Quelques exemples de
questions courantes de droit
international d'une
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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
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DEPARTMENT OF EXTERNAL AFFAIRS AND INTERNATIONAL TRADE
LEGAL AFFAIRS BUREAU

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THE NORTH AMERICAN FREE TRADE AGREEMENT

The North American Free Trade Agreement, signed by the leaders of Canada, the United States and Mexico on December 17, 1992, represents a significant new contribution to global trade liberalization. The NAFTA builds upon and significantly expands the scope of the FTA, and creates new norms for international trade agreements.

NAFTA incorporates the trade-liberalizing disciplines of the GATT and the FTA, including such fundamental principles as national treatment, most favoured nation, and transparency. It builds upon the GATT and the FTA by setting out more sophisticated, precise and predictable regulations in a variety of areas, including rules of origin and customs administration. NAFTA contains specialized provisions to apply to a number of individual sectors, such as automotives, textiles, energy, and agriculture. The NAFTA is fully consistent with Article 24 of the GATT, which explicitly permits the formation of free trade areas between constituent territories.

NAFTA goes beyond any trade agreement negotiated to date in its regulation of such areas as investment, services, and procurement. For example, NAFTA contains several new investment obligations which were not included in the FTA, including most favoured nation treatment, minimum standard of treatment in accordance with international law, and provisions related to senior management and boards of directors. The definition of "investment" under NAFTA is broad, including controlled enterprises, minority equity interests, intra-corporate loans, and loans and debt securities with terms of at least three years. NAFTA also extends the list of performance requirements prohibited under the FTA to include trade balancing, technology transfer, and exclusive supplier requirements. The NAFTA prohibition on performance requirements applies to all investments, whether by domestic investors, NAFTA investors, or non-NAFTA investors. These performance requirement provisions are broader than the prohibitions contained in the draft GATT Code on Trade Related Investment Measures (TRIMs). Moreover, while the FTA provided for the resolution of investment disputes on a state-to-state basis, NAFTA goes further by also allowing for direct investor-state arbitration.

A wide range of services are covered under NAFTA, which will help to

support the movement towards a multilateral General Agreement on Trade in Services (GATS). While the FTA took a "positive listing" approach to trade in services, covering only those services listed, NAFTA uses a "negative list", covering all measures affecting the crossborder trade in non-financial services, other than those specifically exempted. This will result in a significantly wider sectoral coverage. NAFTA also contains specific provisions on financial services and telecommunications.

The rules applicable to government procurement have been broadened under NAFTA to cover goods, as in the FTA, and services and construction. The list of government departments and entities subject to liberalized procurement practices has also been extended. NAFTA adds some $58 billion in procurements to the $20 billion already covered under the FTA and GATT.

NAFTA has a comprehensive chapter on intellectual property rights. It is based in large measure on the draft GATT Agreement on Trade-Related Intellectual Property Rights (TRIPs) in the Dunkel text. The chapter covers both substantive intellectual property standards and disciplines for the enforcement of intellectual property rights.

The dispute settlement mechanisms of the FTA have been strengthened by NAFTA. Chapter 20, the general dispute resolution chapter of NAFTA, incorporates much of Chapter 18 of the FTA, with a number of improvements. These include the use of consensus rosters for panellists, instead of separate national rosters; the principle of "reverse selection", under which a government selects panellists from among the other country's nationals; the use of scientific review boards to address factual issues related to environment, safety, health or conservation measures; and binding dispute settlement to determine if a country's retaliation for non-compliance by the other country with a panel report is "manifestly excessive". As under the FTA, the NAFTA dispute settlement procedure is based on three main stages: consultations, meetings of the Free Trade Commission, and panel proceedings.

Finally, the review by binational panels of final antidumping and countervailing determinations has been maintained under NAFTA, with new provisions to safeguard the system by ensuring that panels are established and their provisions are implemented.

NAFTA is scheduled to come into force on January 1, 1994.

DISPUTE SETTLEMENT UNDER THE CANADA-U.S. FREE TRADE AGREEMENT (FTA) - OCTOBER 1992 TO OCTOBER 1993

Chapter 19 of the Free Trade Agreement provides for review by binational panels of final anti-dumping and countervailing duty determinations. Disputes arising from the interpretation or application of the FTA are resolved pursuant to Chapter 18.

Chapter 19 decisions

There were a number of panel decisions relating to the export to the United States of live swine from Canada. The U.S. imposed duties on Canadian live swine in 1985. Since the imposition of duties predates the entry into force of the Free Trade Agreement, Canada has not been able to seek a review of the 1985 decision. However, Canada has used Chapter 19 to challenge final determinations in administrative reviews by the U.S. Department of Commerce made after January 1989.

The fourth U.S. administrative review of imports of Canadian live swine was the subject of the decision of a binational panel in Live Swine from Canada ("Live Swine IV"! (October 30, 1992). The panel ruled that Canada's National Tripartite Stabilization Scheme for Hogs did not confer a countervailable subsidy on Canadian producers of live swine. The panel decision arose from a Canadian challenge to an administrative review conducted by the U.S. Department of Commerce, which calculated a countervailing duty rate for live swine. The panel ordered the Department of Commerce, inter alia, to recalculate its countervailing duty rate on Canadian live swine in accordance with the panel's decision. In its determination on remand, Commerce confirmed its original decision on its countervailing duty rate. A review of the remand decision resulted in the panel remanding the second determination, in part, with instructions.

