QUELQUES EXEMPLES DE QUESTIONS COURANTES DE DROIT INTERNATIONAL D'UNE IMPORTANCE PARTICULIÈRE POUR LE CANADA

SOME EXAMPLES OF CURRENT ISSUES OF INTERNATIONAL LAW OF PARTICULAR IMPORTANCE TO CANADA

MINISTÈRE DES AFFAIRES ÉTRANGÈRES ET DU COMMERCE INTERNATIONAL
DIRECTION GÉNÉRALE DES AFFAIRES JURIDIQUES

DEPARTMENT OF FOREIGN AFFAIRS AND INTERNATIONAL TRADE
LEGAL AFFAIRS BUREAU

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INTERNATIONAL CRIMINAL COURT

On July 17, 1998, the Statute of the International Criminal Court ("ICC") was adopted by the Diplomatic Conference in Rome, Italy. The ICC Statute will enter into force once it has been ratified by 60 states. The ICC will be complementary to national courts and will exercise jurisdiction where national courts are unable or unwilling to bring transgressors to justice.

The Court will have jurisdiction over genocide, war crimes and crimes against humanity (as well as the crime of aggression once a suitable definition is adopted). Significantly, the definition of "war crimes" includes war crimes committed during internal armed conflicts, which are the most prevalent and brutal conflicts in the modern world. The definitions of crimes are derived from existing customary international law.

The Court has "automatic jurisdiction", which means that all state parties recognize the jurisdiction of the Court over these crimes, without any need for case-by-case consent. A transitional provision allows states parties to withhold automatic consent to jurisdiction over war crimes for a one-time period of seven years.

Proceedings may be initiated by a state party, by the UN Security Council, or by the Prosecutor. The ability of the independent Prosecutor to initiate proceedings is essential, as states parties and the Security Council may be reluctant to refer serious situations for political reasons. In order to prevent frivolous prosecutions, the Prosecutor is subject to checks and balances, such as the need for judicial approval.

The Court has a constructive relationship with the Security Council, which may refer situations to the Court and require cooperation from all UN member states. In exceptional circumstances, the Security Council may request a twelve-month deferral of Court proceedings where Chapter VII measures are underway to promote international peace and security.

The Statute contains a number of provisions to address the plight of women and children in armed conflict. The Statute recognizes rape, sexual slavery and other forms of sexual violence as a war crime and a crime against humanity, and also recognizes the enlistment or use of children under 15 in armed conflicts as a war crime. Provisions in the Statute ensure that the Court will have advisers on violence against women and children and will take these concerns into account.

Canada is pleased with the outcome of the negotiations. The

resulting Court will be an independent and effective institution, with sufficient safeguards to ensure that its operations will be beyond reproach. It is hoped that a permanent institution will promote stability by ending impunity for the most serious crimes and acting as deterrent to future violators.

Canada has played a leadership role in advocating the creation of an independent and effective ICC. During the preparatory negotiations, Canada served as the Chair of the Like-Minded Group, a group of states with a shared commitment to an independent and effective ICC. During the Conference, Philippe Kirsch (Legal Adviser of the Canadian Department of Foreign Affairs and International Trade) served as Chair of the pivotal Committee of the Whole. Minister Axworthy participated in the Conference to emphasize the urgent need for a strong ICC.

The ICC Statute will enter into force once 60 states have ratified it, so those states which have supported the Court must continue to do so by ratifying the Statute and by encouraging others to ratify. In addition, a Preparatory Commission, to be established this autumn by the General Assembly, will work out critical details of the Court's operation, such as the rules of procedure. We must also work to understand and address the concerns of those states who are hesitant about the Court, to ensure the broadest possible support for an institution which is credible and responsible.

INTERNATIONAL CRIMINAL TRIBUNALS

a) International Criminal Tribunal for the former Yugoslavia

Canada is a strong supporter of the International Criminal Tribunal for the former Yugoslavia, which was established by the UN Security Council to prosecute individuals alleged to have committed serious violations of international humanitarian law, including war crimes, crimes against humanity and genocide. The Tribunal is based in The Hague. Madame Justice Louise Arbour (formerly of the Ontario Court of Appeal) serves as the Chief Prosecutor. US judge Gabrielle Kirk McDonald was elected as the new President of the Tribunal in November 1997.

Apprehension of Indictees: The number of indictees in custody has swelled, due to the pressure on states and entities in the region to cooperate and the willingness of the international community to make arrests. Arrest operations have been carried out by international forces (particularly UK, US and Dutch SFOR troops) since June 1997 bringing the total number of arrests to nine. These arrests and the demonstrated fairness of the Tribunal hearings, have triggered a wave of voluntary surrenders. Since October 1997, 14 indictees have surrendered, with the most recent surrender occurring on April 16. Eight have been detained by international forces. As a result, the Tribunal now has 29 indictees in custody.

Finance: In December 1997, the UN General Assembly approved a dramatic budget increase for the Tribunal, to enable the Tribunal to handle its increased workload. The $64 million budget was approved following Fifth Committee discussions chaired by Canada. This has enabled the Tribunal to hire more personnel. On June 12, 1998, the ICTY inaugurated its third courtroom.

Kosovo: Following the outbreak of violence in Kosovo, the Chief Prosecutor issued a press release noting that the jurisdiction of the Tribunal extends to violations of humanitarian law in the territory of the former Yugoslavia since 1991, therefore including the events in Kosovo. She confirmed that the Tribunal is gathering information and evidence and monitoring that situation. However, this investigation has been seriously undermined by the Government of the Federal Republic of Yugoslavia's refusal to cooperate with the Tribunal's investigations in Kosovo despite Security Council Resolution no.1160. As a result, three indicted persons (Mile Mrksic, Miroslav Radic, and Veselin Sljivancanin) from the F.R.Y. who have been charged with serious violations of international humanitarian law have not been arrested almost three years after the issuance of arrest warrants.

The Government of Canada strongly supports the Tribunal, as we regard its work as essential in ending the cycle of impunity and violence. If indictees are not removed from their communities, their influence remains unchecked, justice will not be seen to be done, and Dayton's multicultural vision of Bosnia cannot be a real proposition. Canada has consistently advocated an active stance by the international community promoting the apprehension of indicted suspects, and we are pleased with the progress made in recent months in bringing war criminals to justice.

Canadian package of assistance: In December 1997, in response to the surge in the demands upon the Tribunal, Canada announced a package of assistance to the Tribunal. The package included: (1) a $400,000 contribution for the exhumation of mass grave sites, (2) an offer of $200,000 to assist with the construction of the third courtroom, if necessary, (3) the secondment of RCMP investigators, (4) a list of names of Canadians with qualifications and expertise most needed by the Tribunal, and (5) commencement of negotiations for a witness relocation Memorandum of Understanding. The package brings Canada's total voluntary contribution to the Tribunal to $1,800,000.

Amicus brief on subpoena issue: In September 1997, Canada and New Zealand submitted a joint brief to the Tribunal, supporting the power of the Tribunal to issue orders for the production of evidence to states and individuals. This power had been challenged by Croatia in the course of Tribunal proceedings. The Appeals Chamber confirmed that the Tribunal does have authority to issue orders to states for the production of evidence, although the controversial label "subpoena" was not used.

b) International Criminal Tribunal for Rwanda

The International Criminal Tribunal for Rwanda ("ICTR" or "the Tribunal") was established by UN Security Council resolution 955 (1994) to prosecute individuals alleged to have committed serious violations of international humanitarian law, including genocide, war crimes, and crimes against humanity. The Tribunal itself (the Chambers and Registry) is based in Arusha, Tanzania, whereas the Office of the Prosecutor, headed by the Deputy Prosecutor, is in Kigali, Rwanda. The ICTR and the International Tribunal for former Yugoslavia share the same Chief Prosecutor, Madame Justice Louise Arbour, as well as the same Appeals Chamber.

Following the transfer of indicted persons from Switzerland and Cameroon, and the dramatic arrest and transfer of nine persons from Kenya in July and August 1997, the Tribunal now has twenty-three people in custody in Arusha. Another indicted person was in custody in the United States, but was released in December 1997 after a trial judge declared the extradition legislation

unconstitutional (U.S. authorities may appeal). Four trials are now underway, involving five accused and one has been convicted. The Tribunal handed down its first judgement in the Akayesu trial on September 2, 1998, as Jean-Paul Akayesu was found guilty of genocide.

