CONFIDENTIAL

Department of External Affairs

Subject:
LEGAL PLANNING COMMITTEE--
INTERNATIONAL LAW COMMISSION

File No. 5475-AX-38-40
Volume ONE 27-12-66
From ~~MAR. 8, 1962~~
To 31 July 1963

Date	Referred To	Returned	Date	Referred To	Returned
5475-AX-40	INTERNATIONAL LAW COMMISSION - GENERAL FILE				
5475-AX-37-40	PRINCIPLES OF INTERNATIONAL LAW RELATING TO FRIENDLY RELATIONS				
5475-EW-40	SIXTH COMMITTEE (LEGAL) OF THE GENERAL ASSEMBLY				
11647-A-40	INTERNATIONAL LAW ASSOCIATION AND CANADIAN BRANCH				

CLOSED

20-5-2-2-61

File No. 2475-AX-38-40 Vol. Exe

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Reviewed by / Révisé par : CJM Date : 1/15

2-2-1

CABINET DIRECTIVE

Circular No. 9

As from Nov. 3/68
not subject to s. 69(1)
Important that it be now
in public domain.
GH

A.D.P. Heeney,
Secretary to the Cabinet,

Privy Council Office,
November 3, 1948.

FILE NO. 5475-AX-38-40

PLEASE KEEP ATTACHED TO TOP OF FILE

FILE CLOSED

THIS FILE IS TO BE USED FOR REFERENCE PURPOSES ONLY.

ALL FURTHER CORRESPONDENCE IS TO BE PLACED ON THE APPROPRIATE FILE WITHIN THE NEW FILE SERIES.

20-5-2-2-#-1

July 31, 1963

MINUTES OF MEETING OF LEGAL PLANNING COMMITTEE

HELD ON JULY 26, 1963

Present: Mr. Cadieux, Chairman
Mr. Kingstone) Legal Division
Mr. Copithorne)
Mr. Cole, U.N. Division
Mr. J.A. Beesley, Secretary

1. Canadian Position in the Sixth Committee on "Friendly Relations" (file 5475-AX-37-40)

The Chairman pointed out that the Canadian position had already been developed to the extent which had seemed feasible to all concerned in the comments drafted by the U.N. and Legal Divisions on the four principles to be studied at the 18th U.N.G.A.; these comments had now been approved by the Minister and forwarded to the Secretariat; our speeches in the Sixth Committee could therefore be largely based on the line taken in those comments.

Some discussion occurred on the question of setting up a sub-committee within the Sixth Committee to study and elaborate the four principles. There is some concern that the Soviet Bloc may calculate that the I.L.C. being fully occupied and the work of codification being urgent, it should proceed in the Sixth Committee or in a sub-committee, i.e. in a political rather than in a technical agency. An attempt should therefore be made to ensure that the respective functions of the Sixth Committee and of the I.L.C. be kept clearly in mind. If it transpires that new subjects are ready for codification, the Sixth Committee and the I.L.C. should consider the problem of priorities but not set up additional codification agencies. It was agreed that:

(a) it would be desirable to head off the appointment of such a committee, (which might tend to operate like a second string I.L.C.), if possible, but in any event to postpone its establishment until after the principles have been debated;

(b) the composition of the committee could raise problems;

(c) if and when such a committee is established it should report back to the Sixth Committee during the 18th Session, rather than at some subsequent date, in order to avoid the possibility of having it operate independently without direction; and

(d) if, as a result of the deliberations of such a committee some codification appeared desirable, then at that stage it would be appropriate to refer the subject to the I.L.C. for codification rather than have the Sixth Committee attempt it.

Mr. Wershof
U.N. Division
Mr. Kingstone
Mr. Copithorne

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It was agreed that pre-Assembly consultations with friendly Governments on these questions would be desirable.

2. Positions to be taken in the Sixth Committee on the I.L.C. Report (file 5475-AX-40)

It was agreed that the Canadian position should take into account the following considerations:

(a) Programme of work

Since the I.L.C. is heavily loaded with work for five years and is dealing with fundamental questions requiring [illegible] study, this work programme should not be disturbed unless a matter of considerable importance emerges. Moreover, the I.L.C. is working close to its maximum efficiency and an increase in its work load (through extending its sittings beyond the 10 weeks in the spring and 3 weeks in the winter just agreed to) would present excessive demands not only on the I.L.C. members, who require approximately a month's preparation for each month of meetings, but also upon the Governments of Member States of the U.N., who seem to be having difficulty coping with the flow of material already being presented for their consideration. The process of developing international law is going ahead as fast as is practicable at present.

(b) I.L.C. liaison with voluntary Organizations

The Soviet Bloc is pressing for exchanges of documents between the I.L.C. and voluntary organizations in an attempt to bypass Governments. U.N. Division should therefore do a study on the rules concerning recognition of voluntary organizations and circulation of their documents, so as to determine what guide lines have already been established in such matters, in order to meet the Soviet Bloc move.

(c) Remuneration of Special Rapporteurs

It was the Chairman's impression that the rapporteurs are receiving remuneration that is hardly more than nominal, and that the amount should be increased in order to properly recompense them for their efforts and also so as to ensure the high standard of work which could only be maintained if the necessary time is spent on the topics.

(d) Physical Facilities of I.L.C.

Although the translation services and handling of documentation has been made more efficient as a result of complaints made last year, the facilities provided to the I.L.C. are not adequate. This is another argument which might be used to meet those who would have the I.L.C. assume a heavier work load.

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3. Seminar on Technical Assistance Resolution on "Friendly Relations" (file 5475-AX-37-A-40)

The Chairman outlined the results of the two-day Seminar, which he considered to have been extremely useful. A number of suggestions had been incorporated into further comments which would be forwarded to our Mission in New York for their views before presentation to the Minister. It was agreed that in the Memorandum to the Minister the point should be made that the exercise has proven so successful that next year, early in the academic term, the Department might consider bringing to Ottawa at departmental expense a group of professors to discuss legal questions on the U.N. agenda; apart from the direct assistance in formulating policy which might thereby be gained, the side effects of better relations with the universities, a more intimate knowledge by professors of international law about the practical problems facing the Department, and possible benefits in our recruiting programme, all provide reasons for giving serious consideration to this idea.

4. International Co-operation Year: Legal Aspects (file 5475-AX-40)

It was agreed that greater numbers of ratification of international instruments was highly desirable, but since Canada's own record was not impressive, due to the federal-provincial problem, it would not be appropriate for Canada to take an initiative on the matter, although we can support one by someone else.

5. Function of Legal Planning Committee (file 5475-AX-38-40)

It was agreed that although the Legal Planning Committee could not yet assume the function assigned to it by the Legal Services Committee, (a group of officials who had reviewed the Glassco Commission recommendations), nevertheless some preliminary steps may be taken, such as circulation of a letter to all other Departments and Crown Agencies asking for their co-operation in drawing up a list of international conferences which might lead to treaties, and bringing to their attention the need to keep the Department informed concerning agreements negotiated outside the Department of External Affairs.

6. The Review of Empire Treaties

It was agreed that in the face of personnel shortages in the Department it was unlikely that it would be possible to assign someone to the task of reviewing Empire Treaties in the near future, and that accordingly it would be advisable to consult closely with Professor Lawford of Queens University so as to ensure that the results of his work on the question will be as complete and accurate as possible.

JB

J.A. BEESLEY,
Secretary.

DEPARTMENT OF EXTERNAL AFFAIRS

MEMORANDUM

TO: MR. CADIEUX, Chairman, Legal Planning Committee

FROM: J.A. Beesley, Secretary

REFERENCE:

SUBJECT: Meeting of Legal Planning Committee

Security: CONFIDENTIAL

Date: July 18, 1963.

File No. 5475-AX-38-40
c.c. 5475-AX-37-40
~~5475-AX-40~~
~~5475-AX-37-A-40~~
~~5475-GX-40~~

There are a number of questions which you might wish to have considered by the Legal Planning Committee at an early date, namely:

(1) Canadian Position in the Sixth Committee on "Friendly Relations"

As you will recall, we have received enquiries from such countries as Chile, Australia, and Tanganyika, and more recently the Netherlands, about the line we propose to take. The Minister has just given his approval to our proposed comments sent up to him by memorandum dated July 4, on the basis of which our position would presumably stress the peaceful settlement of disputes question and the need to develop procedures rather than to attempt further codification. We have not yet, however, consulted with other friendly countries on these matters. The questions to be considered, therefore, would seem to be:

(a) the elements of the preliminary Canadian position on the item; and

(b) what pre-Assembly consultation should be undertaken with other friendly governments.

(2) Positions to be taken in the Sixth Committee on the I.L.C. Report

The most important question is presumably that of treaties. It might be useful, however, to have a brief discussion on the problems which you consider might arise, and the position the Canadian Delegation might take on the I.L.C. Report.

(3) Seminar on Technical Assistance Resolution

As you know, the Canadian National Commission for UNESCO Seminar of International Law Experts on the implementation of Resolution No. 1816 of the 17th UNGA (Technical Assistance and International Law) will be held on July 25. Professors MacKay, St. John MacDonald, Morin, Pepin and Curtis will be attending as well as you, Mr. Sicotte, and myself, and, presumably, a representative from the Department of Justice, (although this last point has not yet been confir...

