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# Quelques exemples de questions courantes de droit international d'une importance particulière pour le Canada

# Some examples of Current Issues of International Law of Particular Importance to Canada

Ministère des Affaires extérieures
Bureau des Affaires juridiques
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## HUMAN RIGHTS

A total of 57 instruments are listed in the UN Document "Human Rights: a Compilation of International Instruments" produced in 1983. With the adoption of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in December 1984, of the Declaration on the human rights of individuals who are not nationals of the country in which they live and the Convention against Apartheid in Sports, both in December 1985, there are now 60 instruments. Of these 60, 32 are treaties (this terms includes covenants, conventions and protocols). The remainder are declarations, codes and standard minimum rules.

Canada is party to 20 of these 32 treaties. More importantly, we are party to five of the six major human rights instruments i.e. the International Covenant on Economic, Social and Cultural Rights (ICESCR), the Convention on the Elimination of All Forms of Racial Discrimination (CERD), the International Covenant on Civil and Political Rights (ICCPR), the Optional Protocol to the ICCPR and the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW). The one major human rights convention to which Canada is not party is the International Convention on the Suppression and Punishment of the Crime of Apartheid.

On August 23, 1985 Canada signed the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Discussions are continuing with the provinces and territories with a view to considering legislative changes that may be necessary to enable Canada to fully implement the Convention and subsequently to ratify it.

### CANADIAN REPORTS UNDER THE UN HUMAN RIGHTS CONVENTIONS

Canada's first report on articles 13 - 15 of the International Covenant on Economic, Social and Cultural Rights was considered by the Sessional Working Group of Governmental Experts on the Implementation of the ICESCR in April, 1986 (the report of the Sessional Working Group is contained in document E/1986/49 of 7 May, 1986). In May, 1986 elections were held to the Committee on Economic, Social and Cultural Rights, which shall replace the Sessional Working Group as of 1 January, 1987. Our eighth report under the Convention on the Elimination of All Forms of Racial Discrimination was submitted to the United Nations in February, 1986 and is expected to be considered by the Committee on the Elimination of Racial Discrimination, along with our seventh report, in March, 1987 (the most recent report of this Committee is contained in document A/40/18).

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DRAFT INSTRUMENTS

An open-ended working group of the Commission on Human Rights (CHR) has met for a week prior to the regular session of the CHR since 1979 to draft a Convention on the Rights of the Child. To date 29 articles have been adopted by the working group, which will likely be considering articles on implementation at its next session in early 1987.

An open-ended working group of the Third Committee of the UNGA continued its consideration of a draft international convention on the protection of the rights of all migrant workers and their families.

The question of a draft declaration on the "right to development" had been under consideration since 1981 by a working group of the Commission on Human Rights (CHR). In the absence of consensus on its text at UNGA 40 or CHR 42, consideration of the draft declaration was postponed until UNGA 41.

Since 1981 an open-ended working group of the Sixth Committee of the UNGA has been considering a draft body of principles for the protection of all persons under any form of detention or imprisonment. The Working Group reconvened at the beginning of UNGA 41 and it is expected to complete its work during the present session.

## EXTRATERRITORIALITY

The unilateral application of laws by foreign countries, particularly the United States, in a manner which seeks to displace Canadian authority over its own territory or which has the effect of placing Canadian companies in the position of having to choose between conflicting legal requirements, has remained of serious concern to Canada.

Canada has accompanied its efforts on specific problem issues with increased attention to the more general economic and political dimensions of extraterritoriality. In 1983, at the OECD, Canada joined with the United Kingdom and other member countries concerned in calling for further study of the impact of conflicting legal requirements being imposed on multinational enterprises, in the context of a review of the 1976 Declaration and Guidelines on International Investment and Multinational Enterprises. In May 1984, the OECD Council, at Ministerial level, specifically endorsed a set of "General Considerations" and "Practical Approaches", including respect for international law, the exercise of moderation and restraint, and pursuit of notification and consultation procedures, as appropriate means to avoid or minimize conflict. A long study by OECD Member countries on national views of the concept of moderation and restraint is in its final phase. Future work in this multilateral

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context will likely focus on specific issues of export controls, securities and futures.

In the past year, Canada has experienced further difficulties in the field of export controls with the U.S.A., notably with respect to questionable submission clauses that purport to limit freedom of action in the eventual re-export of the goods in question. Canada has maintained its dialogue with the U.S.A. with a view to ensure broad policy cooperation against unwarranted diversion of sensitive technology while avoiding extraterritorial application of U.S. laws and regulations. Canada kept a close brief on U.S. regulatory initiatives, such as the Libyan sanctions and introduction of Distribution Licenses as well as other methods of controlling re-export in foreign countries.

The 1984 Memorandum of Understanding on Notification, Consultation and Cooperation on Antitrust proved to be a useful device in ensuring that the Canadian Government interests and policies were taken into account by the Antitrust Division of the U.S. Department of Justice in an ongoing merger case involving a U.S. and a Canadian company.

Decisions were rendered recently in U.S. courts on cases where Canada had presented amicus curiae briefs,

either alone or in conjunction with other countries: MATSUSHITA Electric Industrial Co. Ltd et al v. Zenith Radio Corporation et al, Railway Labor Executive's Association v. U.-S. Railroad Retirement Board. A decision is still outstanding in the case of Alcan Aluminium Ltd. v. Franchise Tax Board of California. In respect of issues raised in the latter case, recent amendments to the unitary method of taxation in California constitute a very positive development in reasserting internationally accepted principles of taxation law.