Canada has provided $1 million in voluntary contributions, and several Canadians are working for the Tribunal in a variety of capacities.

REFORME DE LA LOI SUR L'EXTRADITION

En mai 1998, le ministre de la Justice déposait en Chambre le projet de loi C-40 concernant l'extradition. Ce projet de loi est destiné à remplacer la Loi sur l'extradition, L.R., ch. E-23, et la Loi sur les criminels fugitifs, L.R., ch. F-32, qui régissent actuellement l'extradition au Canada. Il vise à simplifier la procédure d'extradition, à la rendre uniforme, plus moderne et conforme aux pratiques internationales. La deuxième lecture du projet de loi a eu lieu les 8 et 9 octobre 1998.

Il s'agit d'une réforme majeure dont un des éléments clé prévoit l'extradition d'individus accusés de crimes de guerre et de crimes contre l'humanité aux tribunaux pénaux internationaux, notamment le Tribunal pénal international pour l'ex-Yougoslavie et le Tribunal pour le Rwanda. Le projet de loi permettra également la désignation de la Cour pénale internationale en tant que tribunal auquel l'extradition pourra être accordée, une fois la Cour opérationnelle.

Le Canada est un ardent partisan des tribunaux pénaux internationaux sur l'ex-Yougoslavie et le Rwanda, qui furent créés par le Conseil de sécurité des Nations Unies dans le but de poursuivre des individus responsables de violations graves du droit humanitaire international, qui incluent les crimes de guerre, les crimes contre l'humanité et le génocide. Le Canada a également joué un rôle de premier plan dans l'élaboration des statuts de la Cour pénale internationale, un processus qui s'est soldé par un retentissant succès diplomatique dans le cadre de la Conférence de Rome en juillet 1998.

Le régime canadien d'extradition existant ne permet toutefois pas au Gouvernement du Canada d'extrader des individus aux tribunaux internationaux, aucune désignation à cet effet n'étant permise dans les lois citées plus haut. A l'heure actuelle, des individus mis en accusation par un tribunal pénal international et présents au Canada ne pourraient faire l'objet d'un ordre d'extradition vers ces tribunaux. Le projet de loi est destiné à combler ce vide et à assurer que le Canada puisse remplir ses obligations internationales et continuer de jouer un rôle de premier plan, tant au niveau humanitaire que dans la lutte contre la criminalité internationale.

Compte tenu de l'essor important des activités criminelles à l'échelle internationale, qui résulte partiellement d'une plus grande mobilité des individus et des biens ainsi que des nouvelles technologies qui font apparaitre de nouveaux types de crimes internationaux, le projet de loi vise aussi à simplifier la procédure d'extradition afin de combattre de manière efficace les crimes tels que le blanchiment d'argent, le trafic de drogue et d'armes, la fraude financière et les autres formes de criminalité internationale. Cette initiative s'ajoute aux efforts déployés par le Canada dans ce domaine, notamment dans l'élaboration d'une Convention sur le crime organisé transfrontalier sous l'égide de l'ONU. A cet effet,

le projet de loi prévoit un assouplissement des règles permettant la réception de preuves soumises au Canada à l'appui de demandes d'extradition, afin de rendre ces règles plus conformes aux pratiques internationales et de donner effet aux dispositions sur l'extradition.

En entreprenant la réforme de l'extradition, le Gouvernement du Canada entend se doter d'un instrument législatif moderne qui contribuera au renforcement de la coopération juridique internationale dans la lutte contre la criminalité.

OAS CONVENTION ON ILLICIT TRAFFIC IN FIREARMS

Mexico took the lead, within the Rio Group of Latin American states, on a new OAS *Convention on Illicit Trafficking in Firearms, Ammunition, Explosives and Other Related Materials*. The initiative gained political momentum when U.S. President Clinton, in summit meetings with Mexican President Zedillo and CARICOM countries agreed to the creation of a hemispheric instrument on firearms trafficking. The OAS Convention was approved after five rounds of negotiations on October 17, 1997.

The new instrument contains effective, practicable and implementable provisions for tightening the net on arms traffickers. Many provisions are patterned on the 1998 Vienna *Convention on Illicit Trafficking in Narcotic Drugs and Psychotropic Substances* and on the recently negotiated OAS *Convention on Corruption*.

The OAS Convention includes provisions for:

- a reciprocal system of import, export and transit authorizations which would preclude states parties from releasing exports to other states parties without corresponding authorizations from receiving states parties;

- mandatory marking of firearms at manufacture and upon import, as well as record-keeping, to facilitate tracing;

- discretionary marking of other military-style weapons;

- information sharing, law enforcement training and various other forms of mutual assistance and cooperation;

- extradition for offences covered by the Convention; and

- preambular language establishes a link between illicit arms trafficking and post-conflict situations and makes clear that lawful cross-border movements by individuals, e.g. for tourism and sport hunting, are not intended to be affected by the Convention.

The OAS instrument is the first international convention to address firearms trafficking. Discussions are now underway at the UN Crime Commission to include a Protocol on Firearms in negotiations on a Draft Convention on Transnational Organized Crime, for which the OAS Convention will likely serve as a blueprint.

CONVENTION FOR THE SUPPRESSION OF TERRORIST BOMBINGS

At the initiative of the P-8, a Working Group of the UN Sixth (Legal Affairs) Committee was tasked (in GA Resolution 51/210) to elaborate a *Convention on the Suppression of Terrorist Bombing Offences* (CSTB). Canada took an active role in the drafting of the initial P-8 text that formed the platform of discussion in the Sixth Committee. DFAIT's Legal Adviser, Philippe Kirsch, was elected to chair the Working Group, which had its first meeting in New York from February 24 to March 7 and its second from September 22 to October 3.

The text remained incomplete following the Fall meeting because of an impasse concerning a proposed exemption from the Convention for the "military forces of a state". At the request of a number of delegations, Canada continued to chair, informally, efforts within the Sixth Committee to reach a compromise solution. This was finally achieved and the final text was approved by the UN General Assembly on December 15, 1997. The Convention opened for signature in New York on January 12, 1998.

Under the Convention, states parties agree, *inter alia*, to criminalize new international offences; namely, the intentional targeting of public places, government or infrastructure facilities or transportation systems with explosive or other lethal devices, including chemical or biological agents and toxins (both attacks resulting in death or serious injury and those aimed at extensive destruction of property are included). States parties further agree to take jurisdiction over offences committed abroad, e.g. by or against nationals, or government facilities such as embassies and to prosecute offenders or extradite them to another state party.

The CSTB is the first counter-terrorism instrument negotiated in the United Nations to include a provision removing the political offence exception to extradition. It is also the first not to require a direct international nexus in the offence itself. As a result, even *prima facie* domestic terrorist offences such as the Oklahoma bombing would trigger the CSTB obligations provided that the suspected perpetrator is found in the territory of another state party.

The Convention was signed by Canada, together with the majority of G-8 countries, on the day it opened for signature. Canada is currently in the process of reviewing existing legislation to determine what, if any, amendments may be required prior to ratification.

DRAFT CONVENTION FOR THE SUPPRESSION OF ACTS OF NUCLEAR TERRORISM

At the initiative of the Russian Federation, an Ad Hoc Committee of the UN Sixth (Legal Affairs) Committee was tasked with elaborating a *Convention for the Suppression of Acts of Nuclear Terrorism.* This Ad Hoc Committee, established by resolution 51/210 of December 17, 1996, met in February 1998 to debate various options that could be envisaged regarding the form of an instrument that might be adopted for the repression on nuclear terrorism. The Committee also reviewed in detail the provisions of a draft Convention proposed by the Russian Federation.

Discussions continued in September/October 1998 under the auspices of the Working Group established by General Assembly resolution 51/210. Both the Ad Hoc Committee and the subsequent Working Group were chaired by DFAIT's Legal Advisor, Philippe Kirsch. The discussions of the Working Group focussed primarily on those articles concerning:

- definitions of materials and offences to be covered by the new instrument,
- application and scope of the new instrument, and
- the return of materials - methodology and responsibility of states parties concerned.

