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

(by Legal AffairsBureau, Foreign Affairs Canada and International Trade Canada)

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I. OCEANS LAW

UNITED NATIONS CONVENTION ON THE LAW OF THE SEA

The 1982 *United Nations Convention on the Law of the Sea* (UNCLOS) is frequently termed the constitution of the oceans. Canada was a leading participant in the negotiation of this wide-ranging treaty and signed the document when it opened for signature in 1982. Canada deposited its instrument of ratification on November 7, 2003 and the Convention entered into force for Canada on December 7, 2003. Canadian ratification of the treaty was delayed, first due to concerns over the deep seabed portions of the Convention, and later over issues related to the need to strengthen the high seas fisheries portions of the Convention. The former was addressed by the Part XI Agreement of 1994. The latter was addressed by the 1995 *United Nations Agreement on Straddling and Highly Migratory Fish Stocks* (UNFA). Canada and the EU ratified UNFA on, respectively, the August 3, 1999 and the December 19, 2003.

By ratifying UNCLOS, Canada has gained a voice in the institutions created under the Convention. In June 2004 Canada sent its first delegations as party to meetings of the International Seabed Authority and of the States Parties to the Convention. In future years, Canada will consider putting forth Canadian candidates for election to the Commission on the Limits of the Continental Shelf (CLCS) and the International Tribunal for the Law of the Sea. One major undertaking that has commenced, supported by a contribution of $69 million over 10 years allocated in the most recent federal budget, is the mapping of the outer edges of Canada's continental shelf in the Atlantic and Arctic. Canada has until 2013 to make its submission to the CLCS on the delimitation of its shelf.

Canada has also joined UNCLOS at a time where states are poised for more strategic and long-term thinking on law of the sea matters. In November 2004, a provision in UNCLOS allowing parties to propose amendments and seek a conference to discuss them becomes active. UNFA also mandates a review conference on the effectiveness of the Agreement, which will be held in spring 2006. Within Canada, strategic thinking has been galvanized by the Government's commitment in the February 2004 Speech from the Throne to developing an Oceans Action Plan. This Plan has been organized along four main themes: 1) international leadership, sovereignty and security, 2) integrated management, 3) oceans health and 4) oceans science.

FISHERIES

1. Convention on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific

The *Convention on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean* establishes a conservation and management framework for tuna and other highly migratory species in the western and central Pacific Ocean. The area covered by this convention encompasses the last major area of the world's oceans not covered by a regional management regime for these species. The western and central Pacific Ocean region produces more than half the world's annual tuna catch, with an annual landed value of over CAD$2 billion. The Convention is particularly significant in Canada's view as it was drafted to implement the 1995 *United Nations Fisheries Agreement* (UNFA) and draws heavily on UNFA, through reference and incorporation of its principles and provisions.

Canada has been an active participant at the preparatory conferences which have been held over the last few

years. The conferences have made progress on financial and procedural regulations as well as selected scientific issues.

The Convention entered into force in June 2004 with the 13th ratification. Canada, which signed the Convention in 2001, is currently considering ratification of the Convention. The Commission established under the Convention will hold its first session in December 2004.

2. Inter-American Tropical Tuna Convention& Inter-American Tropical Tuna Commission

The Inter-American Tropical Tuna Commission (IATTC), established by the *1949 Inter-American Tropical Tuna Convention* (the 1949 Convention), is the first international organization dealing with tuna fisheries. In 1998, the IATTC established a working group to review the 1949 Convention and to amend it with a view to strengthening it and better aligning it with new fisheries realities and international fisheries instruments.

After five years of negotiation, agreement was reached in June 2003 on the text of an amended international convention for the management of tuna and billfish in the eastern Pacific Ocean. The Convention=s newly-defined area covers the western coast of the Americas from Canada in the north to Chile in the south, and as far west as French Polynesia. The Convention area includes part of Canada=s exclusive economic zone and territorial sea.

During negotiations, Canada campaigned for a text that would be consistent with Canada=s interpretation of the *United Nations Fisheries Agreement* (UNFA). While this goal was not fully achieved due to the participation of countries which are critical of UNFA, Canada was nonetheless able to achieve agreement on a text that supports an ecosystem and precautionary approach to fisheries conservation and management. The amended text also ensures that the impact on other species of tuna fishing is taken into account.

The amended Convention is open for signature until December 31, 2004. Canada is currently evaluating whether it will sign during this period.

3. Canada - U.S. Pacific Hake / Whiting Agreement

In November 2003 Canada and the United States signed an agreement that allows for the joint management of the trans-boundary Pacific Hake resource off the Pacific coast.

Prior to the agreement, there had been a long-standing disagreement between Canada and the United States on the relative share that each country should have of the annual coast-wide Total Allowable Catch (TAC) of Pacific Hake: Canada claimed that it was entitled to 30 percent of the resource, and the United States claimed 80 percent of the resource. As a result of this, since 1991, the two countries collectively fished in excess of the scientifically recommended catch.

The Agreement resolves this dispute by allocating 26.12 percent of the TAC to Canada, and 73.88 percent of the TAC to the United States. The Agreement also formalizes existing levels of scientific cooperation by creating committees to assess the stock and develop related advice, to conduct peer review, and to advise the two governments on the TAC.

The Agreement is not yet in force. It is hoped that it will enter into force and be implemented in early 2005. In the meantime, Canada and the United States informally applied the spirit of the treaty to the

management of the 2004 Pacific Hake fishery.

4. Canada-U.S. Treaty on Pacific Albacore Tuna Vessels and Port Privileges

After extensive negotiations, on May 28, 2004 Canada and the United States brought into force amendments to the 1981 *Treaty between the Government of Canada and the Government of the United States of America on Pacific Coast Albacore Tuna Vessels and Port Privileges*. The treaty facilitates the fishing of Albacore Tuna by both countries= vessels in the EEZ of the other, and the landing of that catch in certain of each other=s ports.

The amendments to the Treaty provide for a managed reduction of the number of vessels that can fish and land catch under the treaty over a five-year period. The 2004 fishing season became Year 1 under the new management regime.

II. ENVIRONMENTAL LAW

BILATERAL AND MULTILATERAL AGREEMENTS ON ENVIRONMENTAL COOPERATION (ENVIRONMENTAL SIDE AGREEMENTS)

To date, Canada has entered into three environmental side agreements, each as a parallel process to the establishment of free trade agreements with the United States and Mexico, Chile, and Costa Rica. The objectives of these environmental side agreements include fostering the protection and improvement of the environment, enhancing compliance with and enforcement of domestic laws, along with the promotion of sustainable development based on cooperation and mutually supportive environmental and economic policies.

1. North American Agreement on Environmental Cooperation

The *North American Agreement on Environmental Cooperation* (NAAEC), also known as the environmental side agreement to *the North American Free Trade Agreement* (NAFTA), entered into force on January 1, 1994. This unique agreement aims to relate liberalized trading regimes to a commitment by governments to responsible environmental stewardship. The objectives of the NAAEC are to create enhanced cooperation among the Parties, protect the North American environment and ensure that each Party effectively applies its domestic environmental legislation. A unique feature of the NAAEC is the Acitizen submission@ process. Articles 14 and 15 of the NAAEC provide that a member of the public or a non-governmental organization may make a submission asserting that a Party is failing to effectively enforce its environmental laws. This process may, on the recommendation of the NAAEC Secretariat and approval of the NAAEC Council, result in the development of a factual record by the Secretariat with respect to the asserted failure to enforce.

To date, the Secretariat has received 47 submissions, 15 of which relate to Canada. For seven of the submissions concerning Canada, the Secretariat terminated the process because the submissions did not meet the initial screening criteria established in the NAAEC or warrant the development of a factual record. For one submission, the NAAEC Council instructed the Secretariat not to prepare a factual record. Factual records have been prepared and released to the public on four submissions, and another two are currently being prepared by the Secretariat. One submission is currently being reviewed by the Secretariat to determine if it meets the initial criteria set out in s. 14(1) of the NAAEC. More information on the submission process can be found at the Commission on Environmental Cooperation website: http://www.cec.org.

2. Canada-Chile Agreement on Environmental Cooperation

The *Canada-Chile Agreement on Environmental Cooperation* (CCAEC), a parallel agreement to the *Canada-Chile Free Trade Agreement* (CCFTA), entered into force on July 5, 1997. The CCAEC captures many of the provisions of the NAAEC, highlighting the cooperative work programme between the two Parties and the implementation of measures aimed at the effective enforcement of their respective environmental laws. Articles 14 and 15 provide for a citizens submission process, closely modeled on that of the NAAEC (see 1. above). Four submissions have been received to date, all of which concern the effective enforcement of Chile=s environmental laws. All of these submission processes have now been completed. Further information on the CCAEC and the citizens' submission process is available at: http://www.can-chil.gc.ca.

3. Canada-Costa Rica Agreement on Environmental Cooperation

The *Canada Costa Rica Agreement on Environmental Cooperation* (CCRAEC) is a parallel agreement to the *Canada-Costa Rica Free Trade Agreement* (CCRFTA) and is modeled after the CCAEC. It was signed on April 23, 2001 and came into force on November 1, 2002.

The CCRAEC commits both countries to ensure their laws provide for high levels of environmental protection and to effectively enforce those laws through appropriate government action, including the prompt publishing or advanced publication, where possible, of all laws, regulations and administrative rulings covered by the Agreement. The CCRAEC also contains provisions relating to transparency and public participation, including a process whereby a person or non-governmental organization may request a response of either Party with respect to the effective enforcement of their environmental laws and regulations. A summary of both the inquiry and response will be made public. Further information on the CCRAEC is available at http://www.dfait-maeci.gc.ca/tna-nac/Costa_Rica-e.asp.

BOUNDARY WATERS

1. International Joint Commission

The International Joint Commission (IJC) is a bi-national commission established by the *Boundary Waters Treaty* which is charged with granting approvals to projects meeting criteria set out in the Treaty, as well as examining issues referred to it by Canada and the United States. For example, in 1999, the Governments of Canada and the United States jointly referred to the IJC the issue of consumption, use and diversion of the waters of the Great Lakes, including bulk water removal. The IJC is continually engaged in managing boundary waters issues through its relationship with boards of control for specific water bodies and through periodic review of past orders. In 2001, the IJC initiated a five-year study of Great Lakes-St. Lawrence River Water Levels and Flows which, among other objectives, will examine the effects of the IJC=s Orders authorizing the regulation of outflows from Lake Ontario. In 2004, Canada and the USA requested that it provide recommendations respecting the water quality in Missisquoi Bay.

2. North Dakota Water Projects

There are a number of closely-related water projects under construction or consideration in North Dakota that have created serious concerns for the governments of Manitoba and Canada, along with some states and NGOs in the United States. The Northwest Area Water Supply project (NAWS) is designed to pipe water from the Missouri River system to municipalities across the continental divide in North Dakota and within the Red River/Hudson=s Bay system. The inter-basin transfer of water and concerns about the adequacy of the federal environmental assessment have prompted Manitoba to seek judicial review in United States Federal Court, supported by Canada, NGOs and the State of Missouri filing as *amici*. Preliminary objections have been briefed and argued and an initial decision by the Court is expected within the next few months.

The Devil=s Lake project (actually two projects, one a large federal project and the other a smaller state project) seeks to take water from this flood-prone lake and transfer it to the Red River system. Devil=s Lake lies within the Red River system but has no natural outlet and also has very poor quality water. Although designed to prevent flooding, the transfer of poor quality water from Devil=s Lake to the Red River threatens the water quality of both Manitoba and Minnesota. While the state project is undergoing

permitting, the Manitoban and Canadian Governments are encouraging those seeking the permit to have any environmental consequences thoroughly examined. Lastly, a congressionally-mandated study to examine future water needs of the Red River Valley in North Dakota is causing concern because of its over-emphasis on inter-basin water transfers. The study is nascent, but is a matter of considerable concern for Missouri, Minnesota, Manitoba and Canada.

3. Upper Columbia River

In December 2003, the US EPA issued an administrative order under the *Comprehensive Environmental Response, Compensation, and Liability Act* (CERCLA) or ASuper Fund@ statute, requiring Teck Cominco Metals (a Canadian-incorporated company operating in Trail, BC) to undertake a series of studies of possible environmental damage to the Upper Columbia River. Concerned with the extraterritorial application of Super Fund to Canadian entities, the Canadian Government has indicated its concern to the US government; the EPA order is subject to a private party enforcement action in Washington State Federal Court.

