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

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PROJET DE DECLARATION UNIVERSELLE SUR LE GÉNOME HUMAIN ET LES DROITS DE L'HOMME

Un groupe d'experts indépendants de l'UNESCO, le Comité International de Bioéthique (CIB), à préparé au cours des dernières années un projet de déclaration visant la protection du génome humain et des droits de la personne face aux avancées de la science, sans toutefois restreindre indûment la poursuite des activités scientifiques bénéfiques à l'être humain.

La première rencontre des représentants et experts gouvernementaux ayant pour mandat d'examiner ce texte s'est tenue à Paris à l'UNESCO du 22 au 25 juillet au siège social de l'UNESCO. Un projet de déclaration modifié a été adopté par le groupe d'experts gouvernementaux en vue de son adoption formelle par les états membres à la Conférence générale de l'UNESCO qui aura lieu du 20 octobre au 14 novembre 1997.

La Déclaration énonce et détaille des principes dont plusieurs trouvent leur source en droit international de la personne. Entre autres, le principe de non-discrimination en raison des caractéristiques génétiques (art. 2 et 6), les principes de dignité humaine et de respect pour la diversité (2 et 18), le principe du consentement préalable éclairé (art.5), le principe établissant la primauté des droits de la personne sur la recherche et ses applications (art.10), l'interdiction des pratiques contraires à la dignité humaine tel le clonage humain (art.11), la liberté de recherche en tant que composante de la liberté de pensée (art.12), des principes visant les conditions d'exercice des activités scientifiques (art.13-16), ainsi que des principes visant la solidarité et la coopération internationale (17-19). On y prévoit de plus la promotion des principes de la déclaration (20-21), ainsi que la mise en oeuvre de ceux-ci entre autre via le CIB en consultation avec les groupes vulnérables (art.24).

Puisqu'il s'agit d'une déclaration, il importe de rappeler que cet instrument énonce des principes ayant une force morale persuasive pour les états mais qu'il ne s'agit pas de dispositions ayant force obligatoire. Il n'en demeure pas moins qu'advenant l'élaboration d'une éventuelle convention sur le sujet par l'UNESCO, il serait normal que la Déclaration serve de base à la rédaction du texte, d'où l'importance d'un examen sérieux des principes contenus et des termes utilisés.

Certaines préoccupations ont été exprimées par les groupes autochtones et les groupes représentant les intérêts des personnes ayant un handicap quant au manque de consultations effectives lors de la rédaction du texte initial par le CIB. Des

inquiétudes ont aussi été exprimées concernant les dangers d'adopter un texte trop permissif pour la science et insuffisant quant à la protection des droits de la personne.

Le Canada appuie l'adoption d'une déclaration acceptable pour tous qui serait cohérente avec les principes existants de droit de la personne et comportant un équilibre avec les objectifs de promotion de la recherche. Nous croyons que des progrès notables ont été réalisés en ce sens au cours des récentes négociations. Lors de la Conférence générale, nous chercherons à discuter entre autres de la question de la représentation au sein du CIB qui poursuivra des activités liées à la Déclaration. De plus, le Canada travaillera en vue de renforcer certains articles de la Déclaration et afin de permettre un processus de consultation effectif dans son suivi.

INTERNATIONAL CRIMINAL TRIBUNAL

Canada is a strong supporter of the International Criminal Tribunals for the Former Yugoslavia and Rwanda, which were established by the UN Security Council to prosecute individuals responsible for serious violations of international humanitarian law, including war crimes, crimes against humanity and genocide. The two Tribunals have the same Prosecutor, Madame Justice Arbour (formerly of the Ontario Court of Appeal), and also share an Appellate Chamber. The Yugoslav Tribunal is based in The Hague and the Rwandan Tribunal is based in Arusha, Tanzania.

a) International Criminal Tribunal for the former Yugoslavia

The International Criminal Tribunal for the former Yugoslavia was created by Security Council resolution 827 (1993) for the purpose of prosecuting persons responsible for serious violations of international humanitarian law on the territory of the former Yugoslavia. Canada has made financial contributions totalling over $1,000,000 to the Yugoslav Tribunal, and several Canadians are presently working for the Tribunal in a variety of capacities.

Since its inception, the most serious impediment to the effective functioning of the Tribunal has been the inability to obtain custody over suspects. In June 1997, suspected war criminal Dokmanovic was arrested in Eastern Slavonia in a joint operation between the United Nations Transitional Administration for Eastern Slavonia (UNTAES) and the Office of the Prosecutor. In July 1997, SFOR forces (the British SAS) detained suspected war criminal Kovacevic at a hospital in Prijedor. In a separate action, SFOR forces (also the SAS) approached and challenged suspected war criminal Drljaca. Drljaca fired at them, and SFOR troops returned fire in self-defence, as a result of which Drljaca later died. Canadians were not involved in these operations. All three men had been indicted in "sealed" or non-public indictments, pursuant to the Rules of Procedure of the Tribunal. US and UK spokespersons have emphasized they will continue to take steps to ensure implementation of Dayton, leaving the door open to more arrests. SFOR has been playing a more active role in the region, taking steps to limit the ability of hardliners to derail implementation of the Dayton peace agreement.

The Trial Chamber's decision in the *Tadic* case was handed down on May 7, 1997. Tadic was found guilty on 11 counts of persecution and beatings, in circumstances amounting to war crimes and crimes against humanity. He was found not guilty of 9

counts of murder and sexual mutilation due to insufficient evidence. He was found not guilty on 11 counts of grave breaches of the 1949 Geneva Conventions, as the Conventions were found inapplicable. This finding hinged on the Trial Chamber's conclusion that the Serbian army was not effectively controlled by the JNA (Yugoslav army) and that the conflict was therefore not an international conflict in those circumstances. The American judge, Judge McDonald, dissented on that point.

In January 1997, the Tribunal issued subpoena orders to Croatia and Bosnia and Herzegovina ("BiH"), as well as the Croatian Defence Minister and the BiH Defence Minister, requiring the production of specified documents. Croatia challenged the legal authority of the Tribunal to issue a subpoena to a sovereign state, arguing that it was immune to subpoenas. In July, the Trial Chamber of the Tribunal held that it has the power to issue subpoena orders to sovereign states and individuals, including government officials. The issue is before the Appeals Chamber, which invited states, non-governmental organizations and individuals to submit *amicus curiae* briefs on the issue. On September 15, 1997, Canada and New Zealand submitted a joint brief, supporting the power of the Tribunal to issue orders for the production of evidence to states and individuals, including high government officials. Similar briefs were submitted by Norway and the Netherlands, and a contrary brief was submitted by China.

b) Rwanda Tribunal

The International Criminal Tribunal for Rwanda ("ICTR" or "the Tribunal") was established by Security Council resolution 955 (1994) to prosecute individuals responsible for genocide and other serious violations of international humanitarian law in the territory of Rwanda in 1994. Following the transfer of an indicted person from Switzerland, and the dramatic arrest and transfer of nine persons Kenya in July and August, the Tribunal now has twenty-one people in custody in Arusha. Another indicted person is in custody in the United States. Trials began this year.

In response to reports of considerable administrative problems with the Tribunal, the U.N. General Assembly ordered the Office of Internal Oversight Services (OIOS) to audit and investigate the Tribunal. The results of the OIOS investigation were released in a report on February 6, 1997. The OIOS found serious management and operational deficiencies with the Tribunal, but did not find evidence of corruption. The OIOS report was particularly critical of the Registry, finding that not a single administrative area functioned effectively. The UN Secretariat was criticized for failing to provide the necessary administrative support.

U.N. Secretary-General Annan has confirmed that he is committed to taking the required measures to address the Tribunal's problems. The Deputy Prosecutor, Mr. Honore Rakotomanana of Madagascar, and the Tribunal Registrar, Mr. Andronico Adede of Kenya, were summoned to New York and asked to resign. The new Registrar is Mr. Agwu Okali of Nigeria, a UN career bureaucrat, and the new Deputy Prosecutor is Bernard Acho Muna of Cameroon, a prominent African lawyer. The U.N. Secretariat is currently providing additional assistance to the Tribunal in accordance with the interim recommendations of the OIOS report.

