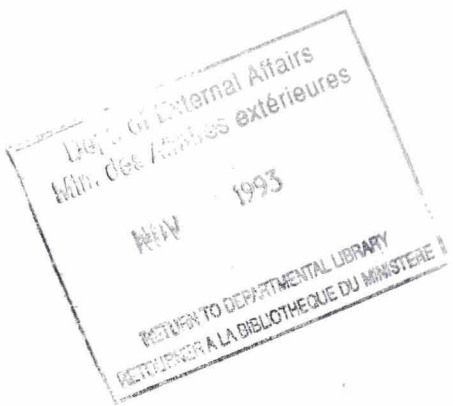
Quelques exemples de
questions courantes de droit
international d'une
importance particuliere pour
le Canada = Some examples

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

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



MINISTERE DES AFFAIRES EXTERIEURES
BUREAU DES AFFAIRS JURIDIQUES

DEPARTMENT OF EXTERNAL AFFAIRS AND INTERNATIONAL TRADE
LEGAL AFFAIRS BUREAU

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LA LOI SUR LES MESURES EXTRATERRITORIALES ETRANGERES ET LA LOI AMERICAINE LIMITANT LE COMMERCE AVEC CUBA

Le 31 octobre 1990, le procureur général du Canada, avec l'accord du SEAE, publiait pour la première fois un décret de blocage en vertu de la Loi sur les mesures extraterritoriales étrangères (LMEE), afin de contrer les dispositions de l'«amendement Mack», qui faisait partie du US Export Administration Re-authorization Bill de 1990. Le Président Bush a finalement opposé son veto à la mesure dont faisait partie l'amendement Mack. L'amendement Mack montre toutefois que les États-Unis n'abordent pas les questions de juridiction de la même façon que le Canada. Puisqu'une disposition identique a par la suite été jointe à d'autres projets de loi du Congrès, cette question demeurera sûrement, dans un avenir prévisible, un élément important du programme bilateral canado-américain. En fait, il semble probable que le Canada décidera de nouveau d'émettre un décret en vertu de la LMEE pour contrer les lois américaines qui devraient être adoptées par le Congrès cette année.

Depuis 1963, les U.S. Cuban Assets Control Regulations (CACRJ ont toujours affirmé l'existence d'une juridiction extraterritoriale sur les filiales étrangères des sociétés américaines. De 1963 à 1975, cette juridiction a été exercée surtout à l'égard des citoyens américains qui dirigeaient ces filiales étrangères. Les filiales canadienne et autres sociétés étrangères étaient elles aussi réglementées, mais cette situation avait peu d'effets, puisque toutes les transactions effectuées par la filiale étaient autorisées par un permis général. Un certain nombre d'incidents bilatéraux se sont produits lorsque les autorités américaines ont refusé d'accorder au directeur américain d'une filiale canadienne une licence qui lui aurait permis de voter en faveur d'un marché particulier entre cette filiale et Cuba.

De 1975 jusqu'à 1990, année où le Congrès américain a adopté l'amendement Mack, la législation américaine mettait l'accent sur la filiale elle-même, bien que les règlements indiquaient clairement que des licences seraient accordées si les transactions faisaient partie de catégories données. En fait, le nombre d'incidents sérieux liés à l'application extraterritoriale des CACR a diminué pendant cette période.

L'amendement Mack a entraîné une aggravation des effets des règlements américains postérieurs à 1975, quoiqu'il n'ait pas réellement donné lieu à une extension de la juridiction. En interdisant la délivrance de licences tout en les exigeant, l'amendement Mack empêchait la négociation cas par cas des transactions, qui permettaient l'octroi de licences, même si gouvernements canadien et américain demeuraient en désaccord sur les principes qui sous-tendent l'exercice par chaque pays de sa juridiction sur les filiales.

Les États-Unis fondent leur position juridique sur des principes relativement non controversables du droit international concernant l'exercice de la juridiction. Ces principes reconnaissent que les États peuvent exercer leur autorité sur des personnes en fonction des

principes du territoire et de la nationalité. Toutefois, les CACR américains postérieurs à 1975 et l'amendement Mack constituent, pour de nombreux pays dont le Canada, une extension inacceptable de ces principes de base du fait qu'ils étendent le principe de la nationalité de façon à permettre à la législation américaine de prescrire une conduite non seulement aux citoyens américains, mais aussi à toutes sociétés, où qu'elles soient, qui appartiennent à ces personnes et qui sont contrôlées par celles-ci.

La position du Canada, partagée par presque tous les autres pays occidentaux, rejette l'assertion selon laquelle le principe de la nationalité peut être étendu pour habiliter un État à réglementer la conduite des sociétés établies dans des États étrangers du fait que leurs propriétaires comptent parmi ses citoyens. De l'avis du Canada, ces sociétés, en se constituant au Canada, deviennent des «nationaux» canadiens. Le fait que les investissements ayant permis la création de ces sociétés provenaient d'un autres État ne peut justifier l'application des lois de cet État hors de ses frontières.

La position du Canada rend donc nuls les soi-disant critères d'équilibre dont les États-Unis se servent dans les cas où ils estiment qu'ils exercent une juridiction sur les filiales conjointement avec l'État où elles se trouvent.

Pour accroître la capacité du gouvernement canadien de contrer ces façons de faire et d'autres assertions inacceptables des États-Unis en matière de juridiction extraterritoriale, le Parlement canadien a adopté la LMEE en 1984. Cette loi permet au gouvernement de neutraliser les assertions de juridiction extraterritoriale de lois étrangères dans un certain nombre de cas, en particulier la production de documents, les litiges antitrust et l'application de lois étrangères qui visent à réglementer la conduite de personnes au Canada. Lorsqu'il a adopté cette loi, le gouvernement a indiqué clairement qu'elle représentait un dernier recours, puisque les décrets de blocage ont pour effet d'imposer aux personnes concernées l'obligation de respecter les dispositions incompatibles du décret canadien et du décret extraterritorial du pays étranger. Étant donné que les États-Unis exerçaient déjà une juridiction inacceptable pour le Canada qui violait le droit international et que l'amendement Mack empêchait toute solution politique dans les CACR américains entraient en conflit avec les lois et la politique commerciale canadiennes. L'adoption de l'amendement Mack était un cas classique justifiant la recours à la LMEE. L'adoption d'une disposition identique contenue dans le projet de loi (Cuban Democratic Act) présentement soumis au Congrès, justifierait, une fois de plus, l'adoption d'un décret aux termes de la LMEE.

THE FOREIGN EXTRATERRITORIAL MEASURES ACT AND U.S. LEGISLATION RESTRICTING TRADE WITH CUBA

On October 31, 1990, the Attorney General for Canada, with the concurrence of the SSEA, issued the first ever blocking order under the Foreign Extraterritorial Measures Act (FEMA) to counteract the provisions of the "Mack Amendment" that formed part of the U.S. Export Administration Re-authorization Bill of 1990. In the end, President Bush vetoed the measure containing the Mack Amendment. Nevertheless, the Mack Amendment provides a useful example of the different approaches to jurisdictional issues adopted by the U.S. compared with Canada. Since an identical provision has subsequently been attached to further bills in Congress, it also promises to remain a significant issue of the Canada/U.S. bilateral agenda for the foreseeable future. In fact, at the time of drafting, it seems likely that Canada will again decide to issue a FEMA order to block compliance with U.S. legislation expected to be passed by Congress this year.

By way of background, since 1963, the U.S. Cuban Assets Control Regulations (CACR) have consistently asserted an extraterritorial jurisdiction over foreign subsidiaries of U.S. corporations. From 1963-75, this jurisdiction was exercised primarily over U.S. citizens who were directors of these foreign subsidiaries. Canadian and other foreign corporations were also regulated, but the practical impact of this was slight since all transactions by the subsidiary were authorized by a general permit. A number of bilateral incidents took place when U.S. authorities would not licence a U.S. citizen who was a director of a Canadian subsidiary to enable him to vote for a particular trade deal by that subsidiary with Cuba.

