Quelques exemples de
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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 extérieures
Bureau des Affaires juridiques
octobre 1981

Department of External Affairs
Bureau of Legal Affairs
October 1981

1981

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International Legal Measures Against Hijacking

Over the past year, Canada was instrumental in the elaboration of two international pronouncements, a resolution and a multilateral statement, on measures to help deter unlawful intereference with civil aviation.

The first of these was Resolution A23-21 adopted unanimously on October 6, 1980 by the Assembly of the International Civil Aviation Organization (ICAO). The resoltuion was entitled "Encouragement of Ratification or of Accession to International Air Law Conventions and Reporting Requirements under Article 11 of the Hague and Article 13 of the Montreal Conventions." Although both the 1970 Hague and 1971 Montreal Conventions contain provisions requiring states parties to report to the ICAO Council relevant information following occurrences of unlawful interference, and in particular information on whether the hijackers were extradited or had their cases submitted for prosecution to local authorities, Canada had noted that these obligations were not, for the most part, being met. As a result, Canada put forward Resolution A23-21, which, among other things, directed the Secretary-General of ICAO within a reasonable time from the date of a specific occurrence of unlawful interference, to ask that states parties concerned forward to the Council in accordance with their national law all relevant information required by the Hague and Montreal Conventions concerning such occurrence. As a result of the Assembly resolution, the Secretary-General has been reminding members of ICAO, by state letter, to report to the ICAO Council in accordance with the resolution and the two international conventions. Reports are now being made by states to the ICAO Council (although some states still are negligent in meeting this international obligation) and as a result the Council has a clearer idea of the degree to which member states are abiding by the international law requiring extradition or prosecution of hijackers.

A second measure taken during the last year to help deter unlawful interference with civil aviation, was the Ottawa Summit Statement on Terrorism, released on July 20, 1981. While other paragraphs of the Statement deal with cooperation among the seven Economic Summit states to prevent and deal with incidents of terrorism, paragraph 3 refers to the March 1981 hijacking of a Pakistan International Airline aircraft (aboard which were Canadian citizens). It expressed the view of the seven states that Afghanistan was in flagrant breach of its international obligations both during the incident and subsequently in giving refuge to the hijackers. The Statement continued as follows: "Consequently the Heads of State and Government propose to suspend all flights to and from Afghanistan in implementation of the Bonn Declaration unless Afghanistan immediately takes steps to comply with its obligations." This was the first time it was considered necessary to implement the 1978 Bonn Declaration

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on Hijacking and it indicated the serious will of the seven Economic Summit countries to take action against a state that had flagrantly breached its international obligations with respect to the safety of international civil aviation.

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MESURES JURIDIQUES INTERNATIONALES CONTRE LA PIRATERIE AERIENNE

Au cours de l'année passée, le Canada a joué un rôle important dans le développement de deux instruments internationaux établissant des mesures destinées à accroître la sécurité de l'aviation civile. En premier lieu, une résolution a été adoptée par consensus le 6 octobre 1980 par l'Assemblée de l'Organisation de l'Aviation civile internationale, visant à assurer que les états membres de l'Organisation communiqueront au Conseil tous les renseignements utiles concernant les mesures prises à l'égard des auteurs d'infractions, en conformité avec leurs obligations en vertu des conventions internationales sur les actes illicites dirigés contre la sécurité de l'aviation civile. En second lieu, une Déclaration multilatérale sur le terrorisme a été adoptée le 20 juillet 1981 par le sommet d'Ottawa. Le paragraphe 3 de la Déclaration se réfère au détournement d'un avion de "Pakistan International Airlines" en mars, et dit: "Les chefs d'Etat ou de gouvernement proposent donc, en application de la déclaration de Bonn, la suspension de tous les vols à destination et en provenance de l'Afghanistan, à moins que ce pays ne prenne immédiatement des mesures pour satisfaire à ses obligations."

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INTERNATIONAL CLAIMS

The continuing work of the Legal Bureau during the last year in the field on international claims resulted in the signature by Canada of three important claims agreements.

On November 7, 1980, the Government of Canada and the Government of the Republic of Cuba signed an agreement that provided for payment of $850,000 by Cuba to Canada, as compensation for the expropriation of assets of Canadian citizens. The property concerned was nationalized by Cuba following the revolution of January 1, 1959, and the settlement was achieved after a number of rounds of negotiations that commenced in 1974. The Agreement of November 7, 1980, was subsequently ratified by both Governments and Instruments of Ratification were exchanged and the Agreement entered into force on June 26, 1981. In accordance with the usual practice of the Government of Canada in respect of international claims settlements the settlement funds will be deposited in the Foreign Claims Fund. Individual claimants will receive an amount, or a pro rata share of the fund, that is approved by the Secretary of State for External Affairs and the Minister of Finance on the recommendation of the Foreign Claims Commission. The Foreign Claims (Cuba) Settlement Regulations P.C. 1981-127 of 22 January 1981 embody the terms of reference that guide the Commission's consideration of the individual claims.

On November 21, 1980, representatives of the Governments of Canada and the U.S.S.R. initialled a Protocol ad referendum that provided for the payment of $3 million to Canada by the USSR, as compensation for the costs incurred in retrieving the debris of the Soviet satellite, Cosmos 954. It will be recalled that the Soviet satellite disintegrated over Canadian territory on January 24, 1978, and that the Government of Canada presented a formal claim to the USSR requesting compensation of slightly over $6 million. Canada's claim was based primarily on the 1972 Convention on International Liability for Damage caused by Space Objects. Three rounds of negotiations were held in 1980: in Ottawa in February and early March; in Moscow in June and again in Ottawa in November. Representatives of the two Governments signed the formal Protocol is Moscow on April 2, 1981, and the settlement funds were received by the Government of Canada shortly thereafter.

