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Canadian Practice in International Law during 1972 as Reflected Mainly in Public Correspondence and Statements of the Department of External Affairs

Edited by

J.A. BEESLEY

J.A. Beesley was Legal Adviser, Department of External Affairs until August, 1973 when he was appointed as Canadian Ambassador to Austria. The extracts from official correspondence contained in this survey have been made available by courtesy of the Department of External Affairs. Material appearing in the House of Commons Debates is not included. Some of the correspondence from which extracts are given was provided for the general guidance of the enquirer in relation to specific facts which are often not described in full in the extracts contained in this compilation. The statements of law and practice should not necessarily be regarded as a definitive general statement by the Department of External Affairs of that law or practice.

LAW OF THE SEA

General

In a statement delivered on November 30, 1972 Mr. J.A. Beesley, Canadian Representative on the First Committee of the United Nations General Assembly, said:

In the view of the Canadian Delegation, the general willingness of states to reconsider their rights and obligations as they are affected by both new and traditional uses of the seas is the major development in the field of international law over recent years. Only developments in the law of outer space and of the environment can come close to ranking in importance with this trend. The Law of the Sea has for centuries reflected the common interest in freedom of navigation. Only in the past two decades has it begun to reflect the common interest in the resources of the seabed. Only in the last decade has it begun to reflect the common interest in conserving the living resources of the sea. Only in the past few years has it begun to reflect the common interest in the preservation of the marine environment itself. Only in the past few years have we even begun to think of an international régime for the area of the seabed beyond national jurisdiction. The law is, however, beginning to change. It has already been altered by state practice and it will be transformed further by any successful Law of the Sea Conference.

...The Canadian Delegation has suggested the concepts of "custodianship" by coastal states and of "delegation of powers" by maritime states as the possible basis of the new régime for the Law of the Sea. Whether or not these terms find their way into the emerging doctrines of international law, the conceptual approach which they reflect is, in our view, already embodied in such proposals as the "economic zone" and the "patrimonial sea". These proposals illustrate clearly that ocean space will no longer be divided in an arbitrary fashion between two distinct zones, one under national sovereignty, the other belonging to no one. No longer will the Law of the Sea be based solely on conflicting rights. No longer will the high seas be subject only to the roving jurisdiction of flag states. The concept of management of ocean space reflected in the decisions at Stockholm, in the proposals in the Seabed Committee, and the Convention drafted at the London Ocean Dumping Conference are a clear indication of the direction of the future Law of the Sea.

...It seems evident that the embryo of an overall accommodation lies in agreement upon a very narrow band of coastal seas subject to complete sovereignty and a wider band of specialized jurisdictions, extending as far as necessary to meet particular objectives, which in principle could have varied limits but in practice might well together comprise a single "economic zone" or "patrimonial sea". The narrow band of sovereignty or territorial sea could be established as extending only to 12 miles, as so many states, including my own, have already accepted. But no one should regard the figure "12", which is, after all, a simple multiple of 3, as sacrosanct, and it may be that an even narrower, generally accepted limit might - if coupled with the "economic zone" concept - facilitate the resolution of this and other related difficulties, such as, for instance, passage through international straits.

To put it simply, Mr. Chairman, we consider that the concept of "economic zone" is the keystone to any overall accommodation on the Law of the Sea. Differences of views may exist concerning the precise nature and extent of jurisdiction to be asserted but it is evident that there can be no solution which is not based on the "economic zone" approach. This presupposes a willingness on the part of major maritime powers to acquiesce in new forms of jurisdiction by coastal states embodying both rights and obligations, elaborated in treaty form, and subject, we would hope, to third-party adjudication concerning the application of these rights and obligations. With respect to coastal states, such an accommodation would presuppose, as a minimum, a willingness to recognize the interests of the international community as a whole, and particularly the major marine states, in freedom of navigation through such zones. Undoubtedly such an economic zone would have to include jurisdiction over the living resources of the sea, which, if not exclusive, would at least include coastal state preferential rights, plus pollution control jurisdiction and sovereign rights over the resources of the seabed of the economic zone. It may be that the continental shelf would extend in some areas beyond the economic zone. In return for acquiescence by other states in these forms of jurisdiction by coastal states, coastal states would accept a narrow territorial sea.

Fisheries

On July 27, 1972 the Delegation of Canada to the United Nations Seabed Committee tabled a working paper on the management of the living resources of the sea. This document outlined and elaborated the principles which Canada believed should form the basis of a system of coastal state management of the fisheries adjacent to its coast. Introducing the working paper on July 28, Dr. A.W.H. Needler, Deputy Representative of Canada to the Seabed Committee, described the Canadian position as follows:

...The Canadian working paper is based on what we view as the functional approach to management of the living resources of the sea. It outlines the relationship between fisheries management and management of the marine environment as a whole. In developing that functional approach, it differentiates between various species and proposes a system of coastal state management of the coastal species, that is the non-sedentary, free-swimming fish which inhabit nutrient-rich areas adjacent to the coast such as, for example, the continental shelf in certain areas and the Humbolt Current in other areas. The working paper also emphasizes the special situation pertaining with respect to anadromous species such as salmon for which Canada proposes a system of coastal state management and, in principle, exclusive utilization. The fundamental principle advanced in the Canadian working paper in respect of the management of coastal species is as follows:

The coastal state has a special interest in and responsibility for the conservation of the living resources of the sea adjacent to its coast and should have the authority required to manage those resources in a manner consistent with its special interest and responsibility, as well as preferential rights in the harvest of such resources.

As regards the limits of the area over which the coastal state would exercise the management authority envisaged under this fundamental principle, the working paper notes that some form of geographic delimitation of authority, related to the relevant biological limits of species distribution, may be necessary.

I wish to emphasize...that the concept of coastal state management of coastal species is not inconsistent with nor an alternative to the concept of an economic zone, or the patrimonial sea as it has recently been described to us... The two approaches are not mutually exclusive. Indeed, the Canadian fisheries management approach represents a particular application of the concept underlying the economic zone, namely specialized jurisdiction for the management of the marine environment and the exploitation of its resources in areas adjacent to the 12-mile territorial sea. What is essential is that the régime we establish must satisfy criteria for sound management as well as the relevant legal, political and economic considerations.

The coastal state's right to exploit the fisheries of adjacent areas might be either preferential or exclusive. Canada has suggested the preferential approach. It should be noted, however, that under the preferential rights approach recommended by Canada the coastal state could reserve to itself as much as 100% of the catch of a particular species. More important still, it would also be noted that under the preferential rights approach as advanced by Canada the coastal state's management and regulatory jurisdiction would be exclusive even if its right to exploit the fisheries was not wholly exclusive.

...The Canadian working paper..goes on to elaborate a number of basic management principles as guidelines for the exercise of fisheries authority by the coastal state beyond the limits of its territorial sea. These guidelines relate to such questions as (a) the allocation of shares among participants in fisheries under the management of the coastal state in areas adjacent to the territorial sea, subject to the coastal state's predominating preferential rights, (b) the coastal state's control of access to these fisheries, (c) the coastal state's responsibility to report on the exercise of its management authority, and (d) the need for appropriate dispute-settlement procedures. The working paper emphasizes that all of these guidelines for the exercise of management authority by the coastal state are subject to the overriding principle of the special interests and rights of the coastal state, which may necessitate modification of the management guidelines in particular fisheries.

...The Canadian working paper recognizes that any system of fisheries management must be founded upon basic scientific principles. This is also true, of course, in the case of the coastal state management system proposed by Canada. It must be emphasized, however, that such scientific principles do not of themselves determine the nature of the juridical and jurisdictional resolution of the problems of international fisheries. These scientific principles are tools to be used by whatever management authority may be established after the process of resolving juridical and jurisdictional problems has been concluded. Hence, having outlined the particular resolution of these problems advocated by Canada, namely the management of coastal species by the coastal state, the Canadian working paper nonetheless is intended to provide some scientific principles which are necessary to ensure maintenance of the productivity of fisheries resources and the value of their yield whatever the management authority selected. Scientific principles must be continually updated and reviewed as particular fisheries respond to fishing pressures and to alterations, both natural and man-made, in the marine environment.