Donor states met in Geneva in May 1997 to review the implementation of the OIOS recommendations and to discuss methods by which states can further assist the Tribunal (funding, demarches, personnel, witness protection). Canada was an active participant at the conference, and is now working with Belgium and Switzerland to study the feasibility of a compensation fund for victims.

Canada has provided a $1 million donation from CIDA, and several Canadians are working for the Tribunal in a variety of capacities. Canada recognizes the difficulties faced by the Rwanda Tribunal, and will continue to support the Tribunal in order to ensure that it functions effectively.

INTERNATIONAL CRIMINAL COURT

Canada is at the forefront of the efforts to establish an International Criminal Court ("ICC"), which would try those accused of the most serious international crimes. As currently conceived, the ICC would have jurisdiction over the most serious international crimes, such as genocide, war crimes and crimes against humanity. The ICC would be complementary to national courts and would have jurisdiction where national courts are unable or unwilling to bring transgressors to justice. It is hoped that a permanent ICC will promote stability by ending the cycle of violence and impunity for the most serious crimes and acting as a deterrent to future violators.

A Preparatory Committee ("PrepCom") has held meetings in 1996 and in February and August 1997. The PrepCom will meet again in December 1997 and in March 1998. A Diplomatic Conference is scheduled for June 1998.

Many controversial issues remain to be resolved, including:

- which crimes to include in the Statute (the definitions of war crimes, genocide and crimes against humanity are being negotiated, but it is undecided whether to include the crime of aggression or particular treaty crimes);

- whether ICC jurisdiction over the core crimes should be automatically recognized upon ratification ("inherent jurisdiction") or whether consent on a case-by-case basis is required ("opt-in");

- the appropriate role of the Security Council (whether it should be able to refer cases to the ICC or to prevent the ICC from acting); and

- which procedures and principles to adopt (hybridization of common law and civil law).

Canada chairs the "Group of Like-Minded States" who are friendly to the ICC. This group was instrumental in achieving agreement on a 1998 diplomatic conference, and has evolved into a forum for developing strategy on substantive issues.

In the August PrepCom, Canada was the Coordinator on the difficult issue of "complementarity", which governs the ability of the ICC to take jurisdiction where national courts are unable or unwilling to prosecute. A tenuous consensus was achieved on a draft Article, making it the first contentious issue where a wide measure of agreement has been achieved.

Canada attaches great importance to universal participation in the ICC negotiations, and has contributed $40,000 from the Peacebuilding Fund to enable least developed countries to participate in the work of the Prep Comm.

LANDMINES AND THE CCW REVIEW CONFERENCE

Every year, more than 25,000 people are killed or injured by anti-personnel mines ("APM"), ninety percent of them are civilians. Many are killed or wounded decades after the conflict in which the mines were planted is over. An estimated 110 million APM currently planted in 70 countries. The areas most severely affected by mines include Angola, Afghanistan, Cambodia, and Mozambique.

a) Landmines and the CCW Review Conference

In response to this urgent humanitarian crisis, in December 1993, the UN General Assembly adopted by consensus resolution 48/79 which requested the Secretary General to convene a conference to review the Convention on Certain Conventional Weapons (CCW). The CCW Review Conference was held in Vienna in September 1995. During the course of the 3 week meeting, the Review Conference adopted a fourth protocol for the CCW which prohibits the use and transfer of blinding laser weapons, but was unable to reach agreement upon changes to Protocol II which covers mines, booby-traps and other devices.

Following an intercessional meeting and extensive consultations, a revised Protocol II was adopted on May 3, 1996 in Geneva. This protocol will place new prohibitions and restrictions on the use of land mines, in particular, the revised Protocol will: apply to non-international armed conflicts; establish minimum technical standards to make all APM detectable and to eliminate the use of "dumb" mines outside of marked and monitored areas; and will place restrictions and prohibitions on the transfer and export of APM. Further, progress toward meeting these new standards will be reviewed on an annual basis at a meeting of states parties.

The negotiations during the CCW Review Conference were very difficult and the changes to Protocol II were not as significant as many states and international and non-governmental organizations wanted. This lack of progress was due primarily to the positions taken by the major mine producing states parties to the CCW which continue to produce and export APM. These states agreed to the prohibition on non-detectable mines and the technical specification for self-destruction and self-deactivation mechanisms for APM on the condition that states were able to defer these requirements for a period of nine years from the entry into force of the amended Protocol II.

b) Canadian initiatives: The Ottawa Process

In January 1996, Ministers Ouellet and Collenette announced a comprehensive Canadian moratorium on the production, export and operational use of APM. In October, 1996, the Ministers announce the joint policy decision to destroy two-thirds of the stockpile of APM, with the last third to be destroyed upon the conclusion of an international agreement banning APM.

Following the conclusion of the CCW Review Conference, Canada invited states and international and non-governmental organizations to an international meeting held in Ottawa in October 1996. This Conference brought together 50 participant and 24 observer states to discuss a strategy for achieving a global APM ban. At that conference, Canada's Minister of Foreign Affairs, Lloyd Axworthy, invited all states to work with Canada in negotiating a treaty banning APM to be signed in Ottawa by December 1997 ("the Ottawa Process").

In January 1996, Canada began working in partnership with a global coalition of like-minded states, international organizations, UN agencies and non-governmental organizations led by the International Campaign to Ban Landmines and the International Committee of the Red Cross. The Austrian government prepared and circulated a draft treaty text, which was the basis of extensive bilateral and multilateral consultations throughout 1997, including at a meeting of 111 countries in Vienna, Austria in February 1997, and a meeting of 120 countries in Bonn, Germany in April 1997. At the Brussels Conference in June 1997, states agreed upon a political declaration which 'locked-in' the commitment of states to the final stages of Ottawa Process - the Oslo negotiations and the signature of the ban treaty in Ottawa in December. By the end of the conference 97 states had signed the Brussels Declaration.

The negotiations on the APM Convention were held in Oslo from September 1-18, 1997. The Conference, chaired by Ambassador Selebi of South Africa, adopted a convention which comprehensively bans the production, use, transfer and stockpiling of APM. The Convention includes provisions dealing with the destruction of stockpiles and existing mined areas, and also includes provisions for the facilitation of compliance with the Convention, and allows for the possibility of fact-finding missions to clarify instances of alleged non-compliance.

The Ottawa Conference will be held from December 2-5, 1997. In addition to the high-level signing ceremony, the Conference will focus on post-Ottawa action on universalization of the convention and future action on the related issues of mine clearance and victim assistance.

DRAFT CONVENTION ON TERRORIST BOMBING OFFENCES

At the initiative of the P-8, announced at the Lyon Summit in 1996, a Working Group of the UN Sixth (Legal Affairs) Committee was tasked (by *GA Res. 51/210*) to elaborate a *Convention on the Suppression of Terrorist Bombing Offences*. This new legal instrument would

- require States Parties to criminalize offences relating to the use of explosive or other lethal devices (including biological and chemical agents and devices causing death or injury through radiation) in public places or against specified targets, including government and infrastructure facilities;

- require States Parties to take jurisdiction over such offences, including offences committed abroad in certain circumstances, and to prosecute or extradite offenders found on their territory

- provide for information exchanges and other forms of cooperation between parties.

Canada took an active role in the drafting of the initial text that formed the platform of discussion in the Sixth Committee, and in the negotiations that followed.

DFAIT's Legal Adviser, Philippe Kirsch was appointed to chair the Working Group, which had its first meeting in New York February 24-March 7, 1997.

DRAFT 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 a summit meeting with Mexican President Zedillo and CARICOM countries agreed to the creation of a hemispheric instrument on firearms trafficking. The OAS instrument will be the first international convention to address firearms trafficking, although the Denver Summit of the Eight also included a commitment to a global instrument on the subject matter.