A third important claims agreement was concluded and entered into force on August 20, 1981, upon its signature in Beijing by the Secretary of State for External Affairs and the Foreign Minister of the People's Republic of China. The

Agreement provides that the PRC will pay to the Government of Canada the sum of $340,000 as compensation for the expropriation of property belonging to Canadian citizens. (Canadian Government claims in respect of the Ming Sung ships and the Embassy in Nanking had been settled earlier). The private claims arose in respect of acts of confiscation that were implemented by the PRC shortly after the revolution in 1949. In 1974, after the establishment of diplomatic relations between Canada and the PRC, the latter agreed to verify details of any private claims that were submitted by the Government of Canada. Officials of both Governments met in April of 1980 to discuss the claims program and substantive agreement on a settlement was reached at the conclusion of a second round of negotiations that was held in Beijing in July of 1981.

The Legal Bureau is continuing its work on the private claims programs against the German Democratic Republic and the Government of Yugoslavia as well as on a number of Government and private claims against other countries.

RECLAMATIONS INTERNATIONALES

Au cours de la dernière année, le travail assidu du Bureau des affaires juridiques dans le domaine des réclamations étrangères aura permis au Canada de signer trois importants accords de règlement.

Le 7 novembre 1980, le gouvernement du Canada et le gouvernement de la République de Cuba ont signé un accord prévoyant le versement au Canada de la somme de $850,000, à titre d'indemnisation pour l'expropriation par Cuba de biens appartenant à des nationaux canadiens. Par ailleurs, le 20 août 1981, le secrétaire d'Etat aux Affaires extérieures et le ministre des Affaires étrangères de la République populaire de Chine ont signé un accord visant le versement au Canada de la somme de $340,000, à titre d'indemnisation pour l'expropriation par la RPC de biens appartenant à des nationaux canadiens. Conformément à la pratique du gouvernement du Canada en ce qui concerne le règlement des réclamations internationales, ces deux sommes seront versées à la Caisse des réclamations étrangères. Chaque réclamant recevra une indemnité dont le montant, correspondant à une part proportionnelle de la Caisse, aura été approuvé par le secrétaire d'Etat aux Affaires extérieures et le ministre des Finances sur la recommandation de la Commission des réclamations étrangères.

Enfin, des représentants des gouvernements du Canada et de l'Union des républiques socialistes soviétiques ont tenu, dans le courant de 1980, trois séries de négociations visant la demande d'indemnisation présentée par le Canada au titre des frais subis pour l'enlèvement des débris du satellite soviétique Cosmos 954. Le 21 novembre 1980, à l'issue de la troisième série de négociations, les représentants des deux gouvernements on paraphé un protocole ad referendum prévoyant le versement au Canada de la somme de $3 millions en règlement définitif de sa réclamation. Le protocole officiel a été signé à Moscou, le 2 avril 1981, et la somme de règlement a été reçue peu de temps après par le gouvernement du Canada.

INTERNATIONAL FISHERIES LAW

The pace of fisheries negotiations stayed fast in 1981. Canada participated in negotiations with some of its largest partners, including the USA, the European Economic Community and the USSR. In addition Canada continued to devote effort to multilateral arrangements, particularly the Northwest Atlantic Fisheries Organization and negotiations on an Atlantic salmon convention.

In March 1981, U.S. President Reagan withdrew from the U.S. Senate the East Coast Fishery Resources Agreement signed by Canada and the USA in March 1979. At the same time, President Reagan formally sought Senate ratification of the Gulf of Maine Maritime Boundary Delimitation Agreement which had been linked to the fisheries agreement. The Senate approved the boundary treaty in April. On the Canadian side, the Governor-in-Council authorized ratification in October. The treaty refers the maritime boundary to a 5-man Chamber of the ICJ. With regard to fisheries, Canadian and U.S. officials are holding consultations concerning the management and conservation of Georges Bank stocks. On the West Coast, Canada and the USA continued discussions on salmon interceptions. Interim arrangements were reached for the 1981 fishery season and a consensus exists with respect to appropriate interception and escapement levels for 1982. Both parties are pursuing efforts to reach a comprehensive long-term agreement to provide for cooperative management and enforcement of Pacific salmon resources.

Further to the interim arrangements concluded between Canada and the USA in August 1980 that provided for reciprocal fishing of albacore tuna off the Pacific Coasts of the two countries, a long-term agreement was signed on May 26, 1981 and came into force on July 29, 1981. The agreement provides, *inter alia*, for reciprocal fishery privileges, port entry, and enforcement. In Canada's view, the conclusion of the treaty has not lessened the need for prosecution of the GATT proceeding that was initiated following the U.S. embargo of Canadian tuna in 1979. Canada has therefore continued to press the GATT panel for a finding.

In November 1980, Canada and the European Economic Community reached *ad referendum* agreement on a long-term fisheries agreement which seeks to match the benefits to the Community of access to fish in Canadian waters to the benefits

to Canada of access to the fish markets of the Community. The EEC, however, did not obtain Council approval of the agreement until October 1981. In the interim, the EEC adopted certain policies which, in the Canadian view, could affect the benefits that Canada is to derive from the agreement. Discussions have therefore been initiated to amend the agreement prior to ratification in order to meet Canadian concerns.

Canada also continued negotiations with Portugal and Spain. On September 17 the Canadian Ambassador to Portugal and the Secretary of State of Portugal signed a Summary Record of fishery negotiations between Canada and Portugal. The Summary Record dealt with Portuguese fishing in Canadian waters, Canadian access to Portuguese fish markets, and cooperation in the Northwest Atlantic Fisheries Organization. Canadian negotiators unsuccessfully sought a similar agreement with Spain, with the result that Spanish fishing vessels were denied licenses to fish in Canadian waters.

On May 12, 1981 Canada notified Soviet and Polish authorities of its decision to terminate in May 1982 the respective bilateral fisheries agreement entered into in 1976. The main objective is to renegotiate the agreements in order to bring them into line with Canada's post-1976 bilateral fisheries agreements and, particularly with regard to the USSR, to obtain better access for Canadian fish and fish products to the Soviet markets. Negotiations of new agreements have started.

During 1981, Canada continued to participate actively in meetings of the Northwest Atlantic Fisheries Organization. On the basis of advice provided by the Scientific Council, agreement was reached at the third annual meeting of the Organization, held in Halifax during September 8-18, 1981, on conservation and management measures in 1982 regarding total allowable catches and allocations for ten fish stocks, three of which are entirely outside the Canadian 200-mile fishing zone. During this meeting, the Organization decided to eliminate the allocations that had in the past been made available to Spain. This was done because Spain had acted inconsistently with the conditions on the basis of which allocations had been made to Spain, as well as with internationally accepted principles of conservation.