Much of the substance of the remaining articles was modelled on corresponding articles of the recently agreed *Convention on Terrorist Bombing Offences*.

On October 9, 1998, the Working Group decided to refer to the Sixth Committee the report prepared by the Friends of the Chairman setting out proposed wording for the new draft Convention. This report was based on comments and proposals made by delegations during their four weeks of deliberations, though it should be noted that several delegations have expressed concerns on certain provisions of the report, including the scope of application. This new legal instrument would:

- require states parties to criminalize offences relating to use, possession, threat to use, and attempt to possess or use radioactive material,
- require states parties to take jurisdiction over such offences, and

- provide for cooperation between parties relating to, *inter alia*, return of nuclear material and exchange of information.

CONVENTION DE L'OCDE SUR LA LUTTE CONTRE LA CORRUPTION D'AGENTS PUBLICS ÉTRANGERS DANS LES TRANSACTIONS COMMERCIALES INTERNATIONALES

La corruption menace la règle de droit, la démocratie et les droits de la personne. Elle mine le principe de bonne gouvernance, menace la stabilité des institutions démocratiques et sape les fondements moraux de la société. La corruption fausse également le commerce international et la libre concurrence, et elle entrave le développement économique, surtout dans les pays en voie de développement.

La corruption des agents publics est l'un des principaux problèmes du commerce et de l'investissement international et l'OCDE y attache beaucoup d'importance. L'organisation, qui regroupe 29 membres, est la principale tribune de politique économique des démocraties industrialisées les plus avancées. Lors de la réunion des ministres de l'OCDE de mai 1997, les participants ont demandé la négociation d'une convention exécutoire sur la corruption d'agents publics étrangers avant la fin de 1997. Ils ont recommandé que les pays membres soumettent à leurs législatures des propositions législatives criminalisant ce type de corruption, et les fassent adopter d'ici la fin de 1998. Les chefs d'État au Sommet des Huit qui se tenait à Denver en juin 1997, ont fait une déclaration dans laquelle ils exprimaient leur satisfaction face aux engagements des ministres de l'OCDE.

Les négociations relatives à la Convention de l'OCDE se sont terminées le 21 novembre 1997. Le Canada a signé la Convention sur la lutte contre la corruption d'agents publics étrangers dans les transactions internationales, à Paris, le 17 décembre 1997. Le dernier Sommet des Huit à Birmingham, en Angleterre, au mois de mai 1998, attacha beaucoup d'importance à l'adoption à la ratification de cette Convention.

L'objectif de la Convention est de criminaliser la corruption d'agents publics étrangers dans la conduite de transactions internationales, conformément à certaines dispositions communes à toutes les parties, de façon à garantir l'équivalence fonctionnelle entre toutes. La Convention exige aussi la coopération multilatérale, la surveillance et le suivi.

En mettant en oeuvre cette Convention, le Canada donnera suite aux engagements pris à l'OCDE et lors du Sommet de Denver de juin 1997. La mise en oeuvre de la Convention permettra surtout la réduction de la corruption, un problème sérieux affectant le commerce international et le développement. En outre, cela aidera les Canadiens qui font des affaires à l'étranger et contribuera à promouvoir le bon gouvernement, la démocratie, la règle de la primauté du droit et les droits de la personne.

OPTIONAL PROTOCOL ON CHILDREN IN ARMED CONFLICT

A working group of the UN Commission on Human Rights has met four times since 1994 to draft an Optional Protocol to the Convention on the Rights of the Child. The fourth session of this working group has taken place on February 2-10, 1998.

The Convention on the Rights of the Child provides that states parties shall take all feasible measures to ensure that persons who have not attained the age of 15 do not take a direct part in hostilities (combat) and that states parties shall refrain from recruiting into their armed forces any person who has not attained the age of 15 (article 38(2) and (3)). The same norm is found in the Geneva Conventions.

The main objectives of the Optional Protocol are to raise the age for participation in hostilities and the age of recruitment. Another objective is to prevent the recruitment and use of children by non-governmental armed groups.

In the negotiations, there are three principal outstanding issues:

- the minimum age for participation in hostilities -- the majority of states could support 18, except a handful of countries;

- the minimum age for voluntary recruitment -- the current draft text contains options ranging from 16 to 18; and

- whether there should be any exceptions to the minimum age for recruitment -- the current draft text could provide for exceptions for training.

The Working Group has agreed, *ad referendum*, that the minimum age for compulsory recruitment (conscription) should be 18. There is also broad support for a provision that would require parties to the Optional Protocol to take all feasible measures to prevent the recruitment of persons under the age of 18 by non-governmental armed groups.

Working groups of the Commission on Human Rights work on the basis of consensus. It has become clear that it will not be possible to reach a consensus that will satisfy many states participants seeking to preserve the status quo applicable to their armed forces on one or more of the above issues.

Canada has been very involved in the drafting and supported the early conclusion of a good optional protocol. Canada supports 18 as the minimum age of involvement in hostilities. On the age of recruitment, Canada is currently examining its domestic legislation to ensure that we are in a position to ratify a strong optional protocol once adopted at the UN.

At the last meeting of the working group, it was impossible to achieve a consensus and it appeared that the text would have to be considerably weakened to accommodate the domestic situation of every countries. An NGO coalition was formed with the objective of getting together a group of countries to support the development of a protocol setting the age of 18 for both participation and recruitment. The next meeting of the working group will take place in early 1999 and it is hoped that the text can be finalized and adopted in the year 2000.

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LAW OF THE SEA AND FISHERIES LAW

a) UN Agreement on Straddling Stocks

The adoption, on August 4, 1995, of the UN *Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of December 10, 1982, relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks* brought to a successful conclusion six years of effort by Canada to fill the gaps in the United Nations Convention on the Law of the Sea (UNCLOS) concerning high seas fishing.

Canada was one of twenty-five states which signed the Agreement when it was opened for signature on December 4, 1995. The Agreement will come into force after thirty states have ratified it. Fifty-nine (59) states have now signed the Agreement and eighteen (18), including the United States and the Russian Federation, have deposited their instruments of ratification. Ratification is a priority for Canada. Canada intends to deposit its instrument of ratification once the legislation to implement it in domestic law has been adopted. The bill to do so (Bill C-27) was tabled in the House of Commons in December 1997 and went through second reading in April 1998. The bill is currently under consideration by the House Standing Committee on Fisheries. Implementing regulations will also be required.

b) Développements à l'Autorité internationale des fonds marins

L'Autorité internationale des fonds marins (AIFM) est une organisation internationale autonome établie en vertu de la *Convention des Nations Unies sur le droit de la mer de 1982 (UNCLOS)* et de l'*Accord de 1994 relatif à l'application de la partie XI de la Convention des Nations Unies sur le droit de la mer.* Ces accords créent un régime international pour l'exploitation minière des grands fonds marins à l'extérieur de la juridiction nationale. L'AIFM est l'organisation par le biais de laquelle les États parties à la Convention organisent et contrôlent les activités dans la zone. L'AIFM a été établie le 16 novembre 1994, au moment de l'entrée en vigueur de la Convention de 1982.

En août 1997, l'AIFM a approuvé des plans de travail pour les activités d'exploration de sept « investisseurs pionniers enregistrés » d'un certain nombre de pays, dont l'Inde, la France, la Chine et la Fédération de Russie. Depuis un an, l'AIFM se concentre sur l'élaboration d'un code minier devant régir les activités de prospection et d'exploration dans les fonds marins.

Bien qu'il ne soit pas encore partie à l'UNCLOS, le Canada a participé à toutes les réunions de l'AIFM à titre de membre provisoire. Le Canada a joué un rôle actif en présidant les séances d'un groupe de pays faisant l'exploitation minière des fonds marins -- le G-10 -- pour coordonner les approches des discussions au Conseil et à l'Assemblée de l'AIFM. En mars 1998, le Canada a été élu au Conseil. Cette décision prendra effet le 1er janvier 1999.

c) Northwest Atlantic Fisheries

The *Convention on Future Multilateral Cooperation in the Northwest Atlantic*, which came into force in 1979, established the Northwest Atlantic Fisheries Organization (NAFO). NAFO's primary objective is to contribute, through consultation and cooperation, to the rational management and conservation of the fishery resources of the NAFO Regulatory Area and to promote to this end scientific research and cooperation among contracting parties.