Four rounds of negotiations at the OAS have moved the text considerably, from a quasi-political statement of ambitious intentions to a legally binding instrument that contains effective and practicable 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 draft includes provisions for a reciprocal system of import, export and transit authorizations, marking and tracing of firearms, information sharing, law enforcement training and various other forms of mutual assistance and cooperation. Possible provisions on extradition are still under discussion.

Negotiations on the convention are expected to be concluded in October of 1997, with a signing ceremony tentatively scheduled for November.

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ENVIRONMENTAL LAW

a) North American Agreement on Environmental Cooperation

The NAAEC, the so-called "environmental side accord" to the NAFTA, entered into force on January 1, 1994. Its Parties are Canada, the United States, and Mexico. The NAAEC seeks to protect the North American environment by ensuring that each Party effectively enforces its environmental laws. Article 14 of the NAAEC provides that the Secretariat may prepare a "factual record" with respect to the alleged failure of a Party to enforce its environmental laws.

The NAAEC Council of the Commission for Environmental Cooperation (CEC) held its Fourth Regular Session on 12 June 1997 in Pittsburgh. At this meeting the Parties agreed to initiate a review of the operation of the Guidelines for Submissions on Enforcement Matters. Discussions on this issue are currently taking place between the Parties.

Currently, four submissions have been made under Article 14 that involve Canada. These pertain to the Atlantic Groundfish Strategy, the enforcement of environmental laws with respect to pork producers in Quebec, the enforcement of environmental regulations to protect endangered species, and the protection of fish habitat from damage caused by hydro-electric dams in B.C. Responses have been filed with the Secretariat with regard to the hydro-electric dam and pork submissions. The other submissions are still under consideration by the Secretariat as to whether a response by Canada is merited.

b) Climate Change

Canada participated in the meetings of the Parties of the Framework Convention on Climate Change in 1997. In particular, final negotiations are currently underway with the objective of reaching an agreement on further commitments for greenhouse gas emission reductions for developed countries beyond the year 2000. These negotiations were launched at the first Conference of the Parties in 1995 in Berlin. It is the objective of the Parties to conclude negotiations by the third Conference of the Parties, scheduled for December 1997 in Japan. As well, Canada is pursuing its strong interest in parallel discussions under Article 13 of the Climate Change Convention for the development of mechanisms for more effective implementation of the Convention.

c) Biodiversity

Negotiations are underway for a global agreement on the safe transfer, handling, and use of living modified organisms. These negotiations are being conducted under the auspices of the Biodiversity Convention. The Parties are aiming to conclude the negotiations on a Biosafety Protocol by end of 1998. The negotiations are focused specifically on the transboundary movement of any living modified organism resulting from modern biotechnology that may have adverse effect on the conservation and use of biological diversity.

d) Convention on Prior Informed Consent

Negotiations are underway under the auspices of the United Nations Environment Programme (UNEP) and the Food and Agriculture Organization of the United Nations (FAO) to develop a legally binding instrument for the application of the Prior Informed Consent (PIC) procedure for certain hazardous chemicals and pesticides in international trade. The fourth session of the Intergovernmental Negotiating Committee will be held from October 20-24, 1997. It is anticipated that negotiations will be completed by early to mid-1998.

Concerns about the growth of international trade in chemicals during the 1960's and 1970's led to the development of two voluntary codes of conduct, one under the FAO (dealing with the distribution and use of pesticides) and one under UNEP (dealing with chemicals international trade). These guidelines involve a PIC procedure, which is a formalized system used to obtain and disseminate decisions of countries regarding the import 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. The global convention under negotiation will be based on the existing voluntary codes and put into place a legally binding system for the application of the PIC procedure.

e) United Nations Economic Commission for Europe (UN ECE) Convention on Long-range Transboundary Air Pollution (LRTAP): Protocol on Persistent Organic Pollutants (POPs)

A Protocol to the LRTAP Convention dealing with POPs is currently under negotiation by members of the UN ECE (Eastern and Western Europe, the U.S. and Canada). POPs are chemicals that, to varying degrees, persist in the environment, accumulate in fatty tissues and are able to move long distances through the atmosphere. This Protocol is designed to address the serious concerns that UN ECE countries have about the effects of POPs

resulting from their long range atmospheric transport. 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.

The POPs Protocol will require Parties to implement a variety of controls on a number of POPs and may serve as a model for the global treaty on POPs that will be negotiated under the auspices of UNEP. It is anticipated that negotiations of this regional agreement will be completed by the end of 1997. Negotiations of the global treaty are scheduled to commence in mid-1997.

f) Agreement on Environmental Cooperation between the Government of Canada and the Government of the Republic of Chile

The Agreement on Environmental Cooperation between Canada and Chile, a "side accord" to the Canada-Chile Free Trade Agreement, mirrors the provisions of the NAAEC in most respects. The Agreement highlights a commitment by both parties to undertake a cooperative work program as well as implementing measures which will reflect the commitment to effective enforcement of environmental laws.

The Agreement provides for an institutional structure similar to the NAAEC Commission for Environmental Cooperation. A small National Secretariat will be established in each country to carry out similar functions to those done by the NAAEC trilateral Secretariat.

NORTHWEST ATLANTIC FISHERIES

The Northwest Atlantic Fisheries Organization (NAFO) held its 19th Annual General Meeting on September 15-19, 1997 in St. John's, Newfoundland. Canada achieved its priority objectives for the meeting: extension of the pilot observer/satellite tracking program for 1998, acceptance of the Scientific Council advice to ensure the conservation of straddling stocks and a renewed ban on shrimp trawling on the Nose and Tail of the Grand Bank.

NAFO agreed to continue the current pilot observer/satellite tracking project for one year, beginning on January 1, 1998. The Parties agreed to consider, at the 1998 Annual Meeting, implementing such a scheme on a permanent basis effective January 1, 1999.

NAFO adopted a scheme to deter Non-Contracting Party vessels from fishing in the NAFO Regulatory Area contrary to NAFO conservation rules. The scheme seeks to halt the landing, transshipment and sale of fish from "flag-of-convenience" vessels.

The Fisheries Commission endorsed an action plan for the implementation of the "precautionary approach" to fisheries management in the NAFO Regulatory Area. The Scientific Council, which will meet in June 1998, will provide advice, using the precautionary approach, for consideration by NAFO at its next Annual Meeting in September 1998 in Lisbon.

On straddling stocks, NAFO continued its moratoria on cod and flounder on the Nose and Tail of the Grand Bank. Moratoria were also introduced for the first time on redfish and witch flounder outside Canada's 200-mile limit.

THE FISHERIES JURISDICTION CASE BEFORE THE ICJ

On March 3, 1995, Canada added Spain and Portugal to list of flag states whose vessels could be arrested in the NAFO Regulatory Area pursuant to the Coastal Fisheries Protection Act and Regulations. The basis for this action was the imminent prospect of Spanish and Portuguese vessels irreparably depleting the Greenland halibut stock. Canada accompanied these amendments with a call to the EU for a 60 day moratorium on Greenland halibut catches in the interests of conservation. On March 6, 1995, the European Council of Ministers formally rejected the proposed moratorium.

On March 9, 1995, pursuant to the Coastal Fisheries Protection Act and Regulations, Canadian officials boarded and arrested the Spanish fishing vessel *Estai* in the NAFO Regulatory Area for fishing contrary to Canadian law. The *Estai* and its crew were taken to St. John's, Newfoundland, where formal charges were laid against the ship and its master. The master was promptly released on bail and the vessel was later released on bond.

Soon after the arrest of the *Estai*, talks commenced between high level Canadian and EU officials. These talks resulted in the signing of an Agreed Minute on April 20, 1995, aimed at strengthening enforcement of international conservation measures in the NAFO Regulatory Area and modifying the Canadian and EU quotas of Greenland halibut for 1995. The Agreed Minute provided that Canada and the EU would submit joint proposals to that end to NAFO. These proposals were adopted by NAFO on September 15, 1995.

