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

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LAW OF THE SEA

Bilateral Discussions

In the course of the last year, (i.e. September 1972 - September 1973) bilateral discussions were held with officials of the Danish government with a view to concluding an agreement on the delimitation of the continental shelf between Greenland and a number of Canadian islands in the Arctic. Discussions have progressed to a point where final agreement is expected to be reached soon.

Multilateral Level

In the course of the last year, the nations of the world have been focusing their efforts on preparing for one of the most important diplomatic conferences ever convened under the aegis of the United Nations, i.e. the Third Law of the Sea Conference, a first substantive session of which is scheduled to take place in the course of 1974, in Santiago, Chile. The U.N. Seabed Committee, whose mandate it is to prepare the Conference, has held two extensive sessions; one in March-April and an eight-week meeting in July-August.

However, an overall assessment of the Seabed Committee's work makes clear that, notwithstanding the intensive efforts displayed, progress towards a comprehensive and viable understanding of the law of the sea was rather slow with states unwilling to move, at this preparatory phase, from their publicly-stated negotiating positions.

Territorial Sea

A major trend is discernable towards adopting a twelve-mile limit for the territorial sea which, incidently, is the limit that Canada chose for itself in 1970. The few large maritime states which still hold to the traditional three-mile limit have indicated that they would be prepared to accept the twelve-mile limit provided their own proposals, and in particular those related to the thorny straits issue, are dealt with satisfactorily by the Conference. On the other hand, those other countries who have laid claim to wide areas of the oceans (in some instances up to 200 miles) as their territorial sea might also be disposed to reconsider their position if their off-shore economic interests are given fair protection in the resulting treaty on law of the sea. The adoption of a twelve-mile limit for the territorial sea would certainly be in line with the practice of a majority (i.e. more than 55) of coastal states.

Straits

The straits issue referred to in the preceding paragraph originates in the fact that if the territorial sea were extended by the Conference to twelve miles, a number of commercially and militarily strategic straits in the world would be completely covered by the territorial waters of one or more states. Large maritime powers, as the United States, the United Kingdom, and the Soviet Union, contend that in all straits used for international navigation foreign vessels should have a right of free transit whereas the states bordering these straits take the view that since the straits lie within their territorial waters, foreign vessels would have right of passage only if passage is innocent, i.e. not detrimental to the peace, security, and good order of the coastal state.

Given the importance attached to this issue by both groups of states it is widely recognized that its resolution will be pivotal to the success of the forthcoming conference.

The Continental Shelf

The resources of the continental shelf i.e. minerals and gas and oil deposits will also be the object of fierce negotiations at the Conference. A large number of developing coastal nations have put forth an economic zone concept which would give coastal states exclusive ownership over all resources in a 200-mile offshore area. For the continental shelf, this would mean preserving for the coastal state a large enough share of the resources contained therein while at the same time leaving a substantial amount of the exploitable resources under the jurisdiction of the international authority to be established for the seabed beyond the limits of national jurisdiction. Small shelf countries or states with no shelf at all are proposing a narrow area of sovereign rights (the figure of 40 miles has been advanced) with the hope that they will be drawing more substantial benefits from a large area of international jurisdiction. Large shelf countries such as Canada and Argentina claim that they have acquired sovereign rights to shelf resources out to the edge of the continental margin on the basis of the 1958 Geneva Continental Shelf Convention, the North Sea decision of the International Court of Justice, and the practice of states. One way out of this confrontation may reside in a tentative proposal put forth by Canada to contribute to the international community a percentage of the revenues accruing from the exploitation of continental shelf resources within a portion of the margin to be determined.

Fisheries

The freedom of fishing on the high seas embodied in the 1958 Convention on Fishing and the Conservation of the Living Resources of the High Seas is bound to be drastically amended by the Conference where three divergent points of view on fisheries will come to a head.

In the context of their economic zone concept, the majority of developing nations have supported a proposal that coastal states should have exclusive sovereignty over the living resources in an area 200 miles wide off their coast.

The distant fishing nations (e.g. Japan, USSR) intent upon preserving the status quo are ready to see it slightly modified in favour of developing nations who would have preferential rights over the living resources in a twenty-four mile area adjacent to their coast. According to the Japanese and Soviet proposals, the other developed nations would have to accept the present freedom of foreign vessels to fish beyond the narrow belt of their territorial waters as has been the case heretofore.

Canada has shared the general position of the developing countries while advocating an approach which would grant coastal states different degrees according to their species. One particularly difficult problem will be to determine the extent of the preferential rights coastal states may have over those coastal species which are found beyond the 200-mile limit.

The ultimate solution attained by the Conference will certainly have to provide coastal states with powers much broader than those they now enjoy over living resources, although it is not clear now what the modalities of the final solution will be.

Preservation of the Marine Environment

Although this issue was barely taken into consideration at the first two Law of the Sea Conferences in 1958 and 1960, its importance has increased since then to a point where it will be one of the main questions and one of the most difficult to resolve at the Conference.

Every nation is disposed to accept, at least in principle, the idea that the marine environment must be preserved from all sources of pollution whether land-based or marine-based, however, given its nature and its terms of reference, the Conference will mainly concern itself with marine sources of pollution. Here again, there are strongly divergent views as to how these sources of pollution should be controlled.

Countries with large merchant navies take the view that only internationally agreed standards should be applicable and enforced by the coastal state and then only for offences occurring in its territorial waters. As to violations to the international standards in the high seas beyond the territorial sea, these states could accept "port state jurisdiction" that is, jurisdiction of the state in the port of which the responsible vessel has docked following its polluting activities.

On the other hand, a number of coastal countries, including Canada, see effective control of marine pollution only through internationally agreed standards supplemented by nationally prescribed and enforced standards when special circumstances warrant them. The unique environment of our Arctic is a case in point. Enforcement of either internationally established or nationally promulgated standards should rest with the coastal state not only with respect to its territorial waters but as well in its broader

area of jurisdiction beyond.

Reconciling these conflicting positions will certainly prove to be difficult as most maritime powers equate efficient coastal state jurisdiction in this respect with a right to discriminately impede navigation.

Marine Scientific Research

None of the 1958 Geneva Conventions on the Law of the Sea deal with the subject of marine scientific research in a comprehensive fashion. This question is referred to only in the Continental Shelf Convention in which there is a provision which submits such research to the consent of the coastal state when it is undertaken on and concerns its continental shelf.

The effect of marine scientific research may have on the security of a coastal state and on its control over the exploitation of adjacent resources have led a number of nations to insist that such activities be subject to the jurisdiction of the coastal state. On the other hand, some of the major powers maintain that freedom of marine scientific research should in no way be restricted.

While agreeing that scientific research undertaken in the jurisdictional area of a coastal state should be undertaken only with its prior consent, Canada recognizes that marine scientific research must be encouraged and that wide dissemination should be given to its findings.

International Seabed Area

In 1970, the General Assembly of the United Nations decided that the seabed area beyond national jurisdiction should be set aside for the common heritage of mankind. The task of the Conference will be to spell out in legal

terms the contents of this new concept of "common heritage of mankind."

There now seems to be fairly wide agreement concerning the basic principles applicable to the exploration and exploitation of the resources of the international area. However, a wide range of views exists as to the powers of the international machinery which should be established to manage the international seabed area. Many developing nations favour an important and exclusive operational role for the international seabed authority whereas many developed countries would like to see the agency controlling the exploration of the resources by means of licenses to corporate entities or states or through joint-ventures. Canada's position has been evolving around a middle of the road approach which would promote the early exploration and exploitation of the area's resources through some sort of licensing system while at the same time providing for the direct participation of the new international authority in the management of the area.

Conclusion

The above discussion of the main issues should make it clear that negotiations will be difficult at the Conference. If a general outline of an agreement based on a twelve-mile territorial sea and a two-hundred mile economic zone seems to be emerging, many thorny issues do not appear to have any clear solution in sight. Adjustments will be in order if both international and conflicting national interests are to be harmonized in a viable constitution of the oceans.

Territorial Sea and Fishing Zones

The most recent statute on this subject was the Act amending the Territorial Sea and Fishing Zones Act, which received Royal Assent on June 26, 1970 and was promulgated on March 10, 1971. The Act extended Canada's territorial sea from 3 to 12 miles: the 12-mile territorial sea is now virtually a rule of law which has been established by state practice. The Act also laid the basis for the establishment of exclusive fishing zones in special bodies of water off Canada's East and West coasts, which were created within "fishery closing lines" established across the entrances to the bodies of water not enclosed within territorial sea baselines by the 1967 and 1969 Orders in Council, that is, the Bay of Fundy, the Gulf of St. Lawrence, Dixon Entrance, Hecate Strait and Queen Charlotte Sound.

