THE EXTRATERRITORIAL APPLICATION OF AMERICAN LAW TO BANKING OPERATIONS IN AUSTRALIA

BARRY METZGER

Coudert Brothers
Solicitors, New South Wales

I Introduction

The issue of the extraterritorial application of American antitrust laws in the context of the uranium cartel litigation between 1976 and settlement of the litigation as against the four Australian defendants in late 1980 and early 1981 was an issue of high principle and an issue of high emotion in the legal, political and commercial communities on both sides of the Pacific. [1]

As most of you are aware the uranium cartel litigation as it affected the four Australian defendants was part of antitrust proceedings initiated by Westinghouse Electric Corporation against twenty-nine American and foreign uranium producers claiming that, through such producers' participation in the international uranium cartel, Westinghouse had been damaged by its inability to obtain uranium at prices which would permit it to perform its own contractual obligations to deliver to its customers fuel for reactors which Westinghouse had sold. The case against the Australian producers was based on the extraterritorial application of the Sherman Act, the protection of which has been held by the courts to extend to conduct outside the territory of the United States if such conduct is intended to, and actually does, have anti-competitive effect on United States imports and exports. That the Sherman Act's protection extends to such conduct outside the territory of the United States has, as a matter of United States law, been recognized since Judge Learned Hand's 1945 decision in the Alcoa case. [2] The Westinghouse uranium litigation - in which cases the Australian defendants and certain other foreign defendants refused to appear but in which the Australian government and certain other foreign governments filed *amicus* briefs - prompted passage in the Australian Parliament in 1976 of the Foreign Proceedings (Prohibition of Certain Evidence) Act and of the Foreign Antitrust Judgments (Restriction of Enforcement) Act in 1979; both pieces of legislation have recently been superseded by the Foreign Proceedings (Excess of Jurisdiction) Act 1984. Such blocking legislation was originally intended to prohibit the reach of the US court's discovery proceedings in the Westinghouse litigation from extending to Australia or to Australian citizens or residents and to prevent enforcement

within Australia of a foreign antitrust judgment which is declared by the Attorney-General to have been given by a foreign court exercising its jurisdiction in a manner "inconsistent with international law or comity". Since certain provisions of the Foreign Proceedings (Excess of Jurisdiction) Act 1984 have general application beyond the field of antitrust and trade practices law, I expect that the legislation will be the subject of further discussion in the course of these proceedings. Commercial considerations ultimately caused the Australian defendants and Westinghouse to reach negotiated settlements of the litigation. Considerations of diplomatic and political relations between the United States and Australia caused the governments to establish in 1982 a framework for consultation in the future regarding the extraterritorial reach of each country's antitrust proceedings; the two governments in June 1982 concluded an Agreement relating to Cooperation in Antitrust Matters. [3] The contentiousness of the Westinghouse uranium litigation at the legal, political and commercial levels and the judicial and legislative precedents which it spawned inevitably colour each country's approach to situations in which the laws of Australia and the United States come into conflict. Hopefully, the passions which animated the uranium cartel litigation will not prevent us from undertaking a dispassionate analysis of legitimate national interests and problems of concurrent jurisdiction and regulation in other areas, such as international banking. Indeed as we proceed with our consideration of the subject, I think it will be seen that what was the end-result of the wrangle over the uranium cartel litigation - an intergovernmental consultative framework as a means for reconciling conflicting national interests in the field of antitrust policy - is much the starting point for the reconciliation of such conflicts in the field of international banking and bank regulation.

In considering the extraterritorial application of American law to the field of banking, the balance of this paper will be devoted to consideration of the application to Australian financial instutions operating in Australia of United States law by virtue of American financial institutions being shareholders of such Australian financial institutions. There are already a significant number of such institutions in the Australian financial community, primarily in the merchant banking sector. Our focus on such institutions has particular relevance at the current time in light of the 27 February 1985 announcement by the Federal Treasurer that five trading banks are to be licensed in the immediate future with American shareholders holding interests ranging from 50 percent to 100 percent. The rationalization occurring in the merchant banking sector will result in a large number of merchant banks wholly-owned by American financial institutions. Such trading banks and merchant banks will be incorporated under the laws of various states and territories of Australia and fully subject to the regulatory jurisdiction of the relevant Australian government agencies. This seems a particularly appropriate time to ask the question of the extent to which such institutions will also be subject to the laws of the United States or a state of the United States. A subject which will not be addressed is the application of United States law to Australian banks outside the territory of the United

States by virtue of such Australian banks having operations in the United States through agencies, branches, subsidiaries and affiliates.