KYOTO PROTOCOL TO THE UNITED NATIONS FRAMEWORK CONVENTION ON CLIMATE CHANGE

In December 2002, Canada ratified the *Kyoto Protocol to the United Nations Framework Convention on Climate Change* (UNFCCC). As of July 29, 2004, 124 countries have ratified or acceded to the Protocol. The Protocol will enter into force when 55 Parties, including Annex I Parties accounting for 55% of that group=s carbon dioxide emissions in 1990, have ratified it. As the United States has indicated that it will not ratify the Kyoto Protocol, Russian ratification is necessary to trigger its entry into force as the total emissions of Annex I Parties that have ratified so far account for 44.2% of that group=s emissions.

The Protocol aims to reduce global emissions of greenhouse gases by at least 5% below 1990 levels in an initial commitment period spanning 2008-2012. Canada has committed to reducing its aggregate emissions of greenhouse gases by 6% from 1990 levels during this period. The Protocol does not include any reference to emission reduction commitments for developing countries, although the broader process under the UNFCCC does include provision for a review of the adequacy of commitments in general.

A number of Aflexibility mechanisms@ (called the AKyoto mechanisms@) are set out in the Protocol. They are meant to allow Parties that have made emission reduction commitments under Annex B to choose the most efficient and cost-effective routes towards emission reductions and/or enhancement of emission sinks. Thus, the Protocol allows for Joint Implementation, the use of a Clean Development Mechanism and International Emissions Trading. The first two mechanisms enable Parties to meet their emission reduction commitment by means of projects carried out abroad that provide a reduction in emissions by sources, or an enhancement of removals by sinks, that is additional to any other reductions that would otherwise occur. International Emissions Trading allows Parties to acquire or sell emissions rights for the purpose of fulfilling their commitment to reduce global emissions of greenhouse gases by at least 5% below 1990 levels by 2012. The Protocol imposes other obligations on Annex I Parties such as monitoring and reporting and provides for a review of the information submitted under Article 7 by expert teams.

The Marrakesh Accords of November 2001 provide some 245 pages of legal text in a set of draft Adecisions@ that resolve key outstanding issues such as compliance, reporting, review, emissions trading and

sinks, and commitments to developing countries (such as funding, capacity building, and technological transfer). The Marrakesh Accords are expected to be adopted at the first meeting of the Parties to the *Kyoto Protocol* after it enters into force.

CARTAGENA PROTOCOL ON BIOSAFETY

In January 2000, the Conference of the Parties to the *Convention on Biological Diversity*, which includes Canada, adopted a supplementary agreement to the Convention known as the *Cartagena Protocol on Biosafety*. The Protocol seeks to protect biological diversity by establishing a framework in which living modified organisms resulting from biotechnology can be traded in a safe and responsible manner. The Protocol entered into force on September 11, 2003 and, as of August 5, 2004, had been ratified or acceded to by 107 States. The first meeting of the Parties to the *Biosafety Protocol* took place in February 2004 in Kuala Lumpur, Malaysia.

Canada signed the *Biosafety Protocol* on April 19, 2001 and is currently assessing whether to become a Party to the Protocol. As part of this evaluation process, consultations were held across the country in 2002-2003 and a study of the compatibility of Canada-s existing regulations with the Protocol was undertaken.

Further information on the Biosafety Protocol may be found at: http://www.biodiv.org/biosafety/

INTERNATIONAL TREATY ON PLANT GENETIC RESOURCES FOR FOOD AND AGRICULTURE

The *International Treaty on Plant Genetic Resources for Food and Agriculture* entered into force on June 29, 2004. Fifty-nine countries have ratified or acceded to the Treaty as of September 16, 2004. The Treaty was adopted by the FAO in November 2001, after seven years of negotiations. In June 2002, Canada became the first developed country to ratify it.

The Treaty governs both access to genetic resources (e.g. seeds) from key food and fodder crops that are held in national and international collections, and the sharing of benefits from the commercialisation of those genetic resources. It seeks to ensure the ongoing health of the world's plant genetic resource collections and includes an important capacity building component. It was negotiated in harmony with the *Convention on Biological Diversity* which has as one of its objectives the fair and equitable sharing of benefits from the use of genetic resources, including appropriate access to those resources.

Further information on the *International Treaty on Plant Genetic Resources for Food and Agriculture* may be found at: http://www.fao.org/ag/cgrfa/

THE PROTOCOL ON ENVIRONMENTAL PROTECTION TO THE ANTARCTIC TREATY

The *Antarctic Treaty*, which entered into force in 1961, was established to promote international cooperation in scientific investigation in the Antarctic and ensure that the Antarctic be used solely for peaceful purposes. The Treaty suspends all claims of territorial sovereignty in the Antarctic. Canada acceded to the Treaty 1988 and participates as a non-consultative Party at the annual Antarctic Treaty Consultative Meetings (ATCMs).

With the goal of further preventing environmental degradation in the Antarctic, the *Protocol on Environmental Protection* (known as the *Madrid Protocol*), was signed in 1991 and came into force in 1998. The Protocol establishes a comprehensive regime to protect the Antarctic environment, including a ban on non-scientific mining, and a requirement that all activities in the Antarctic undergo a prior environmental assessment in accordance with procedures prescribed in the Protocol. Through its technical Annexes, the Protocol establishes standards for certain activities (e.g. waste management and disposal and pollution prevention) and prohibits other activities except under the authorization of a permit (e.g. interference with flora and fauna, the import of non-native species, and entry into designated protected areas). Canada ratified the Protocol on November 13, 2003. Canada implements its obligations under the *Protocol through the Antarctic Environmental Protection Act*. Further information on the Antarctic Treaty System, including the Madrid Protocol, may be found at: http://www.ats.org.ar.

HAZARDOUS SUBSTANCES

1. Stockholm Convention on Persistent Organic Pollutants

Adopted in May 2001, and in force since 17 May 2004, the *Stockholm Convention on Persistent Organic Pollutants* (the *Stockholm Convention*) is designed to protect human health and the environment from persistent organic pollutants (POPs). POPs are chemicals that remain intact in the environment for long periods, become widely distributed geographically, accumulate in the fatty tissue of living organisms and are toxic to humans and wildlife. POPs circulate globally and can cause damage wherever they travel. Implementation of the *Stockholm Convention* requires governments to take measures to eliminate or reduce the release of POPs into the environment.

While POPs are a concern for all Canadians, the presence of POPs in Canada=s north has been of particular concern. Canada has been a leader in the negotiation of the *Stockholm Convention* having hosted the first meeting of the Intergovernmental Negotiating Committee to develop an international legally binding instrument for implementing international action on certain POPs in June 1998 in Montreal. Canada=s commitment to the Convention was made even clearer when Canada became the first State to ratify the Convention within 24 hours of its adoption.

The first meeting of the Conference of the Parties to the *Stockholm Convention* is scheduled for May 2-6, 2005 in Punta del Este in Uruguay. This first meeting will offer an opportunity to the Parties to establish the POPs Review Committee, to provide guidance to the Convention=s financial mechanism and to make decisions relating to the implementation of the Convention including the adoption of guidelines on best available techniques (BAT) and best environmental practices (BEP) to reduce or eliminate releases of unintentionally produced POPs including dioxins and furans.

Further information on the *Stockholm Convention* may be found at: http://www.pops.int/.

2. Rotterdam Convention on Prior Informed Consent Procedures for Certain Hazardous Chemicals and Pesticides in International Trade

The *Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade* (the *Rotterdam Convention*) requires exporters trading in a list of hazardous substances (certain chemicals and pesticides) to obtain the prior informed consent of importers

before proceeding with the trade. The *Rotterdam Convention* establishes a first line of defence by giving importing countries the tools and information they need to identify potential hazards and exclude chemicals they cannot manage safely. If a country agrees to import chemicals, the Convention promotes their safe use through labeling standards, technical assistance, and other forms of support.

The *Rotterdam Convention* was adopted in September 1998 and entered in force on February 24, 2004. Canada acceded to the Convention on August 26, 2002.

The first meeting of the Conference of the Parties was held from September 20-24, 2004 in Geneva, Switzerland. On the occasion of this first meeting, the Conference of the Parties adopted its rules of procedure and its financial rules, and established a Chemical Review Committee consisting of 31 experts in chemical management appointed on the basis of geographical distribution between developed and developing Parties. In addition, the Conference of the Parties agreed to amend the Convention by listing 14 additional chemicals in the Annex III of the Convention. This amendment will enter into force on February 1, 2005.

Further information on the Rotterdam Convention may be found at: http://www.pic.int/.

3. Basel Convention on the Control of Transboundary Movements of Hazardous Wastes & Their Disposal

The *Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal* (the *Basel Convention*) was adopted in March 1989 and entered into force in May 1992. As the end of September 2004, 163 States had ratified the Convention. Canada became a Party to the Basel Convention in August 1992.

The primary goal of the *Basel Convention* is to control and reduce the international movement of hazardous waste in order to protect human health and the environment. Waste export is prohibited to States which have banned the import of waste. Where transboundary movement of hazardous waste has not been banned, the movement is subject to prior notification and the consent of the importing State. The next Conference of the Parties will take place in Geneva, Switzerland on October 25-29, 2004. The theme A*Partnership for Meeting the Global Waste Challenge*@ was chosen in order to address the challenge for the environmentally sound management of hazardous wastes that overlaps with the issues surrounding municipal wastes. This calls for an integrated approach to tackling waste issues, involving many different partners and stakeholders.

Further information on the *Basel Convention* may be found at: http://www.basel.int/.

III. ECONOMIC LAW

ECONOMIC SANCTIONS

The imposition of economic sanctions against foreign States and non-State actors remains an important instrument for the international community in the enforcement of international norms and laws. In order to maximize the legitimacy and effectiveness of a sanctions regime, particularly one involving trade and economic measures, Canadian policy seeks to ensure that sanctions measures are applied multilaterally whenever possible.

1. Chapter VII of the United Nations Charter and the United Nations Act

Most of Canada=s economic sanctions are imposed as a result of decisions taken by the United Nations Security Council under Chapter VII of the *Charter of the United Nations* (the *UN Charter*). If the Security Council determines that there has been a threat to the peace, a breach of the peace or an act of aggression, it may decide what measures shall be taken to maintain or restore international peace and security. Following a debate among its members, the Security Council is authorized to adopt resolutions obliging Member States to impose sanctions. Decisions taken by the Security Council under Chapter VII become treaty obligations for Canada as a party to the *UN Charter* and are generally implemented under Canadian domestic law by regulations made pursuant to the *United Nations Act*, R.S.C. 1985, c. U2.

For example, the *Regulations Amending the United Nations Sierra Leone Regulations* (SOR/2004-117, May 11, 2004) removed the prohibitions on the import into Canada of rough diamonds originating from Sierra Leone, originally imposed by Resolution 1306 (2000) and subsequently extended by Resolutions 1385 (2002) and 1446 (2002). The amending Regulations became necessary when the Security Council decided to end the rough diamonds embargo in light of the Government of Sierra Leone's efforts to control and manage its diamond industry and ensure proper control over diamond mining areas. Sierra Leone is implementing the Kimberley Process Certification Scheme, an international certification system established in 2002, which regulates trade in rough diamonds in order to break the link between armed conflict and the illicit trade in conflict diamonds.

The Regulations Amending the United Nations Liberia Regulations (SOR/2004-153, June 17, 2004) maintained the ban on the import of round logs, timber products and rough diamonds from Liberia into Canada, as well as the arms embargo imposed against Liberia by Security Council Resolution 1343 (2001) and continued by Resolution 1521 (2003), following the departure of former President Charles Taylor and the formation of a National Transitional Government of Liberia. The amending Regulations added exemptions to the arms embargo for the United Nations Mission in Liberia (UNMIL) and an international training and reform programme for the Liberian armed forces and police, as approved in advance by the Security Council=s Sanctions Committee established pursuant to Resolution 1521. The Regulations also gave effect to Resolution 1532 of March 12, 2004 by imposing a freeze on the assets of Charles Taylor, his immediate family, senior officials of his former regime and other close associates as identified by the Sanctions Committee. The ban on the entry or transit of these individuals, decided by the Security Council in Resolution 1521, is enforced in Canada under section 35 of the *Immigration and Refugee Protection Act*.