From 1975 to passage of the Mack Amendment by the U.S. Congress in 1990, U.S. law focused directly on the subsidiary itself, although regulatory language provided a clear signal that licenses would be granted if transactions fell within particular categories. In fact, serious incidents arising from the extraterritorial application of the CACR declined during this period.

The Mack Amendment represented an aggravation of the impact of the post-1975 U.S. rule, although not literally an extension of its jurisdictional reach. By prohibiting the issuance of licenses while at the same time requiring them, the Hack Amendment prevented the case by case negotiation of transactions that enabled licenses to be issued even though the Canadian and U.S. government continued to disagree over the principles that underlay each country's exercise of jurisdiction over subsidiaries.

The U.S. bases its legal position on relatively uncontroversial international law principles for exerting jurisdiction in which it is recognized that states may exercise control over persons on the basis of territory and nationality. However, the provisions of the post-1975 U.S. CACR and the Mack Amendment are to many countries, including Canada, an unacceptable extension of these basic principles in that both measures extend the nationality principle to enable U.S. law to proscribe conduct by not only U.S. citizens, but by any corporations, wherever organized, that are owned and controlled by such persons.

The Canadian position, shared by almost all other western countries, rejects the contention that the nationality principle can be so extended to enable a state to regulate the conduct of corporations organized in foreign states on the basis of the ownership or control of their citizens. From the Canadian perspective, these corporations, by the act of incorporation in Canada, are "nationals" of Canada. The fact that investment enabling such companies to be created came from outside the jurisdiction cannot act as a basis for the laws of that country to follow them over the border. As such, the Canadian position voids the so-called balancing tests utilized by the U.S. in cases where they take the position that they exercise a concurrent jurisdiction over subsidiaries with the territorial state.

To strengthen the ability of the Canadian government to combat this and other unacceptable U.S. assertions of extraterritorial jurisdiction, the Canadian Parliament passed the FEMA in 1984. It provides to the government a legislative basis to counteract the extraterritorial assertion of jurisdiction by foreign law in a number of instances, in particular, for discovery of documents, anti-trust litigation and the application of foreign laws that purport to regulate conduct in Canada. At the time of passage, it was made clear by the government that the FEMA represented a weapon of last resort since the effect of blocking orders is to place persons in the position of conflicting requirements between any Canadian order and the extraterritorial order of the foreign state. Given that the U.S. already exercised an unacceptable jurisdiction that offended international law and given that the Mack Amendment prevented any political solution where the U.S. CACR collided with Canadian law and trade policy, the adoption of the Mack Amendment was a classic case justifying the usage of the FEMA. The passage of an identical provision in legislation (The Cuban Democracy Act) now before Congress would again justify the issuance of an order under FEMA.

CONVENTION DES NATIONS UNIES SUR LE DROIT DE LA MER

La Convention sur le droit de la mer, adoptée en avril 1982, établit un régime intégral de réglementation des mers et océans du globe. Au terme de la période de signature, le 9 décembre 1984, 159 États (dont le Canada) l'avaient signée, ce qui représente une adhésion sans précédent à un accord international. Parmi les pays qui n'ont pas signé la Convention parce qu'ils s'opposaient à ses dispositions sur l'exploitation des grands fonds marins, figurent les États-Unis, le Royaume-Uni et l'Allemagne. La Convention entrera en vigueur douze mois après la date du dépôt du soixantième instrument de ratification ou d'adhésion. Au ler août 1992, 51 États l'avaient ratifiée.

Comme par le passé, ces douze derniers mois le Canada a participé activement aux travaux de la Commission préparatoire chargée par la Conférence des Nations Unies sur le droit de la mer de mettre sur pied le système institutionnel envisagé par la Convention. La Commission préparatoire s'est réunie à New York en août 1991, puis à Kingston, en Jamaïque, en février/mars 1992, afin de poursuivre l'élaboration des mécanismes nécessaires à la mise en oeuvre du régime établi dans la Convention pour l'exploitation des ressources des grands fonds marins.

Pour favoriser le règlement des problèmes non résolus relatifs au régime d'exploitation minière des grands fonds marins prévu par la Convention, le Secrétaire général des Nations Unies a engagé des consultations informelles auxquelles tous les Etats sont désormais invités. Au ler août 1992, sept séances avaient été menées avec toutes les principales parties, dont les États-Unis. Ces discussions informelles visent à compléter et non à remplacer les réunions de la Commission préparatoire. Les progrès accomplis au cours des deux dernières réunions de cette Commission ainsi que lors des consultations informelles permettent d'espérer que la Commission préparatoire puisse terminer ses travaux en 1993.

En fait, l'année 1993 devrait permettre de déterminer, sur la base des consultations du Secrétaire général des Nations Unies, si la Convention deviendra l'objet d'une adhésion universelle.

SAINT-PIERRE-ET-MIQUELON (SPM)

Le Tribunal d'arbitrage a rendu sa sentence le 10 juin 1992 dans l'affaire de la délimitation des espaces maritimes entre le Canada et la France. Cette décision mettait fin à un différend vieux de presque 30 ans au cours desquels les deux Parties avaient tenté en vain d'en arriver à un règlement négocié. De 1966 à 1977, les pourparlers ont porté sur la délimitation du plateau continental. Au début de 1977, le Canada et la France ont étendu leur juridiction à 200 milles marins au large de leurs côtes respectives. Tandis que le Canada déclarait une zone de pêche exclusive de 200 milles marins au large de son littoral, la France emboîtait le pas en décrétant un zone économique étendant à 188 milles marins au-delà de la mer territoriale de l'archipel. Dès lors, les négociations ont porté sur la délimitation tant du plateau continental que de la colonne d'eau.

Le Canada ne reconnaissait à SPM qu'une zone maritime de 12 milles marins. La France, pour sa part, revendiquait une ligne d'équidistance modifiée, ce qui lui aurait attribué quelque 14 500 milles marins carrés d'océan.

En janvier 1987, constatant l'impossibilité de régler leur différend à l'amiable, les Parties ont convenus de négocier un accord d ' arbitrage . Le 3 0 mars 1989, à 1 ' issue de plus de deux ans de pourparlers, le Canada et la France signaient une entente instituant un tribunal d'arbitrage chargé de procéder à la délimitation des espaces maritimes.

Le tribunal se composait de cinq juges, dont un nommé par le Canada (M. Allan Gotlieb) et un nommé par la France (M. Prosper Weil). Les trois autres, désignés conjointement par les deux gouvernements, étaient M. Eduardo Jiménez de Aréchaga, président du tribunal, M. Gaëtano Arangio-Ruiz, professeur de droit à l'université de Rome, et M. Oscar Schachter, professeur de droit à l'université Columbia.

La sentence du 10 juin 1992, obligatoire et sans appel, accorde à la France une zone maritime de 3 617 milles marins carrés. Cette zone adopte une configuration assez librement décrite comme étant celle d'un champignon dont la tête, de forme asymétrique, a 24 milles marins du côté ouest de 1 ' archipel, 12 milles marins à l'est, et dont le pied, qui constitue une projection frontale d'une largeur de 10,5 milles marins, se prolonge vers le sud jusqu ' à une distance de 200 milles marins de la côte française. Le verdict du tribunal fut rendu par une majorité de trois juges, les deux membres nationaux étant dissidents. La géographie côtière de la région des approches du golfe du Saint Laurent a largement inspiré la décision. En ce sens, aussi inhabituel que soit le tracé de la frontière maritime, la superficie de l'espace attribué à la France reflète assez bien la position défendue par le Canada.

