, 141–143.

The Bill was assented to on 16 December 1985 (Act No 196 of 1985) came into operation (except for sub-section 18(2)) on 1 April 1986 (*Commonwealth of Australia Gazette*, No S 128, 26 March 1986). The Act is reproduced in (1986) 25 ILM 71.

Foreign States—actions relating to foreign forces in Australia—United States forces

On 12 June 1986 the following answer was given to the question (Sen Deb 1986, 3875):

> Senator COLEMAN—My question, which is directed to the Minister representing the Attorney-General, follows in part that already asked by Senator Sanders and refers to media coverage of the situation at Port Melbourne on 9 June and I understand at Port Adelaide earlier in the week. My concern is about an incident that occurred when some Australian citizens, including anti-nuclear protesters and policemen, were struck by water from a high pressure fire hose operated by American crewmen of the USS *Rathburne* while the ship was in port. I ask: What is the legal position in relation to this incident and similar incidents? Does this incident constitute a precedent? If injury is caused to an Australian citizen or if property is damaged in such an incident, who is liable for the payment of compensation?
>
> Senator GARETH EVANS—I am advised by the Department of Defence, rather than the Attorney-General's Department, that the legal position and responsibilities of United States forces in Australia are set down in the 1963 Australia-United States Agreement on the Status of United States forces in Australia. Depending upon the circumstances, which would need to be assessed by due legal process, the agreement would allow for United States service personnel to be prosecuted in Australian courts. Naturally Australian citizens have recourse to due legal process. I do not want to comment or to speculate further on the particular incident to which Senator Coleman referred and the applicability of that legal process to those circumstances.

Jurisdiction—extraterritorial application of laws—United States laws

On 14 March 1984 the Australian Ambassador in Washington sent a letter to all members of the United State House/Senate Conference Committee on the renewal of the Export Administration Act (Department of Foreign Affairs, *Backgrounder*, No 426, 11 April 1984, Annex), part of which read as follows:

> While there are a number of aspects of the legislation which trouble us, our major concerns are:
>
> 1. **Extraterritorial Application**
>
> We are particularly concerned that the legislation would require the United

States to assert an unacceptable degree of extraterritorial control over persons and products, including technology, which are within the jurisdiction of other countries.

We believe that US claims to extraterritorial jurisdiction are substantially unsupported by international law and are contrary to the principles of international comity. We therefore urge you to exclude from the proposed legislation powers to impose or maintain export controls on companies or persons outside US territory. We also urge you and your colleagues to remove re-export controls on US goods or technology where the goods are consigned to allied countries—such as Australia—which co-operatively maintains export controls.

2. **Retroactivity**

The US practice of imposing export controls retroactively has serious consequences for international commercial relations which require predictable trading laws to support stable trade relations. Sanctions can be applied to companies long after contracts have been concluded in good faith and in conformity with existing US regulations. We urge you to incorporate into the legislation the principle of contract sanctity for both foreign policy and national security controls.

3. **Exemptions to Enforcement Measures**

In 1982 an Australian company had difficulty in securing equipment for use in an Australian gas pipeline project as a result of enforcement measures directed at firms in a third country. Recalling this problem, we proposed to the Administration in our note of May 23 1983 the inclusion in the new Act of a suitable mechanism to enable exemptions to enforcement measures to be made in circumstances where the interests of third countries, not the primary focus of restrictions imposed under the Act, are prejudiced. Australia is disappointed that such a mechanism, which could reduce the conflicts created by the Act between the United States and its allies, is absent from the draft legislation. A report on 'Australian—United States Relations: The Extraterritorial Application of United States Law' of the Joint Committee on Foreign Affairs and Defence of the Australian Parliament refers to this problem.

4. **Import Restrictions**

We remain concerned by proposals that provide for unilateral import sanctions on those who violate US national security controls. We believe that such action could adversely affect international trade and investment and conflicts with generally recognized rules developed in the GATT and the OECD.

In our view, closer co-operation and consultation between allies rather than unilateral measures is the appropriate course to promote our common security while minimising conflicts of jurisdiction.