At NAFO's 20th Annual General Meeting in Lisbon in September 1998, it was agreed that permanent 100% observer coverage would be adopted for all fishing vessels in the NAFO Regulatory Area. As a result, fishing in the northwest Atlantic will continue to be effectively monitored and controlled. NAFO also decided to continue serveral moratoria on groundfish fisheries as well as a moratorium on fishing 3LNO shrimp on the Grand Bank, a measure which will favour the recovery of Canada's depleted groundfish stocks. Finally, NAFO members accepted that scientific advice provided by the Scientific Council would be the basis for fisheries management decisions about each of the straddling stocks.

d) Pacific Salmon Treaty

The implementation of the 1985 *Pacific Salmon Treaty* (PST) and the accompanying Memorandum of Understanding (MOU) has been a source of strong disagreement between Canada and the USA. Under the Treaty, each party must conduct its fisheries and salmon enhancement programmes so as to prevent overfishing and provide for optimum production. Each should receive benefits equivalent to the production of salmon originating in its waters.

Canada-USA stakeholder negotiations reached an impasse in spring 1997. To reinvigorate the process, Canada and the USA agreed to appoint national representatives to meet with stakeholders and government officials and prepare a report. Dr. David Strangway (Canada) and William Ruckelshaus (USA) recommended in a joint report in January 1998: 1) the negotiation of interim fishing arrangements for up to two years; 2) the development of a practical framework for implementing Article III (on conservation and equity) of the Treaty; and 3) a review of the Pacific Salmon Commission.

Through the spring of 1998, Canadian and American Chief Negotiators (Don McRae and Roberts Owen) met to discuss northern (B.C./Alaska) and southern (B.C./Washington/ Oregon) fisheries. In the south, Canada and the USA agreed, on July 3, 1998 to interim fisheries arrangements for Fraser River sockeye. In the north, however, negotiations on interim arrangements collapsed when Alaska would not match Canada's coho conservation measures in the northern boundary area. The Chief Negotiators are expected to resume discussions on long-term arrangements for the PST in the fall of 1998.

e) L'affaire de la compétence en matière de pêcheries soumise à la CIJ

Le 3 mars 1995, le Canada a ajouté l'Espagne et le Portugal à la liste des États du pavillon dont les navires pouvaient être arraisonnés dans la zone de réglementation de l'Organisation des pêches de l'Atlantique nord-ouest conformément *à la Loi et au Règlement sur la protection des pêcheries côtières*. Le 9 mars 1995, conformément à la Loi, le Canada a arraisonné le navire de pêche espagnol « Estai ». Le 28 mars 1995, l'Espagne a soumis une requête à la Cour internationale de justice alléguant que les actions du Canada étaient contraires au droit international.

La Cour examine actuellement la question de sa compétence pour entendre l'affaire. L'Espagne et le Canada ont fait des déclarations, conformément à l'article 36(2) du Statut de la Cour, acceptant la juridiction obligatoire de la Cour. Mais la déclaration du Canada contient une réserve excluant de la juridiction de la Cour les « différends auxquels pourraient donner lieu les mesures de gestion et de conservation adoptées par le Canada pour les navires pêchant dans la zone de réglementation de l'OPANO, telle que définie dans la *Convention sur la future coopération multilatérale dans les pêches de l'Atlantique nord-ouest, 1978,* et l'exécution de telles mesures.»

L'Espagne et le Canada ont déposé leur mémoire en septembre 1995 et en février 1996 respectivement, et la Cour a tenu des audiences en juin 1998. La seule question examinée par la Cour était celle de sa compétence. La décision de la Cour devrait être rendue d'ici la fin de 1998.

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ENVIRONMENTAL LAW

a) Accord nord-américain de coopération dans le domaine de l'environnement (ANACE)

L'ANACE, qui est « l'accord environnemental additionnel » à l'ALENA, est entré en vigueur le 1er janvier 1994. Ses parties sont le Canada, les États-Unis et le Mexique. L'ANACE vise à protéger l'environnement nord-américain en veillant à ce que chaque partie applique efficacement ses lois environnementales. L'article 14 de l'ANACE dispose que le Secrétariat peut préparer un "dossier factuel" relativement à une allégation qu'une partie omet d'assurer l'application efficace de sa législation de l'environnement.

Lors de la dernière séance ordinaire du Conseil de la Commission de coopération environnementale (CCE) tenue en juin 1998 à Mérida, au Yucatán, le Comité consultatif public mixte (CCPM) a reçu du Conseil le mandat de mener un examen public des Lignes directrices révisées relatives aux communications sur les questions d'application visées aux articles 14 et 15 de l'ANACE. Les Lignes directrices révisées visent à mieux aider les citoyens à préparer des communications sur des questions d'application couvertes par l'Accord. Le CCPM a affiché les Lignes directrices révisées sur le site web de la Commission et demande les vues et les recommandations du public pour fonder ses avis au Conseil.

Quatre communications impliquant le Canada sont actuellement sous consideration en vertu de l'article 14. Elles concernent : 1) la protection de l'habitat du poisson contre les dommages causés par des barrages hydro-électriques en Colombie-Britannique; 2) l'application des lois environnementales en ce qui concerne les producteurs de porc du Québec; 3) l'application et l'exécution générales des articles de la Loi sur les pêches concernant la protection des habitats et la Loi canadienne sur l'évaluation environnementale (LCEE); et 4) l'application de certains articles de la Loi sur les pêches visant à protéger le poisson et son habitat des effets environnementaux négatifs de l'industrie minière en Colombie-Britannique. Un dossier factuel est actuellement préparé pour l'affaire des barrages hydro-électriques; le gouvernement a soumis ses réponses au Secrétariat sur les communications concernant l'affaire du porc et celle impliquant la Loi sur les pêches et la LCEE; le Secrétariat de la CCE examine encore l'autre communication concernant l'habitat du poisson et l'industrie minière en Colombie-Britannique pour déterminer si une réponse du Canada est justifiée.

b) Accord de coopération dans le domaine de l'environnement entre le gouvernement du Canada et le gouvernement de la République du Chili

L'Accord de coopération dans le domaine de l'environnement entre le Canada et le Chili, un « accord additionnel » à l'Accord de libre-échange entre le Canada et le Chili, est entré en vigueur en juillet 1997. L'Accord reprend essentiellement les dispositions de l'ANACE et souligne l'engagement des deux parties de mener un programme de travail coopératif et de mettre en oeuvre des mesures visant l'application efficace de leurs lois environnementales.

La Commission canado-chilienne de coopération environnementale, qui s'inspire du modèle de la Commission de l'ANACE, sera officiellement établie le 9 novembre 1998, date à laquelle la composition des secrétariats nationaux et des divers comités établis conformément à l'Accord devrait aussi être annoncée.

c) Climate Change

Negotiations with the objective of reaching an agreement on commitments for greenhouse gas emission reductions beyond the year 2000 led to the adoption of the Kyoto Protocol at the Third Conference of the Parties to the Framework Convention on Climate Change (FCCC), held in December 1997 in Japan. Canada signed the Kyoto Protocol in April 1998; as of August 25, there were 50 signatories. The Protocol will enter into force when 55 parties representing 55% of global greenhouse gas emissions ratify. There have been no ratifications to date.

The Protocol contains greenhouse gas emission reduction commitments aimed at reducing global emissions by at least 5% below 1990 levels in an initial commitment period spanning 2008-2012 (Article 3.1). These commitments, addressed to developed countries and countries with economies in transition ("Annex I Parties"), can be met through net changes in greenhouse gas emissions from sources and removals by sinks resulting from certain types of land-use change and forestry activities (Article 3.3). The Protocol does not introduce emission reduction commitments for developing countries. Canada committed to reducing its aggregate emissions by 6% from 1990 levels (Annex B).

A number of "flexibility mechanisms" are outlined in the Protocol, intended to allow parties to choose the most efficient and cost-effective routes towards emission reductions and/or enhancement of emissions sinks. Thus, the Protocol allows for joint implementation (Article 6), the use of a clean development mechanism (Article 12) and emissions trading (Article 17). The common denominator of all flexibility mechanisms is that they involve transfers of emission rights or emission reduction credits among Protocol parties. While international emissions trading involves transfers of portions of their emissions allowances

among parties, joint implementation and the clean development mechanism involve transfers of emission reduction credits generated by specific projects undertaken for this purpose. While joint implementation and emissions trading takes place among Annex I parties, the clean development mechanism also involves developing countries.