HUMANITARIAN CONSIDERATIONS AS AN ELEMENT IN THE MAINTENANCE OF INTERNATIONAL PEACE AND SECURITY

Although many forms of international involvement in the internal affairs of States have become increasingly accepted (protection of the environment, removal of trade barriers are but a few examples) the prohibition of "intervention," in the sense of unauthorized foreign presence on the territory of a State, remains as one of the fundamental principles of modern international law. Its maintenance is considered essential by most States for political reasons, including self-protection. No right for States to intervene for humanitarian reasons exists in contemporary international law. This position is buttressed by the United Nations Charter, which forbids State Members to use, or threaten to use force, against the territorial integrity of any State.

The Charter also specifically prohibits the United Nations from intervening in the internal affairs of States, except in cases of collective action authorized by the Security Council, to maintain or restore international peace and security. This exception has served as the legal justification for recent actions in Northern Iraq, the former Yugoslavia and Somalia, all based on the proposition that humanitarian considerations constitute an important element in the maintenance of international peace and security.

This novel application of collective security measures represents the continuation of a positive trend towards increased UN concern over and active involvement in human rights, humanitarian assistance and the advancement of democratic values. It is animated, to a significant degree, by the increased risk of domestic and international conflicts following the end of the Cold War, and by public demands to deal effectively with the causes, and failing that, the consequences of such conflicts.

In resolution 688 of 5 April 1991, the Security Council qualified the repression of civilian populations in Iraq, because of its leading to massive flows of refugees towards and across international frontiers, and to cross border incursions, as a threat to international peace and security. The resolution served as the basis for establishing a "safe haven" for the Kurds.

In resolution 751 of 24 April 1992, the Security Council mentioned the magnitude of human suffering caused by the civil conflict, and expressed its concern that continuation of the situation in Somalia constituted a threat to international peace and security. The resolution established a United Nations operation in Somalia, including, among others, the deployment of a UN security force.

In resolution 770 of August 13, 1992, the Security Council stated that the provision of humanitarian assistance in Bosnia and Herzegovina was an important element in the Council's effort to restore international peace and security in this area. The resolution called on the taking of all measures necessary to facilitate the delivery of humanitarian assistance.

In resolution 775 of August 28, 1992, the Security Council reaffirmed that the provision of humanitarian assistance was an important element in the effort of the Council to restore international peace and security in the area. The resolution increased the strength of the United Nations Operation in Somalia;

Although the resolution on Iraq established a linkage between the events and international conflict (i.e. outflow of refugees exacerbates border tensions), such linkage is absent from the resolutions on Bosnia-Herzegovina and Somalia. Instead, humanitarian considerations are identified as important elements in maintaining international peace and security, without specifying the relationship between the two.

These series of resolutions, taken together, constitute an expansion of the concept of peace and security . Implicit in them is the assumption that other events, besides aggression or the unwarranted used of force affecting other states, may constitute a threat to international peace and security.

Thus, the resolutions indicate that humanitarian considerations, under some circumstances, will warrant appropriate involvement by the Security Council, even if the situation does not involve an immediate threat against the territorial integrity of another State.

CHEMICAL WEAPONS CONVENTION

After years of difficult negotiations on a Chemical Weapons Convention, a draft agreement was adopted by the Conference on Disarmament in Geneva during the summer of 1992. Formal negotiations on the Convention had been ongoing since 1984, although international discussions on a chemical weapons ban began in 1968.

Although every country involved in the negotiations would have preferred further amendments, the text represents the best possible compromise acceptable to the largest number of countries.

From the Canadian perspective, the convention meets three significant criteria: comprehensiveness- it will eliminate an entire category of weapons of mass destruction; universality- in all probability, there will be a significant number of original signatories from all geographic regions at the signing conference, with many more States adhering thereafter; and effective verification- the Convention regime establishes new norms for verification and inspection that surpass any other previous multilateral arms control and disarmament instruments.

The Convention will be considered at this session of the United Nations General Assembly. Canada is co-sponsoring a resolution calling for its adoption. A formal signing ceremony will be held in Paris, possibly as early as January 1993. The Convention will enter into force with ratification by 65 States.

ENVIRONMENTAL LAW

The most significant developments in the field of international environmental law occurred in Rio de Janeiro in June of 1992 when the Convention on Biological Diversity and the Convention on Climate Change were signed at the United Nations Conference on Environment and Development (UNCED). UNCED also adopted Forest Principles; a non-legally binding authoritative statement of principles for a global consensus on the management, conservation and sustainable development of all types of forests. Although the Earth Charter developed by Canada was not adopted at UNCED, negotiations led to the acceptance of an agreement entitled the Declaration on Environment and Development (the Rio Declaration).

Within the United Nations Economic Commission for Europe, Canada has been active on a number of issues. Under the Long Range Transboundary Air Pollution Convention, Canada is involved in negotiations with respect to a Second Protocol on Sulphur Dioxide Emissions. The Convention on the Transboundary Effects of Industrial Accidents was signed by Canada in Helsinki in March of 1992. However, Canada chose not to sign the Convention on the Protection and Use of Transboundary Watercourses and International Lakes, signed by a number of European nations in 1992, as the bilateral arrangements already in place with the United States provide a more suitable framework for the protection of Canada's water resources.

With the proliferation of international environmental agreements, Canada together with many other countries is increasingly focusing on the interaction between international trade law and international environmental law. Two key international fora discussing the issue are the Trade and Environment Committee of the OECD and the reactivated GATT Group on Environmental Measures and International Trade.

The North American Free Trade Agreement (NAFTA) is the most environmentally-sensitive trade agreement ever negotiated. In addition to its general commitment to sustainable development and environmental conservation and protection, there are a number of innovative and precedent-setting provisions. Further to the NAFTA, the Ministers responsible for the environment of Canada, Mexico and the United States met on September 17, 1992 in Washington to sign a Trilateral Memorandum of Understanding on Environmental Education and announce an agreement in principle to the creation of a North American commission on environmental cooperation.

Canada's Instrument of Ratification of the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal was deposited with the Secretary General of the United Nations on August 28,1992. Accordingly, the Convention will enter into force for Canada on the ninetieth day following such deposit, i.e. on November 26,1992. The first meeting of the Contracting Parties will be held in November of this year. In addition, Canada confirmed its acceptance of the OECD Council Decision concerning the Control of Transfrontier Movements of Wastes Destined for Recovery Operations" adopted in Paris on March 30, 1992.

The signing of the Protocol on Environmental Protection to the Antarctic Treaty by Canada and thirty-one other Treaty parties in Madrid on October 4, 1991 was a significant development in both environmental law and Antarctic affairs. The Protocol designates Antarctica as a natural reserve, devoted to peace and science. Its main component is a prohibition on any activities related to mineral resources, other than scientific research, for a period of at least 50 years.

HIGH SEAS FISHING LEGAL INITIATIVE

In the context of its strategy to combat overfishing by foreign vessels just outside its 200 mile zone, Canada has launched a legal initiative in the United Nations. This is a multilateral exercise aimed at developing international law rules, consistent with the UN Convention on the Law of the Sea (UNCLOS), to govern high seas fisheries in a way that will put an end to overfishing.

The initiative originally took the form of what became known as the "Santiago Paper", a document based on the conclusions of a meeting of experts held in St. John's two years ago and developed into a series of principles and measures on high seas fishing by a core group of Chile, New Zealand and Canada in Santiago in May 1991.

At the fourth session of the Preparatory Committee of the UN Conference on Environment and Development (UNCED), held in March 1992 in New York, the number of co-sponsors rose to 40. At the UNCED Rio Summit itself, a good part of the substance of the paper was successfully negotiated into the Agenda 21 section on high seas living resources, and heads of state and governments called for a conference under UN auspices to promote effective implementation of the provisions of UNCLOS, related to straddling stocks and highly migratory species.

