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Some Examples of Current Issues of International Law of Particular Importance to Canada

Ministère des Affaires extérieures
Bureau des Affaires juridiques

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DIPLOMATIC AND CONSULAR PRIVILEGES AND IMMUNITIES

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Le gouvernement du Canada a établi par le Décret C.P. 1976-2233 du 14 septembre 1976 un programme de subventions aux municipalités et aux provinces pour tenir lieu des taxes et des coûts d'amélioration locale sur certaines propriétés utilisées à des fins consulaires.

Après avoir établis les mécanismes administratifs appropriés, les autorités fédérales ont informé, le ler avril 1977, les autorités provinciales et les municipalités intéressées de la mise en marche de ce programme. Le programme a pour but de compenser à l'échelle du pays les exonérations de taxes accordées par les municipalités et qui résultent des obligations internationales du Canada contenues dans la Convention de Vienne sur les relations consulaires, ratifiée par le Canada en 1974.

Les subventions s'appliquent aux immeubles dont les gouvernements étrangers sont les propriétaires et qui servent de bureau consulaire ou de résidence au chef de poste consulaire de carrière. Elles s'appliquent de même à la délégation commerciale d'un pays du Commonwealth et à la résidence du délégué commercial lorsque ce dernier a le statut de les fonctions d'un chef de poste consulaire.

Les exonérations sur les propriétés consulaires valent uniquement pour les locaux ou les parties des locaux qui servent effectivement aux fonctions consulaires. Les immeubles ou les parties d'immeubles qui servent à des fins autres que les fonctions consulaires, telles que les activités commerciales de nature lucrative ou les programmes d'enseignement de langues destinés au public ne sont pas exonérés. Comme par le passé, les autres propriétés consulaires et résidences appartenant à des gouvernements étrangers demeurent sujettes aux taxes foncières.

Le ministère des Affaires extérieures administre le programme en collaboration avec le ministère des Finances.

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On June 29, 1977, the Royal assent was given to the Diplomatic and Consular Privleges and Immunities Act. The enactment of legislation in that field by the Canadian Government was the natural consequence of Canada's ratification, in 1966, of the Vienna Convention on Diplomatic Relations and its adhesion, in 1974, to the Vienna Convention on Consular Relations. The purpose achieved in enacting domestic legislation in that field is to give greater certainty to the law governing the status of foreign diplomatic and consular personnel who are accredited to Canada.

The Act enumerates the Articles of the two Vienna Conventions establishing or relating to specific privileges and immunities, including those which may affect the rights of private persons, as distinct from those Articles which are purely formal and which create only obligations between governments. In matters of immunity, it is important to note, at the same time, that the persons to whom these immunities are accorded are not above the law. Under international law they remain under the duty to respect the laws and regulations of Canada. This obligation is formally stated in Article 41 of the Vienna Convention on Diplomatic Relations and Article 55 of the one on Consular Relations. Failure to observe Canadian laws and regulations may lead to formal representations to the Government of the sending State and ultimately, in serious cases, to the expulsion from Canada of the person concerned.

While recognizing, at the domestic level, the privileges and immunities provided to diplomatic and consular personnel by the two Vienna Conventions, the new legislation enables the Canadian Government, when any of the provisions of the Convention are not being fully applied to Canadian representatives abroad, to apply similar restrictions to the representatives in Canada of the foreign government concerned. A provision of this kind was considered desirable to give the Canadian Government the leverage it would need to negotiate a settlement to any dispute which might arise over the application of the Convention.

Also, since the provisions of the two Conventions apply to representatives of all countries, with the enactment of the new legislation, there was no longer a need for special legislation concerning representatives in Canada from Commonwealth countries. For this reason the Diplomatic Immunities (Commonwealth Countries) Act was repealed.

Finally, the recent legislation relates to the diplomatic and consular missions of other countries in Canada and to members of the staff of such missions only. It does not relate to the treatment which Canada may give to international organizations, including representatives of member states or others who may enter Canada to attend international conferences. This subject remains covered by the Privileges and Immunities (International Organizations) Act.

UNITED NATIONS CONFERENCE ON TERRITORIAL ASYLUM

As a result of a resolution of the United Nations General Assembly, the Secretary General, in co-operation with the United Nations High Commissioner for Refugees, convened a Conference on Territorial Asylum that took place in Geneva from January 10 to February 4, 1977. The purpose of the Conference was to consider and adopt a convention which would set standards for the protection and admission of persons fleeing persecution who are not covered by the 1951 Convention on Refugees. The Conference, however, did not meet its objectives and at the end of four weeks had completed preliminary work on only five of a possible twelve to fifteen Articles of the Convention. The basic problem was a fundamental difference of opinion between the geographical groups at the Conference, roughly the Western and Latin American countries on the one hand and the Asian and Socialist countries on the other hand. The former group, including Canada, while desirous of maintaining the sovereign rights of the State, viewed the Convention as a means of ensuring that individuals fleeing persecution are accorded every possible protection from arbitrary rejection or return to countries of persecution. The latter group, however, was more concerned with reiterating the sovereign rights of the receiving States rather than those of the individual.

At the end of the session, the Conference adopted the following recommendation:

> "The United Nations Conference on Territorial Asylum
>
> Having been unable to carry out its mandate within the allocated time,
>
> 1. Considers that efforts to draft a convention on territorial asylum should be continued;
>
> 2. Requests the Secretary General of the United Nations to transmit the report of this Conference to States;
>
> 3. Recommends that the General Assembly of the United Nations at its thirty-second session consider the question of convening at an appropriate time a further session of the Conference."

In assessing future action to be taken, in reconvening the Conference, the following considerations are relevant.

At the international level, Canada's record in dealing with refugees compares favourably with that of the great majority of the countries of the world. At the internal level, Canada's new immigration legislation incorporates for the first time provisions relating to the selection of refugees abroad as well as provisions outlining in detail the procedure to be followed in dealing with persons seeking asylum at the borders or while in Canada. These provisions reflect the present Canadian obligation under the Convention on Refugees and are more generous than might be anticipated from a Convention on Territorial Asylum if adopted at the present time with the spirit that prevailed in Geneva.

NUCLEAR NON-PROLIFERATION AND SAFEGUARDS

During the past three years Canada has been renegotiating its nuclear cooperation agreements with its nuclear customers, a process begun late in 1974 following a review of Canadian nuclear policy in the wake of the Indian nuclear test. Agreement was reached last year with two uranium customers, Finland and Spain, and two reactor customers, South Korea and Argentina, and this year a Nuclear Cooperation Agreement was signed with another uranium customer, Sweden. Discussions have proceeded with EURATOM, Japan and Switzerland.

At the same time Canada has recognized that its bilateral efforts on the non-proliferation front would be ineffective unless the internationally acceptable minimum level of safeguards could be raised to a parallel level of stringency. To promote such international standards Canada has actively supported the activities of the International Atomic Energy Agency and has met with the nuclear supplier nations to discuss safeguards policy. In addition, Canada intends to participate in the International Nuclear Fuel Cycle Evaluation proposed by President Carter at the London Summit which, over the next two years, will examine means of using nuclear energy to meet world energy needs while avoiding the danger of the spread of nuclear weapons.

The Government has continued to pursue its policy, outlined by the Minister of Energy, Mines and Resources on December 20, 1974, of selling uranium and CANDU reactors under strict safeguards to selected customers. Furthermore, on December 22, 1976, the Secretary of State for External Affairs announced in the House of Commons that shipments to non-nuclear-weapon States under future contracts will be restricted to those that ratify the Non-Proliferation Treaty or otherwise accept international safeguards on their entire nuclear programs. It follows from this policy that Canada will terminate nuclear shipments to any non-nuclear-weapon State that explodes a nuclear device. This policy is in keeping with Canada's commitments under the Treaty on the Non-Proliferation of Nuclear Weapons to export nuclear items only under safeguards and to ensure that the benefits of lower cost energy which nuclear power promises is shared by all nations.

CANADA TREATY SERIES

The Canada Treaty Register, maintained by the Treaty Section, Legal Advisory Division, reports that action was taken during the past 12 months (July 1, 1976 - June 30, 1977) in connection with 29 multilateral and 55 bilateral agreements.

This Section continues to provide answers to a great number of written and oral questions from other divisions, other departments of government, foreign governments and the general public concerning treaties to which Canada may or may not be a party.

A cumulative index to the Canada Treaty Series covering the years 1965 through 1974 was completed and published. In addition 15 individual treaties which entered into force in 1975 and 30 treaties in the 1976 Series were published in the Series. 10 treaties in the 1976 Series are now in the process of publication. The preparation of the 1977 Series is underway.