II Extraterritoriality and banking - the conceptual framework

Extraterritoriality is a feature of the legal systems of most nations. In certain circumstances, nations assert jurisdiction over their citizens wherever located by virtue solely of their status as citizens. English law punishes treason, homicide and bigamy when committed abroad by a British subject. The United States taxes its citizens on their worldwide income, even if such citizens are not normally resident in the territory of the United States. [4] It is my understanding that Australia taxes foreign corporations which are deemed to be managed and controlled from within Australia and that it asserts certain regulatory controls over foreign subsidiaries outside Australia of banking institutions incorporated in Australia and over foreign subsidiaries of other Australian companies which subsidiaries are organized in a tax haven jurisdiction. [5] Similarly, France and Germany have legislative provisions which extend extraterritorially to their non-resident citizens and, in certain circumstances, to foreign corporations owned or otherwise controlled by French or German citizens or parent corporations. [6]

In some respects the scope of laws' extraterritorial application has narrowed over the last century. A century ago it was considered self-evident that English and American citizens resident in India, China and Japan were entitled to be tried in those countries by English or American courts exercising extraterritorial jurisdiction within the territory of such countries. Neither a jurisprudential scholar nor a minister of foreign affairs would seriously argue that such extraterritoriality was appropriate today; it is viewed as a feature of colonialism which has passed into history.

While the concept of extraterritoriality in such circumstances has withered, its scope has grown in the commercial and regulatory laws of many countries as a function of the growing importance of international trade and the growth of foreign investment. The effective protection of investors in publicly listed corporations and effective regulation of domestic capital and financial markets is far more complex and difficult in the case of a multinational corporation headquartered in such country than in the case of a corporation operating only in the home country's domestic markets. A global perspective on the multinational corporation's operations and detailed information on such operations are necessary for effective regulation. The legitimacy of concurrent regulatory jurisdiction is recognized - the host country has national interests embodied in its laws and regulatory policies with which the corporation must abide and the corporation must at the same time comply with those aspects of the laws of its home country which are given such effect. The laws of the home country must not indiscriminately be given extraterritorial effect; only those aspects of the home country's law should be given extraterritorial effect which are necessary effectively to protect an essential interest of the

home country. A formula for balancing such interests on a case-by-case basis is necessary, providing an analytic framework for resolving conflicts on the basis of the relative interests of each state. This "balancing of interests" concept exists in American law where the courts have been confronted with a conflict between a host country's law and the potential extraterritorial application of some aspect of American law. In the field of antitrust the need for a "balancing of interests" analysis was first enunciated in 1976 by the Ninth Circuit Court of Appeals in its decision in Timberlane Lumber Co v Bank of America. [7] A fuller consideration of such an analysis, again in the antitrust field, was the Third Circuit Court of Appeals 1979 decision in Mannington Mills, Inc v Congoleum Corp [8] which stated that the United States rules of substantive antitrust analysis should not be applied mechanically where foreign contacts are involved. The court stated that "the individual interests and policies of each of the foreign nations differ and must be balanced against our nation's legitimate interest in regulating anti-competitive activity". A balancing of interests approach was applied in which the following elements were considered:

(1) the degree of conflict with foreign law or policy;
(2) the nationalities of the parties;
(3) the relative importance of the alleged violation of American antitrust law compared to that abroad;
(4) the availability of a remedy abroad and the pendency of litigation there;
(5) the existence of intent to harm or affect United States commerce and the foreseeability of the harm or effect;
(6) the possible affect 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 order is effective;
(9) whether an order for relief would be acceptable in the United States if made by the foreign nation under similar circumstances; and
(10) whether a treaty with the affected nation has addressed the issue. [9]