While negotiations between Canada and the EU were proceeding, on March 28, 1995, Spain filed an application with the International Court of Justice alleging that Canadian actions were contrary to international law. Both Spain and Canada had made declarations pursuant to Article 36(2) of the Statute of the Court accepting its compulsory jurisdiction. However, the Canadian declaration contains a reservation that is pertinent to the present dispute, in that it excludes from the Court's jurisdiction:

> "disputes arising out of or concerning conservation and management measures taken by Canada with respect to vessels fishing in the NAFO Regulatory Area, as defined in the Convention on Future Multilateral Co-operation in the Northwest Atlantic Fisheries, 1978, and the enforcement of such measures."

Spain has asked that the Court declare (i) that the

Canadian legislation, in so far as it presumes to exercise jurisdiction over vessels of another flag state on the high seas outside of Canada's fisheries jurisdiction, is not opposable to Spain; (ii) that Canada must refrain from repeating its enforcement actions on the high seas and must give Spain reparation, in an amount that will cover all the damages and prejudice suffered; and (iii) that the enforcement actions on the high seas against the *Estai* constituted a violation of the principles and norms of international law.

Spain has continued this case in spite of the agreement reached between the EU and Canada.

Canada has consistently argued that the previously quoted reservation to its declaration accepting the Court's compulsory jurisdiction clearly excludes this dispute with Spain. As a result, on May 2, 1995, the President of the Court decided that the initial phase of the Court's proceedings will concern only the question of jurisdiction. The deadline for the submission of Spain's Memorial was September 29, 1995. Canada had to file its Counter-Memorial by February 29, 1996. Both deadlines were met.

On April 17, 1996, the President of the Court convened the Agent for Spain and the Agent for Canada to a meeting in The Hague to discuss the next steps of the procedure. At this meeting, Spain asked for a second round of written pleadings. Canada was of the view that a new round of pleadings was not necessary. By an Order dated May 8, 1996, the Court concluded that it was "sufficiently informed, at this stage, of the contentions of fact and law on which the Parties rely with respect to its jurisdiction in the case and...the presentation, by them, of other written pleadings on that question therefore does not appear necessary". The Court thus decided, by fifteen votes to two (Vereshchetin and Torres Bernárdez dissenting), not to authorize the filing of a Reply by the Applicant and a Rejoinder by the Respondent on the question of jurisdiction.

The written proceedings in the jurisdictional phase have come to an end. The Registry of the Court has indicated informally that, given the other cases on the Court's list, this case (jurisdictional phase) will not come up for hearing until 1998, at the earliest.

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.

The Parties agreed in the PST to conduct their fisheries within the framework of two broad principles: conservation and equity. The conservation principle requires each Party to conduct its fisheries and salmon enhancement programs so as to prevent overfishing and provide for optimum production. The equity principle provides that each Party should receive benefits equivalent to the production of salmon originating in its waters.

Following two years of unsuccessful government-level negotiations, Canada made a proposal to submit the equity dispute to binding arbitration in 1995. The USA rejected that proposal but agreed to non-binding mediation. The mediation process took place between October 1995 and February 1996, but ultimately failed. However, the mediator, Ambassador Chris Beeby of New Zealand, did submit a proposal for a solution to the equity issue (the Agreement between the Parties specified that it could not be released publicly).

Canada-U.S. stakeholder negotiations reached an impasse in spring 1997, and subsequent government-to-government negotiations broke down on June 20. On July 22, the U.S. rejected Minister Axworthy's June 26 written request for binding arbitration and proposed instead the appointment of two prominent individuals, one from each country, to reinvigorate the stakeholder process to make a positive difference before the 1998 fishing season.

On July 25, Canada appointed Dr. David Strangway (former President of the University of British Columbia) as Special Representative of the Prime Minister on Pacific Salmon. The U.S. appointed William Ruckelshaus (a former Administrator of the Environmental Protection Agency). Dr. Strangway will report to the Prime Minister and the Ministers of Foreign Affairs and Fisheries and Oceans. Mr. Ruckelshaus will report to the President and Secretary of State. The special representatives have already met stakeholders and Canadian and U.S. officials. They are expected to produce a joint report by the end of December.

In mid-July, Alaska fishers began taking large numbers of Canadian sockeye salmon in the Noyes Island fishery. The Canadian Government issued a strong protest to the U.S. State

Department that the Alaska actions were in violation of the Treaty. Fishers in Northern British Columbia protested by blockading an Alaska ferry system vessel, the *MV Malaspina*, in Prince Rupert harbour for three days.

To show its displeasure with the lack of progress in the Pacific Salmon dispute, the British Columbia government has sought to cancel the license that provides for the use of the seabed at the Nanoose Bay Canadian Forces Maritime Test Range. This installation is an important venue for testing torpedoes used by both the Canadian Forces and the U.S. Navy. The federal government has launched a legal challenge to the B.C. action and has undertaken to keep the range open and functioning, in line with its international commitments.

On August 22, the State of Alaska initiated an action in tort for economic loss against the B.C. fishers involved in the blockade of the *MV Malaspina*.

On September 8, the B.C. government filed a lawsuit in Seattle against the U.S. federal government and the States of Alaska and Washington. B.C. is seeking: 1) a declaratory judgment that the defendants have violated the Pacific Salmon Treaty and U.S. domestic law; 2) an order from the court compelling the U.S. Secretaries of State and Commerce to certify to the U.S. Section of the Pacific Salmon Commission that the U.S. is in danger of not fulfilling its international obligations under the Treaty; 3) an injunction against the defendants to restrain from violating the Treaty; and, 4) more than $300 million in damages. The U.S. court will look at several procedural issues before examining the merits of B.C.'s case.

U.N. AGREEMENT ON STRADDLING STOCKS

At the end of its sixth and final session, on August 4, 1995, the United Nations Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks adopted, without a vote, the Draft *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*. This 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, in order to control effectively fishing activities beyond 200 nautical miles, in the Northwest Atlantic and elsewhere around the world.

The enforcement scheme provided for in the Agreement is a significant improvement over previous rules of international law. While maintaining primary flag state responsibility, Articles 21 and 22 of the Agreement provide for action to be taken by non-flag state inspectors when the flag state is unable or unwilling to act.

The Agreement as a whole is a comprehensive body of rules which should go a long way towards ensuring the sustainable use of endangered resources. With its legally binding character, its well-developed provisions on conservation and management, its solid and practical enforcement system and its compulsory and binding dispute settlement procedures, the Agreement fully meets the objectives Canada had set for itself in the Conference.

Canada was one of the twenty-five states which signed the Agreement when it was opened for signature in New York 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 fifteen (15), including the United States and the Russian Federation, and 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-96) was tabled in the House on April 17, 1997. It died on the order paper upon dissolution of the House for the federal election. It is intended that the implementing legislation will be re-introduced in the current Parliament. Implementing regulations will also be required.

CLAIMS AGAINST IRAQ

During the period of 1992 to the end of 1994, the Government of Canada forwarded over 1,300 compensation claims to the United Nations Compensation Commission (UNCC) in Geneva, for losses resulting from Iraq's invasion and occupation of Kuwait between the period of August 2, 1990 to March 2, 1991.

The UNCC, a subsidiary organ of the United Nations Security Council, was established to give effect to Security Council Resolution 687 which affirmed that Iraq was "liable under international law for any direct loss, [or] damage,...to foreign Governments, nationals and corporations" resulting from Iraq's actions.

The creation of the UNCC introduced a unique system for dealing with international claims. Traditionally, under certain conditions, governments can espouse claims for losses or injuries on behalf of their nationals. Government espousal effectively renders the claim a state claim. Under the UNCC system, states are required to submit claims on behalf of their nationals. However, the claim remains that of the individual or corporation, with governments providing more of a coordinating function. For the Government of Canada, this involved a program to review claims to ensure they met UNCC requirements and to prepare consolidated claim submissions for onward transmission to the UNCC.