Marine Scientific Research

Introducing a Canadian working paper on marine scientific research to the United Nations Seabed Committee, on August 7, 1972 Dr. A.W. May, Alternate Representative of Canada to the Seabed Committee, said:

...The Canadian working paper attempts to find an accommodation not only between various national interests but also between national interests and the vital interests of the world community in unfettered scientific inquiry... Thus our paper emphasizes the rights of coastal states, but it emphasizes also that all states, whether coastal or not, have the right to conduct or authorize scientific research in the marine environment. It also emphasizes however that coastal states have the right to regulate and participate in scientific research carried out in areas within their jurisdiction, but it emphasizes also that they share in the responsibility to further the growth of marine scientific research and obviate interference with its progress.

The Canadian Delegation recognizes that there may be legitimate fears that coastal states might arbitrarily withhold or unreasonably delay their consent to research programmes in maritime areas under their jurisdiction. For our part we consider that arbitrary refusal, or frustration by red tape, of a scientific programme which meets all reasonable criteria would not be to anyone's advantage; our working paper minimizes such possibilities by calling for the elaboration of international rules to facilitate research and by providing that the coastal state should reply promptly to requests for permission to conduct scientific investigations.

...It is generally recognized that it is difficult to distinguish between so-called "pure" scientific research and commercial exploration, or between research for peaceful purposes and research for military purposes. It is to this basic difficulty that we owe many of the political and juridical difficulties of marine scientific research, particularly in areas under national jurisdiction. States naturally wish to control activities which might have a bearing on the development of their resources or on their security. With these factors in mind the Canadian working paper advances a broad and comprehensive definition of marine scientific research without attempting to differentiate between the purposes and motives for which it may be carried out. The coastal state's right to regulate would apply to all acitivities falling within that comprehensive definition. Here I would draw particular attention to principle 12 of the Canadian working paper. The essence of that principle is contained in the opening clause, namely "Marine scientific research shall comply with all the coastal state's laws and regulations when carried out in areas within the jurisdiction of the coastal state".

...It is in principle 1 of our working paper that the Canadian Delegation attempts to deal squarely with a particularly important aspect of the problem of distinguishing between scientific research carried out for differing purposes and objectives. That principle states that the knowledge and information resulting from marine scientific research would be exchanged and made available to the whole world when it is of a non-proprietary or non-military nature... Principle 1 of the Canadian working paper should not be viewed as an invitation for states to classify all results of marine

scientific research as proprietary or military in nature for the prupose of withholding those results from others. We do not consider that this has happened in the past nor that it will happen in the future. What is of special importance to Canada and no doubt to most other countries is that the results of marine scientific research, particularly as they relate to their own coastal areas and their coastal security, should in appropriate cases be exempt from the principle of free and open access to all.

...It is incumbent on all of us not to let these problems divert us from the fundamental principle that the knowledge resulting from marine scientific research is part of the common heritage of all mankind. If it is true that scientific research merits special protection and facilitation, then this is true only to the extent that such research contributes to the universal pool of human knowledge, freely available to all and fully shared by all.

...Freedom of access to scientific information will be meaningless for the developing countries unless and until they have the trained personnel and technological capacity to understand and utilize that information and secure the practical benefits to which it can give rise. Provision must be made to strengthen the scientific and technological capabilities of the developing countries so that they may increasingly participate in and profit from marine scientific research programmes. This approach is also reflected in the Canadian working paper... It must be stressed, however, that the interests and needs of the developing countries, like the interests and needs of other smaller powers, will largely be directed towards scientific research related to their own coastal areas and their own coastal resources. Hence the issue at stake for such powers is not only scientific and technological development but also the authority to regulate marine scientific research in areas within their jurisdiction. The very exercise of that authority will of itself contribute to the development of their scientific and technological capabilities.

INTERNATIONAL ENVIRONMENTAL LAW

The following excerpt is taken from a Memorandum of February 2, 1973 prepared by the Environmental Law Section of the Legal Operations Division of the Department of External Affairs:

In 1972, there were a number of developments of significance which could have an interesting impact on the evolution of international environmental law. Among these were:

a) The Declaration of the United Nations Conference on the Human Environment.

The Declaration was proclaimed by the United Nations Conference on the Human Environment and taken note of at the 27th Session of the United Nations General Assembly. It contains principles of a legal nature largely because of a Canadian initiative taken during the drafting of the Declaration. It has been observed by the International Law Association in its report on

the Conference that the Declaration contains:

> "important new principles which may serve as a foundation for developing international law relating to the environment. Chief among these is Principle 21, which declares that States have "the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction"."

The following are excerpts from a Statement on the Declaration delivered by the Legal Adviser of the Department of External Affairs to the Closing Plenary Session of the Stockholm Conference:

> "The Canadian Government considers that Principle 21 (formerly 18) reflects customary international law in affirming the principle that States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction".
>
> The Canadian Government considers that the secondary consequential Principle 22 (formerly 19) reflects an existing duty of states when it proclaims the principle "that States should co-operate to develop further the international law regarding liability and compensation for the victims of pollution and other environmental damage caused by activities within the jurisdiction or control of such States to areas beyond their jurisdiction".
>
> The Canadian Government considers also that the tertiary consequential principle contained in the Draft Declaration on the Human Environment as it first came before us in plenary (former Principle 20 not now contained in the Draft) on the duty of States to inform one another considering the environmental impact of their actions upon areas beyond their jurisdiction also reflected a duty under existing customary intern ational law, when it proclaimed, in essence, the principle "that relevant information must be supplied by States on activities or developments within their jurisdiction or under their control whenever there is reason to believe that such information is needed to avoid the risk of significant adverse effects on the environment in areas beyond their national jurisdiction".

These legal principles, taken together with the important and closely related marine-pollution principles and the draft articles on a proposed dumping convention, on which we have already taken action, provide us with an opportunity to work together in a co-operative spirit of conciliation and accommodation to elaborate laws that will protect us all by protecting our environment.

b) The endorsement by the Stockholm Conference of a "set of general principles for assessment and control of marine pollution" and of a statement of objectives concerning the marine environment and the referral of these principles on the rights of coastal states respecting the protection of the marine environment to the forthcoming Law of the Sea Conference and the October 1972 IMCO Conference on Marine Pollution. These principles put forward by Canada are intended to form the basis for a comprehensive approach to the preservation of the marine environment. This approach, to be implemented at the Law of the Sea Conference, does not necessarily imply the elaboration of a single treaty instrument dealing with all aspects of marine pollution. Nor does it imply that specialized agencies such as the Intergovernmental Maritime Consultative Organization (IMCO) do not have an important role in the elaboration of technically-oriented standards and measures for the prevention of marine pollution. What it does entail is that whatever the number of particular international instruments, these instruments should together constitute a coherent, uniform and all-embracing treaty system.

On the basis of these principles, Canada has proposed that the Conference on the Law of the Sea lay down the keystone for such a treaty system by elaborating a "master" or "umbrella" treaty which would:

- Establish general objectives and the general rights and obligations of States in respect of the preservation of the marine environment;

- Affirm a general commitment to the elaboration of and adherence to particular specialized treaties intended to achieve these general objectives;

- Give a common direction and impetus to the further development of national and international measures for the preservation of the marine environment, and provide an organic link, in terms of both substance and implementation, between such measures (whether existing or envisaged);

- Fix uniform rules for certain problems common to such instruments, e.g. enforcement, compensation, etc.

c) At an intergovernmental Conference in London in October-November 1972, the elaboration of an international Convention to prevent the pollution of the marine environment by the dumping of wastes and other matter at sea; Canada signed the Convention on December 29, 1972.