The *United Nations Afghanistan Regulations* were amended (SOR/2004-160, July 7, 2004) to implement Security Council Resolutions 1390 (2002) and 1526 (2004), which *inter alia* lifted restrictions related to the operation of Taliban aircraft, flights to designated territories under Taliban control, and the operation of

Taliban offices, as a consequence of the collapse of the Taliban regime in Afghanistan. The resolutions also maintained the freeze on the assets of those listed by a UN Security Council Committee (also known as the 1267/1333 Committee, named after Resolutions 1267 and 1333) as members of the Taliban or Al-Qaida, or associates of Usama bin Laden, and continued to prohibit the supply, sale, and transfer of arms and technical assistance to them.

On July 30, 2004, the Security Council adopted Resolution 1556, imposing immediately an arms embargo against non-governmental entities, including the Janjaweed militia, operating in the Darfur region of Western Sudan. The *United Nations Sudan Regulations* (SOR/2004-1011, September 23, 2004) give effect, under Canadian domestic law, to the embargo by prohibiting the supply of arms and related technical assistance to anyone in Sudan by anyone in Canada or by any Canadian outside of Canada. It also prohibits the use of Canadian registered ships or aircraft for the same purposes. It provides for exceptions to the embargo for verification, monitoring or peace support missions, including such operations led by regional international organizations, such as the African Union, which are authorized by the United Nations or are operating with the consent of the relevant parties.

In addition, pursuant to Security Council resolutions, Canada also imposes economic sanctions in relation to Iraq (arms embargo and asset freeze of the previous Government of Iraq and those of Saddam Hussein and other senior officials of the former regime) and Rwanda (arms embargo). Measures imposed against the former Federal Republic of Yugoslavia under the *United Nations Federal Republic of Yugoslavia Regulations* were lifted on February 10, 2004. The *United Nations International Criminal Tribunal for the Former Yugoslavia Regulations*, which imposed a freeze on the assets of five Yugoslav government officials indicted by the International Criminal Tribunal for the Former Yugoslavia, pursuant to orders of the tribunal, were repealed on February 10, 2004 (SOR/2004-13), when the objectives of those orders were fulfilled.

2. United Nations Suppression of Terrorism Regulations

Security Council sanctions may also be directed against non-State actors. On September 28, 2001, the Security Council adopted Resolution 1373, in response to the September 11, 2001 terrorist attacks against the United States. Key provisions of the resolution require States to:
(1) criminalize the provision or collection of funds used to carry out terrorist acts; (2) freeze without delay funds and other financial assets of persons who commit or are involved in the commission of terrorist acts; and (3) prohibit making funds, assets and services available to persons who commit or are involved in terrorist acts. In order to implement this resolution, Canada made the *United Nations Suppression of Terrorism Regulations*. The Regulations require persons in Canada and Canadians outside of Canada to effectively freeze the assets of listed persons and prohibit fundraising for or on behalf of listed persons. For the purpose of the Regulations, the phrase listed persons include those listed by the Security Council Sanctions Committee known as the 1267/1333 Committee as members of the Taliban or Al-Qaida, or associates of Usama bin Laden (see paragraph on United Nations Afghanistan Regulations, above), as well as those listed in a Schedule to the Regulations, who there are reasonable grounds to believe are involved in or associated with terrorist activities.

The Regulations also include an obligation to disclose the existence of any property possessed or controlled by persons engaged in terrorist activities or any transaction related to property of such persons. Since they were made, the Regulations have been amended eighteen times to add, and in two cases remove, names from the Schedule. As of September 29, 2004, 486 individuals and entities were subject to the Regulations, either by virtue of their listing in the Schedule or because of their listing by the 1267/1333 Committee.

The Regulations have been supplemented, but not replaced, by the *Anti-Terrorism Act* (Bill C-36, now S.C. 2001, c. 41). Among other things, the Act amended the *Criminal Code* to create various terrorist offenses and a process for the listing of terrorist entities. The effect of listing under the *Criminal Code* is similar to, but more extensive than, listing under the Regulations. The Office of the Superintendent of Financial Institutions maintains on its website a consolidated list of all names listed under both the Regulations and the *Criminal Code*.

3. Special Economic Measures Act

Absent a UN Security Council resolution, Canada may impose sanctions in accordance with the *Special Economic Measures Act:* 1) Afor the purpose of implementing a decision, resolution or recommendation of an international organization or association of States, of which Canada is a member, that calls on its members to take economic measures against a foreign State@; or 2) Awhere the Governor in Council is of the opinion that a grave breach of international peace and security has occurred that has resulted or is likely to result in a serious international crisis@. At present, no country is subject to regulations or orders under the *Special Economic Measures Act*.

4. Export and Import Permits Act

Canada may also impose economic sanctions by using the *Export and Import Permits Act*. Permits are required for all goods exported to countries on the *Area Control List*, for the export of goods on the *Export Control List* and for the import of goods on the *Import Control List*. Foreign policy considerations may factor into the Minister=s decisions respecting permit applications. Myanmar (Burma) is presently on the Area Control List.

Further information on Canadian economic sanctions can be found at:
http://www.dfait-maeci.gc.ca/trade/sanctions-en.asp.

INTERNATIONAL AIR LAW

1. Convention on International Interests in Mobile Equipment and its Aircraft Protocol

The *Convention on International Interests in Mobile Equipment* (the AConvention@) and its *Protocol on Matters Specific to Aircraft Equipment* (the AAircraft Protocol@), developed under auspices of the International Institute for the Unification of Private Law (UNIDROIT) and the International Civil Aviation Organization (ICAO) were adopted at a Diplomatic Conference held in Cape Town, South Africa, from October 29 to November 16, 2001.

The Convention establishes an international legal framework for the creation, priority, and enforcement of security and leasing interests in mobile equipment, specifically high-value aircraft equipment (airframes, engines, and helicopters), railway rolling stocks, and space assets.
The Aircraft Protocol completes this legal framework with specific provisions relating to aircraft equipment, including the creation of an International Registry where interests in aircraft equipment can be registered, and the establishment of rules to determine the order of priority between these interests.
Additional protocols on railway rolling stocks and space assets are currently being negotiated at UNIDROIT.

The Convention and Protocol, by creating a modern and harmonized international regime for secure interests in aircraft equipment, are expected to reduce the risk of financial loss for lenders. The ensuing reduction in the cost of credit should assist airlines in acquiring new aircraft and aircraft manufacturers in financing the sale of their products. Faced with an increasingly unstable and competitive environment, the Canadian air transportation industry, including airlines, aircraft manufacturers, and financial institutions, strongly supports signature and ratification of the Convention and Protocol.

Canada signed the Convention and Aircraft Protocol on March 31, 2004. Ratification will necessitate the adoption of federal and provincial implementing legislation. The Convention entered into force on April 1, 2004. The Aircraft Protocol will enter into force following the deposit of the eighth instrument of ratification. Four States have ratified the Aircraft Protocol to date. Despite the fact that it has formally entered into force, the Convention can only have practical application once a protocol relating to a specific type of equipment has come into force. The date of entry into force of the Aircraft Protocol will therefore be of particular importance for both the Protocol and the Convention.

INTERNATIONAL SPACE LAW

1. Legal Subcommittee of the United Nations Committee on the Peaceful Uses of Outer Space (COPUOS)

The Committee on the Peaceful Uses of Outer Space (COPUOS) was established by Resolution 1472 (XIV) of the United Nations General Assembly. The Committee=s mandate is to review the scope of international cooperation in peaceful uses of outer space, devise programs in that field under the auspices of the United Nations, encourage research and the dissemination of information on outer space matters, and study legal problems arising from the exploration of outer space. The Committee has 65 member States, including Canada and other major space-faring nations.

The Legal Subcommittee is one of two standing subcommittees of COPUOS; the other being the Scientific and Technical Subcommittee. The Legal Subcommittee meets annually to consider questions put forward by the United Nations General Assembly (usually formulated within its Sixth Commission), reports from various bodies and issues raised by member States. Working on a consensus basis, the Subcommittee makes recommendations that are approved by the Committee and included in its annual report, which can be found at the following Internet address: http://www.oosa.unvienna.org/COPUOS/Legal/index.html

In addition to dealing with the standing items on its agenda - such as review of the status of international conventions on space and the activities of international organizations relating to space law - the Legal Subcommittee of COPUOS considers matters relating to the definition and delimitation of outer space, reviews the principles underlying the use of nuclear power sources in outer space, studies the practices of States regarding the registration of space equipment, and assists organizations and States involved in drafting the *Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Space Equipment.*

At its last session in March-April 2004, the Subcommittee, after years of deliberation, adopted a draft resolution on the concept of Alaunching State@, which is at the heart of the five United Nations conventions on outer space. The resolution will be submitted for adoption to the 59th session of the United Nations General Assembly this Fall.

The Subcommittee also began consideration of the practice of States and international organizations in registering space objects. This issue is of particular importance at this time of increasing commercialization of space activities. While private entities are more and more involved in the conduct of space activities and satellites are traded like any other commodity, States are the main subjects of the current international legal regime on outer space. This results in unique challenges for space-faring nations trying to adapt to new realities of space use and exploration.

NUCLEAR DISARMAMENT AND NON-PROLIFERATION

1. Canada-Russia Agreement Concerning the Destruction of Chemical Weapons, the Dismantlement of Decommissioned Nuclear Submarines, and the Physical Protection, Control and Accountancy of Nuclear and Other Radioactive Material

On June 9, 2004, Canada and Russia signed an *Agreement Concerning the Destruction of Chemical Weapons, the Dismantlement of Decommissioned Nuclear Submarines, and the Physical Protection, Control and Accountancy of Nuclear and Other Radioactive Material* (the AAgreement@). This Agreement provides a framework for bilateral cooperation between Canada and Russia pursuant to the Global Partnership against the Spread of Weapons and Materials of Mass Destruction (the AGlobal Partnership@), established at the G8 Summit at Kananaskis in 2002.

The Global Partnership is aimed at preventing the acquisition of weapons and materials of mass destruction by terrorists or those who shelter them. Under the Global Partnership initiative, the G8 leaders undertook to raise up to US$20 billion to address a number of non-proliferation, disarmament, counterterrorism and nuclear safety issues, initially in Russia. Canada has pledged $1 billion over ten years.

The risk of weapons of mass destruction (WMD) being used in terrorist activities increased significantly after 1991 when Russia took possession, from the states of the former Soviet Union, of vast quantities of nuclear, radiological, and chemical weapons and related destructive and dangerous materials. Russia now represents a storage depot for approximately 40,000 metric tonnes of chemical weapons; tonnes of highly enriched uranium and weapon-grade plutonium; and more than 50 decommissioned nuclear submarines with spent nuclear fuel. The Agreement will assist in securing and destroying these stockpiles.

The first project under the Agreement, which was announced in July 2004, will allow for the provision of $24.4 million in assistance to Russia for the dismantlement of decommissioned nuclear submarines. This project will also help Russia address the environmental threat posed by nuclear spent fuel to the Arctic and Barents Sea.

IV. DISPUTE RESOLUTION

INTERNATIONAL COURT OF JUSTICE

1. Advisory Opinion on the Construction of a Barrier in the Occupied Territories

On the July 9, 2004, the International Court of Justice (ICJ), the UN's principal judicial organ seated in The Hague, Netherlands, issued its Advisory Opinion on the construction of a barrier in the occupied territories. After unanimously upholding its jurisdiction, the majority of the ICJ found that there were no compelling reasons preventing it from ruling that Israel's building of the barrier in the occupied territories violates various international obligations incumbent upon Israel, and that the barrier must be dismantled immediately and Israel must make reparation for any damage caused. In its submission to the Court, Canada agreed that there were legal issues arising out of the construction of the barrier but questioned the utility of a referral of the matter to the ICJ at that time. Canada respects the Court's Advisory Opinion and has underlined the need for all parties engaged in the Middle East Peace Process to fully comply with their obligations under international law at all times.