The UNCC system also permitted governments to determine their own definition of the term "resident". Under traditional international law, states only espouse claims on behalf of their nationals. The UNCC wanted all individuals who had suffered a loss or injury as a result of the invasion of Kuwait to have recourse to a remedy, regardless of nationality (except for Iraqi citizens, who were required to have bona fide nationality of another state). Accordingly, the Government of Canada submitted claims not only on behalf of Canadian citizens, but also Canadian permanent residents, who had obtained residency status in Canada by March 31, 1993.

The UNCC has received over 2.6 million claims from 95 countries and 15 international organizations with a total asserted value of approximately US$180 billion. To date, three Panels of Commissioners have reviewed and made recommendations on over 350,000 individual claims in Categories A (Departure), B (Serious Personal Injury and Death) and C (Losses under US$100,000). Claims in these categories are considered to be the most urgent claims, to be processed using expedited procedures. These first instalments of claims have allowed the UNCC to

formulate general criteria related to issues of causation, evidence, and valuation, and to develop mass processing methods and techniques to be applied in future instalments.

The Compensation Fund will be financed by 30 percent of the annual value of exports of petroleum and petroleum products from Iraq. UN Security Council Resolution 986 (1995) was adopted as a temporary measure to provide for the humanitarian needs of the Iraqi people by permitting the export of petroleum and petroleum products. The Government of Iraq and the United Nations signed a Memorandum of Understanding on May 20, 1996, to implement Resolution 986. Now that the required mechanisms are in place, the UNCC Compensation Fund is in receipt of funds and has begun to make initial payments on claims. Further initial payments will depend on the availability of funds from the implementation of the oil-for-food provisions.

The Government of Canada has submitted some 1300 individual and corporate claims with losses totalling approximately US$141 million. A claim for government losses of nearly 56 million dollars was also submitted to the UNCC.

Canada continues to monitor the activities of the UNCC and keep Canadian claimants informed on the status of the claims review.

CERTAINES MESURES CONCERNANT LES PÉRIODIQUES

Un groupe spécial a été établi en juin 1997 sous l'égide de l'Organisation mondiale du commerce (l'"OMC") pour examiner une plainte des États-Unis concernant trois mesures canadiennes visant les périodiques : le Code tarifaire 9958, qui prohibe l'importation au Canada de certains périodiques, y compris les éditions dédoublées; la partie V.1 de la Loi sur la taxe d'accise, qui impose une taxe d'accise sur les éditions à tirage dédoublé de périodiques; et l'application par la Société canadienne des postes, pour la poste - publications, de tarifs commerciaux "canadiens", de tarifs commerciaux "internationaux" et de tarifs "subventionnés".

Le Groupe spécial en est venu aux conclusions suivantes: 1) le Code tarifaire 9958 est incompatible avec l'article XI:1 du GATT de 1994, et ne peut être légitimé aux termes de l'exception prévue à l'article XX d) du GATT de 1994; 2) la partie V.1 de la Loi sur la taxe d'accise est incompatible avec la première phrase de l'article III:2 du GATT de 1994; 3) et l'application par la Société canadienne des postes aux périodiques de production nationale de tarifs postaux commerciaux canadiens moins élevés que ceux appliqués aux périodiques importés est incompatible avec l'article III:4 du GATT de 1994; mais 4) le maintien du barème des tarifs subventionnés se justifie aux termes de l'article III:8 b) du GATT de 1994.

Le Canada a fait appel des conclusions du panel sur la taxe d'accise et les États-Unis de celles sur les tarifs postaux subventionnés. L'Organe d'appel a conclu que la partie V.1 de la Loi sur la taxe d'accise est incompatible avec la deuxième phrase de l'article III:2 du GATT de 1994. L'Organe d'appel a aussi conclu que le Groupe spécial avait erronément interprété l'article III:8 b) du GATT de 1994 et a infirmé ses constatations et conclusions selon lesquelles le barème des tarifs postaux subventionnés se justifie aux termes du GATT de 1994.

Le rapport du Groupe spécial et le rapport de l'Organe d'appel ont été adoptés par les Membres de l'OMC le 30 juillet 1997. Le Canada a fait les commentaires qui suivent.

a) Remarques liminaires

1. Le Canada reconnaît que, conformément aux articles 16:4 et 17:14 du *Mémorandum d'accord sur les règles et procédures régissant le règlement des différends* (le *Mémorandum d'accord*), les rapports du Groupe spécial et de l'Organe d'appel sont adoptés et acceptés sans condition par les parties au différend, à moins que l'Organe de règlement des différends (l'ORD) ne

décide par consensus de ne pas adopter lesdits rapports. Le Canada note cependant que la procédure d'adoption est sans préjudice du droit des Membres d'exprimer leurs vues. Par conséquent, le Canada souhaite exprimer ses vues sur les rapports du Groupe spécial et de l'Organe d'appel et souligner l'importance que revêtent à ses yeux un certain nombre de questions soulevées en l'espèce.

2. C'est avec tout le respect dû au régime de règlement des différends, dont il connaît l'importance fondamentale, que le Canada exprime la grande déception que lui inspirent le rapport rendu par l'Organe d'appel, ainsi que certains aspects des délibérations de celui-ci. Les observations du Canada pourront être prises en compte lors des futures discussions qu'auront les Membres dans le cadre de l'examen du *Mémorandum d'accord*.

3. Le Canada a directement intérêt à ce que le commerce international soit régi par un système ouvert, respecté et stable. Toutefois, à mesure que s'accroîtront sous l'effet du commerce la mondialisation et l'uniformité entre les pays, c'est la culture qui permettra de préserver le caractère distinct des Membres de l'OMC et de garantir leur souveraineté. Voilà pourquoi le gouvernement du Canada est résolu à maintenir des politiques et des instruments stratégiques efficaces en vue de soutenir le développement culturel.

4. La presse écrite demeure l'un des principaux moyens de communication au Canada et dans le monde. Parmi les différents organes de la presse écrite, les périodiques en particulier sont des publications à la fois spécifiques et d'actualité. Les périodiques créés pour répondre aux besoins du marché canadien diffèrent des périodiques élaborés en fonction des besoins, des intérêts et des opinions d'autres pays. Il ne serait pas normal que le Canada, ni n'importe quel autre Membre de l'OMC, s'attende à ce que des publications étrangères rendent compte de la réalité qui lui est propre. Or, c'est cette réalité particulière qui détermine la spécificité souveraine d'un pays. Il nous faut donc absolument trouver, dans le cadre du système commercial réglementé, un moyen qui permette aux Membres de l'OMC d'établir et de maintenir des politiques ayant pour objet de promouvoir la culture et l'identité qui leur sont propres.

b) Rapidité et équité

5. Les dispositions de l'Accord de l'OMC sur le règlement des différends assurent une application plus rapide et plus équitable des règles du commerce. Le Canada était au premier plan de la réforme du processus de règlement des différends lors des négociations du Cycle d'Uruguay, et il continue d'en appuyer les objectifs.

6. Le souci de rapidité est partout présent dans les procédures de travail prescrites par le *Mémorandum d'accord*, qui fixent à l'ORD des délais stricts pour la remise de ses décisions. Assurer le règlement rapide des différends ne doit pas, toutefois, amener à négliger les principes fondamentaux de l'équité.

7. Le Canada est déçu par le comportement de l'Organe d'appel quant aux règles de l'équité les plus élémentaires. L'équité exige qu'on ait la possibilité de présenter ses arguments et de se faire entendre. Déterminer la substituabilité, la compétitivité et le protectionnisme au titre de la deuxième phrase de l'article III:2 du GATT de 1994 était d'une importance cruciale, à la fois pour l'interprétation du GATT de 1994 et pour l'issue de l'affaire qui nous occupe. Or, aucun argument n'a été présenté sur ces points à l'Organe d'appel, ni sollicité par celui-ci. S'il nous avait été donné la possibilité de présenter des arguments écrits et oraux en bonne et due forme, nous n'aurions pas sujet de nous plaindre du manque d'équité de la procédure.