Both the original and remand decisions in Live Swine IV were challenged by the United States pursuant to the Extraordinary Challenge procedure in Article 1904.13 of the FTA. Under this procedure, either country can seek a review of a binational panel ruling by an Extraordinary Challenge Committee on the grounds, inter alia, that the panel manifestly exceeded its powers, authority or jurisdiction. The U.S. argued that the panel in the Live Swine IV case exceeded its

jurisdiction by failing to apply the appropriate standard of judicial review. On April 8, 1993, the Extraordinary Challenge Committee dismissed the U.S. request for an extraordinary challenge, since in the Committee's view the U.S. failed to meet the burden of persuasion under Article 1904.13.

A binational panel examined the fifth U.S. administrative review of imports of Canadian swine in the Live Swine V decision of June 11, 1993. The panel affirmed the determination made by the U.S. Department of Commerce that the Tripartite Stabilization Scheme was countervailable during the fifth review period. The panel distinguished the Live Swine IV decision on a number of grounds, including the fact that a higher percentage of Tripartite payments went to hog producers during the fifth review period.

A binational panel was asked to review a determination made on remand by the Canadian International Trade Tribunal (CITT) that the dumping of U.S. beer had caused material injury to beer production in B.C. In the Beer Originating or Exported From the United States decision of February 8, 1993, the panel affirmed the CITT's determination.

Panels also dealt with the export of U.S. carpets to Canada, focusing on both the injury to Canadian industry, and on the determination of dumping. The CITT had decided that the dumping of U.S. machine tufted carpeting had caused or was likely to cause material injury to Canadian production. In Machine Tufted Carpeting Originating In or Exported From the United States (April 7, 1993), a panel affirmed part of the CITT's determination, but remanded to the Tribunal certain issues related to material injury to Canadian industry. In a related decision issued on May 19, 1993, a panel partially remanded to Revenue Canada aspects of its determination related to dumping, specifically dealing with the period of time for recovery of costs, as well as the issue of 'like goods'. Revenue Canada's determination on remand was affirmed by a panel on September 28,1993.

Two panel decisions on softwood lumber were issued within the past year. In May, 1992, the U.S. Department of Commerce ruled that Canadian provincial stumpage programs and B.C.'s log export restrictions provided a countervailable subsidy of 6.51% . The panel in the Softwood Lumber Products from Canada case (May 6, 1993) instructed the Department of Commerce to review its determinations on number of issues, including the applicable legal standard to be used in determining the definition of subsidy, and whether the alleged subsidy

had been provided to a specific industry. On September 17, the Department of Commerce reaffirmed its original ruling that provincial stumpage programs and the B.C.'s log export measures confer a countervailable subsidy. The FTA panel will review this redetermination by the Department of Commerce and will issue a second ruling in mid-December. A separate panel, which issued its decision on July 26, 1993, ruled that there was not substantial evidence to support the determination of the U.S. International Trade Commission that U.S. industry was being injured by subsidized Canadian softwood lumber exports. The ITC will respond to this ruling in late October.

The determination by the U.S. Department of Commerce that countervailable benefits had been provided to Canadian magnesium exporters was the subject of a panel decision in Pure and Alloy Magnesium from Canada (August 16, 1993). The panel remanded part of the determination to the Department of Commerce, to reconsider the methodology it used in determining whether a subsidy existed. The determination on remand by Commerce was affirmed by the panel in its final decision of October 6, 1993. In a decision of August 27, 1993, a panel remanded to the U.S. International Trade Commission its determination on injury, requiring the ITC to explain its determinations with respect to whether separate U.S. industries producing pure and alloy magnesium were materially injured by dumped and subsidized Canadian imports.

Chapter 18 decisions

Two Chapter 18 panels released their final reports during the past year.

A panel was established in May 1992 at the request of the U.S. to resolve a dispute regarding the export of Canadian durum wheat to the United States. The dispute arose over the interpretation of Article 701.3 of the FTA, which provides that neither Party shall sell agricultural goods for export to the other Party at a price below the acquisition price plus storage, handling and other costs. In The Interpretation of and Canada's Compliance with Article 701.3 with Respect to Durum Wheat Sales (February 8, 1993), the panel provided a detailed interpretation of Article 701(3). Among the key interpretations made by the panel were that the acquisition price of goods referred to in Article 701.3 includes only the Canadian Wheat Board's initial payment, or in the event of an upward adjustment, the acquisition price for goods sold after the adjustment is the initial payment plus such adjustment. The panel also held that Western Grain Transportation Act payments for shipments through Thunder Bay are to be

excluded from the cost calculation required by Article 701.3 and that only storage and handling charges paid by the Board should be included in determining costs. The panel recommended that a bilateral working group be established to oversee periodic audits of the Board to determine compliance with Article 701.3.