Canada has continued its negotiations with Switzerland, the Cayman Islands and on the multilateral level through the Commonwealth with a view to developing a network of Mutual Legal Assistance Treaties (MLAT) in criminal matters. These treaties have as a prime objective to ensure that assistance be provided to foreign countries through appropriate channels and thus to prevent the utilization of unilateral transborder subpoenas which, in derogation from international legal principle, may ignore the fact that the defendant may be placed under conflicting requirements in another jurisdiction. Such issues were raised in the Bank of Nova Scotia cases in the U.S. These MLAT negotiations are ongoing at their normal pace.

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## L'IMMUNITE DES ETATS ETRANGERS DEVANT LES TRIBUNAUX

La Loi portant sur l'immunité des Etats étrangers devant les tribunaux (S.C. 1980-81-82, c. 95), dont le titre abrégé est la Loi sur l'immunité des Etats, est entrée en vigueur le 15 juillet 1982. Cette Loi a consacré le principe de l'immunité de juridiction de l'Etat étranger, sauf pour ses activités commerciales et certaines autres exceptions. Ainsi, un Etat étranger peut maintenant être poursuivi devant les tribunaux canadiens en raison d'activités et d'actes qui revêtent un caractère commercial. En restreignant l'immunité de l'Etat étranger, la Loi le place dans une position juridique sensiblement la même que celle de tout autre justiciable, pour ce qui est de ses activités ou actes de nature commerciale.

Avant l'adoption de cette Loi par le Parlement canadien, la jurisprudence démontrait une incertitude quant à l'étendue de l'immunité qui devait être accordée à l'Etat étranger. Alors que certaines décisions avaient opté pour le principe de l'immunité restreinte, la tendance majoritaire appliquait encore le principe de l'immunité absolue. Comme le principe de l'immunité absolue, élaboré en d'autres temps et circonstances, est progressivement tombé en désuétude dans nombre d'Etats, le Canada se devait de légiférer pour corriger l'incertitude jurisprudentielle antérieure.

Essentiellement, les deux raisons qui ont poussé le Canada à adopter le principe de l'immunité restreinte, étaient depuis assez longtemps invoquées par de nombreux observateurs et experts en droit international et constitutionel. Tout d'abord, il y a la position du gouvernement fédéral et des gouvernements provinciaux devant les tribunaux canadiens. Depuis plus de trente ans en effet, le principe de l'immunité de la Couronne a été considérablement modifié et, en règle générale, ces gouvernements sont maintenant comptables devant les tribunaux. Cette évolution est venue étayer l'opinion selon laquelle les Etats étrangers devraient, du moins quant à leurs activités ou actes de nature commerciale, pouvoir faire l'objet de poursuites devant les tribunaux canadiens. L'accroissement important, ces dernières années, des activités commerciales des Etats est un deuxième facteur invoqué au Canada et à l'étranger en faveur d'une limitation de l'immunité des Etats étrangers. En effet, au fur et à mesure que les Etats se sont engagés dans toutes sortes d'activités commerciales, il est devenu de plus en plus difficile de justifier le concept de l'immunité absolue.

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La Loi stipule que la règle de l'immunité doit s'appliquer même si l'Etat étranger s'abstient d'agir dans l'instance. Elle précise cependant les cas où l'immunité est écartée à titre d'exceptions expresses à la règle générale de l'octroi de l'immunité de juridiction.

En ce qui concerne l'exécution des jugements, la Loi précise que les biens utilisés ou destinés à être utilisés dans le cadre d'une activité commerciale sont saisissables, qu'ils fassent ou non l'objet de l'instance, sauf dans certains cas spécifiques. Toutefois, les biens d'une banque centrale étrangère qui ne sont pas utilisés ou destinés à être utilisés à des fins commerciales sont insaisissables.

Certaines mesures de contrainte ne peuvent être prises contre un Etat sans le consentement écrit de ce dernier. La Loi codifie également les procédures se rapportant, entre autres, à la signification d'actes de procédure.

Le principe de réciprocité entre Etats est respecté grâce au pouvoir conféré au Gouverneur-en-conseil de restreindre l'immunité. Par ailleurs, une disposition permet d'établir la qualité d'un Etat étranger, de ses territoires ou subdivisions politiques par la délivrance à cette fin d'un certificat établi par le Secrétaire d'Etat aux Affaires extérieures.

En reconnaissant certains privilèges et immunités traditionnellement accordés aux Etats étrangers, la Loi ne déroge ni à la Loi sur les privilèges et immunités diplomatiques et consulaires[1] ni à la Loi sur les forces étrangères présentes au Canada[2].

Depuis l'entrée en vigueur de la Loi sur l'immunité des Etats, une douzaine de poursuites ont été intentées contre des Etats étrangers. Jusqu'à présent, ces poursuites ont donné lieu à un seul jugement qui a été signifié à l'Etat étranger.

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[1] S.C. 1976-77, c. 31, modifié par S.C. 1980-81-82-83, c. 74

[2] S.R.C. 1970, c. V-6, modifié par S.C. 1972, c. 13

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## RECIPROCITE DANS L'APPLICATION DES CONVENTIONS DE VIENNE SUR LES PRIVILEGES ET IMMUNITES

Le droit international public requiert que chaque Etat accorde certains privilèges et immunités aux établissements diplomatiques et consulaires, ainsi qu'au personnel à qui il a permis d'assumer des fonctions spécifiques sur son territoire (i.e. l'inviolabilité des personnes et des établissements, immunité de juridiction, exemption de taxes directes dans l'Etat accréditaire, etc.). Cette obligation a longtemps existé en droit international coutumier, mais le contenu de ce devoir a été codifié dans deux Conventions multilatérales générales: la Convention de Vienne sur les relations diplomatiques, adoptée le 18 avril 1961 et ratifiée par le Canada le 26 mai 1966, et la Convention de Vienne sur les relations consulaires adoptée le 24 avril 1963 et à laquelle le Canada a adhéré le 18 juillet 1974.