8. L'Organe d'appel s'est dit en mesure de compléter l'analyse de l'article III:2 du GATT de 1994 en l'espèce, à condition de trouver dans la partie du rapport du Groupe spécial intitulée « Principaux arguments » une base suffisante lui permettant de le faire. L'Organe d'appel s'est donc reposé sur le résumé des arguments figurant dans le rapport du Groupe spécial relativement à la deuxième phrase de l'article III:2 du GATT de 1994. Dans un examen en appel, cela ne saurait remplacer la présentation d'arguments écrits et oraux en bonne et due forme.

9. L'Organe d'appel a fondé sa décision sur un critère qui n'a été ni traité dans le rapport du Groupe spécial ni soulevé en appel, et qui n'a donc pas été abordé dans les exposés écrits et oraux des parties. Il n'a pas été donné avis aux parties de l'intention de l'Organe d'appel de s'appuyer sur un critère qui ne constituait pas la base de l'appel en vertu de l'article 17:6 du *Mémorandum d'accord*. L'Organe d'appel a donc rendu sa décision en l'absence d'arguments des parties, et sans avoir donné à celles-ci la possibilité d'en présenter sur ce point. Cette façon de procéder revient à nier le droit des parties d'être notifiées et de se faire entendre sur toutes les questions pertinentes.

10. L'Organe d'appel a invoqué sa décision dans l'affaire *États-Unis - Essence*, dans laquelle il avait examiné le texte introductif de l'article XX après avoir établi que l'un des paragraphes de cet article était d'application. Il s'agissait là tout simplement de l'analyse en deux temps d'une seule et même disposition juridique. Pour décider si une exception prévue à l'article XX est ou non d'application automatique, il faut absolument examiner le préambule de cet article. En revanche, les deux phrases de l'article III:2 du GATT de 1994 énoncent des

obligations distinctes, dont la portée et les règles diffèrent, et elles ont clairement été traitées comme telles dans des décisions antérieures, y compris l'affaire *Japon - Boissons alcooliques*.

11. Dans son examen des arguments du Canada faisant appel de la décision du Groupe spécial sur la taxe d'accise en tant que mesure affectant les services, l'Organe d'appel a conclu que cette taxe devait être considérée comme s'appliquant à une marchandise puisque le Canada n'avait pas fait appel de la décision visant le Code tarifaire 9958. Selon les règles de l'équité, il ne saurait être tiré de conclusions préjudiciables du fait qu'une partie s'abstient de faire appel de telle ou telle question.

c) GATT / AGCS

12. Le Canada est tout particulièrement déçu de la décision de l'Organe d'appel quant aux arguments qu'il a présentés sur l'application des disciplines du GATT aux mesures visant les services. Une interprétation cohérente du GATT de 1994 et de l'AGCS examinés conjointement, qui donne un sens à toutes les dispositions de ces deux traités, est essentielle pour faire en sorte que les Membres s'acquittent à l'avenir de l'ensemble de leurs obligations et engagements visant le commerce des marchandises et des services.

13. Lorsqu'il est invité à se prononcer sur la portée relative des deux accords, l'Organe d'appel se doit d'observer un raisonnement prudent et réfléchi pour que tous les Membres puissent comprendre comment il est parvenu à sa décision. Dans l'affaire qui nous occupe, l'Organe d'appel avait à statuer sur l'applicabilité des dispositions du GATT et de l'AGCS quant à la taxe d'accise. Nous sommes déçus qu'il n'ait pas appliqué un raisonnement mûrement réfléchi à la question de la taxe d'accise en tant que mesure affectant les services de publicité. Au lieu de cela, il semble avoir largement fondé sa décision concernant cette question capitale sur son interprétation des liens stratégiques existant entre la taxe visant les services de publicité et la mesure à la frontière s'appliquant aux périodiques comme tels.

14. Le rapport de l'Organe d'appel montre à l'évidence que les Membres de l'OMC doivent réfléchir à la corrélation entre les obligations résultant du GATT de 1994 et les engagements souscrits dans le cadre de l'AGCS. En effet, faute de nous entendre sur la portée respective de ces deux accords, nous risquons d'être confrontés à un nombre croissant de différends qui laisseront à l'Organe d'appel le soin de trancher la question. Le Canada tient à rappeler à ce propos la récente décision dans l'affaire *EC - Bananes*, et à souligner qu'il nous

faut examiner cette question plus avant si nous voulons voir progresser de façon constructive nos travaux sur le secteur des services.

d) L'article III du GATT

15. L'Organe d'appel a considéré qu'il ne pouvait statuer sur la question des « produits similaires » en raison de l'absence d'une analyse suffisante de ce point dans le rapport du Groupe spécial. S'il n'était pas possible de déterminer la « similarité » aux fins de la première phrase de l'article III:2 en l'absence d'une analyse suffisante du Groupe spécial, à plus forte raison n'était-il pas possible de déterminer si les produits étaient « directement concurrents ou substituables » aux fins de la deuxième phrase. En effet, le rapport du Groupe spécial ne contenait aucune analyse de cette deuxième phrase, laquelle doit elle aussi être examinée au cas par cas comme il a été dit dans l'affaire *Japon - Boissons alcooliques*. Le Canada s'interroge sur le fait que l'Organe d'appel ait pu, d'une part, s'interdire de statuer sur une question parce que l'analyse qui en avait été faite n'était pas suffisante, et, d'autre part, se prononcer sur une question qui, elle, n'avait même pas été analysée par le Groupe spécial.

16. La constatation de l'Organe d'appel concernant les « produits similaires » reposait, en partie, sur son analyse des exemples de *Sports Illustrated* et de *Harrowsmith*, qui n'avaient aucune pertinence en l'espèce. Nous y voyons une incompréhension fondamentale des faits. L'édition à tirage dédoublé de Sports Illustrated était une édition *nationale* et non pas un produit importé, ce dont convenaient d'ailleurs les deux parties. L'Organe d'appel s'est également appuyé sur le fait que Harrowsmith Country Life, un périodique d'appartenance canadienne antérieurement publié aux États-Unis, avait cessé de produire son édition américaine. Comme ce produit n'avait jamais été exporté au Canada et qu'il n'était pas destiné au public canadien, on ne saurait soutenir que l'arrêt de la production de l'édition américaine était dû à une application protectrice de la taxe. Ainsi donc, la mesure ne devait avoir d'effets que sur les opérations nationales.

17. À la page 21 de son rapport, l'Organe d'appel a présumé que l'expression « directement ou indirectement » figurant à la première phrase de l'article III:2 s'appliquait également à l'égard de la deuxième phrase de cet article, étant donné son « champ d'application [...] plus vaste ». Or, si la deuxième phrase est de portée plus vaste quant aux produits qu'elle vise, elle ne l'est évidemment pas quant aux mesures fiscales auxquelles elle s'applique.