- leaves with non governmental bodies
- remuneration of special rapporteurs
- special winter session
- new programme

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CIRCULATION

Mr. Sicotte
Mr. Kingstone
Mr. Copithorne

Ext. 326A (6/56)

18.7.39 (us)

The questions which might usefully be discussed by the Legal Planning Committee are:

(a) the proposed agenda for the Seminar; and

(b) the departmental position, if any, on the questions to be discussed.

(4) International Co-operation Year: Legal Aspects yes

As you will recall, Mr. Tremblay wrote to you on May 16 suggesting that an attempt be made to focus attention upon the need for ratification of multilateral instruments as an important element in the development of international co-operation. The Legal Planning Committee has not yet considered the advisability of proceeding with this suggestion, (which could develop into a minor Canadian initiative at the U.N.), and you may consider it worthwhile to discuss the question.

(5) Function of Legal Planning Committee ✓ yes.

Mr. Sicotte has suggested that you may consider it useful to have a brief discussion on the new functions of the Legal Planning Committee to be undertaken as a result of the Glassco Commission recommendations.

2. Would you please indicate which subjects you would like raised, and when a meeting might be held.

we need an advocate from Personnel whether we can get a suitably qualified officer.

J. A. Beesley,
Secretary

How about Friday at 3 p.m?

Legal/M.D.Cepithorne/G.Sicotte/ep

DEPARTMENT OF EXTERNAL AFFAIRS

MEMORANDUM

TO: Mr.M.H.Wershof

FROM: Legal Division

REFERENCE:

Security Confidential

Date June 13, 1963

File No. 12206-40 ~~997-D-5-40~~

SUBJECT: Review of Empire Treaties

This subject has been receiving intermittent attention since 1955 at which time Miss Barrière (as she then was) outlined the work involved (see memo of March 15, 1955 flagged in attached file and your comments dated March 23, 1955). Some work was done by Miss Barrière in her spare time but by 1957 it was evident that a more serious approach would have to be taken if significant headway was to be made. At that time after considering alternatives such as the employment of a law student or graduate during the summer months, it was decided that an additional F.S.O. 1 position be added to Legal Division, the holder of which was to carry out a review of Empire Treaties. (See memorandum to Mr. Cadieux dated January 17, 1957 flagged). In fact, however, no officer was made available to fill the position. Further attention was paid to the question in 1960, when an Ottawa lawyer, Mr. Gordon F. Maclaren entered into an extended correspondence with the Under-Secretary (as well as the Prime Minister and Senator Aseltine) on the status of certain treaties, and inspired certain questions in the Senate's Standing Committee on External Relations on the subject. (See flagged papers in attached file 10461-40).

2. In 1960, a memorandum on the subject was drafted for the Prime Minister (flagged) but we have been unable to determine whether it actually went forward and which if any of the three alternative procedures, the Prime Minister indicated he wished followed. There is no further reference to the memorandum to the Prime Minister, which leads us to believe that it was not in fact submitted to him. Later in 1960, Legal Division finally obtained from the Establishment Board the addition to its establishment of an F.S.O.2 position to carry out a review of Empire treaties. (See Statement of Duties dated December 5, 1960, flagged). This position has been filled only sporadically, and the two or three short term incumbents often had to be assigned to more immediately pressing activities. (Please note, however, that a paper was written last year entitled "Canadian Succession to British Treaties" It is annexed to our memorandum of March 23/62 and defines the area of study).

3. Meanwhile, outside the Department, Miss Barrière, now teaching at the University of Montreal, continued occasional research on the subject in the hope of eventually submitting it as her doctoral thesis at Columbia University. She has from time to time shown some interest in working in the Department but generally has preferred to continue the project as she formulated it some years ago, using sources outside the Department where available. She expressed mild interest in working on the project this summer in the Department but then said she was obliged to take certain courses

CIRCULATION

Historical

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at Columbia during the summer. She also commented that her supervisor at Columbia was of the opinion that the subject was too vast for a doctoral thesis.

4. In 1962, Professor Hugh Lawford of the Law Faculty of Queen's became interested in the subject of Empire treaties.(1) He obtained a grant of $1,000. from the C.I.I.A. and in addition, Queens received a grant of $12,000. from the Canada Council for the "collection and publication of an annotated edition of treaties and other international acts relating to Canada."(2) Professor Lawford has told us that he has interested a New York firm in the possibility of publication. In the meantime, however, he is concerning himself with the preparation of a comprehensive list of all treaties which were at any time binding upon Canada and has at the moment five students working under his direction in the Public Archives, in the archives of Upper Canada in Toronto, on orders-in-council, on old treaty series, etc. Our impression is that Prof. Lawford is approaching his project in a methodical and comprehensive way. He estimates that he will have enough funds from the grants to keep the five students working next summer as well, by which time he hopes to be able to see the end of the compilation aspect of his project.

5. The current restrictions due to the austerity programme and -presumably- to recruitment difficulties, make it unlikely that Personnel Division will be able for some time to come to fill the position [EXT 1722] presently assigned to Legal Division for a review of Empire Treaties. You have suggested that we engage a university professor to carry out the review in our Department under contract during the summers, starting perhaps next year. This is a possibility for 1964, although the study could not be completed before late 1965 at the earliest.

6. In these circumstances, we obviously must consider the value of Lawford's project for our purposes. It seems to achieve, by and large, the aim which we had set for ourselves. A list of Empire Treaties compiled by our Department on the other hand, while undoubtedly useful to us, might not be suitable for publication, in view of the potential need to consult the other contracting parties as well as other members of the Commonwealth whose own positions with regard to these treaties might be affected by our action. Furthermore, some of the older treaties, if found to be theoretically in effect, should be considered for abrogation. In short, we might find that a number of political decisions were necessary prior to publication. For these reasons, two at least of the persons who have been closely concerned with this problem over the years, (Mr. Grenon and Miss Barrière) were of the opinion the Department might well have to decide against publication.

(1) He had written an article in the Canadian Bar Review arguing -- contrary to the position taken by a representative of this Division before the Senate's Standing Committee on Transport and Communications that Canadian treaties regarding navigation on the St.Lawrence were more extensive and more complex than had been suggested;(139 C.B.R. (1961) p. 577-602).

(2) See Canada Council announcement of the grant dated December 10, 1962 (flagged) which mentions "the inadequacy of published sources of treaties affecting Canada".

7. Nevertheless, a restricted list, limited to Government users, could be compiled in our Department, either by an F.S.O. or by an outside jurist under contract. Covered by the oath of secrecy, our own researchers would have access to relevant classified documentation, - a facility unavailable to Lawford at present. They could not, however, for such a survey hope to compete in thoroughness with the latter, who is equipped with comparatively large staff and facilities.

8. On balance, therefore we are led to the conclusion that the Department should keep abreast of Professor Lawford's project, providing him with all reasonable assistance (see memorandum of a conversation in Mr. Glazebrook's office flagged on file 997-D-5-40) in the expectation that his unofficial compendium may turn out to be at least as valuable to us as any Departmentally produced official list. If you agree that no immediate action be taken to pursue in the Department the review of Empire Treaties, I suggest we bring the file forward annually starting next January, to determine, in the light of the progress made by Prof. Lawford, whether this policy should be continued.

Legal Division

Mr. Scott

I reluctantly agree to your para. 8 but I would like to review it with Mr. Cadieux. Please return this to me July 22

June 14 [illegible]

O/USSEA/A. de W. M[illegible]

Legal Planning Committee

5475-AX-38-40

RESTRICTED

25-7-63

MEMORANDUM FOR MR. DUDER

The Role of External Affairs in International Negotiations

You asked me for a note on references in the Glassco Reports to the need for coordination by External Affairs. I have prepared the attached paper hurriedly but I think that I have covered all the points that might be considered even tangently relevant to the project in hand.

A. de W. Matheweon

A. de W. M.

c.c. Legal Division

Reference in Glassco Commission Reports to activities abroad that should be (but are not) conducted by External Affairs or should be coordinated with (or by) External Affairs:

1. The operation of a communications network outside Canada to serve all departments and agencies other than those served by their own special systems (see Vol. 2 p. 246) - Comment: The observations of the Commission were not too helpful in this regard for the Department already does provide the teletype services recommended. This is a very complex field involving arrangements with the armed forces and other governments as well as with user departments and agencies. The costing factor proposed is therefore of doubtful utility.

2. The maintenance of a travel office responsible for making travel arrangements for all members of the public service (See Vol. 2 p. 165). Comment: The alternative proposed by the Commission is the retention of a travel agency for this purpose. We are quite neutral on this recommendation (save with respect to travel arrangements for couriers which will not be left to anyone but the couriers themselves) but would have to survey the needs of other departments and be assured of adequate increase in staff and space before we could undertake the responsibility recommended.

3. The constitution of an expert legal service to which all departments and agencies should submit question of international law (see Vol. 2 p. 416). - Comment: The wording of the formal recommendation contains the words "assume responsibility for co-ordinating the international legal work of departments and agencies". To this Legal Division would presumably breathe a fervent "amen". This involves more staff, retained for longer periods and a willingness on the part of other departments (and divisions of this Department) to refer matters to Legal Division in time for there to be a thorough examination. As regards the procedure for coordination it is being proposed by a committee of senior officials who studied the Commission recommendation that more use be made of an enlarged Legal Planning Committee. This will itself involve more staff to give the Committee an adequate Secretariat.