Similarly a balancing of interests approach has been recognized in determining whether a United States court will require a banking institution to disclose information as to conduct outside the territory of the United States which is relevant to its violation or the violation by its customer of United States law; typically such cases have involved violations of the "insider trading" prohibitions of America's securities laws or questions of tax evasion (often in the context of narcotics enforcement efforts). In United States v First National City Bank ('Loveland') [10] the Second Circuit Court of Appeals in 1968 upheld a Federal district court's contempt of court citation against an American bank for its failure to comply with a subpoena served on its head office in New York requiring the production to a grand jury of records located in the bank's German branch. Applying a balancing of interests test, the court

noted that the subpoena had been issued in connection with a federal grand jury investigation into criminal violations of United States laws, that the United States had a strong public interest in seeing that criminal activity in the United States was not 'shielded' from investigation by its grand juries, that the national interest of Germany in bank secrecy was not clear because it was not a matter of statutory law nor did a violation carry a criminal penalty, that neither the German government nor the United States Department of State had intervened in order to indicate that the German national interest in bank secrecy was significant, and that as a practical matter the exposure of the bank to a civil damages claim was extremely speculative. Such a balancing of interests test was also applied by the Fifth Circuit Court of Appeals in a 1976 case, United States v Field, [11] and by the Eleventh Circuit Court of Appeals in a 1984 case, In re Grand Jury Proceedings Bank of Nova Scotia, [12] though both Field and Bank of Nova Scotia went significantly beyond the holding in Loveland by requiring production to a United States grand jury of subpoenad documents located outside the United States which documents were entitled to the protection of bank secrecy laws in the Cayman Islands and the Bahamas, respectively. Under both bank secrecy laws the banking institutions and their officers were potentially subject to criminal penalties if they complied with the United States grand jury subpoenas. In Field the Fifth Circuit Court of Appeals expressed sympathy with the bank officer's predicament but concluded that under a balancing of interests analysis the United States interest in supporting grand jury investigations of criminal activities outweighed the Cayman's interest in blanket bank secrecy; the court was struck by provisions of the Cayman's bank secrecy law which provided that the Director of Banking in the Caymans could obtain records of the type requested by the grand jury. The court in Bank of Nova Scotia similarly gave considerable weight to the interests of a United States grand jury investigation involving tax evasion and narcotics trafficking. Such decisions strike fear into the hearts of senior bank executives, and such fear is not limited to foreign bankers. Loveland involved the United States and German operations of Citibank and other cases which have reached the courts have involved the domestic and international operations of other American banks. [13]

The real question which these "balancing of interests" cases ask is whether it is reasonable to apply American law to a given transaction or activity in light of the justified expectations of the parties concerned, the traditions of the international legal community with respect to the type of transaction or activity which is at issue, the impact of the transaction or activity on consumers and markets within the territory of the United States, the potential conflict with the laws of another state and the actual conflict with foreign laws or interests. [14] Some link - typically territoriality or nationality - is a necessary precondition to the application of American law, but as the draft Restatement of the Foreign Relations Law of the United States (Revised) states:

> "although [a basis] for jurisdiction... is present, a state may not apply law to the conduct, relations, status or interests of persons or things having connections with

> another state or states when the exercise of such jurisdiction is unreasonable." [15]

American courts have been called upon to consider conflicts of law in the field of banking relatively infrequently. Most recent decisions have been in bank secrecy cases such as <u>Loveland</u>, <u>Field</u> and <u>Bank of Nova Scotia</u>. These cases set forth a "balancing of interests" formulation but are almost invariably decided in favour of disclosure, directing the financial institution concerned to divulge information demanded by an American governmental agency though such disclosure is prohibited by relevant foreign law. These decisions have involved banks but do not involve questions of American regulatory policies regarding banks; generally they have involved issues relating to the application of the United States' securities or tax laws; in some sense, the involvement of a banking institution has been only incidental to the courts' analysis of the interests being balanced. In cases which may arise in the future in the United States courts dealing with conflicts between the bank regulatory laws of the United States and another jurisdiction, a balancing of interests test can be expected to be applied. How will these interests be balanced?