18. Le passage du rapport du Groupe spécial que l'Organe d'appel cite aux pages 29 et 30 de son rapport montre que les périodiques ont besoin aussi bien de revenus de diffusion que de recettes publicitaires, et que la qualité du contenu rédactionnel est affectée par le manque d'annonceurs. Mais il *ne montre pas* que les périodiques sont directement concurrents ou substituables comme produits de consommation. Nous soutenons que la citation du rapport du *Groupe de travail sur l'industrie canadienne des périodiques* qui est reproduite dans le rapport de l'Organe d'appel n'est pas suffisante pour étayer une telle conclusion, d'autant plus qu'elle se heurte au témoignage selon lequel les périodiques en question constitueraient « un très mauvais substitut » comme produits de consommation. À notre avis, l'analyse se ramène à un énoncé politique dont la valeur probante, que ce soit en termes d'économie ou de droit, est minime.

e) Tarifs postaux « subventionnés »

19. L'Organe d'appel a affirmé que son interprétation du texte était corroborée par le contexte de l'article III:8(b) examiné au regard de l'article III:2 et 4 du GATT de 1994. Mais l'Organe d'appel n'a pas examiné le contexte de l'exemption visant les subventions aux producteurs au regard des disciplines relatives au traitement national. De plus, l'Organe d'appel s'est fondé sur l'objet et le but de l'article III:8(b) pour tirer ses conclusions concernant les tarifs « subventionnés », mais il n'a ni expliqué quels étaient cet objet et ce but ni procédé à leur examen. En conséquence, sa décision n'est pas étayée par un raisonnement suffisant pour nous permettre de comprendre pourquoi les tarifs postaux « subventionnés » ne peuvent bénéficier de l'exemption autorisée par l'article III:8(b).

f) Conclusion

20. Le Canada demeure ferme dans son attachement au système de règlement des différends, et il entend bien continuer de respecter les règles et les procédures qui régissent ce système. Le Canada notifiera à l'ORD ses intentions concernant la mise en oeuvre des recommandations et décisions de l'ORD et ce, au plus tard le 29 août 1997. Toutefois, au lieu de faire sa déclaration à la réunion prévue par l'article 21:3 du *Mémorandum d'accord*, le Canada informera l'ORD par lettre transmise au président pour distribution aux Membres de l'ORD. À l'issue d'un entretien avec les États-Unis, l'autre partie en cause, nous sommes convenus que cette approche permet de préserver nos droits et obligations respectifs tout comme si la réunion prévue par l'article 21:3 avait eu lieu.

21. Dans ses observations finales, le Groupe spécial a souligné que « le présent différend ne portait pas sur la faculté qu'ont

les Membres de prendre des mesures pour protéger leur identité culturelle ». Cette faculté ne doit pas être tenue pour acquise. Le Canada a un voisin dix fois plus gros que lui avec lequel il a une langue en commun, ainsi que la frontière non défendue la plus longue au monde. Pour lui, le défi consiste à « protéger [son] identité culturelle » sans qu'il lui soit possible de réaliser les économies d'échelle dont disposent les producteurs de produits et de services culturels qui renforcent l'identité américaine. Le problème canadien est, à bien des égards, unique en son genre. Nous estimons néanmoins qu'il est de l'intérêt de tous les Membres que cette question soit confrontée sans détour. Pour sa part, le Canada reste résolu à appliquer des politiques et des mesures propres à renforcer la viabilité de ses industries culturelles, tout en veillant au respect de ses droits comme de ses obligations en tant que Membre de l'OMC.

John Weekes
Ambassadeur du Canada auprès de l'Organisation mondiale du commerce
Genève, le 30 juillet 1997.

ECONOMIC SANCTIONS

The imposition of economic sanctions against foreign states continues to be an active area of international law.

Most commonly, the determination of whether such sanctions will be imposed against individual states is made at first instance by the United Nations Security Council. Under Chapter VII of the UN Charter, the Security Council is authorized, following debate among member countries, to adopt United Nations Security Council Resolutions requiring member states to impose sanctions.

Once adopted by the Security Council under Chapter VII of the UN Charter imposing trade, commercial and financial sanctions, such resolutions become international law treaty obligations of Canada as a signatory of the UN Charter, and are implemented under Canadian domestic law by regulations passed pursuant to the United Nations Act, R.S.C., c.U-3.

Countries currently subject to United Nations sanctions include:

- Iraq (comprehensive sanctions)
- Libya (asset freeze, export restrictions, aircraft related industries)
- Federal Republic of Yugoslavia (Serbia and Montenegro)- (asset freeze on disputed property)
- Angola (arms embargo to UNITA-controlled areas)
- Rwanda (arms embargo)
- Sudan (diplomatic personnel)

Canada also imposes sanctions on countries by placing them on the Area Control list of the Export and Import Permits Act, R.S.C., c.E-19. Countries on the Area Control list presently include Libya, Angola and Burma.

Canada may also use the Special Economic Measures Act R.S.C. c.S-14.5, to impose sanctions unilaterally, when faced with "a grave breach of international peace and security" (art. 4), or when implementing a decision or recommendation of an international organization or association of States (other then the United Nations) of which Canada is a member (the G-8, the Organization of American States, etc.). There are presently no sanctions imposed pursuant to the SEMA.

CERTAIN MEASURES CONCERNING PERIODICALS COMMENTS ON THE APPELLATE BODY REPORT

A Panel was established in June 1997 under the World Trade Organization (the "WTO") to consider a complaint by the United States concerning three Canadian measures on periodicals : Tariff Code 9958, which prohibits the importation into Canada of certain periodicals, including split-run editions; Part V.1 of the Excise Tax Act, which imposes an excise tax on split-run editions of periodicals; and the application by Canada Post Corporation of commercial "Canadian", commercial "international" and "funded" publications mail postal rates.

The Panel reached the conclusions that : (1) Tariff Code 9958 is inconsistent with Article XI:1 of the GATT 1994 and cannot be justified under Article XX(d) of the GATT 1994; (2) that Part V.1 of the Excise Tax Act is inconsistent with Article III:2, first sentence, of the GATT 1994; and (3) that the application by Canada Post of lower "commercial Canadian" postal rates to domestically-produced periodicals than to imported periodicals is inconsistent with Article III:4 of the GATT 1994; but (4) that the maintenance of the "funded" rate scheme is justified under Article III:8(b) of the GATT 1994.

Canada appealed the finding on the excise tax and the United States appealed the finding on the postal subsidy. The Appellate Body concluded that Part V.1 of the Excise Tax Act is inconsistent with Article III:2, second sentence, of the GATT 1994. The Appellate Body also concluded that the Panel incorrectly interpreted Article III:8(b) of the GATT 1994 and reversed the Panel's findings and conclusions that Canada's funded postal rates scheme is justified under the GATT 1994.

The report of the Panel and the report of the Appellate Body were adopted by WTO Members on July 30, 1997. Canada made the following comments.

a) Opening remarks

1. Canada acknowledges, in accordance with Articles 16.4 and 17.14 of the Understanding on Rules and Procedures Governing the Settlement of Disputes ("DSU"), that the Panel and Appellate Body reports are adopted and unconditionally accepted by the parties to the dispute, unless the Dispute Settlement Body ("DSB") decides by consensus not to adopt the reports. Nonetheless, Canada notes that the adoption procedure is without prejudice to the right of Members to express their views. Consequently, Canada wishes to express its views on the reports of the Panel and the Appellate Body, and to underline the importance to Canada of a number of issues raised in this case.

2. It is with respect for the fundamental importance of the

dispute settlement system that Canada expresses its great disappointment with the report of the Appellate Body, and with certain aspects of the Appellate Body's deliberations. Canada's observations may be reflected in the future discussions that Members may have in the context of the review of the DSU.

3. Canada has a vested interest in an open, respected and stable system for international trade. However, as international trade leads to an increasingly globalized and homogeneous world, it will be culture that will preserve the distinctiveness of WTO Members and ensure their ongoing sovereignty. The Government of Canada is therefore committed to maintaining effective policies and policy instruments in support of cultural development.

4. Print-based media are still a primary means of communication in Canada and around the world. Of all the different types of print-based media, periodicals in particular are timely and topical publications. Periodicals that are created for and in response to the needs of the Canadian market are not like periodicals that are created for and reflect the needs, interests and perceptions of the markets of other countries. It is not realistic for Canada, or for any Member of the WTO for that matter, to rely upon, nor even expect, media products from other countries to attempt to reflect its own reality. For it is in this reality that our sovereign distinctiveness as a country is determined. It is therefore critically important that a way be found, within the rules-based trading system, for WTO Members to be able to develop and maintain policies that promote their own unique culture and identity.

b) Expeditiousness and fairness

5. The dispute settlement provisions in the WTO Agreement ensure greater expeditiousness and fairness in the application of trade rules. Canada was at the forefront of the reform of the dispute settlement process during the Uruguay Round negotiations and continues to support these goals.