During 1981 Canada also continued to participate in negotiations with the European Economic Community, the USA, Norway, Sweden, Iceland and the Faroe Islands on an Atlantic salmon convention. The negotiations were complicated by a decision by Denmark to allow Greenlanders to fish a higher tonnage of salmon off Greenland than in past years. Officials of all concerned states met to try to achieve an acceptable accommodation and a draft treaty exists as a basis for further negotiations.

On June 26, 1981 the Secretary of State for External Affairs and the Minister of Fisheries and Oceans announced that Canada had deposited a notice of withdrawal from the 1946 International Convention for the Regulation of Whaling and from the International Whaling Commission. Under the terms of the Convention,Canada's withdrawal will become effective on June 30, 1982. Canada will continue to support international cooperation for the conservation of the world's whale stocks. Indeed,Canada fully intends to seek the advice of the International Whaling Commission's Scientific Committee and to exchange scientific data and analyses with that body, relevant to Canadian management of cetacean stocks in its 200-mile zone.

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DROIT INTERNATIONAL DE LA PECHE

En 1981, des négociations bilatérales ont été effectuées avec plusieurs des pays les plus importants pour le Canada dans le secteur de la pêche, y inclus les Etats-Unis, la Communauté économique européenne, et l'Union des Républiques socialistes soviétiques. Les Etats-Unis ont décidé de ne pas ratifier l'accord signé en 1979 relatif aux ressources halieutiques de la côte atlantique. Des consultations canado-américaines ont donc eut lieu pour discuter des meilleures méthodes de gérer les stocks dans ce secteur. Des efforts ont aussi été poursuivis sur la côte ouest en vue d'aboutir à un accord global visant la gestion coopérative et la mise en valeur des ressources en saumon du Pacifique. De plus, un accord entra en vigueur concernant les thoniers du Pacifique et leurs privilèges portuaires. Les négociations avec la Communauté économique européenne ont abouti, en novembre 1980, à un accord ad referendum qui n'a été approuvé par le Conseil des Ministres de la Communauté qu'en octobre 1981. Etant donné ce délai, il s'avère nécessaire de renégocier quelques aspects de l'accord.

Des arrangements de pêche ont été conclus avec le Portugal pour 1981, mais les négociations avec l'Espagne ont échoué. Le Canada a aussi entamé des négociations avec l'URSS et la Pologne, pour remettre au point certaines dispositions des accords de 1976, afin de mieux tenir compte du régime des pêches post-1976 dans les zones de 200 milles. Sur le plan multilatéral, le Canada a annoncé sa décision de se retirer de la Commission baleinière internationale.

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TROISIEME CONFERENCE DES NATIONS UNIS SUR LE DROIT DE LA MER

La dixième session de la Conférence des Nations Unies sur le droit de la mer s'est tenue à New York du 9 mars au 24 avril 1981, et à Genève du 3 au 28 août 1981. L'objectif qui consistait à mettre fin aux négociations et à formuler un texte définitif n'a pu être atteint principalement à cause de la décision de la nouvelle administration américaine d'entreprendre une révision complète du projet de convention et, entretemps, de ne pas poursuivre les négociations sur les questions en suspens. Cette décision, annoncée quelques jours seulement avant le début de la dixième session, a sérieusement affecté le processus de négociations et a jeté un doute sur l'avenir de la Conférence dans son ensemble.

Au début de la dixième session, la Conférence a dû procéder à l'élection d'un nouveau président suite au décès, en décembre 1980, de l'Ambassadeur Shirley Amerasinghe qui avait présidé aux destinées de la Conférence depuis ses débuts, en 1972. Après une semaine de débats, l'Ambassadeur de Singapour, M. Tommy Koh, a été élu à ce poste. Dans les semaines qui ont suivies, il s'est montré à la hauteur de la confiance que la conférence dans son ensemble avait mise en lui.

Malgré ces difficultés la dixième session a été en mesure d'accomplir un travail utile. La principale réalisation a été, sans aucun doute, l'accord sur la formulation des articles concernant la délimitation des frontières maritimes entre Etats. Cette question épineuse faisait l'objet de négociations entre deux groupes d'intérêts depuis plus de six ans et semblait insoluble. Un groupe d'Etats favorisait le principe de l'équidistance tandis que l'autre favorisait les "principes équitables" comme base de règlement des conflits portant sur la délimitation. L'accord des deux groupes sur une formule de compromis résulte en grande partie des efforts du Président Koh qui a proposé cette formule dans les derniers jours de la session suite à d'intensives négociations. Une autre réalisation d'importance fut le choix de la Jamaique en tant que siège de la future Autorité internationale des Fonds marins et de la ville de Hambourg (RFA) en tant que siège du Tribunal international du Droit de la Mer.

Les discussions se sont poursuivies sur la question de la participation d'organisations internationales telles la CEE à la Convention, de même que sur la participation de mouvements de libération tel l'OLP. Le projet de résolution portant création d'une commission préparatoire visant à préparer l'entrée en vigueur du régime juridique qui régira l'exploitation des fonds marins à également été l'objet d'une révision détaillée. Quelques points de divergences demeurent toutefois sur ces questions.

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Lors de la première partie de la dixième session, à New York, peu de progrès ont été accomplis sur les questions en suspens concernant le régime d'exploitation des fonds marins internationaux étant donné la non-participation de la délégation américaine qui est un acteur principal dans ces négociations. Parmi les points en suspens mentionnons la limitation de la production minière des fonds marins. Les Etats producteurs, dont le Canada, considèrent que la formule actuelle de limitation à la production minière des fonds marins n'offre pas une protection adéquate aux producteurs terrestres. Certains Etats africains ont fait de nouvelles propositions à cet égard mais les discussions n'ont pas abouti. L'Australie a continué, avec l'appui du Canada et d'autre producteurs terrestres, de faire pression en vue d'inclure dans le project de convention une disposition interdisant les pratiques commerciales déloyales. Les discussions sur cette question se poursuivront lors de la onzième session. D'autre part, étant donné la position des USA, les Etats en développement ont refusé de négocier la question de la protection des investissements effectués avant l'entrée en vigueur de la convention, question qui avait d'abord été soulevée par la délégation américaine.