Notice of the publication of the cumulative index and of individual treaties appear in the Daily and monthly Checklist of Government Publications, available from the Publications Centre, Supply and Services Canada, 270 Albert Street, Ottawa, K1A OS9. Individual copies of treaties may also be purchased from that Centre.

ENVIRONMENTAL LAW

There were several significant developments in the field of environmental law, both at the multilateral and bilateral level, during 1977. At the urging of Canada, the Governing Council of the United Nations Environmental Programme established a working group of experts on environmental law. The group has been given a broad mandate to review the work undertaken in this field by UNEP to date and to develop a programme of work in the environmental law field by concentrating on areas, such as liability and compensation for environmental damage, which are in need of study and subsequent action. By establishing this committee, UNEP has taken a positive step in institutionalizing environmental law at the multilateral level, in accordance with Principles 21 and 22 of the Stockholm Declaration on the Human Environment, directly related to the development of international law of the environment.

The working group on environmental law can be viewed as a recognition by UNEP of its responsibilities in this field. At the first meeting of the working group in Geneva in September, the Canadian delegate was elected to serve as its chairman for the first two-year period. The group decided to select as its first topic for study the field of liability and compensation for damage from marine pollution caused by offshore mining on the continental shelf. In carrying out its mandate the group will take fully into account the relevant work of the U.N. Law of the Sea Conference.

An environmental disaster, late in 1976, focused public and governmental opinion during 1977 on the need for stricter international anti-pollution standards. In December 1976, the Liberian tanker, the "Argo Merchant", spilled 7.5 million gallons of oil off Nanucket Island and this spill was followed by a rash of further spills in United States' coastal waters. Newly-elected President Carter responded a short time later with a call for stricter anti-pollution standards to abate the threat of marine pollution from ships. The Carter Administration presented to Congress a package proposal on marine pollution, which concentrated on six areas:

ratification of international conventions for the prevention of pollution from ships; reform of domestic and international ship construction and equipment standards; improvement of international crew standards and training; development of the domestic tanker boarding program; approval of domestic comprehensive oil pollution liability and compensation legislation, and improvement of the ability of USA federal agencies to respond to oil pollution emergencies. In keeping with these proposals, the USA called on the Inter-Governmental Marine Consultative Organization (IMCO) to schedule an early international conference to consider measures to improve tanker safety. This Conference will be held in London in February 1978, to consider draft protocols to the 1974 Safety of Life at Sea Convention and to the 1973 Marine Pollution Convention.

The reference to comprehensive oil pollution liability and compensation legislation was of particular interest to Canada since such legislation would supercede the Trans-Alaska Pipeline Authorization (TAPA) Fund under which Canadian claimants were guaranteed access to a $100 million marine pollution claims fund on the same basis as residents of the USA who had suffered damage from the movement of Alaska oil. The U.S. Administration version of the comprehensive act continued to give Canadians access to similar funds but another version of the bill required Canada to provide reciprocal arrangements for potential USA claimants. Canada has expressed its concern to the USA about this provision and the U.S. Administration has supported Canada's position.

The USA, for its part, is interested in obtaining access for its citizens to the relevant remedies available under Canadian legislation which deal with liability and compensation for marine pollution damage, in particular, the Canada Shipping Act and the Arctic Waters Pollution Prevention Act. In the context of Canadian drilling in the Beaufort Sea, Canada has advised the USA that provisions of Canadian legislation are being reviewed to provide potential American claimants reciprocal access to Canadian legislative remedies.

In June of 1977, the Cabinet authorized offshore exploratory drilling in the Beaufort Sea for the next three years, subject to annual reviews, more stringent conditions and improved monitoring and surveillance. The arrangement established in 1976 to compensate American claimants in the event of an oil spill was continued for the 1977 season. This is an arrangement in which the operators have entered

into an agreement with the Canadian Government, guaranteed by bond, to provide up to $10 million to USA claimants. Under the provisions of the Arctic Waters Pollution Prevention Act, some $30 million is available to Canadian claimants in the event of an oil spill. Canada and the USA agreed in the summer of 1977 to extend the operation of the Joint Oil Spills Contingency Plan to the trans-boundary waters of the Beaufort Sea.

West coast environmental issues continued to be an active area in 1977 with the start of Alaska tanker traffic carrying oil to the southern 48 states along British Columbia's coast. For the past five years, Canada has expressed opposition to large-scale tanker movements through the Strait of Juan de Fuca en route to and from Puget Sound. In 1974 the Canadian and USA governments agreed to undertake negotiations for a general plan to reduce environmental risks in the area. A voluntary vessel traffic management scheme was introduced in the Strait in 1974 followed by a voluntary traffic separation scheme in 1975. An oil spill contingency plan, similar to the one which was introduced in 1977 in the Beaufort Sea, has been operational since 1975. Discussions were held with USA officials throughout 1977 to make the voluntary vessel traffic management/traffic separation scheme mandatory for all ships navigating the Strait.

While the west coast still remains a problem area in Canada/USA environmental relations, a number of major positive developments took place in 1977 with regard to the Garrison Diversion Unit. In the late 1960's the USA began construction of an irrigation project in North Dakota which, in the opinion of Canada, would seriously degrade the waters of the Red River in Manitoba to the injury of the health and property in Canada, thus violating the Boundary Waters Treaty of 1909. After several years of exchanges, President Carter in April 1977, recommended to Congress that the project be markedly reduced in scale, eliminating virtually all parts of the project affecting Canada. Although Congress voted full funding for Garrison despite the President's recommendation, a report of the House Appropriations Committee recognized the importance of considering the IJC's study of the project, and noted that construction carried out in the budgetary period in question would accordingly not deal with works potentially affecting Canada. The U.S. Government also reiterated its commitment regarding construction of works potentially affecting Canada, and added that these undertakings were "in keeping with the spirit of mutual understanding and forebearance which has characterized and will continue to characterize the efforts

of the two governments in addressing trans-frontier pollution matters." In September of 1977, the IJC released its long-awaited report and concluded that the construction and operation of the Garrison Diversion Unit in North Dakota, as envisaged, would cause significant injury to health and property in Canada as a result of adverse impacts on water quality and would cause adverse and irreversable impacts on some of the important biological resources in Manitoba. The IJC concluded that portions of the project potentially affecting Canadian waters should not be constructed unless and until the two governments agreed on measures to resolve this problem. These recommendations are being studied by the two Governments.

INTERNATIONAL FISHERIES LAW

In retrospect, 1976 can be considered the year that the international community generally accepted the theoretical concept of increased rights and duties of the coastal state wihin a 200-mile limit. By contrast, but complementary to previous development, 1977 saw the principle incorporated into numerous arrangements on unilateral, bilateral and multilateral levels. The 200-mile principle permeated nearly every aspect of fisheries policy and necessitated the re-evaluation and amendment of traditional fishing patterns and agreements worldwide.

For Canada, the 200-mile concept assumed a substantive character with the extension of fisheries jurisdiction by Order-in-Council on January 1, 1977. The Government considered that extension was necessary in order to ensure rational management of the dwindling fish stocks being decimated by the intensive fishing practices of foreign fleets. This action would ensure the survival of coastal communities heavily dependent on the fishery for their livelihood and permit the rebuilding of depleted fish stocks. As a result of the extension, Canadian officials alone are empowered to determine the level of fish stocks within the zone, to fix the total allowable catch for each stock and area, to assess the needs of Canadian fishermen and to assign, taking into account conservation measures, the surplus to foreign countries which have traditionally fished in Canadian waters.

To complement this extension of jurisdiction, Canada has continued to negotiate bilateral agreements with those countries that have customarily fished off its coasts. Canada already has agreements which contain recognition of the Canadian 200-mile zone with Norway, Poland, the USSR, Spain and Portugal. Additional agreements, known as "second generation" treaties to differentiate them from those negotiated before the extension of jurisdiction, were reached with Cuba, Romania, the German Democratic Republic and Bulgaria. These countries are permitted to fish within the 200-mile limit under a Canadian system of licences and annual quotas for stocks surplus to Canadian requirements. The importance of these treaties for Canada lies in the fact that the parties recognize the special interest that Canada has in the areas adjacent to and immediately beyond the 200-mile limit, known as the Flemish Cap and the tail of of the Grand Banks. Canada now has agreements with all nations fishing off its coasts except Japan and the European Common Market. A timetable for negotiation is being

established with the remaining two.