On 21 August 1984 the Attorney-General, Mr Bowen, provided the following written answer to a question on notice in the House of

Representatives (HR Deb 1984, 113–114):

> The litigation referred to in the answer to question No 2206 (*Hansard*, 5 June 1981, page 3306) involved civil proceedings initiated in the United States by the Ace Shipping Line alleging breaches of American anti-trust laws by five defendant shipping lines. The Australian National Line was not a named defendant but was indirectly involved as a member of two consortia which were named defendants (Associated Container Transportation (Australia) Ltd and Pacific Australia Direct Line).
>
> The proceedings have been discontinued, the five defendants agreeing to pay damages in settlement. Although the terms of the compromise were not made public, press reports have indicated that the amount payable in full settlement was US dollars 1.5m.
>
> The then Attorney-General's Press Release (20/83) of 23 February 1983 referred to two separate proceedings both related to an investigation commenced in 1980 by the United States Department of Justice into the United States-Australia/New Zealand ocean freight trade.
>
> Various shipping lines and conferences were served with Civil Investigative Demands (CIDs) to produce documents for the investigation. The shipping lines challenged the CIDs and later took the matter on appeal to the United States Court of Appeals for the District of Columbia Circuit (Washington DC) and the United States Court of Appeals for the Southern District of New York.
>
> The New York court ruled against the shipping lines, allowing the Department of Justice to have access to the documents. Although the Washington court has not yet handed down its decision, it had earlier ruled that there would be no stay of proceedings and that the documents the subject of that appeal should be handed over to the Department of Justice pending the court's final decision.
>
> The Australian Government did not take any steps in relation to the *Ace* proceedings. However, the Government did intervene by way of amicus curiae brief in the shipping investigations in both the Washington and New York appeals. It stated that the investigation was an unwarranted inquiry by the United States into the acts and decision making processes in Australia of government instrumentalities carrying out statutory functions.
>
> In the Washington appeal it argued that communications between the shipping lines and Australian Government instrumentalities (Australian Meat and Livestock Corporation, Australian Meat Board) should be exempt from any antitrust liability pursuant to the Noerr-Pennington doctrine. This court has not yet handed down its decision.
>
> In the New York appeal, it argued that the 'act of state' doctrine barred judicial enforcement of CIDs relating to the shipping lines' communications in Australia with Australian Government officials. The court decided that it was premature to apply the 'act of state' doctrine at the investigative stage of the proceedings, although it left open the question whether it would apply it at a later stage.

The Australian Government has no plans to take further steps in either the Ace case or the Shipping Investigation.

Although the Shipping Investigation has not yet been completed, the United States Government informed the Australian Government in a Diplomatic Note of 22 April 1983 that the legality and validity of the actions of its official producer export boards are not in question. Although the Shipping Investigation pre-dates the Anti-trust Cooperation Agreement (see question No 1408) the US diplomatic note affirmed the willingness of the United States to treat the Investigation as if it came within the terms of the Agreement, and provided useful information, on a confidential basis, about the nature and scope of the Investigation.

On 8 May 1984 the Attorney-General, Mr Bowen, was asked the following questions upon notice:

(1) Has the Government given any notifications pursuant to (a) Article 1.1 and (b) Article 1.2 of the United States-Australia Antitrust Co-operation Agreement of June 1982; if so (a) what are they and (b) what has been the outcome of each notification?

(2) Has the Government of (a) Australia, and (b) the United States of America requested any consultations pursuant to article 2.1 of the agreement; if so, (a) what are they and (b) what has been the outcome of each request?

(3) Have there been any consultations pursuant to article 2.3 of the agreement; if so, what are the details?

(4) Has the Government requested any memorialisation pursuant to Article 4.1 of the agreement; if so, what are the details?

(5) Has the Government made any request pursuant to article 6 of the agreement; if so, (a) what are the details and (b) what has been the outcome of each request?

(6) Does the Government consider that the agreement is operating satisfactorily?

He answered on 21 August 1984 'No' to the first five questions, and to the sixth he said (HR Deb 1985, 114):

Yes, the United States has notified the Government on a confidential basis, pursuant to the bilateral agreement, of three inquiries into possible breaches of American antritrust laws by or involving Australian owned companies. Two of the inquiries have now been discontinued, while the third has not been finalised.