Traditionally, banking has been viewed as an activity closely related to the national interests of the host country. Almost without exception, banks are the most widely regulated economic institutions in a nation. The purposes of such regulations include the protection of depositors, the implementation of governmental monetary policy as a means of regulating the national economy, and the allocation of credit to priority sectors of the economy. The primacy of banking regulation by the host country is illustrated by provisions of the Treaties of Friendship, Commerce and Navigation between the United States and certain other countries to establish a framework for the encouragement of commerce. A central premise of the Treaties of Friendship, Commerce and Navigation - most of which were negotiated in the 1950s - was that each signatory would grant "national treatment" to nationals and companies of the other country; that is, each signatory would treat nationals and companies of the other signatory engaged in commerce within its borders in the same manner as its domestic enterprises. Banking, however, was recognized as an exception. Typical of such provisions is Article VII (2) of the Treaty of Friendship, Commerce and Navigation between the United States and the Federal Republic of Germany which provides that:

> "Each Party reserves the right to limit the extent to which aliens may establish, acquire interests in, or carry on enterprises engaged within its territories in communications, air or water transport, taking and administering trusts, <u>banking involving depository functions</u>, or the exploitation of land or other natural resources. However... neither party shall deny to transportation, communications and banking companies of the other Party <u>the right to maintain branches and agencies</u>, in conformity with the applicable laws and regulations, to perform functions necessary for essentially international operations in which they engage." [16]

While the reservation embodies the view that domestic depositary banking is subject to the host country regulation on a basis which is entitled to distinguish (and discriminate) between local ownership and foreign ownership, it at the same time recognizes that the encouragement of foreign trade requires at least limited presence of foreign banks. Similar provisions are found in the United States' Treaties of Friendship, Commerce and Navigation with Japan and France. It is notable, though, that the Treaty with the United Kingdom contains no such reservation, and American banks and their English subsidiaries are entitled to national treatment in the United Kingdom. There is no Treaty of Friendship, Commerce and Navigation between the United States and the Commonwealth of Australia.

While I have described the "traditional view" as recognizing the primacy of the national interests of the host country in regulating the activities of banking institutions operating within its borders, there has as well been a recognition by the host country of the legitimate regulatory interests of the home country from which foreign banking institutions have come. Indeed some host country regulators, such as the Bank of England, have traditionally sought letters of comfort from the head offices or parent banks of financial institutions doing business in England. Such letters of comfort create at least moral obligations on the part of such foreign institutions to support their operations in the United Kingdom while at the same time skirting home country prohibitions in many jurisdictions against parent guarantees of their foreign branches' and subsidiaries' operations.

Over the past two decades the growing importance of international business for many banks, the vastly expanded presence of foreign banks in host countries, the growth of a largely unregulated Eurocurrency markets and the trauma of a number of significant bank failures have contributed to a growing recognition that effective prudential supervision of banks with international operations requires an expanded and more effective supervisory role for the banks' home country regulators. During the 1970s the failure of Bankhaus Herstatt in Germany, the failure of Franklin National Bank in the United States and the secondary financial institutions crisis in the United Kingdom were each noteworthy. The failure of Banco Ambrosiano of Italy and the recent rescue by the United States government of Continental Illinois Bank and Trust Company of Chicago are unpleasant reminders that the problem of major bank failures was not an isolated phenomenon of the early 1970s. Since 1974 the Standing Committee on Banking Regulations And Supervisory Practices - the so called "Cooke Committee" - at the Bank for International Settlements has been the forum for discussion of, and cooperation on, international banking supervision. In order to prevent the situation where a foreign branch or subsidiary of a bank might evade supervision through a reciprocal renunciation of jurisdiction by the authorities of both the home country and the host country, it has been decided that the solvency of a bank's activities should fall under the overall responsibility of the bank supervisory authorities of the country in which the parent bank is domiciled, the home country. [17] This principle is embodied in what is generally referred to as the Concordat; more

specifically the policy is embodied in a document entitled "Principles of the Supervision of Banks' Foreign Establishments". Effective supervision requires a perspective on the global operations of a banking institution and a perspective on the consolidated, worldwide financial position and condition of such institution. Attempts to establish international banking regulation have been taken by means of coordination of national regulatory authorities. The countries concerned attempt to reach agreement by consensus through the Bank for International Settlements on the objectives and means to be used, and each country is then responsible for carrying such objectives into effect for those banks within its jurisdiction. No attention has seriously been devoted to the notion of international regulation by a supranational body.