Le droit d'envoyer et de recevoir des représentants diplomatiques et consulaires est l'un des attributs de la souveraineté des Etats, selon le droit international public. L'obligation d'accorder à ces représentants les privilèges et les immunités prévus par le droit international est concomitant au droit de légation.

Le Canada a pu devenir partie à la Convention sur les relations diplomatiques et à la Convention sur les relations consulaires sans avoir à adopter au préalable une législation particulière puisque les obligations que devait alors assumer le Canada par ces deux Conventions reflétaient presque entièrement les principes préexistants du droit international coutumier, lesquels étaient déjà intégrés dans le "Canadian Common Law". En effet, le Canada a attendu 1977 pour adopter la Loi concernant les privilèges et immunités diplomatiques et consulaires au Canada, loi sanctionnée le 29 juin 1977 et modifiée par la Loi modifiant la Loi sur les privilèges et immunités diplomatiques et consulaires, sanctionnée le 10 juillet 1981.

Les immunités du personnel diplomatique et consulaire par rapport aux systèmes administratif et judiciaire de l'Etat accréditaire reflètent le fait que ces personnes sont envoyées et reçues à titre de représentants de leur gouvernement et un Etat ne cherche normalement pas à soumettre à ses processus judiciaires les représentants diplomatiques et consulaires du gouvernement d'un autre Etat. De même, les privilèges, qui représentent en effet une exemption par rapport à certaines formes de taxation, reflètent le fait qu'un Etat n'impose pas normalement de taxes à un autre Etat, au moins quant à ces activités gouvernementales (distinctes des activités commerciales).

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Les objectifs visés par l'établissement d'un régime de privilèges et immunités sont de s'assurer que les membres d'une mission diplomatique ou consulaire peuvent s'acquitter de leurs devoirs légitimes sans entrave par l'Etat accréditaire.

Les Conventions de Vienne établissent des régimes pour la protection des missions diplomatiques et consulaires et de leur personnel dans toutes les parties du monde, incluant plusieurs pays où la règle de droit et la liberté des personnes ne sont pas respectées avec la même rigueur qu'au Canada. Cela est un facteur d'une importance particulière pour le Canada dont les relations politiques, économiques, et commerciales avec l'étranger sont essentielles à la sécurité et au bien-être de notre pays. Nous avons un grand nombre de représentants canadiens dans nos missions diplomatiques et consulaires à l'étranger. Leur habileté à oeuvrer effectivement, aussi dans certains cas leur sécurité personnelle et celle de leurs familles, dépend largement d'un régime international bien établi régissant leur status dans les pays où ils servent le Canada.

En vertu de la Loi sur les privilèges et immunités diplomatiques et consulaires, telle que modifiée, les dispositions des deux Conventions de Vienne qui énoncent les privilèges et immunités, incluant celles qui peuvent affecter les droits de personnes privées, "ont force de loi au Canada à l'égard de tous les pays (y compris ceux du Commonwealth), qu'ils soient ou non parties aux Conventions" (article 2(1)). Ainsi, le Canada applique le principe de réciprocité à tous les Etats, qu'ils soient ou non parties aux Conventions de Vienne. Toutefois, les organisations internationales en sont exclues.

Afin de s'assurer que les privilèges et immunités prévues par les Conventions de Vienne soient accordés aux missions et au personnel diplomatique et consulaire canadien, la Loi sur les privilèges et immunités, telle que modifiée, prévoit que le Secrétaire d'Etat aux Affaires extérieures, s'il l'estime opportun, peut retirer tout ou partie des privilèges et immunités ainsi conférés, s'il lui apparaît "que les privilèges et immunités accordés à la mission diplomatique ou à un poste consulaire canadiens à l'étranger, ou à toute personne concernée par la mission ou par un tel poste, sont inférieurs à ceux que confère la présente Loi à la mission diplomatique ou au poste consulaire de ce pays, ou aux personnes concernées par la mission ou par un tel poste" (article 2(4)).

En conséquence, la pratique du Canada est entièrement conforme à l'article 47, paragraphe 2(a) de la Convention de Vienne sur les relations diplomatiques qui stipule que le fait

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pour l'Etat accréditaire d'appliquer restrictivement l'une des dispositions de la Convention parce qu'elle est ainsi appliquée à sa mission dans l'Etat accréditant ne sera pas considéré comme discriminatoire.[1]

En conséquence, en vertu du principe de la réciprocité il est possible d'adopter des mesures restrictives à l'égard du personnel des missions diplomatiques d'Etats qui ont pris eux-mêmes l'initiative de telles limitations.

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[1] La dispositions équivalente dans la Convention de Vienne sur les relations consulaires est l'article 72, paragraphe 2(a)

## "LA BRETAGNE"

Le Canada et la France ont soumis à l'arbitrage obligatoire leur différend découlant de la condition rattachée à la licence de pêche délivrée au chalutier "La Bretagne", un navire-usine français immatriculé à Saint-Pierre-et-Miquelon.