On 30 June 1985 the Attorney-General, Mr Bowen, issued the following statement (Comm Rec 1985, 987–988):

In marking the third anniversary of the signing of an historic agreement with the US concerning Australia-US antitrust measures the Attorney-General, the Hon Lionel Bowen, today announced details of two Government initiatives which will benefit Australian exporters.

Intervention in US Supreme Court antritrust proceedings

In a move to protect Australian exporters from involvement in US antitrust proceedings. Australia has intervened in a case in the United States Supreme Court, together with three other foreign governments.

The United States Supreme Court had granted leave for the first ever joint amicus curiae brief to be lodged by the Governments of Australia, Canada, France and the United Kingdom in the *Zenith* case. An amicus curiae brief is a submission to a court by a person who is not a party to litigation, but has volunteered or been invited to assist the court upon a matter pending before it.

The *Zenith* case is an action against Japanese electronic products manufacturers and exporters by US competitors who allege violations of the Sherman Antitrust Act in a conspiracy to drive them out of the market. Mr Bowen said: 'The brief does not address the facts or merits of the case. Its purpose is to inform the US Supreme Court of the views of the participating governments on the foreign sovereign compulsion doctrine.

The foreign sovereign compulsion doctrine provides a defence to alleged violations of US antritrust law where the impugned conduct took place within another country and was compelled by the government of that country. It is a recognition of the international law principle of mutual respect for the sovereignty of friendly foreign governments within their own territory. Mr Bowen said: 'The doctrine is important to Australia because it provides a defence for exporters to the US where the exported goods or commodities are subject to conditions and controls imposed by the Australian Government'.

The brief argues that US courts should accept as conclusive the duly issued statement of a friendly foreign government regarding the existence and effect of its export control laws. It asserts that such laws should not, in themselves, constitute or be a feature of a conspiracy in violation of US antitrust laws.

Protection of Australian steel exporters

In the area of steel exports the Australian Government has obtained assurances from the US Government that implementation of Australia's steel export control policy does not violate US antitrust law. Mr Bowen said that the assurances were based on the protection that Australian companies obtained from the foreign sovereign compulsion doctrine.

The steel export control policy (full details of which were announced by the Minister for Trade last December) was the first policy the Australian Government had notified under the Australia-United States Anti-trust Co-operation Agreement.

Under the terms of this agreement, which came into force on 29 June 1982, the US must notify Australia of any antitrust investigation that may have implications for Australia's laws, policies or national interests. To date, the US has notified Australia of six investigations. Australia, on the other hand, is given the option of notifying the US of any policy that it has adopted that may have antitrust implications for the US.

Exports of Australian steel products to the US are governed by an export restraint arrangement between the two countries which provides for Australia to set limits on the export of specified steel products in exchange for undertakings related to US antidumping and countervailing trade actions against Australian steel exporters.

The antitrust co-operation agreement provides that the Australian Government may request the US to certify in writing its conclusions that the implementation of the Australian policy should not be a basis for action under US antitrust laws. The US Assistant Attorney-General, J. Paul McGrath, recently wrote to give such a certification regarding Australia's export controls on steel products.

Under the agreement, if requested by the Australian Government, the US Government is obliged to participate in any private antitrust litigation against Australian steel exporters and inform the court of its conclusions. The agreement provides that documents and information provided by either party in the course of notification or consultations should remain confidential. However, in this case Australia requested and the US agreed to the correspondence being made public.

Mr Bowen expressed the hope that the publication of the correspondence would discourage the initiation of private treble damages action and so provide a further assurance of protection for Australian steel exporters against involvement in antitrust litigation.

The amicus curiae brief referred to in the Attorney-General's statement was submitted in *Matsushita Electric Industrial Co Ltd et al v Zenith Radio Corporation and National Union Electric Corporation* on 15 June 1985, and read as follows:

The Governments of Australia, Canada, France and the United Kingdom of Great Britain and Northern Ireland submit this brief as amici curiae.