2. Case on the Legality of the Use of Force (Serbia and Montenegro v. Canada et al.)

Canada is one of eight NATO countries involved in a case before the International Court of Justice that was brought by the Federal Republic of Yugoslavia in April 1999. The oral hearings held in April 2004 addressed only preliminary issues on jurisdiction and admissibility that were raised by the NATO respondents.

Yugoslavia B now Serbia and Montenegro (SaM) B claimed that the NATO military campaign, which was aimed at ending crimes against humanity in Kosovo that had led to the forced displacement of some 750,000 civilians, violated international law concerning the use of force. SaM also claimed that the NATO bombing campaign was carried out with genocidal intent against the Serbian people. Canada totally rejects these allegations.

In May 1999, SaM requested the Court to make an order for provisional measures (interim relief), namely the immediate cessation of the NATO campaign. The Court rejected SaM=s interim request, and dismissed the case against the United States and Spain for Amanifest lack of jurisdiction@. However, the Court refused at that time to dismiss the case outright against Canada and the seven remaining NATO states (the UK, France, Germany, Belgium, the Netherlands, Italy, and Portugal).

On January 5, 2000, SaM submitted written pleadings to the Court detailing its claims and making new allegations, including against the UN-authorized, NATO-led multinational force in Kosovo (KFOR). In July 2000, Canada and the seven remaining respondent states individually submitted to the Court preliminary objections to the SaM action, on the basis that the Court lacked jurisdiction and that the portions of the claim relating to KFOR were inadmissible. Among other things, Canada argued that the then-Federal Republic of Yugoslavia did not have standing to appear before the Court since it was not a member of the United Nations (the FRY, following the ouster of President Slobodan Milosevic, applied for and was granted UN membership only in 2001); and that jurisdiction could not be claimed under the Genocide Convention since there was absolutely no evidence of genocidal intent by NATO.

After several extensions -- in the course of which dramatic political changes took place -- SaM finally

submitted on December 18, 2002 written observations to the Court, in which it essentially accepted key points made by the NATO respondents and opposed none of their preliminary objections. The new regime in SaM, faced with the difficulty of not being able to withdraw the case for domestic political reasons, did not advance strong arguments why the Court should find jurisdiction, but rather asked it to make a finding that would assist SaM in resolving the legal legacy of the Milosevic years (which includes cases brought by Bosnia and Croatia for violations under the Genocide Convention). Given the current case load of the ICJ, judgment on jurisdictional issues is not expected until later this Fall at the earliest.

V. INTERNATIONAL CRIMINAL LAW

INTERNATIONAL COURTS AND TRIBUNALS

1. International Criminal Court (ICC)

The International Criminal Court (ICC) is a permanent international judicial institution designed to help bring to justice those individuals responsible for genocide, crimes against humanity and war crimes. The *Rome Statute of the International Criminal Court* (the *Rome Statute*) entered into force on July 1, 2002, having obtained the required 60 ratifications. As of September 29, 2004, the number of ratifications has increased to 97.

The ICC complements, but does not replace, national courts, and may exercise jurisdiction only where national courts are unable or unwilling to prosecute. The *Rome Statute* contains extensive safeguards and checks and balances to ensure that the ICC focuses on the most serious international crimes.

Canada signed the *Rome Statute* on December 18, 1998 and ratified it on July 7, 2000. Canada was the first country in the world to adopt comprehensive legislation, the *Crimes Against Humanity and War Crimes Act*, implementing the obligations of the *Rome Statute*. Canada is recognized as a world leader in the efforts to establish and support the ICC. Canada's *ICC and Accountability Campaign*, funded from Foreign Affairs Canada's Human Security Program, provides funding to events and projects that promote the ratification and implementation of the *Rome Statute*; assist with the effective functioning of the ICC and other international criminal institutions such as the ICTY, ICTR and Sierra Leone Special Court; and conduct education and outreach on the ICC and other tribunals.

The 18 judges of the Court were elected by the Assembly of States Parties in February 2003. Philippe Kirsch of Canada was elected as one of the judges and in March 2003, Judge Kirsch was elected as the first President of the ICC. In April 2003, the Assembly of States Parties unanimously elected Luis Moreno Ocampo of Argentina to serve as the Prosecutor. In July 2003, Bruno Cathala of France was elected by the judges to serve as Registrar. Thus, the key officials of the Court are now in place.

To date two States have referred situations to the ICC: Uganda in December 2003 and the Democratic Republic of Congo (DRC) in March 2004. The ICC Prosecutor officially launched investigations into the situations in the DRC in June 2004 and in Uganda in July 2004.

Canada ratified the ICC=s Agreement on Privileges and Immunities (APIC) on June 22, 2004, triggering its entry-into-force on July 22, 2004. APIC, now ratified by 16 states, gives representatives of States Parties, personnel and various officers of the Court the privileges and immunities needed for exercise of the ICC=s duties. Canada=s leadership in ratifying APIC has been lauded by many countries and nongovernmental organizations. The coming into force of APIC is particularly important now that the ICC Prosecutor has begun investigating cases.

The ICC=s Assembly of States Parties met from September 6-10, 2004 in The Hague. The Assembly considered and adopted the budget for the ICC for 2005. This budget contains a core aspect (funds needed for the operation of the ICC whether or not it hears cases) and a more flexible conditional aspect (with estimates for funding for two or more cases) totalling approximately i 67 million.

The United States (US) continues to oppose the ICC and has undertaken a worldwide campaign to conclude bilateral immunity agreements (BIAs), ostensibly under art. 98(2) of the *Rome Statute*, to preclude the surrender of US nationals to the ICC. Canada has refused to enter into such a BIA as to do so would be incompatible with the Rome Statute. In particular, such a BIA would cover not only military personnel on mission but all US nationals, which goes well beyond the provisions of art. 98(2) of the *Rome Statute*. The US has also pressed for immunity from the ICC, in Security Council Resolutions 1422 and 1487, for UN peacekeepers from States not party to the ICC. However, on June 23, 2004, the US withdrew its bid to renew Security Council Resolution 1487 for another year, after nine Security Council members expressed their intent to abstain on a vote.

The ICC is a modern and necessary international institution which enjoys very strong support from the international community and in world public opinion. Canada continues actively to support universal ratification and implementation of the Rome Statute and the Agreement on Privileges and Immunities of the International Criminal Court as the best means of combating impunity and promoting accountability for the most serious international crimes. The success of the ICC will depend on the support it receives from all States and the public at large, especially during the crucial initial period of its existence. ICC States Parties are working to build a reliable and responsible system to bring to justice the world's worst criminals and to protect victims, and Canada will continue to lead in this effort.

Further information on Canada and the ICC is available at: www.icc.gc.ca / www.cpi.gc.ca.

2. International Criminal Tribunal for the Former Yugoslavia (ICTY)

The *International Criminal Tribunal for the former Yugoslavia* (ICTY) was established by the United Nations Security Council in 1993 to prosecute individuals alleged to have committed serious violations of international humanitarian law, including war crimes, crimes against humanity and genocide in former Yugoslavia since 1991. Over the course of its lifespan, the Tribunal=s workload has increased significantly. The ICTY=s staff has increased to 1238 members from 84 countries, and its budget has expanded from US$276,000 in 1993 to over US$100 million in 2004. Fifty-two accused are currently in detention at the ICTY=s detention unit, and 11 accused have been provisionally released. Twenty-one accused are currently at large (including Radovan Karadzic and Ratko Mladic). Fourteen accused are currently serving their sentences in Austria, Finland, Germany, Italy, Norway, Spain and Sweden, with 10 others having completed their sentences. Thirty-five cases have been completed. According to a completion strategy adopted by the ICTY and endorsed by the Security Council, all investigations should be completed by the end of 2004, all trials by the end of 2008 and all appeals by the end of 2010. The current President of the ICTY is Theodor Meron (U.S.A.) and the Chief Prosecutor is Carla Del Ponte (Switzerland).

The ongoing trial of Slobodan Milosevic is being widely reported. Milosevic was initially self-represented (though assisted by Alegal associates@), with the Tribunal assisted by *amici curiae* to ensure that his rights were fully respected. On September 2, 2004, the Trial Chamber assigned defence counsel to Milosevic on the basis that his present health situation meant that he was not fit enough to defend himself. Prior to that ruling, Milosevic=s ill health resulted in over a dozen interruptions in the trial and 66 lost trial days. The ruling on assignment of counsel is being appealed.

The Government of Canada strongly supports the ICTY, as it regards its work as essential in ending the cycle of impunity and violence in the region. Canada has to date provided over CAD$5 million in voluntary contributions to the Tribunal and forensic experts to exhume bodies in Kosovo. Canada is very concerned at the failure of many Member States of the United Nations to pay their assessed contributions to the ICTY in

full and on time, with has led to a significant budget shortfall and the freezing of new hiring.

3. International Criminal Tribunal for Rwanda (ICTR)

The *International Criminal Tribunal for Rwanda* (ICTR) was established in 1994 by the United Nations Security Council to bring to justice the leaders and planners of the 1994 Rwandan genocide, which claimed the lives of an estimated 800,000 Tutsi and moderate Hutu. The ICTR is based in Arusha, Tanzania. The Chief Prosecutor (Hassan Jallow of the Gambia) also has an office in Rwanda. The Registrar is Adama Dieng (Senegal) and the President of the Tribunal is Judge Erik Mose (Norway). As of September 2004, the ICTR has handed down 17 judgments involving 23 accused. These judgments involve one Prime Minister, four Ministers, on Prefect, five Bourgemestres and several others holding leadership positions. Eight trials are currently in progress, involving 25 accused. Seventeen accused are awaiting the commencement of their trials, and 10 indictees are at large. Benin, France, Italy, Mali, Swaziland and Sweden have agreed to accept those convicted by the ICTR to serve their sentences. Rwanda is also in discussions with the ICTR on enforcement of sentences.

The ICTR=s 2004 budget is over $100 million. It has staff from more than 80 different countries. The ICTR is following a completion strategy similar to that of the ICTY. All trials (an estimated 65-70 in total) will be completed by 2008. Like the ICTY, the ICTR is considering transferring some cases to national courts.

Several Canadians are working for the ICTR in a variety of capacities. Canada has provided over CAD$1 million in voluntary contributions since the establishment of the Tribunal and has also provided other forms of assistance, such as the donation of a special collection of legal articles and publications on the law of genocide for the use of the Tribunal and its judges. In June 1999, amendments to the *Extradition Act* and several other statutes were adopted, in order to permit surrender of indictees directly to the Tribunal. Canada is very concerned at the failure of many Member States of the United Nations to pay their assessed contributions to the ICTR in full and on time, with has led to a significant budget shortfall and the freezing of new hiring.

4. Sierra Leone Special Court

On August 14, 2000, the Security Council adopted Resolution 1315, requesting the Secretary-General to negotiate with the Government of Sierra Leone in order to establish an independent Special Court to try serious violations of international humanitarian and Sierra Leonean law. In January 2002, the Secretary-General and the Government of Sierra Leone officially signed the agreement to create the Special Court. The Court was established in 2002, and is based in Freetown, Sierra Leone.

The Special Court is mandated to try those who bear the greatest responsibility for committing serious violations of international humanitarian and Sierra Leonean law from November 30, 1996 (the date of the failed Abidjan Peace Agreement) onward. The Special Court is a "hybrid" tribunal, applying both international and domestic laws, and employing both international and domestic staff and judges. The Ahybrid@ format was chosen because it has the greatest potential for building capacity and strengthening the rule of law within Sierra Leone=s decimated legal system.

The Court consists of three organs: the Office of the Prosecutor, the Registry and the Chambers (both Trial and Appeal). The Prosecutor, David Crane of the United States, was appointed in April 2002. The Office of the Prosecutor began its work in Freetown in August of that year. The Registrar, Robin Vincent of the United Kingdom, also began work in Freetown in August 2002. The judges were appointed in July 2002 by

the United Nations Secretary-General and the Government of Sierra Leone. Canadian Brigadier-General Pierre Boutet was appointed to the Trial Chamber, along with Benjamin Mutanga Itoe of Cameroon and Bankole Thompson of Sierra Leone. The five members of the Appeals Chamber are Emmanuel O. Ayoola from Nigeria (President), A. Raja Fernando from Sri Lanka, Gelaga King from Sierra Leone, Geoffrey Robertson from the United Kingdom, and Renate Winter from Austria.