Bilateral and Multilateral Fisheries Questions

By the end of 1972 Canada concluded fisheries phasing out and/or regulation agreements with all countries fishing in Canadian waters, chiefly involving the east coast: Britain, Denmark, France, Norway, Portugal, Spain and the U.S.A. An agreement with the U.S.S.R. provided for regulation on the high seas off Canada's Pacific coast. During 1973 the agreements with the U.S.A. and U.S.S.R. were extended in amended form. 1973 also saw the continuation of Canada-U.S.A. talks on salmon interceptions, designed to regulate the practice under which the fishermen of each country catch salmon bound for the rivers of the other, and involving the Fraser River Convention.

On the multilateral side, Canada continued its active participation in such fora as the International Whaling Commission, the Inter-American Tropical Tuna Commission, the International North Pacific Fisheries Commission, and the International Commission for the Northwest Atlantic Fisheries and with regard to the latter, arranged for the convening of a special meeting in Ottawa in October, following the annual meeting in Copenhagen in June. Canada also arranged the convening of an FAO Conference in Vancouver in February to discuss fisheries problems with a view to assisting in the preparations for the Law of the Sea Conference scheduled for Santiago, Chile in early 1974. Fisheries have also figured prominently in Canadian participation in the United Nations Seabed Committee meetings held in March-April, and July-August 1973, in preparation for this Conference.

Environmental Law

Canadian activity in the environmental law field during the past year has been directed to three main areas: implementation of the Stockholm Declaration on the Human Environment and its Action Plan;the development of a legal regime for the prevention of marine pollution and bilateral discussions with the United States on environmental matters. The impetus generated by the Stockholm Conference for environmental law is still being felt and continues to be the basis of the Canadian approach to environmental law matters. The Stockholm Declaration, particularly Principles 21 and 22 on state responsibility for environmental damage and the development of international law for liability and compensation for pollution damage, served as the foundation for Canadian proposals on marine pollution put forward in the U.N. Seabed Committee and in IMCO as well as serving as the basis for discussions with the U.S.A. on trans-border environmental problems. The effective implementation of the Stockholm principles on a world-wide basis requires a permanent international administrative structure and for this reason Canada was a firm supporter at last fall's U.N. General Assembly session of the establishment of a United Nations Environmental Program (UNEP) headed by Maurice Strong.

Canada and a group of other nations also were at the forefront in the 27th U.N. session in attempting to maintain the integrity of the Declaration on the Human Environment.

Due to a bilateral dispute between Argentina and Brazil Principle 20 of the draft Declatation, on the duty to consult for

activities which have the risk of damaging the environment of another state, was omitted from the Declaration and referred to the General Assembly for consideration. The two countries, with a large amount of support, introduced a resolution on the duty to consult which in the Canadian view also embodied an interpretation of the scope and significance of Principles 21 and 22. Canada felt that this resolution could have resulted in an undermining of the principles as an agreed basis for the development of international environmental law. The Canadian delegation, with the support of other delegations particularly New Zealand and Mexico, attempted to ensure that the legal effect of Principles 21 and 22 of the Declaration on the Human Environment. In the result, the two key principles of the Stockholm Declaration remain in the form unanimously adopted at the Conference; unfettered by subsequent General Assembly interpretation.

The Ocean Dumping Conference held in London in November presented yet another opportunity for follow-up action on the Stockholm Conference. This Conference was part of the Stockholm Action Plan and Canada took a leading role, encouraging the elaboration of a Convention which is both enforceable jurisdictionally and environmentally sound. As adopted the Convention is enforceable not only against vessels registered in the territory or flying the flag of a contracting state but also against vessels and fixed or floating platforms under the jurisdiction of a contracting state and believed to be engaged in dumping. This is the first international maritime agreement which specifically makes provision for both flag state and coastal states jurisdiction. So as not to prejudice the work of the Law of the Sea Conference, the Ocean Dumping Convention specifically defers resolution

of the question of the "nature and extent" of flag state and coastal state jurisdiction for the prevention of marine pollution to the LOS Conference.

For the past year, the United Nations Seabed Committee has been considering the problems of regulating marine pollution and enforcement jurisdiction over vessels polluting the seas. At the March session of the Seabed Committee Canada introduced a draft Comprehensive Marine Pollution Convention based on a working paper tabled the previous summer. The Comprehensive Convention would serve as an "umbrella" to the more specialized marine pollution conventions, such as the one on ocean dumping, by setting uniform rules for dealing with certain recurring problems such as enforcement jurisdiction, compensation for damage and settlement of disputes. The proposed Comprehensive Convention would make provision for the establishment of environmental protection zones within which various marine pollution conventions would be enforceable by the coastal state as well as the state of the flag. In putting forth the comprehensive treaty, Canada has attempted to found its proposals on the concepts discussed and approved at the Stockholm Conference as well as other international meetings. Each article of the Canadian comprehensive draft is based on one or more of the Stockholm principles, particularly Principles 21 and 22; the three principles on the rights of coastal states reviewed by the Stockholm Conference, and the 23 marine pollution principles endorsed by the Conference. At the March Seabed session, the Canadian text was used as the working draft for the Seabed Committee's proposed set of treaty articles on marine pollution and there was further reference to it at the July/August 1973 session of the Committee in

addition to texts put forward by other delegations.

Canada has maintained a consistent position on marine pollution matters in Stockholm, the U.N. Seabed Committee, at the London Dumping Conference and in IMCO, which is sponsoring an International Conference on Marine Pollution which inter alia is intended to prepare a Convention on Prevention of Pollution from Ships in October. The draft IMCO Convention prepared for the Conference has thus far followed the traditional pattern of enforcement by the flag state and by any other state only when an offence contrary to the Convention occurs "within its territorial sea." Canada has attempted in two ways to make enforcement of the convention more of an equal partnership between flag and coastal states. First, it has pressed at preparatory meetings for the Conference to have the term 'territorial sea' altered to 'waters under its jurisdiction' followed by a saving clause similar to that in the Ocean Dumping Convention which leaves the resolution of the jurisdictional issues to the LOS Conference. Secondly, it has introduced a novel 'port state jurisdiction' concept which would allow a state the right to enforce the convention against ships which are found in its ports and which have contravened the convention anywhere.

Canada also has been active bilaterally in the environmental law field. We have joined with the United States in studying the possibilities of entering into an agreement on the settlement of disputes of an environmental nature. The studies toward such an agreement involve questions of state responsibility for environmental damage (whether caused by public or private entities); compensation for damage; the use of injunction at the international level to curtail environmental damage

and the most suitable tribunal to assess the damage and compensation. Another area of developing interest between the two countries, which is partially included in the whole area of settlement of environmental disputes, is weather modification activity. This activity has raised the possibility of an agreement between Canada and the United States which would include recognition of a duty to consult for a weather modification activity carrying a risk of harm to the other state as well as a liability clause for an activity on one side of the border having adverse effects on the other.

International Terrorism

At the 1972 session of the United Nations General Assembly, the Secretary-General requested the inclusion on the agenda of an item entitled "Measures to prevent terrorism and other forms of violence which endanger or take innocent human lives or jeopardize fundamental freedoms." Due to the inclination of many countries to interpret incorrectly this initiative as an attempt to put the lid on national liberation movements, it was only possible to inscribe the item by specifying that it would just cover acts of "international" terrorism, and that the underlying causes of terrorism, as well as measures to prevent it, would be considered. The General Assembly eventually established a 35-member Ad Hoc Committee on International Terrorism which met from July 16 to August 10, 1973 in New York to prepare "recommendations for possible co-operation for the speedy elimination of the problem." Canada voted against the resolution having co-sponsored an unsuccessful competing resolution which would have requested the International Law Commission to draft, with the highest priority, a convention on measures to prevent international terrorism. In spite of dissatisfaction with the Committee's weak mandate, however, Canada agreed to serve on the Ad Hoc Committee.

In the Canadian observations submitted to the Secretary-General in the spring of 1973 and during the session of the Ad Hoc Committee, Canada took the position that although the underlying causes of terrorism should be studied, this should not delay the taking of immediate effective measures to prevent acts of international terrorism, such as the approval of a new international convention.