The results of the London Conference were summarized in a press release issued by the Canadian Delegation as follows:

> "The Canadian Delegation considers that the results of the London Conference on International Control of the Dumping of Wastes at Sea are beneficial to all countries represented.
>
> The rights and obligations of all countries have been respected. The common objective of prohibiting dumping which might degrade the marine environment has brought together both flag states and coastal states in an accommodation of interests stressing not merely rights but obligations. The Convention may therefore prove to be a real breakthrough in the development of concrete International Environmental Law. It translates into treaty form as far as ocean dumping is concerned the Stockholm Declaration on the Human Environment and the Marine Pollution Prevention Principles endorsed at Stockholm. During the more than a year of negotiations, the Canadian Delegation has sought to ensure that the Convention is effective both environmentally and jurisdictionally. The environmental imperatives are met by the Convention in that it adopts 'black-list/grey-list.' Under this approach, there is an absolute prohibition on the dumping of substances on the black-list save only in the case of exceptional emergency. The jurisdictional considerations are met by provisions permitting both coastal and flag states to enforce the Convention.
>
> Agreement was reached on even the most controversial issues:
>
> 1. The jurisdictional principle consistently recommended by Canada which allows not only maritime flag states but coastal states to enforce the Convention against aircraft and vessels fixed or floating under their jurisdiction. Thus, accommodation has been reached between the flag states and the coastal states permitting all parties to endorse the Convention.
>
> 2. The escape clause permitting dumping of particularly dangerous substances at sea in emergency situations, stresses the obligation of states in such circumstances to consult the organization (still to be established or selected). It also provides that States exercising the escape clause should avoid damaging the marine environment, and consult with other states that might be affected. It has been agreed, at the request of the Canadian Delegation, that the escape clause can be waived at

the time of ratification or accession. Thus, only those states who feel need of the escape clause will have the right to invoke it. This is a considerable improvement over a proposal which would have made the escape clause open to every state automatically.

3. The responsibility of states for damage they do to other states or to the environment beyond national jurisdictions by their dumping activity has also been accepted. The Convention recognises that states should act in accordance with the principles of international law concerning a state's responsibility for environmental damage, i.e. the Stockholm Declaration Principle 21".

OUTER SPACE LAW

Draft Convention on the Registration of Objects Launched into Outer Space

The following is an extract from a statement made in the First Committee of the United Nations General Assembly on October 13, 1972 by Dr. Saul F. Rae, Permanent Representative of Canada to the United Nations:

...My delegation shares with our French colleague a deep sense of satisfaction at the amount of progress it was possible to make during consideration of the France-Canada draft registration convention, the text of which is attached to the report of the Legal Sub-Committee. Although no agreement was reached on some details, most of the important principles were accepted, thanks to the positive and conciliatory spirit which characterized the deliberations of the Working Group on Registration set up by the Legal Sub-Committee. We were particularly pleased that even though it was not possible to reach agreement on the type of detailed information to be provided to the Secretary-General, there was no objection to the principle of furnishing to the Secretary-General information on objects launched into outer space.

...My Government continues to hold the view that the present voluntary registration system fails to provide an adequate foundation for the evolving international legal regime governing space activities and that what is needed is a comprehensive, fully accessible international system providing for compulsory registration, prompt provision of information and arrangements for the updating of this information. In our view, the costs of a system of the type embodied in the France-Canada draft would be relatively minor compared to the benefits. In fact, in order to keep the costs down, article VII-2 provides that States Parties should have full access to the information in the central register but does not require the Secretary-General to circulate the potentially copious information received. We presume that the Secretary-General would follow his usual practice of issuing an annual report summarizing the trends and statistics. We imagine that the Secretary-General may have to computerize the register as space objects are launched with greater frequency, but we consider that whatever additional costs might be involved would be justified and would be reasonable.

My Government realizes that any registration system established now will undoubtedly have to be made more sophisticated in future years. However, we consider that an essential first step is contained in the France-Canada draft. We would propose that the General Assembly should approve the Outer Space Committee's recommendation that the Legal Sub-Committee continue in 1973 to give priority to the subject of registration.

It is our hope that individual countries will submit the draft text

considered by the Legal Sub-Committee's Working Group to their technical officials so that, in consultations among interested countries between now and the Legal Sub-Committee's session in 1973, agreement can be reached on a generally acceptable text. It is our expectation, which we think reasonable, that the France-Canada draft will form the basis for a recommendation next year to the General Assembly to approve the text of a convention on registration of objects launched into outer space.

Draft Treaty Concerning the Moon

On May 2, 1972, Mr. D. M. Miller, Head of the Canadian Delegation, made the following statement at the 11th Session of the Legal Sub-Committee of the United Nations Committee on the Peaceful Uses of Outer Space:

...My delegation is of the con idered view that the principles laid down in a Moon Treaty should also apply to other celestial bodies. However, we should include an article which envisages the drafting and approval, at appropriate times in the future, of treaties to govern man's activities on other celestial bodies, it being understood that such future treaties will take precedence over the Moon Treaty with respect to the particular celestial body dealt with. In other words, the specific provisions of the Moon Treaty should apply to other celestial bodies until such time as the international community agrees that they should be modified in relation to a particular celestial body.

My delegation also believes that it is not only important to elaborate upon Article II of the Outer Space Treaty in ensuring that the moon is not subject to national appropriation, but also to include specific provisions to guarantee that the benefits from the exploitation of the moon's natural resources will be distributed equitably... We agree that, as reflected in paragraph 1 of Egypt-India Working Paper 20 and in paragraph 1 of the United States Working Paper 12/Rev. 1 on Article VIII, we should affirm in the draft treaty the principle that the natural resources of the moon and other celestial bodies shall be the common heritage of all mankind. It is true that at present we only have a very vague idea of what resources may be found on the moon. In the view of my delegation, it would be prudent to enshrine the principle now when we can only guess at what riches may be found... At an appropriate future time, an international regime providing for generally agreeable institutional arrangements will have to be worked out to govern the exploitation of our common heritage.

Remote Sensing of Earth by Satellite

In a statement delivered in the First Committee of the United Nations General Assembly on October 13, 1972, Dr. Saul F. Rae, Permanent Representative of Canada to the United Nations, said:

Direct Canadian experience with remote sensing from satellites has only begun with the launching of the ERTS-1 Satellite. After less than three months of operations, it is, of course, much too early to make any over-all assessment of our participation in the ERTS Program and the uses to which these data can be put. However, we already consider that the quality of the images is sufficiently high to warrant geometric correction and enlargement to provide timely small-scale photomaps to meet the planning needs of many users. Nevertheless, our resource scientists consider that many scientific and engineering problems remain to be solved before the data can be used systematically to monitor our environment and observe our resources. While initial efforts to take advantage of this technology have been promising, we have already concluded that we have a long way to go in the development of practical applications. My Government will continue to participate actively in the Working Group on Remote Sensing and its Task Force which are exploring these applications. We welcome the fact that, as agreed at its preparatory session last May, the Working Group on Remote Sensing will study the legal implications and organizational requirements of Remote Sensing. My Delegation realizes that it will be necessary to await greater knowledge of the potential uses and the limitations of the technology before we are in a position to agree upon definitive international arrangements to maximize the benefits to all nations. Moreover, we do not underestimate the difficult questions involved in harmonizing the sovereign rights of states with the obvious advantages to be gained by an international approach. However, we expect that the Working Group will point the way to practical international arrangements which represent a responsible and realistic balance between national and international interests.

Direct Broadcast Satellites

In a statement delivered in the First Committee of the United Nations General Assembly on October 13, 1972, Dr. Saul F. Rae, Permanent Representative of Canada to the United Nations, said:

My Delegation supports the recommendation of the Outer Space Committee that the Working Group on Direct Broadcast Satellites, in view of its interdisciplinary character and its coordinating functions, should be reconvened next June to review the substantive developments that have occurred since its last session in May, 1970. At that time the Working Group recommended that member states and regional international organizations should promote and encourage regional arrangements, both at the governmental and non-governmental level, as a practical first step to increase international cooperation in the use of direct broadcast satellite systems.

Since May, 1970 there has been a number of pertinent developments, as described in the Outer Space Committee's Report, in the ITU, UNESCO and World Intellectual Property Organization. Moreover, the UNESCO Draft Declaration of Guiding Principles on the Use of Satellite Broadcasting and the Soviet Draft International Convention on Principles Governing the use by States of Artificial Earth Satellites for direct TV

Broadcasting appear to have a great deal in common, although the Soviet Draft has a more negative emphasis which could impede the development of an area of space technology with important practical benefits for all countries.

My Delegation considers that the Working Group on Direct Broadcast Satellites, which has both scientific and technical as well as legal responsibilities, would be the most appropriate forum in which to take an overview of recent developments in accordance with its mandate to formulate recommendations on the most effective way of making the benefits of direct broadcast satellites generally available.