INTEREST OF THE AMICI CURIAE

The amici were not involved in the case at bar[1] and take no position on this controversy other than to support petitioners' position on the foreign sovereign compulsion and act of state defences. Moreover, the refusal of the Court of Appeals below to give dispositive weight to, or even to acknowledge, the official statement of the Japanese Government is of great concern to amici because it is inconsistent with the fundamental international legal principle of mutual respect for the sovereignty of friendly foreign governments within their own territory. The interest of the amici in these matters is described in detail below.

Amici are among those governments most friendly to the United States. Each considers the United States to be one of its most important trading partners. For many years, each has conducted friendly economic relations with the United States via a carefully fashioned network of multilateral and bilateral agreements, formal and informal arrangements, active participation with the US Government in international organizations, and ad hoc consultations with the Executive Branch.

Trade and investment between the United States and the amici are traditionally and necessarily conducted on the basis of mutual respect for each nation's sovereignty. Principles of international law and comity govern

1. Amici did advise the Department of State of their serious concern about the Court of Appeals' treatment of the act of state and foreign sovereign compulsion issues. The Solicitor General lodged copies of amici's statements with the Clerk of the Court in connection with the filing of the petition for a writ of certiorari

these relationships. One of the fundamental attributes of each nation's sovereignty is the right to control conduct within its borders in the manner it deems appropriate, subject only to such limitations as may be agreed between governments or otherwise required by international law. To the extent that different national policies give rise to international concern or dispute, bilateral or multilateral diplomatic mechanisms, rather than unilateral adjudication, are the appropriate means of seeking resolution. This strongly held position of the amici and other nations on sovereignty has led to difficulty with regard to the application of the antitrust laws of the United States.[2] High level intergovernmental consultations have, from time to time, been held and multilateral understandings have been reached on how conflicting national interests may be reconciled.[3] The Governments of Australia[4] and Canada[5] have entered into bilateral notification, consultation, and cooperation arrangements with the US Government concerning issues arising under the US antitrust laws.

The need for mutual accommodation and comity among co-equal sovereigns has been judicially acknowledged in the US legal doctrines of foreign sovereign compulsion and act of state. In a number of situations, the US Government has advised the amici that the doctrine of foreign sovereign compulsion would constitute a defense to liability arising from an antitrust lawsuit in the United States based on conduct affecting US commerce that was mandated by a foreign government. In reliance on such assurances, some of the amici have acceded to requests by the US Government for the imposition of government mandated export restraints on their manufacturers. For example, earlier this year the US Government requested that Australia

2. For an acknowledgement of these difficulties, see Sec of State George P Shultz, *Trade, Interdependence and Conflicts of Jurisdiction*, Address before the S Car Bar Ass'n in Columbia (May 5, 1984), reprinted in Dept of State Bulletin, June 1984, at 33. See also *Perspectives on the Extraterritorial Application of US Antitrust and Other Laws* (J Griffin ed 1979).
3. On May 18, 1984, Ministers comprising the Council of the Organization for Economic Cooperation and Development, including the U.S. Secretary of State, agreed to strengthen bilateral and multilateral cooperation in intergovernmental conflicts involving multinational enterprises by strongly encouraging governments to follow an approach of cooperation, moderation and restraint, rather than unilateral action. See Organization for Economic Cooperation and Development, *International Investment and Multinational Enterprises: The 1984 Review of the 1976 Declaration and Decisions* 26 (1984); see also Organization for Economic Cooperation and Development, *Recommendation of the Council Concerning Cooperation Between Member Countries on Restrictive Business Practices Affecting International Trade*, OECD Doc C (1979) 154 (1979).
4. Agreement Between the Government of the United States of America and the Government of Australia Relating to Cooperation of Antitrust Matters (June 29, 1982), reprinted in [1969-83 Current Comment Transfer Binder] Trade Reg Rep (CCH), 50,440.
5. Memorandum of Understanding Between the Government of Canada and the Government of the United States of America as to Notification. Consultation and Cooperation with Respect to the Application of National Antitrust Laws (Mar 9, 1984), reprinted in 5 Trade Reg Rep (CCH), 50,464.

limit the quantity of certain steel exports to the United States. Pursuant to the Agreement Between the Government of the United States and the Government of Australia Relating to Cooperation on Antitrust Matters, the Australian Government requested the US Government's views on antitrust questions regarding the Australian Government's steel export control system. In response, the then Assistant Attorney-General for the Antitrust Division advised the Australian Government, inter alia, that:

> We also believe that a court would view Australian steel exporters' compliance with the mandatory export limits established by the Australian Government as having been compelled by your government, acting within its sovereign powers and in conjunction with the United States Government under the Trade and Tariff Act of 1984, and consequently as not giving rise to a violation of United States antitrust laws.