The providing of expert assistante in treaty negotiation is also advocated for this Department and this is, I understand, generally the case now. However, the Legal Planning Committee will have a role to play in determining whether this Department or a specialist department should provide legal expertise if required.

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4. The provision of active leadership in coordinating the external information and publicity activities of all departments and agencies (See vol. 3 p. 82). - Comment: The Commission rightly observed that the existing machinery for coordination in Ottawa had not operated effectively for some years and, latterly, had not operated at all. This is quite true. The fault lies partly in the defects of the machinery (there is no power nested in the coordinator) and partly in the inability of the Department to obtain sufficient staff to permit it to give the existing Committee the secretariat it requires to operate. Reference by the Commission to activities in certain countries (e.g. top of p. 75 Vol. 3 and middle of p. 74 Vol. 3) touch on another aspect of the question of coordination dealt with in Report 21 (on this Department) and referred to below.

5. "At posts abroad, the Head of Post be made responsible for the supervision and coordination of all activities of civil departments and agencies of the Government of Canada" (see Vol. 4 pages 135-139 and p. 143) - Comment: This is the text of the Commission's recommendation and it focusses upon the central issue of the most fundamental concern to this Department. The question must be asked whether this Department exists to provide the facilities for coordinating Government policy in the external field and to provide advice as to the external consequences of that policy or whether this Department is just another department of Government providing external political advice and carrying on other activities under the General headings "Protection" "Negotiation" and "Representation". If the answer is that the former is the proper role of this Department then it follows that the Commission is right and a greater measure of authority should be given to the Ambassador by the Government. If the role of the Department is otherwise it will not be helpful to place upon an Ambassador chosen from the ranks of this Department responsibilities that he is in no position to discharge.

DEPARTMENT OF EXTERNAL AFFAIRS

MEMORANDUM

FILE

TO: MR. CADIEUX, Chairman, Legal Planning Committee

FROM: J.A. Beesley, Secretary

REFERENCE:

SUBJECT: Meeting of Legal Planning Committee

Security CONFIDENTIAL

Date July 16, 1963.

File No. 5475-AX-38-40
t.c. 5475-AX-37-40
5475-AX-40
5475-AX-37-A-40
5475-OX-40

There are a number of questions which you might wish to have considered by the Legal Planning Committee at an early date, namely:

(1) Canadian Position in the Sixth Committee on "Friendly Relations"

As you will recall, we have received enquiries from such countries as Chile, Australia, and Tanganyika, and more recently the Netherlands, about the line we propose to take. The Minister has just given his approval to our proposed comments sent up to him by memorandum dated July 4, on the basis of which our position would presumably stress the peaceful settlement of disputes question and the need to develop procedures rather than to attempt further codification. We have not yet, however, consulted with other friendly countries on these matters. The questions to be considered, therefore, would seem to be:

(a) the elements of the preliminary Canadian position on the item; and

(b) what pre-Assembly consultation should be undertaken with other friendly governments.

(2) Positions to be taken in the Sixth Committee on the I.L.C. Report

The most important question is presumably that of treaties. It might be useful, however, to have a brief discussion on the problems which you consider might arise, and the position the Canadian Delegation might take on the I.L.C. Report.

(3) Seminar on Technical Assistance Resolution

As you know, the Canadian National Commission for UNESCO Seminar of International Law Experts on the implementation of Resolution No. 1816 of the 17th UNGA (Technical Assistance and International Law) will be held on July 25. Professors MacKay, St. John MacDonald, Morin, Pepin and Curtis will be attending as well as you, Mr. Sicotte, and myself, and, presumably, a representative from the Department of Justice, (although this last point has not yet been confirmed)

CIRCULATION

Mr. Sicotte
Mr. Kingstone
Mr. Copithorne

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Ext. 326A (6/56)

The questions which might usefully be discussed by the Legal Planning Committee are:

(a) the proposed agenda for the Seminar; and

(b) the departmental position, if any, on the questions to be discussed.

(4) International Co-operation Year: Legal Aspects

As you will recall, Mr. Tremblay wrote to you on May 16 suggesting that an attempt be made to focus attention upon the need for ratification of multilateral instruments as an important element in the development of international co-operation. The Legal Planning Committee has not yet considered the advisability of proceeding with this suggestion, (which could develop into a minor Canadian initiative at the U.N.), and you may consider it worthwhile to discuss the question.

(5) Function of Legal Planning Committee

Mr. Sicotte has suggested that you may consider it useful to have a brief discussion on the new functions of the Legal Planning Committee to be undertaken as a result of the Glassco Commission recommendations.

2. Would you please indicate which subjects you would like raised, and when a meeting might be held.

J. A. Beesley

J. A. Beesley,
Secretary

DRAFT

June 27, 1963.

Our file: 1-11-L-1
cc: 5475-AX-38-40

MEMORANDUM TO: Personnel Division

Subject: Expansion of Legal Division's Functions
Establishment of Position of Secretary to Legal Planning Committee

One of the recommendations of the Glassco Commission was that "a strengthened Legal Division of the Department of External Affairs assume responsibility for coordinating the international legal work of departments and agencies and provide the expert assistance required on such matters as treaty negotiation". (p. 416-417) In his report to the Chairman of the Legal Services Committee established to look into the Glassco Report, Mr. Cadieux noted that the liaison and coordination between External Affairs, Justice and other Departments can and should be improved; that improved liaison and coordination will inevitably impose additional burdens upon the Departments of External Affairs and Justice which will require additional personnel; and that the Legal Planning Committee could well provide the machinery for improved liaison and coordination with other Departments. In its Report, the Legal Services Committee recommended that

> "the existing Legal Planning Committee of the Department of External Affairs, meetings of which have been attended from time to time by a Justice officer, should be expanded to include representation from other departments interested in international law matters, particularly those having domestic implications. It would have the task, if adequate staff resources can be made available, of foreseeing the need for legally qualified personnel to participate in forthcoming international conferences and negotiations. It would also ensure, to the extent this could be anticipated, that all departments concerned were adequately consulted in the formulation of guidance for the Canadian participants or negotiators".

The Glassco Commission has recommended that this Department assume responsibility for coordination of such matters as treaty negotiation, and the Legal Services Committee has recommended how such coordination might be brought about through

the use of an expanded Legal Planning Committee. The first step to implement these recommendations is the assignment of a middle rank officer to serve full time as secretary of this Committee. While we do not as yet have a complete idea of the functions of this officer, we have drawn up the following tentative outline of his responsibilities;

- to serve as secretary and executive officer of the Legal Planning Committee;
- to establish and maintain a close working relationships with all other government departments (and crown agencies?) whose work touches on treaty matters;
- to establish and maintain a record of conferences at which the Canadian government may be represented and which may lead to the conclusion of treaties affecting this country;
- to ensure that all interested government departments and agencies are informed of such conferences;
- to coordinate consultation on whether legally qualified personnel should participate in such conferences;
- to coordinate formulation of legal guidance for Canadian participants in such conferences;
- such other functions as may be deemed appropriate or necessary by the Legal Planning Committee for the proper discharge of the recommendations the Glassco Commission and the Legal Services Committee.

We should point out that at present, it is only possible to give a tentative formulation of the functions of this position. We do not know how the requirements of the job will develop, nor indeed

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do we have the staff necessary to carry out a proper survey of its potential dimensions. This list of functions is therefore provisional in nature but is the minimum necessary to implement the recommendations.

Legal Division

Copies to (X)

file on 5475-AX-38-40

CONFIDENTIAL

File: 5475-AX-38-40

June 14, 1963.

Minutes of Meeting of Legal Planning Committee at 11:30 a.m., Friday, June 14

Present:

Mr. Cadieux	- Chairman
Mr. Wershof (X)	- Assistant Under-Secretary
Mr. Sicotte	- Head of Legal Division
Mr. Cole (X)	- U.N. Division
Dr. U.T.R. Flemington	- External Aid Office
Miss Dench	- Information Division
Mr. Plourde (X)	- Information Division
Mr. Copithorne (X)	- Legal Division
Mr. Beesley	- Secretary

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1. Proposed Comments on Technical Assistance Resolution

The first topic discussed was the final text of a proposed reply to a circular received from the Secretary-General of the U.N. relating to Technical Assistance Resolution on International Law No. 1816(XVII). Several drafting changes were suggested and agreed to; it was decided that the proposed reply, as amended, could now be submitted to the Under-Secretary for his signature.

2. It was also announced by the Chairman that the National Council of UNESCO had agreed to hold and finance the suggested Seminar of Experts. A letter had been sent from the Under-Secretary to the National Commission of UNESCO confirming the request for the Seminar.

2. Proposed Comments on "Friendly Relations" Resolution

3. The next topic discussed was the proposed Government comments to be filed pursuant to "Friendly Relations" Resolution No. 1815(XVII) dated January 3, 1963. The Chairman made three points:

(a) that it is appropriate that some comments be submitted by Canada in the light of the active part it played in the Sixth Committee on this question;

(b) that such comments should not restrict or embarrass us in our later statements in the Committee; and

(c) there is a Canadian interest in and position on the Resolution based on peaceful settlement of disputes, even though it is not possible as yet to announce a decision on the Court.

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4. Some discussion took place concerning the question of tone and emphasis in the comments; it was agreed that it would be desirable to shorten the proposed comments and, in the process, make them more factual and less "philosophical" and "historical" in tone.