A resolution is being introduced at the UN General Assembly this fall to convene the Conference in the spring of 1993. Canada will host a meeting of like-minded states in St. John's from January 21-23, 1993 to co-ordinate positions for the Conference.

SANCTIONS ÉCONOMIQUES

L'imposition de sanctions contre un État étranger est un domaine du droit international où l'on assiste depuis peu à une activité extrêmement intense. Au nombre des récents événements qui sont à l'origine de cette effervescence figurent la crise du Golfe et la flambée de violence qui a éclaté dans diverses régions de l'ancienne Yougoslavie. Ces crises ont amené le Conseil de sécurité des Nations Unies à imposer des embargos commerciaux et financiers à caractère exécutoire contre l'Iraq, par la résolution 661 (1990) du 6 août 1990, complétée par la résolution 670 (1990) du 25 septembre 1990, puis contre la République fédérale de Yougoslavie (Serbie et Monténégro), par la résolution 757 du 30 mai 1992.

Le refus de la Libye de livrer deux de ses nationaux soupçonnés d'être les auteurs de l'explosion de Lockerbie a provoqué un troisième embargo du Conseil de sécurité, embargo limité cette fois-ci aux liaisons aériennes et aux exportations de pièces d'aéronef et d'armes, et imposé contre ce pays, en vertu de la résolution 748 (1992) du 31 mars 1992.

Dans chaque cas, le Conseil de sécurité a agi conformément au chapitre VII de la Charte des Nations Unies (article 41). Ces résolutions du Conseil de sécurité appellent les États à appliquer ces mesures aux activités qui se déroulent sur leur territoire et à celles auxquelles se livrent leurs nationaux à l'étranger. Au Canada, chacune de ces séries de sanctions a été appliquée par des règlements établis en vertu de l'article 2 de la Loi sur les Nations Unies.

Bien qu'il ait été possible de recourir à la Loi sur les Nations Unies pour appliquer les sanctions dans ces cas, dans le passé, nous avons été confrontés à plusieurs crises internationales (Afghanistan, Malouines, Pologne et Afrique du Sud, etc.) où le Conseil de sécurité n'a pas pu adopter des sanctions à caractère exécutoire et où le Canada ne disposait pas des textes législatifs qui lui auraient permis de prendre des mesures de concert avec ses alliés.

Il en a été de même lors de la guerre du Golfe. Alors que l'Irak avait envahi le Koweït le 2 août 1990, le Canada a dû attendre qu'une résolution du Conseil de sécurité soit adoptée le 6 août pour bloquer les avoirs irakiens. Le Royaume-Uni et les États-Unis, pour leur part, avaient légalement le pouvoir d'agir immédiatement. En octobre 1991, lorsque l'Organisation des États américains (OEA) a exhorté ses membres à suspendre leurs liens économiques, financiers et commerciaux avec Haïti et à bloquer les avoirs haïtiens, le Canada n'avait pas légalement le pouvoir d'agir en conséquence.

Afin de combler cette lacune, la secrétaire d'État aux Affaires extérieures a, le 12 décembre 1991, proposé au parlement le projet de loi C-53, la Loi autorisant la prise de mesures économiques spéciales, qui a recu la sanction royale le 4 juin 1992. Cette loi prévoit que le gouverneur en conseil peut intervenir dans les deux cas suivants :

1) afin de mettre en oeuvre une décision, une résolution ou une recommandation d'une organisation internationale d'États ou d'une association d'États dont le Canada est membre, appelant à la prise de mesures économiques contre un État étranger;

2) s'il juge qu'une rupture sérieuse de la paix et de la sécurité internationales est susceptible d'entraîner ou a entraîné une grave crise internationale.

Cette loi autorise le Gouverneur en conseil à prendre des décrets et règlements pour restreindre ou interdire, à l'égard d'un État étranger, une vaste gamme d'activités, notamment toute opération portant sur un bien détenu par l'État étranger visé; l'exportation et l'importation, la vente, la fourniture ou l'envoi de marchandises à destination ou en provenance de cet État; la prestation ou l'acquisition de services financiers et autres; l'atterrissage dans cet État étranger d'un aéronef immatriculé au Canada; l'atterrissage au Canada des aéronefs immatriculés dans cet État étranger ou utilisés par lui ou pour son bénéfice, ainsi que le survol du Canada par ces aéronefs. Cette mesure législative prévoit aussi que tout bien situé au Canada et détenu par un État étranger, une personne qui s'y trouve, un de ses nationaux qui ne réside pas habituellement au Canada ou en leur nom peut, par décret, être saisi, bloqué ou mis sous séquestre.

Conformément à cette loi, et sur la base des résolutions de l'OEA appelant ses membres à appliquer des sanctions contre Haïti, le gouvernement a été en mesure de prendre des règlements pour bloquer les avoirs haïtiens et interdire les activités maritimes touchant cet État.

Tout en souhaitant que le nombre des crises internationales pouvant provoquer l'imposition de sanctions aille en diminuant, nous croyons que le Canada est aujourd'hui mieux à même de réagir à de telles situations rapidement et de façon efficace.

ECONOMIC SANCTIONS

The imposition of sanctions against a foreign state recently has become an extremely active area of international law. Among the recent events that have led to the burst of activity in this area were the Gulf crisis and the upsurge in violence in parts of the former Yugoslavian state. Those crises resulted in the imposition by the United Nations Security Council of mandatory trade, commercial and financial embargoes against Iraq by Resolution 661 (1990) of August 6, 1990, as completed by Resolution 670 (1990) of September 25, 1990, and against the Federal Republic of Yugoslavia (Serbia and Montenegro) by Resolution 757 of May 30, 1992.

Libya's refusal to give up two of its nationals alleged to have been involved in the Lockerbie bomb blast resulted in a third Security Council embargo, this time limited **to air links,** aircraft components and arms exports against that country, pursuant to Resolution 748 (1992) of March 31, 1992.

For each of these resolutions, the Security Council was acting under Chapter VII of the Charter of the United Nations (i.e. pursuant to Article 41 of the Charter). These Security Council resolutions called on states to apply these measures to activities within their territory and to those of their nationals abroad. Each of these set of sanctions were implemented in Canada by regulations made pursuant to section 2 of the United Nations Act.

While it was possible to use the United Nations Act as a basis for implementing the sanctions in these cases, in the past, we have been faced with a number of international crises (e.g. Afghanistan, Falklands, Poland and South Africa) where the Security Council was unable to adopt mandatory sanctions and where Canada was left without proper legislative authority to take measures in concert with its allies.

Even in the case of Iraq, although that country had invaded Kuwait on August 2, 1990, Canada had to await the adoption of a resolution of the Security Council on August 6, 1990, in order to freeze Iraqi assets. The United Kingdom and the United States, on the other hand, had legislative authority in place to take such action immediately. In October 1991, when the Organization of American States (OAS) urged its member states to suspend their economic, financial and commercial ties with Haiti and to freeze the Haitian State assets, Canada did not have adequate statutory authority to respond appropriately.

In order to remedy this lacuna, the Secretary of State for External Affairs introduced Bill C-53 in Parliament, on December 12, 1991 - the Special Economic Measures Act (SEMA) which was assented to June 4, 1992. The SEMA provides that the Governor in Council may act in two situations:

1) in order to implement a decision, resolution or recommendation of an international organization of states or association of states, of which Canada is a member, that calls on its members to take economic measures against a foreign state; or

2) where the Governor in Council is of the opinion that a grave breach of international peace and security has occurred that has resulted or is likely to result in a serious international crisis.