AIR LAW

Anti-Hijacking Enforcement Measures

On September 4, 1972 Mr. D.M. Miller, Head of the Canadian Delegation to a Special Sub-Committee in Washington D.C. of the Legal Committee of the International Civil Aviation Organization (ICAO), made the following statement:

...As an indispensable first step, countries must take action, collectively or individually, to prevent these acts before they occur, by improving the effectiveness of detection methods and means. To that end, Canada is placing increasing emphasis on the entire range of protective measures, on their wider employment, stricter application and further development. My Government has already instructed the Canadian member on the Air Navigation Commission to play a leading role in the transformation of the recommended security procedures of ICAO into internationally agreed and accepted standards to be applied by all member states...

...The second essential step is to convince all states that it is in their enlightened self-interest to adhere to the Tokyo, Hague and Montreal Conventions and to abide by their principles. The 1963 Tokyo Convention, aptly characterized as the legal foundation in this area of progressive development of international air law, codified the rule that passengers and crew of a hijacked aircraft shall be permitted to continue their journey as soon as practicable and that the aircraft and cargo shall be returned to the persons lawfully entitled to possession. The 1970 Hague Convention, which built upon this foundation, defined the offence of unlawful seizure and stipulated that alleged offenders had to be either prosecuted or extradited, thereby going a long way towards ensuring that no hijacker will go unpunished because of legal technicalities. And the 1971 Montreal Convention established similar provisions for a broader category of unlawful acts against the safety of civil aviation. Canada, I am pleased to say, Mr. Chairman, is a party to all three Conventions...

My Government believes that only when potential offenders, hijackers and saboteurs alike, fully realize that no havens are available, will we be able to eliminate most acts of unlawful interference. Therefore, the major air service states must be prepared, we think, to take joint-action when the international legal obligations reflected in these three conventions are not respected. And, as in the elaboration of these conventions, ICAO has an important and entirely appropriate responsibility to see to their enforcement by working out, in full conformity with international law and the U.N. Charter, a convention establishing effective international machinery.

It was to that end that Canada and the U.S.A. collaborated in presenting to the 1971 Sub-Committee on the Council resolutions of October 1, 1970 a draft convention enabling joint-action to be taken in response to the most serious incidents involving breaches of the fundamental principles of international law as expressed in the Tokyo, Hague and Montreal Conventions. The Sub-Committee made useful if limited progress, largely through the work of its drafting committee, in considering this draft, although several states were reluctant then to have ICAO proceed as rapidly as, in our opinion, the situation demanded...

...Canadian authorities have also been reconsidering, as another possible alternative, amendment of the 1944 Chicago Convention on International Civil Aviation. You will remember, Mr. Chairman, that Switzerland proposed this at the 17th (Extraordinary) Assembly of ICAO and that in December, 1970 the Council decided to study the matter. It is possible that a way could be found of amending the convention so as to provide a simple and effective means of ensuring that states meet their obligations under the conventions dealing with the unlawful interference with international civil aviation while bringing equally effective pressure to bear on those states which are not yet parties to such conventions. Despite the validity of criticism that amending the Chicago Convention would be a complicated and time-consuming alternative, it would seem to offer the possibility of achieving a complete and logical answer to the Council resolution under which we are meeting, and if the amending mechanism of Article 94 (b) were employed, the result could be the broader and faster acceptance of a solution than might be the case with an entirely new convention...

However, Mr. Chairman, the Canadian Government has concluded that the most appropriate course of action for this meeting would be continuation of the work already commenced on the Canada/U.S.A. draft convention. Accordingly, we have been considering what modifications might be made to that draft to take account of the comments made at the last occasion, almost a year and a half ago, when it was studied by a Sub-Committee of the Legal Committee. We think, for example, that the two-stage procedure should include a direct link with the ICAO framework, probably the Council, inserted between the stages; that the provisions concerning the composition and responsibilities of the Commission at the first stage should be further elaborated so as to ensure the selection and election to the Commission of impartial individuals of renown for their experience and expertise in international civil aviation...

INTERNATIONAL TERRORISM

In a statement delivered in the Sixth Committee of the U.N. General Assembly on November 16, 1972, Mr. David Miller, the Canadian Representative, said:

...I sincerely trust, Mr. Chairman, that all of us agree the Secretariat deserves our high praise for its paper (A/C6/418) to which we should now give our most serious attention. Considering the extremely short time available for its production, the paper is a scholarly, objective and comprehensive presentation. And my Delegation, fully conscious of the complexities involved, is sincerely grateful to the authors for their diligence and professionalism.

The Secretariat has, as directed, focused upon terrorist acts having international aspects or implications. Thus the paper traces the past efforts of the world community to deal with international terrorism. A recurring theme throughout these efforts has been the concept of terrorism as a conspicuous act, both of violence and communication, intended to spread terror among a given population or group and designed to attract public attention and to coerce the authorities into a particular and often limited course of action. Acts of international terrorism can be committed for criminal motives such as extortion. However, it should be acknowledged that the acts of international terrorism which are the most intractable are those which are politically motivated and rooted in acute situations of misery, frustration, grievance and despair. The Secretariat's study rightly refers to the slowness of advance towards the elimination of these root causes.

...Acts of international terrorism must be dealt with by the international community acting in concert. Obviously we should not minimize the difficulties nor perhaps expect immediate positive results, but equally we cannot ignore the problem because of its inherent complexities. As my Foreign Minister said to the General Assembly on September 28, "...there must be no truce with terror... the act we condone today may be the one we regret tomorrow when it is turned against us".

And what should be accomplished by the General Assembly at this session?

First, we must strongly condemn all acts of international terrorism, direct or indirect, involving innocent persons.

Second, we should recall and be guided by the past efforts of the international community to deal with terrorism and the progressive development of relevant principles of international law.

Third, we should seek to strengthen the worldwide network for the collection and dissemination of information, through INTERPOL and by other means, multilateral or bilateral about terrorists, individuals and groups, as part of a concerted and coordinated plan of preventative action to stop terrorist acts from occurring.

Fourth, we should reaffirm and where necessary strengthen existing international instruments which govern crimes found shocking to the conscience of mankind; piracy, slavery, trafficking in narcotics and more recently aerial hijacking and sabotage and acts against internationally protected persons, all of which instruments are directed against the crime, regardless of motive or cause. We should encourage all states to become parties to these conventions which prescribe special treatment for these abhorrent acts. And we should actively support, in this regard, the current efforts of the International Civil Aviation Organization to elaborate a convention providing both for the prompt and impartial investigation of acts endangering the safety of civil aviation and for cooperative international action to eliminate the danger. Over 60 incidents of hijacking have occurred around the globe since the beginning of this year alone. The average rate of these incidents is now about one every 4½ days. It is therefore no wonder that those states concerned with the safety of civil aviation and with the safety of the millions of passengers who travel by air each year are proposing in ICAO a treaty that would enforce the principles reflected in the Tokyo, Hague and Montreal Conventions. The General Assembly's consideration of a convention for the protection of diplomats and now perhaps of innocent persons against acts of international terrorism, such as the recent epidemic of letter bombs, is at a stage analogous to ICAO before the elaboration of the Hague Convention on Hijacking. Mr. Chairman, we can foresee therefore, the development of our present handling of international terrorism in a fashion very similar to that taking place in the field of international civil aviation.

Fifth and finally, we must act quickly to develop such additional legal instruments as we deem to be desirable to deal with the international elements involved in acts of terrorism. In our deliberations we should concentrate on the need to protect the innocent and to create instruments which will be victim-oriented and will deal effectively with the problem. We must be clear also about what is being done in different fora about the different aspects of international terrorism and then concentrate on what remains to be done.

Accordingly, Mr. Chairman, Canada is of the opinion that it is necessary to augment existing conventional international law through a new instrument on terrorism having the broadest possible coverage and application in cases of violent attack having international characteristics or effects and directed against innocent persons wherever they may be and regardless of the motives or objectives involved - a convention which will employ the principle of universality as the basis for the assertion of jurisdiction in respect of such acts, and a convention which will provide for the punishment of these crimes by severe penalties which take account of the aggravated nature of the offences, and will call for the extradition or prosecution by the competent authorities of the state in which the perpetrators of the

terrorist act are found - in short a new instrument patterned on the Hague and Montreal Conventions and on the International Law Commission Draft Articles on the Protection of Diplomats under International Law.