Two trials are ongoing at the Special Court. One case involving three accused from the Civil Defence Forces began on June 3, 2004, and one case involving three accused from the Revolutionary United Front began on July 5, 2004. A second Trial Chamber of three judges is expected to be appointed soon, to hear the case of three accused from the Armed Forced Revolutionary Council. Charles Taylor, former president of Liberia, now in exile in Nigeria, is the most high profile indictee not in custody. Despite strong efforts by Canada, Netherlands, the United Kingdom and the United States, voluntary contributions for the Special Court=s third year of operations fell short of the US$30 million required. The United Nations General Assembly approved in principle a one-time subvention of up to US$40 million, to cover the financial period to the end of 2005. An amount of $16.7 million was authorized to be paid to the Special Court for the period July 1- December 31, 2004. The General Assembly will consider the authorization of the remaining funds this autumn.

Canada has been very involved in the creation of the Special Court. Canada participated actively during its term on the Security Council in the drafting of Resolution 1315 and the subsequent discussions on the Special Court. Canada has contributed CAD$3.25 million in funds and expert personnel to the Special Court, including four police officers and six legal interns. Canada served as Chair of the Management Committee, which provides oversight on non-judicial matters for the Special Court, from its inception until July 2004, when the United Kingdom became Chair.

INFORMATION SHARING AND PRIVACY

Information sharing between governments has been on-going for many years in areas such as, for example, police and customs cooperation and is an integral part of the Government=s operations in relation to foreign policy. International initiatives have recently focused on improving information sharing between governments, particularly in relation to criminal and terrorist activity. For example, the G8 leaders at the Sea Island Summit last June launched the Secure and Facilitated International Travel Initiative (SAFTI) to improve the security and efficiency of air, land, and sea travel. SFATI includes a number of projects to enhance information sharing between partner governments.

While the need for better coordination and information sharing both within governments (see the March 2004 report of the Auditor General at http://www.oag-bvg.gc.ca/domino/reports.nsf/ html/20040303ce.html and between governments has been recognized as essential for ensuring the free flow of people and goods while protecting national security, such sharing must be done in a way that is consistent with privacy and other rights of individuals.

Concerns have been expressed with the sharing of or access to personal information. In Canada privacy related legislation has been enacted over the years such as the *Privacy Act* and the *Personal Information Protection and Electronic Documents Acts* (PIPEDA) to safeguard personal information. In addition the Charter has been invoked in some cases in relation to privacy issues.

The issue of foreign access to personal information in Canada came to a fore recently in BC in relation to

the US *Patriot Act*. Concerns had been expressed that personal information that was being archived in private facilities could become accessible to the United States law enforcement authorities via the *Patriot Act*. The Privacy Commissioner of Canada made a submission to the BC Information and Privacy Commissioner, noting, *inter alia*, that:

> No one seriously questions that governments and private sector organizations must collect, use and disclose personal information to do business, run programs and ensure adequate public security. However, Canadians are increasingly concerned about the extent to which their governments claim to require personal information about individuals to fight crime and protect national security. Canadians are also concerned about how and when personal information about them is shared with foreign governments and agencies, including police and security agencies. Their concern centers on the balance between law enforcement and public security on the one hand, and respect for fundamental human rights such as privacy on the other.

The full text of the Privacy Commissioner=s submission can be found at http://www.privcom.gc.ca/media/nr-c/2004/sub_usapa_040818_e.asp

Foreign Affairs Canada is working with all of our partner departments to develop international mechanisms that will allow for effective information sharing with Canada=s allies provided they are in compliance with our international obligations and they strike the appropriate balance between national security and individual privacy.

TRANSNATIONAL ORGANIZED CRIME

The first Conference of the Parties to the *United Nations Convention on Transnational Organized Crime* met from June 28 to July 9, 2004, in Vienna to consider how to improve the operation of legal cooperation under the Convention. The Conference considered technical assistance for developing countries, the mechanism for reviewing the implementation of the Convention, the Protocols on human trafficking and smuggling, and the agenda of the 2005 Conference.

The Convention set out the general work plan of the Conference in Article 32. The Conference was to agree upon mechanisms for encouraging the mobilization of voluntary contributions for technical assistance; facilitating the exchange of information among States Parties on patterns and trends in transnational organized crime and on successful practices for combatting it; reviewing periodically the implementation of this Convention and making recommendations to improve this Convention and its implementation.

The first Conference of the Parties to the Convention considered how it should organize the future work of the Conference. The consensus was that the agendas of the future Conferences should be concise and focused on thematic aspects of the Convention. The Conference agenda for 2005 will focus on the criminalization of the offences in the Convention. The delegations decided that the issue of the mechanism for reviewing the implementation of the Convention would be put off until the next session and that questionnaires on the implementation of the Convention and the two Protocols would be circulated to all parties and signatories.

Another issue discussed was technical assistance to developing countries. Article 30 of the Convention

calls on countries to Aprovide technical assistance to developing countries to assist them in meeting their needs for the implementation of this Convention. To that end, States Parties shall endeavour to make adequate and regular voluntary contributions to an account specifically designated for that purpose in a United Nations funding mechanism.@ The Secretariat will prepare a report on technical assistance for consideration at the next Conference.

There are two Protocols to the Convention which are in force. There were separate meetings of the States Parties to these Protocols as the States Parties differ for the Convention and the two Protocols. There was an active discussion of the importance of the *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children.* Countries set out their national plans to combat trafficking. A separate questionnaire on this Protocol has been set up and the Secretariat report on countries action in setting out the criminalization of the offenses in the Protocol. This will be discussed at the next session.

The Parties to the *Protocol against the Smuggling of Migrants by Land, Air and Sea* also met and there will be a questionnaire circulated.

The third Protocol, the *Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition*, is not yet in force. It will enter into force on the ninetieth day after the date of deposit of the fortieth instrument of ratification, acceptance, approval or accession. There are 52 signatories and 26 countries have ratified the Protocol. The Secretariat believes that the Protocol may come into force before the next Conference in 2005. If it comes into force, a meeting of the Parties to that Protocol would have to be held at the next Conference in summer 2005.

ANTI-CORRUPTION EFFORTS

1. United Nations Convention Against Corruption

During negotiations for the *United Nations Convention against Transnational Organized Crime* (TOC), a consensus emerged that the TOC=s brief treatment of the criminal aspect of corruption would need to be supplemented by a separate instrument on corruption. Building on past United Nations work on corruption, including *its Global Programme on Corruption*, GA Resolution 55/61 of December 4, 2000, asked the Secretary-General to Aconvene [...] an open-ended expert group@ to prepare for Athe negotiation of the future legal instrument against corruption.@ This was followed by GA Resolution 55/188 of December 20, 2000, on APreventing and combatting corrupt practices and illegal transfer of funds and repatriation of such funds to the countries of origin@. This Resolution flagged a central concern of many developing States which have been hurt by corrupt senior government officials embezzling state funds and assets and hiding them abroad. As agreed at the U N Crime Commission in Vienna in May 2001, draft terms of reference for the negotiation of the *United Nations Convention against Corruption* (UNCAC) were proposed by a group of experts convened in Vienna, from July 30 to August 3, 2003.

The Ad Hoc Committee on the Negotiation of a Convention against Corruption finalized negotiations at its seventh session, held in Vienna in the Fall of 2003. UNCAC focuses on preventive measures, criminal sanctions, international co-operation, asset recovery and technical assistance. The UNCAC is more comprehensive than existing anti-corruption agreements and is expected to become the most important and widely-applied instruments in the fight against corruption. The Convention extends global level tools for cooperation against corruption already in place on a regional or bilateral level and will improve information-sharing and law enforcement cooperation amongst Parties. For example, UNCAC goes beyond the *Transnational Organized Crime Convention* by broadening access to mutual legal assistance and providing a comprehensive set of mechanisms to facilitate the return of assets associated with corruption. As of September 24, 2004, 111 countries have signed and 6 ratified UNCAC. Canada

signed UNCAC on May 21, 2004 and is considering ratification. UNCAC will enter into force on the 90th day following ratification by the thirtieth State Party.

2. Canada and Other International Instruments against Corruption

Several regional conventions and other documents on corruption already exist. The most notable of these is the Organization for Economic Cooperation and Development (OECD) *Convention on Combatting Bribery of Foreign Public Officials in International Business Transactions* (the *OECD Convention*), which has been signed by all 30 members of the OECD and five non-member States. The *OECD Convention* prohibits businesses based in signatory countries from bribing public officials anywhere in the world, thus encouraging a level playing field among all members and having a global impact. The *OECD Convention* has a two phase monitoring process. Phase 1 is designed to evaluate whether the legal texts through which participants implement the Convention meet the standards set by it. Phase 2 studies and assesses the structures put into place to enforce national laws and determine their practical application.

To date, 34 of the 36 members of the Working Group have undergone Phase 1 reviews and 8 have been reviewed Phase 2 reviews. Canada has received positive reviews under both phase 1 and 2 of the OECD process.

A more purely regional instrument is the *Inter-American Convention against Corruption* (IACAC) which was negotiated by the members of the Organization of American States (OAS), but is open to signature by non-OAS members. The IACAC was one of the first international anti-corruption instruments and, like the *OECD Convention*, has a monitoring mechanism that reviews legislation and implementation of IACAC by its members. There are 30 State Parties to IACAC. Canada will be reviewed by this mechanism in 2005.

In 1999, the Commonwealth Heads of Government Meeting adopted a *Framework for Commonwealth Principles on Promoting Good Governance and Combatting Corruption*, a non-binding political statement.

Further information on the Department of Foreign Affairs and International Trade=s anti-corruption work and links to other sources of information are available at:
http://www.dfait-maeci.gc.ca/internationalcrime/corruption-e.asp.

Further information on public consultations on the United Nations Convention against Corruption as well as links to key anti-corruption documents are available at:
http://www.dfait-maeci.gc.ca/internationalcrime/instrument-e.asp.

VI. HUMANITARIAN LAW

THE CANADIAN NATIONAL COMMITTEE FOR HUMANITARIAN LAW

The Canadian National Committee for Humanitarian Law (CNCHL) is established pursuant to a recommendation of the 26th International Conference of the Red Cross and Red Crescent. Its main task consists of facilitating the implementation of international humanitarian law in Canada, including the *Geneva Conventions* and their *Additional Protocols.*

The core members of the CNCHL consist of representatives of the following departments and organizations: Foreign Affairs Canada, the Department of National Defence, the Department of Justice, the Canadian International Development Agency, the Department of the Solicitor General as represented by the Royal Canadian Mounted Police and the Canadian Red Cross Society.

This summer, the CNCHL launched a website at www.cnchl-cncdh.ca which provides information on the work of the CNCHL, international humanitarian law issues and links to other resources and international bodies.

PROTOCOL ON EXPLOSIVE REMNANTS OF WAR

In November, 2003 a legally binding *Protocol on Explosive Remnants of War* was adopted by the States Parties to the 1980 *Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons* (CCW). The new Protocol is restricted to post-conflict remedial measures to protect civilians and humanitarian operations through battlefield clearance, transfer of information, warnings, and voluntary assistance to these ends. Canada was extensively involved in the development of the negotiating text, and participated actively in the negotiations.

Explosive Remnants of War (ERW) refers to unexploded and abandoned ordnance which often remain on the ground long after conflicts have ceased, presenting major humanitarian concerns to civilians and relief operations, and often severely impeding crucial development efforts requiring the return of land to productive use. The humanitarian impact of ERW is well-documented and has received considerable international attention in the aftermath of the Kosovo, Afghanistan and Iraq conflicts.

The CCW is a treaty providing a framework for restricting or prohibiting the use of excessively injurious or indiscriminate weapons. With 96 States Parties, including the USA, China, and Russia, it is a flexible instrument allowing for the adoption of protocols addressing specific types or aspects of conventional weapons. To date, protocols have been adopted on: weapons that cause non-detectable fragments; anti-personnel landmines (since superseded for most states by the more stringent *Ottawa Convention*); incendiary weapons; and blinding laser weapons.

SAFETY OF UNITED NATIONS AND ASSOCIATED PERSONNEL

In recent years, the safety of UN and associated personnel has increasingly been compromised. Their neutrality and impartiality has been flouted and operations and individuals targeted for violence.