5. The Chairman suggested that paragraphs 20 and 21 of the proposed comments might be redrafted along the following lines: Having considered the problem, our tentative conclusion is that the requirement is not essentially one of mere codification. Although there was no wish to prejudge the debate in the Sixth Committee on this issue, the problem would seem to be not so much the need for new law but the application of presently existing law; otherwise the codification of law in the abstract is not helpful. While the law clearly requires adaptation, and, in some cases, fuller elaboration, the over-riding issue is whether and how the law can be more effectively applied.

6. A second point to be made is that it is necessary to take account of the problem of what is legal and what is political. This is a very complex question, requiring, in each case, a fine judgment; this question may itself provide a useful area of study.

7. The third point which might be made is that there is one area in which there is a clear legal duty and where considerable study of methods is needed, - namely, peaceful settlement. While it should not be suggested that the Court can settle every dispute in the present stage of international law, when political considerations must often apply, the Court could make a much fuller contribution to peaceful settlement of disputes if states were willing to utilize it.

8. It was agreed that Legal and U.N. Divisions would continue to collaborate on the drafting of the proposed comments, which would then be submitted to the Minister under memorandum which would explain that it is necessary that we say something in the light of our past policy on this question, that the proposed comments could provide a useful outline of the line we might take at the U.N., and that they have been drafted with a view to the fact that it may yet be possible to take action on the Court.

3. <u>Co-ordination with other Departments on Treaty Matters</u>

9. The Chairman expressed his view that the best approach to this problem was to make a submission to Treasury Board based on the Glassco Commission's recommendations, (as amended by the Miquelon Legal Services Committee) requesting the personnel necessary in order to implement the recommendations. It was agreed that a memorandum to Personnel Division would be drafted, in Mr. Cadieux's absence in Geneva, and submitted to Mr. Cadieux for his approval there, before being incorporated into the recommendation to Treasury Board.

J. A. Beesley

J. A. Beesley
(Secretary)

DEPARTMENT OF EXTERNAL AFFAIRS

MEMORANDUM

TO: MR. CADIEUX, Chairman of the Legal Planning Committee

FROM: J. A. BEESLEY, Secretary, Legal Planning Committee

REFERENCE: Conv. re arrangements for meeting on Friday, June 14 at 11.30 a.m. my office, re

SUBJECT: Proposed Meeting of Legal Planning Committee

Security: CONFIDENTIAL

Date: June 11, 1963.

File No. 5475-AX-38-40

There are several questions which you might wish to have considered by the Legal Planning Committee prior to your departure for Geneva, namely:

(1) Comments on "Friendly Relations" Resolution yes

It will be necessary to redraft the proposed comments in the light of the Minister's decision not to raise the question of unconditional acceptance of compulsory jurisdiction of the International Court until September. You may wish also to have the question of the advisability of giving comments at all in the light of this situation reconsidered. (We have received enquiries from Chile, Australia and Tanganyika about the line we propose to take, and we have said that because of the active role we and others played last year we considered it appropriate to follow up with comments. Neither Chile nor Australia intends thus far to file comments, however; Tanganyika appears uncertain, and we have been told by the Australians that the State Department does not intend to file comments, while the British Foreign Office does.) The questions to be decided, therefore, seem to be:

See UN Div's memo of Mar 1/63 & Mr Cadieux on "Legal Planning Ctee - Sovereign Equality" See also my memo & UN Div of April 10/63 on "Meeting of Legal Planning Ctee", and attached draft paragr for inclusion in comments on "Friendly Relations" resolution dated April 2

(a) whether we wish to file comments;

(b) if so, what the comments should be; and

(c) the answer we should give to enquiries concerning our position.

(2) Proposed Comments on Technical Assistance Resolution yes

The general line to be taken was agreed on at the earlier informal meeting of June 3 of Legal, U.N., and Information Divisions and External Aid Office, chaired by you. A Draft of the proposed comments (copy attached) is now circulating in the divisions concerned and will be made ready for the Committee's final consideration, if you so desire.

See paper dated June - 1963 circulated by Mr Sinclair

CIRCULATION

(3) Proposed Studies on State Succession by Professor Morin no

Professor Morin's terms of reference have already been set out in your letter to him, and arrangements have been made to provide him with office space, (although not stenographic assistance), in Legal Division. There may,

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however, be some aspect of the matter that you may wish to have considered by the Legal Planning Committee.

(4) Co-ordination with other Departments on Treaty Matters yes ✗

Now that the legal study group on the Glassco Commission recommendations has completed its work, it may be appropriate to begin our co-ordination activities with other departments, (unless you consider present staff limitations make such an undertaking premature). A first step might be to write to every Department outlining the decisions taken and suggesting a meeting to consider:

See Mr Cadieux's letter to Brigden 7 May 70 & attachment

(a) the drawing up of a list of forthcoming conferences involving treaties or agreements;

(b) the correlation of treaty records by various departments;

(c) the setting up of a system of liaison and co-ordination on treaty matters.

✗ let us ascertain how far we can go under present circumstances. ✗ JB what we need to do the job properly. NC

Secretary,
Legal Planning Committee

EXTRACT FROM PARAGRAPH 21 OF THE REPORT OF THE LEGAL SERVICES COMMITTEE APPEARING ON PAGE 6

The existing Legal Planning Committee of the Department of External Affairs, meetings of which have been attended from time to time by a Justice officer, should be expanded to include representation from other departments interested in international law matters, particularly those having domestic implications. It would have the task, if adequate staff resources can be made available, of foreseeing the need for legally qualified personnel to participate in forthcoming international conferences and negotiations. It would also ensure, to the extent this could be anticipated, that all departments concerned were adequately consulted in the formulation of guidance for the Canadian participants or negotiators.

c.c. Mr. Cadieux
Mr. Wershof
Mr. Sicotte
Mr. Kingstone
Mr. Copithorne
Mr. Beesley
(three for file) Orig on 1-11-L-1

O/USSEA/A. de W. Mathewson/gh

Legal Division

5475-AX-40
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Orig. 1-2-2-1-2

May 30, 1963.

Dear Mr. Miquelon,

On May 22 I sent to you a copy of my letter to the Deputy Minister of Justice to which was attached an alternative draft of that part of paragraph 21 of the report of the Legal Services Committee which appears on page 6 of its report. Mr. Driedger concurs in my draft with the addition of a few words to the first sentence. I agree with this addition.

Attached is our agreed alternative draft. In case it is your wish to circulate it to other members of the Committee for their comments, I am sending 15 copies.

Yours sincerely,

M. CADIEUX

M. Cadieux.

Jean Miquelon, Esq.,
Under-Secretary of State,
Hunter Building,
Ottawa

31.5.18(05)

Alternative draft of that part of paragraph 21 of the Report of the Legal Services Committee appearing on page 6

Your Committee agreed that the legal division of the Department of External Affairs should be excluded from the planned form of integration, but concluded that although the secondment of a Justice officer to the legal division would be welcomed by External Affairs, shortages of qualified personnel made impossible such an arrangement for the time being and, in any event, it is by no means evident that the secondment of a Justice officer to External Affairs would necessarily result in an improvement of legal services so far as the Department of External Affairs is concerned. It was also agreed that the Legal Adviser should retain his present title. As a refinement of the existing system of liaison between External Affairs and Justice and as a means of ensuring close and continuing consultation among departments regarding international matters having domestic legal implications your committee came to the following conclusions.

(a) There should be an international law section in the Department of Justice adequately staffed to maintain liaison with External Affairs and other departments on international law matters and in conjunction with the legal division of external affairs to deal with domestic law aspects of international matters.

(b) The existing Legal Planning Committee of the Department of External Affairs, meetings of which have been attended from time to time by a Justice officer, should be expanded to include representation from other departments interested in international law matters, particularly those having domestic implications. It would have the task, if adequate staff resources can be made available, of foreseeing the need for legally qualified personnel to participate in forthcoming

international conferences and negotiations. It would also ensure, to the extent this could be anticipated, that all departments concerned were adequately consulted in the formulation of guidance for the Canadian participants or negotiators.

c.c. Mr. Miquelon

Me Sidlik (Legal Div)

O/USSEA/A. de W. Mathewson/gh

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Orig 1-2-2-1-2

May 22, 1963.

Dear Mr. Driedger,

Since the meeting of the Legal Services Committee on May 21 at which the committee's draft report was discussed I have tried my hand at rephrasing that part of paragraph 21 which reflects the committee's consensus regarding the Glassco Commission nineteenth recommendation in the legal services field.

I attach a copy of the draft which I would substitute for all of paragraph 21 appearing on page 6 of the committee's report. I should be grateful for your comments.

I am sending a copy of this letter and its attachment to Mr. Miquelon for his information.

Yours sincerely,

M. CADIEUX

M. Cadieux.

E. A. Driedger, Esq.,
Deputy Minister
Department of Justice,
Ottawa

23.5.1(05)

Your Committee agreed that the legal division of the Department of External Affairs should be excluded from the planned form of integration, but concluded that although the secondment of a Justice officer to the legal division would be welcomed by External Affairs, shortages of qualified personnel made impossible such an arrangement for the time being. It was also agreed that the Legal Adviser should retain his present title. As a refinement of the existing system of liaison between External Affairs and Justice and as a means of ensuring close and continuing consultation among departments regarding international matters having domestic legal implications your committee came to the following conclusions.

(a) There should be an international law section in the Department of Justice adequately staffed to maintain liaison with External Affairs and other departments on international law matters and in conjunction with the legal division of External Affairs to deal with domestic law aspects of international matters.