Letter from Ass't Att'y Gen McGrath to Charge d'Affaires, Embassy of Australia, at 3 (January 18, 1985).

In situations other than export restraints, some amici have considered entering into agreements or understandings with the US Government intended to regulate aspects of their bilateral economic relations. In such deliberations, amici have relied upon their understanding of relevant international legal principles and the decisions of this Court and lower US courts relating to the defenses of foreign sovereign compulsion and act of state. The fundamental basis on which relations between the amici and the United States are conducted would be removed if these defenses could not be invoked by private parties that rely upon such intergovernmental understandings in their subsequent conduct. Indeed, US laws purporting to impose liability on conduct mandated by friendly foreign sovereigns would themselves constitute a serious invasion of the sovereignty and prerogatives of such sovereigns.

In addition to the shared interest of the US Government and the amici in the viability and scope of the foreign sovereign compulsion and act of state defenses, amici also have a compelling interest in the treatment that is accorded their official statements made to US courts. In 1978, the Department of State, at the suggestion of the Clerk of this Court,[6] encouraged foreign governments to present their views directly to US courts.[7] Since then, friendly foreign governments have relied on the State Department's position and have presented their views directly to the relevant US court, as did the Japanese Government below. In this case and others, the filing of a statement by a friendly foreign sovereign in a US court has failed to prove satisfactory. For example, the Seventh Circuit's treatment of

---

6. Letter from Solicitor General McCree to Legal Adviser Hansell (May 2, 1978), printed in 1978 Dept of State *Digest of United States Practice in International Law* 561, reprinted in part in 73 Am J Int'l L 122, 125 (1979).
7. Dept. of State, Circular Diplomatic Note to Chiefs of Mission in Washington, D.C. (Aug. 17, 1978), printed in 1978 Dept of State *Digest of United States Practice in International Law* 560, reprinted in part in 73 Am J Int'l L 122, 124 (1979). See also Letter from Deputy Legal Adviser Marks (June 15, 1979), described in 73 Am J Int'l L 669, 678-79 (1979).

friendly foreign government amicus briefs in the *Uranium*[8] case prompted the Legal Adviser of the State Department to request the Justice Department to inform the court that the court's language has caused serious embarrassment to the United States in its relations with some of our closest allies.[9] In the instant case, the Court of Appeals below did not acknowledge, let alone give conclusive effect to, the directly relevant filing by the Government of Japan.

ARGUMENT

I. A US COURT MAY NOT DISREGARD THE STATEMENT OF A FRIENDLY FOREIGN GOVERNMENT THAT IT MANDATED PRIVATE CONDUCT.

The related doctrines of foreign sovereign compulsion and act of state are judicial acknowledgments of the fundamental principle of international law that a sovereign's exercise of its authority within its territory is not reviewable by the courts of another nation.[10] In 1962, this Court indicated that conduct compelled by a foreign sovereign does not give rise to US antitrust liability. *Continental Ore Co v. Union Carbide & Carbon Corp*, 370 US 690, 706–07 (1962) (the defense was not available in that case because there was "no indication that [any] official within the. . . Canadian Government approved or would have approved of" the challenged conduct). This Court and lower US courts have offered several well reasoned explanations for the existence and importance of the foreign sovereign compulsion doctrine, including: international comity, judicial noninterference in the Executive Branch's conduct of international relations, fairness to private parties caught between conflicting sovereign commands, the construction of the Sherman Act,[11] and the concept that conduct compelled by a foreign sovereign should be deemed an act of the sovereign