On September 17, 1992, Canada requested a Chapter 18 panel to review the prohibition by Puerto Rico of UHT milk produced in Quebec. In Puerto Rico Regulations on the Import Distribution and Sale of UHT Milk from Quebec (June 3, 1993), the panel decided that Puerto Rico's prohibition of Quebec UHT milk was not in violation of the FTA. However, the panel also ruled that the U.S. had nullified and impaired benefits that Canada could reasonably expect to derive from the FTA by closing the Puerto Rican market to Quebec UHT milk while negotiations were underway with respect to equivalency. The Panel recommended that the U.S. and Canada conduct an equivalency study to determine whether Quebec UHT milk is produced under conditions which have the same effect as those set out in the U.S. Pasteurized Milk Ordinance. If Quebec and Puerto Rican standards for UHT milk are found to have the same effect, then the Panel recommended that UHT produced in Quebec should be re-admitted for sale in Puerto Rico.

Currently, Chapter 18 consultations are underway at the request of Canada with respect to the U.S. Export Enhancement Program.

IRAQ CLAIMS: WORLD TECHNOLOGY MEETS WORLD LAW

Following the Gulf War, the United Nations Security Council (S.C.) established the United Nations Compensation Commission (UNCC) to evaluate losses arising from Iraq's invasion and occupation of Kuwait. A subsidiary organ of the Security Council, the UNCC was intended to give effect to Security Council 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.

The UNCC is currently establishing the legal and logistic machinery to deal with nearly 1.5 million compensation claims in many world languages covering the full range of losses directly caused by the invasion.

The Governing Council, the principal policy-making body of the UNCC, has laid out in 16 decisions the legal framework for the resolution of these claims; the Secretariat is receiving and organizing the claims and three Panels of Commissioners will review claims and provide their recommendations to the Governing Council for final decision. Canada's former Ambassador to the United Nations in New York, Mr. Yves Fortier has been named the Chair of the Panel of Commissioners reviewing claims on Form C.

Expedited claims on Form A, B and C will be reviewed first by the Panel of Commissioners and recommendations must be made on each instalment of claims within a four month time period. Larger claims on Form D, corporate claims on Form E and government claims of Form F will be dealt with at a later date.

The UNCC expects to receive over 1 million claims on Form A for lump sum departure costs. These claims are submitted by national governments on specially designed UNCC software. The data on this software will be compared electronically with massive departure lists provided by governments in the Gulf region. Only in the case of discrepancies, will supporting documentation be requested from governments in non-electronic form.

Nearly 5,000 claims on Form B are expected to be filed for a modest lump sum payment for serious personal injury or death and nearly 500,000 claims on

Form C are expected to be submitted for all losses up to U.S $100,000. These claims must be submitted in hard copy form, with full supporting documentation. A number of paralegals have been hired to review the documentation (in many languages) and critical information will be inputted onto a massive computer program. It is anticipated that Panels of Commissioners will make decisions on "significant common legal and factual issues." These decisions will be then applied to the inputted claims data on the computer. The Panel of Commissioners will then review most expedited claims after they have been organised by country and legal and factual issues.

For all other claims, the Panel of Commissioners has 6-12 months to review and make recommendations. For unusually large or complex claims, the Panel may ask for additional or written submissions and hold oral proceedings. Claimants then may be assisted by an attorney or other representative.

The UNCC Governing Council has permitted countries to submit claims on behalf of their nationals and "in [their] discretion...other persons resident in [their] territory." Accordingly, the Government of Canada has submitted claims on behalf of Canadian citizens, and "Canadian permanent residents" who have landed in Canada by March 31, 1993. Many individuals resident in Canada who do not meet Canadian residency criteria have asked the Ottawa office of the United Nations High Commissioner for Refugees to submit their claim to the UNCC for them. Canada also submitted claims on behalf of Iraqi nationals as long as they were Canadian citizens by July 1, 1993.
All claims must be presented to the UNCC, collectively, by the governments of individual claimants. By October 1, 1993, the Government of Canada had submitted to the UNCC over 1300 claims worth approximately U.S. $128 million.

ECONOMIC SANCTIONS

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

UN trade, commercial and financial sanctions adopted under Chapter VII of the UN Charter are currently in effect against:

IRAQ

Resolution 661 (1990) of August 6, 1990
Resolution 670 (1990) of September 25, 1990
Resolution 687 (1991) of April 3, 1991
Resolution 778 (1992) of October 2, 1992

(These are only some of the UN Resolutions dealing with Iraq but they constitute the most important ones)

Federal Republic of Yugoslavia (Serbia and Montenegro)

Resolution 757 (1992) of May 30, 1992
Resolution 820 (1993) of April 17, 1993

Libya

Resolution 748 (1992) of March 31, 1992

Angola/UNITA

Resolution 864 (1993) of September 15, 1993

Libya's continuous refusal to give up two of its nationals alleged to have been involved in the Lockerbie bomb blast has resulted recently in further discussions in the Security Council on strengthening the existing sanctions against Libya.

The Security Council decision to adopt economic measures against Angola is in reaction to the continuous military actions of UNITA in Angola. These measures established an embargo on petroleum and arms directed to UNITA. The UNITA-Angola sanctions set a precedent to the extent that it is the first time that the target of UN sanctions is not a state or a country.

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. In order to remedy this lacuna, the Special Economic Measures Act (SEMA) was enacted in June 1992.