Aux termes de cette licence accordée par les autorités canadiennes, "La Bretagne" pouvait pêcher dans le golfe du Saint-Laurent mais ne pouvait pas y utiliser son équipement de filetage. Cette condition correspondait à l'interdiction de transformer leurs prises en filets faite aux bateaux de pêche canadiens, avec lesquels les bateaux immatriculés à Saint-Pierre-et-Miquelon ont le droit de pêcher "sur un pied d'égalité" en vertu de l'article 4 de l'Accord de pêche canado-français de 1972. Les autorités françaises s'élevèrent contre la restriction imposée à "La Bretagne", qu'elles estimaient incompatible avec l'Accord de 1972.

Un Tribunal d'arbitrage fut donc constitué, composé du Professeur Donat Pharand, de la faculté de droit de l'Université d'Ottawa, du Professeur Jean-Pierre Quéneudec, de la faculté de droit de l'Université de Paris, et du Professeur Paul De Visscher, de la faculté de droit de l'Université de Louvain, faisant fonction de Président.

Le Tribunal d'arbitrage a rendu sa décision le 17 juillet 1986, statuant par deux voix contre une que l'Accord de 1972 "ne permet pas au Canada d'interdire aux chalutiers francais immatriculés à Saint-Pierre-et-Miquelon le filetage de leurs prises dans le golfe du Saint-Laurent". La sentence du Tribunal est accompagnée d'une opinion dissidente. Ayant convenu avec la France que cette sentence serait finale et obligatoire, le Canada lèvera sous peu la restriction relative au filetage que comporte la licence délivrée à "La Bretagne".

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## SAINT-PIERRE-ET-MIQUELON (SPM)

The Saint-Pierre-et-Miquelon (SPM) archipelago is located less than 9.5 nautical miles west and southwest of Newfoundland's Burin Peninsula. Negotiations between Canada and France on the delimitation of the continental shelf off Newfoundland and SPM began in 1967. In 1978, after the two sides had extended their fishing zones to 200 miles, the negotiations were expanded to include fisheries jurisdiction as well.

The French position since 1978 has been that SPM is entitled, in principle, to a full 200-mile exclusive economic zone (EEZ), and that the maritime boundary with Canada is to be determined on the basis of equidistance measured from the nearest coasts of SPM and of Newfoundland and Nova Scotia. This would result in a total maritime zone for SPM of approximately 13,500 square nautical miles (s.n.m.).

Canada's position has been that France is entitled in law to no more than a 12-mile territorial sea.

After four unsuccessful rounds from 1978 to 1981, negotiations were suspended. They resumed in 1983 with the last session having been held in Paris in October of 1985.

The boundary negotiations have been complicated by the fact that any agreement regarding Saint-Pierre-et-Miquelon's EEZ could have a significant impact on Canadian fisheries allocations to France and because of the possibility of expoliting hydrocarbons in portions of the disputed area.

Since January 1984 there has been agreement that, in order to maintain a favourable atmosphere for the boundary negotiations, both countries would exercise mutual restraint and would forego the boarding and inspection of the other's vessels in the disputed area.

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## THE UNITED NATIONS CONVENTION ON THE LAW OF THE SEA

The Law of the Sea (LOS) Convention, which was adopted in April 1982, sets out a comprehensive regime for the regulation of the world's oceans. When it closed for signature on December 9, 1984, it had 159 signatories, which represents an unprecedented response to any international accord. Among the countries that did not sign the Convention, because of objections to its deep sea-bed mining regime, were the United States, the United Kingdom and the Federal Republic of Germany. The Convention will come into force 12 months after the date of deposit of the sixtieth instrument of ratification or accession. As of September 15, 1986, 31 states had ratified the Convention.

As a state with one of the longest coastlines in the world and with important ocean interests, Canada regards the LOS Convention as a unique opportunity to make a major contribution to world peace and security by reducing the potential for conflict in the competing uses of the oceans. While some aspects of the Convention codify existing customary international law, other aspects represent new law. The provisions of the Convention are having a significant impact on Canadian domestic legislation, although Canada has not yet decided whether or not to ratify it. Failure of the Convention could, in Canada's view, risk a return to the uncertainties that existed before the Convention was negotiated.

During the past year, Canada was an active participant in the work of the Preparatory Commission (PrepCom), established in order to set up the institutional system envisaged in the Convention. The PrepCom met in Kingston, Jamaica, in March, 1986, and in New York City, in August, 1986 to continue its efforts to develop suitable mechanisms for implementation of the regime outlined in the Convention for the exploitation of deep sea-bed resources.

Pursuant to Resolution II of the final session of the LOS Conference, the PrepCom is also engaged in efforts to establish a system to protect already existing investments in sea-bed mining for the period during which the Convention has not yet entered into force. Particularly noteworthy in this regard have been the ongoing efforts of interested states to develop a satisfactory method to resolve conflicts of overlapping claims for deep sea-bed mining sites in one particularly promising area of the Pacific. Canada has maintained the position that the resolution of this problem should be achieved on a comprehensive basis involving all "pioneer investors", as defined by Resolution II, including private consortia that may at a later stage register sites under the Convention.

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In February, 1986, the four states with state enterprises identified as pioneer investors (USSR, France, Japan, India) reached an agreement among themselves, with the assistance of PrepCom Chairman Warioba, designed to permit registration of their claims by the PrepCom. While this agreement (the Arusha Understanding) addressed the question of the resolution of overlapping claims between themselves it did not do so in terms that would resolve the problem of overlaps with the claims of private consortia.