(b) The existing Legal Planning Committee of the Department of External Affairs, meetings of which have been attended from time to time by a Justice officer, should be expanded to include representation from other departments interested in international law matters, particularly those having domestic implications. It would have the task, if adequate staff resources can be made available, of foreseeing the need for legally qualified personnel to participate in forthcoming

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international conferences and negotiations. It would also ensure, to the extent this could be anticipated, that all departments concerned were adequately consulted in the formulation of guidance for the Canadian participants or negotiators.

DEPARTMENT OF EXTERNAL AFFAIRS

MEMORANDUM

TO: U.N. DIVISION, MR. KINGSTONE AND MR. COPITHORNE

FROM: J.A. Beesley, Secretary of the Legal Planning Committee

REFERENCE:

Security RESTRICTED

Date April 10, 1963.

File No. 5475-AX-38-40

SUBJECT: Meeting of Legal Planning Committee

Mr. Cadieux has asked that the next meeting of the Legal Planning Committee be held at 3:00 p.m., Tuesday, April 16 to consider the following subjects:

(a) The "rebus sic stantibus" principle and the effect of duress on the conclusion of treaties

Mr. Copithorne has added conclusions to his paper of March 4. A copy of the revised paper is attached.

(b) Accession to League Conventions

The Sixth Committee has asked the I.L.C. to study the question of broadening participation in League of Nations Conventions. Attached is a copy of Mr. Copithorne's paper of April 8 discussing this question.

(c) Canadian Governmental comments on U.N. "Friendly Relations" Resolution No. 1815

You will already have received a copy of U.N. Division's draft paper of March 1, 1963. A copy of Legal Division's supplementary draft paper of April 2 is attached.

(d) Conflict of Treaties

The general question of conflict of treaties will be amongst those matters examined by the I.L.C. during consideration of the second third of the proposed draft convention on treaties. This question will be discussed if a background paper being prepared by Mr. Copithorne can be completed and distributed in time for the meeting.

J. A. Beesley

J. A. Beesley,
Secretary

CIRCULATION

Mr. Cadieux
Mr. Wershof

Ext. 326A (6/56)

April 2, 1963.

DRAFT PASSAGE FOR INCLUSION IN CANADIAN COMMENTS ON "FRIENDLY RELATIONS" RESOLUTION (1815)

The United Nations Charter recognizes the close causal relationship between peace and justice, and that procedures for peaceful settlement of disputes provide a link between the two. One of the Purposes of the U.N. is "to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace"; Article 2(3) of the Charter lays down the positive obligation: "All members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered"; Article 33 outlines some of the means for the achievement of these ends: "The Parties to any dispute, the continuation of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice". Articles 1 and 7 establish the International Court of Justice as one of the principal organs of the U.N., and its principal judicial organ.

No machinery corresponding to the International Court of Justice is provided for in the Charter for the purposes of assisting in the utilization of those other peaceful means referred to in Article 33. The Canadian Government recognizes the need to further the development

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of all means of peaceful settlement, including those suggested by Article 33, and considers that a study should be made by the Sixth Committee of the desirability of developing procedures for peaceful settlement of international disputes. Of the many means available none is alone sufficient; each can be apt in particular circumstances; the existence of a variety of choices of means of peaceful settlement increases the likelihood of utilization of the pacific approach itself; the mere existence of well-developed procedures can have far-reaching substantive effects.

Of the various means available for peaceful settlement of disputes, settlement by an impartial authority, particularly by judicial settlement, provides, in the view of the Canadian Government, the surest guarantee of the sovereign equality of states. The International Court of Justice, consisting of permanently existing machinery of a highly refined form, readily available for the judicial settlement of international disputes, comprises just such an authority. It is the view of the Canadian Government that the continuing development and increasing application of the Rule of Law internationally provides the surest path to peace. The Canadian Government recognizes, however, that the mere existence of such machinery is ineffective unless coupled with the will on the part of member-states to utilize them.

It is commonly accepted that the International Court has not played the role which was envisaged for it, and that one of the major reasons for this unfortunate situation is the reluctance of the nations of the world to submit to its jurisdiction. While wider acceptance of the compulsory jurisdiction of the Court would not in

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itself resolve this problem, such action would, in the view of the Canadian Government, contribute considerably to the enhancement of the status of the Court and as a consequence, further the development of the Rule of Law amongst nations. With these considerations in mind, the Canadian Government has decided to file a new and unconditional declaration of acceptance of compulsory jurisdiction of the International Court of Justice. In reaching this decision the Canadian Government have done so in the conviction that such action would constitute an affirmation of Canada's acceptance of and belief in the Rule of Law amongst nations.

The Canadian Government has accordingly today filed with the Secretary General of the United Nations a new Declaration accepting the jurisdiction of the International Court of Justice unconditionally.

April 10, 1963.

MEMORANDUM FOR THE LEGAL PLANNING COMMITTEE

International Law Commission: Conflict of Treaties

Introduction

"Diplomatic practice [shows] clearly ... that the problem of conflict of treaties is neither new nor negligable, that it may involve major political issues as well as legal technicalities and that it is closely related to the fundamental problem of international law, namely that of reconciling the claims of legal order, stability and respect for duly created rights and obligations with the pressure of growth, development and change which constitutes the law of life itself". (1) Case law on the subject is fragmentary and while it includes a number of decisions which may be suggestive in connection with various aspects of the problem, it has not had a decisive influence. As a result, the conflict of treaties has been largely in the hands of the writers who have, since the time of Grotius, been much concerned with it.

The Theory of Legal Obligation

Some writers have been content to postulate various rules of interpretation drawn from the classical writers, reinforced by analogy from domestic law, while others have looked to the nature of the obligations created by a treaty. It is proposed here to consider briefly the theory of treaty obligation before commenting upon the various rules of interpretation. For a treaty to come into force, it must meet certain conditions of customary international law; the particular procedure prescribed by general international law for the creation of treaty norms

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(1) Jenks "The Conflict of Law Making Treaties" 30 BYB (1953) p. 401-453 at p. 408.

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must take place. One of these conditions is that the contents of a treaty must not be in violation of hierarchically superior norms of general or particular international law, jus cogens. Thus, contracting parties can lawfully derogate from particular law binding on themselves, as well as general customary law, providing it constitutes jus dispositivum (sometimes described as "pliable" law), but they cannot derogate from the superior norms of jus cogens. Examples of customary law constituting jus dispositivum are the rules that consuls do not enjoy diplomatic privileges and immunities, and that a state may exercise jurisdiction in respect of persons and things on board a foreign private merchant ship lying in its ports. Examples of customary law constituting jus cogens are pacta sunt servanda, and the freedom of the high seas. Fitzmaurice suggests it is not possible to state exhaustively what are the rules of international law that have the character of jus cogens but a feature common to them, or to a great many of them, evidently, is that they involve not only legal rules but considerations of morals and of international good order.(2) McNair describes them as "rules which have been accepted, either expressly by treaty or tacitly by custom, as being necessary to protect the public interests of the society of states or to maintain the standards of public morality recognized by them.(3) Where two conflicting treaties are involved the paramountcy or validity of subsequent treaty depends on the type of norms that have been created by the first treaty. If the earlier treaty contains norms jus cogens (as declaratory of existing international law for example, or as containing rules which have come to be recognized as valid for and erga omnes, and have been received into the general body of international law, e.g. the Hague Conventions of 1899 and 1907)

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(2) Fitzmaurice, 3rd Report on The Law of Treaties, A/CN.4/115, 1958 p. 65.
(3) McNair, "Law of Treaties, 1961", p. 215.

a later treaty in derogation of these norms will be invalid.[4] If however, the initial treaty creates jus dispositivum, the parties can lawfully agree to derogate from it by a subsequent treaty.

It has already been noted that the rules of customary international law, which includes the concept of pacta sunt servanda, are jus cogens, that is to say hierarchically superior norms. A treaty can restate such norms but can it create them? A distinction is sometimes made between contractual treaties which are generally considered to create merely individual and concrete norms, and legislative treaties which create general and abstract norms, although it can be argued that treaties whether contractual or legislative, create only norms of particular international law, that is to say, they cannot create general international law because they cannot bind non participating states (pacta tertiis nec nocent nec prosunt). The effect of a treaty upon third parties is a separate subject, but it is clear notwithstanding the general presumption, that treaties in some cases have had an effect on third states. See for example the Free Zones Case in which the Permanent Court of International Justice stated that while it could not be lightly presumed that stipulations in favour of a third state had been adopted in order to create a legal right in its favour, there was nothing to prevent contracting parties from effectively creating rights in favour of third parties.[5] There have also been a line of treaties establishing international régimes for waterways such as the Congo, the Niger, the Suez and the Kiel Canal. In the case of the latter, the Permanent Court held in The Wimbledon that the Versailles Treaty had created benefits in the Canal for "all the Nations of the World".[6]

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(4) Kunz, "The Meaning and the Range of the Norm of Pacta Sunt Servanda"39 A.J.I.L. (1945), p. 180-197, at p. 194, argues that if the parties to the later agreement were not the same as those to the earlier agreement, the former agreement would be valid although its parties would be guilty of an illegal act, engaging their international responsibility. He proceeds from this conclusion to distinguish between the invalidity of treaty norms and the illegal creation of valid treaty norms.

(5) Ser. A/B, No. 46.