Given the weakness and ambiguity of its mandate, the Ad Hoc Committee ended its session without being able to reach agreement on any

specific recommendations to the General Assembly for future action on measures to prevent international terrorism. The thrust of the Ad Hoc Committee was diverted from consideration of measures against acts of terrorism committed by individuals or groups to acts of "state terrorism" and the legitimacy of counter-struggle by national liberation movements and oppressed or occupied peoples.

Faced with the inability of the Ad Hoc Committee to agree on any specific recommendations, the General Assembly will have to review the situation at its 1973 session and decide what further steps might be taken and whether the Committee's mandate should be renewed.

Air Law - Unlawful Interference with Civil Aviation

Canada has been in the forefront of national, bilateral and multilateral efforts to combat the serious dangers and inconvenience posed by acts of unlawful interference with civil aviation. At the multilateral level, Canada made significant contributions to the negotiation, under the auspices of the International Civil Aviation Organization (ICAO), of three important international conventions to which Canada is a party: the 1963 Tokyo Convention, which, inter alia, obliges Contracting States to permit hijacked passengers and crew to continue their journey as soon as practicable, and to return hijacked aircraft and cargo; the 1970 Hague Convention, which gives Contracting States in whose territory an alleged hijacker is found the option of either extraditing or prosecuting him; and the 1971 Montreal Convention, which gives Contracting States in whose territory an offender, alleged to have committed an armed attack or act of sabotage, is found, the option of either extraditing or prosecuting him.

Since 1970 Canada and the U.S.A. have been trying to secure the approval of a fourth multilateral convention which would create international machinery for investigating, determining fault and taking "joint action" (such as by the suspension of air services) in cases in which states fail to live up to the obligations contained in the Tokyo, Hague and Montreal Conventions. In April, 1971 representatives of Canada and the U.S.A. presented a working paper, to an ICAO Legal Sub-Committee, containing the draft text of such a convention. However, after the initiative encountered opposition from a number of countries including the U.S.S.R., France and Arab countries, in the summer of 1971 the ICAO Assembly voted, over the opposition of Canada, to remove the subject from the active list on the ICAO Legal Committee's work programme.

In the aftermath of the Lod Airport massacre, the ICAO Council again assigned a high priority to the question of a "joint action" convention. On June 19, 1972 the Council adopted a resolution, proposed by the U.S.A. and co-sponsored by Canada, directing the ICAO Legal Committee "... to convene immediately a Special Sub-Committee to work on the preparation of an international convention to establish appropriate multilateral procedures within the ICAO framework for determining whether there is a need for joint action..." The Special Legal Sub-Committee met in Washington from September 4 to 15, 1972. Although some states continued to oppose any type of joint action against defaulting states, the Special Sub-Committee was at least able to agree that the preparation of an international convention was "ripe" for consideration by the ICAO Legal Committee.

The ICAO Legal Committee met in Montreal from January 9 to 30, 1973 to consider the Washington report. It soon became clear that a majority of states was unwilling to go as far in any new convention as Canada and the U.S.A. would have preferred. The majority decided in principle that any new convention should not authorize the taking of action against states not party to the convention, nor the investigation of the behaviour of states not party to the convention without the consent of that state. Although it looked like the Legal Committee might get completely bogged down due to the negative stand taken by the Arab and many developing countries, it was finally possible for the Committee to recommend to the ICAO Council to:

(i) Submit to an extraordinary session of the ICAO Assembly two proposals for amending the ICAO Constitution (Chicago Convention):

- a <u>French draft</u>, which would incorporate the Hague Convention offences into the Chicago Convention but would not expand the presently ineffective sanctions authorized under the

Chicago Convention other than by providing that, under Article 94(b) of the Chicago Convention, any state which does not ratify the amendments within a specified time after the amendments have come into force shall cease to be a member of ICAO, and

- a Swiss/U.K.draft, which would incorporate both the Hague and Montreal Convention offences into the Chicago Convention, authorize the ICAO Council to investigate breaches and determine fault, and permit, inter alia, the suspension of air services against offending states; and

(ii) convene, at the same time and place as the ICAO Assembly, a diplomatic conference to consider two proposals:

- a Nordic draft for a new convention, which would authorize the ICAO Council, using a Commission of Experts appointed by it, to investigate incidents, and permit the Council on the basis of this investigation, to determine fault and "recommend" measures to remedy the situation provided that the offending state is a party to the convention or consents to the investigation. If the Council did not reach a decision or if the offending state did not comply with the Council's recommendations, the ICAO Secretary-General could convene a conference which might also "recommend" measures to remedy the situation; and
- Soviet draft protocols to the Hague and Montreal Conventions, which would require states party to the protocols to agree to extradite hijackers to the state of registry of the aircraft without the option to prosecute instead of extraditing.

On March 5, 1973 the ICAO Council decided to schedule the Diplomatic Conference and Extraordinary Assembly at FAO Headquarters in Rome from August 28 to September 21.

Canada/Cuba Hijacking Agreement of February 15, 1973

In 1969 the Cuban Government, which has been unwilling to become a party to the multilateral conventions dealing with various aspects of unlawful interference with civil aviation, invited any countries wishing to do so to negotiate with it on a bilateral basis. Canada, the U.S.A. and Mexico took up this invitation in 1969. A Canadian Delegation went to Havana in February, 1971 where detailed consideration was given to a Canadian draft text. As agreed during the Havana talks, Canadian officials revised the text and transmitted it to the Cuban Government in March, 1972 with an invitation to send a Cuban Delegation to Ottawa.

At the end of November, 1972 and early in December, the Cuban Government gave identical draft texts to the U.S.A., Mexico and Canada. The U.S.A. Government negotiated through the Swiss Ambassador in Havana. The Canadian Government sent a member of the Legal Bureau to Havana in December to assist the Canadian Ambassador in seeking clarification of details of the Cuban text, and sent a delegation to Havana from February 5 - 12 headed by the Department of External Affairs Legal Adviser. The Canada/Cuba Agreement and a U.S.A./Cuba memo of understanding were signed on February 15, the former in Ottawa and the latter in Washington, D.C. and Havana. Mexico and Cuba signed an agreement on June 7, 1973.

These agreements appear to be having an important deterrent effect against potential hijackings to Cuba.

Protection of Diplomats

Further to a decision of the 26th U.N. General Assembly, the Secretary General in January 1972 invited member States to submit their comments on the question of the protection of diplomats for transmission to the International Law Commission (ILC). In its comments of April 1972 Canada expressed the basic view, stressed in the following excerpt, that a Convention on this subject should be adopted and that the greatest value of such a convention would be in its deterrent effect:

> "The attacks of a new kind against diplomatic and consular inviolability which we have been witnessing in recent years must be countered in every appropriate way. It is the Canadian Government's opinion that an international convention to ensure the inviolability traditionally accorded by international law to those professionally engaged in international relations is highly desirable. (...) The deterrent effect is the most important feature of any convention intended to ensure the security of international relations through better protection of diplomats (...)".

In July 1972 the ILC produced "Draft articles on the prevention and punishment of crimes against diplomatic agents and other internationally protected persons". As in the related Montreal and the Hague conventions on hijacking, in essence the draft articles require each State party either to extradite or submit for prosecution, any alleged offender found on its territory.

In October 1972 these draft articles were the object of a preliminary discussion in the Sixth Committee of the 27th U.N. General Assembly. In its intervention on October 6, 1972 the Canadian Representative in the Sixth Committee expressed general acceptance of the draft, and further said:

> "We are aware of the heavy pressure upon governments which arises when a diplomat or an important dignitary of a foreign state is kidnapped. We consider, however, that it is essential, if we are to deter such offences in the future, to make clear that all states are prepared to act firmly in both the prevention and punishment for such offences."

By Resolution 2926 (XXVII) of November 28, 1973 the 27th General Assembly requested comments from states on the draft with a view to the final elaboration of the Convention at the 28th session.

In its further comments, submitted on July 5, 1973, Canada reiterated its general support for the draft, and stressed the desirability and the urgency of adopting definitively the Convention at the 28th session of the General Assembly. It was also suggested that the draft be amended to bring the text more in line with the Montreal and the Hague Conventions on unlawful interference with civil aviation.

This item is seen by Canada as having very high priority in the work of the Sixth Committee this fall. There are indications that the discussions may lead to a positive outcome.

Humanitarian Law in Armed Conflicts

(a) Up-Dating of 1949 Geneva Conventions

The Legal Bureau has been working closely with the Judge Advocate General's Office of the Department of National Defence (DND) and the Canadian Red Cross Society in the different stages of diplomatic activity, under the auspices of the International Committee of the Red Cross (ICRC), which it is hoped will lead to adoption in 1974 of two Protocols adapting the four Geneva Conventions of August 12, 1949 for the Protection of War Victims to the realities of contemporary armed conflict situations.