...Mr. Chairman, international law is already being rapidly developed to further protect innocent civilians and the civilian population as a whole from terrorist acts in situations of armed conflict. What we need urgently is similar protection against acts of international terrorism for innocent persons outside the ambit of such conflicts. ...We should bear in mind the considerable background and examples available to us and not pretend the problem is new and requires exhaustive examination... We should agree to establish a procedure either by way of an intersessional committee or committees to develop effective measures to prevent international terrorism in light of its causes or by requesting that this be done urgently by the International Law Commission, following the pattern of last year's instructions to the Commission concerning the protection of diplomats convention. The Canadian Delegation, Mr. Chairman, is prepared to support any positive proposals along these lines which will serve rapidly to strengthen and expand existing international law against all acts of international terrorism.

PROTECTION OF DIPLOMATS

Pursuant to a decision of the U.N. General Assembly, the Secretary-General invited member States to submit comments on the question of protection of diplomats for transmission to the International Law Commission (I.L.C.). In its comments of April, 1972 the Government of Canada expressed the following view:

> Security and the absence of coercion are the two essential elements in inter-State and international relations. It is for this reason that one of the oldest institutions of international law is the inviolability of ambassadors and their staff, an inviolability which imposes on the receiving State the obligation to protect them from any attack against their person, freedom or dignity. This rule of inviolability is still as essential today as ever for the proper conduct of international relations. 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.... If its work is to be useful, the International Law Commission should embody in its draft convention, above all, the elements most likely to have a deterrent effect with regard to crimes against foreign representatives. In the opinion of the Canadian Government, this deterrent effect is the most important feature of any convention intended to ensure the security of international relations through better protection of diplomats, consuls and other agents concerned with international relations.

On the basis, inter alia, of member States' comments, in July 1972 the I.L.C. prepared "Draft articles on the prevention and punishment of crimes against diplomatic agents and other internationally protected persons". These draft articles were the object of a preliminary discussion in the Sixth Committee of the U.N. General Assembly. In his statement of October 6, 1972, Mr. J.A. Beesley, the Canadian Representative in the Sixth Committee, said:

> Perhaps the most important provision in a draft convention on diplomatic agents is that states parties should recognize in specific terms that these crimes cannot be classed as political crimes giving

grounds for political asylum. An offence under the proposed convention should be regarded not merely as an offence against a particular state but as an offence against all states. Such offences are not merely breaches of the laws of any particular state but are breaches of the law of nations itself. Without such provisions the deterrent effect of the convention would not be fully met. We recognise, however, that because of the importance attached by some states to political asylum it may be necessary to accept the solution proposed in the draft articles of placing the obligation upon the state parties in whose territory the alleged offender is present to take the appropriate measures under international law so as to ensure he is presented for prosecution or extradition (as provided in Article 5 of the draft), and that if such state does not extradite the alleged offender, to submit the case to its competent authorities for the purpose of prosecution and penalty in accordance with the law of that state (as provided for in Article 6 of the draft). 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.

MULTINATIONAL ENTERPRISES

In a statement delivered on October 11, 1972 in the United Nations General Assembly's Sixth Committee, Mr. D.M. Miller, the Canadian Representative, said:

...Turning to the question of the future work of the United Nations Commission on International Trade Law (UNCITRAL), representatives will recall that last year Canada suggested that UNCITRAL consider the study of the conduct of the multinational enterprise. The events of recent months as reflected in the increased attention being given to the multinational enterprise both within and without the United Nations family, have strengthened my Delegation's belief that the implications for international trade law of the activities of the MNE should be considered by this Committee. I wish, therefore, to expand upon previous Canadian suggestions, and to make suggestions as to the means by which UNCITRAL, through an increased awareness of the influence of multinational enterprises on international economic relations, may both further serve the unification and development of international trade law and the economic and legal interests of all states.

Canada, perhaps as much as any other country, accepts the presence of the multinational enterprise. The role of the multinational enterprise in the economic development of our country is well recognized; the beneficial efforts of the presence of this enterprise are not, in the Canadian view, to be dismissed without appreciation. We have, however, to understand the multinational enterprise, and to accept that such enterprises, because of their trans-national structure and orientation, have interests and objectives which may not always accord with national economic objectives. The multinational enterprise, in Canada or elsewhere, has the facility to circumvent in whole or in part national legal jurisdictions in many and diverse fields such as trade policy, foreign exchange regulations, taxation, business practices and pollution control.

While appreciating the obvious benefits to the Canadian economy which have resulted from foreign investment, Canadians have become familiar with the effects of transfer pricing, currency hedging and international planning as practiced by the multinational enterprise. We are also aware of the multinational enterprise as a medium for the extraterritorial extension of the laws and policies of other governments.

In recent years, the Canadian Government has devoted considerable time and resources to the consideration of the benefits and concomitant costs to Canada of foreign investment and of the activities in our country of both Canadian and foreign multinational enterprises. With the publication this year of the governmental study on Foreign Investment in Canada, which includes a detailed discussion in a Canadian context of the problems to which I have referred, we have extended our understanding of the effect ot the multinational enterprise within the Canadian economic environment.

It is the concern today of many governments, and within the capacity of all governments, to take national initiatives to regulate the activities of the multinational enterprise. In addition to national initiatives, it has been the Canadian experience that bilateral arrangements such as double taxation agreements and the informal anti-trust notification and consultation procedure which exists

between Canada and the USA, can serve as first steps in meeting, in a cooperative international framework, some of the problems created by foreign investment and the activities of the multinational enterprise.

Increasingly, however, we are concerned that national programs and bilateral arrangements, in isolation, may prove inadequate to the task of monitoring and, where necessary, regulating the activities of multinational enterprises. The Canadian Government has, therefore, participated extensively in the inter-governmental consultative examination of multinational enterprise activity being conducted within the OECD, and supports the work which is underway within the ILO on the relationship between multinational undertakings and social policy. In the past months we have noted, with very great interest, the resolutions on international economic relations adopted at UNCTAD III, on a proposed charter of economic rights and duties and the further study of the effects of restrictive business practices, and, most recently, by ECOSOC, on the establishment of a "group of eminent persons" to study the role of multinational enterprises and their impact on the process of economic development. In our view these resolutions reflect, inter alia, the increasing appreciation of many governments that the aggregate of the economic activity of the multinational enterprise may have influence and effect on economic development beyond the control of individual governments, and, that these common concerns may appropriately be examined by the United Nations organization on behalf of all member states.

Delegations will be familiar with the specialized studies of the activities of the multinational enterprise now or shortly to be underway within the United Nations organization and, in particular, with the scope of the examination to be undertaken by the proposed ECOSOC Group of Eminent Persons. An opportunity will be afforded this Group to review studies undertaken in the ILO, in UNCTAD and elsewhere. The global nature of their review, and the stature of the Group can, in our view, provide the Group with an unparalleled opportunity to produce a comprehensive and objective report on the activities and effects of multinational enterprises.

In the preparation of this document, the ECOSOC Group will be able to draw on the results of the very considerable research undertaken in recent years by economists, sociologists, business analysts and trade unionists on the changing structure of international trade and economic development, on the influence of direct foreign investment on trade and capital movement and on the role of the multinational enterprise in the acceleration of these changes during the past two decades. Although Canadians have no wish to duplicate in any way the work which will be undertaken by the ECOSOC Group, which could play a central coordinating role in respect of studies underway in various bodies within the U.N. family, we have been concerned however that members of the international legal community have appeared to be somewhat less aware of these important changes. This is one of the major reasons why my Delegation suggested last year that the Committee consider the concept that UNCITRAL undertake examination of the conduct of the multinational enterprise in the context of international trade law.

We have had in mind that the Commission appoint a small group of international law experts to examine the effect of multinational enterprise activity on international trade law. In illustrating this suggestion, I refer to a recent article of Professor J.H. Behrmann of the University of North Carolina, one of the leading academic authorities on the role of the multinational enterprise, who pointed out that host governments when faced with the multinational enterprise phenomenon may respond in three ways: Firstly, host governments may adopt restrictive national policies; secondly, they may decide to encourage home-based

multinational enterprises as a countervailing force to foreign investors; and/or thirdly, they may work together toward the "harmonizing or unifying of national laws and regulations so as to create an inter-governmental net that constrains the multinational enterprise, yet permits it to develop in an efficient manner."