The Resumed Session of the PrepCom, in New York City, was devoted mostly to the question of possible registration of this first group of applicants and to the related question of mechanisms for resolution of overlapping claims between the USSR and the consortia. Intensive negotiations involving primarily the first group of applicants, western states (including Canada) having interests in sea-bed mining, and the Group of 77 resulted in the adoption by the PrepCom, on September 5, 1986, of a complex understanding (LOS/PCN/L.41/Rev.1-Annex) that provides, inter alia, for a procedure leading in principle to the registration of the first group of applicants at the next session of the PrepCom, in April, 1987, and for intersessional negotiations on overlapping claims which could extend beyond the next session as necessary.

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## CANADA-USA MARITIME BOUNDARY ISSUES

While the judgement, in October 1984, of a Chamber of the International Court of Justice (ICJ) fixed a single maritime boundary between Canada and the United States in a large portion of the Gulf of Maine area, several maritime boundaries remain unsettled between the two countries.

### Gulf of Maine - Landward and Seaward Extensions

Under the terms of the agreement submitting the Gulf of Maine maritime boundary dispute to a Chamber of the ICJ, the Chamber was to fix the single maritime boundary seaward from a point 39 nautical miles from the terminus of the land boundary. The reason for not having the Chamber rule on the maritime boundary landward from this point related largely to the dispute over Machias Seal Island, which is claimed by both countries. The eventual seaward extension of the continental shelf dividing line will also have to be agreed in due course.

### Strait of Juan de Fuca

The international boundary inside the Strait was fixed in the last century and is not the subject of dispute.

There is no agreement between Canada and the United States regarding the extension of the maritime boundary seaward of the Strait. The United States position has been to espouse equidistance, using a line drawn by reference to coastal sinuosities.

### Dixon Entrance

Inside the Entrance, the Canadian position is that the "A-B Line", established by the 1903 Alaska Boundary Tribunal, is the international boundary with respect to both land and sea. The Americans, who earlier claimed a three-mile territorial sea and a nine-mile continguous fishing zone in the area, now maintain that the maritime boundary should follow a median line, more or less equally dividing the waters inside the Entrance between Canada and the United States.

There is no agreement between Canada and the United States regarding the extension of the maritime boundary seaward of the Dixon Entrance. The United States position has been to espouse equidistance.

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Beaufort Sea

The USA claims a maritime boundary based on equidistance from the termination of the land boundary on the 141st meridian. The Canadian position, based on our interpretation of the language of Article III of the 1825 Russian-British Convention of St. Petersburg, is that the maritime boundary should follow the 141st meridian -- in effect, a direct seaward extension of the land boundary.

Recent Developments

In October, 1985, United States Secretary of State Shultz suggested to the Secretary of State for External Affairs that Canada and the United States might undertake preliminary discussions and possible negotiations on outstanding maritime boundary issues. United States officials later indicated that they would be interested in focussing first on west coast maritime boundaries.

Mr. Clark consulted the Government of British Columbia on this matter and received the views of numerous groups and communities on the west coast. In the light of these consultations, Mr. Clark concluded that this was not an opportune time to resume discussions with the USA on west coast maritime boundaries and, in August, 1986, he so informed the United States Secretary of State.

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## PECHES INTERNATIONALES

Plusieurs questions liées au droit international des pêches ont une importance particulière pour le Canada.

### Accord sur les pêches dans le fleuve Yukon

Depuis 1985, le Canada et les Etats-Unis poursuivent des discussions qui selon les termes de l'article VIII du traité sur le saumon conclu entre les deux pays en 1985 visent notamment: à rendre compte des captures américaines de saumon originaires de la section canadienne du fleuve Yukon; à établir des pratiques de gestion coopérative tenant compte des programmes américains de gestion des stocks originaires de la section américaine du fleuve Yukon; à envisager des programmes de recherche coopérative, des occasions de mise en valeur et des échanges de données biologiques; à mettre sur pied une structure organisationnelle pour traiter des questions propres au fleuve Yukon.

Les deux délégations se sont rencontrées à plusieurs reprises en 1986 et entendent poursuivre leurs discussions en vue de rechercher un partage équitable du saumon au fleuve Yukon et d'assurer une pêche commerciale

### Commission internationale des pêches du Pacifique nord: modification de la Convention internationale concernant les pêcheries hauturières de l'océan Pacifique nord

Le Secrétaire d'Etat aux Affaires extérieures a été autorisé en vertu d'un décret, le 15 mai 1986, à préparer et délivrer un instrument d'acceptation de la modification d'une annexe de la Convention internationale concernant les pêcheries hauturières de l'océan Pacifique nord. Cette Convention est un accord tripartite entre le Canada, le Japon et les Etats-Unis visant la réglementation des pêches dans la région. La modification en question avait précédemment été adoptée par la Commission internationale des Pêches du Pacifique nord le 9 avril 1986. Elle a pour effet de réduire l'interception, par le Japon, de certaines espèces de saumon de l'Amérique du Nord (dont certains d'origine canadienne).

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## ARCTIC

In a statement in the House of Commons on September 10, 1985, the Right Honourable Joe Clark, Secretary of State for External Affairs, strongly reaffirmed Canada's sovereignty in the Arctic.

Among the measures that he outlined on that occasion were the following: immediate adoption of an Order-in-Council establishing straight baselines around the Arctic archipelago; immediate talks with the United States on cooperation in Arctic waters, on the basis of full respect for Canadian sovereignty; immediate withdrawal of the 1970 reservation to Canada's acceptance of the compulsory jurisdiction of the International Court of Justice, adoption of a Canadian Laws Offshore Application Act; and construction of a Polar Class 8 icebreaker.