---

8. The court described the foreign governments as "surrogates" for non-appearing defendants and added "shockingly to us, the governments of the defaulters have subserviently presented for them their case against the exercise of jurisdiction". In *Re Uranium Antitrust Litigation*, 617 F 2d 1248, 1256 (7th Cir 1980).
9. Letter from Legal Adviser Owen to Assistant Attorney General Shenefield (Mar. 17, 1980). For background and a substantial text of the letter, see 74 Am J Int'l L 657, 665-67 (1980).
10. "The sovereignty and equality of states represent the basic constitutional doctrine of the law of nations...The principle corollaries of the sovereignty and equality of states are: (1) a jurisdiction, *prima facie* exclusive, over a territory...; (2) a duty of non-intervention in the area of exclusive jurisdiction of other states...; I Brownlie, *Principles of Public International Law* 287 (3d ed 1979).
11. "Anticompetitive practices compelled by foreign nations are not restraints of commerce, as commerce is understood in the Sherman Act, because refusal to comply would put an end to commerce." *Interamerican Refining Corp v Texaco Maracaibo, Inc*, 307 F Supp 1291, 1298 (D Del 1970).

itself.[12] Amici urge this Court to reaffirm the foreign sovereign compulsion doctrine's vitality.

The most reliable evidence of a foreign sovereign's policy, law, method of operation and intention vis-a-vis particular challenged conduct is a statement by that sovereign. This Court has relied on statements from subordinate state governments within the domestic legal environment of the United States.[13] In an international context the equality of nations demands that at least the same weight should be given to the statement of a co-equal, friendly foreign sovereign describing its regulatory actions and their significance within its own cultural and legal environment, which often will be unfamiliar to US courts.

As noted above, since 1978 the US Government has encouraged foreign governments to address US courts directly. If this Court now holds that such filings properly may be disregarded by US courts, the Executive Branch will have the very difficult task of convincing foreign sovereigns that there is any acceptable mechanism in the US legal system for friendly foreign sovereigns to express the nature and effect of their regulatory actions within their territory. It clearly would not be acceptable to such sovereigns that they be required to submit the determination of such questions of fact to the courts of another sovereign.

Amici therefore urge this Court to hold that official statements made to US courts by friendly foreign governments that they mandated private conduct may not be disregarded.

II. THE TRIER OF FACT MAY NOT ADJUDICATE THE VERACITY OF AN OFFICIAL STATEMENT BY A FRIENDLY FOREIGN SOVEREIGN THAT IT MANDATED PRIVATE CONDUCT.

In 1897, this Court formulated what it later described as the 'classic American statement'[14] of the act of state doctrine:

> Every sovereign State is bound to respect the independence of every other sovereign state, and the courts of one country will not sit in judgment on the acts of the government of another, done within its own territory. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves.
> *Underhill v Hernandez*, 168 US 250, 252 (1897).

The act of state doctrine apparently was first applied by this Court in a suit under US antitrust law in 1909, when it held, citing *Underhill*, that the

---

12. *Timberlane Lumber Co v Bank of America NT & SA*, 549 F 2d 597, 606 (9th Cir 1976).
13. In *Southern Motor Carriers Rate Conference Inc v United States*, 105 S Ct 1721, 1730 (1985), this Court was faced with the task of determining whether, in the absence of a Mississippi statute expressly permitted the challenged conduct, the state had clearly articulated a policy to displace competition with a regulatory structure. The Court relied on the State of Mississippi's Amicus Curiae Brief in the District Court to hold that the state commission had actively encouraged collective ratemaking.
14. *Banco Nacional de Cuba v Sabbatino*, 376 US 398, 416 (1964).

doctrine barred adjudication of a claim that the defendant persuaded the Costa Rican Government to expropriate a competitor's plantation. *American Banana Co v United Fruit Co*, 213 US 347, 357–58 (1909).

In analyzing the act of state doctrine in a recent antitrust case, the Ninth Circuit made the following perceptive comments in illuminating the underpinnings of that doctrine:

The doctrine recognizes the institutional limitations of the courts and the peculiar requirements of successful foreign relations. To participate adeptly in the global community, the United States must speak with one voice and pursue a careful and deliberate foreign policy. The political branches of our government are able to consider the competing economic and political considerations and respond to the public will in order to carry on foreign relations in accordance with the best interests of the country as a whole. The courts, in contrast, focus on single disputes and make decisions on the basis of legal principles. The timing of our decisions is largely a result of our caseload and of the random tactical considerations which motivate parties to bring lawsuits and to seek delay or expedition. When the courts engage in piecemeal adjudication of the legality of the sovereign acts of states, they risk disruption of our country's international diplomacy. The executive may utilize protocol, economic sanction, compromise, delay, and persuasion to achieve international objectives. Ill-timed judicial decisions challenging the acts of foreign states could nullify these tools and embarrass the United States in the eyes of the world.