The SEMA authorizes the Governor in Council to make such orders or regulations to restrict or prohibit a broad range of activities in relation to a foreign state, including dealings in the properties of a foreign state; exportation/importation, sale, supply or shipment of goods to or from that state; the provision or acquisition of financial services or other services; the landing of aircraft registered in Canada in a state's territory; and landing in or flight over Canada by an aircraft registered or used by or for the benefit of a state. The SEMA also provides that any property situated in Canada that is held by or on behalf of a foreign state, any person in that state, or a national of that state who does not ordinarily reside in Canada may, by order, be seized, frozen or sequestrated.

Pursuant to the SEMA, and on the basis of OAS resolutions urging OAS member states to implement sanctions against Haiti, the Government was able to make regulations freezing the assets of the Haitian state and prohibiting activities of ships in relation to that country.

While we are hopeful that the number of international crises leading to the imposition of sanctions will abate, we nevertheless can be confident that Canada is now better equipped to respond to such crises in a timely and effective manner.

INTERNATIONAL CRIMINAL COURT AND CODE OF CRIMES

The issue of a draft code of offences against the peace and security of mankind, was mandated by the UN General Assembly to the International Law Commission in 1947. At its forty-third session, in 1991, the Commission provisionally adopted on first reading the draft articles of the draft Code of crimes, and decided, through the UN Secretary General, to transmit the draft articles to Governments for their comments and observations by January 1, 1993.

The Commission also noted that the draft that it had completed on the first reading constituted the first part of the Commission's work, and that it would continue at forthcoming sessions to consider further and analyse the issues raised in its report concerning the question of an international criminal jurisdiction, including the possibility of establishing an international criminal court or other international criminal trial mechanism.

At its meeting of July 17, 1992, the Commission determined that it had concluded the task of analysis of the question of establishing an international criminal court or other international criminal trial mechanism, and that further work on the issue required a renewed mandate from the UN General Assembly. The Mandate needed to take the form not of still further general studies or exploratory studies, but of a detailed project, in the form of a draft statute.

In her address to the Forty Seventh Session of the UN General Assembly, last September 24, the Honourable Barbara McDougall, Secretary of State for External Affairs, gave Canadian support to the idea of mandating the International Law Commission to draft such a statute, and announced that Canada would convene an international meeting of experts to mobilize legal expertise on the matter.

SUCCESSION ET RECONNAISSANCE D'ETAT

A) INTRODUCTION

Le Canada, comme toute la communauté internationale, a été confronté a la dislocution d'Etats multiethniques dans la foulée du processus de démocratisation initié par le président Gorbatchev de la défunte U.R.S.S.

B)LES ETATS BALTES

Le cas soviétique fut paradoxalement, et malgré l'immensité du territoire, le plus facile a suivre d'un point de vue juridique. Le Canada n'ayant jamais reconnu l'intégration par la force de la Lituanie, de l'Estonie et de la Latvie dans le giron soviétique en 1940, Ottawa n'avait nul besoin de reconnaitre la réémergence de ces trois républiques baltiques en Etats souverains et pût se contenter d'établir avec elles des relations diplomatiques.

C)L'U.R.SS.

La chute du parti communiste d'Union soviétique à la suite du coup d'Etat avorté de août 1991 et la dislocution des treize républiques socialistes soviétiques restantes en une confédération d'Etats souverains se fit d'un commun accord entre le nouveau pouvoir russe à Moscou et ses anciens partenaires. Le consensus dégagé au sein de cette communauté d'Etats permit au Canada de reconnaitre à son tour la république fédérée de Russie comme seul Etat continuateur de la défunte Union soviétique, les douze autres Etats successeurs lui reconnaissant sa légitimité à hériter ainsi du siège permanent au Conseil de Sécurité des Nations-Unies occupé

Remarquons cependant que le Canada, à l'instar de bien d'autres pays, ne reconnait pas la prétention de la Russie d'être le seul Etat successeur des dettes de l'ancienne U.R.S.S. et estime jusqu'à nouvel ordre l'ensemble des anciennes républiques soviétiques comme débitrices solidaires des sommes dues.

D) LA YOUGOSLAVIE

L'ancienne république fédérative socialiste de Yougoslavie (R.F.S.Y.) présente dans le contexte de la guerre actuelle un cas juridique d'autant plus difficile que viennent s'y joindre des considérations géopolitiques importantes. Le Canada a reconnu la Slovénie et la Croatie (le 15 janvier 1992) comme nouveaux Etats indépendants et successeurs de la R.F.S.Y.; Le Canada a de la meme manière reconnu la Bosnie-Herzégovine (le 08 avril) mais n'en a pas fait de même avec la "Macédoine". Cette reconnaissance aura lieu quand il sera établi que semblable reconnaissance contribuera à la stabilité et non à l'instabilité de la région.

La Serbie et le Monténégro se sont pour leur part regroupés en une nouvelle "république fédérative de Yougoslavie" avec la prétention d'être l'Etat "continuateur" de la défunte République fédérative socialiste de Yougoslavie. Cette prétention a été rejettée par le Canada comme par les anciens Etats membres de la R.S.F.Y. et par la grande majorité des autres Etats membres des Nations-Unies. Le Canada, qui a une politique de reconnaitre des Etats et non des gouvernements, a maintenu entre-temps ses relations diplomatiques avec Belgrade sans préjuger du statut définitif de la Yougoslavie(Serbie et Monténégro), Etat successeur avec d'autres de la R.F.S.Y.;

La nouvelle fédération yougoslave ne pouvant prétendre assurer la continuation de la défunte R.F.S.Y., le Canada a appuyé la résolution de l'Assemblée Générale des Nations-Unies prise le 23 septembre, sur recommandation du Conseil de Sécurité, suspendant la Yougoslavie (Serbie et Monténégro) des travaux de l'Assemblée Générale et l'enjoignant à poser sa candidature à l'O.N.U.; Semblable suspension a déjà été imitée depuis à l'O.A.C.I. et à l'Organisation mondiale de la propriété intellectuelle, et pourrait bien être suivie de nombreuses autres dans les différents organes subsidiaires, institutions spécialisés et organisations internationales où la Yougoslavie(Serbie et Montenegro) estime pouvoir occuper le siege de l'ancienne R.F.S.Y.; La Yougoslavie(Serbie et Monténégro) a, du reste, annoncé vouloir demander a la Cour Internationale de Justice son avis sur la légitimité de ses prétentions de "continuer" la personnalité légale de la défunte R.F.S.Y.

E) LA TCHECOSLOVAQUIE

L'ancienne Tchécoslovaquie socialiste s'est d'abord transformée en une République fédérative tchèque et slovaque. Les Parlements(Conseils Nationaux) des deux Républiques se sont depuis entendus sur une séparation à l'amiable pour le 1 janvier 1993. Prague et Bratislava négocient actuellement une union douanière et monétaire. Bien qu'il ne nous appartienne pas de spéculer sur l'avenir de la République fédérative, il est probable que sa dislocation dans les faits entrainerait des problêmes de succession d'Etat similaires à ceux évoqués plus haut.

EXCERPT FROM THE AMICUS CURIAE BRIEF OF CANADA TO THE SUPREME COURT OF THE UNITED STATES ON THE ALVAREZ-MACHAIN CASE

In the Alvarez-Machain case Mexican nationals kidnapped Alarez-Machain, a Mexican, from his office in Guadalajara, Mexico and brought him to the United States to stand trial on charges that he participated in the murder of Enrique Camarena, an agent of the U.S. federal Drug Enforcement Agent. The District Court concluded that the kidnappers acted as agents of the DEA. The U.S. Supreme Court ruled that a defendant may not be prosecuted in violation of an extradition treaty but that the kidnapping did not violate the U.S.-Mexico Extradition Treaty. Neither the Treaty's language nor the history of negotiations and practice under it supported the proposition that it prohibited abductions outside of its terms. The Court said that the Treaty did not provide the only way in which one country might gain custody of a national of the other country for the purpose of prosecution. It therefore found that the kidnapping did not contravene U.S. domestic law (although it may have been a breach of international law).