With the implementation of the 200-mile limit, and the wide-spread belief that ICNAF, despite being the most efficient of the international regional conventions, was only partially successful in retarding the decline of fish stocks, Canada took the initiative in suggesting that the time was propitious to negotiate a new convention to incorporate the jurisdictional realities emerging from the Law of the Sea Conference and to develop a framework for the international management of fisheries resources beyond 200-mile limits on the Atlantic coast. As a result, Canada hosted two preparatory sessions in March and June and a full diplomatic conference in October. Among other aims, Canada hopes that the new convention will incorporate specific reference to the Canadian special interest in the two areas beyond the 200-mile limit.

In a step to clarify the state of fisheries relations between Canada and the United States, the two governments signed the 1977 Interim Fisheries Agreement on February 26. The treaty stipulates that both countries will continue to permit fishing by the other in its zone and will make every effort to preserve the existing patterns in the reciprocal fisheries. Pending the settlement of maritime boundaries, interim measures of mutual restraint would be followed in boundary regions. Enforcement would be conducted by the flag state in the case of Canadian and American vessels; neither state would authorize fishing by third parties in boundary areas; and either party may enforce against third parties. To hasten the settlement of the maritime boundaries issue special high level negotiators were appointed by the two governments.

On the Pacific, Canada entered into negotiations with the United States to replace the 1930 Fraser River Salmon Treaty with one to encompass the entire coast. While generally retaining the organizational framework established by the earlier Agreement, the new treaty would update arrangements to take into account recent problems arising from conservation and enhancement programs. This complicated issue centres around the need to devise a flexible formula to ensure that salmon raised in one country's enhancement program are not all caught by the other. This disincentive to develop conservation programs must be rectified by establishing a fair and equitable escapement program in order that the benefits of conservation and management accrue to the correct party. Negotiations on this

have been progressing in Vancouver and Seattle.

In November, a full review of the International North Pacific Fisheries Commission (INPEC) will take place in Anchorage with the United States and Japan to assess the work of the Commission.

OUTER SPACE LAW

As a country with communications satellites in geostationary orbit and an active program in the field of remote sensing, Canada has a direct interest in the rational and progressive development of international law relating to outer space. The United Nations has provided a focal point for this process through its Committee on the Peaceful Uses of Outer Space and its Legal Sub-Committee. This Committee has been responsible for the development of the following international instruments relating to outer space: the 1967 Treaty on Principles Governing the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies, the 1968 Agreement on the Rescue of Astronauts, Return of Astronauts and the Return of Objects Launched into Outer Space, the 1972 Convention on International Liability for Damage Caused by Space Objects and the 1975 Convention on Registration of Objects Launched into Outer Space.

At, its Sixteenth Session, held in New York from March 14 to April 8, the Legal Sub-Committee continued to consider, as a matter of high priority, the "elaboration of principles governing the use by States of artificial earth satellites for direct television broadcasting". The major outstanding questions facing this year's session were the issues of consent and participation, illegal broadcasts and program content. A recent development of particular relevance to the work of the Sub-Committee was the World Administrative Radio Conference (WARC) held in Geneva from January 10 to February 13, 1977. This conference developed detailed plans for the broadcasting satellite service in the 12 GHZ band for Europe, Africa, Asia and the South Pacific. Countries of the Americas are expected to conclude a similar detailed plan in 1983. The basis for these plans is Regulation 428 (a) of the Radio Regulations of the International Telecommunication Union which states, "In devising the characteristics of a space station in the broadcasting satellite service, all technical means available shall be used to reduce, to the maximum extent practicable, the radiation over the territory of other countries unless an agreement has been previously reached with such countries".

Put somewhat differently, the technical framework of the 1977 WARC was based on the general principle that

intentional coverage of one country by another country requires the agreement of the former.

At the 16th Session, Canada and Sweden, continuing their longstanding cooperation in this field, jointly introduced two working papers. The first paper contained a proposed preamble to the draft principles. The second paper was a revised draft principle on consultation and agreements which attempted to link the legal framework of the International Telecommunication Union (ITU) and especially the 1977 WARC, to a general principle on agreement. This text was consistent with earlier Canada/ Sweden proposals and ensured that the establishment of an international direct television broadcasting service by satellite could only take place with the agreement of the receiving state.

This compromise text represents, in the Canadian view, a responsible and workable balance between the need to facilitate the orderly development of an important new area of technology and the need to protect the sovereign rights of states to regulate their communications systems. Canada was pleased at the progress achieved both at the Legal Sub-Committee and the 20th Session of the parent committee, which met in Vienna from June 20 to July 1, 1977, in working toward a consensus on this text and the draft preamble. On the basis of these negotiations, it is hoped that it will be possible to conclude a full draft set of principles at the next session of the Legal Sub-Committee.

The Legal Sub-Committee in 1977 also continued its work on the legal implications of remote sensing of the earth from space. During the session six new draft principles were developed, three on the basis of common elements which had been identified at last year's session and three which were developed on the basis of new formulations. As well, a controversial text of a "possible draft principle" on permanent sovereignty over natural resources was also formulated.

The draft principles elaborated related to the following subjects: role of the United Nations, dissemination of information regarding impending natural disasters, duty to avoid detrimental use of remote sensing data or information, dissemination of technical information to developing countries, state responsibility for activities in the field of remote sensing, and right of a sensed state to access to data pertaining to its territory.

During negotiations in the Legal Sub-Committee, Canada has taken the position that the legal framework which is established to govern the activities of states engaged in remote sensing of the earth from space should facilitate the maximum cooperative utilization of remote sensing technology consonant with the need to safeguard legitimate national interests.

With respect to the latter consideration, the complexity of the issues involved in a legal analysis of remote sensing, together with rapidly advancing technology, make it difficult to foresee the precise manner in which states could, in the future, be adversely affected by remote sensing activities. For this reason, Canada, at the last session of the Legal Sub-Committee, introduced an informal working paper containing a draft text of a possible review clause for inclusion in the draft principles. Canada suggested that such a clause might constitute a useful safeguard in the draft principles whereby the Outer Space Committee or the General Assembly would periodically, or on demand of a specified number of member states, review the adequacy of the guiding principles on remote sensing. Such a clause would introduce an element of flexibility to the draft principles and would also provide a form of protection against possible problems o unforeseen detrimental effects of remote sensing activities. This question will be considered further at future sessions of the Legal Sub-Committee.

Although the 16th Session of the Legal Sub-Committee was to accord high priority to completing the draft moon treaty, very little progress was made at the session with respect to the major outstanding issues. These are:

1) the scope of the treaty, i.e. whether the draft treaty should relate only to the moon or should include reference to other celestial bodies;

2) the legal status of the natural resources of the moon, and of other celestial bodies, including the question of the possible future establishment of an international régime to govern exploitation of those resources when this becomes feasible; and

3) information to be furnished on missions to the moon.

Only three sessions of the working group were held this year, a large part of which were devoted to procedural matters. The situation with respect to the draft moon treaty therefore remains basically unchanged. On the one hand are a number of developing countries who continue to insist on a direct reference to the moon and its natural resources and other celestial bodies and their natural resources as the common heritage of mankind. These countries are also committed to the establishment of an international legal régime to govern the exploitation of such resources when this becomes feasible. On the other hand are those states which do not wish to place undue international legal restrictions on research and unforeseen future prospects for exploitation of the resources of the moon and other celestial bodies. Unless major changes take place in these positions, the prospects for progress on this item at the next session of the Legal Sub-Committee do not appear promising.

HUMANITARIAN LAW IN ARMED CONFLICT

The 1971 initiative of the International Committee of the Red Cross (ICRC) to update the provisions of the Geneva Conventions came to fruition in June 1977 when the Diplomatic Conference at its fourth session adopted two Protocols relating to the protection of victims of international armed conflict (Protocol I) and victims of non-international armed conflicts (Protocol II). The Protocols will be open for signature in December of 1977.

Four years of protracted and difficult negotiation have resulted in the adoption of two instruments which represent a significant, and in the case of Protocol II, an unprecedented and innovative development of international humanitarian law applicable in armed conflict. The basic rationale behind the Protocols was to revise the law of armed conflict in the light of technological and political changes which have greatly altered the conduct of modern warfare. To this must be linked the humanitarian motive which sought to extend the protection given to victims of armed conflict, particularly civilians. The Protocols also reflect elements in the current climate of international politics, particularly the concerns of the developing countries. This has led to the adoption of controversial articles whose focus is national wars of liberation and the related issues of colonialism and racism. The injection of these elements has significantly changed the traditional concept of the law of armed conflicts. One can therefore approach the Protocols, particularly the first, from three general and interrelated perspectives: the political, the humanitarian and the technical.