A la reprise de la dixième session à Genève, la délégation américaine a indiqué qu'elle entendait utiliser le temps disponible pour obtenir l'opinion des autres délégations sur les difficultés que présente à son avis le projet de convention et évaluer les possibilités de modification au texte. Lors d'un discours en plénière et lors de rencontres officieuses, le chef de la délégation américaine, l'Ambassadeur Malone, a expliqué que les préoccupations de son Gouvernement portent essentiellement sur le régime d'exploitation des fonds marins internationaux et plus particulièrement sur: le processus de prise de décision au sein de l'Autorité internationale des Fonds marins, la composition du Conseil de l'Autorité, la limitation de la production minière des fonds marins, la discrimination en faveur de l'Entreprise par le biais des transferts de techniques et d'avantages financiers et, d'une manière générale, la future règlementation internationale de l'exploitation des fonds marins qui sera trop lourde de l'avis des USA. Plusieurs rencontres officieuses ont eu lieu au cours desquelles la délégation américaine a pu constater qu'il ne serait pas possible d'apporter des changements fondamentaux au projet de convention. Les Etats en développement, de même que les Etats socialistes, le groupe des Etats nordiques et certains autres Etats industrialisés tels l'Australie et le Canada ont en effet clairement affirmé que les principaux compromis qui sous-tendent le texte et qui sont le fruit de plusieurs années de négociations ne sauraient être remis en cause. La délégation des USA devra maintenant évaluer la résultat de la dixième session et décider de sa participation à la onzième et dernière session.

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Le Comité de rédaction a poursuivi, au cours de la dixième session et pendant une période de travail intersessionnelle de cinq semaines, sa lourde tâche qui consiste à reviser le texte de négociation article par article dans les six langues officielles de la Conférence. Approximativement les 3/4 du projet de convention ont jusqu'à maintenant été examinés par le Comité de rédaction.

La plupart des délégations étaient préoccupées par les délais auxquels la Conférence s'est heurtée depuis un an. C'est pourquoi un programme de travail détaillé a été adopté en vue de la onzième session qui se tiendra à New York en mars/avril 1982. Les trois premières semaines de cette ultime session seront consacrées à la négociation après quoi le texte sera officiellement adopté par la Conférence. La Conférence a en outre prié le Secrétaire Général des Nations Unies de demander aux Gouvernement du Vénézuela de prendre les dispositions nécessaires en vue de la cérémonie de signature qui aura lieu à Caracas en septembre 1982.

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THIRD UNITED NATIONS CONFERENCE

ON THE LAW OF THE SEA

The Tenth Session of the Third Conference on the Law of the Sea was held in New York from March 9 to April 24, 1981 and in Geneva from August 3 to 28, 1981. The previously agreed objective of concluding negotiations was not met, largely because of the U.S. announcement on the eve of the Session that the new Administration was undertaking a complete review of the text, and that meanwhile the USA would not negotiate on the outstanding issues. This was a major set-back for the Conference and it brought negotiations on the seabed mining regime to a halt.

Despite these difficulties, the Tenth Session was able to accomplish some useful work. The major achievement was undoubtedly the agreement on a new, and widely accepted article on boundary delimitation. The Conference also decided, by vote, to name Jamaica as the site of the International Seabed Authority and Hamburg as the site of the International Tribunal for the Law of the Sea. The question of participation in the Convention by international organizations, such as the EEC, and liberation movements was also discussed extensively as well as the establishment of a Preparatory Commission to lay the groundwork for the seabed mining regime. Further discussion will be necessary, however, to reach consensus on these issues.

At the resumed Tenth Session in Geneva, the U.S. delegation indicated some of the major problems that it has with the Draft Convention, all of them related to the seabed mining regime. During informal meetings, representatives of the Group of 77, the Socialist group and a number of Western industrialized countries, including Canada, made it clear that they were not prepared to renegotiate fundamental aspects of the seabed mining regime. The U.S. Administration will now have to decide whether it will participate in the Final Session of the Conference to be held in New York in March/April 1982.

In accordance with a decision of the Conference, the Treaty should be open for signature in Caracas in the fall of 1982.

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CANADIAN TREATY PRACTICE

The Treaty Section, in the Economic Law and Treaty Division of the External Affairs Department's Bureau of Legal Affairs, provides legal advice to Departments of the Canadian Government on Canadian treaty practice and procedure, on the drafting of treaties (also called agreements, conventions and protocols), and on their interpretation with respect to the rights and obligations which they create for Canada as instruments legally binding in international law. The Section advises on Canadian requirements and international practice relating to treaties. The Section prepares all formal instruments (ratification, accession, acceptance or approval) relating to treaties to which Canada wishes to subscribe, and assembles them for tabling in Parliament by the SSEA.

Treaty Section also advises all Departments of Government on legally non-binding instruments such as memoranda of understanding or arrangements. Such arrangements or understandings are employed to cover cooperative programmes or informal engagements in a wide variety of fields and their form may be government-to-government, department-to-department or agency-to-agency.

Treaty Registry

Treaty Section maintains a detailed register of all treaties to which Canada is a signatory or party. Records are kept of the date and place of signature of a treaty, the date of tabling in Parliament or approval by Parliament and, as applicable, of ratification or accession by Canada and entry into force; a record is also kept of any Canadian reservations, related agreements on the same subject and notices of termination or withdrawal.