Discussions have begun on a variety of issues in need of further clarification and guidance before the first meeting of the Protocol parties upon entry into force. Initial negotiation of guidelines and requirements for the use of the flexibility mechanisms got underway during 1998. Discussions have also taken place on considering, under Article 3.4, the inclusion of sinks related activities other than those listed in Article 3.3 for the purposes of meeting emission reduction commitments (*e.g.* soils sinks activities). A further topic of discussion is the development of "effective and appropriate" compliance procedures and mechanisms, to be approved by the first meeting of the parties to the Protocol (Article 18). Canada has also been actively involved in discussions on greater involvement of developing countries. All of the above-mentioned issues will be among the items on the agenda of the Fourth Conference of the FCCC Parties, to be held in Buenos Aires in November 1998.

d) Biodiversity

Negotiations are underway for a global agreement on the safe transfer, handling and use of living modified organisms. These negotiations are conducted under the auspices of the Biodiversity Convention and aim at the adoption of a Biosafety Protocol to the Convention. The negotiations are focused on the transboundary movement of living modified organisms resulting from modern biotechnology that may have adverse effect on the conservation and use of biological diversity. The centerpiece of the Protocol is an "advanced informed agreement" (AIA) regime, requiring the notification of an intended transboundary shipment of living modified organisms and the assessment of associated risks before the receiving state permits import. The fourth and fifth sessions of the *Ad Hoc* Working Group on Biosafety took place in Montreal in February and August 1998. At the fifth session, the draft text of the Protocol was significantly consolidated and streamlined. However, differences remain regarding many of the key negotiating issues. These include issues related to the scope of the Protocol and the AIA regime, the allocation of responsibilities between importing and exporting states, and between importers and exporters, the need for a liability regime, and capacity building. Nonetheless, the negotiations on the Protocol are expected to conclude at the sixth session of the Working Group, and the Protocol would then be adopted by an extraordinary Conference of the Parties to the Biodiversity Convention, both to be held in Colombia in February 1999.

e) Convention on Prior Informed Consent (PIC)

Concerns about the growth of international trade in chemicals during the 1960s and 1970s led to the development of two voluntary codes of conduct, one under the Food and Agriculture Organization of the United Nations (FAO) (dealing with the distribution and use of pesticides) and one under the United Nations Environment Programme (UNEP) (dealing with international trade in chemicals). These guidelines involve a PIC voluntary procedure, which is a formalized system used to obtain and disseminate decisions of countries regarding the import or the transit of chemicals covered by the procedure. The goal is to promote shared responsibility between exporting and importing countries with respect to the protection of human health and the environment from the harmful effects of certain chemicals and pesticides that are being traded internationally. Canada has supported the PIC procedure for years and has been actively implementing it as part of its commitment to both voluntary instruments.

Negotiations under the auspices of UNEP and FAO to develop a legally binding instrument for the application of the PIC procedure for certain hazardous chemicals and pesticides in international trade, based on the two existing voluntary instruments, were finally completed in March 1998. A final text was adopted in Rotterdam on September 11, 1998, and the "Rotterdam Convention" is now open for signature and ratification. Canada plans to sign before the end of the year.

As the Rotterdam Convention will enter into force only 90 days after the 50th ratification instrument is deposited, a resolution on interim arrangements was adopted in Rotterdam in order to ensure the continued operation of the voluntary procedure and to prepare for the rapid and effective operation of the Convention, once it comes into force. Those interim arrangements took effect on the date the Convention was opened for signature and will remain in effect until its entry into force.

f) United Nations Economic Commission for Europe (UNECE) Convention on Long-range Transboundary Air Pollution (LRTAP): Protocol on Persistent Organic Pollutants (POPs) and Negotiations for a Global Treaty on POPs

In recent years, there has been a dramatic growth in chemical manufacturing and other human activities that result in the release of toxic pollutants. Many of these activities are essential to modern society; but they can also pose a serious threat to human health and the environment. Particularly challenging is a group of chemicals known as "persistent organic pollutants", or POPs. POPs are chemicals that are used as pesticides or in industry and that, to varying degrees, persist in the environment, accumulate in fatty tissues and are able to move long distances through the atmosphere.

A Protocol to the LRTAP Convention dealing with POPs was adopted in June 1998, by members of the UNECE (Eastern and Western Europe, the U.S. and Canada) and is now open for signature and ratification. Canada has signed the Protocol and plans to ratify it shortly. This Protocol is designed to address the serious concerns that UNECE countries have about the effects of POPs resulting from their long-range atmospheric transport. Once in force, it will require parties to implement effective measures to control, reduce or eliminate discharges, emissions and losses of POPs. Canada is particularly concerned about the impact of POPs in the Arctic and has played an important role in the preparation and development of this Protocol.

As POPs circulate globally, no country acting alone, or even regional group of countries, can protect its citizens or environment from risks. Recognizing this, governments have agreed to negotiate a global treaty under the auspices of UNEP using the regional Protocol as a point of reference. The first negotiating session took place in Montreal in June 1998 and it is anticipated that negotiations will be completed by the end of 1999.

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PLANT GENETIC RESOURCES FOR FOOD AND AGRICULTURE

Negotiations have been taking place since 1994 to revise the International Undertaking on Plant Genetic Resources for Food and Agriculture (IUPGR) under the auspices of the United Nations Food and Agriculture Organization (FAO). The latest round took place in Rome in June 1998.

The revision exercise is intended to harmonize the IUPGR with the *United Nations Convention on Biological Diversity* and to provide a general strategy for international cooperation for the conservation and sustainable use of plant genetic resources for food and agriculture.

The Consolidated Negotiating Text contains scientific and technical provisions relating to cooperation among countries to promote the conservation, exploration, collection, characterization, evaluation, documentation and sustainable use of plant genetic resources for food and agriculture. However, the negotiations centered so far around the following main issues, which are proving more controversial:

- the question of the terms of access to plant genetic resources;

- the sharing of benefits from the use of those resources, as envisaged in the *Convention on Biological Diversity*;

- the recognition of the contribution of farmers to the conservation and development of plant genetic resources for food and agriculture in the form of "farmers' rights".

Like many other countries, Canada has an interest in ensuring that plant genetic resources for food and agriculture are preserved and made easily available in order to promote the development of new crop varieties and to reduce the dangers which could result from a narrow crop genetic base. As such, Canada has been an important player in the negotiations of the revised IUPGR.

The next round of negotiations will take place in winter or spring 1999.

JOINT CONVENTION ON THE SAFETY OF SPENT FUEL MANAGEMENT AND THE SAFETY OF RADIOACTIVE WASTE MANAGEMENT

Negotiations at the International Atomic Energy Agency (IAEA) led to the adoption on September 5, 1997, of the *Joint Convention on the Safety of Spent Fuel Management and the Safety of Radioactive Waste Management*.

The Convention strengthens the existing system of international nuclear safety standards and norms, with the specific objectives of ensuring that "during all stages of spent fuel and radioactive waste management, there are effective defences against potential hazards so that individuals, society and the environment are protected from harmful effects of ionizing radiation..." and to prevent accidents with radiological consequences should they occur during any stage of spent fuel or radioactive waste management.

Among other things, the Convention obliges states to:

1. take certain measures relating to safety in the siting, the design and construction, and the operation of spent fuel and radioactive waste facilities, as well as the decommissioning of such facilities;

2. take steps to ensure protection against operational radiation and to prevent unplanned releases of radioactive materials, and adopt emergency plans for radiological emergencies;

3. adopt a legislative and regulatory framework to govern the safety of spent fuel and radioactive waste management, and establish a regulatory body entrusted with the implementation of that framework; and

4. report on the measures they have taken to implement their obligations under the Convention.

There are also provisions relating to the transboundary movement of spent fuel and radioactive waste, and the rights and obligations of the state of origin of a shipment, the states of transit and the state of destination of the shipment.