Protocol I

The Conference began its deliberations in three Committees on April 12 after an opening plenary session. The plenary reconvened on May 23 to consider the articles adopted by the Committees and sat until June 11 when the texts of the two Protocols were adopted.

Previous editions of Current Issues have dealt with articles adopted at the first three sessions of the Conference. This brief report will highlight those provisions adopted at the fourth session and attempt to identify the most significant aspects of the Protocols in terms of the important developments in this area of international law. The actual changes are many, the first

Protocol containing 102 articles, the second 28. These provisions will not be discussed in detail here as a full explanation of the modifications in the law would require an extensive comparison of the Protocols with the texts of the Geneva Conventions.

Political Considerations

Of those provisions which reflect changes in current thinking on international armed conflict, one of the most important is that which categorizes struggles for national liberation and self-determination as international conflicts. This follows a decision of the Conference, at its first session, to allow liberation movements to participate as observers and was also reflected in a subsequent decision to allow them to sign the Final Act. Further, the Protocol also revises the concept of combatants and broadens it to include what could be described as guerilla fighters. The requirements for such fighters to distinguish themselves from the civilian population and retain combatant status are minimal and were the subject of contentious debate at the fourth session.

Another innovative provision and one strongly advocated by the African delegations is one which denies mercenaries combatant or prisoner of war status, thus permitting their prosecution as war criminals. It should be noted, however, that the concept of the mercenary has been extremely limited and is defined in terms of six criteria which must be taken cumulatively in order for the provision to apply.

These provisions, as well as an earlier decision to include the practice of apartheid as a grave breach of the Protocol, indicate the extent to which the law of armed conflict has been affected by the current concerns of many of the developing countries.

Humanitarian Considerations: the Extension of Protection

Other significant changes relate to the definition of perfidy, inclusion of legal advisers in military units, the obligation to disseminate the Conventions and protocols within the armed forces and the civilian population, the responsibility of a commander for the acts of his subordinates, provision for the designation of protecting powers, (or allowing the ICRC to act as a substitute if no protecting power is so designated) and the establishment of a (voluntary) Fact-Finding Commission to look into alleged grave breaches of the Protocol or Conventions. On this

latter provision, the Canadian delegation was one of those which argued for a mandatory inquiry system but this proposal was strongly opposed by the socialist states and many developing countries and was subsequently rejected by the Conference.

In connection with those provisions relating to methods and means of combat, the Protocols extended the scope of protection to be enjoyed by both civilians and prisoners of war. For example, the Protocol contains extensive provisions on family reunion and on the protection of women and children. There are also special provisions for refugees and journalists. In addition, there are articles dealing with the protection of cultural objects, places of worship, objects indispensable to the survival of the civilian population, the natural environment, installations containing dangerous forces, non-defended localities and demilitarized zones. These provisions (and others) considerably extend the scope of protection offered by the conventions and will have the effect of limiting the freedom of military action.

In addition, the protection of those hors de combat, both civilian and military, has been broadened, particularly in terms of their treatment by an adverse party into whose hands they fall. Of special interest in this regard is an article entitled "fundamental guarantees" which represents a kind of mini-bill of rights for persons detained, interned or arrested for actions related to the armed conflict.

Technical Considerations

On a more technical level, the Protocol extends the scope of the law as it relates to medical and other assistance to the victims of armed conflict. It is in this area that technological advances have been reflected in humanitarian law. For example, the Protocol calls for the allocation of specific call signs and frequencies for medical aircraft. A technical annex to the Convention contains, among other things, provisions on the use of distinctive signals (light, radio and electronic) for medical units and transports.

The Protocol breaks new ground on protection of civilian medical units, i.e., medical personnel, transport

and equipment. It also contains new provisions on civil defence and relief to the civilian population. One of the more interesting articles in this area is a provision which limits and regulates the conditions under which medical experimentation, organ and tissue transplants and surgical operations can be carried out.

As can be seen, Protocol I covers a broad area. In its discussions, the Conference touched on a wide range of issues and had the task of amalgamating in one instrument, military, legal, technical and political considerations. It attempted to balance the factor of humanitarian assistance and protection with that of military necessity, to say nothing of the effort to reflect many of the prevailing preoccupations of contemporary international politics. It is not surprising, therefore, that this balance was not always struck to the satisfaction of all concerned.

Protocol II

The second Protocol, on internal armed conflict, represents an historic development in international humanitarian law as it regulates the conduct of an activity hithertofore immune to international regulation.

Since Protocol II concerns internal armed conflict, it is not surprising that many states, particularly from the Third World, regarded it with hesitation, if not hostility. On the other hand, another group of states, mainly Western European, were of the view that the second Protocol should, as far as possible, mirror the first. As the draft of this Protocol grew more extensive, opposition to it increased, to the point where, near the end of the fourth session of the Conference, there were doubts as to whether such a Protocol would succeed at all. As a result, an effort was made, thanks to the head of the Pakistani delegation, to present a revised, simplified and shortened draft of this Protocol. This draft was to a great extent modeled on an earlier Canadian proposal on Protocol II which had been submitted at a previous session of the Conference. The rationale behind the Canadian initiative was that since the Protocol was to deal with situations of internal conflict, it should be kept as simple and basic as possible, since, particularly from the point of view of the dissident side in the conflict, the technical facilities and personnel and

material resources required to apply the provisions of the instrument would be extremely limited. In the event, this view prevailed and although the results were less than many had wanted, they represent a real achievement in the establishment of a minimum but workable standard for the conduct of hostilities within one country.

Those who opposed the very idea of a Protocol II were motivated by a concern for national sovereignty and the fear of outside interference in the internal affairs of states. They would not subscribe to any instrument which could be interpreted as conferring any legal status on a dissident or break-away movement. Thus, unlike the first Protocol, the second contains no language which could be read as putting the two sides on an equal footing: expressions such as "parties to the conflict" or "combatants" are not to be found in Protocol II.

One of the most difficult aspects of this Protocol, both from the point of view of its negotiation as well, presumably, from that of its implementation, is the field of application. A non-international armed conflict is defined in part as one "which takes place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol". We are also told what a non-international armed conflict is not, viz "situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature". The point at which a particular conflict passes from the latter category into the first will be difficult to identify and there will inevitably be more than one view on this question. As in all international agreements, however, the effective application of this Protocol will depend on the good will of states and it is expected that most governments in this situation will see it as in their interest to apply the Protocol in order to ensure reciprocal treatment of members of their own armed forces and the civilian population who are in the hands of the dissident force.

Despite difficulties in application, the Protocol contains provisions of undoubted humanitarian value on the protection of the wounded, sick and shipwrecked and on the humane treatment of both civilians and detained members of

the armed forces. There are, for example, prohibitions on collective punishment, attacks on civilians or starvation or displacement of the civilian population. As in the first Protocol, objects indispensable to the survival of the civilian population and installations containing dangerous forces are protected.

One of the most significant aspects of the Protocol is its attempt to deal with the bitterness and revenge which seem the inevitable consequence of civil war. It calls upon the authorities in power, at the end of hostilities to "grant the broadest possible amnesty to persons who have participated in the armed conflict".

The second Protocol, like the first, requires that only two instruments of ratification be deposited before its entry into force. It was believed that as few procedural obstacles as possible should be placed in the way of the application of this development of international law which has as its object the alleviation of the plight of the victims of armed conflict.

Prohibition of Certain Conventional Weapons

A number of delegations were strongly of the view that the new Protocols should incorporate prohibitions on the use of certain weapons. Other delegations, including that of Canada, argued that the issue of the prohibition of weapons lay outside the scope of what has been called the Geneva law and was basically a disarmament question and thus within the competence of other international fora.

A separate committee (the Ad Hoc Committee on Conventional Weapons) was established to study this question. It did not, however, engage in the drafting of any provisions for consideration by the Plenary for inclusion in the Protocols. Instead, it discussed a number of proposals and working papers on the use of certain weapons which were considered appropriate for prohibition. These included incendiary weapons, weapons which produce fragments not detectable by X-ray and mines and booby traps. In addition, fuel air explosives and small calibre projectiles were considered. The Committee compiled a comparative table of these proposals which should prove useful in any future discussions of this question.

A number of delegations which were the most active proponents of having a weapons prohibition provision in Protocol I advanced a proposal which sought to establish an international committee whose function would have been to determine which conventional weapons should be prohibited. This proposal was approved in Committee but rejected by Plenary where it failed to obtain the required 2/3 majority.

The Plenary did, however, unanimously adopt a resolution calling for a special conference on weapons to be held by 1979. The UN Central Assembly has been given the responsibility of taking whatever further action is required to convene this conference.