The Canadian Government filed an amicus curiae brief with the Supreme Court of the United States. The following is an excerpt from that brief:

"The issues presented in this case could have a profound effect on Canada-USA extradition relations. Canada files this brief out of concern for the practice of transborder abductions of fugitives contrary to law. Such abductions contravene fundamental principles of justice that Canada has sought to uphold. They conflict with Canada's sense of the way the return of fugitives with its great neighbour ought to be conducted. Abductions offend against Canada's view of the law in international affairs. Canada is concerned that the United States Government considers it permissible for a law enforcement agency, sworn to uphold the law, to violate a treaty relationship, the sovereignty and laws of a treaty partner and the rights of a fugitive resident of a treaty partner.

Canada has a long tradition of international cooperation through extradition treaties with the United States beginning with the Jay Treaty of November 19, 1794 between Great Britain and the United States. Since 1842, rendition has been governed by a series of agreements of which the extant Treaty of Extradition of December 3, 1971, 27 U.S.T. 985, T.I.A.S. No. 8237 ("Treaty") came into force on March 12, 1976. A Protocol to this Treaty, significantly broadening the types of offenses for which extradition could be granted, came into force on November 26, 1991.

The Treaty, on a reciprocal basis, establishes a comprehensive system for rendition of fugitives, describes the nature of offenses for which extradition may be sought, and guarantees every fugitive access to the courts of the requested nation in order to test the validity of a rendition request.

The Treaty is part of the law of Canada and was negotiated with the

understanding by Canada that the agreement would provide the exclusive means whereby Canada and her constituent provinces, and the United States and its constituent states would seek to obtain custody of fugitives from each other.

Because this case affects the construction of all of petitioner's extradition treaties it raises doubt concerning the correctness of Canada's perception of the mutually agreed upon manifest scope and purpose of the Treaty. Moreover, in this case, the United States seeks the imprimatur of the Court to abrogate if necessary, the right of Canadian citizens and others to access Canadian courts, contrary to its solemn undertaking in the Treaty to respect that right.

Canada and the United States enjoy an undefended border more than 3000 miles in length. The ease with which this border may be crossed accounts for the fact that approximately 50% of all American requests for extradition are made to Canada. In 1991, the United States made 74 requests for extradition to Canada and Canada made 47 requests to the United States. Many of these requests emanate from state and local authorities. Transborder incidents, involving bounty hunters, resulted in an exchange of notes in 1988 between Secretary of State George P. Shultz and Secretary of State for External Affairs Joe Clark in an attempt to partially resolve the problem. The position adopted by the petitioner in this case, however, raises a potentially far more serious problem; the spectre not only of federal, but more likely of official state and local incursions to abduct fugitives, where extradition is seen as too costly, too slow or unavailable, in violation of Canada's territorial integrity. This unlawful conduct would in effect be sanctioned in United States law by a decision favouring petitioner.

Canada has an interest in ensuring that its treaties are given that construction and application which their express terms, nature, scope and purpose require. Moreover, Canada has an interest, indeed an obligation to its citizens, in taking all steps necessary to protect the rights of its inhabitants and its sovereign interest in its territorial integrity, guaranteed by the Treaty and international law.

SUMMARY OF ARGUMENT

Canada submits that the current position of the United States departs from established practice in the relations between the United States and Canada, and among other nations, on which many extradition treaties have been built. Ultimately it departs as well from common sense underpinnings of all such treaties, which is to substitute the rule of law for force in such matters as national sovereignty, the right to give asylum, and the orderly cooperation in the enforcement of criminal laws.

Canada views transborder abductions from Canada to the United States as breaches of the Canada-United States Extradition Treaty and breaches of Canada's sovereignty. Other civilized nations, as well, would not agree with the position of petitioner in this case; they would insist that unless a nation otherwise consents to a removal of a

person from its territory, an extradition treaty is the exclusive means for a requesting government to obtain such a removal and that it is the policy of nations to request return of abducted persons. Canada and its component governments do not hold to a policy of abductions from American territory, and if abductions occur, they could not reasonably expect the United States to acquiesce in Canadian courts' disrespect of U.S. sovereignty through exercise of jurisdiction over abducted individuals. The Government of Canada would, upon protest, cooperate to obtain the return of an abducted fugitive."

THE UNITED NATIONS CLAIMS COMMISSION: INSTITUTIONALIZING CLAIMS

Following the Allied victory in the Gulf war, the United Nations Security Council (S.C.) established the United Nations Compensation Commission ("the Commission") to deal with the overflow of claims arising from Iraq's unlawful invasion and occupation of Kuwait. A subsidiary organ of the Security Council, the Commission was intended to breathe life into S.C. Resolution 687's affirmation that Iraq was "liable under international law for any direct loss, [or] damage, ... to foreign governments, nationals and corporations" resulting from Iraq's actions.

Based in Geneva, the Commission consists of an Executive Secretary overseeing the work of a Secretariat, a Governing Council, comprising the 15 members of the Security Council at any given time, and an indeterminate number of commissioners. The Governing Council gives policy direction to the Commission; the Secretariat services the Commission; and, the commissioners serve as the principal claims evaluators, sitting in panels of three and working in a personal capacity.

In addition, S.C. Resolution 687 established a Compensation Fund, under the auspices of the Commission, as the financial vehicle through which Iraqi funds would be channelled to the eventual claimants. A 30 per cent levy on future Iraqi oil revenues should ensure that the Fund will be continually replenished.

One of the first major tasks tackled by the Commission was to categorize claims and establish an expedited process for urgent cases. Specific amounts were fixed for costs arising from forced departure from Kuwait or for the loss of a family member. As well, the Commission served notice that it will give priority to the processing of claims for losses up to U.S. $100,000.

All claims must be presented to the Commission, collectively, by the governments responsible for individual claimants. The Canadian Government is tasked with reviewing more than 800 Canadian individual and corporate claims and submitting a "consolidated claim" to the Commission by July 1, 1993.

The Secretariat will perform a preliminary assessment before claims are submitted to a panel of commissioners. Working under strict time deadlines, the commissioners must verify and evaluate the claims and make recommendations regarding awards to the Governing Council. The Governing Council approves all final awards. As the last step, the national governments are responsible for the distribution of the funds awarded to individual claimants.

Given the difficult circumstances under which losses occurred, the

commissioners will apply a modified standard of proof for claimants to prove loss or damages. The applicable law used by commissioners in their determination will be Resolution 687, other resolutions, the criteria established by the Governing Council, decisions of the Governing Council and where necessary, other relevant rules of international law. Panel decisions require a simple majority.

Most decisions of the Governing Council require a majority of nine members, with no member possessing a right of veto. All decisions of the Governing Council are final and not subject to appeal or review on procedural, substantive or other grounds.

LA COMMISSION DE COMPENSATION DES NATIONS UNIES: L'INSTITUTIONNALISATION DES RÉCLAMATIONS

Suite à la victoire alliée dans la guerre du Golfe, le Conseil de sécurité des Nations Unies a créé la Commission de Compensation des Nations Unies ("la Commission") chargée de régler le déluge de réclamations provoqué par l'invasion et l'occupation illégale du Koweit par l'Irak Organe subsidiaire du Conseil de sécurité, la Commission devait concrétiser l'affirmation contenue dans la Résolution 687 a l'effet que "l'Irak est responsable, en vertu du droit international, de toute perte, de tout dommage,... direct subis par des gouvernements étrangers et des personnes physiques et sociétés étrangères" du fait de l'invasion et de l'occupation du Koweit par l'Irak.