(6) Ser. A, No. 1.

Such rights may also arise from bilateral treaties, as in the case of the Panama Canal in which separate (and in some respects, inconsistent) treaties between the United States and Panama, and the United States and the United Kingdom, provided that the Canal shall be open to vessels of all nations. However, some writers argue that what has been created by such instruments is a political interest having a validity independent of treaty created legal rights.(7)

The rule that treaties cannot validly impose obligations upon states which are not parties to them follows clearly from the sovereignty of states. There are signs, however of a departure from this principle in the Charter of the United Nations which provides for example, in Article 2 paragraph 6, that "The Organization shall ensure that states which are not members of the United Nations act in accordance with these Principles so far as may be necessary for the maintenance of international peace and security". This clearly constitutes a claim to regulate the conduct of non members to the extent required for the fulfillment of the object of the Article, and Kelsen argues that as the Charter attaches a sanction to a certain behaviour of non members, it in effect establishes an obligation for non-members to observe the contrary behaviour.(8) McNair argues that the General Treaty for the Renunciation of War is binding on every state, if one accepts the premise as he does, that when a new state receives recognition, expressly or by implication, it has accepted general conventional law as it has accepted general customary law.

Higher Law

It is now generally accepted that notwithstanding the fact that no treaty is yet universal in its membership, certain treaties must be regarded as being "higher law", that

(7) Gihl, "International Legislation", 1937.
(8) Kelsen, "The Law of the United Nations", p. 107.

is to say, as transcending in kind and not merely in degree, ordinary agreements between states,(9) treaties which partake "of a degree of generality which imparts to them the character of legislative enactments, properly affecting all members of the international community or which must be deemed to have been concluded in the international interest".(10) By general agreement this higher law includes the Covenant of the League of Nations, the General Treaty for the Renunciation of War, and the United Nations Charter, but it is doubtful whether it extends, so far at least, to other instruments of a general character such as a covenant of human rights or instruments specifically designed for the codification of international law, or the great bulk of international legislation of a more technical character.(11) Whether the three former treaties are hierarchically superior because they are "law making" is much disputed. Many writers deny the distinction between "traité-loi" and "traité-contrat"(12) but others have found it useful to consider the two types separately in formulating rules to govern the conflict of treaties. Fitzmaurice makes a different distinction and sets out two rules: one for bilateral and those multilateral treaties which are of "the reciprocating type, providing for a mutual interchange of benefits between the parties, with rights and obligations for each involving specific treatment at

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(9) McNair, "The Functions and Differing Legal Character of Treaties" 11 BYB (1930) p. 113.

(10) Lauterpacht, Article 16(4) of his 2nd Report on Law of Treaties, A/CN.4/87, p. 35.

(11) See, however, McNair, op. cit. p. 221 "If the first treaty is a multipartite law-making treaty clearly intended to create permanent rules and containing no power of denunciation, it is probable that a treaty made between two or more parties in derogation of its provisions - for instance, an agreement between two or more parties to the Declaration of Paris of 1856 to permit the use of privateers - would be null and void" McNair would also include the Slavery Conventions of 1926 and 1956 in his group of hierarchically superior treaties.

(12) See for example, Gihl, op. cit. and Lauterpacht, "The Covenan as Higher Law" 17 B.Y.B. (1936) p. 54-65. However, the latter admits that if a multilateral treaty is concluded with the intention of creating an everlasting condition of things, and if it provides special sanctions for its violation, its violation on the part of one of the parties does not entitle the other to the usual remedy of cancelling the treaty.

the hands of and towards each of the others individually"; the second for those treaties creating obligations of an objective character which cannot be analysed as separate obligations towards individual parties. These are either;

> "(a) of the interdependent type, where a fundamental breach of one of the obligations of the treaty by one party will justify a corresponding non performance generally by the other parties, and not merely a non performance in their relations with the defaulting party (e.g. a disarmament treaty); or
>
> (b) of the integral type where the force of the obligation is self existent, absolute and inherent for each party, and not dependent on a corresponding performance by the others (e.g. Genocide Convention)"(13)

A traditional concept analogous to that of "a higher law" is the so-called "Public Law of Europe" frequently referred to by older writers, and espoused by the Committee of Jurists appointed by the League of Nations in 1921 to consider the 1856 Convention embodying an "international settlement" for the Aaland Islands. Professor Verdross and his followers have also argued that "the general principles of law recognized by civilized nations" are hierarchically superior to both customary and treaty law. This theory is now largely discarded although it is admitted that such principles probably constitute subsiduary norms of international law.

If, because of their intrinsic character and the degree of acceptance they have secured, the little group of "higher law" treaties have created norms jus congens, the interesting question then arises as to whether the parties have a right to withdraw from such agreements, that is to say, whether the parties can derogate from jus cogens. The Covenant provided such a right and a number of states exercised it. The Charter is silent on the point. At San Francisco, a Committee was about equally divided on the question of providing such a right and while it was finally decided not to include it, the Committee passed a resolution which said in part.

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(13) Fitzmaurice, Articles 18 and 19, 3rd Report, p. 23 and 25.

> "If, however, a member because of exceptional circumstances feels constrained to withdraw, and leave the burden of maintaining international peace and security on the other members, it is not the purpose of the organization to compel that member to continue its cooperation in the organization ... Nor would a member be bound to remain in the organization if its rights and obligations as such were changed by Charter amendments in which it has not concurred and which it finds itself unable to accept".(14)

Scope of Treaty Conflict Problem

Having discussed in cursory fashion, the theory of legal obligation and particularly the evolution in the last half century of treaties which are generally agreed to have created hierarchically superior norms of international legal obligation, the next step might be to consider briefly the nature and scope of the problem of treaty conflict. Although as noted at the beginning of this paper, the problem of the conflict of treaties is by no means a new one, it has become of increasing importance and infinitely more complex with the greatly increased use of the multilateral treaty as a means of regulating the conduct of states. Jenks considers the problem to be the result of the imperfect development of the law of the revision of multipartite instruments and the definition of the legal effect of such revision. Formulated in this manner the subject is clearly another aspect of what is perhaps the major problem of international law, that of stabilizing juridical norms within a process providing for peaceful change.

However, containing the substance of the discussion within the framework of the conflict of treaties, it would be useful to look briefly at the type of problem which arises in the multilateral field. Whenever, for example, provisions of

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(14) See Kelsen, op. cit., Chapter 7, p. 122-135 for a full discussion of the question. McNair "The Law of Treaties 1961", at p. 217 argues that those provisions of the Charter "which purport to create legal rights and duties possess a constitutive or semi legislative character, with the result that member states cannot 'contract out of' them or derogate from them by treaties made between them and that any treaty whereby they attempted to produce this effect would be void". For a discussion of Article 103, see below.

a revised international instrument which are incompatible with those of the original instrument, come into force for some but not all of the parties to the original instrument, the original and revised instruments remain in force simultaneously for the parties to both of them, in respect of their relations with different groups of co-contractants. The problem also arises in a number of other ways. The first is related to the geographica scope of the instruments, some designed for world-wide effect and some to be merely regional instruments. Jenks gives a number of examples of actual conflict and points to the rapid increase in the number of European regional instruments with a binding character dealing with matters which are, or may be governed in varying degrees by general international instruments. In some cases there is quite clearly a valid function for regional instruments of a supplementary nature and both the United Nations Charter and the U.P.U. Convention make provision for regional arrangements. Another source of conflict of law making treaties is in instruments which approach the same problem from different angles. The protection of particular groups of people, for example, may tend to cut across provisions of instruments dealing with particular subjects or problems. (Cf. U.N. Convention on Status of Refugees with the I.L.O. Convention on Migration for Employment). Another source of conflict is between liberalizing and regulatory instruments, such as the removal of restrictions on the movement of persons, vis-à-vis the regulation of public health. Yet another source of conflict is between instruments dealing with related subjects which fall under the functional jurisdiction of different international organizations. It appears, for example, that radio communication at sea is governed partly by the I.T.U. Convention and Regulations, and partly by the SOLAS Convention.

The following conflict situations can be distinguished: conflicts between bilateral treaties concluded between the same parties A and B; conflicts between multilateral treaties

concluded between the same parties ABCD etc.; conflicts between bilateral treaties concluded between three different parties one of which is party to two or several bilateral treaties i.e. between treaties between A B and treaties between B C; conflicts between multipartite treaties concluded between different parties. If a number of parties to a later multilateral treaty is smaller than the number of parties to the prior treaty such an arrangement is designated as inter se agreement.(15) However, while this appears to be a formidable area of potential conflict, states do sometimes include provisions to avoid conflict. Such provisions make take the following forms: a treaty by implication may provide for the supersession (i.e. the revision or abrogation) of an earlier treaty,(16) a treaty may contain a clause that a particular provision or that all provisions of an earlier treaty are abrogated by a subsequent treaty;(17) a treaty may contain an express provision that it does not conflict with an earlier treaty;(18) a treaty may provide that no future treaty which

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(15) McNair distinguishes a separate category of conflicting treaties which are dispositive in character, that is to say, creating, transferring or recognizing rights in rem, McNair, op. cit., p. 224.

(16) See Article 11 of Convention Relating to Liquor Trade in Africa of September 10, 1919 "All the provisions of former general international Conventions relating to the matters dealt with in the present Convention shall be considered as abrogated in so far as they are binding between the Powers which are parties to the present Convention" (Hudson Int. Legislation (1931) p. 358).