INTERNATIONAL LEGAL MEASURES AGAINST TERRORISM

The past year has seen a renewal of efforts within the United Nations to come to grips with the issue of international terrorism and, in particular, the taking of hostages.

International terrorism was originally inscribed on the agenda of the United Nations General Assembly in 1972 by the Secretary-General, following the tragic events at the Munich Olympics. That year, the Assembly adopted a resolution that created an Ad Hoc Committee on International Terrorism. This Committee met only once, in 1973, its work being hindered from the outset by highly ambiguous terms of reference. In the face of strong resistance by certain African and Arab delegations to the introduction of international measures against certain categories of terrorist acts, the agenda item was tacitly permitted to remain inactive through the 1973, 1974 and 1975 General Assembly Sessions.

In 1976, at the 31st session of the U.N. General Assembly, the issue was revived as a result of an initiative by the Federal Republic of Germany relating to the drafting of a convention against the taking of hostages. This proposal called for the creation of a new committee to deal with this subject. At the same time, a number of Third World countries introduced a resolution which called for the reactivation of the Ad Hoc Committee on International Terrorism. Canada, although a member of this Committee, voted against this resolution in the belief that the mandate of the Committee was unsatisfactory and could even be used to provide justification for certain acts of terrorism.

The last session of the Ad Hoc Committee was held in New York from March 14 to 25, 1977. As in 1973, Third World delegations stressed the importance of studying the causes of international terrorism, which were generally attributed to policies followed by Israel and governments in Southern Africa. These delegations were also opposed to any proposals which might, in their view, affect the operations of national liberation movements. Canada and other Western delegations, on the other hand, stressed the need for the international community to develop specific

and concrete measures against all acts of international terrorism, regardless of motive, such measures to be based on the principle of "prosecute or extradite" contained in the 1970 Hague Convention for the Suppression of Unlawful Seizure of Aircraft, the 1971 Montreal Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation and the 1973 Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents.

As a result of such divergent points of view on the work of the Committee, no progress was made of a substantive nature, nor was agreement reached on a future program of work.

The work of the Ad Hoc Committee on the Drafting of an International Convention Against the Taking of Hostages, which met in New York from August 1 to 19, 1977, met with only limited success. While the mandate of this Committee provided a sharper focus than that of the Ad Hoc Committee on International Terrorism, debate in the two Committees was strikingly similar. Most Arab delegations stressed that the question of hostage-taking was an integral part of the question of international terrorism and that its underlying causes should, therefore, be examined. The most serious divergence of views, however, as was clear even at the time of the establishment of the Hostage-Taking Committee, was the question of the scope of the convention and its application to national liberation movements. Various Arab and African delegations noted that unless a satisfactory solution was found to this question, it would be very unlikely that the Hostage-Taking Committee could make progress. Nevertheless, some debate of a substantive nature did take place on relevant legal matters such as preventive measures against hostage-taking, criminal sanctions, jurisdiction and extradition, raised in the draft convention submitted to the Committee as a basis for its work by the Federal Republic of Germany. While strong differences of opinion continue to exist on fundamental issues, the Committee adopted a resolution which recommends that its mandate be renewed for another year.

In approaching the work of the Committee, Canada believes that the groundwork for international cooperation in combatting the taking of hostages has been established by the 1970 Hague, the 1971 Montreal and 1973 New York Conventions. These instruments do, however, leave gaps which should be filled by the proposed new convention. This convention should build upon these precedents without duplicating or disturbing the existing and accepted international legal framework.

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 increased substantially during recent years, as a result of increased international travel for private and commercial purposes. There has been a marked increase in the service of legal documents originating in Canada on persons residing abroad and vice versa. Canada has civil proceedings conventions with 19 states for this purpose. However, even in the absence of a convention, the Section has often been successful in arranging for the service of documents abroad on behalf of the legal profession in Canada. In addition, the number of Commissions Rogatory for the taking of testimony in both civil and criminal matters abroad has increased. The Section assists both provincial governments and practising lawyers in this field. The Section also liaises between provincial governments and foreign governments on such matters as reciprocal enforcement of maintenance orders and foreign judgments. The demand for the authentication of signatures on legal documents required for use abroad has increased particularly with respect to the People's Republic of China, where Canadian companies are becoming commercially involved. Finally, requests for extradition and rendition of fugitive offenders to and from Canada have increased greatly, specifically between Canada and the United States of America in relation to drug offences.

In response to a growing number of requests from private groups and individuals concerned with inter-provincial and international adoption, the establishment of a National Adoption Desk and Central Registry was approved by the Conference of Welfare Ministers in Ottawa in February, 1975 and was announced by the Honourable Marc Lalonde, Minister of Health and Welfare Canada, at that time. The aim of the Desk is to standardize and harmonize both international and inter-provincial adoption policies and procedures. A member of the Section serves on the Committee whose role is (a) to formulate a Canadian policy and position on international adoption generally, and (b) to develop procedural standards and guidelines in connection with the Desk's operations. The nature and degree of involvement of our missions and consular officers abroad in the adoption process has been carefully outlined in accordance with international practice and accepted functions of diplomatic and consular posts abroad. The formal announcement

of the Desk's inter-provincial operations took place on August 15, 1975 and the international side of the Desk has been in operation since November 1, 1976. A member of the Section will continue to serve in an advisory capacity to the Desk for the foreseeable future. The Department has been able to provide assistance both in individual adoption cases and in obtaining information on adoption procedures in foreign countries.

At present Canada has extradition treaties with some 41 countries. Most of these treaties predate 1925 and the majority were concluded by Britain on behalf of Canada in the latter part of the 19th century. The process started by Canada in 1975 to up-date existing and conclude new extradition treaties is continuing. In April, 1977 an agreed extradition treaty text was initialled with Norway. In February, 1975 extradition treaty talks had been held with authorities of the Federal Republic of Germany. Since that time discussions have continued by means of diplomatic correspondence. In October, 1977 a further round of talks was held and a draft extradition treaty text was initialled. It is anticipated the treaty will be signed presently. Extradition treaty talks were held with France in October, 1976 and a further round of talks was held in October, 1977. An agreed text was concluded and initialled ad referendum.

The Section has become extensively involved in the international aspects of "civil kidnapping" or "child napping". The Extra-Provincial Custody Orders Enforcement Act, recommended in 1974 by the Uniform Law Conference of Canada, has been enacted by Manitoba, Prince Edward Island, Nova Scotia and Newfoundland. The Attorney General of Canada at the Federal-Provincial Conference of Attorneys General held at Halifax in October, 1975 urged all provinces to adopt similar legislation. The problem of civil kidnapping was discussed at the meeting of Commonwealth Law Ministers held in Winnipeg in August, 1977. It was agreed that an early examination be given to greater co-operation in the enforcement of custody orders, particularly as criminal proceedings are generally unsuited for use in a family context. The delegates emphasized that their concern was for the welfare of the children and that the examination of a Commonwealth scheme could reduce the number of such distressing incidents.

As an example of the work of the Section an interesting case arose recently when a Canadian born child was taken to Germany by his German citizen mother without the knowledge and/or consent of his Canadian father. Since that time the father has been granted custody of the child by order of the Ontario courts. Because the Order is ineffective in Germany the father was forced to defend a custody action commenced by his wife in that country. The case was complicated by a series of court proceedings through the Amtsgericht and Landgericht in Berlin; first, on the issue of jurisdiction and, secondly, on the substantive issue of custody. On November 9, 1976 the Berlin Supreme Court granted custody of the child to the father and ordered that the child be returned over to him and returned to Canada. In reaching a decision the Berlin court took cognizance of the 1961 Hague Convention concerning the powers of authorities and the law applicable to the protection of infants. The present status of the case is that the mother and child have apparently gone into hiding. On January 14, 1977 an arrest warrant was issued against the wife. The Berlin police have as yet been unable to locate the wife and child. At present the Department is involved in about 20 cases of "child napping".

In the past year, Canada has agreed to treaties on the exchange of prisoners with the United States and with Mexico. The purpose of these treaties is to promote the rehabilitation of offenders by enabling them to serve sentences in their own countries. In each case, the consent of the offender as well as the approval of the authorities of the two governments is required.

The treaties provided for the exchange of prisoners, probationers and parolees under the responsibility of the federal governments. However, provinces and states may participate in the arrangements with the consent of the federal governments.

Upon transfer, the original sentence will carry over to the new confinement preserving deductions for good behaviour, pre-trial confinement, etc. The transfering state retains a power to grant pardon or amnesty. However, with these exceptions, the execution of the sentence is to be carried out according to the rules and practices prevailing in the state to which the offender is transferred. No offender shall be transferred until the time for leave to appeal against conviction or sentence has expired an while proceedings by way of appeal or collateral attack are pending.