To its credit the ICRC was among the first to recognize the inadequacies of the Geneva Conventions. At the 21st International Conference of the Red Cross in Istanbul in September, 1969, the ICRC tabled a report entitled "Reaffirmation and Development of the Laws and Customs Applicable in Armed Conflicts." At the Conference Canada and Sweden co-sponsored a resolution requesting the ICRC to propose as soon as possible concrete rules to supplement existing humanitarian law, submit these proposals to governments for comment, and, if desirable, recommend the convening of diplomatic conferences of States Parties to the Geneva Conventions and other interested states to elaborate international legal instruments incorporating these proposals. Canada also co-sponsored a resolution recalling the unfortunate fact that since 1949 non-international armed conflicts had been increasing, and requesting the ICRC, with the co-operation of government experts, to devote special attention to this subject.

Encouraged by the United Nations Secretary-General, the ICRC

convened a First Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts in Geneva in May, 1971. The ICRC prepared extensive background documentation for the Conference. 39 governments provided delegations composed of some 200 diplomatic, legal, military and medical experts. The Canadian Delegation was composed of senior officers from the Legal Bureau and the Office of the Judge Advocate General of DND. Among other things the Delegation promoted vigorously the view that, building upon common Article 3 of the 1949 Geneva Conventions, there should be a basic minimum standard of humanitarian treatment applied in all armed conflict situations whether these are characterized as "international" or "non-international". The Canadian experts presented a draft protocol embodying this concept for which a number of other experts expressed support.

On the basis of the comments of government experts and further statements made by governments during consideration of this subject in the Third (Social and Human Rights) Committee at the 1971 session of the United Nations General Assembly, the ICRC formulated two draft protocols, and accompanying commentaries, to the Geneva Conventions - one, concerning international armed conflicts and the other, which was based on the draft proposed by Canada at the First Conference but which went far beyond the Canadian draft by introducing rules of combat as opposed to purely humanitarian rules, concerning armed conflicts not of an international character. After a preparatory meeting of National Red Cross experts in Vienna in March, 1972, the ICRC convened a Second Conference of Government Experts in Geneva from May 3 to June 3, 1972 to consider the two draft protocols. Over 460 experts attended from 76 states as well as observers from the United Nations and interested non-governmental organizations.

At the Second ICRC Conference Commission II, which as at the First Conference was chaired by a Canadian expert, reviewed the second

draft protocol dealing with non-international armed conflicts. Although the necessity for developing common Article 3 of the 1949 Geneva Conventions was largely accepted by the experts, the question of whether this should be done in a separate second protocol was discussed actively. Some declared that the victims of international and non-international armed conflicts should be equally protected by a single protocol, but most believed that the nature, conditions and fundamental differences of non-international conflicts necessitated separate treatment. It was generally agreed that whenever possible the language of the two protocols should be similar.

The second draft protocol was defined to apply to all situations where hostilities of a collective nature occurred between "organized armed forces under the command of a responsible authority." As at the First Conference, experts differed over whether the application of the protocol should cover internal armed conflicts of relatively low intensity, or should be limited to conflicts of high intensity where both parties, including the rebels, have at least quasi-governmental authority, control of some territory and the capacity to abide by the protocol. Some experts considered that "wars of national liberation" were international in nature and thus to be excluded from the second protocol and treated differently from conflicts of secession or dismemberment of a territory.

Practically all experts agreed on the need to provide captured combatants with elements of humane treatment not now provided for in common Article 3. Although some favoured the granting of prisoner of war status, as in the Third Geneva Convention, to guerrilla fighters and other persons meeting certain minimum requirements, most favoured the more basic treatment extended to civilians deprived of their freedom for acts connected with the conflict. Some experts favoured the abolition of the death penalty

for combatants who had respected the essential provisions of the laws of armed conflict. Others considered that the execution of combatants should simply be suspended until the termination of hostilities in the expectation that a general amnesty would then be granted.

Although many outstanding points remained to be resolved, considerable progress was registered at the Second ICRC Conference in further identifying and clarifying the main issues. On the basis of the work of the Second Conference and consideration of this subject in the Sixth (Legal) Committee at the 1972 session of the U.N. General Assembly, the ICRC has recently revised its two draft protocols and distributed them to States Parties to the 1949 Geneva Conventions. The Swiss Government, in collaboration with the ICRC, has convened a diplomatic conference in Geneva from February 22 to March 28, 1974 which, it is hoped, will adopt final versions of the two protocols. The revised protocols will be one of the subjects which will be examined at the 22nd International Conference of the Red Cross in Tehran in November, 1973.

(b) Draft Convention on Protection of Journalists

For the past three years, spearheaded by France, the United Nations General Assembly's Commission on Human Rights and Third Committee have been elaborating a Draft Convention on the Protection of Journalists Engaged in Dangerous Professional Missions in Areas of Armed Conflict.

Canada was one of a number of countries which expressed the fear that the granting of special protection to an increasing number of categories might weaken the general protection due to the civilian population (including journalists) by reason of the 1949 Geneva Conventions (especially the Fourth Convention on Protection of Civilian Persons in Time of War) and the Protocols which are now being worked out.

However, Canada also realizes that it is in the common interest to facilitate the spread of information concerning armed conflicts in order to enhance the possibilities for settling disputes peacefully as well as to contribute to the more effective implementation of humanitarian law in armed conflicts. Moreover, journalists on dangerous missions differ from the general civilian population in that journalists must run risks voluntarily whereas civilians are usually involuntary victims of circumstances beyond their control.

The Second ICRC Conference of Government Experts was not able to spend much time on the protection of journalists. Since it appears that a majority of states believes that there should be a separate convention granting special protection to journalists, the Canadian Delegation to the 1973 session of the General Assembly's Third Committee will be cooperating with other delegations in proposing improvements to the Draft Convention to ensure that the details of the special protection afforded to journalists will be realistic and effective.

(c) Conventional Weapons and the Civilian Population

At the First ICRC Conference of Government Experts a number of countries led by Sweden proposed that the use of types of conventional weapons which are particularly dangerous to civilians should be outlawed in one of the protocols now being worked out to the 1949 Geneva Conventions. During consideration of "Human Rights in Armed Conflicts" in the Third Committee at the 1971 session of the United Nations General Assembly, Sweden tabled a resolution which, inter alia, requested the Secretary-General to prepare a report on napalm and other incendiary weapons, and invited the Second ICRC Conference "to devote special attention to...

legal restraints and restrictions on certain methods of warfare and weapons that have proved particularly perilous to civilians..." The Secretary-General's report on napalm and other incendiary weapons was given preliminary consideration at the 1972 session of the General Assembly in the First (Disarmament) Committee.

At the Second ICRC Conference of Government Experts, Sweden and 18 other countries proposed that "the ICRC should arrange a special meeting to consult with legal, military and medical experts on the question of express prohibitions or limitations of use of such conventional weapons as may cause unnecessary suffering or be indiscriminate in their effect." The Canadian intervention on this question was influential in persuading the ICRC that its report should confine itself to creating a solid factual basis for subsequent discussion of this subject in the most appropriate forum. This was consistent with the position taken in the Canadian comments on "Respect for Human Rights in Armed Conflicts" submitted to the United Nations Secretary-General in June, 1971 when the view was expressed that examination of a ban on the use of particular types of weapons "might best be left for resolution by the international fora directly concerned with disarmament."

In February, 1973 the ICRC convened a meeting in Geneva of medical, military and legal experts to assist the ICRC in preparing a documentary report on the problem, use and effect of "such conventional weapons as may cause unnecessary suffering or strike indiscriminately." It is expected that the ICRC's report will be circulated in October, 1973.

Definition of Aggression

The search for a generally acceptable definition of aggression has been going on since 1927 when the League of Nations first took up the task. More recently, since 1968 there have been annual sessions of the 35-member United Nations Special Committee on the Question of Defining Aggression on which Canada is represented. The sixth session was held in Geneva from April 25 to May 30, 1973.

In spite of the unwillingness at past sessions of the non-aligned members to explore the middle ground between the Soviet and non-aligned draft definitions, on the one hand, and the Western draft definition (Canada, U.S.A., U.K. Australia, Japan and Italy), on the other hand, a real attempt was made at the last session to bridge differences. At the 1973 session, a number of non-aligned countries (led by Ghana, Guyana, and Cyprus) abandoned extreme positions favoured by the more extreme representatives of the non-aligned group, and made a number of proposals which could form the basis of an acceptable "package" acceptable since the overriding discretion of the Security Council to determine an act of aggression would not be undermined.