The government notified the Secretary General of the United Nations of its withdrawal of the 1970 reservation on September 10, 1985, and the straight baselines became effective January 1, 1986. The Canadian Laws Offshore Application Act received first reading on April 11, 1986. The subject of cooperation between Canada and the USA in Arctic waters has been addressed by the Prime Minister in meetings with the US President and Vice President, as well as by the Secretary of State for External Affairs and the US Secretary of State. Officials have also had a number of exchanges. Agreement has not yet been reached on cooperative arrangements, but the talks are still continuing. The government's commitment to constuction of the icebreaker was reaffirmed in the Throne Speech delivered on October 2.

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## ENVIRONMENTAL LAW

The following paragraphs briefly describe some of the recent developments in the area of the protection of the environment that have a special importance for Canada.

### Convention for the Protection of the Ozone Layer

On 22 March 1985, the Convention for the Protection of the Ozone Layer was adopted at a diplomatic conference in Vienna. The Convention commits participating nations to protect human health and the environment against adverse effects resulting from modifications to the ozone layer. It also provides for international cooperation and research, monitoring, scientific assessment, and exchange of information on matters relating to the status of the ozone layer. In addition, the diplomatic conference requested the United Nations Environment Programme to continue work on a protocol to the Convention which would provide internationally agreed measures to control global production, emissions and use of chlorofluorocarbons (CFCs).

On 4 June 1986, Canada became the first nation to ratify the Convention. Since then, Canada has actively participated in two international workshops on CFCs and an international conference on the effects of changes in the stratosphere ozone and global climate. The purpose of these meetings was to prepare the groundwork for a diplomatic conference in 1987 when countries will attempt to finalize a protocol addressing the control of ozone-modifying substances. Canada has prepared a draft protocol for the consideration of interested parties prior to the diplomatic conference.

### London Dumping Convention

Two issues of continuing importance at the London Dumping Convention (LDC) are the ocean dumping of low-level radioactive wastes and disposal into the sea-bed of high-level radioactive wastes.

In 1983, at the 7th Consultative Meeting of the Contracting Parties to the LDC, a resolution was adopted calling for a moratorium on the ocean dumping of low-level radioactive wastes, pending submission of a report on the scientific and technical considerations relevant to whether such dumping should be subject to an outright ban. Canada supported the resolution. Following the 8th Consultative Meeting (1984), a panel of independent experts was established to study the accumulated scientific and technical information.

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At the 9th Consultative Meeting in 1985, the Parties adopted a resolution which provided for an indefinite extension of the moratorium pending the completion of further studies, both scientific and socio-economic.

Discussion concerning the issue of disposal into the sea-bed of high-level radioactive wastes has included the questions whether such disposal is covered by the LDC and, if so, whether the Convention permits temporary retrievable emplacement of such wastes for research purposes.

Hazardous Wastes

Under the auspices of the United Nations Environment Programme (UNEP) an Ad Hoc Working Group of Experts on the Environmentally Sound Management of Hazardous Wastes was established pursuant to a UNEP Governing Council Decision in 1982. At the Third Session of the Ad Hoc Working Group in Cairo in December of 1985, Draft Guidelines and Principles for the Environmentally Sound Management of Hazardous Wastes were adopted. These Guidelines, accompanied by a set of recommendations for action, were submitted to the Executive Director of UNEP for adoption by UNEP's Governing Council.

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# IAEA Conventions for Early Notification and for Assistance in case of Nuclear Accident

## Background

In the wake of the Chernobyl nuclear accident last spring, the international community was faced with the urgent need to establish efficient mechanisms providing for early notification and assistance in case of nuclear accident. From July 21 to August 15, 1986, a group of experts, representing some 50 countries, met at the International Atomic Energy Agency (IAEA) headquarters in Vienna, at the invitation of the Director General of the Agency, to draft two Conventions bearing on the subject. On September 26, 1986, fifty states, including Canada, signed the "Convention on Early Notification of a Nuclear Accident" and the "Convention on Assistance in the Case of a Nuclear Accident or Radiological Emergency".

## Convention on Early Notification of a Nuclear Accident

The Convention on Early Notification covers a large scope of nuclear activities or facilities where nuclear accidents may happen. Whether an accident occurs in a nuclear reactor, in a radioactive waste management or nuclear fuel facility, during the transport of nuclear fuel or as a result of the use of radioisotopes for power generation in space object, there is an obligation for States Parties to (a) notify the IAEA and those States which may be physically affected of such occurrence, and (b) promptly provide them with the available information relevant to minimizing the radiological consequences. The Convention describes the basic data to be made available e.g. time, location and nature of the accident; established cause; general characteristics of the radioactive release and its predicted behaviour over time. It also provides that the IAEA shall act as a channel of communication for the dissemination of such information to interested states.

While it is worth noting that the Convention does not differentiate between civil and military nuclear activities and facilities, there remains a grey area in relation to its applicability in cases of accidents involving nuclear weapons. It is hoped that, should such an accident occur, notification will nonetheless be effected by the State responsible on the same basis as that provided for in the Convention.

Another one of the Convention's lacuna is that the State in which the nuclear accident occurs has the sole discretion to determine whether it will result in an international transboundary release that could be of radiological safety significance for another State, thereby triggering the notification process. Standardized criteria to measure the threshold beyond which such safety could be deemed to have been compromised will be developped in the years to come.