International Association of Machinists v Organization of Petroleum Exporting Countries, 649 F 2d 1354, 1358 (9th Cir 1981), *cert denied*, 454 US 1163 (1982).

Amici submit that the preceding explanation of the bases of the act of state doctrine, as well as *United States v Pink*, 315 US 203, 218–21 (1942), and its progeny, explain why US courts may not adjudicate the veracity of an official statement by a friendly foreign government that it mandated private conduct. Such an adjudication of a friendly foreign sovereign's official statement would be an unacceptable intrusion into the sovereignty of that friendly foreign government. It could, as a practical matter, render the act of state and foreign sovereign compulsion doctrines meaningless and would, at minimum, create uncertainty in international economic relations. Amici believe that the US Government would have the same reaction to such adjudications of its statements by foreign courts.

Another sound policy reason for US courts not to inquire into the veracity of such a statement by a friendly foreign sovereign is that such an inquiry will necessarily involve the difficult task of appraising the manner in which a foreign political and legal system operates. In each case where the question of foreign sovereign compulsion arises, the determinative inquiry for a US court is whether the foreign sovereign exercised its authority to mandate the relevant conduct. The fact that a foreign sovereign may express itself in a manner other than by explicit, compulsory orders may reflect a different style of governance, not a less intense involvement in the issue. Friendly foreign governments should not have their national policies questioned or thwarted by American courts because they do not adopt compulsory formal

orders.[15] Inflexibility by US courts in requiring explicit formal orders would discriminate improperly in favor of governments with centrally planned and highly regulated economies and would elevate the form of the foreign sovereign's involvement over the substance of that involvement.

Within the context of the US federal system, this Court has recognized that private anticompetitive conduct encouraged, but not compelled, by state governments may be entitled to antitrust immunity.[16] In this case, the Government of Japan has expressly stated that it mandated the challenged private conduct. Amici respectfully submit that in an international context it would be inappropriate for this Court to fail to accord co-equal foreign sovereigns the freedom in choosing regulatory alternatives or in expressing their national policies that it has accorded states in the US federal system.

Amici strongly urge the Court to adopt the Executive Branch's suggestion that statements by friendly foreign governments that they mandated private conduct within their territory be given 'dispositive weight'. Brief for the United States as Amicus Curiae in Support of the Petition for Certiorari at 17.

III. CONDUCT MANDATED BY A FOREIGN SOVEREIGN MAY NOT CONSTITUTE OR BE A FEATURE OF CONSPIRACY UNDER US ANTITRUST LAW

As discussed above, the foreign sovereign compulsion and act of state doctrines require a US court to consider and give conclusive effect to the statement of a friendly foreign sovereign that it mandated private conduct. It would be illogical to reach such a result, but then to hold that such conduct may nevertheless constitute or be a feature of conspiracy under US antitrust law. Such a holding could lead to the very exacerbation of international conflict that the foreign sovereign compulsion and act of state doctrines are designed to avoid.

Attempts by US courts to hold that conduct mandated by a foreign sovereign constituted a feature of conspiracy under US antitrust law would, in many instances, be resisted by foreign governments as a matter of national sovereignty. This could lead to further foreign governmental measures to counteract what many nations view as assertions of US jurisdiction that are

---

15. It also should be noted that Section 2-615(a) of the Uniform Commercial Code provides in part that "compliance in good faith with any applicable foreign or domestic governmental regulation or order whether or not it later proves to be invalid" excuses non-performance. This section has been held to excuse non-performance based on an *informal* US Government procurement program. *Eastern Air Lines Inc v McDonnell Douglas Corp*, 532 F 2d 957, 996 (5th Cir 1976).