In its report the Special Committee noted with satisfaction the further progress made during the 1973 session, and expressed the belief that such progress makes it "a practical possibility" to elaborate a generally acceptable definition at its 1974 session. It therefore recommended that at its 1973 session the United Nations General Assembly should invite the Special Committee to resume its work as soon as possible but not later than in 1974. It is expected that the General Assembly will approve the holding of another session of the Special Committee in 1974 in New York.

Outer Space Law

The Legal Bureau, which is represented on the Interdepartmental Space Committee's Sub-Committee on the International Aspects of Space Policy, coordinates Canadian participation in the legal aspects of the work of the United Nations Committee on the Peaceful Uses of Outer Space (Outer Space Committee) and its Legal Sub-Committee. The following are some of the main subjects currently or recently under consideration:

(a) International Liability Convention

After many years of difficult negotiation in the Outer Space Committee and its Legal Sub-Committee, on the recommendation of the Outer Space Committee the 1971 session of the United Nations General Assembly endorsed the Convention on International Liability for Damage Caused by Space Objects. Canada, Iran, Japan and Sweden were the only countries who abstained in the vote on the resolution commending the Convention. These countries expressed the view that the Convention was not sufficiently "victim-oriented" as it does not refer specifically to the law of the place where the damage occurs as the applicable law to determine the measure of compensation, and does not provide for binding arbitration in the event that the states directly concerned cannot reach agreement on responsibility for damage and the amount of compensation. These features were not included in the "compromise package" agreed to between the U.S.A. and U.S.S.R. at the 1971 session of the Legal Sub-Committee.

Most countries, while willing to endorse the Convention on the grounds that it was the best compromise achievable, would have preferred arbitration awards to be binding rather than merely recommendatory. Accordingly, Canada proposed in the General Assembly's First Committee

that states consider making declarations, when they sign or ratify the Convention, to accept arbitration decisions as binding vis-à-vis any state which makes a reciprocal declaration. This option was incorporated in the resolution endorsing the Convention.

(b) Canada/France Draft Registration Convention

At the 1972 session of the Legal Sub-Committee, the Canadian delegation tabled a Draft Convention on the Registration of Objects Launched into Outer Space providing for the establishment of an international system for registering all objects launched into outer space. In 1968 France had also tabled a draft convention but the emphasis in their draft had been on national registers rather than on an international register. The Canadian and French delegations were able to combine their separate drafts into a joint draft which was given detailed consideration by a working group of the whole. Although the U.S.A. and U.S.S.R. were not enthusiastic about the idea of a compulsory registration system, they were not obstructive. Accordingly, although no agreement was reached on some details in the joint draft, most of the important principles were accepted. For example, although it was not possible to reach agreement on the type of detailed information to be provided to the United Nations Secretary-General, there was no objection to the principle of furnishing information on objects launched into outer space. At its 1972 session the General Assembly noted the progress made by the Legal Sub-Committee and agreed that at its 1973 session the Legal Sub-Committee should pursue, as a matter of priority, its work on the draft convention.

At the 1973 session of the Legal Sub-Committee, the Canadian

and French delegations presented a revised version of their joint draft convention taking into account suggestions made at the 1972 session and in consultations since then with a number of interested countries. It was possible to reach general agreement on the details of the draft convention except on two questions: (1) whether the convention should contain a clause providing for some sort of "review" of the convention after it has been in force for a number of years; and (2) whether the convention should provide for the "marking" of space objects by launching states. Agreement was later reached on an appropriate review clause at the 1973 session of the Outer Space Committee, but the question of marking remains to be resolved either at the 1973 session of the General Assembly or, more likely, at the 1974 session of the Legal Sub-Committee.

(c) Draft Moon Treaty

The 1973 session of the Legal Sub-Committee gave further consideration to the U.S.S.R. and U.S.A. texts of the draft treaty relating to the moon, pursuant to the original initiative of the U.S.S.R. at the 1971 session of the U.N. General Assembly. Unfortunately little progress was made at the 1973 Legal Sub-Committee session toward completion of a final text of a draft agreement primarily because of fundamental differences of opinion on a number of issues, which are briefly outlined below.

(i) Scope of the treaty

Although the U.S.A. called for explicit mention of other celestial bodies in the title, preamble and operative provisions of the draft treaty, the U.S.S.R. insisted that the moon be the exclusive or at least primary object of the treaty. A compromise suggestion by Sweden that the treaty be restricted to the solar system failed for lack of agreement as to how to formulate this expansion of scope.

(ii) Proprietary rights in the moon's natural resources

Article II of the 1967 Outer Space Treaty which contains the principle of non appropriation of the moon, is intentionally silent on the question of the exploitation of the moon's resources. At the 1972 meeting of the Legal Sub-Committee the U.S.S.R. had strongly opposed incorporation of the concept that "the natural resources of the moon and other celestial bodies shall be the common heritage of all mankind." The Canadian delegation had expressed the view that the treaty should affirm this principle, but at an appropriate future time it would be necessary to establish an international régime and generally agreeable institutional arrangements to govern the exploitation of our common heritage. At the 1973 meeting there was disagreement between the space powers and the developing countries in particular as to whether there should be any proprietary rights in the moon's natural resources prior to the establishment of an international regulatory régime.

In the distinct hope that positions would be modified on these important points the Sub-Committee took note of some six formulations of the text on the draft Moon Treaty which had now been produced by the working group and requested the parent Outer Space Committee to make its best efforts to complete the treaty at its June session. However, the Outer Space Committee's working group on the Moon Treaty failed to make much progress on the natural resources question. The U.S.A. position on this question is that only those resources "in place" on the moon or other celestial bodies should not be the property of any state. The "in place" formulation would permit any state to acquire some rights over these resources once they have been removed, at least

prior to the establishment of an international régime. The Canadian delegation was unsuccessful in obtaining consensus support for some sort of provisional or limited right of use of resources extracted prior to the establishment of the international régime.

(d) Direct Broadcast Satellites (DBS)

A joint Canada/Sweden initiative led to the creation by the General Assembly in 1968 of the Outer Space Committee's Working Group on DBS. The Working Group has held four sessions to consider current and foreseeable developments in this field including the technological, social, cultural, political, economic and legal implications. At the 1972 session of the General Assembly, the U.S.S.R. tabled a draft international convention on principles governing the use by States of artificial earth satellites for direct television broadcasting. After noting the U.S.S.R. draft convention, the General Assembly requested the Outer Space Committee to elaborate principles with a view to concluding an international agreement or agreements.

At its fourth session in June, 1973 the Working Group considered a joint Canada/Sweden working paper containing draft principles governing direct television broadcasting by satellite. These draft principles try to establish a realistic and responsible balance between the protection of sovereign rights, on the one hand, and the facilitation of an important new technology with obvious benefits for all countries, on the other hand. The U.S.S.R. draft convention, in the view of many countries, places too much emphasis on the former at the expense of the latter. It is anticipated that at its 1973 session the General Assembly will decide that the elaboration of principles should continue at a fifth session of the Working Group to be held in Geneva from March 11 to 22, 1974 and then at the next

session of the Outer Space Committee's Legal Sub-Committee to be held in Geneva from May 6 to 31, 1974.

(e) Remote Sensing of the Earth by Satellite

At its July, 1971 session the Outer Space Committee's Scientific and Technical Sub-Committee, at the request of the General Assembly, established a Working Group on Remote Sensing of the Earth by Satellite with a mandate to review all factors relating to this new space application and to make recommendations on its optimum use in scanning resources and monitoring environmental conditions. At its preparatory session in May, 1972 the Working Group established a task force, consisting of experts from Canada, Sweden, France, India, the U.S.A. and U.S.S.R., to assist the United Nations Secretariat in preparing a background document summarizing information available on remote sensing in the field of: the state of the scientific and technical art; economic and social benefits; users' needs and priorities; legal implications; and organizational requirements. This background document was considered at the Working Group's first substantive session which was held in New York from January 29 to February 9, 1973.