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Convention on Assistance in the Case of Nuclear Accident or Radiological Emergency

This Convention provides that States Parties shall cooperate between themselves and with the IAEA to facilitate prompt assistance in the event of a nuclear accident or radiological emergency. It is noteworthy that the State Party requesting assistance needs not to be the State where the nuclear accident occurred.

The Convention further establishes the framework under which assistance will take place, stating the obligations of both the requesting and assisting parties and setting out the role of the IAEA. Though assistance would normally be offered on a cost recovery basis, the Convention provides certain criteria to be taken into account when considering if assistance should be offered without costs. Among these criteria, the needs of developing countries are to be given due consideration.

The Convention also contains clauses on privileges and immunities to be granted to the assisting party and on the transit of its personnel, equipment and property. A further provision on claims and compensation stipulates that the assisting party and its personnel will be held harmless by the requesting party in respect of legal proceedings that might be brought against them for acts performed in the course of assistance. This latter clause, and those relating to privileges and immunities may be the object of a reservation at the time of signing, ratifying or acceding to the Convention.

Conclusion

Although these two hastily drafted Conventions have some shortcomings, they are, nonetheless, an important step forward in the creation of international mechanisms to respond to nuclear accidents and better remedy their effects if and when they do occur. Canada actively participated throughout the process that led to the drafting of the present texts, and supported their adoption on September 25, 1986, by the Special Session on Nuclear Safety of the General Conference of the IAEA. Canada signed both Conventions, subject to ratification, on September 26 and is now studying the means to implement them under its domestic legislation. Canada's signature paralleled along that of States most advanced in the development of nuclear technology, including the United States, the USSR, the United Kingdom and France.

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## AIR LAW: CANADIAN INITIATIVE ON AIRPORT SECURITY

In response to the increasing incidence of terrorist attacks at airports and in accordance with the Canadian Government's policy of contributing to international efforts to develop additional measures to combat terrorism, Canada presented a proposal on airport security at the 26th Assembly of the International Civil Aviation Organization (ICAO), September-October, 1986. The proposal, which took the form of a working paper, called for the adoption of a new multilateral instrument which would apply the "extradite or prosecute" regime of the Hague and Montreal Conventions to perpetrators of acts of terrorist violence at airports.*

The Hague and Montreal Conventions focus on attacks against aircraft and seek to ensure that perpetrators of those attacks do not go unpunished, particularly by escaping from the territory of the state where the act occurred. They thus oblige a state which finds an alleged offender on its territory "to submit the case to its competent authorities for the purpose of prosecution" (Article 7 of Montreal) or to extradite him to another state with jurisdiction. The Canadian proposal essentially would extend this system to acts of violence at airports, thus complementing the Hague-Montreal system.

The paper submitted to ICAO identified, in fairly general terms, a number of acts which affect international civil aviation but which were not made offences under the Hague or Montreal Conventions, i.e. acts of violence against persons; placing explosive devices in airports; damaging security facilities and the unlawful penetration of security areas. The offences in question should be defined in such a way as to be seen to endanger or otherwise adversely affect the safety of international civil aviation. It will then be the responsibility of the judges of the domestic courts of each state party to determine whether a particular act at an airport is of purely internal concern or is of such a nature as to add an international element making it appropriate for the application of the "extradite or prosecute" principle. In practice, terrorist acts at airports normally affect the interests of more than one state.

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*1970 Convention for the Suppression of the Unlawful Seizure of Aircraft (the Hague Convention).
1971 Cnvention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation (the Montreal Convention).

The proposal received unanimous support at the Assembly which adopted a resolution, sponsored by 35 delegations representing all regional groups, to refer the subject to ICAO's Legal Committee for the preparation of the text of a draft instrument. There are a number of technical, legal issues which the Committee will have to address, e.g. the identification and definition of the offences to be covered; the scope of application (i.e. how an airport is to be defined or described) and whether the new instrument should take the form of a separate agreement or an amendment to the Montreal Convention. The Legal Committee of ICAO will meet early in 1987 to complete a draft text and a diplomatic conference will be convened later in the year to adopt a new instrument.

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## DROIT DE L'ESPACE

Le Sous-Comité juridique du Comité des utilisations pacifiques de l'espace extra-atmosphérique (CUPEEA) des Nations Unies avait deux principaux points à son ordre du jour lors de sa 25e session en mars 1986. On a d'abord discuté des conséquences juridiques de la télédétection spatiale, un domaine dans lequel le Canada est depuis plusieurs années à la fine pointe technologique. Un groupe de travail auquel participait la délégation canadienne a achevé l'élaboration du projet de principes en la matière, sur lequel un consensus est intervenu. Ces principes confirment que la liberté de l'exploration et de l'utilisation de l'espace dans des conditions d'égalité s'applique aux activités de télédétection. Celles-ci ne doivent cependant pas être menées de manière préjudiciable aux droits et intérêts de l'Etat observé, qui a accès aux données sans discrimination et à des conditions de prix raisonnables.

Des progrès ont également été faits en ce qui concerne l'élaboration de règles relatives à l'utilisation des sources d'énergie nucléaire dans l'espace, un sujet mis à l'ordre du jour du Sous-Comité par le Canada après la désintégration du satellite soviétique Cosmos 954 au-dessus des Territoires du Nord-Ouest en 1978. Après plusieurs années de discussions exploratoires, le Sous-Comité avait enfin reçu mandat d'élaborer un projet de principes et le Canada a continué de jouer un rôle de premier plan sur ce sujet en soumettant un document au groupe de travail pertinent. C'est sur la base de ce document qu'un consensus est intervenu sur deux projets de principes, portant sur la notification avant la rentrée dans l'atmosphère d'un objet spatial ayant à son bord une source d'énergie nucléaire et sur l'assistance aux Etats en pareille circonstance.