In the contemporary environment we thus find ourselves having the benefit of a consultative mechanism for the resolution of bank regulatory conflicts between host country and home country through an ad hoc consultative process. The limitations on judicial resolution of such conflicts have been demonstrated in other areas of economic endeavour such as the Uranium Antitrust Litigation. It is submitted that a "balancing of interests" test in the courts provides a sound analytic framework for resolving questions of conflicts of law which arise from the proposed extraterritorial application of provisions of American law. It suffers, however, by not providing to participants in the commercial world predictable rules for the guidance of their conduct. The position of the Australian government during the Uranium Antitrust Litigation was that the resolution of conflicts of law was an intergovernmental, public law exercise rather than a matter to be determined in the courts of one nation only in the context of litigation between private parties. It should be recognized that such conflicts of law have a very real public law aspect, as evidenced by the 1982 antitrust consultative agreement between the two governments. Such conflicts may require action at both levels - in litigation and through concurrent intergovernmental consultation. The consultative framework established by the 1982 agreement does not mandate governmental intervention in litigation between private parties and recognizes explicitly that the governmental parties may constitutionally have no power to alter the course of such litigation.

III Extraterritoriality and banking - the application of United States banking regulations in Australia

It seems appropriate to provide some flesh and bones to this conceptual analysis by specifically focusing on a number of provisions of United States bank regulatory law which apply to Australian subsidiaries and affiliates of banks incorporated in the United States. During the Australian government's consideration of the desirability of granting trading bank licenses to foreign banks, it was often stated that the Australian operations of such banks would be required to be locally corporated in Australia to ensure more effective regulatory control and full compliance with Australian law. [18] The fact of separate incorporation does not, unto itself, reduce to any significant degree the extent to which such an Australian subsidiary or affiliate will be subject to United States

regulation of the overseas operations of its banks and bank holding companies. The primary American regulations applying to the overseas operations of American banks are found in regulation K promulgated by the Board of Governors of the Federal Reserve System.

Investment Limitations. An American bank which is a member of the Federal Reserve System or an American bank holding company, directly or indirectly, may invest outside the United States in a subsidiary (that is, a company more than 50 percent owned by such member bank or bank holding company) provided that the subsidiary is engaged only in what are known as "listed activities". Such an investor may invest in a joint venture (that is, a company more than 20 percent but less than 50 percent owned by such member bank or holding company) provided that no more than 10 percent of such joint venture's assets or revenues are attributable to activities which are not listed activities. Such an investor may make a portfolio investment (that is, an investment involving less than 20 percent of the relevant company or trust) without regard to whether such company is engaged in listed activities provided that the worldwide portfolio investment by such member bank or bank holding company in companies in which activities other than listed activities constitute more than 10 percent of their assets or revenues shall not exceed 100 percent of the capital and surplus of the investor. Such investments can be made without the prior consent of the Federal Reserve Board if the total amount invested is less than US$2,000,000 or certain specified percentages of the investor's capital and surplus. Investments in excess of those amounts require specific approval by the Federal Reserve Board. The "listed activities" in which a subsidiary or joint venture can engage without a specific, prior approval from the Federal Reserve Board are known as the "Reg K laundry list" and are:

(1) commercial banking;
(2) financing, including commercial financing, consumer financing, mortgage banking and factoring;
(3) leasing real or personal property if the lease serves as the functional equivalent of an extension of credit to the lessee of the property;
(4) acting as fiduciary;
(5) underwriting credit life insurance and credit accident and health insurance related to extensions of credit by the investor or its affiliates;
(6) performing services for other direct or indirect operations of a United States banking organization;
(7) holding the premises of a branch of an Edge Corporation or member bank or the premises of a direct or indirect subsidiary;
(8) providing investment, financial or economic advisory services;
(9) general insurance brokerage;
(10) data processing;
(11) managing a mutual fund if the fund's shares are not sold or distributed in the United States or to United States residents and the fund does not exercise managerial control over the firms in which it invests;