At that meeting, both by way of comment on the Secretariat's background document and in discussions of the Working Group's mandate for future work, Canadian representatives stressed the need to begin work at an early stage on the development of legal principles which, while firmly based on the technical requirements of remote sensing, would strike a responsible balance between the interests of the principal entities involved in the activity i.e. sensing states, sensed states, user groups and the international community generally. These principles would govern the essential facets of remote sensing in its various phases including

the acquisition of raw data, the processing of the data into usable form, the dissemination of processed data and the interpretation of processed data. The Canadian representatives outlined various options for states rights at each of these four phases of remote sensing, emphasising that the analytical framework on which the Canadian statements were based did not prejudge the Canadian position in the future development of legal principles on remote sensing. The Canadian statements also suggested areas from related fields (e.g. domestic legislation and practice governing dissemination of scientific and commercial information) which might provide useful analogies for the development of guiding principles for remote sensing activities.

Reaction in the Working Group to the emphasis placed by Canada on the legal, as opposed to the technical, aspects of the subject ranged from those of the U.S.A. and U.K. delegations which believed that legal considerations were somewhat premature at this time in view of the experimental stage of the technology, through varying degrees of support from countries such as Sweden, Brazil, Australia, Japan and Mexico, to a call by the U.S.S.R. for quite restrictive principles emphasising State Sovereignty. At the conclusion of the session the Working Group decided to revise and expand its background document, and to focus its efforts in the immediate future on the question of dissemination of data, including the development of principles to govern such dissemination.

The tenth session of the Scientific and Technical Sub-Committee was held in New York, May 7-18, and the subject of remote sensing received priority treatment. The Sub-Committee decided to ask the Secretary-General to circulate a new and broadened questionnaire on remote sensing to all U.N. member states together with informative background material. The

Canadian delegation participated in the drafting of the questionnaire and was instrumental in having questions related to member states attitudes on organizational and legal matters included along with questions of a more technical nature.

At the Sixteen Session of the parent Outer Space Committee (June 25-July 6) it was agreed that its Legal Sub-Committee would devote part of its next session to consideration of the legal implications of remote sensing.

Role of the International Court of Justice (ICJ)

In August, 1970 Canada, Argentina, Finland, Italy, Japan, Liberia, Mexico, the U.S.A. and Uruguay asked the United Nations Secretary-General to inscribe on the agenda of the General Assembly's 1970 session a new item entitled "Review of the Role of the International Court of Justice." At the 1970 Session Canada co-sponsored a draft resolution which would have established an Ad Hoc Committee of 25 experts to study the role of the Court in order to make recommendations on enhancing the Court's effectiveness. Member States, States Parties to the Statute of the Court, and the Court itself were also invited to submit their views and suggestions to the Secretary-General. The resolution was opposed by the U.S.S.R. which felt that such a study was unnecessary. France and a number of non-aligned countries proposed a compromise resolution, which was adopted unanimously, deferring consideration of the establishment of an Ad Hoc Committee until the 1971 session but, in the interim, inviting Member States to submit to the Secretary-General their comments on the role of the Court.

At the General Assembly's 1971 session, the Sixth (Legal) Committee had before it a report of the Secretary-General containing the comments submitted by 31 countries including Canada. The U.S.S.R. expressed the view that the small number of comments received indicated a lack of interest in the subject. They maintained that if countries were not making use of the Court to settle international disputes, it was due to political considerations. It was their view that countries, although under obligation to settle disputes peacefully, were not obliged to use the Court as a means of arbitration. They could see, therefore, little use in establishing a committee to study the role of the Court. Canada

and other countries argued that the malaise surrounding the Court also sprang from other factors such as inaccessibility to the Court, the formality and length of proceedings, high costs involved in pleading cases before the Court, etc. They considered that if an Ad Hoc Committee could study these problems, it could perhaps come up with a number of generally acceptable recommendations, not necessarily involving formal amendments to the Statute of the Court, which would remove many of the Court's present drawbacks. Canada and 30 other countries again presented a resolution calling for the establishment of an Ad Hoc Committee to study the role of the Court. The U.S.S.R. presented a resolution which would have postponed further consideration of the item until the Court completed its review of its rules of procedures. A French resolution deferred a decision on the establishment of an Ad Hoc Committee until the 1972 session and, in the interim, invited states which had not yet done so to submit comments to the Secretary-General. The French draft was approved after the U.S.S.R. withdrew its resolution.

At the 1972 session of the General Assembly, it again became clear that there was not sufficient support for the creation of an Ad Hoc Committee. A French resolution was finally approved expressing satisfaction with the revisions introduced by the Court in its rules of procedure and postponing further study of the matter until the 1973 session of the General Assembly.

Espousal and Settlement of Claims

The branch of international law described variously as the law of international claims, the protection of citizens abroad or the responsibility of states for injuries to aliens is based on an elementary principle of international justice whereby a state is entitled to protect its subjects, when injured by acts contrary to international law committed by another state from whom they have been unable to obtain satisfaction through the ordinary channels.

Canadian practice in the field of international claims is of recent origin. It has evolved largely since the end of World War II as part of the gradual process of assumption by the Canadian Government of full responsibility for the conduct of Canadian foreign relations and for the protection of Canadian persons and property abroad. Assuming that they are meritorious, international claims brought to the Department of External Affairs are normally dealt with in one of four ways. If the claim appears to arise out of an isolated act of the state concerned, which has likely affected one or at most only a few Canadian citizens, and if the claimant has either exhausted local remedies or met the other normal requirements which apply, the individual claim or claims may be espoused by the government i.e. submitted to the foreign government with a demand for redress. If, on the other hand, the claim appears to arise out of one or more state acts of general application, such as nationalization decrees, if the interests of many Canadian citizens may be affected, and if no effective local remedies are available, then the claim is likely to become part of a package to be espoused by the Canadian Government and settled on a lump-sum basis. A third variant which is however little used today in Canadian practice is that of agreement

between the governments concerned to submit claims to international adjudication. A fourth possibility, less formal but often effective, is the exercise of good offices, i.e. resort to informal measures which may take a variety of forms including an enquiry by the Canadian representatives as to the present status of a dispute, a request for a review of an administrative decision, or a request for information as to the regulations or procedures which a Canadian should follow in order to press his own claim under local laws.

Before deciding either to espouse a claim or to use its good offices, the Department of External Affairs examines four elements in respect of claims submitted to it: nationality, ownership, loss and valuation. Concerning nationality, the well established rule of customary international law is that a state may only espouse the interests of persons who were its nationals continuously at all relevant times (i.e. at the time of taking, espousal and settlement). A claimant must also supply documentary evidence in support of his claim proving that he has clear title to the lost property. The third element is proof of loss which, in most cases, consists of establishing that the property was taken over by the respondent state, but which can also mean proof that the property has been placed under state administration or transferred in the name of another person or body. With regard to the effective date of the taking, there are three possibilities, the date on which a claimant lost control, the date on which title was registered in the name of the state and the effective date of the legislation or administration decree. Finally, with respect to valuation, Canadian

practice has been to follow established principles of international law under which values are normally based upon the reasonable and fair market value of the property concerned at the time of the loss.

In the past ten years, the Department of External Affairs has been especially active in negotiating claims settlements with Eastern European countries and in defending the interests of Canadian natural and juridical persons who have been subject to expropriation or nationalization measures, most often in developing countries. Bulgaria, Hungary, Poland and Czechoslovakia have now signed agreements with Canada settling long outstanding claims of Canadian citizens.

In order to negotiate an agreement with a foreign country, the Department of External Affairs collects and analyses claims of Canadian citizens containing sufficient information to identify clearly the nature and the value of the claims. Once the claims have been analysed and are considered to be bona fide, they are submitted to the other government which, in its turn, goes through the same process of analysis. In due course, some time after the submission of the claims, negotiations get under way between authorities of the two sides. It usually takes a number of rounds of negotiations spread over a period of years to achieve an agreement in the form of a lump-sum settlement. It is rarely if ever possible to reach complete agreement on the validity and valuations of all the claims in question, but sooner or later the two sides agree to what are in effect three categories of claims. The first are those which, after the exchange of information, prove to be insupportable; the second, those claims which appear to be valid; and third, those claims where there is agreement to disagree. This last category,

always the largest, is due to matters such as differences of view over legal and beneficial interest in the subject matter of the claim, the effective date of nationalization measures in relation to the date of acquisition of Canadian citizenship, and the effect of non-compliance with domestic legislation in the states concerned.

There comes a time nevertheless when the other state considers that it has exhausted its repertoire of arguments and has made up its mind what amount it is prepared to pay for a settlement of claims and the concomitant improvement of relations with Canada that such a settlement is likely to bring about. At this stage the negotiations take on a political colouration and the whole spectrum of relations between the two states becomes relevant. In point of fact, the final settlement may serve more to reflect the state of relations between the two states than the legal merits of the individual claims themselves.