Canada signed and ratified the Convention on May 7, 1998. For the Convention to enter into force, 25 states must ratify it, including 15 states each having an operational nuclear power plant. So far, three states have ratified the Convention, including Canada.

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IMPOSITION OF SANCTIONS AGAINST THE FEDERAL REPUBLIC OF YUGOSLAVIA

While most of the sanctions measures imposed against the Federal Republic of Yugoslavia were lifted with the implementation of the Dayton Peace Accords, the crisis in Kosovo in the spring of 1998 led to the imposition of new sanctions. The Serb authorities used excessive force against the civilian population of ethnic Albanians in the region, resulting in deaths, destruction of villages and displacement of people, with an outflow of refugees to neighbouring Albania. The international community reacted in two ways to impose sanctions against Yugoslavia.

On March 31, 1998, the United Nations Security Council, acting pursuant to Chapter VII of the United Nations Charter, adopted Resolution 1160 (1998), which called on all states to prevent the export, sale, supply or shipment of arms to the Federal Republic of Yugoslavia by their nationals, or from their territories or using their flag vessels or aircraft.

At a meeting of the foreign ministers of the G8 in London on May 9, 1998, Canada, France, Germany, the United Kingdom, the United States and the European Commission agreed to freeze funds held abroad by the Federal Republic of Yugoslavia and Serbian governments and stop new investments in Serbia.

To implement sanctions decided by the United Nations Security Council, Canada makes regulations pursuant to the *United Nations Act*, R.S.C. 1985, c.U-2. That Act provides that the Governor in Council may make regulations to comply with the international obligations imposed by resolutions of the Security Council pursuant to Article 41 of the United Nations Charter. The existing regulations (United Nations Federal Republic of Yugoslavia (Serbia and Montenegro) Regulations, SOR/93-211, as amended) were amended to enact the new sanctions measures mandated by the United Nations in Resolution 1160 (1998). The amendments to the Regulations (now retitled the United Nations Federal Republic of Yugoslavia Regulations) were enacted on July 28, 1998.

To meet Canada's political commitment at the G8 foreign ministers' meeting to impose further sanctions against Yugoslavia, regulations were imposed under relatively new legislation, the *Special Economic Measures Act*, S.C. 1992, c.17. The Act had only been used once before, to meet a call by the Organization of American States for economic sanctions against the regime in Haiti that ousted the government of President Aristide.

The *Special Economic Measures Act*, in section 4(1), authorizes the Governor in Council to make regulations in response to "a decision, resolution or recommendation of an international organization or association of states, of which Canada is a member, that calls on its members to take economic measures against a foreign state". The G8, represented in this instance by the foreign ministers, constitutes an "association of states, of which Canada is a member". The sanctions measures agreed to by Canada were enacted by the Special Economic Measures (Federal Republic of Yugoslavia) Regulations, also on July 28, 1998.

IMPLICATIONS OF CANADIAN PARTICIPATION IN THE NEW CIVIL INTERNATIONAL SPACE STATION

The major recent development in space law for Canada was the signing of the *Intergovernmental Agreement on the Civil International Space Station* in Washington, D.C., on January 29, 1998. In 1988, Canada, along with Japan, the United States and the member states of the European Space Agency, signed (but never ratified) the first Intergovernmental Agreement on the Civil International Space Station. In 1994, the Space Station partners agreed to invite Russia to enter negotiations in order to join the partnership.

Canada has a unique role since virtually the inception of the project in 1984, upholding the tradition of the CANADARM on the U.S. space shuttles. Our excellence in robotics was reaffirmed by the announcement that Canada would also supply the "hand" on the end of the new generation of CANADARM, the Special Purpose Dextrous Manipulator (SPDM). As a result of this investment, Canada will have the right to a three-month Canadian astronaut flight every three years, consistent with our investment in the project.

With the new Space Station, humanity will no longer be a temporary visitor in space (as was the case until now with short orbital or lunar flights). There will soon be a permanent human presence in space, one that will require a new legal regime. Until now, manned space objects were launched by a state (usually the United States or the Soviet Union/Russia). As a rule, the space object was deemed to be an extension of the launching state's sovereignty, where the launching state's laws had jurisdiction.

The new Space Station will be multinational. Each state-partner will have jurisdiction on its elements (that is, each state will have jurisdiction over the parts of the Station that it provides) and over its nationals operating on the Station. Unlike the other states that are providing complete components (the Japanese laboratory, the U.S. living quarters, etc.), Canada will provide a small yet vital element to the Station, the SPDM, the new robotic arm. Canadian legislation must therefore be amended to extend Canadian jurisdiction to the SPDM and to all Canadian nationals operating on the Space Station.

As a result, some Canadian laws may need to be amended, including:

- the *Criminal Code*, to extend the application of Canadian criminal jurisdiction into Outer Space;

- the *Immigration Act*, to facilitate the entry into and residence in Canada of foreign nationals to carry out functions necessary for the implementation of the Space Station Program;

- Canadian intellectual property legislation (e.g. the *Copyright Act*, the *Patent Act*) to protect the intellectual property rights of scientific discoveries made by Canadian nationals on board the Space Station.

New legislation will also be necessary to implement the cross-waiver of liability and funding aspects of the agreement.

NAFTA INVESTOR-STATE DISPUTE SETTLEMENT

Chapter Eleven of the North American Free Trade Agreement (NAFTA) establishes obligations of each of the NAFTA parties to investors of the other parties and provides a mechanism for settlement of disputes between investors and NAFTA parties in respect of such obligations. The substantive obligations to investors and the dispute-resolution process under Chapter Eleven are similar to provisions found in numerous other investment treaties that have been concluded between countries over the years, including Canadian foreign investment protection agreements and U.S. bilateral investment treaties.

The obligations to investors are contained in Section A of Chapter Eleven. Examples are obligations of a NAFTA party to provide to investments and investors of other NAFTA parties national or most-favoured nation treatment; an obligation not to impose requirements on investors or investments for domestic content or local preference; an obligation not to expropriate or take measures tantamount to expropriation of an investment except on certain conditions including payment of compensation.

Section B of Chapter Eleven provides a mechanism for dealing with disputes by investors that a NAFTA party has breached its obligations under Section A. The process envisages that the parties to a dispute attempt to settle a claim through consultation or negotiation. If an investor is to submit a claim to arbitration, the investor must first submit a notice of intent and then a notice of arbitration. Arbitration is by a three-person arbitral panel, and the panel must determine the dispute in accordance with the NAFTA and applicable rules of international law.

The rules applicable to the arbitration may be the ICSID (International Centre for the Settlement of Investment Disputes) Convention, the Additional Facility Rules of ICSID or the UNCITRAL (United Nations Commission on International Trade Law) Arbitration Rules, depending on the circumstances of the particular case. For example, Canada is not a party to the ICSID Convention; therefore, disputes involving Canada can only be submitted to arbitration under the ICSID Additional Facility Rules or the UNCITRAL Arbitration Rules. Chapter Eleven provides that the applicable arbitration rules govern the arbitration except to the extent that they are modified by Section B.

In the case of Canada, of the four notices of intent received to date, only one (a claim by Ethyl Corporation Inc.) has proceeded to the stage where a claim was submitted to arbitration. Ethyl Corporation's request for arbitration of its claim was made in April 1997 and an arbitral panel was constituted in September 1997. Ethyl Corporation filed its statement of claim in October 1997

alleging that legislation banning import and interprovincial trade in the gasoline additive methylcyclopentadienyl manganese tricarbonyl (MMT) prevented Ethyl from carrying on its business of importing and distributing MMT in Canada, contrary to a number of the obligations contained in Section A of Chapter Eleven. Canada filed its statement of defence in November 1997 refuting Ethyl's claim.

Canada raised a number of objections to the jurisdiction of the arbitral panel. It was contended that prerequisites in Section B to the submission of the claim to arbitration, and to Canada's consent to arbitration under Chapter Eleven, had not been met. Canada also maintained that the claim was not within the scope of Chapter Eleven for various reasons, including that it sought to recover damages allegedly occurring outside Canada.

In February 1998, the arbitral panel held a hearing on Canada's objections to the panel's jurisdiction. The panel made its award on jurisdiction in June 1998. In its award, the panel found that the prerequisites were "procedural" rather than jurisdictional, and that any failure of the claimant to meet them had either not prejudiced Canada or had since been cured. Canada's objections to jurisdiction based on the scope of application of Chapter Eleven were joined to the merits of the case.