During the twelve month period from October 1, 1980 to September 30, 1981, Canada signed 43 treaties - 36 bilateral and 7 multilateral. During this period 46 bilateral treaties came into force. Instruments of acceptance or ratification were deposited with respect to 8 multilateral treaties and 4 multilaterals entered into force. Of particular note among bilateral treaties was the entry into force of 12 double taxation agreements. Other bilaterals signed or ratified during this period concerned economic cooperation, claims, investment insurance, social security, extradition, navigation, fisheries, telecommunications, nuclear cooperation, defence, textiles, radio and air services. Multilateral treaties that were signed or ratified include several Multilateral Trade Negotiation (MTN) Agreements, the Convention on the Civil Aspects of International Child Abduction, an Agreement with the member nations of the Association of Southeast Asian Nations (ASEAN) on economic cooperation, and the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be deemed to be Excessively Injurious or have Indiscriminate

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Effects. Canada deposited instruments of ratification or accession regarding the Convention on the Prohibition of Military or any Other Hostile Use of Environmental Modification Techniques, amendments to the Universal Postal Convention, an amendment to the NATO Status of Forces Agreement, a Protocol and Supplementary Protocol to the General Agreement on Tarifs and Trade (GATT) and regarding protocols amending the North Pacific Fur Seal Convention, the Wheat Trade Convention and the Food Aid Convention.

The Section is completing work on the first edition of a new publication, "Canadian Treaties in Force as of January 1, 1981 - Les Traités canadiens en vigueur au 1er janvier 1981.

Notice of publication of each text in the CTS is given in the daily and monthly schedules of Canadian Government publications. The texts and schedules can be obtained from the Publication Centre of the Department of Supplies and Services, Hull, Quebec, K1A OS9.

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LA PRATIQUE CANADIENNE EN MATIERE DE TRAITES

Il appartient à la Section des Traités, Ministère des Affaires extérieures, de donner des avis juridiques en ce qui concerne la procédure canadienne des traités, de rédiger les traités et de les interpréter quant aux droits et obligations qui en découlent pour le Canada. La Section répertoire et enregistre tous les traités qui lient ou concernent le Canada; elle en fait également publier les textes dans son Recueil des Traités du Canada (RTC). La première édition d'un recueil complet de tous les traités en vigueur pour le Canada devrait paraître bientôt sous le titre " Canadian Treaties in Force as of January 1, 1981- Les Traités canadiens en vigueur au ler janvier 1981".

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PRIVATE INTERNATIONAL LAW

The work of the Private International Law Section, as its name implies, involves matters of interaction between the domestic law of Canada, both federal and provincial, and the domestic law of foreign states. The volume of work of the Section has grown substantially during recent years as a result of the increased number of international transactions by Canadians, both for private and commercial purposes. Requests from Canadian lawyers for assistance in serving legal documents on persons residing abroad are received on almost a daily basis and numerous requests are also made by foreign missions in Ottawa to serve documents on persons in Canada. Canada has conventions Regarding Legal Proceedings in Civil and Commercial Matters with 19 states, which provide for reciprocal assistance in the service of legal documents. In addition, the Section has often been successful in arranging for the service of documents abroad in countries with which Canada does not have a convention. The Section handles requests for rogatory commissions for the taking of evidence in both civil and criminal matters, abroad for use in Canada, and vice versa. The Section assists both provincial governments and practicing lawyers in this field. A booklet prepared by the Legal Advisory Division on International Judicial Co-operation in Civil, Administrative, Commercial and Criminal Matters has been published. It is designed to provide guidance on the various procedures to follow in Canada and abroad to serve documents or to take evidence. It has been distributed to law societies in Canada, Canadian missions abroad, and foreign missions in Ottawa. A copy may be obtained by writing to the Department of External Affairs, 125 Sussex Drive, Ottawa. The Section liaises between provincial governments on such matters as reciprocal enforcement of maintenance orders and judgments. Requests for the authentication of signatures on legal documents required for use abroad have increased not only in respect of Canadian companies which engage in foreign business ventures, but also in respect of private individuals who require authentication of signatures on birth, marriage and death certificates and of school marks and educational qualifications. Requests for extradition and rendition of fugitive offenders to and from Canada continue at a high level, particularly between Canada and the United States of America.

The process, started several years ago, of concluding new extradition treaties, is continuing. A new extradition treaty was signed in Rome on May 6, 1981 between Canada and Italy. It will come into force upon ratification and will replace the Treaty between Great Britain and Italy (and applicable to Canada) for the Mutual Surrender of Fugitive

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Criminals of 1873. The extradition treaty between Canada and France signed on February 9, 1981 will be ratified as soon as the French authorities are in a position to do so. Negotiations with the Netherlands are continuing. The amendment proposed to the Canada-Finland Extradition Treaty, which was signed on June 21, 1978, is being considered by the Department of Justice. As soon as a decision is made, the Treaty can be ratified. The new Fugitive Offenders Act (based on the British model of 1966) which permits rendition of offenders between Commonwealth states is awaiting approval of the Canadian Parliament.

The abduction of children by one parent, often in contravention of a Canadian custody order, remains an intractable problem for many Canadian citizens. At any given moment the Department has 40 or more active cases, and the number of such cases is increasing. There is reason to believe that the majority of such cases never come to the attention of the Deparment. As a Canadian custody order has no extra-territorial effect, the role of the Department remains to assist in establishing contact between the parents, to obtain the names of lawyers in the other country who could be consulted with respect to initiating a custody action before the courts where the child is located, and to attempt to obtain a report as to the well-being of the child.

Normally, the Department becomes involved when a telephone call or letter is received indicating a child has been taken by a parent, who may or may not be a Canadian citizen, contrary to a Canadian custody order. If the child's exact location is known, the appropriate Canadian post will be asked to attempt to contact the abducting parent to ascertain the child's health and well-being and to enquire under what circumstances, if any, the parent is prepared to return the child to Canada. However, the Department cannot conduct searches for children in foreign countries. In addition, the Department obtains the names of lawyers engaged in the practice of family law in the particular area and requests an informal opinion regarding the prospects of of success, time required, and expected cost of a custody action.

Canada is participating in two initiatives taken to ensure greater international co-operation for the resolution of such cases. First, within the context of the

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Commonwealth, member countries have undertaken to examine on a priority basis, the possibility of greater co-operation in family law matters and the enforcement of custody matters. Secondly, Canada represented by officials of both federal and provincial governments, participated in the fourteenth session of the Hague Conference on Private International Law in the course of which the Convention on the Civil Aspects of Child Abduction was signed, on October 25, 1980, by four countries, including Canada.