In addition to such lump-sum settlements, the Legal Advisory Division of the Department of External Affairs concerns itself with particular cases of uncompensated taking of Canadian interests, most frequently with respect to corporate claims. While there is no single Canadian policy governing the Canadian Government's actions in these cases, Canada does respect the right of the state of incorporation to espouse an international claim arising out of a wrongdoing to a corporation but further recognizes a state's right to establish its own criteria for espousing the claims of its corporate nationals. Recent Canadian practice with regard to espousal of claims arising out of corporate shareholdings distinguishes four different situations. On the one hand,

in the case of a Canadian owned company incorporated under the laws of Canada which has a valid claim, the Canadian Government is able under international law and recognizes as a general policy that it has an obligation to intervene. On the other hand, Canada cannot and will not act on behalf of a company which is not registered in Canada and which is foreign owned (despite the fact that it may have a minority Canadian shareholder interest). If a company is substantially Canadian owned but is registered outside Canada, the Canadian Government is barred by international law from espousing a claim but may and usually does use its good offices in an attempt to obtain compensation. Finally, with regard to a company registered in Canada but foreign owned, the Canadian Government will probably not espouse; where, however, there is some degree of Canadian beneficial interest, then, depending on the particular circumstances, it may be prepared to use its good offices. In summary, to justify Canadian diplomatic intervention, not only is the place of incorporation and the need for a substantial Canadian interest in the company taken into consideration, but other factors such as whether or not the corporation carries on business and active trading interests in Canada and the extent to which the company is beneficially owned in Canada and whether it is operating to the benefit of the Canadian economy also carry much weight.

Recent and Current Activities

On April 18, 1973, the Government of Canada and the Government of the Czechoslovak Socialist Republic signed an Agreement Relating to the Settlement of Financial Matters. Under the terms of the Agreement,

the Government of Czechoslovakia will pay to the Government of Canada the sum of $3,250,000 in full and final settlement of Canadian claims, arising before the date of the coming into force of the Agreement, against the Government of Czechoslovakia and Czechoslovak natural and juridical persons in respect of property, rights and interests in Czechoslovakia affected by Czechoslovak measures of nationalization, expropriation, taking under administration or any other similar legislative or administrative measures. The Agreement was confirmed by an Exchange of Letters on June 22, 1973. Once the requisite Order-in-Council establishing the Foreign Claims (Czechoslovakia) Settlement Regulations has been issued, all claims that were received within the established deadlines will be referred to the Foreign Claims Commission for report and recommendations.

Various claims against the People's Republic of China have been discussed with the Chinese authorities this year. On June 4, 1973, the Government of the People's Republic of China repaid the Government of Canada the sum of $14,469,183.06 which had been loaned to the Chinese Ming Sung Industrial Company Ltd. on October 30, 1946 to finance the construction, by two Canadian companies, of nine vessels. Further discussions with the Chinese relating to other claims are proceeding in an expeditious and satisfactory manner.

The Government of Yugoslavia has now agreed in principle to look at post 1948 Canadian claims and the Department of External Affairs is presently collecting and analysing them prior to commencing negotiations with the Yugoslav authorities. The Department of External Affairs is also studying Canadian claims against Cuba with a view to holding a second round of negotiations with the Cuban authorities towards the end of 1973.

UNCITRAL - Multinational Enterprises

Following a Canadian initiative to have the U.N. Commission on International Trade Law (UNCITRAL) study trade law issues raised by the activities of multinational enterprises, the 27th Session of the U.N. General Assembly asked UNCITRAL "to seek from Governments and interested international organizations information relating to legal problems presented by the different kinds of multinational enterprises, and the implications thereof for the unification and harmonization of international trade law". The Commission was invited to consider, on the basis of the information it obtained and that which is available from other sources, including ILO, UNCTAD and ECOSOC studies, "what further steps would be appropriate in this regard". (UNGA Resolution 2928(XXVII) of November 28, 1972).

Acting on this resolution, the sixth session of UNCITRAL, held in April of this year, asked the U.N. Secretary General to

(a) submit a questionnaire to Governments and interested international organizations seeking information about legal problems presented by MNEs and suggestions of areas in respect of which measures might appropriately be taken by the Commission; and

(b) prepare a report for the Commission

(i) analysing replies to the questionnaire;

(ii) surveying available studies which disclose MNE-related problems susceptible of solution by means of uniform legal rules; and

(iii) suggesting future courses of action.

A progress report is to be submitted by the Secretary General to UNCITRAL at its seventh session.

The Secretary General's questionnaire was sent out in August. It is brief and cast in general terms. The term MNE, for the purposes of the questionnaire, includes enterprises which, through branches, subsidiaries or affiliates, engage in substantial commercial or other economic activities in countries ("host" countries) other than the country in which decision-making and control is centered (the "home" country).

The questionnaire puts six questions:

(1) In your country, have problems arisen with respect to MNEs for which a solution should be sought through the development of legal rules? If so, what is the nature of these problems?

(2) What objective should be sought through the development of legal rules?

(3) Are national laws or regulations in force or under consideration in your country which are intended to promote those objectives? If so what are their provisions?

(4) Should the objectives mentioned in reply to (2) be promoted through the development of international legal rules? If so, which of the following approaches should be used:

(a) a uniform law to be adopted by an international convention,

(b) model rules that might be employed or adapted in national legislation without the obligations of uniformity, or

(c) other possible approaches to the development of international legal rules?

(5) Do you have other information or suggestions bearing on the future course of action by UNCITRAL in this area?

Replies are to be submitted by February 1, 1974.

At the time of writing, the questionnaire had just been distributed to interested Canadian Government departments and agencies. The area covered by the queries is exceedingly broad and the preparation of the Canadian reply provides an opportunity for the statement of basic policy principles governing Canada's attitude to MNEs to which it is "host" country, keeping in mind the existence of MNEs for which Canada is the "home" country. Our experience on both sides of the relationship should enable Canada to put forward a particularly well-informed and balanced reply. The preparation of this reply is on the point of being undertaken.

Sovereign, Diplomatic and Consular Immunities

Questions involving the privileges and immunities enjoyed by the representatives of States and international organizations are dealt with as part of the responsibilities of the Advisory Section of the Legal Advisory Division. The Section has the function of determining, in specific cases which may arise, the privileges and immunities to which representatives of foreign or Commonwealth States in Canada and Canadian representatives abroad are entitled under international law, either conventional or customary. In this regard the Section works in close contact with the Protocol Division of the Department. In addition, the Section is an active participant in the task of ensuring that the right of States, diplomats, consular officials, and international organizations to immunity from the jurisdiction of municipal courts is respected.

As for more concrete examples, when for instance a foreign mission in Canada, whether consular or diplomatic, wishes to purchase an official property, it must first secure the concurrence of the Canadian Government through the Section, which will take steps to ensure whenever possible that the property is exempted from real estate taxes. In certain cases the Section will have to make sure that only a particular portion of a building, used for consular or diplomatic purposes, enjoys tax exemption and inviolability. The Section, in collaboration with our Protocol Division and the Department of Justice, also deals with the personal inviolability and immunity from jurisdiction of foreign diplomats involved in civil actions, or responsible for anything from traffic violations, even to certain criminal acts. In cases of abuse however such persons may be requested to leave Canada.

The Section is equally concerned with the status and problems of Canadian diplomatic and consular personnel abroad. It advises Canadian missions wishing either to invoke or to waive immunity from jurisdiction on their own behalf or for members of their staff involved in legal processes. Although Canadian right to immunity will often be confirmed by the Section, foreign missions and their personnel do have a duty under the Vienna conventions on diplomatic and consular relations to respect local laws. Thus the Section will also often instruct missions to waive immunity so that Canada and Canadians will not unnecessarily evade the normal course of local justice.

Apart from diplomatic and consular immunity the Section is further concerned with sovereign immunity, which may be invoked when Canada or Canadian Government agencies are involved in legal proceedings in foreign courts. For example Canada has invoked its sovereign immunity in certain legal proceedings which are under way in a Piraeus court (in Greece) against a number of defendants and which have attempted to implead Canada. These proceedings are related to a shipment by CIDA of Canadian wheat which was destined for East Pakistan, but which could not be unloaded because of the outbreak of the civil war there.

U.N. Charter of Economic Rights and Duties of States

In May 1972 the U.N. Conference on Trade and Development (UNCTAD) decided to establish a Working Group of governmental representatives of 31 (later increased to 40) member states to prepare a draft charter of the economic rights and duties of States.