In response to the adoption in October 1991, of economic sanctions against the Haitian State by the Organization of American States (OAS), Canada used SEMA for the first time in June and July 1992 by adopting regulations and orders implementing these measures.

Subsequently, the Security Council adopted Resolution 841 (1993) of June 16, 1993 requesting all its member States to freeze the assets of the Haitian Government and establish a petroleum and arms embargo to Haiti. As the previous regulations and orders adopted under SEMA pursuant to the OAS Resolutions had a generally wider scope than the measures adopted by the UN, no further action was necessary by the Canadian Government to implement UN Resolution 841.

On August 27, 1993 the Security Council adopted Resolution 861 (1993) requesting the suspension of the sanctions imposed against Haiti pursuant to its Resolution 841. The previous day, on August 26, the OAS had also called for the suspension of sanctions against Haiti. As it was not legally possible merely to suspend the application of the regulations and orders made under SEMA, they were simply revoked on September 8, 1993. SEMA only provides for the adoption, revocation or amendment, but not the suspension, of regulations and orders.

With enhanced cooperation in Security Council, the previous obstacles in adopting sanctions under Chapter VII have been largely removed. One hopes that the situations calling for the imposition of UN sanctions will diminish over time.

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

On October 9, 1992, the Attorney General for Canada, with the concurrence of the SSEA, issued the second blocking order under the *Foreign Extraterritorial Measures Act* (FEMA). The *Foreign Extraterritorial Measures (United States) Order,* 1992, was issued to counteract the provisions of the *Cuban Democracy Act* of 1992, ("the Torricelli Bill"), which formed part of the *National Defence Authorization Act for Fiscal Year* 1993. The Torricelli Bill purports to prohibit subsidiaries of U.S. companies (including those in Canada) from trading with Cuba. The FEMA order has two basic provisions: a) companies receiving any instructions relating to the extraterritorial measures in the Cuba Democracy Act are required to give notice of such instructions to the Attorney General and b) companies are prohibited, under penalty of fine or imprisonment, from complying with such instructions.

The first blocking order had been issued on October 31, 1990 and was directed the provisions of the "Mack Amendment" which had formed part of the *Export Administration Re-authorization Bill* of 1990. In the end the first blocking order was never tested, as President Bush vetoed the measure containing the Mack Amendment, and was revoked when the second order was issued.

The issuance of the blocking order, together with protests at the American action made at the diplomatic level, is the latest instance of a clash on the extraterritorial application of American law. Since 1963, the U.S. *Cuban Asset Control Regulations* (CACR) have asserted an extraterritorial jurisdiction over foreign subsidiaries of U.S. corporations. Until 1975, this primary exercise of this jurisdiction was over the activities of U.S. citizens who were directors of these foreign subsidiaries. While foreign corporations (including Canadian) were subject to regulation, there was little practical impact as all transactions by the subsidiary were authorized by a general permit. There were instances when U.S. authorities would not licence a U.S. citizen who was a director of a Canadian subsidiary to vote for a particular trade deal proposed by that subsidiary.

From 1975 until 1990, with the passage by Congress of the Mack Amendment, the focus of U.S. law was on the subsidiary itself, not the directors. However, the CACR regulatory language provided a signal that licences would

be granted for transactions that fell within certain categories. This shift reduced the number of serious disputes arising out of the extraterritorial application of the CACR.

What the Mack Amendment attempted, and the Torricelli Bill achieved, was a prohibition on the issue of licences. This has removed the possibility of negotiating, case by case, the issuance of licences. When the licensing procedure was in place, it allowed the Canadian and American governments to continue to disagree on the principles of jurisdictional reach, while permitting Canadian-based subsidiaries to trade with Cuba.

The basis for the U.S. legal position for exerting jurisdiction is widely recognized and relatively uncontroversial; a recognition that states may exercise control over persons on the basis of territory and nationality. The objection of Canada and other countries to the post-1975 CACR is that it represents an unacceptable extension of these basic principles in that the measures extend the nationality principle to enable U.S. law to proscribe conduct not only by U.S. citizens, but any corporations owned and controlled by U.S. citizens, wherever the corporations are organized.

Canada, like most western countries, rejects this extension of the nationality principle to enable a state to regulate conduct of corporations organized in foreign states on the basis of ownership or control by its citizens. For Canada, such corporations become "nationals" of Canada by the act of incorporation in Canada. We do not accept the contention that the fact that investment enabling such companies to be created came from outside the jurisdiction acts as a basis for the laws of the originating country to follow them over the border. This Canadian position voids the so-called balancing tests used by the U.S. in cases where it takes the position that it exercises a concurrent jurisdiction over such subsidiaries with the territorial state.

To combat this and other unacceptable American assertions of extraterritorial jurisdiction, Parliament passed the FEMA in 1984. It provides the government with a legislative basis to counteract the extraterritorial assertion of jurisdiction by foreign law in a number of instances, including discovery of documents, anti-trust regulation and the application of foreign laws that purport to regulate conduct in Canada. The Torricelli Bill represented such an unacceptable assertion of extraterritorial jurisdiction and clashed with Canadian law and trade policy. That justified the issuance of the FEMA order, a blunt

instrument of last resort.