The arbitration did not in fact proceed to a hearing on the merits, because Ethyl Corporation withdrew its claim in July 1998 as part of a resolution of all disputes associated with the MMT legislation, including the removal of the prohibition on import and interprovincial trade in MMT.

The resolution was prompted by a decision in April 1998 by a dispute-settlement panel established pursuant to the Agreement on Internal Trade (AIT). The panel found that the legislation was inconsistent with the AIT and recommended removal of the inconsistency. The AIT is an agreement between the Government of Canada and the governments of the provinces and territories of Canada having the objective of reducing and eliminating, to the extent possible, barriers to the free movement of persons, goods, services and investments within Canada. The challenge to the legislation under the AIT was made by the provinces of Alberta, Nova Scotia, Quebec and Saskatchewan.

On July 22, 1998, a notice of intent was served on Canada by S.D. Myers Inc., a U.S. corporation, alleging that an interim ban on the export of PCBs from Canada prevented Myers from obtaining PCB waste in Canada for disposal at its plant in Ohio, contrary to a number of provisions of Section A of Chapter Eleven. The issue has not proceeded to arbitration at this time.

To date, there has been no determination by any arbitral panel of the obligations of the NAFTA parties contained in Section A of Chapter Eleven.

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LAW OF INTERNATIONAL TRADE

a) International Trade Law Treaties

1. *Marrakesh Agreement Establishing the World Trade Organization* and associated treaties

The World Trade Organization (WTO) was created in 1994 to provide a common institutional framework for the conduct of international trade. It is essentially a council made up of representatives from all member states. It oversees all the treaties created at the conclusion of the Uruguay Round of Multilateral Trade Negotiations, including the *General Agreement on Tariffs and Trade, 1994*, the *General Agreement on Trade in Services*, and the *Agreement on Trade Related Aspects of Intellectual Property Rights*. Through the WTO, member states seek to implement the obligations created by these treaties. The WTO is a forum for negotiations and consultations, and it administers the dispute settlement procedures in instances where member states are unable to resolve their differences. It is also expected to cooperate with organizations such as the International Monetary Fund, with a view to achieving greater coherence in global economic policy.

2. *General Agreement on Tariffs and Trade, 1994*

While this is a treaty associated with the WTO Agreement, it merits separate mention as one of the most important trade law treaties applying to Canada. The GATT 1994 is a multilateral treaty applying to most of the world's countries that sets out the basic rules covering trade in most goods, and it provides the foundation for many of the obligations contained in the *North American Free Trade Agreement* (see below). It is a continuation of the original GATT of 1947, and is virtually identical to it in substance, although it is legally a distinct treaty. It is through the GATT that global tariffs have been lowered, and that such principles as "most favoured nation" treatment and "national treatment" have been universalized. See section B) below for brief introductions to these obligations. Note that the GATT does not apply to trade in services, but such trade has been covered since 1994 by the *General Agreement on Trade in Services* (GATS).

3. *North American Free Trade Agreement*

The NAFTA applies only to Canada, the United States and Mexico. It covers trade in most goods, including some not covered by the GATT. It includes trade in services, and it even sets limits on rules governing investment by nationals of other member states. It also requires most government procurement contracts to be open to bids from corporations of the other member states.

4. Bilateral Trade Agreements

Canada has recently concluded bilateral free trade agreements with Chile and Israel. These are smaller-scaled agreements modeled on the NAFTA.

b) Basic Principles of International Trade Law

The law of international trade is both wide-ranging and complex. A document such as this cannot properly cover even the basic principles of such a broad field. This discussion should therefore be seen only as an introduction to some of the most basic elements of the law of international trade.

1. "Most Favoured Nation" Treatment

This obligation is found in both the GATT and the NAFTA. Where Canada grants most favoured nation (MFN) status to another country, it is promising to treat that country's products or services no less favourably than it treats any other country's products or services. Thus, a preference granted to the goods of one country must be extended, immediately and unconditionally, to the like goods of all MFN countries. This is an important obligation, since the GATT requires that all member states accord each other's goods MFN treatment. Canada must thus extend any preference to most of the world's countries. Note, however, that there are exceptions for preferences accorded within the framework of a regional free trade association. The MFN principle generally applies to border measures like tariffs, although it also applies to measures affecting the internal sale, offering for sale, purchase, transportation, distribution and use of products. It can be applied to both goods and services; in addition, NAFTA extends it to investors from all NAFTA states.

2. National Treatment

This principle originates in the GATT 1947, which requires that internal law not be used to afford protection to domestic production. Internal law includes internal taxes and all laws and regulations affecting the internal sale, offering for sale, purchase, transportation, distribution or use of products. No imported goods shall be subject to internal taxes or charges in excess of those applied to like domestic products, and such taxes cannot be otherwise applied so as to afford protection to domestic production. NAFTA has expanded the concept for its own purposes. Under that agreement, the parties must extend national treatment to the investors and service providers of the other NAFTA parties. Treatment accorded to them shall be no less favourable than that accorded to Canadian investors and service providers.

3. Dumping

This is the practice of selling goods in a foreign market at prices below the normal value of the goods. Where this causes or threatens to cause damage to domestic industry, the importing country may impose an anti-dumping duty on those goods.

4. Subsidies and Countervailing Duties

A subsidy is money granted, directly or indirectly, by the government of a country on the manufacture, production or export of a product. Where a subsidy has been paid, the importing country may level a countervailing duty equal in amount to the subsidy, provided the subsidy causes or threatens to cause material injury to domestic production. Note that the WTO prohibits granting subsidies contingent on export performance or on the use of domestic over imported products.

5. Import and Export Restrictions

Trade law agreements seek to ban the imposition of qualitative restrictions on either imports or exports. Such restrictions include quotas, import or export licences and other measures, although they do not usually include duties, taxes or other financial charges.

6. Government Procurement

NAFTA requires the states parties to the agreement to open up government procurement to bids from corporations and individuals in other NAFTA states. This means that in certain circumstances federal government departments may be prevented from awarding a contract without seeking bids ("single sourcing"). Mexican and U.S. bids would have to be accorded the same treatment as Canadian ones. Procurement may also be subject to the WTO.

7. Technical Barriers to Trade

For trade law purposes, a technical regulation is a mandatory rule setting out product characteristics, production methods or related processes. A standard is essentially the same thing, but is not mandatory. Trade law requires that neither create unnecessary barriers to trade.

8. Intellectual Property Rights

Intellectual property rights are covered by both the WTO and NAFTA. They can be subject to the "most favoured nation" and "national treatment" obligations.

9. Exceptions

Trade law recognizes instances in which a country willnot be obliged to apply treaty obligations. Thus, both GATT and NAFTA provide that their provisions do not prevent, *inter alia*, the adoption of measures necessary to protect public morals, measures necessary to protect human, animal or plant life or health, or measures necessary for the protection of essential security interests.

10. Dispute Settlement

There are complex dispute settlement mechanisms built into GATT and NAFTA, and into the other multilateral agreements associated with the WTO. Very generally, these mechanisms work by having the parties first seek to negotiate an agreement. If negotiations fail, the parties may seek consultations with each other. If consultations also fail, the parties may resort to a binding dispute settlement procedure. Note, however, that a state cannot be forced to change its laws, even if they have been found to be contrary to a trade treaty. Where a state refuses to amend or withdraw an illegitimate measure, affected states are entitled to withdraw concessions of an equivalent value. Alternatively, the state with the nonconforming measure can pay compensation to affected states.

c) Current Issues

At the global level, Canada is taking part in the round of negotiations intended to lead to a multilateral agreement on investment (MAI). The MAI would impose disciplines on national rules governing foreign investment, and would prevent governments from discriminating against foreign investors. Canada already has some experience in this regard, since the NAFTA already imposes disciplines on investment rules. In 1999, we will also be revisiting all the WTO agreements, as they come up for their first periodic review.

On a regional level, Canada is taking part in negotiations that are intended to lead to the creation of the Free Trade Area of the Americas (FTAA). The hope is that a NAFTA-like agreement will cover all of North and South America by 2005. Canada is also hoping to conclude a free-trade agreement with the European Free Trade Association (EFTA).