The system proposed in the Hague Convention is simple. Where a child is wrongfully removed or retained, that is where there is a breach of custody rights under the law of the state in which the child is habitually resident, the person whose rights of custody have been breached may apply to a "Central Authority" of the State where the child is, with a view to obtaining the return of the child, voluntarily if possible, or otherwise by means of a judicial decision. The judicial or administrative authority will study the documentation provided and if justified will order the immediate return of the child to the country of habitual residence. The treaty is open for accession by any country, whether a member of the Hague Conference or not. Before Canada may become party to the agreement, it will be necessary for the provinces to adopt legislation giving effect to its provisions, and discussions are taking place. In summary, this Hague Convention holds the promise of bringing order into the current chaos of international child abduction. It is hoped that the treaty will soon be in force among as many countries as possible.

In recent years, Canada has entered into Treaties on the Execution of Penal Sentences (Transfer of Offenders treaties) with the United States, Mexico and Peru. Under these treaties, a Canadian citizen convicted and sentenced to a term of imprisonment in these countries may apply to serve the sentence in a Canadian penal institution, subject to the approval of the states concerned. To date, 87 inmates in Canadian institutions were returned to the United States, and 67 Canadian prisoners in U.S. institutions plus nine Canadian prisoners in Mexican institutions were returned to Canada. Two more Canadian citizens recently convicted in Peruvian courts will be transferred to Canada in the near future. To date, 163 persons have been transferred to or from Canada. Similar treaties have been signed with France and Bolivia but have not yet

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been ratified. A number of other countries have expressed an interest in negotiating similar treaties and talks have been initiated for this purpose. In October 1980, a Canadian delegation attended a meeting in Strasbourg of Council of Europe experts for the purpose of drawing up a model agreement for a simple prisoner transfer agreement, for use by member and non-member states. It is expected that the model agreement will be ready for use by early 1983.

The Department continues to assist in international adoption matters where Canadian citizens seek to adopt a child abroad. The Private International Law Section works with the National Adoption Desk, Health and Welfare Canada, which provides liaison and co-ordination between the provincial child welfare authorities. Through its missions abroad, the Department is able to obtain expeditiously information on adoption procedures in foreign countries for distribution to Canadian agencies through the National Adoption Desk.

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DROIT INTERNATIONAL PRIVE

La Section du droit international privé s'occupe des questions où interagissent des lois fédérales et provinciales du Canada et le droit interne d'Etats étrangers. Ainsi, la Section est appelée quotidiennement à prêter assistance à des avocats canadiens et à des missions diplomatiques étrangères pour ce qui est de la signification d'actes judiciaires à l'étranger et au Canada. Le Canada est en effet lié à 19 Etats par des conventions relatives à la procédure en matière civile et commerciale. La Section prête également son concours pour l'obtention des preuves testimoniales à l'étranger aux fins de leur utilisation au Canada, et vice versa. La Direction des consultations juridiques a publié récemment une brochure intitulée "Entraide judiciaire internationale en matière civile, commerciale, administrative et criminelle". On peut en obtenir un exemplaire en s'adressant au ministère des Affaires extérieures, 125, promenade Sussex, Ottawa. Par ailleurs, la Section assure la liaison entre gouvernements provinciaux, pour ce qui est notamment de l'exécution réciproque des obligations alimentaires, et légalise les actes publics devant être produits devant une instance étrangère.

Le processus de conclusion de nouveaux traités d'extradition se poursuit. Un nouveau traité d'extradition, signé avec l'Italie le 6 mai 1981, entrera en vigueur dès qu'il aura été ratifié. Les traités d'extradition conclus récemment avec la France et la Finlande attendent la ratification. La nouvelle Loi sur les délinquants en fuite (conçue sur le modèle de la loi britannique de 1966) attend l'approbation du Parlement du Canada. La Section prête également assistance aux parents dont les enfants ont été enlevés et emmenés à l'étranger. Normalement, cette assistance consiste à mettre le parent concerné en rapport avec un avocat du pays en cause et à tenter d'obtenir, par les voies diplomatiques, des renseignements sur le bien-être de l'enfant. Le Canada a signé la Convention sur les aspects civils de l'enlèvement international d'enfants, le 25 octobre 1980, lors de la 14e session de la Conférence de La Haye de droit international privé. L'adhésion du Canada est subordonnée à la coopération des provinces.

Le Canada est lié aux Etats-Unis, au Mexique et au Pérou par des traités sur l'exécution des peines imposées aux termes du droit criminel. Des traités semblables, signés avec la France et la Bolivie, n'ont pas encore été ratifiés. Une délégation canadienne a participé à Strasbourg à une réunion d'experts du Conseil de l'Europe en vue de mettre au point un modèle d'accord sur le transfèrement des prisonniers, lequel devrait être en usage d'ici mai 1983. Enfin, le Ministère continue de prêter son concours en matière d'adoption internationale.

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ENVIRONMENTAL LAW

Multilateral

The UNEP Senior Level Meeting on Environmental Law will be held in Montevideo, Uruguay, from October 28 to November 6, 1981. The decision to convene the meeting was taken by the UNEP Governing Council at its eighth session in April, 1980, in response to a joint initiative by Canada and Sweden. The Governing Council also decided that the UNEP Working Group of Experts on Environmental Law would meet as a Preparatory Committee for the Senior Level Meeting.

In April, 1981, Canada participated in a meeting of a small drafting group which produced a draft resolution for the Governing Council setting out the mandate for the Senior Level Meeting, and suggesting dates for it and the meeting of the Preparatory Committee. Decision 9/19 A taken by the Governing Council at its Ninth Session in May, 1981, based on this draft, provides that the mandate of the Senior Level Meeting shall be, "To establish a framework and methods for the development and periodic review of environmental law, by focussing upon..." a number of elements including " the identification of major subject areas - such as marine pollution from land-based sources, protection of the ozone layer, and disposal of hazardous wastes - suitable for increased global and regional coordination and cooperation in elaborating environmental law, with particular regard to the interests of developing countries;". The decision also directs the Senior Level Meeting, "To set out a programme, including global, regional and national efforts in furtherance of the above elements".