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 1er octobre 1993, 56 États l'avaient ratifiée.

En avril 1993, après onze ans de délibérations, les quatre comités spéciaux et la plénière de la Commission préparatoire de l'Autorité internationale des fonds marins et du Tribunal international du droit de la mer ont terminé leurs travaux, sans toutefois parvenir à régler certains problèmes importants reliés au régime établi dans la Convention pour l'exploitation des ressources minérales des grands fonds marins. Afin de trouver une solution à ces difficultés que la Commission préparatoire ne fut pas en mesure de résoudre, le Secrétaire général des Nations Unies a poursuivi des consultations informelles auxquelles tous les États étaient invités. L'année 1994 devrait permettre de déterminer, sur la base de ces consultations, si la Convention deviendra l'objet d'une adhésion universelle.

ENVIRONMENTAL LAW

On September 14, 1993, Canada, the United States of America and Mexico signed the North American Agreement on Environmental Cooperation. It creates an operating framework for cooperation on environmental issues and a means to ensure that each of the three countries respects and enforces its environmental laws. The Agreement expands on commitments to environmental sustainable growth made by the three countries in the North American Free Trade Agreement (NAFTA).

Canada ratified both the Convention on Climate Change and the Convention on Biological Diversity on December 4, 1992. International meetings have been held in preparation for their entry into force. As of August 16, 1993, 31 States had ratified the Convention on Climate Change. This Convention will enter into force 90 days after the date of deposit of the 50th instrument of ratification. As of October 12, 1993, 31 States had ratified the Convention on Biological Diversity. This Convention will enter into force on December 29, 1993, which is 90 days after the date of deposit of the 30th instrument of ratification.

Within the context of the United Nations Economic Commission for Europe, negotiations for the Second Sulphur Protocol are continuing. Some delegations want this Protocol to be finalized before the end of this calendar year. Although the pace of negotiations has accelerated, it is not yet known whether that is a realistic goal.

In June of 1993, the OECD Council at Ministerial Level endorsed the report of the OECD Joint Session of Trade and Environment Experts. This report concerning trade and the environment was developed after intensive negotiations. The Joint Session concentrated on the identification, description, analysis and understanding of various factors which stand at the interface between trade and environmental policies. The procedural guidelines outlined in the second part of the report are intended "to help governments improve the mutual compatibility of trade and environmental policies and policy making". They address the following issues: transparency and consultation; trade and environmental examinations; reviews and follow-up; international environmental cooperation; and dispute settlement.

Following the first meeting of the Conference of the Parties to the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, the first meeting of the Ad-Hoc Working Group of Legal and Technical Experts was convened in September of 1993 to consider and develop a Draft Protocol on Liability and Compensation for Damage resulting from Transboundary Movements of Hazardous Wastes and Their Disposal. Some of the issues which are being discussed in this context are the scope of the proposed protocol, who should be liable and the nature of the liability.

UNITED NATIONS CONFERENCE ON STRADDLING FISH STOCKS AND HIGHLY MIGRATORY FISH STOCKS

As part of its strategy to combat overfishing by foreign vessels just outside its 200 mile zone, in 1989 Canada launched a multilateral initiative to further develop the rules of international law, embodied in the United Nations Convention on the Law of the Sea (UNCLOS), that govern high seas fisheries. These rules provide, inter alia, that coastal States and distant water fishing States shall "seek to agree" on conservation measures for straddling fish stocks (stocks that straddle the 200 mile limit) and that they shall "cooperate" to establish such measures for highly migratory fish stocks. After being successfully pursued in the United Nations Conference on Environment and Development, the Canadian initiative is presently underway in the UN Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks, which met in March and July of 1993 and will meet again in March and August of 1994 before reporting to the General Assembly later that year.

In the Conference and throughout the process leading up to it Canada has worked closely with a "core group" of coastal States composed of Argentina, Chile, Iceland and New Zealand. At the outset it was apparent that, while some shared Canada's concern with respect straddling stocks, the primary interest of the majority of coastal States related to highly migratory stocks and would also have to be taken into account.

At the second session of the UN Conference last July, Canada and its Core Group allies tabled a Draft Convention on the Conservation of Straddling Stocks on the High Seas and Highly Migratory Fish Stocks on the High Seas. Its main elements deal with conservation and management, surveillance and control, enforcement, regional fisheries organizations and arrangements, and settlement of disputes.

Canada's objectives at the Conference are not fully shared by the major distant water fishing States. For instance, the United States and Russia endorse our views on straddling stocks but want highly migratory stocks to be treated differently. Japan, Korea, China and the European Community continue to stress freedom to fish on the high seas and want to limit the outcome of the Conference to a non-binding General Assembly resolution.

In order to avoid a polarization of the Conference, the Core Group agreed not to press for an immediate discussion of its Draft Convention. As a result the Chairman conducted the July meeting on the basis of a list of issues he had submitted and reflected the views expressed during the debate in a Negotiating Text on which he wants the Conference to focus when it reconvenes in March. In preparing this text the Chairman has drawn extensively on the Draft Convention, which bodes well for a successful conclusion of the Conference from Canada's point of view.