Ayant son siège à Genève, la Commission a un Secrétaire général qui gère le travail d'un secrétariat, un conseil d'administration, composé des 15 membres en exercice du Conseil de sécurité, et un nombre indéterminé de commissaires. Le conseil d'administration est chargé de fixer les orientations des politiques de la Commission; le secrétariat sert les besoins quotidiens de la Commission; et, les commissaires sont les vérificateurs et évaluateurs des réclamations. Ils travaillent, en leur propre nom, regroupés en chambres de trois commissaires.

De plus, la résolution 687 a mis sur pied le Fonds de Compensation des Nations Unies, sous l'égide de la Commission, comme véhicule financier par lequel les fonds irakiens seront remis aux réclamants éventuels. Un droit de trente pour-cent sur le pétrole irakien devrait permettre au fonds de se renflouer.

Une des tâches prioritaires de la Commission était la classification des réclamations en catégories et la mise au point de critères propres à accélérer le règlement des urgences. Des montants précis étaient fixés pour les coûts liés à des expulsions du Koweit ou pour l'indemnisation suite au décès d'un proche parent. En outre, la Commission fit savoir qu'elle donnerait priorité au traitement des réclamations pour des pertes supérieurs a 100,000. (U.S.).

Toutes les réclamations doivent être présentées à la Commission par les gouvernements des requérants, qu'ils soient des personnes physiques ou morales. Le gouvernement canadien est alors chargé d'examiner plus de 8oo réclamations d'individus ou de sociétés canadiennes et de transmettre une réclamation collective au plus tard le ler juillet 1993.

Le secrétariat est chargé de faire un examen préliminaire des réclamations. Elles seront ensuite soumises pour vérification et évaluation, à des chambres composés normalement de trois commissaires. Travaillant dans des délais précis, les commissaires doivent transmettre leurs recommandations au Conseil d'administration. Ce dernier prendra

la décision définitive. Comme dernière étape, les gouvernements sont responsables de la distribution des fonds aux requérants.

Tenant compte des circonstances difficiles qui ont entouré les pertes, les commissaires utiliseront des critères modifiés pour prouver les pertes ou dommages. Lorsqu'ils examineront les réclamations, les commissaires appliqueront la résolution 687 et les autres résolutions du Conseil de sécurité et les critères énoncés par le Conseil d'administration pour les différentes catégories de réclamations et toutes ses décisions pertinentes. Ils appliqueront aussi, le cas échéant, d'autres règles pertinentes du droit international. Une majorité des votes des commissaires est requise pour toute recommandation.

Les décisions du conseil d'administration nécessitent une majorité d'au moins neuf de ses membres, aucun membre n'ayant de droit de veto. Ces décisions sont finales et sans appel ou révision, que ce soit pour des motifs liés à la procédure ou à la substance.

HUMAN RIGHTS

Canada is party to 22 of the 34 treaties in the human rights field of the United Nations. Treaties include covenants, conventions and protocols. Of these, Canada is party to seven of the eight major instruments. These are the International Covenant on Economic, Social and Cultural Rights (ICESCR), the International Covenant on Civil and Political Rights (ICCPR), the Optional Protocol to the ICCPR, the International Convention on the Elimination of All Forms of Racial Discrimination (CERD), the Convention on the Elimination of Discrimination Against Women (CEDAW), the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) and the Convention on the Rights of the Child. Canada is not party to the Second Optional Protocol to the ICCPR aiming at the Abolition of the Death Penalty.

In addition to the treaties adopted by the United Nations, there are also a number of other human rights instruments. These include declarations, standard minimum rules, bodies of principle and so forth. For example, the Conference on Security and Cooperation in Europe (CSCE) has devoted a large part of its work to the human dimension, starting with the Helsinki Final Act in 1975. The Copenhagen Document is the final document in a series devoted to human rights standards. While these instruments are not legally binding, they do set a basic minimum standard which states are expected to strive to achieve.

Canadian Reports under UN Human Rights Conventions

Under a number of UN human rights treaties, Canada is required to submit periodic reports on the measures taken to implement its obligations. Canada's second report under the ICESCR was submitted to the ICESCR Committee in October 1991. Our second report under the ICCPR was considered by the UN Human Rights Committee in November of 1990. The next report is due in 1994. The ninth and tenth reports under the Convention on the Elimination of of Racial Discrimination were considered in March 1991 by the CERD Committee, and the eleventh report was submitted in November 1991. The third report under CEDAW was submitted to the UN in September of 1992. Consideration of this report by the CEDAW Committee is not expected until 1994. Canada's second report under the Convention Against Torture was submitted in September 1992 and will be considered by the Committee against Torture in 1993. Canada will be submitting its first report under the Convention on the Rights of the Child in early 1994.

Draft Instruments

Several human rights instruments are currently under consideration by various UN bodies. A working group of the Commission on Human Rights (CHR), has been meeting since 1978 on a declaration on the rights of minorities. In February 1992 the CHR

adopted the declaration, which will be considered by the UN General Assembly this fall. The CHR has also developed a draft declaration on the forced disappearance of persons. The Working Group on Indigenous Peoples of the Sub-Commission on Prevention of Discrimination and Protection of Minorities is currently drafting a declaration on indigenous rights. A text is expected to be submitted to the CHR in 1994. An inter-sessional working group of the Commission on the Status of Women CSW recently adopted a Declaration on Violence Against Women which is expected to be adopted by the CSW early in 1993. It is expected that the declaration will be considered by the UN General Assembly in the fall of 1993.

Organization of American States

The Organization of American States (OAS), which Canada joined in 1990, has a long history of activity in the field of human rights. The most important instruments are the 1948 Declaration on the Rights and Duties of Man and the American Convention on Human Rights. The former, while not legally binding, serves as an interpretative guide to the human rights obligations of member states under the OAS Charter. The American Convention is a binding instrument that not only elaborates basic human rights and freedoms, but also establishes important implementing mechanisms such as the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights. The federal government is currently consulting with the provinces and territories concerning adherence to this Convention.

The OAS also has a number of other human rights instruments. Canada has adhered to three conventions on the rights of women and is currently involved in the development of an OAS Convention on Violence against Women. Canada is also actively involved in the drafting of an Inter-American Convention on the Forced Disappearance of Persons.

SAFE USE OF NUCLEAR POWER IN OUTER SPACE

Since the Soviet Cosmos 954 crashed in northern Canada in 1978, scattering radioactive debris over parts of the Northwest Territories, Canada has been pressing for international acceptance of a set of principles to help protect the public from dangerous incidents of this kind.

Canada began negotiations in the UN Committee on the Peaceful Uses of Outer Space (UNCPUOS) in 1979, to develop safety principles governing the use of nuclear power sources in outer space. Initially, the proposal was opposed by the USSR but opposition ceased with political developments in that country, eventually leading to the Russian Federation supporting the principles. The United States, however, delayed agreement expressing concern in particular over a provision that would set a limit on the amount of radiation that could be caused should a Nuclear Power Source (NPS) satellite return to Earth. At the last UNCPOUS session in June the United States withdrew its opposition, clearing the way for the adoption of the principles by the UN General Assembly this fall.

Besides the limit on radiation, the principles include provisions on the publication of a safety asessment before launch, notification of re-entry, assistance to states and liability and compensation. The principles are not binding and are limited to existing NPS for on-board electrical systems, not for propulsion. Nevertheless, they are a step in the advancement of outer-space law and demonstrate how persistent legal argument over time can bring results in a new and complex area.

INTERNATIONAL TRANSFER OF OFFENDERS: A STRATEGIC APPROACH

The Transfer of Offenders Act was passed in 1978. Since then there has been considerable activity on both the domestic and the international front. Domestically, treaties have been ratified with 6 countries, 341 Canadians have been repatriated, and 105 foreign nationals have been returned to their country of domicile. As well, Canada is a party to the Convention on the Transfer of Convicted Persons of the Council of Europe which provides for the transfer of offenders with 30 countries. Canada has been actively involved in the negotiation of the Organisation of American States Inter-American Convention on Serving Criminal Sentences abroad and deliberations at Commonwealth and the United Nations' meetings.