The first meeting of the Working Group, held in February 1973, revealed serious divergencies of view among participants. In general the Latin Americans, frequently supported by the Africans, made the most extensive proposals. The Asians and Eastern Europeans were more moderate while the Western Europeans and the U.S.A. displayed little enthusiasm for the undertaking. The Working Group produced a draft outline envisaging a charter consisting of a preamble and chapters on (i) fundamentals of international economic relations, (ii) economic rights and duties, (iii) common responsibility toward the international community, (iv) implementation and (v) final provisions. Reflecting the widely diferring views expressed in the discussions, the draft outline contained several alternative texts on most items to which it referred.

The second meeting of the Working Group, held in July, was marked by a calmer and more co-operative atmosphere with less division along purely geographic or ideological lines. In attempting to fill out the draft outline prepared at the first session, the Working Group debates clarified many of the issues dividing its members. These issues include:

(i) permanent sovereignty over natural resources and the

related questions of foreign investment and control of multinational enterprises. Some developed countries consider established principles of international law to be fully applicable to nationalization/expropriation whereas some developing countries prefer to apply national standards to these acts. The Canadian delegation resisted an initiative of the European Community states to delete paragraphs on control of foreign investment and of multinational enterprises.

(ii) non-discrimination in trade. Developing countries seek to establish that their right to non-reciprocal preferential treatment should be established as a separate principle rather than as an exception to a general right to engage in international trade without discrimination on the basis of political, economic or social systems. European Community states continued to resist reference to non-discriminatory treatment. The Canadian delegation was concerned to ensure that acceptance of the concept of non-discrimination in international trade did not constitute general extension of MFN treatment to all countries. The delegation was satisfied that discussion of this item met Canada's concern on this point.

(iii) the legal nature of the Charter. A clear majority of the developing countries want a legally binding instrument. The Eastern Europeans seem prepared to concur. Western countries are divided on this issue, which was discussed

at length at the first session, but not at the second. Canada has not ruled out the possibility that the Charter might take the form of a binding instrument, provided its content is satisfactory.

At the conclusion of its second session the Working Group recommended that it be authorized to continue to work in 1974.

Canada regards the elaboration of the proposed charter as part of a continuing process of developing principles of international law arising out of the objectives of the U.N. Charter. The proposed economic charter could provide a basis for development of international law governing international economic relations comparable in significance to the declaration of principles of international law concerning friendly relations and co-operation among states.

Canada seeks to apply four basic criteria to proposals in the Working Group: first, that they be consistent with the principles and objectives of the U.N. Charter and the Declaration on Friendly Relations; second, that they apply universally, i.e., to the economic relations of all states; third, that they deal realistically with substantive issues of international economic co-operation; and, fourth, that they not deal with issues more appropriately dealt with in other bodies.

Canada Treaty Series

Naturally, the Treaty making activity of states has continued undiminished, both in the multilateral and bilateral fields. During the past 12 months Canada became a party to 48 Agreements, bilateral and multilateral. The Treaty Section of the Legal Advisory Division of the Department continues to maintain the Canada Treaty Registry, which records Canada's own activities in this field coupled with information concerning the position of other states parties to those Agreements. Details of Canadian treaty action, as well as answers to hundreds of enquiries regarding Agreements to which Canada may or may not be a party are provided to other Divisions of the Department of External Affairs, other Government departments and members of the public. In recent years, the programme of bringing the Canada Treaty Series into print had fallen badly behind schedule. This situation, however, has now been rectified and the texts of treaties coming into force for Canada are being printed and made available much more rapidly. Thus, all volumes of the Canada Treaty Series covering the period up to the end of 1971 are already with the Queen's Printer and it is expected that they will soon be available to the public through Information Canada.

Greenpeace

The Canadian owned vessel Greenpeace III and French naval ships have been involved in two separate incidents over the past year and a half within the zone de sécurité around Mururoa Atoll. In June 1972, the Greenpeace III was in collision with a French naval vessel on the high seas beyond French territorial waters. In August, 1973 French seamen boarded the Greenpeace III, subdued its crew and sequestered it in Mururoa itself.

Greenpeace III (1972)

This matter is a complex one, both in law and as to the facts. Mr. McTaggart, the owner and skipper, alleges that his boat, the Greenpeace III, was rammed by a French naval vessel and that this was due to the fault of the French. On the other hand, the French authorities have since stated that the collision was due to Mr. McTaggart's fault and they have denied responsibility for it. The fact that the incident occurred on the high seas, beyond any national jurisdiction, and that it took place within an area of the high seas that the French had announced was to be closed because of nuclear testing activities, has created additional legal complications, both in terms of domestic and international law.

The Canadian authorities had been made aware of Mr. McTaggart's trip to the zone before his departure from New Zealand and we have been in almost constant contact with him or with his lawyers since the accident.

As to the background of the 1972 incident, in brief, Mr. McTaggart a Canadian citizen, is the owner of a sailing ship, the Greenpeace III, formerly Vega, which (because of its small size) was not registered here in Canada or in New Zealand, where the vessel was normally kept. Mr. McTaggart left New Zealand in the Greenpeace III at the end of April 1972, having stated his intention to sail into the French nuclear testing area

around Mururoa. In mid-May, he took on supplies at Rarotonga, in the Cook Islands, and by May 31st, was apparently some 120 miles West of Mururoa and then entered the nuclear testing zone. He remained there for the month of June, subject to occasional air and naval surveillance by the French. From time to time he was in communication with the French authorities and he has alleged that he was sometimes harassed by French naval vessels. On June 30th a collision occurred between the Greenpeace III and a French vessel, La Paimpolaise, which caused considerable damage to the former. Mr. McTaggart eventually agreed with the French authorities that he should be towed into Mururoa, where the French would carry out certain temporary repairs to his boat. He has stated that on July 4th he was ordered to leave and, despite the fact that the Greenpeace III was still leaking, that he was denied permission to call at Tahiti. He therefore sailed back to Rarotonga and arrived there on July 15th. In due course, on November 13, 1972 his attorneys submitted a claim for damages and out-of-pocket expenses to the French authorities. In their reply of March 28, 1973 the French denied responsibility and declined any liability.

In view of the circumstances surrounding the 1972 incident, the Canadian Government had decided that it would be proper to use good offices with the French Government in an effort to have the matter resolved in a satisfactory manner. With these considerations in mind an official of the Department of External Affairs visited Mr. McTaggart in Vancouver late in 1972. The same official later went to Paris, where he was able to exchange views with officials of the French Foreign Ministry. From time to time, since then, both before and after the French denial of responsibility, Canadian and French officials have been in further contact about the matter and have continued to discuss it. The latest Canadian demarche was incorporated in a note delivered to the French Foreign

Ministry by our Embassy in Paris on June 6th, seeking to have the French reconsider their position. This they have so far declined to do. A related subject, which has been examined by our own lawyers, here and in France, is the possibility of Mr. McTaggart seeking legal redress through the French Courts.

Greenpeace III (1973)

On September 14th, the Secretary of State for External Affairs, the Honourable Mitchell Sharp, issued a statement about the recent incident concerning the vessel Greenpeace III. In this statement he expressed the view that:

> "Mr. McTaggart is a private Canadian citizen with a legitimate grievance against the French Government, one who is at a distinct disadvantage because he cannot effectively pursue his claim without the Canadian Government providing, as at present, moral and diplomatic support to this end."
>
> "As soon as the Canadian Government learned about this incident, we informed the French authorities not only that we considered that the creation of zones of security, for the purpose of nuclear tests, was an abuse of the freedom of the high seas, but also that we regarded the actions of the French seamen in boarding the ship in international waters, subduing the crew and removing it by force, as being a clear violation of international law."

After referring to consular assitance provided to Mr. McTaggart, Mr. Sharp added:

> "The French Ambassador was called in on two occasions, on the second of which I handed over to him a formal diplomatic note. We have asked that a full investigation take place to establish the true facts of the case and we are continuing to seek further

information both from the French Government and from the 'Greenpeace' crew members to this end."

"We fully support and endorse Mr. McTaggart's claim. If the information which we are in the process of collecting from the 'Greenpeace' crew, together with that which we expect to receive in due course from the French authorities should, in our opinion, justify formal espousal of his claim, which would thus be raised to the Government-to-Government level, the Canadian Government would be quite prepared to do this. I believe, however, that until we have received all the depositions from the crew and until the French authorities have had an opportunity to respond to our formal request for an investigation, this would be premature."