THE INTERNATIONAL CRIMINAL COURT

Canada played a leading role at the Forty-Seventh Session of the United Nations General Assembly in obtaining consensus on a resolution calling on the International Law Commission (ILC) to give priority to establishing an International Criminal Court. The issue was raised by the Honourable Barbara McDougall, then Secretary of State for External Affairs, in her address to the General Assembly on September 24, 1992.

By General Assembly Resolution 47/33, November 15, 1992, the ILC was mandated to prepare a draft statute for an International Criminal Court. An international meeting of experts on this subject took place in Vancouver on March 22-27, 1993.

On July 19, 1993, the ILC submitted the Revised Report of its Working Group on the subject, containing a Draft Statute for an International Criminal Court. The draft is very much a preliminary document, with certain articles being presented with various options for consideration and discussion by Member States.

Canada intends to speak to the issue of the draft statute during the debate of the Sixth Committee of the United Nations at the end of October. In addition to expressing its support for the work done by the ILC and requesting that continued priority be given to the Court, Canada will draw the attention of Committee members to provisions that require further development, such as prosecutor independence, sentencing and prison facilities, the power of an international court to issue orders binding on a Member State and the creation of an appeals division. Canada further intends to submit detailed comments on individual articles and drafting matters directly to the ILC.

WAR CRIMES IN THE FORMER YUGOSLAVIA

1. The International Tribunal

At the London Conference in August 1992, Canada was one of the first countries to call for an International Tribunal to try charges of war crimes committed in the former Yugoslavia. At the October meeting of CSCE Ministers in Stockholm, the then Secretary of State for External Affairs also endorsed the creation of a war crimes tribunal.

On February 22, 1993 the UN Security Council (UNSC) adopted Resolution 808, which established a war crimes tribunal to prosecute those responsible for serious violations of international humanitarian law in the former Yugoslavia. The Secretary-General was asked to report on how the tribunal might operate. On May 25, 1993 the UNSC adopted Resolution 827 approving the Secretary-General's report and adopting the Statute of the International Tribunal annexed to the report.

The Tribunal, as set out in the Statute, consists of 11 judges elected for a 4/4 year term. Elections took place at the UN General Assembly in September. Canada's candidate, Judge Jules Deschênes, was elected on the first ballot with the second-highest vote count among 23 candidates. The Tribunal will commence operations on November 17; its first task will be to establish a set of procedural and evidentiary rules. Substantive activities are expected to commence in early 1994. The seat of the tribunal has (at least for now) been determined as The Hague, Netherlands. The question of funding remains open. A Chief Prosecutor is yet to be chosen.

The Department of Justice is currently studying measures necessary under Canadian law to implement the provisions of Article 4 of the Resolution 827, particularly those concerning extradition, transfer or surrender of persons to the tribunal and future "requests for assistance or orders issued by a trial chamber".

Canada has offered to the international tribunal the services of a team of lawyers and investigators, to be seconded from its Departments of Justice and National Defence.

2. The UN Commission of Experts (UNCOE)

UNSC Resolution 780 requested states to collate information in their possession relating to violations of humanitarian law, to make such information available to UNCOE and "to provide other appropriate assistance".

Canada was the first country to make a substantial financial contribution to the voluntary fund for UNCOE. A Canadian was appointed UNCOE's special rapporteur for on-site investigations; a team of Canadian investigators has conducted two missions into Bosnia-Herzegovina, with a third likely to take place in November.

In accordance with UNSC Resolution 780, which requests Member States to collate information in their possession relating to violations of humanitarian law, Canada established a position for an information co-ordinator in January 1993. Canada has submitted two reports to date (March 9, 1993 and June 21, 1993). The reports contain information from a variety of sources, including more than 60 reports from non-governmental and regional organizations, governments, the United Nations and Canadian individuals as well as a legal analysis which concludes that the situation in the former Yugoslavia is subject to the war crimes provisions of the Geneva Conventions.

UN CONVENTION ON THE PROTECTION OF PEACEKEEPERS

A draft Convention on the Protection of United Nations Peacekeepers will be discussed in the Sixth Committee of the United Nations General Assembly this fall in New York. The decision to promote negotiations on such a convention was prompted by the recent dramatic increase in deliberate attacks on peacekeepers and associated civilian personnel.

Traditionally, UN peacekeepers monitored or supervised ceasefires, truces or armistice agreements where they were unlikely to encounter serious casualties or deliberate attacks. More recently, however, peacekeeping missions have become more complex and diverse. Their mandates now include supervision of the disarming and disbanding of armed factions; the establishment of protected areas for persons subjected to human rights abuses; the enforcement of sanctions; the monitoring of elections, borders, human rights and repatriation of refugees; and the protection and delivery of humanitarian supplies to civilian populations. As such, peacekeepers are operating amidst armed conflict, both of an international and non-international character.

At least one draft before the Sixth Committee includes provisions on the obligation to prosecute or extradite those individuals suspected of committing serious crimes against UN peacekeepers. Among the issues to be decided during the negotiations will be the scope of application of the Convention, including which persons, which UN operations and which offences will be covered.

Canada strongly supports the concept of such a draft convention and will actively participate in the Sixth Committee Working Group negotiations this fall.