It is in this last area that Canada believes UNCITRAL can play a most important role. Indeed, Mr. Chairman, this approach falls squarely within the mandate and terms of reference of UNCITRAL which has as its object, under Resolution 2205(XXI), the promotion of the progressive harmonization and unification of the law of international trade. We have also had in mind the Group of Experts reporting to the Commission consider the merits and practicability of various proposals which have been developed in recent years within the academic community on the role of the multinational enterprise and are designed to enhance the amount of information available to national governments on the activities of multinational enterprises and thus better equip governments to regulate international trade and investment or envisage the establishment of an international regime respecting the multinational enterprise, a major step to making the conduct of the multinational enterprise a subject of international law. The mandate of UNCITRAL seems particularly relevant in this regard having in mind its function of "collecting and disseminating information on national legislation and modern legal developments, including case law, in the field of the law of international trade."

...Canada is firmly of the view that UNCITRAL can and should, amongst its most important concerns, give full consideration to the role of the multinational enterprise and the implications for international trade law of the activities of such enterprises. We recognize the commitments that the Commission has made to the subjects of international trade law to which it has given priority, and we do not suggest that any of these topics be set aside. Rather, it is our view that the Commission, in recognition of its responsibility to the progressive harmonization and unification of international trade law, must equip itself so that in terms of its broad objectives and in the furtherance of its priorities of study it is fully able, in the interests of all states, to contend with the effect on international trade law of the influence of the multinational enterprise. Without imposing upon the already full work load of the Commission, a small group of experts, as I have suggested, could be appointed to prepare a preliminary review and recommendations for further consideration.

We believe that the Commission must determine itself the manner in which it meets its responsibilities in respect of the influence of the multinational enterprise on international trade law. We are, nevertheless, prepared to assist the Commission, as the Commission may wish.

Further, it is our view that UNCITRAL, as the U.N. legal forum devoted to the examination and development of international trade law, cannot fail to take note of the importance which governments and the U.N. organizations attach to the examination of the activities of the multinational enterprise and the influence and effect of such activities on international trade, investment and the economic development of individual states. We believe that as the international community prepares its assessments of the role of multinational enterprise activity, and considers the courses which will best serve the economic, financial, trade and development interests of that community, the legal issues involved, including those specifically within the ambit of the Commission, must receive consideration. We propose, therefore, that the Commission, in its future work, ensure that in relation to the influence of the multinational enterprise on international trade

law, it is in a position to meet this challenge. In raising this subject last year the Canadian representative suggested, in the most general terms, that UNCITRAL consider the study of international trade law aspects of the multinational enterprise. I believe the events of the intervening months have only served to underline the importance of the subject.

UNITED NATIONS

Charter Review

The following extract is taken from the Government of Canada's reply to the Secretary-General's invitation to Member States to communicate their views and suggestions on the review of the Charter:

Suggestions for Charter amendment have also been made regarding membership of the Security Council, including for example a proposal for a new category of permanent or semi-permanent members, drawn from amongst those States regarded as best able to contribute to the maintenance of international peace and security... In practice, as in the case of proposals for weighted voting in the General Assembly, it would be very difficult to determine acceptable criteria for creating a further category of States, in addition to the permanent members, who would be entitled to preferred treatment in elections to the Security Council. One criterion which is sometimes proposed on the basis of a somewhat narrow reading of Article 23 is the ability to contribute materially to the maintenance of international peace and security. From an examination of the membership of the Security Council over the last 26 years, it is clear that there has in fact been a significant correlation between the size of assessed contributions to the regular budget and the frequency with which Member States have served as non-permanent members of the Council. It is to be anticipated, however, that an increasing number of non-permanent members will be drawn from among those States which each pay assessments of less than 0.1 per cent of the budget (currently some 65 per cent of the total membership). It would be difficult to sustain the view that these smaller States should be discouraged from taking an active part in the work of one of the principal organs of the United Nations. It would be equally difficult to assert that larger or wealthier States should be singled out by virtue of their wealth alone as being in a special position to contribute responsibly and constructively to the work of the Council.

The following is an extract from a statement made on September 28, 1972 by the Honourable Mitchell Sharp, Secretary of State for External Affairs, in the General Debate at the 27th Session of the United Nations General Assembly:

The successive challenges of the last generation have been met with only two changes in the Charter, to increase the membership of the Security Council and of the Economic and Social Council. Apart from this, we have built upon the Charter machinery, giving a living interpretation to the Charter itself. While it has been difficult in practice to secure the required degree of agreement to amend the Charter, this does not seem to

have prevented the U.N. from keeping up with the times. Canada is ready to look seriously at any specific proposals to amend the Charter or make it work better, if these have broad support among member states. But I am not convinced that a new Charter that could be agreed upon now would be better than the Charter written in 1945.

In a statement delivered in the Sixth Committee of the United Nations General Assembly on December 1, 1972 the Canadian Representative, Mr. E. Wang, said:

...Over the past year and earlier, through a period of comprehensive review of Canadian foreign policy, my Government has invited and heard the views of many Canadians on questions debated in these halls, including the question of review of the Charter. Some Canadians have expressed a sense of frustration felt from time to time in Canada at the difficulties experienced in this Organization in coming to grips with serious international problems. Our reply to Canadians who have written of the need to make the United Nations a more influential and active body has been based on this same premise, namely that more than anything else, the effectiveness of the United Nations is directly dependent on the political will of all members, especially the great powers.

...In general terms, one can discern three different approaches in the past to the task of strengthening the effectiveness of the Charter and of the United Nations. At each General Assembly over the past 27 years we have witnessed and participated in each of these approaches with varying degrees of emphasis and varying degrees of success. The first has been the declaratory or hortatory approach by which we remind ourselves of our higher objectives and responsibilities as reflected in the Charter and in the changing aspirations of the international community. With rare exception, such as the Friendly Relations Declaration, the declaratory approach has probably had only a limited impact on the problems and objectives which it is designed to serve.

A second approach has been by periodic efforts to reform and adapt the procedures and structures of the General Assembly, the Security Council and other U.N. organizations. Such reform and adaptation have been essential but again and again it has become clear that they cannot in themselves provide solutions to political and substantive problems which stubbornly resist procedural or organizational treatment.

A third and in our view the most effective approach has been the persistent effort of seeking accommodation and progress day-to-day and year-to-year on the many specific issues facing the international community over many fields.

The Review of the Role of the International Court of Justice

In a statement delivered on December 8, 1972 in the Sixth Committee of the United Nations General Assembly, the Canadian Representative, Mr. J. A. Beesley, said the following:

...The most important development in relation to the Court since our debate here in the Sixth Committee last year has, of course, been the publication of new Rules of Procedure of the Court on May 10, 1972 marking the first major revision of the Court's rules since 1946.

It is perhaps too early to assess the full significance of the revised Rules or their effect upon the development of international law and the role of the Court itself. It is clear, however, that these rules are the outcome of a careful review within the Court over a period of the past few years and that their main thrust and intent is to speed up procedures, provide for greater flexibility, and reduce costs--all highly desirable objectives.

...My Delegation regards the present debate as a useful opportunity for member states to discuss the nature of the revisions and clarify attitudes towards the Rules and towards future efforts to enhance the effectiveness of the Court. We offer the following brief and necessarily preliminary comments on the new Rules.

Of the changes made by the Court, probably the most important in their potential for contributing to a strengthening and revitalization of the Court are those relating to Article 7 and Article 26.

The effect of changes in Article 7 is to permit greater expertise to be brought to bear in cases before the Court. It is clearly intended to make recourse to the Court more attractive to states in that it can help allay concerns which states may have in particular cases about any lack of special expertise or technical competence on the part of the judges. The new rule enables both the full Court and Chambers to appoint "assessors", that is to say, experts. Moreover, it requires the Court to take into account the views of parties to a dispute as to who should be selected as "assessors", or experts. Another change expands the scope of the Article to cover both contentious cases and requests for advisory opinions. The voting balance for appointment of assessors is also changed from an absolute to a simple majority.

The new Article 26 provides, for the first time, that the views of parties about the composition of an ad hoc Chamber are to be taken into account. Under the old system, the composition of the Chamber was the prerogative of the Court. The parties themselves are now to be consulted not only as to the number of judges to be involved but also as to the particular judges who might be thought most appropriate to hear a given dispute. Again the result of this revision should be to make ad hoc Chambers a more attractive means of settlement of judicial disputes. As some commentators have observed, the system has become sufficiently flexible to permit states to resort to an ad hoc Chamber in much the same way as they might otherwise resort to a specially agreed

ad hoc arbitral tribunal, a mechanism which figures prominently in the history of international adjudication of disputes to which Canada has been party.