(12) performing management consulting services provided that such services when rendered with respect to the United States market shall be restricted to the initial entry;
(13) underwriting, distributing, and dealing in debt and equity securities outside the United States, provided that no undewriting commitment by a subsidiary of an investor for shares of an issuer may exceed $2 million or represent 20 percent of the capital and surplus or voting stock of an issuer unless the underwriter is covered by binding commitments from sub-underwriters or other purchasers;
(14) engaging in other activities that the [Federal Reserve] Board has determined by regulation or order are closely related to banking. [19]

Activities not set forth in the "laundry list" can be the subject of an application to the Federal Reserve Board for a specific consent to engage in such activities, but such specific consents are not easily obtained. What is significant is that the Reg K laundry list can prevent a subsidiary bank licensed in a host country from engaging in certain activities which are permitted under the laws of the host country and in which banks in the host country generally engage. Australian banks provide travel agency services to their customers; such activities by an Australian bank in which more than 20 percent of the shares were held by an American member bank or bank holding company would violate Reg K. Similarly, such an Australian bank could not engage in property investment, property development or property management activities; it could not make significant investments in natural resource projects; it could not hold a significant interest in a gold bullion dealer; and its equity underwriting activities and the equity underwriting activities of any stockbroker in which it held a significant interest would be constrained by the US$2,000,000/20 percent limitation set forth in paragraph (13) above. Application could be made to the Federal Reserve Board for a specific consent to engage in such activities and the fact that such activities are generally engaged in by Australian banks would be a persuasive factor. Nonetheless, the Federal Reserve Board would make an independent assessment of whether such activities were "closely related to banking" and, in particular, involved commercial and other risks of a type with which an American commercial bank is familiar and of a type which an American commercial bank has experience in managing. In effect an Australian trading bank or merchant bank subsidiary of an American bank or bank holding company exists in a particularly conservative regulatory posture - it can engage in those activities permitted by the most restrictive applicable rule as between the host country and the home country; it can engage only in those activities which are permitted by both regulatory jurisdictions. Ironically, an Australian merchant banking subsidiary of an American bank or bank holding company is probably subject to greater US regulatory constraints and oversight in its business activities in Australia than such merchant bank is subject to by Australian regulatory authorities.

The extraterritorial reach of these American investment limitations does not apply directly to the Australian subsidiary bank. By their terms they apply to the American investor. The sanction arising upon a subsidiary engaging in an activity not on

the Reg K laundry list is not directed against the Australian subsidiary; the sanction is a requirement that the American investor divest such subsidiary.

Lending Limits. An Australian trading bank or merchant bank subsidiary of an American member bank is subject to global lending limits imposed by Regulation K:

> "Except as the Board may otherwise specify:
>
> (iii) the total liabilities of any person to a majority owned foreign bank or Edge Corporation subsidiary of a member bank and to majority owned subsidiaries of such foreign bank or Edge Corporation when combined with the liabilities of the same person to the member bank and its majority owned subsidiaries, shall not exceed the member bank's limitations on loans to one person [being 15 percent of such member bank's capital and surplus]." [20]

Again, such lending limits impose on an Australian trading bank or merchant bank subsidiary of an American bank a conservative regulatory posture in which the lender is constrained by the lower lending limit which is applicable as between the host country, Australia, and the home country, the United States. In contrast to the investment limitations discussed above which by their terms apply only to the American investor, the extension of legal lending limit restrictions to the Australian subsidiaries of such an investor by their terms are implicitly applicable both to the member bank and its Australian subsidiaries.

Related Transactions. Section 23A of the Federal Reserve Act prohibits member banks and their 25 percent-owned or otherwise controlled affiliates from entering into credit transactions with affiliates of the member bank except within certain overall limitations based on the capital stock and surplus of the bank and, in certain cases, where such transactions are secured by collateral of a specified kind and amount. The applicable rules under section 23A are quite complex in their operation. It may suffice to cite but one example: the Australian trading bank or merchant bank subsidiary of a member bank is prohibited by the operation of section 23A from making loans in Australia to a unit trust with respect to which such trading bank or merchant bank is a sponsor, investment adviser or manager. [21] It is my understanding that there are no comparable restrictions on such loans by an Australian trading bank or merchant bank.