6. Expeditiousness is a constant preoccupation of the DSU working procedures that provide strict time-frames for DSB decisions. Ensuring an expeditious dispute settlement system must not result, however, in neglect of the fundamental principles of fairness.

7. Canada expresses disappointment with the handling of basic fairness requirements by the Appellate Body. Basic fairness requires an opportunity to argue and be heard. The determination of substitutability, competitiveness and protectionism under Article III:2, second sentence, of the GATT 1994 is a point of critical importance to the interpretation of the GATT 1994 and to the outcome of this case. Argument was neither submitted to nor solicited by the Appellate Body on these points. Had an opportunity been provided to submit a full written and oral argument, there would be no basis for a claim of lack of

procedural fairness.

8. The Appellate Body found that it could complete the analysis of Article III:2 of the GATT 1994 in this case, provided that there was sufficient basis in the "Main Arguments" part of the Panel Report to allow the Appellate Body to do so. The Appellate Body, therefore, relied on the summary of arguments from the Panel report with respect to Article III:2, second sentence of the GATT 1994. This is no substitute for a full written and oral argument on appeal.

9. The Appellate Body based its decision on a test that was not dealt with in the Panel report, that was not raised on appeal, and that was accordingly not addressed in the written or oral arguments of the parties. No notice was given to the parties of the intention of the Appellate Body to base its decision on a test that did not form the basis of the appeal under Article 17, paragraph 6 of the DSU. The Appellate Body, therefore, rendered its decision without the benefit of written or oral argument by the parties, and without providing a proper opportunity to the parties to submit such argument. The procedure adopted by the Appellate Body amounts to a denial of the right to be given notice and to be heard on all relevant issues.

10. The Appellate Body relied on the *United States-Gasoline* case, where it considered the chapeau to Article XX after deciding that one of the subparagraphs of Article XX was applicable. This was simply a two-step analysis of a single legal provision. Any ruling on whether an exception in Article XX applies automatically involves a consideration of the chapeau. The two sentences of Article III:2 of the GATT 1994, in contrast, are distinct obligations with different coverage and rules, and have been clearly treated as such in prior decisions, including the *Japan-Alcoholic Beverages* case.

11. In reviewing Canada's appeal of the Panel's decision on the excise tax as a services measure, the Appellate Body inferred that because Canada did not appeal the ruling on Tariff Code 9958, the excise tax should be considered a tax on a good. It is inappropriate, as a matter of fairness, to draw prejudicial inferences from decisions not to appeal distinct issues.

c) GATT / GATS

12. With respect to Canada's arguments on the application of GATT disciplines to services measures, Canada is most disappointed in the Appellate Body's ruling. A coherent interpretation of the GATT 1994 and the GATS together, giving meaning to all the treaties' provisions, is essential for future compliance by Members with all their obligations and commitments in respect of trade in goods and services.

13. When the Appellate Body is asked to rule on the relative scope of the two agreements, it is important to apply careful and

deliberate reasoning for Members to understand how it arrived at its decision. In this case, the Appellate Body was asked to rule on the applicability of the GATT and GATS provisions to the excise tax. We are disappointed that the Appellate Body did not provide considered reasoning on the question of the excise tax as a measure affecting advertising services. Instead, the decision on this critical point appears to rest largely on the Appellate Body's interpretation of policy linkages between the tax on advertising and the border measure targeting magazines *per se*.

14. It is clear from the report of the Appellate Body that WTO Members have to reflect upon the issue of the relationship between obligations under the GATT 1994 and commitments under the GATS. In the absence of agreement among Members on the respective scope of the two Agreements, we will face an increasing number of disputes that leave the Appellate Body to make this determination. Canada points to the recent *EC-Bananas* decision, and underscores the need for further attention to this issue, if our work in the services area is to make meaningful progress.

d) GATT Article III

15. The Appellate Body considered that no decision on the "like products" issue could properly be made because of the absence of any adequate analysis in the Panel report. If it was impossible to make a determination of "likeness" for the purpose of Article III:2, first sentence, in view of the absence of an adequate analysis in the Panel report, then *a fortiori* it was also impossible to determine whether the products were "directly competitive or substitutable" for the purpose of the second sentence. The Panel report contained no analysis of the second sentence at all, which is also to be addressed on a case-by-case basis, according to the *Japan-Alcoholic Beverages* case. Canada questions the Appellate Body's decision to refuse to rule on an issue because the Panel analysis is inadequate, but then to rule on a separate issue that the Panel failed to analyze at all.

16. The Appellate Body's finding on the "like products" issue was, in part, based on its analysis of the *Sports Illustrated* and *Harrowsmith* examples, neither of which was relevant to the case. This indicates a fundamental misunderstanding of the facts. The Sports Illustrated split-run was a *domestic* and not an imported product. This was common ground between the parties. The Appellate Body also based its conclusion on the fact that the U.S. edition of Harrowsmith Country Life, a Canadian-owned periodical formerly published in the United States, had ceased production. Since this product was never exported to Canada, and was not destined for a Canadian readership, it cannot be sustained that the closure of the U.S. edition amounts to a protective application of the tax. Thus the measure was to have an effect only on a domestic operation.

17. The Appellate Body assumed at p. 19 of their Report that the

words "directly or indirectly" in Article III:2, first sentence, must also apply to Article III:2, second sentence "given the broader application of the latter". While the second sentence is broader in its product coverage, it clearly is not broader in respect of the taxation measures to which it applies.

18. The statement quoted from the Panel report at pp. 26-27 of the Appellate Body report shows that magazines need both circulation and advertising revenue, and that a shortfall of advertising will affect editorial quality. It does *not* show that magazines are directly competitive or substitutable as consumer products. We contend that the quotation at p. 27 of the Appellate Body report from the Report of the Task Force on the Canadian Magazine Industry does not provide sufficient evidence on which to base such a conclusion when weighed against the countervailing evidence that the relevant magazines were very "poor substitutes" as consumer products. It is our view that all that is left of the analysis on this issue is a political statement whose probative value, either as a matter of economics or of law, is minimal.

e) "Funded" postal rates

19. The Appellate Body said that their textual interpretation was supported by the context of Article III:8(b) examined in relation to Articles III:2 and III:4 of the GATT 1994. But the Appellate Body did not make any examination of the context of the producers' subsidy exemption in relation to national treatment disciplines. Further, the Appellate Body relied on the object and purpose of Article III:8(b) to draw their conclusions in respect of "funded" rates. Unfortunately, the Appellate Body did not then explain what the object and purpose were nor did it conduct any analysis of them. As a result, this decision fails to provide sufficient reasoning to enable us to understand why the "funded" postal rates could not benefit from the exemption allowed in Article III:8(b).

f) Conclusion

20. Canada's commitment to the dispute settlement system remains firm. It is Canada's intention to continue to abide by the rules and procedures governing the settlement of disputes. Canada will inform the DSB of our intentions in respect of implementation of the recommendations and rulings of the DSB by August 29, 1997. However, in lieu of making its statement at the meeting required by Article 21(3) of the DSU, Canada will inform the DSB by letter transmitted to the Chairman for circulation to the Members of the DSB. We have spoken with the United States, the other party in this case, and we both agree that our respective rights and obligations will be preserved through this approach, as if the meeting under Article 21(3) had been held.

21. In their concluding remarks, the panelists stressed "that the ability of any Member to take measures to protect its

cultural identity was not at issue in the present case". This ability is not to be taken for granted. In the Canadian context, where we share a common language and the world's longest undefended border with a neighbour ten times our size, it is our unique challenge to "protect our cultural identity" with no possibility of achieving the economies of scale available to producers of cultural products and services that reinforce the American identity. While many aspects of the Canadian problem are unique, we believe all Members have an interest in addressing the issue squarely. For its part, Canada is committed to policies and measures to strengthen the viability of Canadian cultural industries, bearing in mind the need to ensure that Canada's rights and obligations as a WTO Member are respected.