Against this background, Mr. Chairman, we have before us a draft resolution A/C.6/L.887, which my Delegation has cosponsored, and which would establish an ad hoc committee of 25 members to study, in light of the comments of Governments and the views expressed at the 25th, 26th, and 27th Sessions of the General Assembly, the role actually being played by the Court in the international community, the problems involved, and ways and means of solving them.

Definition of Aggression

On November 3, 1972 Mr. G.I. Warren, Canadian Representative, said the following in the Sixth Committee of the United Nations General Assembly:

During consideration of this subject a year ago in the Sixth Committee, my Delegation expressed the view that, given the continuation of what we then hoped would be an emerging spirit of cooperation and mutual accommodation, circumstances might be propitious in 1972 for a breakthrough on this perennial item. We believed that it might be possible to resolve the major outstanding issues on the basis of what we perceived to be the "middle ground" between the three draft definitions. In describing this "middle ground" in some detail, we pledged the flexibility of our Delegation and the other sponsors of the 6-power definition in the search for mutually acceptable solutions to unresolved issues.

We have unfortunately concluded, on the basis of our assessment of the results of the Special Committee's 1972 session, that this optimism was unjustified. It is true that agreement was reached on a few minor points. For example, the 6-power compromise formula was accepted on the question of political entities other than states, and there seems to be a basis for agreement on the right of peoples to self-determination, the legal consequences of aggression and weapons of mass destruction. However, the most difficult problems remain unresolved, namely those of priority and aggressive intent, the indirect use of force and the legitimate use of force.

RECOGNITION OF STATES

Recognition not used as a Political Instrument

In a letter dated January 25, 1972 in response to a request for information concerning recognition of States by Canada, the Secretary of State for External Affairs advised as follows:

On the basis of my statement on CBC Cross-Country Check-Up of December 12, to the effect that the Canadian Government does not use recognition as a political instrument, you ask whether political and economic interests do not in fact determine whether a new state receives recognition or not. This is one of those questions which cannot be answered by a simple yes or no.

Recognition of a foreign state is, in my view, an act of mixed character. It is legal inasmuch as the basic criteria which define a state are laid down by international law. It is political in the sense that an act of recognition expresses the attitude of one state towards another. When the question of recognition arises, the Government first examines whether the legal criteria for statehood are met - that is, whether the state in question has a definite territory, a stable population, and a viable independent government able to maintain public order. Once these criteria are met, the Government examines, in the light of Canadian interests, whether an act of recognition is appropriate.

There is no obligation on Canada to recognize another state. Recognition can therefore be withheld, and has been withheld, in certain cases to indicate disapproval of policies especially repugnant to Canadians, such as those of the régime in Rhodesia.

While recognition can be a purely political tool when it is used to give support to entities which do not yet meet the international legal criteria for statehood, this is not a practice that Canada follows.

DIPLOMATIC AND CONSULAR RELATIONS

Diplomatic Bag - Use by Third States

In a memorandum dated March 28, 1972 in response to a request for an opinion as to whether it is permissible under the Vienna Convention on Diplomatic Relations for a state to allow another state the limited use of the former's diplomatic bag, the Legal Bureau of the Department of External Affairs advised as follows:

En effet, les dispositions de la Convention de Vienne référant à la valise diplomatique sont assez peu élaborées, se limitant essentiellement à reconnaitre le principe le l'inviolabilité de la valise sans assujettir cette inviolabilité à la nature du contenu de la valise. Ainsi, l'article 27, par. 3, énonce que "la valise diplomatique ne doit être ni ouverte ni retenue". L'on aurait pu ajouter, comme dans le cas des bagages de l'agent (art. 36, par. 2) "à moins qu'il n'existe des motifs sérieux de croire qu'il contient des objets..." non destinés à des fins officielles, ou encore, pour rendre conditionnelle cette immunité, l'on aurait pu prévoir une possibilité d'inspection, comme dans le cas de la valise consulaire (art. 35, Convention de Vienne sur les relations consulaires, 1963). Bien entendu, il y aurait abus si la valise contenait autre chose que des documents diplomatiques ou des objets à usage officiel (art. 27, par. 4). Mais une telle éventualité ne peut justifier l'inspection de la valise par le pays d'accueil. Il semble assez évident que les documents diplomatiques ou la correspondance officielle mentionnés à l'article 27 sont ceux de l'Etat propriétaire de la valise. Mais c'est une pratique généralement acceptée qu'un Etat utilise la valise d'un Etat ami pour des raisons de convenance. On peut donc difficilement, dans un tel cas et pourvu qu'on se limite à des documents officiels, parler d'abus de la valise. L'Etat d'accueil ne pourrait non plus sous ce chef justifier l'inspection ou la rétention de la valise. En fait, vu le silence de l'article 27, par. 3, il serait juste de dire que l'inspection de la valise diplomatique n'est admissible en aucun cas et que le gouvernement de l'Etat d'accueil n'a aucun droit de regard sur son contenu.

Acceptance of Post of Honurary Consul by a Federal or Provincial Official

In a memorandum dated April 27, 1972 in response to a request for an opinion as to whether or not a Canadian federal or provincial official could accept the position of Honourary Consul on behalf of a foreign government, the Legal Bureau of the Department of External Affairs advised as follows:

En ce qui concerne les fonctionnaires fédéraux, il n'existe aucun obstacle juridique à l'acceptation d'un tel poste. La Loi sur l'emploi dans la Fonction publique non plus que la Loi sur l'administration financière ne contiennent aucune disposition interdisant un tel cumul de fonctions. Sous la Loi de l'emploi dans la Fonction publique, les seules activités interdites sont les activités politiques reliées à une élection au Canada (art. 32). La Loi sur l'administration financière donne une large discrétion au Conseil du Trésor pour fixer les conditions d'emploi dans la Fonction publique (art. 5, par. 1 et art. 7, par. 1), mais ne contient aucune disposition faisant obstacle à un tel cumul de fonctions.

Le problème se réduit donc à une question de politique ministérielle. Il appartient à notre ministère de trancher cette question compte tenu de son rôle général pour la conduite des affaires extérieures du Canada. Le Sous-secrétaire a la discrétion de déterminer si un poste de consul honoraire est incompatible avec les fonctions d'un employé fédéral; s'il considère qu'il n'y a pas incompatibilité, alors le sous-ministre responsable de la

personne concernée peut tout de même s'objecter si le temps occupé par cette fonction consulaire serait préjudiciable à la fonction principale de la personne concernée. Nous avons discuté de cet aspect de la question avec la Commission de la Fonction publique. A notre avis, il y aurait éventuellement conflit d'intérêts si l'on devait accepter cette pratique de permettre à des fonctionnaires de représenter au Canada des intérêts de Gouvernements étrangers. Si, toutefois, il est décidé qu'il n'y a pas incompatibilité, il faudrait que la personne concernée, avant d'accepter une telle nomination, obtienne l'approbation du Conseil du Trésor et de la Commission de la Fonction publique.

Quant aux fonctionnaires provinciaux, sans entrer dans les dispositions législatives particulières à chaque province, il nous semble que le même argument de conflit d'intérêts est valable et qu'il appartient aussi à notre ministère de s'opposer à un tel cumul de fonctions dans l'intérêt de la politique extérieure du Canada.

PRIVILEGES AND IMMUNITIES

In a memorandum dated May 4, 1972 arising out of an inquiry as to whether the International Development Research Centre could be defined as an international organization for the purpose of the Privileges and Immunities (International Organizations) Act, the Legal Advisory Division of the Department of External Affairs advised as follows:

We have considered (the request for) an international status for the International Development Research Centre and the relevant legislation such as the Privileges and Immunities (International Organizations) Act (1970 Revised Statutes of Canada, Ch. P-22), the International Development Research Centre Act (1970 Revised Statutes of Canada, Ch. 21 (1st suppl.)), the Income Tax Act, the Public Service Superannuation Act as well as the works of authoritative scholars in the field of international law.