The Treaty on the Execution of Penal Sentences between Canada and the United States was signed on March 2, 1977 and the Treaty between Canada and Mexico is expected to be signed in November 1977. Both Treaties are subject to ratification. A Bill to provide for the implementation of such treaties was introduced into the United States Senate and

House of Representatives in April 1977. It is expected that similar enabling Canadian legislation will be put before Parliament in the fall of 1977.

Canada is pursuing the possibility of entering into similar treaties with other interested countries. At the present time, there are approximately 250 Canadians in foreign prisons and 575 non-Canadians in Canadian federal prisons.

THIRD U.N. LAW OF THE SEA CONFERENCE : SIXTH SESSION

A CANADIAN ASSESSMENT

Introduction

The Sixth Session of the Third U.N. Conference of the Law of the Sea was held in New York from May 23 to July 15, 1977. On the basis of the discussions which took place in formal and informal negotiating sessions of the three main committees and of the plenary of the Conference, and in informal meetings outside the committee framework, the President of the Conference (H.S. Amerasingle of Sri Lanka), together with the chairmen of the three main committees (First Committee: Paul Bamela Engo, United Republic of Cameroon; Andrés Aguilar, Venezuela; Alexander Yankov, Bulgaria) and in association with the other officers of the Conference (Kenneth O. Rattray of Jamaica, the Rapporteur-General and J. Alan Beesley of Canada, the Chairman of the Drafting Committee), produced a new Informal Composite Negotiating Text (ICNT). The ICNT is a further step in the treaty-making process at the Conference, consolidating in one single working document the four separate parts of the old Revised Single Negotiating Text (RSNT) which had been produced at the end of the Fourth Session in May 1976 and incorporating many changes in an attempt to move towards consensus on a range of controversial issues.

While it is difficult to assess in definitive terms the outcome of the session in individual areas without the benefit of a more complete analysis of the ICNT, on the whole, the Conference would seem to have taken a step forward in the law-making process begun in Caracas in 1974. The Sixth Session, in fact, made more progress than the last two sessions combined and while many difficult and contentious issues remain unresolved, the session examined in depth virtually all outstanding issues and, in certain important areas, the Conference moved closer to consensus than heretofor. Thus, what has emerged is a list of issues which, taken together, could help point the way at the next session to a package of compromises leading to an overall consensus on a draft treaty.

Committee I

The primary focus of attention at the Sixth Session was the international system for deep seabed mining under discussion in Committee I. The first three weeks of the Conference were devoted exclusively to this subject in an attempt to break the deadlock that resulted at the Fifth Session between industrialized and developing countries over access by private corporations to the seabed area. There was

broad agreement at the outset that the Committee should try to capitalize on the fruitful informal intersessional discussions held under the chairmanship of Jens Evensen of Norway in Geneva in February/March 1977. Mr. Evensen was asked by the chairman of Committee I to chair informal working group meetings of the Committee with a view to drafting new compromise formulations on the basis of intersessional discussions. This process proved largely productive and many of the new provisions in the ICNT, based on Evensen's drafts, represent a forward step from the analogous RSNT provisions.

As a result of the points raised in the informal Committee I working group, by concerned land-based mineral producers, including Canada, the ICNT now contains the framework (Article 150) for a workable formulation for achieving a relationship between deep seabed mining and total world production (in contrast to the old RSNT formula) which could go some way in meeting Canadian objectives to provide protection against market disruption of land-based producers of minerals due to deep seabed production of the same minerals, principally the production of nickel. The formula would allow an economic incentive of up to 9 deep seabed mine sites upon the outset of commercial production and it would further allow deep seabed production to compete for 60% of the cumulative growth of world nickel demand.

On the basic question of parallel access to the deep seabed (an issue over which the Conference was deadlocked at the Fifth Session), the ICNT article, while not free from major problems and some ambiguity, theoretically appears to ensure that private corporation or state entities will obtain contracts from the International Seabed Authority to mine in the international seabed area. The text of Article 151, when read in combination with the conditions for granting of contracts by the Authority in Annex II of the ICNT, could be interpreted as restricting access to the seabed area by imposing burdens on applicants respecting transfer of technology to the Enterprise; it does indicate however that conditions for such contracts must be under "fair and reasonable terms and conditions". Article 151 and Annex II diverge from the compromise formulations suggested by Mr. Evensen during the session and might prove difficult for most industrialized countries, whose corporations have invested considerable money in deep seabed research and development, to accept.

Useful time was devoted to discussing the legal status and financing of the Enterprise, a matter which the Committee had not yet reviewed in detail. While the ICNT text on both points will require considerable improvement, particularly with respect to the various approaches to financing the operations of the Enterprise, the text has

helped at least to focus attention on the key problem areas. The objective is to develop a system for financing the Enterprise in order to allow it the means of becoming a going concern roughly in phase with the corresponding mining activities of private corporations or state owned entities.

For the first time the Conference examined in some detail the financial obligations to be borne by deep seabed mining contractors. The specific types of financial obligations cited in the ICNT are an application fee, annual fixed charge for mining, royalities and sharing of net proceeds. Whether or not these obligations turn out to be overly onerous will depend to a large extent on the precise figures eventually incorporated in the draft text.

The discussions also dealt with some of the very complex issues respecting institutional matters, particularly the structure, powers and functions of the Assembly, the Council and the organs of the Council (the Economic Planning Commission, the Technical Commission and the Rules and Regulations Commission). With respect to the important question of the composition of the Council — which is the "executive organ" of the Authority — the ICNT incorporates membership eligibility criteria aimed at providing a balanced, representative membership. Canada is not satisfied that the categories as set out in new Article 159 are entirely acceptable: as the world's largest producer of nickel, it is important to Canada to have fairly certain assurances that it will have a seat on the Council.

Finally, the Sixth Session considered the question of privileges and immunities to be accorded to the Authority and the Enterprise under the treaty. In some ways, the ICNT is an advance over the RSNT provisions but in Canada's view there is much work needed to ensure that the Enterprise is not accorded undue advantages over commercial entities, by being given a range of privileges and immunities usually granted to international organizations and not appropriate for profit-making concerns.

Committee II

1. Definition of Continental Margin and Payments or Contributions

At the Sixth Session, the Group of Land-Locked and Geographically Disadvantaged States (LL/GDS) reiterated their opposition to the definition of the continental shelf contained

in Article 64 of the RSNT which provided that "the continental shelf of a coastal state comprises the seabed and subsoil of the submarine areas that extend beyond its territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin, or to a distance 200 nautical miles from the baselines, "whichever is greater". The LL/GD states continued to insist that the rights of the coastal state over the resources of the continental shelf should be limited to a maximum of 200 miles from the baselines. Some of these states proposed cutting off coastal state sovereignty by reference to a depth criteria as an alternative approach. The group of wide margin states (Canada, Australia, New Zealand, Norway, U.K., Ireland, India, Argentina, USA) on the other hand, remained united in insisting, consistent with the established rule in the 1958 Geneva Convention on the Continental Shelf and the "natural prolongation" principle established in the 1969 North Sea Continental Shelf Case, that states have the right to exploit the shelf out to the edge of the margin even where it extends beyond 200 miles. As well, the wide margin states supported a draft provision proposed by Ireland which defined the continental margin in precise fashion by reference to the thickness of sedimentary rock. The wide margin states or "margineers" as they are known, reiterated their willingness to agree to a formula for the contribution of payments to the international community derived from revenues earned from resource exploitation on the continental shelf beyond 200 miles, provided that the Irish formula for defining the margin was accepted by the Conference. As a result of the continuing opposition of the LL/GD group of states to coastal state sovereign rights to the edge of the margin, the ICNT does not contain the Irish formula in the definition of the continental shelf in Article 76. However, the position of the margineers is protected in Article 76 of the ICNT (old RSNT Article 64) which recognizes the continental shelf as extending to the outer edge of the margin. Furthermore, a revised revenue sharing formula along lines which would be largely acceptable to the wide margin states — from 1% up to a maximum of 5% of the well-head value — has been included in Article 82 of the ICNT. Canadian acceptance of a scheme for payments or contibutions is conditional on an acceptable definition of the outer edge of the margin and the retention of coastal state sovereignty over shelf resources.