Canada is committed to enhancing the security of UN and associated personnel. In April 2002 we ratified the 1994 *Convention on the Safety of UN and Associated Personnel* (*1994 Convention*) and implemented it in

our domestic laws. We are also working hard to strengthen the legal protections available. We were instrumental in the creation of and have participated actively in the UN Ad Hoc Working Group considering options to expand the scope of legal protections available to UN and associated personnel. This group is currently considering a proposal for an optional protocol that would expand the scope of application of the *1994 Convention*.

Apart from UN peace-keeping operations, where the *1994 Convention* applies automatically, it otherwise applies only to UN operations where the Security Council or the General Assembly have declared that there exists an Aexceptional risk@ to the safety of personnel participating in the operation. The question of what amounts to an Aexceptional risk@is highly political, has never been defined and to date, neither the Security Council nor General Assembly have ever made such a declaration. As a result, the Convention has only been applied to United Nations peacekeeping operations, whereas threats to the safety and security of UN personnel in a range of operations, in particular in humanitarian settings, have escalated over the past decade at an unprecedented rate.

Canada is actively participating in the Working Group discussions on a proposed optional protocol to the *1994 Convention* which aim to extend the prevention and criminalization obligations under the Convention automatically to a broader range of UN operations. In this manner, it is hoped that an optional protocol would eliminate the political deadlock that has stymied application of the 1994 Convention.

VII. HUMAN RIGHTS

RIGHTS OF THE CHILD

1. Optional Protocol To The Convention On The Rights Of The Child On The Sale Of Children, Child Prostitution And Child Pornography

The main objective of the *Optional Protocol to the Convention on the Rights of the Child, on the Sale of Children, Child Prostitution and Child Pornography* is to define more clearly what constitutes sale of children, child prostitution and child pornography, and to strengthen the relevant provisions in the *Convention on the Rights of the Child* by criminalizing these activities and instituting measures for the protection of child victims. The Optional Protocol entered into force on January 18, 2002.

Canada signed the Optional Protocol on November 10, 2001 with the support of provinces and territories. Canada enacted Criminal Code amendments to address the exportation of child pornography and will soon be in a position to ratify the Optional Protocol. Ratification will reaffirm the Government commitments in the February 2004 Speech from the Throne to protect Canada=s children from exploitation and abuse. A link to the text of the Optional Protocol is found on the website of the United Nations Office of the High Commissioner for Human Rights at: http://www.unhchr.ch/html/menu2/dopchild.htm.

RIGHTS OF PERSONS WITH DISABILITIES

1. Ad Hoc Committee On A International Convention On The Protection And Promotion Of The Rights And Dignity Of Persons With Disabilities

An Ad Hoc Committee to elaborate a convention to protect and promote the rights of persons with disabilities was established by resolution of the United Nations General Assembly in 2001. To date, the Ad Hoc Committee, under the Chairmanship of Ambassador Gallegos of Ecuador, has held four meetings: one in 2002, one in 2003 and two in 2004. At the meeting in 2003, all but one Member State as well as all NGO representatives were in favour of proceeding with the elaboration of a new instrument. The Ad Hoc Committee established a Working Group with a view to preparing a draft text which would serve as the basis of negotiation. The Working Group, which was composed of 27 states, including Canada, 12 NGOs and one national human rights institution, met in January 2004 for two weeks. The state purpose of the draft Convention is to guarantee the full and equal enjoyment of all human rights and fundamental freedoms to all persons with disabilities. It reaffirms civil, political, economic, social and cultural rights. Since the meeting of the Working Group, the Ad Hoc Committee has met twice and has completed a first reading the draft text. In addition, at it most recent meeting (August-September, 2004), the Ad Hoc Committee was able to complete a more in-depth discussion of a few initial articles. Canada has been a key participant in the discussions of the Ad Hoc Committee. In particular, Canada has contributed to the framing of the equality rights provision in the draft Convention and will serve as facilitator (Chair) for the discussion of an article dealing with legal capacity.

OPTIONAL PROTOCOL TO THE CONVENTION AGAINST TORTURE

1. Optional Protocol To The Convention Against Torture And Other Cruel, Inhuman Or Degrading Treatment And Punishment

In 2002, the United Nations General Assembly adopted the *Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, and requested the Secretary-General to open it for signature, ratification and accession at United Nations Headquarters from January 1, 2003. The Optional Protocol was approved by a vote of 104 in favour, 8 against (China, Cuba, Israel, Japan, Nigeria, Vietnam, Syria, United States), with 37 abstentions.

The objective of the Optional Protocol is to establish a system of regular visits to be undertaken by independent international and national bodies to places where people are deprived of their liberty, in order to prevent torture and other cruel, inhuman or degrading treatment or punishment. It establishes a Subcommittee on Prevention to carry out, within the framework of the *Charter of the United Nations* and in cooperation with States party to the Convention, the functions laid down by the Option Protocol. Expenditures incurred in implementation of the Optional Protocol are to be borne by the United Nations. A Special Fund will be set up to help finance the implementation of the Subcommittee's recommendations. Reservations to the Optional Protocol are not permitted.

Canada actively participated in the negotiation of the Optional Protocol, and voted in favour of its adoption at both the United Nations Commission on Human Rights (CHR) on April 22, 2002, and at the General Assembly on December 18, 2002. Canada supports the fundamental elements of the Optional Protocol regarding the establishment of an international mechanism to conduct visits to places of detention to prevent torture and has invited the international Subcommittee, once established, to visit Canada. Domestically, Canada has a number of mechanisms in place both federally and provincially to protect persons in places of detention from torture. These include human rights commissions, correctional investigators, police oversight agencies, ombudsmen, and the law courts.

Consultations are underway in Canada on the possibility of signing and ratifying the Optional Protocol, focusing in particular on whether the federal and provincial mechanisms in place in Canada would comply with the provisions of the Optional Protocol.

ENFORCED DISAPPEARANCES

The Commission on Human Rights (CHR) established by Resolution 2001/46 an inter-sessional open-ended working group, with the mandate to elaborate, in the light of the findings of an independent expert, a draft legally binding normative instrument for the protection of all persons from enforced disappearance. The Working Group is to take into account, *inter alia*, the draft international convention on the protection of all persons from enforced disappearance transmitted by the Sub-Commission on the Promotion and Protection of Human Rights in its Resolution 1998/25, for consideration and adoption by the United Nations General Assembly, and to prepare the draft on the basis of the *United Nations Declaration on the Protection of All Persons from Enforced Disappearance.* The Working Group held its first session in January 2003 and has met annually since then.

Canada's objectives for a new instrument are to ensure that it provides effective protection to persons against enforced disappearance, that it assists in ascertaining the fate of disappeared persons, and that it provides for adequate sanctions against the perpetrators of enforced disappearances. Canada considers that a new instrument should complement existing instruments and mechanisms, such as the *International Covenant on Civil and Political Rights*, the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, and the *Rome Statute of the International Criminal Court.*

VIII. HEALTH LAW

FRAMEWORK CONVENTION ON TOBACCO CONTROL

In May 1999, the World Health Assembly (WHA) adopted a resolution setting out a timetable for the development of a *Framework Convention on Tobacco Control* (FCTC). Negotiations on the Convention began in October 2000. The FCTC, the first ever global public health treaty, was adopted by member countries of the World Health Organization (WHO) at the World Health Assembly, on May 21, 2003, following almost three years of negotiations. The Honourable Anne McLellan, Minister of Health, signed the FCTC on July 15, 2003 at a ceremony held at the United Nations in New York, along with 72 other WHO member States. The FCTC requires 40 ratifications to enter into force.

The FCTC's objective is to protect present and future generations from the health and economic consequences of tobacco consumption and exposure to tobacco smoke through an international framework of measures. Currently, more than four million people die from smoking-related causes each year, and half of all long-term users die from the consequences of tobacco use. More than 45,000 Canadians die each year from tobacco-related causes. Many developing countries in particular pushed for a strong convention to bolster domestic efforts on tobacco control. The Convention will provide an impetus for States to take measures to reduce consumption of tobacco products, and will provide a foundation for the further elaboration of international standards.

Canada played a key role in the development of the FCTC and Canadas pioneering measures on tobacco control over the past thirty years helped shape the treaty. In fact, many of the elements of the FCTC are key aspects of Canada's domestic initiatives in tobacco control, particularly in areas dealing with packaging and labelling, advertising and public education programs. Canada believes that international action will enhance the effectiveness of domestic measures, and that the Convention will support a comprehensive approach to reducing the international tobacco control problem.

The FCTC provides for the adoption of annexes and protocols to allow for the further development of tobacco control measures. The FCTC includes a no reservations clause and provides that only Parties to the Convention may become Parties to any protocols. The FCTC will be funded through voluntary contributions.

INTERNATIONAL HEALTH REGULATIONS

Foreign Affairs Canada is involved with Health Canada in the negotiation of several instruments touching on health law. One of these is the update to the World Health Organizations- International Health Regulations. The current Regulations, which were adopted in 1969, only require international reporting of three diseases: cholera, plague and yellow fever. Since 1969, outbreaks of disease not covered by the Regulations (such as Ebola and SARS) have underlined the urgency and importance of global strategies. The purpose of the updated Regulations will remain to ensure maximum security against the international spread of disease with minimum interference with world traffic. Key elements will include: surveillance, notification, verification and response to public health emergencies of international concern; provisions for health measures for airports, ports, ground crossing; and processes to be followed by WHO in determining a public health emergency and issuing recommendations. The first intergovernmental meeting to discuss a draft of the Revisions will be held at the WHO in Geneva, November 1-12, 2004.

CONVENTION ON CLONING

Discussions have been taking place at the United Nations since 2001 regarding an convention to address human cloning. These discussions have not progressed because it has not been possible to secure broad agreement for the mandate of any convention negotiation. One group of states, headed by Costa Rica and the United States, would support a convention that bans all cloning (including therapeutic cloning). A second group, headed by Belgium, would hope to ban human cloning and call for a moratorium on therapeutic cloning. In 2003, Canada made statements supporting a consensus approach to the negotiations but did not explicitly support either proposal. Given the divisive nature of the discussion, a vote to defer all further negotiations on this issue for 2 years was held: 80 member states voted for the deferral and 79 against. There were 15 abstentions including Canada. The motion was later amended to a 1 year deferral. Given the voting history and statements on this issue, it is unlikely that in 2004 either proposal could achieve the level of strong support needed to form the basis for negotiation.

IX. TRADE LAW

RECENT CASES DECIDED BY WTO PANELS OR THE WTO APPELLATE BODY IN WHICH CANADA WAS A PARTY

1. WTO - Canada as Complainant

- *United States - Continued Dumping and Subsidy Offset Act of 2000 (Byrd Amendment) (*Complaint by Canada and Mexico*)*

The U.S. *Continued Dumping and Subsidy Offset Act of 2000* (known as the *Byrd Amendment*), mandates the distribution to affected domestic producers of duties assessed pursuant to anti-dumping or countervailing duty orders or findings. The DSB found that the *Byrd Amendment* violated the *Anti-Dumping Agreement*, the *Agreement on Subsidies and Countervailing Measures*, and the GATT 1994 as it is a specific action against dumping or a subsidy that is not permitted by those agreements. A WTO arbitration panel gave the United States until December 27, 2003, to comply with the ruling. When the United States did not comply, Canada and the seven other complainants to the original dispute (Brazil, Chile, the EC, India, Japan, Korea, and Mexico) sought authorization from the DSB to retaliate by suspending obligations to the United States. The complainants tied their requested levels of retaliation to the amount of disbursements made by the United States under the *Byrd* Amendment. The United States challenged the retaliation requests.