Supervision. An American investor in an Australian trading bank or merchant bank subsidiary is required to maintain effective systems of records, controls and reports with respect to such subsidiary. Information on risk assets, liquidity management, and audit controls are to be maintained. Reports are to be provided on risk assets which are "sufficient to permit an appraisal of credit quality and assessment of exposure to loss, and for this purpose [should] provide full information on the condition of material borrowers". [22] Somewhat less extensive information and reports are required with respect to joint

venture investments. [23] In either case, such information and reports are to be made available by the American investor to the relevant United States bank regulatory agencies. With the consent of the host country, on-site examinations of such subsidiaries may be conducted by such United States bank regulatory agencies.

IV Conclusion

The examples I have given in which United States bank regulatory agencies have, as a matter of United States law, an interest in the supervision of the Australian trading bank and merchant bank subsidiaries of American member banks and bank holding companies are, for the most part, unexceptional. While they may be viewed by some as an infringement of Australian sovereignty, the role of United States bank regulators is consistent with the Concordat established by the Cooke Committee at the Bank of International Settlements, which has been accepted by the governments of both the United States and Australia. In the event of any conflict, the Cooke Committee itself provides an intergovernmental consultative framework for the consideration and, hopefully, the resolution of any such conflict.

Footnotes

[1] In re Uranium Antitrust Litigation. Westinghouse Elec Corp v Rio Algom Ltd 617 f 2d 1248 (7th Cir 1980). See generally, Pengilley, "Extraterritorial Effects of United States Commercial and Antitrust Legislation: A View from 'Down Under'", 16 Vand L Rev 833 (1983).

[2] United States v Aluminium Co of Am (Alcoa), 148 F 2d 416 (2d Cir 1945).

[3] Agreement between the Government of Australia and the Government of the United States relating to Cooperation in Antitrust Matters, signed at Washington, June 29, 1982. 1982 Aust Treaty Series No 13.

[4] The Tax Reform Act of 1984 extended the jurisdictional reach of America's worldwide taxation to non-citizens holding visas as permanent residents - so-called "green card" holders - even if such individuals are not normally resident in the United States.

[5] By its terms the Foreign Proceedings (Excess of Jurisdiction Act 1984 purports to extend to Australian citizens not resident in Australia by prohibiting them from giving evidence to a foreign tribunal in proceedings declared by the Attorney-General to involve an exercise of jurisdiction by the foreign court in a manner which is contrary to international law or inconsistent with international comity or international practice.

[6] Pengilley, supra at 839.

[7] 549 F 2d 597 (9th Cir 1976).

[8] 595 F 2d 1287 (3d Cir 1979).

[9] Id at 1297-98. Cf *Laker Airways Ltd v Sabena*, 731 F 2d 909 (DC Cir 1984) for a criticism of the "balancing of interests" test in antitrust cases.

[10] 396 F 2d 897 (2d Cir 1968).

[11] 532 F 2d 404 (5th Cir 1976).

[12] 740 F 2d 817 (11th Cir 1984).

[13] See, eg, the Garpeg litigation in the New York and Hong Kong courts involving the Chase Manhattan Bank, as described in Tierney, "Bank Confidentiality and New York Law", 3 *Int Fin L Rev* 45 (July 1984); *Garpeg Limited v Chase Manhattan Bank*, 583 F Supp 789 (SDNY 1984).

[14] Lowenfeld, "Antitrust, Interest Analysis, and the New Conflicts of Laws", 95 Harv L Rev 1976, 1980 (1982).

[15] Restatement of the Foreign Relations Law of the United States (Revised) sec 403(1) (Tentative Draft No 2, 1981).

[16] 7 UST 1839, 273 UNTS 3 (emphasis added).

[17] See Richardson, International Cooperation in Banking Supervision, Record of Proceedings of the International Conference of Banking Supervisors, London, July 5-6, 1979; Communique of the Governors of the Central Banks of the Group of Ten and Switzerland, Basle, April 15, 1980.

[18] See, eg, Chanticleer, *The Australian Financial Review*, March 1, 1985, p 79.

[19] 12 CFR 211.5(d).

[20] 12 CFR 211.6(b).

[21] 12 USC 371c(b)(1)(D).

[22] 12 CFR 211.7(a)(1).

[23] 12 CFR 211.7(a)(2).