The Working Group of Experts on Environmental Law met in Geneva from September 9 to 18 as a Preparatory Committee for the Senior Level Meeting. This meeting was immediately preceded by a meeting of representatives of a number of developing countries to identify their particular concerns. The Preparatory Committee adopted a program of action which will be the basic working document for the Senior Level Meeting.

In February, 1980, the UNEP Working Group of Experts on Environmental Law completed its work on liability and compensation, the fourth and final part of its study on the legal aspects of offshore mining and drilling carried out within the limits of national jurisdiction. The report of the Working Group of Experts was considered by the UNEP

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Governing Council at its Ninth Session in May, 1981. It requested the Executive Director of UNEP to circulate the texts of the conclusions reached by the Working Group to all Governments for their comments; recommended that Governments consider them when drafting legislation or negotiating agreements on this subject, and requested the Executive Director to report on this subject to the Governing Council at its tenth session.

Work on a convention on liability and compensation in connection with the carriage of noxious and hazardous substances by sea continued in the Legal Committee of the Intergovernmental Maritime Consultative Organization. The Committee will take up this subject again at its 47th session in February, 1982, with a view to holding a diplomatic conference to conclude the convention in 1983 or 1984.

Bilateral

Formal negotiations on a transboundary air pollution agreement between Canada and the United States opened in Washington on June 23, 1981, pursuant to the Memorandum of Intent on transboundary air pollution signed by the two governments in August, 1980. The Memorandum pledged the governments to negotiate an air pollution agreement and established a committee structure to undertake preparatory work to be followed by formal negotiations. Committee reports on atmospheric modelling; impact assessment; emissions, costs and engineering assessment; and strategies development and implementation were submitted to the governments in February, 1981. The report of the Legal, Institutional and Drafting Work Group, which draws together available information on international law and domestic legal matters pertaining to the negotiation of a transboundary air pollution agreement, was completed in July, 1981.

The next round of negotiations will be held in Ottawa late in the year.

DROIT DE L'ENVIRONNEMENT

Sur le plan multilatéral, c'est au sein du Programme des Nations Unies pour l'Environnement que se sont produits en 1981 les principaux faits nouveaux en matière de droit international de l'environnement. Lors de sa neuvième session, en mai, le Conseil d'administration du PNUE a établi un mandat détaillé en vue de la Réunion de hauts fonctionnaires spécialistes du droit de l'environnement qui se tiendra à Montevideo, en Uruguay, du 18 octobre au 6 novembre. Toujours dans le cadre du PNUE, le Groupe de travail d'experts sur le droit de l'environnement a achevé son étude sur les aspects juridiques des activités de forage et d'exploitation minière offshore menées dans les limites de la juridiction nationale. Par ailleurs, les travaux se sont poursuivis en 1981 au sein d'un autre organisme des Nations Unies, l'Organisation intergouvernementale consultative de la navigation maritime, en vue d'une convention sur la responsabilité et l'indemnisation relativement au transport maritime de substances nocives et dangereuses.

Sur le plan bilatéral, des négociations officielles sur la pollution atmosphérique transfrontière se sont engagées le 23 juin entre le Canada et les Etats-Unis, en application du Memorandum déclaratif d'intention signé à cet égard par les deux gouvernements en août 1980. La prochaine série de négociations se tiendra à Ottawa vers la fin de l'année.

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International Development Law

Development issues in international fora are varied and disparate and consequently it is only possible to touch on some of the more important legal developments of the past year. For the purpose of this piece, we will highlight various issues under what has loosely become known as the new international economic order which encompasses nearly all development questions. This concept had its origins in three resolutions, adopted by the United Nations in May 1974, entitled Declaration on the Establishment of a New International Economic Order, the Programme of Action on the Establishment of a New International Economic Order, and the Charter of Economic Rights and Duties of States.

Codes of Conduct

In the economic sphere a number of codes designed to establish guidelines for the transfer of science and technology between developed and developing countries and/or to govern the activities of transnational corporations are being negotiated. Among these may be included the Code of Conduct on the Transfer of Technology and the Code on Transnational Corporations, both of which are still under negotiation, in addition to the Principles and Rules for the Control of Restrictive Business Practices which were recently adopted by the 35th General Assembly.

The negotiations on the Code of Conduct on the Transfer of Technology are designed to formulate standards that would facilitate this transfer with the aim of encouraging access to science and technology on improved terms for developing countries taking into account their special developmental requirements. The outstanding issues that remain to be settled relate to the relationship of RBPs to the transfer of technology, suitable provisions on dispute settlement and applicable law, and decisions on chapters on institutional machinery and guarantees. The main objective of the Principles and Rules for the Control of RBPs is to establish guidelines to ensure that such practices (e.g. price fixing, collusive tendering and market sharing) do not adversely affect international trade and development particularly of the developing countries. Canada has supported the three exercises in part due to its unique position as a developed, technology and capital-importing country that is host to many multi-national corporations. This situation results in Canada sharing in some instances the same problems and aspirations as developing countries, while at the same time agreeing with other developed countries on other issues.

Of central importance in all three negotiations has been the question of their legal character. The developed countries, including Canada, have insisted that these arrangements be of a voluntary non-binding nature. This has been largely based on the

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argument that it is neither desirable nor feasible for states to undertake legal obligations that would require wholesale government supervision and control of the activities of their nationals. The developing countries have argued that these Codes must be legally binding in order to be effective. To date only the Principles and Rules on RBP's have been completed and they are voluntary. While the developing states eventually agreed to a legally non-binding RBP instrument, the group would not accept any direct reference to its voluntary nature. The point was sidestepped by stating in the resolution of the Conference submitting the set of Principles and Rules to the United Nations General Assembly for its final adoption that all decisions have been taken necessary "for its adoption as a resolution". Resolutions of the United Nations General Assembly are not considered as legally binding. It is generally accepted, although not finally agreed upon, that the Transfer of Technology code will be voluntary and probably the TNC code will also be of a non-binding character. Both these exercises may adopt the procedure devised during the RBP negotiations to resolve this delicate issue.