2. Legal Status of the Exclusive Economic Zone

One of the most difficult issues at the Conference is the problem of defining the legal status of the exclusive economic zone. On the one hand, the major maritime states wanted the zone legally defined as high seas in order to prevent erosion of traditional high seas freedoms of navigation and overflight. On the other hand, many coastal states considered that this zone was a zone of national jurisdiction and ipso facto distinguishable in law from the high seas. Canada together with several other members of the coastal state group took the position at the Fourth and Fifth Sessions that the solution to this impasse was to consider the zone sui generis, neither high seas nor territorial sea but partaking of some of the attributes of both; to a large extent, the new provisions in Part V of the ICNT reflect this conceptual approach. They result from intensive informal negotiations (which also concerned marine scientific research in the economic zone and exceptions from the settlement of disputes procedures, see below) and their effect is to avoid the problem of a specific definition in law of the exclusive economic zone and instead to provide a satisfactory balance between the rights of coastal states within the zone and the rights of other states therein in respect of freedom of navigation and overflight, and the laying of submarine cables and pipelines and "other internationally lawful uses of the sea related to these freedoms". While a number of so-called territorialist states (those who support a 200-mile territorial sea concept or, at least, the definition of the 200-mile exclusive economic zone as a zone of national jurisdiction) may still oppose the ICNT formulations, it is hoped that the "balancing" approach reflected in the draft text can ultimately command a broad consensus, particularly since it can probably be accepted by the major maritime states, provided other outstanding issues are resolved. If such a consensus can be realized at the Seventh Session, the result will have been an important achievement in resolving what was one of the most difficult issues facing the Conference.

3. Fisheries

The economic zone regime now firmly entrenched in the negotiating text reflects the Canadian position on coastal state management and control of fisheries within the 200-mile limit. The provisions in the ICNT make it clear that the coastal state has sovereign rights over these resources, can establish total allowable catches and all other management measures required, provide for its own fishermen in accordance with their harvesting capacity, and distribute any surplus that remain to other countries. The clear consensus which

has been reached on this subject at the LOS Conference has provided the basis for action by an increasing number of states, including Canada, which have found it necessary to extend their fisheries jurisdiction to 200 miles in advance of the conclusion of the Conference.

During the Sixth Session, fisheries-related discussions focussed on three major issues:

(a) the problem of access to living resources by the land-locked and geographically disadvantaged states;

(b) highly migratory species; and

(c) anadromous species.

Although the ICNT articles on these subjects (64, 66, 69 and 70) have been incorporated unchanged from the RSNT provisions, all of these issues will likely continue under consideration at the Seventh Session of the Conference.

One of the most difficult outstanding problems at the Conference concerns the demands by the LL/GDS Group to have preferential rights of access to the living resources of the exclusive economic zones of coastal states. Originally the LL/GDS Group had demanded access to more than simply the surplus in the EEZ. Coastal states, however, insisted that access to the EEZ by LL/GDS should be confined to the surplus in similar fashion to access by third states generally. Progress was made at the session in finding a means to resolve the problem, with the introduction, at the very end, of a new draft text which would protect all the vital interests of coastal states while providing considerable advantages for the LL/GDS Group and although the proposed text has not been included in the ICNT, it could form the basis for discussions at the next session on this subject.

Progress was also made on the question of highly migratory species, through the introduction and consideration of a new formula which aims at promoting regional and international cooperation and at balancing the rights and interests of the coastal states with those of other states who fish for highly migatory species, to ensure both conservation and optimum utilization of the stocks.

The Article on anadromous species (Article 66 of the ICNT) remains unchanged from the RSNT provision. This Article is of importance to Canada because it establishes that the state of origin has the primary interest in and responsibility for stocks originating in its rivers and provides a basic prohibition on fishing for salmon on the high seas beyond 200 mile fishing limits. Canada is opposed to any alteration to Article 66 which could upset the present delicate balance in the text and jeopardize agreement on the entire anadromous stocks provision.

4. Lateral Delimitation of the Continental Shelf and Exclusive Economic Zone

Discussion focussed on the differing approaches to amending Articles 62 and 71 of the RSNT (delimitation of the exclusive economic zone and of the continental shelf, respectively, between opposite or adjacent states). Libya introduced a proposed revision reinforcing the RSNT text which provided for delimitation on the basis of equitable principles. Canada is concerned that by ascribing paramount importance to equitable principles a large element of uncertainty would be introduced into the law thus further complicating the resolution of marine boundary disputes. A Spanish proposal, co-sponsored by Canada and 20 other states, would stipulate the median line as the guiding principle for marine boundary delimitation along the lines of the present provision of the 1958 Continental Shelf Convention.

Despite intensive discussions, the Conference unfortunately remains polarized on this issue between the two opposing camps. As a consequence, the RSNT provisions have been incorporated unchanged in the ICNT. Canada is not in agreement with these provisions which by ascribing overriding importance to equitable principles and subordinating the median line concept constitutes an unfortunate departure from existing international law. Debate will continue at the Seventh Session and Canada together with like minded states will further efforts to obtain changes in the text aimed at confirming the median or equidistance principle as the paramount rule governing delimitation of continental shelves and establishing the same rule in respect of economic zones between adjacent or opposite states.

Committee III

1. Preservation of the Marine Environment

Discussion of outstanding marine pollution issues at the Sixth Session proved to be largely a repetition of the debate at the previous session, although positions of different countries and groups of countries became more clearly defined. Two issues of major concern to Canada are the standard setting powers of coastal states in the territorial sea and coastal state enforcement powers in the 200-mile economic zone. On both these issues, some progress was made, although the results as reflected in the ICNT were not satisfactory from the Canadian point of view. With respect to the legislative competence of the coastal state in the territorial sea, Canadian efforts to obtain deletion of Article 20(2) of Part II of the RSNT, which restricted the powers of the coastal state to pass laws affecting design, construction, manning or equipment of foreign vessels, were unsuccessful. These restrictions, which represent a significant erosion of sovereign rights which coastal states have traditionally exercised within their territorial sea under existing international law, were thus carried over into Article 21(2) of the ICNT. As a result of extensive consultations between sessions with other governments and close collaboration with like minded governments during the course of the session, Canada was able to obtain recognition among a broad cross-section of delegations of the unacceptably restrictive language in Article 20(2) of the RSNT. Article 21(2) of the ICNT thus incorporates less restrictive language. While the prohibition of the application of national design, manning, construction and equipment standards in the 12-mile territorial sea for foreign vessels is retained, coastal states would be granted the right to give effect to generally accepted international rules and the reference to prohibition of national laws relating to all other "matters" is deleted.

The amended text, while representing some improvement on the previous language, still creates serious difficulties for Canada. Although preferring the total deletion of Article 21(2), the Canadian delegation had also worked actively to find suitable alternative language which would represent a reasonable accommodation between coastal and flag state interests. In Canada's view the proposal put forward by Morocco and Kenya (which in addition to the deletion of "matters" would reserve to a coastal state at least the residual right to apply national design, construction, manning and equipment rules to foreign vessels in the

territorial sea in the absence of international rules), while falling short of meeting its concerns, might offer a better basis for compromise than the text now incorporated in the ICNT. This will be a matter for further consideration in the intersessional period.

With respect to Part III of the RSNT, Canadian efforts to strengthen coastal state enforcement powers in the exclusive economic zone to the extent of allowing inspection of foreign vessels in cases of threatened pollution damage did not meet with success due to the strong opposition of the maritime powers. Conversely, determined efforts by a number of maritime powers to further limit coastal state enforcement powers in the exclusive economic zone were equally unsuccessful. However, the ICNT includes provisions (principally Article 212) which could have the effect of weakening both coastal state and flag state obligations alike in implementing international pollution standards in domestic law by allowing them the right only to pass laws which give effect to "generally accepted" international rules and standards in the exclusive economic zone.

The universal port state concept has been retained despite concerted efforts by some maritime powers to limit its scope. However an amendment agreed by the informal negotiating group of Committee III at the Fifth Session which would have entitled a port state to undertake an investigation of a vessel voluntarily within its internal waters, as well as within port or at an offshore terminal, which had committed a discharge violation on the high seas or in the internal waters, territorial sea or economic zone of another state, was not included in the ICNT. This matter will have to be considered at the Seventh Session.

Another important factor to emerge from the Sixth Session of importance to Canada is that the RSNT provision recognizing the right of the coastal state to apply special environmental standards in ice-covered waters, the "Ice-covered areas" article, has been incorporated unchanged in the ICNT, (Article 235) further strengthening international acceptance of Canada's Arctic Waters Pollution Prevention Act of 1970.

In summary, while there are some important inadequacies in specific articles, the basic concept of a comprehensive umbrella marine pollution control treaty based upon the zonal concept and a functional sharing of jurisdiction

among coastal, flag and port states has been preserved in the ICNT. The effect of all these provisions, hopefully with further adjustments as noted, would be a major and radical change from the previous laisser-faire regime based upon the concept of unrestricted freedom of the high seas.