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International Commercial Arbitration

On May 12, 1986 Canada acceded to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958), generally known as the "New York Convention". The Convention entered into force for Canada on August 10, 1986. In this connection the Parliament of Canada, earlier this year, passed the United Nations Foreign Arbitral Awards Convention Act. The provinces have enacted similar provincial implementing legislation.

In the fall of 1985, the United Nations General Assembly recommended the UNCITRAL Model Law on International Commercial Arbitration for due consideration by all States. The United Nations Commission on International Trade Law (UNCITRAL) had finalized and adopted the Model Law earlier in 1985. At the same time as the United Nations Foreign Arbitral Awards Act, the Parliament of Canada enacted the Commercial Arbitration Act, to which was annexed the Commercial Arbitration Code. The Commercial Arbitration Code is based on the UNCITRAL Model Law on International Commercial Arbitration. Most provinces have enacted similar legislation, also based on the UNCITRAL Model Law, and others plan to do so in the future.

UNCITRAL Work on International bills of Exchange

The long standing work of UNCITRAL to achieve a Convention in International Bills of Exchange and International Promissory Notes may be brought to a successful conclusion at the 20th Session of the Commission in 1987. The Commission devoted three weeks of its 1985 session to discussing the draft Convention. Following further preparatory work by the Working Group on International Negotiable Instruments in January 1987, UNCITRAL will continue its examination of the draft Convention at its 20th session in 1987. It was decided by the Commission not to convene a diplomatic conference, but to finalize the text in the Commission in 1987, and thereafter to transmit the text to the General Assembly for adoption and opening for signature.

The convention would perform a useful role in furthering the financing of international trade transactions, particularly in cases where existing national legislation may not now be in harmony with the laws of some other trading States or may suffer from some inherent deficiencies.

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UNCITRAL Draft Legal Guide on Industrial Works

From the inception of the work on the Legal Guide on International Contracts for the Construction of Industrial Works in 1981, Canada has been one of the most active participants. The completed Legal Guide, which will cover many complex and difficult matters, will be of great value to lawyers, contracts officers and administrators who act on behalf of purchasers of construction work, particularly in developing States, and to representatives of the construction companies who deal with them. A balanced and practical Legal Guide will assist parties in arriving at contractual terms and at reasonable solutions to difficulties which may arise. This Guide will be the first product of the UNCITRAL Working Group on the New International Economic Order. It is expected that the review of all the draft chapters will be completed by the UNCITRAL Working Group on the New International Economic Order, at its ninth session (March 30 - April 16, 1987). Thereafter the draft Legal Guide will be referred to the Commission.

Canada-United Kingdom Convention Providing for the Reciprocal Recognition and Enforcement of Judgment in Civil and Commercial Matters.

The Convention (signed April 24, 1984) was ratified on October 1, 1986 and will enter into force on January 1, 1987. In accordance with a declaration made by Canada pursuant to Article XII, the Convention will extend to British Columbia, Manitoba, New Brunswick, Nova Scotia and Ontario.

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Space Station

The United States and Canada are currently negotiating an Intergovernmental Agreement and a companion Memorandum of Understanding on Canada's participation in the Space Station. Similar negotiations are proceeding between the USA and Japan, and the USA and the European Space Agency (and its Member States). As part of the negotiations the legal regime applicable to the Space Station in such areas as criminal law, intellectual property, civil liability and tax will be discussed. This presents a major step in the development of the commercial side of international space law.

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CONFERENCE DES NATIONS UNIES SUR LE DROIT DES TRAITES ENTRE ETATS ET ORGANISATIONS INTERNATIONALES OU ENTRE ORGANISATIONS INTERNATIONALES.

Le Canada a participé, aux côtés des délégations de 96 Etats, et de représentants du Conseil des Nations Unies pour la Namibie et de 19 organisations internationales intergouvernementales, à la Conférence des Nations Unies sur le droit des traités entre Etats et organisations internationales ou entre organisations internationales. Cette conférence s'est tenue à Vienne, du 18 février au 21 mars 1986.

La Conférence a adopté le texte d'une "Convention de Vienne sur le droit des traités entre Etats et organisations internationales ou entre organisations internationales" visant essentiellement à étendre aux traités auxquels une ou plusieurs organisations internationales sont parties les règles posées par la "Convention de Vienne de 1969 sur le droit des traités", laquelle se limite aux traités entre Etats.

La délégation canadienne a tenu à jouer un rôle actif dans l'élaboration de cette Convention, car elle constituait à ses yeux une étape importante dans l'élaboration de règles favorisant le maintien de l'ordre juridique international. Nous estimons que son texte final représente une excellente codification des principes existants du droit international coutumier, en matière de droit des traités entre Etats et organisations internationales ou entre organisations internationales. La Convention telle qu'adoptée ne crée pas de principes de droit nouveau susceptibles d'affecter négativement les droits des Etats dans leurs relations conventionnelles avec les organisations internationales.

La délégation canadienne a donc signé l'Acte final de la Conférence, le 21 mars 1986; selon la procédure habituelle suivie lors de telles conférences diplomatiques, telle signature ne visait qu'à authentifier le résultat des travaux. Elle a par la suite recommandé que le Canada signe et ratifie le plus tôt possible cette "Convention de Vienne sur le droit des traités entre Etats et organisations internationales ou entre organisations internationales".


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