This experience has provided Canada with a good sense of its purposes and principles in international transfers. It has also served to identify problem areas, omissions in law and policy, and key implementation issues. Canada is now at a significant juncture: it has outgrown its skeletal statutory framework and ad hoc treaty negotiations, and should now be positioning itself with an integrated statute and treaty negotiation structure.

We may speak of four general objectives in the transfer of offenders:

1. Humanitarianism

Language barriers, unfamiliar environment and lack of contact with friends and relatives increase the pains of imprisonment for foreign offenders. Customs and food may be unfamiliar or incompatible with the inmate's religions precepts or dietary requirements, health and sanitary conditions may be unsatisfactory, discipline may be excessive, and corruption and discrimination may prevail. Concern for these factors is demonstrated both in a desire to return Canadian offenders to Canada from abroad and in a reluctance to return foreign offenders to what may be harsh conditions in their home countries.

2. Social re-integration

Underlying the sense of compassion and desire to alleviate suffering is the interest in facilitating the successful reintegration of the offender into society. This objective is really distinct from the first one, as it is a motivating force even where the offender is incarcerated in a foreign country with correctional standards and social customs similar to Canada's. An offender incarcerated in a foreign jurisdiction may not be able to take advantage of any release planning and conditional release, either because such things do not exist there or because policy or statute limits their availability to foreign offenders.

This, combined with unbridgeable distance from the support network of family and friends, can mean that the chances of successful social reintegration into the home community are much reduced.

3.International Cooperation

All countries proscribe certain behaviour, and endeavour to suppress it through criminal laws and penalties. While territoriality is a long-standing principle of criminal law (crimes are prosecuted and penalties enforced in the geographical jurisdiction of a state), this picture has been complicated in the latter half of this century by rapid increases in technology and travel. Criminal activity is no longer bound by geography. Just as the activity has expanded, so too must the response to it. Countries must now work together to ensure that laws and penalties are enforced, and are enforced in a way which maximizes the prevention of further criminal activity.

4. Maintenance of an effective correctional system

In some European countries, an acute problem has grown: fully half of their prison population may be persons from other countries. This means the expenditure of taxpayer dollars to provide custodial facilities for persons with no long-term commitment to the country. This undermines the ability to meet the objective of maintaining a corrections system which is coherent, efficient, and cost-effective. This objective calls into question the desirability of subsidizing the punishment and rehabilitation of foreigners when resources could be used to promote the safe custody and successful reintegration of the state's own citizens.

II. Relationship between the objectives

In addition to identifying objectives, attention must be given to their relative ranking and the conflicts or compatibilities between them. The compatibility, or lack thereof, will be a key factor in developing the strategy for further activity in the area of international transfers.

This task is simplified if we examine the underlying principles of international transfers to which Canada has traditionally adhered:

a) Consent of all parties to the transfer

All treaties entered into by Canada to date set out as a fundamental principle the consent of the three parties involved: the offender, the sentencing state, and the receiving state. The importance attached to the first of these is such that procedures are in place to ensure that the consent is knowledgeably and freely given.

The Transfer of Offenders Act (TOA) does not explicitly require the offender's consent, but it is argued that the requirement is implicit insofar as the provisions of the Act are triggered by the offender's application for transfer.

b) No aggravation of sentence

Where the sentence is continued, adapted or converted by the receiving state, in no case shall it result in aggravation of the sentence as imposed by the foreign jurisdiction.

This principle is adhered to as a matter of policy: it is not explicitly articulated in either the TOA or treaties.

c) Equality of treatment with inmates in Canada

Once offenders are transferred to Canada, they are subject to the same custodial regime (including conditional release privileges) as offenders who were sentenced in Canada. This principle is contained in the Act.

d) Adherence to international criminal justice standards

In the conduct of its domestic correctional system and in entering into treaty relations with other states, Canada is bound by a variety of international obligations to maintain standards with respect to criminal justice matters. This includes adherence to such protocols as the UN Universal Declaration of Human Rights, International Covenant on Civil and Political Rights, and the Standard Minimum Rules for Prisoners.

e) Respect for sovereignty

In general terms, the principle of sovereignty is defined as the international independence of a state, combined with the right and power of regulating its internal affairs without foreign dictation or interference. In the context at issue, it is more narrowly stated as the prohibition against the receiving state reviewing the conviction or sentence after transfer to the receiving state. In some treaties, this prohibition can extend as far as denying any exercise of clemency, in addition to prohibiting review by appellate procedures.

These principles form a coherent and complementary package for the program of the transfer of offenders between Canada and other countries.

NEW EXTRADITION ACT: OLD TREATIES

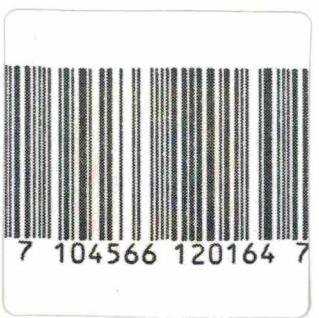
In recent years extradition to and from countries other than the United States and a few others has been difficult if not impossible. One of the reasons for this is that we are operating under legislation that does not reflect current circumstances. Canada's Extradition Act was passed in 1877 and is patterned on the British Extradition Act of 1870. It has not been significantly changed since that time. Another reason is that most countries that have extradition treaties with Canada, but particularly those with civil law systems, find it difficult to meet Canadian evidentiary requirements to succeed in extraditing suspected criminals from Canada.

One question being examined is the relationship between the new Act and the extradition treaties that are in existence at the time it enters into force. Canada's extradition treaties fall into three fairly distinct periods. The first is from 1873 to 1928 when Britain concluded a number of extradition treaties, some thirty of which are still in force for Canada. These treaties are all moribund. They do not reflect modern treaty law nor current Canadian treaty practice. For instance under most of these treaties we could extradite for the offence of slavery but not for narcotics trafficking.

The second period is from 1969 to 1981 when several old treaties were renegotiated and new ones concluded. These were a great improvement on the earlier treaties but still have flaws, one of them being that they maintain the old "list" approach where offences are listed in the treaty and extradition will only be granted for those offences. Modern treaties do not incorporate lists but cover all extraditable offences punishable by a term of imprisonment of one year or by a more severe penalty.

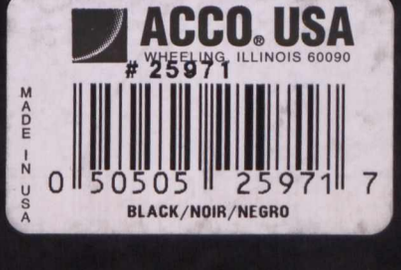
The third period is from 1985 to the present, during which we have completed nine extradition treaties that conform broadly with modern extradition law and practice.

Consideration is being given to terminating many of the treaties in the first category. While we would normally recommend that they simply be left "on the books" unused, we think there are compelling reasons for terminating them. It is necessary to ensure that all treaties meet the terms of the Charter of Rights and these older treaties would be unlikely to withstand a Charter challenge. The treaties in the second category would remain in force temporarily, but would be renegotiated or updated on a priority basis to bring them into line with the new legislation. The treaties in the third category would remain in force under the new Act.



It should be emphasized that decisions as to termination would be made on a case by case basis and no treaty would be terminated until after the new Act is in force. In any case, by the time the new Act comes into force a number of treaties will have been renegotiated.

At the time of termination it would be explained to each treaty partner that such action was necessary due to a fundamental change in Canada's extradition law and that we would consider the need for a new treaty to reflect that change in relation to our and their extradition priorities. In the meantime, the new Act provides for extradition in the absence of a treaty on a case by case basis.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