CHEMICAL WEAPONS CONVENTION

On 13 January 1993, the then Secretary of State for External Affairs, Barbara McDougall signed, on Canada's behalf, the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction, known commonly as the Chemical Weapons Convention (CWC). The CWC was negotiated over six years in the Geneva-based Conference on Disarmament. Once the Convention comes into force (180 days after the 65th ratification has been deposited, but not earlier than 13 January 1995), it will prohibit the development, production, stockpiling, retention and use of chemical weapons and their precursors. 129 other countries were also original signatories to the Convention.

In order to implement the Convention, an Organization for the Prohibition of Chemical Weapons is being established in the Hague. The Organization will comprise:

- a Conference of States Parties that will meet annually;
- a 41 member rotating Executive Council with day to day responsibility for supervising the activities of the Organization; and
- a Technical Secretariat.

The latter will include an Inspectorate responsible for verifying compliance with the Convention.

One of the most important and politically sensitive aspects of the CWC will be the timely and safe destruction of chemical weapons in the territories of States Parties. Canada is currently in the process of ratifying the Convention.

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 working actively for international acceptance of a set of legal principles to help protect the public from similar dangerous incidents.

Negotiations on safety principles governing the use of nuclear power sources in outer space began in 1979 in the U.N. Committee on the Peaceful Uses of Outer Space (UNCOPUOS). After years of negotiations, the UNCOPOUS session in June 1992 adopted a Set of Principles Relevant to the Use of Nuclear Power Sources in Outer Space. For its part, the U.N. General Assembly, adopted these principles in resolution 47/68 of 14 December 1992.

In addition to placing limits on radiation, the principles include provisions on the publication of a safety assessment before launch, notification of re-entry, assistance to states and liability and compensation. The principles are not binding on states and are limited to existing nuclear power sources for on-board electrical systems, not for propulsion.

While the U.N. resolution provides that the principles should be reopened for revision by the UNCOPUOS no later than two years after their adoption, given the difficulties related to their negotiation, it is unlikely that proposals for revision will be put forward at this time.

NPT 1995 EXTENSION CONFERENCE

Since its entry into force on March 5, 1970, the Treaty on the Non-Proliferation of Nuclear Weapons (NPT) has constituted the cornerstone of the world's non-proliferation system. It provides a political and legal barrier to the legitimization of additional nuclear weapons, the legal foundation for the commerce in nuclear equipment, material and technology as well as the basic commitments to be verified by the International Atomic Energy Agency (IAEA) - Safeguards System. More than 150 States have ratified the NPT since its signature in 1968.

Every five years since 1970, the Parties to the NPT have held a Review Conference in order to review the operation of the NPT with a view to assuring that the purposes of the NPT are being realized.

The year 1995 will not only mark the 25th anniversary of the NPT but also a critical step for in its evolution. Article X (2) of the Treaty requires that in 1995, a conference be convened to decide its future. The decision as to the length of extension of the Treaty must be taken by a majority of the Parties to the NPT. Only two options are possible:

1) the NPT could be extended for an additional fixed period or periods; or

2) the NPT could continue in force indefinitely.

Canada strongly supports the indefinite extension of the NPT in unamended form as the other option does not unambiguously conserve the NPT and the benefits it supplies. The Canadian position have been expressed and reiterated on many occasions, more recently during Prime Minister Campbell's address to the 48th United Nations General Assembly in New York on September 29, 1993. Canada believes that the 1995 NPT Review Conference should focus exclusively on the extension of the NPT and progress on this issue should not be linked to reform of the substantive provisions of the Treaty.

Before the 1995 NPT Extension Conference, which will be held in New York in April 1995, at least four Preparatory Conferences (PrepComs) will be necessary for the preparation of the appropriate documents and their review as

well as for other procedural matters. The first Prepcom was held in New York in May 1993 and the others are scheduled for January 1994 in New York, September 1994 in Geneva and January 1995 in New York.

The 1995 NPT Extension Conference will remain a priority for Canada in the upcoming months. Its indefinite extension and universal adherence are essential to global security.

COOPERATION JUDICIAIRE

Le Canada a été approché par de nombreux pays afin de conclure des Conventions bilatérales de coopération judiciaire, notamment en matière de reconnaissance de jugements étrangers dans les domaines civil et commercial.

Le Canada a préféré longtemps privilégier une approche multilatérale, en espérant notamment que le projet de convention multilatéral de la Conférence de la Haye prendrait forme rapidement.

La réunion de juin 1993 de la Conférence de la Haye ayant annihilé l'espoir de voir un projet de convention multilatérale aboutir avant quelques années, le Canada a décidé de reprendre, ou d'amorcer, des négociations en vue de conclure des conventions bilatérales là où le besoin se fait le plus sentir. La France a ainsi récemment confirmé sa volonté de négocier un traité avec le Canada. Un projet australien de conclure différentes ententes avec les provinces et territoires canadiens pourraient d'autre part donner plutôt lieu à un accord international entre les deux gouvernements fédéraux. D'autres projets sont actuellement à l'étude, notamment avec des pays d'Europe de l'est.