In its August 31, 2004 award, the Arbitrator awarded each of the complainants, including Canada, the right to retaliate against U.S. trade, on an annual basis, in an amount equivalent to up to 72 percent of the annual level of *Byrd* Amendment disbursements made in respect of anti-dumping and countervailing duties collected on goods from that complainant. Under the DSU, the level of suspension authorized must be equivalent to the level of nullification or impairment. In reaching its decision, the arbitrator rejected the initial argument of Canada and the other parties requesting authorization that the level of nullification or impairment could be determined independent of any adverse effects that *Byrd* disbursements may have on the trade of the requesting parties. However, it accepted Canada's alternative argument that, despite the lack of empirical evidence of trade effects in the form of a reduction in imports, these effects could be established on the basis of a counterfactual economic model taking into account the value of the disbursements, their likely use by recipients, import penetration and elasticities of substitution. In so doing, the arbitrator rejected the U.S. position that the trade effects were non-existent and the level of suspension therefore should be "zero". The award means that Canada=s authorized level of retaliation will change from year to year, depending on the amount of the relevant *Byrd* disbursements. The award is not subject to appeal.

- *United States - Final Countervailing Duty Determination With Respect to Certain Softwood Lumber from Canada (Complaint by Canada)*

In April 2001, following the termination of the *Canada-U.S. Softwood Lumber Agreement*, the U.S. Coalition for Fair Lumber Imports Executive Committee filed countervailing and anti-dumping duty petitions with the U.S. Government. On March 21, 2002, the Department of Commerce (DOC) made an affirmative final determination (CVD FD) of subsidy published in the Federal Register on April 2, 2002. The DOC found that Canadian softwood lumber exports to the U.S. were subsidized, largely by provincial timber management programs, and set a country-wide duty rate of 19.34%. The rate was reduced on May 22, 2002 to 18.79% to reflect certain ministerial errors. The duty does not apply to softwood lumber produced in the Maritime Provinces provided such lumber is not produced from Crown timber harvested in any other province.

In its WTO challenge, Canada argued that the conduct of the Lumber IV countervailing duty investigation, the final determination and the resulting imposition of countervailing measures were inconsistent with U.S. obligations under the SCM Agreement and GATT 1994.

On August 29, 2003, the Panel ruled that the use by the U.S. of cross-border comparisons to find a subsidy violated U.S. international trade obligations. It also ruled that the U.S. impermissibly presumed that the alleged stumpage (timber harvesting) subsidy passed through arm=s-length sales of logs and lumber to downstream producers.

The Panel Report was appealed to the Appellate Body. The Appellate Body released its report on January 19, 2004, and the Panel and Appellate Body reports were adopted on February 17, 2004. With respect to benefit, the Appellate Body reversed the Panel=s finding. However, the Appellate Body concluded that an investigating authority should only be permitted to use a benchmark other than in-country private market prices in Avery limited@ circumstances. In particular, the Appellate Body indicated that such a benchmark could only be used where it has been established, first, that private prices of the goods in question in the country of provision are distorted, because of the predominant role of the government in the market as a provider of the same or similar goods, and, second, that the benchmark is representative of prevailing market conditions in the country of provision.

The Appellate Body was unable to find that the United States= use of cross-border comparisons was inconsistent with Article 14(d) of the SCM Agreement. The Appellate Body found that it could not complete the Panel=s analysis because the Panel had not made factual findings with respect to whether the prices in the country of provision were distorted or whether the benchmark used by the United States was representative of prevailing market conditions in Canada. Further, there were not undisputed facts on the record that the Appellate Body could rely on.

The Appellate Body upheld the Panel=s finding that the U.S. Department of Commerce=s pass-through analysis with respect to Asawmill-to-sawmill@ transactions was inconsistent with the SCM Agreement and GATT 1994. The Appellate Body also found that the United States had conceded that a pass-through analysis was required for transactions between independent harvesters and downstream sawmills. In making these findings, the Panel and the Appellate Body have confirmed a fundamental principle of the SCM Agreement: that is, an investigating authority may not presume the pass-through of a subsidy; it must establish it.

- *United States - Final Dumping Determination of Softwood Lumber from Canada (Complaint by Canada)*

On March 21, 2002, the U.S. Department of Commerce announced its final dumping determination against Canadian softwood lumber. Specific rates were applied to six Canadian mandatory respondents. An Aall others@ rate of 8.43% was applied.

A WTO Panel was established on January 8, 2003. In its request for a Panel, Canada claimed that the final determination, the investigation and initiation of the investigation were not in conformity with U.S. obligations under the AD Agreement and the GATT 1994.

The final Panel Report was released to all Members of the WTO on April 13, 2004. The Panel found that Azeroing@ was a violation of Article 2.4.2 of the AD Agreement, but failed to rule on Canada=s claims that

zeroing was a violation of the Afair comparison@ requirement in Article 2.4 and of Articles 1, 9.3 and 18.1 of the AD Agreement and Article VI of GATT 1994. The practice of Azeroing@ refers to treating the difference between the weighted average normal value and the weighted average export price for product sub-groups as zero where the weighted average normal value is less than the weighted average export price. The Panel also rejected Canada=s arguments on initiation, like product, and a number of company-specific issues.

On May 13, 2004, the United States appealed on the issue of Azeroing@. Canada cross-appealed on Abitibi=s general and administrative expenses and Tembec=s by-product revenue offset, two of the company-specific issues. On August 11, 2004, the Appellate Body issued its report. The Appellate Body upheld the Panel's ruling on zeroing, i.e., zeroing is inconsistent with Article 2.4.2 of the AD Agreement. It found that zeroing could not take into consideration Aall@ export transactions as required by Article 2.4.2 of the AD Agreement. The Appellate Body also reiterated that the calculation methodologies in this provision related to the calculation of the Amargin of dumping@ for the product as a whole, rather than for individual sub-groups as the United States contended. The Appellate Body allowed Canada's appeal on Article 2.2.1.1 of the AD Agreement (in respect of Abitibi) concerning the Panel's statement regarding the term "consider" and found consequential violations of Articles 2.2, 2.2.1 and 2.4 but (consistent with Canada's request) did not make findings on whether the United States acted inconsistently with these provisions. The Appellate Body rejected Canada's appeal on the Tembec by-product issue.

At the September 27, 2004, DSB meeting, the United States indicated that it would implement the DSB recommendations but would need a reasonable period of time to do so.

- *United States - Final Injury Determination With Respect to Certain Softwood Lumber from Canada (*Complaint by Canada*)*

On May 16, 2002, the United States International Trade Commission issued its final determination that an industry in the U.S. was threatened with material injury by reason of imports of softwood lumber from Canada that the DOC had determined were subsidised and sold in the U.S. at less than fair value. As a result, final anti-dumping and countervailing duties were applied against imports of Canadian softwood lumber. On May 7, 2003, a WTO panel was established. On April 26, 2004, the Panel report was adopted by the WTO DSB.

The key WTO provisions addressed to threat of injury determinations are found in Article 3.7 of the Anti-dumping Agreement and Article 15.7 of the SCM Agreement. The Panel held that the fundamental finding supporting the threat of injury determination - the finding that the volume of subject imports would increase substantially - violated those articles as it was not one that could be reached by an objective and unbiased decision-maker.

The Panel examined each of the six factors relied on by the ITC to justify its volume finding. Those factors were the following: (1) Canadian producers= excess capacity and projected increases in capacity, capacity utilization, and production; (2) the export orientation of Canadian producers to the US market; (3) the increase in the volume of subject imports over the period of investigation; (4) the effects of expiration of the Softwood Lumber Agreement (SLA); (5) subject import trends during periods when there were no import restraints; and (6) forecasts of strong and improving demand in the US market.

In its analysis of those factors, the Panel noted that the ITC did not rely on a significant rate of increase during the period of investigation (POI) in support of its volume finding; that the capacity of Canadian producers was projected to increase by less than one percent in 2002 (and by a further .083 percent in 2003);

and that the excess capacity figures before the ITC also did not indicate a likelihood of substantially increased imports. The Panel further noted that nothing in the ITC determination suggested that the Aexport orientation@ of Canadian producers to the US market would change from the historical pattern evident throughout the POI. With respect to the expiration of the SLA and the subject import trends during the periods when there were no import restraints, the Panel was not persuaded that they supported the conclusion of an imminent substantial increase in imports given the Alacunae@ in the explanations provided by the ITC. The Panel also rejected the forecast of Astrong and improving demand@ as supporting the ITC=s volume finding, due in part to the fact that the ITC failed to demonstrate that this would lead to increased market share for Canadian imports. On the basis of the foregoing, the Panel concluded that it could find Ano rational explanation in the ITC=s determination, based on the evidence cited, for the conclusion that there would be a substantial increase in imports imminently@.

As the ITC=s causation analysis was based on this volume finding, the panel found that analysis to be inconsistent as well with the causal relationship requirement found in Article 3.5 of the Anti-dumping Agreement and Article 15.5 of the SCM Agreement. Having reached the finding of inconsistency with respect to this element of the causation analysis, the Panel next indicated that it did not have to make a formal finding on the non-attribution aspect of the causation provisions in Articles 3.5 and 15.5. Nevertheless, the Panel considered the issue and agreed with Canada that the U.S. failed to ensure that injuries caused by other factors (i.e., third country imports, U.S. industry=s contribution to oversupply) were not attributed to imports of Canadian softwood lumber products.

On May 19, 2004, the United States announced that it would need a reasonable period of time to implement the recommendations of the DSB in this case. On July 27, 2004, the United States Trade Representative formally requested the ITC to issue a new determination not inconsistent with the findings of the DSB. For that purpose, on July 30, the ITC issued a notice of the institution of a proceeding and later indicated that it intended to issue questionnaires, to issue a pre-hearing staff report, to receive briefs and to hold a hearing.

- *European Communities - Measures Affecting the Approval and Marketing of Biotech Products (*Complaint by Canada, United States and Argentina*)*

Since October 1998, the European Communities (EC) has maintained a moratorium on the approval of products of agricultural biotechnology, which are food or food ingredients that contain or consist of, or are produced from, genetically modified organisms, and genetically modified organisms intended for release into the environment (Abiotech products@). The EC effectively has suspended the consideration of applications for approval of biotech products, and the granting of approvals for those products, under the relevant EC approvals process.

In addition to the EC-wide moratorium on new biotech products, France, Greece, Austria and Italy maintain national measures prohibiting the importation, marketing or sale of certain biotech products that have been approved by the EC for importation, marketing or sale in the EC.

In May 2003, following many years of efforts at the political level to have the moratorium lifted, Canada, together with the United States and Argentina, sought formal consultations with the EC under the WTO dispute settlement regime. These consultations did not result in a change in the position of the EC. As a consequence, pursuant to requests by Canada, the United States and Argentina, a WTO panel was established on August 29, 2003. The Panel was composed on March 4, 2004.

In its panel request, Canada argued that the EC measures at issue violate Articles 2, 5, 7 and 8 and Annexes

B and C of the SPS Agreement; Articles 2, 5 and 9 of the TBT Agreement; Articles I, III, X and XI of the GATT 1994 and Article 4 of the Agreement on Agriculture.

The Panel met with the parties on June 2-4, 2004. On August 13, 2004, the Panel decided to seek the advice of scientific/technical experts. The Panel=s second meeting with the parties is scheduled to take place in the late fall of 2004, with the final report slated for distribution to the parties in early spring 2005.

2. WTO - Canada as Defendant

- *Canada - Measures relating to wheat exports and the treatment of imported grain (*Complaint by the United States*)*

At the request of the United States, a World Trade Organization dispute settlement panel was established on March 31, 2003, to examine U.S. allegations that:

- Canada was in violation of Article XVII of the GATT 1994 with respect to the Canadian Wheat Board (CWB); and
- certain Canadian grain transportation policies and parts of the *Canada Grain Act* and *Canada Grain Regulations* relating to grain segregation and entry authorization for foreign grain were inconsistent with Canada=s national treatment obligations under Article III:4 of the GATT 1994 and Article 2 of the *Agreement on Trade Related Investment Measures.*

The Panel=s final report was circulated to Members on April 6, 2004. In its report, the Panel found that the United States had failed to demonstrate that Canada was in violation of Article XVII with respect to the CWB. However, the Panel found that certain Canadian grain transportation policies and parts of the *Canada Grain Act and Canada Grain Regulations* relating to grain segregation and entry authorization for foreign grain were inconsistent with Article III:4 of GATT 1994. Having found these measures to be inconsistent with Article III:4, the Panel exercised judicial economy and did not examine the allegations under Article 2 of the TRIMs Agreement.