16. The Court recently held that, in the state action immunity context, a private party acting pursuant to an anticompetitive state regulatory program need not "point to a specific, detailed legislative authorization" of its challenged conduct but may rely on an express intent to displace competition in a particular field with a regulatory structure. *Southern Motor Carriers Rate Conference Inc v United States*, 105 S Ct at 1730-31 (quoting *City of Lafayette v Louisiana Power & Light Co*, 435 US 389, 415 (1978)).

inconsistent with international law.[17] In this case, the Executive Branch has clearly recognized the dangers of such developments. Id at 16–20.

IV. ISSUES IMPINGING ON THE SOVEREIGNTY OF FOREIGN GOVERNMENTS SHOULD BE DECIDED AT AS EARLY A STAGE AS POSSIBLE

Finally, it is submitted that issues in US legal proceedings that impinge on the sovereignty of other nations should be decided as early in the proceedings as possible.[18] One of the underlying rationales of the act of state and foreign sovereign compulsion doctrines is that, whatever the eventual outcome of the litigation, an inquiry into the actions of a foreign government will disrupt harmonious international economic relations. Moreover, US-style discovery conducted beyond US territory can only exacerbate conflict in such a situation, and is clearly inappropriate where the official statement of a friendly foreign government can resolve the matter conclusively.

CONCLUSION

Amici urge the Court to reaffirm the vitality of the foreign sovereign compulsion and act of state doctrines by holding that US courts may neither disregard nor adjudicate the veracity of a statement by a friendly foreign sovereign that it mandated private conduct, and to hold that such conduct may not constitute or be a feature of conspiracy under US antitrust law.

The United States Supreme Court decided the case on 26 March 1986, but did not consider the issues raised in the amici curiae brief: see 106 S Ct 1348; 54 United States Law Week 4319.

Extraterritorial application of laws—United States anti-trust laws—agreement between Australia and the United States on anti-trust co-operation

On 14 October the Attorney-General, Mr Bowen, gave the following written answer to a question on notice (HR Deb 1986, 2108–2109):

> In August 1985, following investigations by the United States Federal Trade Commission, the United States Department of Justice instituted proceedings against Mr Robert Holmes a Court, Bell Resources Ltd and Weeks Petroleum alleging violation of the United States pre-merger notification laws.
>
> The allegations related to the acquisition of shares in a US company, ASARCO Inc by Weeks Petroleum Ltd, a subsidiary of Bell Resources Ltd of which Mr Holmes a Court is Chairman.
>
> In March 1986 the proceedings against all defendants were settled without going to trial and without any admissions by the defendants, on the

17. See, e.g., AV Lowe, Extraterritorial Jurisdiction: An Annotated Collection of Legal Materials (1983); Meessen, Antritrust Jurisdiction Under Customary International Law, 78 Am J Int'l L 783 (1984); Cira, The Challenge of Foreign Laws to Block American Antitrust Actions, 18 Stan J Int'l L 247 (1982).
18. For the recommendation of swift action, see JR Atwood & K Brewster, *Antitrust and American Business Abroad* 348 (2d ed 1981).

basis of a payment by Weeks Petroleum Ltd of a civil penalty of US $450,000. The proceedings against the other defendants were dismissed.

During the course of those proceedings, Bell Resources representatives made representations to the Australian Government, asking that it hold consultations with the US Government pursuant to the Australia/US Antitrust Co-operation Agreement. The Australian Government did not initiate such consultations. However, the Government had been kept fully informed by the US Government of developments in the proceedings pursuant to the notification provisions (Article 1.2 and 1.3) of the Antitrust Co-operation Agreement, and was closely monitoring the matter.

Subsequently, representations were made asking me to exercise my powers, pursuant to section 7 of the Foreign Proceedings (Excess of Jurisdiction) Act 1984, to prohibit certain Australian residents from giving evidence or information to the US authorities. At that time Mr Holmes a Court and Bell Resources Ltd had obtained an injunction from the Western Australian Supreme Court which restrained various persons from disclosing, without the applicants' consent, information concerning the matters in question. In light of all the circumstances of the matter, I was not prepared at that stage to consider the exercise of my powers under section 7 of the Foreign Proceedings (Excess of Jurisdiction) Act 1984 or to make any decision on the exercise of those powers.