CANADIAN CASES IN INTERNATIONAL TRADE LAW

a) World Trade Organization Cases

1. Australia - Measures Affecting the Importation of Salmon

Canadian fresh, frozen and chilled salmonids have been denied entry to the Australian market since 1975, purportedly for animal health quarantine reasons. A WTO panel was established pursuant to Canada's request at the DSB meeting on April 10, 1997. The U.S., the EC, India and Norway participated as third parties. In its Final Report, issued to the parties on May 5, 1998 and circulated to WTO members on June 12, 1998, the panel found Australia's ban inconsistent with several provisions of the SPS Agreement. Australia filed a notice of appeal on July 22, 1998. The appeal was heard on August 21-22.

2. Brazil - Export Financing Programme for Aircraft

Under the *Programa de Financiamento as Exportacoes (PROEX)*, Brazil grants export subsidies in the form of interest rate equalization payments and export financing programmes to foreign purchasers of Brazil's Embraer aircraft. Canada and Brazil held consultations in Geneva on July 22, July 25, and November 4, 1996, in Brasilia on November 21-22, 1996, in Rio de Janeiro on June 8-9, 1998, and Washington D.C. on June 25-26, 1998, but these consultations failed to resolve the matter. Canada requested a panel alleging that the export subsidies under PROEX are inconsistent with Article 3 of the *Agreement on Subsidies and Countervailing Measures* (SCM Agreement). A panel was established pursuant to Canada's request at the DSB meeting on July 23, 1998. The U.S. and the EC have joined as third parties.

3. EC- Measures Affecting Livestock and Meat *(Hormones)*

The European Communities (EC) ban the importation of animals, and meat from animals, which have been administered certain hormones for purposes of promoting the growth of the animals. Canada alleged that the ban is inconsistent with Articles 2, 3 and 5 of the SPS Agreement, Article 2 of the TBT Agreement, Articles III or XI of GATT 1994, and Article 4 of the Agreement on Agriculture. The subject matter of this dispute is identical to the U.S. complaint in which Canada has made a Third Party representation. A panel was established pursuant to Canada's request on October 16, 1996. The final report of the panel was circulated to all WTO members on August 18. The report was favourable to Canada in finding the EC in violation of Articles 3.1, 5.1 and 5.5 of the SPS Agreement. On September 24, the EC appealed the panel report. The Appellate

Body report, which was issued on January 16, 1998, substantially modified the panel report. The Appellate Body upheld the violation found by the panel in respect of Article 5.1 but reversed the violations found by the panel in respect of Articles 3.1 and 5.5. At a meeting of the DSB on March 13, 1998, the EC stated its intention to implement the recommendations and rulings of the DSB, but negotiations between the EC, Canada and the United States failed to establish the "reasonable period of time" for the EC to bring itself into compliance. The parties submitted the dispute to arbitration. On May 27, the arbitrator decided that "the reasonable period of time" for the EC to implement the DSB's recommendations and rulings in this case is 15 months from the date of adoption of the Appellate Body and Panel Reports by the DSB (i.e., 15 months from February 13, 1998).

4. Dairy Export Pricing Milk TRQs

Following a Super 301 application by the U.S. dairy industry, on October 10, 1997 the U.S. requested consultations under Article XXII of the GATT on the export pricing mechanism used for sale of milk by provincial marketing boards. The same request also challenged Canada's tariff-rate quotas for consumer milk imports. These consultations were held in Geneva on November 19. New Zealand requested its own consultations with respect to the export pricing issue on December 29. These consultations were held on January 28, 1998. A single panel for both the U.S. and New Zealand complaints was established on March 25, 1998. Submissions will be exchanged in September - October and the first hearing is scheduled for October 19-20.

5. Canada - Measures Affecting the Export of Civilian Aircraft

On March 10, 1997, Brazil requested consultations with Canada pursuant to Article 4 of the *Agreement on Subsidies and Countervailing Measures* (SCM Agreement). Consultations were held in Geneva on April 30, 1997, but these consultations failed to resolve the dispute. Brazil requested a panel, alleging that certain programmes and measures maintained by Canada or its provinces are inconsistent with Article 3 of the SCM Agreement. A panel was established pursuant to Brazil's request at the DSB meeting on July 23, 1998. The U.S. and the EC have joined as third parties.

6. Korea - Liquor Taxes

A panel was established on October 13, 1997 in this matter at the request of the EC and the U.S. Korea was alleged to have a liquor tax system which resembles the tax system in Japan which was found to be inconsistent with Article III of the GATT. Canada reserved its third party rights, filed its third party submission and attended a session of the panel on March 6, 1998, to make oral submissions. The panel issued its final report to the principal parties on July 31,

1998. Third parties, including Canada, received a copy of the final report on September 18, 1998, indicating that Korea's liquor tax system was inconsistent with GATT's Article III.

7. Chile - Taxes on Alcoholic Beverages

A WTO panel was established, at the EC's request, concerning Chile's taxes on alcoholic beverages on November 19, 1997; Canada reserved its third party rights. Since the establishment of this panel, Chile has amended its liquor law in question. Consequently, both the U.S. and the EC asked for a new round of consultations, initiating a new dispute settlement process. Acting upon another EC request, a panel was established to take up the already established EC/Chile panel regarding the same matter (previous panel dealt with old legislation, this panel request deals with the new legislation). Canada, Peru and the U.S. reserved their third party rights. Mexico intervened to note its interest in this matter but it did not reserve its third party rights. Peru also intervened to express its interest (especially with regard to how it affects pisco) and requested that the panel also deal with various TRIPS issues. Chile responded by pointing out that the TRIPS provisions were not in the EC's requests for the establishment of a panel and, therefore, the panel would have no mandate to deal with these issues. A panel was constituted on June 25, 1998, and Canada's third party submission must be filed by October 1, 1998.

b) NAFTA Chapter 19 Cases Involving Canada

Reviewing Agency Determinations

1. Rolled Steel Plate from Canada

This case involves a SECOFI final anti-dumping duty determination on rolled steel plate originating in or exported from Canada which was appealed by Canadian producers. The panel decision was issued on December 17, 1997. The panel unanimously affirmed in part and remanded in part the agency's determination.

2. Corrosion-Resistant Carbon Steel Flat Products from Canada

This case involves a U.S. Department of Commerce final anti-dumping determination on corrosion-resistant carbon steel flat products from Canada. The panel was established on September 9, 1997. The panel decision was issued on June 4, 1998, remanding the matter to the U.S. Department of Commerce. A determination on remand was filed with the panel on September 3, 1998. Any participant who intends to challenge the determination on remand had up to September 23, 1998 to do so.

3. Concrete Panels from the United States

This case involves a final determination of material injury made by the Canadian International Trade Tribunal (the "CITT") respecting concrete panels, reinforced with fibreglass mesh, originating in or exported from the U.S. The hearing was held on May 28. The panel decision was issued on August 26, 1998, affirming the injury determination of the CITT.

4. Steel Wire Rod from Canada

Canadian exporters requested panel review of the U.S. Department of Commerce's affirmative countervailing duty determination on November 21, 1997. The panel has been suspended pending a decision of the U.S. Court of International Trade on the U.S. International Trade Commission's negative finding of injury.

5. Hot-Rolled Carbon Steel Plate from Mexico

Mexican exporters requested panel review of the Canadian International Trade Tribunal's finding of the threat of material injury on November 28, 1997. The panel decision is expected on October 9, 1998.

6. Prepared Baby Food from the United States

U.S. exporters and the Director of Investigation and Research, Competition Bureau, Industry Canada, requested panel review of the final determination of injury by the CITT respecting the dumping of prepared baby food from the United States on June 5, 1998.

7. Brass Sheet and Strip from Canada

Canadian exporters requested panel review of the final determination of injury by the U.S. Department of Commerce in the matter of the antidumping duty administrative review respecting brass sheet and strip from Canada on July 15, 1998.

8. Cold-Reduced Flat-Rolled Sheet Products of Carbon Steel from the United States

U.S. exporters requested panel review of the determination by the CITT respecting cold-reduced flat-rolled sheet products of carbon steel (including high-strength low-alloy steel) from the United States on September 1, 1998.