On June 1, 2004, the United States notified its intention to appeal certain of the Panel=s findings. Specifically, the United States asked the Appellate Body to review:

- the Panel=s finding that Canada=s request for a preliminary ruling on whether the United States Panel Request met the requirements of Article 6.2 of the DSU was filed in a timely manner;
- the Panel=s finding that the CWB Export Regime is consistent with Canada=s obligations under Article XVII of the GATT 1994; and
- the Panel=s alleged disregard, contrary to Article 11 of the DSU, of certain evidence submitted by the United States.

Canada cross-appealed the Panel=s failure to find a breach of subparagraph (a) [general principles of non-discriminatory treatment] of Article XVII:1 of the GATT 1994, before examining whether the conduct was consistent with subparagraph (b) [commercial considerations] of Article XVII:1 of the GATT 1994.

On August 30, 2004, the Appellate Body issued its findings. The Appellate Body dismissed all the U.S. grounds of appeal. The Appellate Body found no error in the Panel=s interpretation of the phrase Asolely in accordance with commercial considerations@ in the first clause of Article XVII:1(b), nor in its interpretation of the term Aenterprises@ in the second clause of that provision. Further, the Appellate Body found that, contrary to the U.S. assertion, the Panel had examined the impugned measure in its entirety and given proper consideration to the evidence before it. Finally, the Appellate Body dismissed the U.S. claim that Canada=s

request for a preliminary ruling under Article 6.2 of the DSU was not raised in a timely manner.

The Appellate Body also dismissed Canada=s cross-appeal that the Panel erred by examining whether Canada was in violation of Article XVII:1(b) without first having found a breach of Article XVII:1(a). The Appellate Body agreed with Canada that Articles XVII:1(a) and (b) do not provide for separate obligations, but rather that Article XVII:1(a) sets out an obligation of non-discrimination and that subparagraph (b) clarifies the scope of that obligation. However, the Appellate Body considered that, contrary to Canada=s assertion, the Panel had, indeed, examined the question of discrimination. In doing so, the Appellate Body cautioned future panels on over-reliance on the use of assumptions and the need for properly structured analysis.

The Appellate Body Report and the related Panel Report were adopted by WTO Members on September 27, 2004.

3. WTO - Canada as Third Party

Canada is a third party to the following WTO disputes:

- *Australia - Quarantine Regime for Imports* (Complaint by European Communities)
- *European Communities - Export Subsidies on Sugar* (Complaints by Australia, Brazil and Thailand)
- *European Communities - Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs* (Complaint by the United States and Australia)
- *Mexico - Measures Affecting Telecommunications Services* (Complaint by the United States)
- *United States - Section 110(5) of the U.S. Copyright Act* (Complaint by the European Communities)
- *United States - Section 211 Omnibus Appropriations Act - Havana Club* (Complaint by the European Communities)
- *United States - Subsidies on Upland Cotton* (Complaint by Brazil)
- *United States - Anti-dumping Measures on Cement from Mexico* (Complaint by Mexico)
- *United States - Anti-dumping Measures on Oil Country Tubular Goods (OCTG) from Mexico* (Complaint by Mexico)
- *United States - Countervailing Duties on Steel Plate from Mexico* (Compliant by Mexico)
- *United States - Cross Border Supply of Gambling and Betting Services* (Compliant by Antigua and Barbuda)

CANADA AND NAFTA CHAPTER 11: RECENT CASES

1. S.D. Myers Inc. vs Government of Canada

S.D. Myers, Inc., a U.S. corporation, submitted a Claim to Arbitration on October 30, 1998, under the dispute settlement provisions of NAFTA Chapter 11. The Claim alleged that the PCB Waste Export Interim Order of November 1995 (the AInterim Order@) breached Canada=s obligations under Articles 1102 (national treatment), 1105 (minimum standard of treatment), 1106 (performance requirements) and 1110 (expropriation), causing US$20 million in damages to it and its Canadian investment. S.D. Myers operates a PCB waste treatment and disposal facility in Ohio and claimed that it had an investment in Canada aimed at sourcing Canadian PCB wastes. U.S. legislation banned the importation of PCB waste since the early 1980s. However, the U.S. Environmental Protection Agency announced in October 1995, and without any notice to Canada, that as of November 15, 1995, it would grant S.D. Myers an Aenforcement discretion@, effectively

permitting it to import PCB waste from Canada for disposal at its Ohio facility.

Canada issued the Interim Order prohibiting the export of PCB waste effective November 20, 1995. The Interim Order was subsequently repealed with the coming into force in February 1997 of the PCB Waste Export Regulations, 1996, which permitted exports of PCB waste for disposal.

The hearing on the merits of the claim took place over the week of February 14, 2000. On November 13, 2000, the Tribunal issued its Award on liability. The Tribunal found that Canada was in breach of its obligations respecting national treatment and the minimum standard of treatment. However, in so finding, the Tribunal acknowledged that NAFTA Parties Ahave a right to establish high levels of environmental protection. They are not obliged to compromise their standards merely to satisfy the political or economic interests of other States@. The Tribunal rejected the claims in relation to Articles 1106 and 1110. On October 21, 2002, the Tribunal ruled that damages incurred by the investor amounted to US$6.05 million plus interest. On December 30, 2002, the Tribunal ordered Canada to pay a portion of the costs of the arbitration.

On February 8, 2001, Canada initiated a statutory review of the Tribunal=s Award on liability in the Federal Court of Canada. The grounds of the review are that the Award deals with a dispute not contemplated by or falling within the terms of Chapter 11 or that the Award is in conflict with the public policy of Canada. Although Canada had asked the Tribunal to suspend the Chapter 11 proceedings pending the review by the Federal Court, the Tribunal decided to proceed with the damages stage in parallel to the statutory review. Canada has also initiated statutory review of both the damages and costs awards. On February 12, 2003, the Federal Court consolidated these applications. Hearings were held before the Federal Court of Canada December 1 to 3, 2003. On January 13, 2004, the judge dismissed Canada=s application.

2. United Parcel Service vs Government of Canada

On April 19, 2000, United Parcel Service of America Inc. (UPS) filed a claim to arbitration and a statement of facts under Chapter 11 of NAFTA alleging that Canada had breached Article 1102 (national treatment) and failed to meet its obligations regarding state enterprises under Chapter Fifteen by giving preferential treatment to Canada Post Corporation and allowing Canada Post to engage in anti-competitive conduct and cross-subsidization. The statement further claimed that Canada had breached Article 1105 (minimum standard of treatment) by not investigating the allegations of anti-competitive conduct and cross-subsidization. UPS asked for $100 million U.S. in damages.

On November 30, 2001, UPS filed an amended statement of facts.

Canada=s first step was to challenge the jurisdiction of the tribunal under Chapter 11 of NAFTA to review some of the allegations made in UPS=s statement. It also pointed out numerous inaccuracies in the statement that would have to be clarified before the matter could proceed. On October 17, 2001, the tribunal made a number of rulings: it found that a preliminary hearing on jurisdiction prior to Canada submitting its defence was warranted; it determined that the arbitration proceeding should take place in Washington; and it stated that it would accept written representations from the Council of Canadians and the Canadian Union of Postal Workers as interveners.

The hearing on jurisdiction that took place in Washington, July 29 and 30, 2002, was the first under Chapter 11 to be open to the public. In its ruling, the tribunal rejected several of the investor=s claims. The tribunal found that it had jurisdiction to review the offences under paragraph 1503(2) and subparagraph 1503(2)(a)

(obligations relating to anti-competitive conduct) only if the monopoly encompassed elements incompatible with an obligation under Section A of Chapter 11.

The tribunal also found that there is no rule in customary international law prohibiting or regulating anti-competitive conduct. On that basis, it rejected the investor=s claim that Canada breached its obligations under Article 1105 by allegedly failing to show transparency in the monitoring, regulation and operation of Canada Post Corporation and allowing Canada Post to engage in anti-competitive conduct.

In its revised statement of claims filed on December 20, 2002, the investor added several new claims to challenge recent government measures. It also reiterated claims that the tribunal had rejected in its ruling on jurisdiction. On February 7, 2003, Canada filed an application with the tribunal requesting that those claims be removed from the amended statement of claim. Also on February 7, 2003, Canada filed its defence.

On April 4, 2003, the tribunal issued an order on procedural directives and confidentiality which also stated that the outstanding jurisdictional issues would be addressed at the same time as the merits of the claim. The hearings will be open to the public.

On April 4, 2003 and August 1, 2003, the tribunal issued procedural directions allowing and introducing modalities for the participation of amici curiae. On August 1, 2003, it also issued an order concerning the production of documents to the effect, notably, that the production of documents and the answers to interrogatories would have to be completed by October 1, 2003. There have been delays in the production of documents and the answers to interrogatories. These are currently ongoing.

3. Where to Find Additional Information

Additional information about current and past WTO cases and NAFTA Chapter 11 cases, including proceedings before the Federal Court of Canada, can be found respectively at http://www.wto.org and at http://www.dfait-maeci.gc.ca/tna-nac/dispute-en.asp and NAFTA-en.asp.

OTHER TRADE LAW DEVELOPMENTS INVOLVING CANADA

1. Fifth WTO Ministerial Conference (Cancún, Mexico)

On July 31, 2004, the 147 World Trade Organization (WTO) members were able to agree on a framework for future negotiations in the Doha round.
To follow developments regarding the WTO negotiations, please visit the following website:
http://www.dfait-maeci.gc.ca/tna-nac/wto-en.asp.

2. Other Negotiations

Canada is negotiating free trade agreements with:
The Americas (FTAA)
Central America Four
European Free Trade Association (EFTA)
Singapore

For more information, please visit the following website:

http://www.dfait-maeci.gc.ca/tna-nac/menu-en.asp.

X. STATE IMMUNITY

STATE IMMUNITY - UN INITIATIVES

In 1977 the International Law Commission was instructed by the General Assembly of the United Nations to consider the Jurisdictional Immunities of States and their Property. A draft text was submitted to the Sixth Committee of the United Nations. In December 2000 the General Assembly decided to establish an Ad Hoc Committee on Jurisdictional Immunities of States and their Property. After 27 years of work in the United Nations system, on March 5, 2004, the Ad Hoc Committee adopted its report containing the Draft United Nations Convention on Jurisdictional Immunities. This report will be considered by the Sixth Committee of the General Assembly on October 24 and 25, 2004, and by the General Assembly in December 2004.

The main principle to be decided in preparing this text was whether to adopt the strict principle of absolute immunity or a more limited state immunity principle. The Convention enshrines the principle of limited state immunity and reflects the practice and laws, in general terms, of Canada and many other countries.

For example, the Convention codifies the customary international law rule that a foreign state is not immune from the courts of another state for breaches of commercial contracts, matters related to state vessels, or damage or loss of property or for personal injury or death caused in whole or in part in the territory of that other state.

There were five main issues considered by the Ad Hoc Committee: the concept of a state for purposes of immunity; the criteria for determining the commercial character of a contract or transaction; the concept of a state enterprise or other entity in relation to commercial transactions; contracts of employment for locally engaged staff; contracts of employment and measures of constraint against state. The Ad Hoc Committee met in February of 2002 and in February of 2003 to draft the text of the Convention.

The mandate of the Ad Hoc Committee in March 2004, was to draft the preamble and the final clauses but not to discuss the substantive text which had already been considered by the Sixth Committee. The Committee had to consider the dispute resolution procedure, reservations, the relation of this Convention to other treaties, the number of ratifications to bring the Convention into force and the incorporation of the understandings into the Convention.

The preamble stresses the importance of this Convention in codifying and developing international law. It also affirms that customary international law continues to cover areas not covered by the Convention. There was discussion on including a statement that this Convention does not cover criminal proceedings in either the understandings or in the preamble. The Committee decided to recommend to the General Assembly to include this statement in the resolution adopting the text. The Committee decided that it would require 30 ratifications for the Convention to come into force.

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Assembly to include this statement in the resolution adopting the text. The Committee decided that it would require 30 ratifications for the Convention to come into force.

The completion of the Convention on Jurisdictional Immunities of States and their Property was a major achievement. The draft Convention is a very broad document that sets out the provisions for implementing state immunity. The Convention is expected to be adopted by the General Assembly and subsequently open for signature and ratification.

In Canada, the Court of Appeal of Ontario has considered state immunity issues in *Bouzari v. Iran.*

XI. TREATY LAW

Please find the update of this section inserted as an addendum.