We have concluded that the IDRC is not a public international organization within the current use of that term nor does it have any international personality under international law. The IDRC was established by unilateral decision of the Canadian Government, under a domestic law, and is directed by appointees designated by the executive of the Canadian Government (Art. 5 of the IDRC Act), which also sets the amount of their remuneration. Non-Canadians are not eligible for the position of Chairman, Vice-Chairman (Art. 10); Canadian citizens are assured of a majority on the Board of Governors (11 Canadian governors out of 21) (Art. 3 and 10). Considering the mode of creation and the provisions of the law regulating the IDRC, it is obvious that the Centre does not meet the requirements of a public international organization, as described for instance by P. Cahier, Le Droit diplomatique contemporain, Librairie E. Droz, 1962, p. 406: "Une entité juridique créée par des Etats ou des organisations internationales en vue d'un but donné et qui possède une volonté autonome, qui s'exprime à travers des organes propres et permanents". And further (Cahier, p. 405): "Une des premières caractéristiques d'une organisation internationale soumise à l'ordre juridique international est d'être composée d'Etats. Il y a à la base de sa création un traité conclu par plusieurs Etats".

Lauterpacht, H. International Law, Longmans, Green & Co., 8th Edit., Vol. 1, p. 375 distinguishes between international organizations of a political character such as the U.N. and those brought into existence by the needs for international cooperation, which "have been created by multilateral treaties which lay down their constitution and define their object and the composition of their organs". C.W. Jenks, International Immunities Oceana, 1961, p. 17, mentions among generally accepted principles in the field of international organizations the proposition "that international institutions should have a status which protects them against control or interference by any one government in the performance of functions for the effective discharge of which they are responsible to democratically constituted international bodies in which all the nations concerned are represented". It seems to us that to meet this requirement, there would necessarily have to be equality of representation and voting. However, since the IDRC does not spring from a multilateral treaty, does not allow for representation other than by invitation from the Canadian government, denies thepossibility of equality of representation among participating states, does not possess autonomy from the Canadian government, we are of the view that a considerable stretch of interpretation would be required to describe it as an international organization. In short, it is our view that the IDRC does not belong to the international legal system; its legal personality does not project beyond the bounds of the Canadian legal system.

Within the Canadian legal system itself, it is very doubtful that the IDRC qualifies as an international organization for the purpose of the Privileges and Immunities (International Organizations) Act. The organizations covered by this Act are those "of which Canada is a member" (art. 3, par. 1). Beside the fact that the IDRC is a creation of the Canadian Government, put, for the purpose of the Public Service Superannuation Act, in the same category as the Canada Economic Council, the National Capital Commission, the National Film Board, the Public Service Commission, etc..., the IDRC Actdoes not provide for any membership for any state. We take it therefore that the IDRC is not an organization of which Canada can be a party and does not fall under the definition of international organization provided in this Act. In fact, the reference in the IDRC Act (art. 19) to the Income Tax Act put it in the category of "charitable organization".

Furthermore, the object of the request is to provide to individuals employed by the Centre, personal benefits making the position offered more attractive. This proposition is in contradiction with the purpose of privileges and immunities recognized to foreign missions and international organizations. As stated in the preamble of the Vienna Convention on Diplomatic Relations (1961), "the purpose of such privileges and immunities is not to benefit individuals but to ensure the efficient performance of the functions of diplomatic missions". The quotation of Jenks above also contains a reference to the purpose of privileges, which can be developed by the following passage from the same author: "The thinking underlying these propositions is essentially institutional in character. It is not concerned with the status, dignity or privileges of individuals, but with the elements of functional independence necessary to free international institutions from national control". (Jenks, C.W. International Immunities, Oceana, 1961, p. 17).

We therefore suggest that to accord to the IDRC the status of an international organization for the sake of granting privileges to its staff, would contradict the purposes of the IDRC Act concerning control by the Canadian Government as well as constituting a possible misapplication of international privileges and immunities. In addition, it would be contrary to Canadian policy of resisting the proliferation of privileges and immunities.

In a memorandum dated November 14, 1972 the Legal Advisory Division of the Department of External Affairs advised as follows:

... it is Canadian practice to describe the status of the bearer in Canadian diplomatic passports, e.g. "Second Secretary at the Canadian Embassy in Rome" and we assume that such is the practice of most, if not all, other countries too.

This practice of describing the status or function of the bearer of a diplomatic passport leads us back to the question-- what immunities should be accorded to the bearer of a diplomatic passport other than a diplomatic agent? The Vienna Convention on Diplomatic Relations is silent on the question, i.e. it limits the definition of a diplomatic agent to "the head of the mission or a member of the diplomatic staff of the mission". Members of the diplomatic staff are defined as "members of the staff of the mission having diplomatic rank". Nor have we been able to find any specific discussion as to the question of the privileges and immunities that might be accorded to a "non-diplomatic bearer of a diplomatic passport" in a number of the standard works on international law and diplomatic practice that we have consulted. (The International Law Commission is working on a draft convention on special missions, i.e. official missions and individuals carrying out special diplomatic assignments in a foreign state such as ceremonial functions. It would be intended that these missions and individuals would be accorded a certain diplomatic status).

It should be noted also that a diplomatic courier enjoys certain immunities and protection in the receiving State (Article 27 of the Vienna Convention).

The Vienna Convention extends privileges and immunities to the "members of the family of a diplomatic agent forming part of his household". (Article 37). Presumably these persons would bear diplomatic passports. The status of such a person, for purposes of privileges and immunities, seems to be related to the very much larger and general question of the rules applicable to persons who are described in the works of authors on international law as "non-diplomats". Wilson in his treatise "Diplomatic Privileges and Immunities" (1967) at page 269 makes the following observations:

> "The extraordinary expansion in the number of foreign agents, both diplomatic and non-diplomatic, has been one of the most significant developments of the post-war period..."
>
> "Nations are more reluctant to grant immunities to non-diplomats than to lower ranking members of diplomatic missions since this extension creates new precedents and could open a Pandora's Box as additional categories of personnel report for overseas duty..."

"There is no fully crystallized body of rules regulating and protecting non-diplomats, such as the Vienna Convention which reflects both a codification and progressive development of inter national law. Nations have taken steps toward creating accepted rules through both bilateral and multilateral treaties covering trade delegations, river and other commissions, economic aid groups, and military missions..."

It may be deducted from the above extract from Wilson that the position of a non-diplomat who bears a diplomatic passport and does not have functions of the nature mentioned by Wilson, i.e. a member of a trade delegation, etc., would be much weaker and that there would be no obligation at present, aside from express arrangement with the country that he enters, to accord any special privileges or immunities to him. As you know, there is a Federal Order-in-Council (P.C. 1956-1373 of September 13, 1956) authorizing the issuance of diplomatic passports to Cabinet Ministers, Deputy Ministers and others. We doubt if Canada would regard other countries as being legally obliged to extend diplomatic privileges and immunities to them, although in practice and as a matter of courtesy, this would probably be done depending on the degree of importance of the person concerned.

In summary, it would seem that there may be no obligation whatsoever to accord Vienna Convention immunities solely on the basis of a person's being the bearer of a diplomatic passport and that whatever immunities might be accorded would depend on the status of the bearer, i.e. is he a diplomatic agent; a non-diplomatic agent such as someone engaged on a trade mission; or a minister or high-ranking official from a foreign country? If he is clearly a non-diplomatic bearer of a diplomatic passport, whatever privileges or immunities are granted to him would seem to be a matter for the State in which he happens to be present to decide, in the absence of a formal obligation to accord benefits to him. Undoubtedly, however, certain courtesies would be extended to such a person, depending upon his status.

In a memorandum dated March 30, 1972 advising as to the response to be made in the event that the authorities of a foreign country should request the production of two Canadian passports as evidence in a prosecution, the Legal Advisory Division of the Department of External Affairs advised as follows:

You will note that the general principle is declared to be that Departmental files are not normally released to foreign courts where the material is to be used against the interests of the Canadian citizen who supplied the information. Examples of the type of considerations that were felt to be relevant in reaching a decision were the furtherance of the ends of justice, the confidential use to which the information was to be put, the United States nationality of the person concerned and, finally, the nature of the offence. In the present case, the third and fourth considerations are different; the accused is a Canadian rather than a United States citizen; the charge against him does not bear on his possession of two passports.

We would conclude that the criteria outlined in the earlier case could be made applicable to a request for the release of a passport. If it was decided to do so, then the (present) case does not meet those standards on the points of citizenship and the relationship of the passport to the offence. In the circumstances we would recommend against making the passport available to the United States authorities.