2. Marine Scientific Research (MSR)

One of the most contentious issues facing the session was the extent to which a coastal state should be given the power to withhold its consent to marine scientific research conducted in its exclusive economic zone or on its continental shelf. (There was no disagreement over the right of the coastal state to regulate marine scientific research within its territorial sea.) As a result of intensive, informal negotiations, a draft provision (combined as a "package" with provisions on issues concerning status of the economic zone and settlement of disputes) was agreed to among the states principally concerned and incorporated in Article 247 of the ICNT which recognizes the principle of coastal state consent for MSR in the exclusive economic zone or on the continental shelf coupled with the important proviso that coastal states shall "in normal circumstances" grant their consent for MSR projects by other states. However, a coastal state may withhold its consent where such research directly affects the exercise of its sovereign rights over living and non-living resources in the exclusive economic zone or on its continental shelf (as well as under certain other circumstances as spelled out in the Article). As was the case in the RSNT, the ICNT also includes an implied consent provision, allowing research projects to go ahead after six months from the date on which notification by the researching state has been given to the coastal state unless within that period the coastal state has refused consent.

Another important provision in the ICNT resulting from negotiations at the Sixth Session would exempt from the compulsory dispute settlement proceedings cases involving the exercise of discretion by the coastal state in granting or withholding its consent to conduct MSR or in exercising its right to require a cessation of research in progress. As the ICNT is now drafted, it may not entirely satisfy the concerns of either major researching states or some coastal states. However, it does appear that a broad cross-section of delegations are prepared to agree to the new text, at least as a basis for further discussion and as a "package" linked to the status of the economic zone. As the ICNT

provisions will have the practical effect of operating as a full consent regime for all research while simultaneously incorporating provisions for its promotion and facilitation, Canada is satisfied that they balance the rights of those states wishing to conduct research and the legitimate rights and interests of coastal states in controlling or regulating certain types of MSR bearing on the utilization of resources over which they exercise sovereign rights.

Plenary Discussions on the Settlement of Disputes

For the first time, the Conference had before it a draft text on the settlement of disputes (Part IV of the RSNT) having the same status as the other parts of the RSNT. Discussions of this subject were conducted in Plenary under the chairmanship of the President of the Conference and were directed to four basic ends:

(1) improving the style and drafting of the RSNT;

(2) consolidating the disputes settlement provisions of Part I of the RSNT on exploitation of the deep seabed with the comprehensive law of the sea dispute settlement system which had been included in Part IV of the RSNT;

(3) resolving certain substantive problems, in particular the question of certain types of disputes exempted from the dispute settlement process in Articles 17 and 18 of the RSNT; and

(4) developing and confirming support for the general principle of compulsory dispute settlement in a future Law of the Sea Treaty.

Of major importance at the session was the general consensus accepting the creation of a separate Seabed Chamber of the proposed Law of the Sea Tribunal. The Chamber would have jurisdiction over disputes arising out of the application of the provisions of the ICNT respecting the exploitation of the deep seabed. The effect will be to amalgamate in one dispute settlement system all disputes relating to the application of the comprehensive Law of the Sea Treaty.

A major contentious issue related to the application of the dispute settlement procedures to the exercise by the coastal state of its sovereign rights over the living resources in the exclusive economic zone. Article 17 of Part IV of the RSNT provided for dispute settlement where the coastal state had "manifestly failed" to comply with specified conditions in the Convention relating to the exercise of its rights with respect to living resources. This provision was not acceptable to the majority of the coastal state group who argued for its deletion on the grounds that it would represent a derogation from the general concept of coastal state sovereign rights over the living resources within the exclusive economic zone. In response to this view ICNT Article 296 now provides that no dispute relating to the interpretation or application of the Convention with regard to living resources shall be brought before the Tribunal unless certain specific obligations with respect to the conservation and utilization of living resources have been breached by the coastal state and subject to the general qualification that in no case shall the exercise of discretion with respect to determining the total allowable catch or the extent of surplus in the exclusive economic zone be called into question. Nor shall the court or tribunal substitute its discretion for that of the coastal state in regard to living resources. An additional proviso stipulates that in no case shall the sovereign rights of a coastal state be called into question. The foregoing would appear to provide a high degree of protection to the coastal state; further study will be given to these provisions to ensure that coastal state jurisdiction with respect to fisheries will be protected and that coastal state discretion within the 200-mile zone will not be called into question.

Apart from the foregoing, discussion in Plenary indicated that the broad outlines of Part IV of the RSNT were generally acceptable to most states. There appeared to be a broad degree of consensus for the alternative procedures which have been included in Article 287 of the ICNT, giving states parties the option of choosing between the Law of the Sea Tribunal, the International Court of Justice, an arbitral tribunal in accordance with Annex VI or a special arbitral tribunal in accordance with Annex VII, with the designation of the general arbitral tribunal as the residual choice of procedure in the absence of an alternative choice. Some difficulties

remain with respect to the so-called "optional exceptions", particularly the provision in the RSNT which said that states could refuse to accept compulsory jurisdiction with respect to the question of disputes concerning the delimitation of sea boundaries, although any state availing itself of this exception would be required to accept a regional or other third-party procedure entailing a binding decision. The ICNT provision (Article 297) attempts to overcome the difficulty in this regard by providing that a state may declare that it does not accept settlement of disputes as provided for in the Convention in respect of bounary delimitation disputes, but prefers a regional or other third-party procedure, provided that such procedures shall exclude the determination of any claim to sovereignty or other rights with respect to continental or insular land territory.

Canada viewed the incorporation of binding third-party settlement procedures as an integral part of a new LOS Treaty of fundamental importance in ensuring a balanced and effective implementation of a new legal order of the oceans. Despite certain shortcomings the adjudication/arbitration procedures embodied in the ICNT are generally satisfactory from the Canadian standpoint and hopefully will obtain consensus support at the Seventh Session.

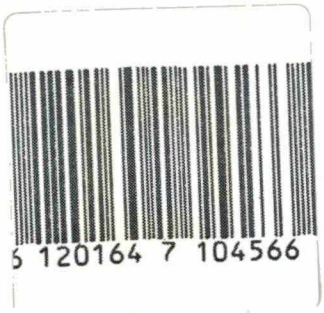
Prospects for the Conference

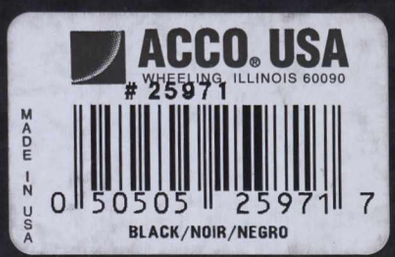
While substantial progress has beem made in resolving most of the key issues at the Conference, intensive negotiations are still required to resolve remaining areas of difficulty, including in particular the proposed arrangements for international deep seabed mining. At least one more session, and possibly two, will be necessary to overcome these difficulties. The assessment of the Canadian delegation is that in spite of the remaining difficulties, consensus on the full range of seabed mining issues is very much closer as a result of the progress achieved at the Sixth Session, but if the momentum of the negotiations is to be sustained, intersessional meetings are essential regarding further refinement of the system of exploitation of deep seabed resources and clarification of certain parts of the ICNT. Given the progress achieved to date and the positive impact that the negotiations have already had on the development of international sea law, particularly with respect to coastal state sovereign rights over living resources, it seems likely that participating states will be willing to persevere towards a successful conclusion of the Conference even if it takes two more sessions to do so.

Failure to see the Conference through to a successful conclusion after it has accomplished so much would be a severe setback to international law and the U.N. Without agreement on a new convention, the functional approach to coastal state jurisdiction as now reflected in the ICNT would in all likelihood give way to the more absolutist approach of the territorialists, i.e. full sovereignty within a 200 mile zone. Failure of the Conference could result in a proliferation of conflicts over the use of the world's oceans, in particular resulting fom differences of view as to the regime which governs deep seabed mining, the rights of passage through international straits falling within the territorial sea of states bordering such straits and the sovereign rights and jurisdictions of coastal states within a 200 mile zone.

Seventh Session

The next and Seventh Session of the Law of the Sea Conference is scheduled to be held beginning March 28 for seven to eight weeks in Geneva to continue the negotiating process and, hopefully, to move closer to an agreement on the text of a draft treaty. Canada is firmly on record as being committed to achieving a successful outcome to UNCLOS and the establishment of a new convention governing all aspects of ocean law. That commitment is unchanged and the Canadian delegation will continue t play its full part in the negotiations, both intersessionally and at the next session in Geneva.

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