Another thorny problem resolved at the RBP negotiations and which may have implications for both the other two negotiations is the scope of application as to whether state enterprises would be included. This was strongly opposed by the socialist states of Eastern Europe, although they gave way during the final round of negotiations and the state-owned company is included under the definition of "enterprises".

In the Transfer of Technology code itself, in addition to its legal character, the question of applicable law is one of the most controversial unresolved issues. Canada, along with the other developed countries, has proposed maintenance of the freedom of the parties to transfer of technology agreements to choose the law applicable to their contracts and the fora for the settlement of disputes arising therefrom. Developing countries insist that the laws of the host state, usually a developing one, should apply, including the referral of disputes arising out of such transactions, to fora in the host state. On the question of arbitration, the developed countries would favour the identification or establishment of some kind of procedure while the developing countries are extremely reluctant to consider recourse to third parties.

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In the case of the Code of Conduct for Transnational Corporations, both developed and developing countries have discovered that it is not always possible to adequately supervise the activities of transnational corporations due to their very success and to the growth of interdependence. Consequently, it was agreed that it would be desirable to establish a code which would set out, amongst other things, the various responsibilities of the host state as well as the home state in relation to the activities of the transnational corporation.

This exercise is not as far advanced as the other two, but a number of important legal principles are evident. Among the many issues in the code in the area of host state responsibility is the question of state sovereignty versus the applicability of international law. Does the concept of "permanent sovereignty", which is contained in a number of U.N. resolutions, give host countries an unqualified right to take whatever measures they wish in respect of such matters as natural resources and economic activities? Some countries argue that "state sovereignty" justifies the application of domestic law to the exclusion of international law apart from those instances where they have freely and specifically accepted the principles. If so, host countries would have a judicial basis to nationalize without any reference to international law foreign enterprises operating within their territories.

In relation to home state responsibility, the crucial issue is extraterritorial application of foreign laws. Developing countries argue for the need for provisions in the code calling for greater control by home states over transnational corporations which are headquartered in their territory. However, it is well recognized that home states do not always restrict themselves to exercising control over their corporations on the basis of the principle of territorial jurisdiction. This could invite extraterritorial application of certain home state laws that may result in the transnational corporation being used as an instrument in the extraterritorial application of foreign policies or laws which in turn may conflict with those of the host country.

International Development Law in UN Legal Fora

Because of the importance of development issues in international relations, legal bodies have devoted increasing attention to their legal significance. Within the permanent machinery of the United Nations, the legal aspects of the New International Economic Order are being considered on both the general and technical levels. In the case of the former, the Sixth (Legal)

Committee of the General Assembly has had on its agenda a Philippine initiative on the question of the progressive development of principles and norms of International Economic Law and is about to consider a comprehensive study on this question prepared by the United Nations Institute for Training and Research. As a supporter of the basic objectives of the NIEO, Canada can support well-developed initiatives to identify and consolidate principles relating to International Economic Law provided that such efforts do not narrowly focus on particular instruments such as U.N. resolutions to the exclusion of important sources of international law such as customary international law.

On the technical level, the United Nations Commission on International Trade Law established in 1980 a working group on the legal aspects of the New International Economic Order, which has decided to undertake work on international contracts of industrial development. Its first exercise in this context bears on contracts relating to the construction of large industrial works and is likely to lead to the drafting of a legal guide on this subject. This is an interesting case where, in spite of a very broad mandate and substantive differences in perceptions between developed and developing states, a UN legal body has been able to work constructively on technical legal questions in the NIEO context.

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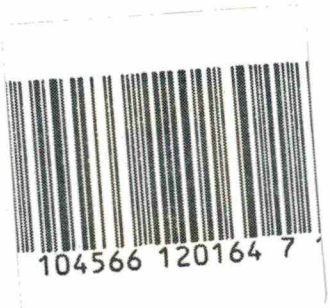
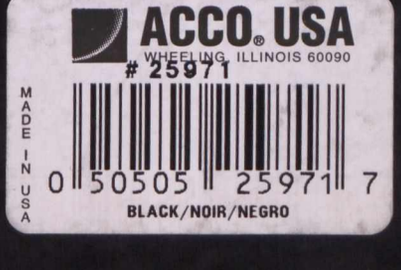


DROIT DU DEVELOPPEMENT INTERNATIONAL

Suite à l'émergence du concept d'un nouvel Ordre Economique International en 1974, un grand nombre d'activités ont été entreprises dans le domaine du Développement International, particulièrement au sein de divers organes des Nations Unies. Certaines de ces activités ont des implications juridiques marquées: C'est le cas de l'élaboration de différents instruments tels que le Code de Conduite sur le Transfert de Technologie et le Code sur les Corporations Transnationales qui sont en cours de négociation, de même que des Principes et Règles pour le Contrôle de Pratiques Commerciales Restrictives qui ont été adoptés à la 35ième Assemblée Générale.

La nature juridique de ces instruments a été au coeur des négociations et particulièrement la question de savoir s'ils devraient imposer des obligations ou contenir des dispositions applicables sur une base volontaire. Une autre question importante est celle du droit applicable qui s'est posée à l'occasion du Code sur le Transfert de Technologie et du Code sur les Corporations Transnationales. Dans ce dernier cas la définition des responsabilités respectives de l'état d'envoi et de l'état d'accueil de ces corporations soulève des problèmes supplémentaires car elle met en jeu dans bien des cas la question de la pertinence du droit international dans l'application du droit domestique.

Les organes juridiques des Nations Unies eux-mêmes portent maintenant une attention croissante à l'impact juridique des questions relevant du développement international. Ainsi, la 6ième Commission de l'Assemblée Générale est en train d'étudier le développement de principes et normes relatifs au Nouvel Ordre Economique International tandis qu'un groupe de travail de la Commission des Nations Unites sur le Droit Commercial International a entrepris de façon plus technique l'étude de certains contrats de développement industriel. Le Canada appuie les objectifs essentiels d'un Nouvel Ordre Economique International mais veille à ce que les initiatives visant à identifier et consolider les principes juridiques pertinents ne se fondent pas sur une base trop étroite mais tiennent compte de toutes les sources importantes du droit international y compris la coutume.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