(17) See The Free Zones Case (Series A/B No. 46) in which Judge Dreyfus in a dissenting opinion, held that one of the Articles of the Treaty of Versailles abrogated by implication, the customs and economic régime established by the Treaty of Paris of 1815 and subsequent acts, while the majority of the Permanent Court held that abrogation was not a necessary consequence of the inconsistency that had arisen.

In passing, Chailley's theory of "l'acte contraire" should be mentioned. In its extreme form the theory implies that a treaty can legally be terminated only by another treaty at variance with the former, but it is evident that treaties can also come to an end by operation of law, e.g. the extinction of a contracting party or of the object, desuetude, in some cases by the outbreak of war etc.

(18) See Article 7 of the NATO Treaty. "This Treaty does not affect, and shall not be interpreted as affecting, in any way the rights and obligations under the Charter of the Parties which are members of the United Nations, or the primary responsibility of the Security Council for the maintenance of international peace and security". Lauterpacht at p. 48 of his 2nd Report discussed the effect to be attributed to such declarations of compatibility and concludes that they serve a useful purpose as a clear expression of intention that the subsequent treaty sha[illegible] be operative if it in fact conflicts with the prior treaty.

would be inconsistent with the present treaty may be concluded;[19] a treaty may constitute a pactum de contrahendo i.e. an agreement to agree on new terms and to supersede thereby existing treaty obligations.[20]

It would be useful at this point to consider the provisions of the Covenant of the League of Nations and the Charter of the United Nations whereby the parties to those two instruments purported to place them above other treaty obligations. Article 20 of the Covenant stipulated that:

> 1. The Members of the League severally agree that this Covenant is accepted as abrogating all obligations or understandings inter se which are inconsistent with the terms thereof, and solemnly undertake that they will not hereafter enter into any engagements inconsistent with the terms thereof.
>
> 2. In case any Member of the League, shall before becoming a Member of the League, have undertaken any obligations inconsistent with the terms of this Covenant, it shall be the duty of such Member to take immediate steps to procure its release from such obligations.

Article 103 of the Charter on the other hand, provides that:

> In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.

There are a number of interesting differences of approach between these two articles. The first is that by Article 20 the Covenant purported to "abrogate" inconsistent inter se obligations, while Article 103 merely states that in case of conflict between obligations, those under the Charter shall

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(19) See Article 10 of the Inter Arab Mutual Defence Pact dated January 15, 1950 "Les Parties contractantes s'engagent chacune à ne pas conclure d'accords internationaux qui dérogeraient au présent traité et à ne pas adopter dans leurs rapports avec les autres Puissances, une attitude incompatible avec les buts de ce traité" quoted in Leca, "Les Techniques de Revision des Conventions Internationales", 1961, p. 170. In a more general sense, see also Article 103 of the U.N. Charter "In the event of conflict between the obligations of the Members of the United Nations under the present Charter and their obligations, under any other international agreement, their obligations under the present Charter shall prevail".

(20) See Article 11(2) of the Canada-United Kingdom Air Agreement of August 19, 1949 which provided that "in the event of the conclusion of any general multilateral convention concerning air transport by which both contracting parties become bound, the present Agreement shall be amended so as to conform with the provisions of such convention".

"prevail". However, Article 20 was not retrospective, although the parties did undertake to attempt to procure their release from prior conflicting obligations, whereas Article 103 applies to all conflicts of obligations. A further point of interest is that Article 20 could be interpreted as referring to obligations of conflicts arising from legal instruments, whereas Article 103 is limited to obligations arising from international agreements.

Juridical Aspects of Problem

Having discussed the theoretical nature of the problem, its scope and application in contemporary international affairs, and the ways in which the parties sometimes avoid or purport to avoid the problem, it is now opportune to consider the juridical aspects of the conflict of treaties. Leca formulates the question thus; "un même acte peut-il être qualifié différemment par deux ordres juridiques, chaque qualification présentant une égale valeur, ou au contraire existe-t-il une hiérarchie logique entre les deux ordres?" (21) Lauterpacht is the leading exponent of what is termed the unitary approach. He argues that in concluding the later treaty, the party to the first treaty has committed an illegal act, that the illegal act makes the second treaty itself illegal, and that the sanction for the illegality is the nullity ab initio of the second treaty. Lauterpacht maintains that the principle that contracts entered into by the parties in violation of previous contractual obligations binding upon them are void, must be regarded as a general principle of law. "It is incompatible with the unity of the law to recognize and enforce mutually exclusive rules of conduct laid down in a contract in cases in which such inconsistency is known to such parties". (22) In effect, Lauterpacht is arguing that the anterior law always

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(21) Op. cit., p. 213.
(22) "International Law", p. 894. (8th ed.)

invalidates the posterior. However, while lex prior is a general rule in the law of contract, lex posterior is the rule in legislative interpretation and the numerous contemporary instruments of a mixed contractual and legislative character do not accommodate themselves to a single juridical rule. Moreover, it proves extremely difficult to establish priority of obligation when dealing with certain multilateral law-making treaties containing complex provisions regarding entry into force. In addition, the combination of the lex prior rule and the need for unanimous consent for the revision of treaties, would make it possible for a single party to block all revision. For this reason, presumably, Lauterpacht amended his original draft Article for the I.L.C. to except from the lex prior rule treaties revising multilateral conventions in accordance with their provisions "by a substantial majority of the parties to the revised convention". He also added the stipulation that for his rule to apply, the second treaty must "impair an essential aspect of /the first treaty's/ original purpose" (See Annex for full text of Lauterpacht's proposal; also his Commentories, First Report A/CN.4/63, p. 198-208, and Second Report A/CN.4/87, p. 35-53).

The opposing school of thought is the pluralist, who argue that conflicting treaties "have equal force and effect, in the sense that the parties incur international responsibility under each of them".(23) Leca summarizes the rebuttal of the pluralists thus:(24) the illegal act of concluding the second treaty need not result in the nullity of the treaty; it is not in any event certain that the conclusion of the second treaty is a juridically illegal act; it is not even certain that the party violates its obligations under the first treaty by participating in the second. The injured party under the first

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(23) Fitzmaurice, Article 8, 2nd Report, p. 27.
(24) Op. cit., p. 222-223.

treaty is logically debarred from seeking the nullity of the second on the grounds of res inter alios acto. Lauterpacht avoids this problem by imputing a knowledge to the third party of the anterior incompatible treaty but this assumes that treaties are relatively few in number and are well publicized. This is clearly not the case today, dispite the publication by the League and the United Nations of Treaty Series and it is hardly realistic to argue that a state is "on notice" of another's states treaty obligations. Furthermore, domestic law does not inevitably maintain that a conflict in contractual obligations results in the formal invalidation of the subsequent contract but rather, may establish a priority of obligation.(25) Kelsen goes ones step further and states "according to general international law, it is not the act of concluding a treaty inconsistent with a previous treaty, but the non fulfullment of this or the other treaty which is illegal".(26) He goes on to point out that even if the conclusion of a treaty inconsistent with a previous treaty is an illegal act, it is only so on the part of the state which is a contracting party of both treaties, not on the part of the state which is a contracting party only to the subsequent treaty. "If the nullity of this treaty is to be considered as a sanction, such sanction is not justifiable in so far as it is inflicted upon the latter".(27)

Inter se agreements are slightly different from those already discussed. They are agreements concluded between states which have assumed the same obligations under the same treaty. The question is to what extent they can modify for themselves the provisions of the earlier treaty, and the answer most widely advanced is that they should not be permitted to

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(25) Ibid.
(26) Kelsen, op. cit. p. 114.
(27) Ibid.

frustrate the general purpose of the treaty.[28] Article 22(c) of the Harvard Draft reflects this view:

> "Two or more of the states parties to a treaty to which other states are parties may make a later treaty, which will supersede the earlier treaty in their relations inter se, only if this is not so inconsistent with the general purpose of the earlier treaty as to be likely to frustrate this purpose".

To forbid some latitude in the matter of inter se agreements would be to place a veto in the hands of what might be a small minority of parties opposing change.

Furthermore, conflicting treaties may not turn out to have conflicting obligations.

> "[Although] two treaties may be inconsistent in that they set up mutually discordant systems, so long as these do not have to be applied to or between the same parties, it may be quite possible to apply both ... In short, there may be a conflict between the treaties concerned without this necessarily resulting in any conflict of obligation for any of the parties".(29)

In connection with the Law of the Sea Conventions, for example, some states proposed a specific rule for general application subject however to the right to make differing rules by bilateral agreement based on reciprocity. Conflict will arise primarily in the case of instruments which lay down rules of objective validity as distinct from instruments which embody separate obligations of different parties. Further, there is no conflict if the obligations of one instrument are stricter than, but not incompatible with those of another, or if it is possible to comply with the obligations of one instrument by refraining from exercising a privilege or discretion accorded by another but though there is no conflict in such cases, there

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(28) In the Oscar Chinn case, however, two judges of the Permanent Court took the view that in the case of treaties, having not merely a dispositive but a quasi-statutory effect and status, providing a constitution, system or régime for an area or in respect of a given subject, it was not open to any of the parties to act in this manner in any circumstances without the consent of all. Series A/B No. 63, at pp. 133-4 and 148.