Il est à remarquer que nous abordons ici un terrain peu connu en droit civil et commercial. Si l'on exclut les «vieux traités d'empire» auxquels le Canada s'était joint dans les années trente, un seul traité de ce type a été conclu jusqu'à présent, soit avec le Royaume-Uni en 1984 sur l'exécution des jugements.

TREATIES ON MATTERS INVOLVING CRIMINAL LAW

TRANSFER OF OFFENDERS

Canada has transfer of offenders arrangements with about 38 countries through bilateral treaties, the Strasbourg Convention on the Transfer of Sentenced Persons and the Scheme for the Transfer of Convicted Offenders within the Commonwealth. These arrangements permit individuals in prison abroad to be returned to Canada to serve their sentence in their own culture and language close to friends and relatives. Rehabilitation is one of the principle objectives of these arrangements

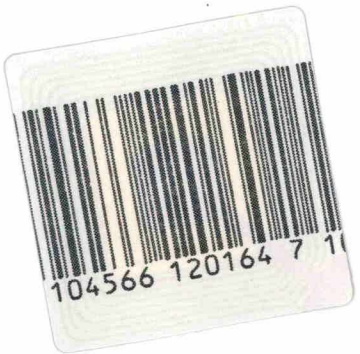
On July 27, 1993 Canada accepted the Scheme for the Transfer of Convicted Offenders within the Commonwealth. This permits offenders from Commonwealth countries which accept this Scheme to serve their sentences in their home countries. Under the Scheme a Canadian prisoner in a Commonwealth country can apply to the government of that country for a transfer to Canada. The prisoner would have to have at least six months of the sentence left to serve and have completed all appeals. If both governments approved the transfer, the prisoner would be brought back to Canada to serve the sentence in a Canadian correctional institution. The sentence of the foreign court would be treated as a sentence of a Canadian court. The appropriate parole board would decide on parole on the basis of Canadian law.

As well Canada is considering joining the Inter-American Convention on Serving Criminal Sentences Abroad which was adopted in July 1993 by the Organization of American States General Assembly.

MUTUAL LEGAL ASSISTANCE TREATIES

The network of Mutual Assistance in Criminal Matters Treaties (Malts) ensure that an effective mechanism of international legal assistance exists for use by Canadian law enforcement authorities. Malts may be used to obtain evidence, exchange information on the proceeds of crime and assist, to the extent permitted by respective laws, in forfeiture. An MLAT may also be used to examine objects, exchange information, locate and identify persons, transfer persons in custody, and facilitate requests for search and seizure. Canada has entered into

treaties with Australia, the Bahamas, France, Hang Kong, the Netherlands, Mexico and the United States. Treaties have been negotiated with Italy Austria, Brazil, Germany, Spain, Venezuela, Switzerland, Portugal and Korea. During 1993 negotiations were started with India, China and Thailand.



CONFERENCE OF MEMBERS OF THE PERMANENT COURT OF ARBITRATION

At the initiative of the Secretary General of the International Bureau of the Permanent Court of Arbitration (PCA), P.J.H. Jonkman, an assembly of the members of the Court was convened in the Peace Palace in The Hague on September 10th and 11th, 1993. Arising from a concern about the dormancy of the PCA, Jonkman set two principal objectives for the Conference: how to increase awareness of the Court and stimulate interest in its potential; the preparation for a possible "Universal Convention for Dispute Settlement during a Third Hague Peace Conference in 1999, coinciding with the centenary of the Permanent Court of Arbitration". The Conference, chaired by Sir Ninian Stephen of Australia, was the first ever gathering of members of the PCA.

By far the most controversial issue was the proposal to convene a Third Hague Peace Conference and the vague suggestion that the PCA be integrated into a comprehensive settlement of disputes mechanism under UN auspices. PCA members from developing countries, with the strong supporting voices of Louis Sohn of the United States and Vladimir Petrovsky of Russia, were keen advocates of such a Conference. Their basic premise was that since the PCA and the ICJ were established without Third World participation and input and since they considered it worthwhile to incorporate conciliation, arbitration and adjudication in a single, comprehensive instrument, it was essential to negotiate such a Convention and what better place than The Hague, and what better occasion than the centenary of the First Hague Peace Conference and the culmination of the UN Decade of International Law.

PCA members from developed countries were decidedly less enthusiastic. The Canadian paper had already stated for the record that the principal need was adherence to existing settlement of disputes mechanisms rather than to seek to add yet another mechanism to the plethora of general and specialized systems for peaceful resolution of disputes already in place... After extended discussion a resolution was adopted which, while making reference to the non-aligned proposal for the Third International Peace Conference, does not reach any categorical conclusion on actually convening such a meeting. Rather the resolution puts the emphasis on setting up a Steering Committee to analyze the historical development and practical application of methods of dispute settlement and to make recommendations on whether to revise the Conventions and whether

to improve the dispute settlement procedures under the aegis of the Permanent Court of Arbitration.

Notwithstanding the cautious wording of the resolution developing countries can be expected to press their proposal for the Third International Peace Conference to mark the culmination of U.N. Decade of International Law. Canada's objective will continue to be the wider application and acceptance of existing mechanisms for dispute resolution. Our view is that there is clearly no lack of such mechanisms, rather the failure is an absence of political will.