(29) Fitzmaurice, 3rd Report, p. 74.

is divergence which may defeat the object of one of the instruments. McNair has pointed out that having regard to the multiplicity of treaties in existence and the complexity of their provisions, it is often very difficult to know whether performance of a later treaty will, when the time for its performance comes, be incompatible with performance of an earlier one.

A number of specific rules have been advanced for the resolution of actual conflict. The rule of lex prior, which has come down from Vattel, states that in the case of conflict the earlier treaty shall prevail. This theory is sometimes embellished with a reference to the "illegality of a contract to break a contract". In domestic law, the rule of lex prior generally applies in contract. It's adoption in international law has been strongly urged by Lauterpacht (see above) and it was incorporated in the Harvard Draft.(30) In practice, however, it is of little help in the international field because of the difficulty of evaluating priority of obligation where there are networks of obligations based in conflicting instruments which have been grown simultaneously. Another classical rule is that of lex posterior which is analogous to the domestic rule of legislative interpretation whereby the latter supersedes the former.(31) Kelsen supports the lex posterior rule except where a contrary intention is to be inferred, for example where a treaty is declared "unchangeable" or is "eternal". It seems generally recognized that this rule is applicable only if the

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(30) Article 16: "If a State assumes by a Treaty with another State an obligation which is in conflict with an obligation assumed by an earlier treaty with a Third State, the obligation assumed by the earlier treaty takes priority over the obligations assumed by the latter treaty".
(31) Aufricht, "Supersession of Treaties in International Law", 37 Cornell Law Quarterly (1952) p. 658-659, describes the rule of lex posterior as one of "the general principles of law recognized by civilized Nations" but quotes no authority for this rather dogmatic statement.

following requirements are met: the later treaty covers the same subject and the same parties as the earlier treaty; the later treaty is of the same or a higher level than the earlier treaty; the scope of the later treaty is of the same degree of generality as the earlier treaty; however like the rule of lex prior, it is not particularly helpful when applied to conflicts between norms evolved in different functional or geographical orbits. A third rule is that of lex specialis which has come down from Grotius. By this rule preference is given to the specific, and to the obligation which approaches most nearly the subject at hand. While there are certain types of situations in which this rule may be helpful, the limits of its application are more difficult to determine in respect of the conflict of law making treaties than in respect of statutes, in the case of which general or special provisions are enacted by the same legislature, or in respect of the general and special terms of contracts binding the same parties.(32)

Jenks has suggested that a helpful analogy might be found in the "pith and substance" principle established by the Privy Council decisions on the B.N.A. Act. Under this principle, one looks to the true nature and character of legislation, its grounds and design, and the primary matter dealt with, as well as its object and scope.(33) In Jenks view the underlying conflict of legislative jurisdiction in the Canadian constitution is analogous to the realm of law making treaties. A final rule worth mentioning is the general presumption against inconsistent treaty obligations.

> "If ... the meaning of a provision is ambigious, the reasonable meaning is to be preferred to the unreasonable, the more reasonable to the less

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(32) Jenks, op. cit. p. 446.

(33) See Leroy "Legislative Power in Canada"; Laskin "Canadian Constitutional Law".

reasonable. The consistant meaning to the meaning inconsistant with generally recognized principles of international law and with previous treaty obligations towards third states".(34)

CONCLUSIONS

Neither Jenks writing in 1953 nor Leca in 1961 apparently felt it possible to formulate general rules for the resolution of conflicting treaty obligations. The latter indeed was writing with the benefit of the work of Lauterpacht and Fitzmaurice for the I.L.C. on this subject. Both Jenks and Leca content themselves to making certain practical proposals for the diminution of the problem and observations as to its nature. Jenks concludes that while undesirable and anomolous in principle, the conflict of treaties is "an unavoidable incident of the absence of any overriding international legislative authority, the parallelism of international and regional action, the practical need for a functionally decentralized national legislative process and the imperfect development of the law concerning the modification of law making treaties by revision or amendment".(35) The subject, Jenks comments, has suffered from being considered too much in terms of abstract legal principle, primarily as applied to matters having political implications and too little in terms of the technicalities of the international legislative process and the nature of the practical problems which may arise in the course of applying law making treaties dealing with interrelated subjects. As a result, no consistent body of principles adapted to modern needs has yet been evolved. The usefulness of the contract law anology in this area is clearly limited. Rather, statute law conflict should be examined to observe the principles applied in reconciling general and subordinate legislation

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(34) Oppenheim, "International Law", 8th Ed. p. 952-953.
(35) Jenks, op. cit. p. 450-451.

federal and state legislation under federal systems, imperial and colonial legislation, and any other applicable principles of the conflict of laws.

From the juridical point of view, it can be concluded that the trend is clearly away from the unitary approach towards the coexistence of the obligations with the party bound by both and in default of the one it fails to perform. If the case comes before a tribunal, the party concerned may be directed to carry out one of the obligations and make reparation for failing to carry out the second. In practice, it may not be possible to prevent a party from choosing between its obligations although it is clearly undesirable that international law should be interpreted as conferring a right of election. Fitzmaurice has formulated a complex set of rules in which he has attempted to give the various rules discussed above their appropriate role within the general principle of the co-existence of obligations. (See Annex for full text). Fitzmaurice's draft is probably as close to adequate as it is possible to achieve at the present time in this uncertain area of the law.

However, it is doubtful whether any set of rules will be fully satisfactory, for many of the conflict problems touch on the frontier between law and politics and are not susceptible of a purely juridical settlement. In advanced domestic legal systems, such conflicts are authoritatively and peacefully decided by special organs for the application of the law, organs different from the parties to the conflict; impartial and independent courts, having compulsory jurisdiction. International law lacks satisfactory special organs for the application of general norms to concrete cases, and the states themselves are necessarily left to apply the law. In these circumstances, a peaceful juridical solution of conflict is likel to be possible only by agreement between the parties.

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In the absence of such agreement, problems arising from the conflict of treaties are unlikely to be capable of juridical settlement . It may well be that until the international community evolves a legislative process, or develops a system of compulsory international tribunals, the whole problem of the validity and termination of treaties must remain in an unsatisfactory condition, and one that cannot be satisfactorily remedied by the formulation of rules of jurisprudence.

EXTRACT FROM LAUTERPACHT'S SECOND REPORT
ON THE LAW OF TREATIES (A/CN. 4/87)

Article 16
Consistency with Prior Treaty Obligations

1. A bilateral or multilateral treaty, or any provision of a treaty, is void if its performance involves a breach of a treaty obligation, previously undertaken by one or more of the contracting parties.

2. A party to a treaty which has been declared void by an international tribunal on account of its inconsistency with a previous treaty may be entitled to damages for the resulting loss if it was unaware of the existence of that treaty.

3. The above provisions apply only if the departure from the terms of the prior treaty is such as to interfere seriously with the interests of the other parties to that treaty or substantially to impair an essential aspect of its original purpose.

4. The rule formulated above does not apply to subsequent multilateral treaties, partaking of a degree of generality which imparts to them the character of legislative enactments properly affecting all members of the international community or which must be deemed to have been concluded in the international interest. Neither does it apply to treaties revising multilateral conventions in accordance with their provisions or, in the absence of some provisions, by a substantial majority of the parties to the revised convention.

EXTRACT FROM FITZMAURICE FOURTH REPORT
ON THE LAW OF TREATIES (A/CN.4/120)

Article 8 - Obligatory character of treaties: the case of conflicting treaty obligations

(1) Except as provided in paragraph (3) below, a conflict between two treaties, both of them validly concluded, can in principle only be resolved on the basis that both have equal force and effect, in the sense that the parties incur international responsibility under each of them. In such a case, the question which of the two treaties is actually to be carried out, and which, by reason of the fact that it cannot be or is not carried out, gives rise to a liability to pay damages or make other suitable reparation for a breach thereof, is governed by the provisions of Articles 18 and 19 of Part II of Chapter 1 of the present Code.

(2) Accordingly, the mere fact that a treaty obligation is incompatible with obligations under another treaty is not in itself a ground justifying non-performance.

(3) The foregoing provisions of the present Article do not apply

(a) where an obligation under one treaty is superseded, cancelled, or replaced by an obligation under a later treaty between identical parties;

(b) as between States parties to both treaties, and having intended, as between themselves, to supersede, cancel, or replace the earlier obligation;

(c) where, according to the provisions of Article 18 of Part II of Chapter 1 of the present Code, one of the treaties or treaty obligations concerned is rendered null and void by reason of conflict with the other;

(d) by reason of Article 103 of the Charter of the United Nations:

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(i) as between Member States of the United Nations, in respect of any treaty obligation in conflict with the obligations of the Charter;

(ii) as between a Member and a non-Member State, as respects the performance of any such conflicting obligation; but not as respects international responsibility and liability for the resulting non-performance.

EXTRACT FROM FITZMAURICE'S THIRD REPORT ON THE LAW OF TREATIES (A/CN.4/115)

Article 18 - Legality of the object (conflict with previous treaties - normal cases

(1) Where a treaty is in conflict with a previous treaty embodying or generally regarded as containing accepted rules of international law in the nature of jus cogens, the invalidity of the treaty will ensue on that ground in accordance with the provisions of Article 17 above.

(2) Subject to the generality of paragraph (1) above, the present Article applies primarily to bilateral treaties, and to those pluri- or multilateral treaties which are of the reciprocating type, providing for a mutual interchange of benefits between the parties, with rights and obligations for each involving specific treatment at the hands of and towards each of the other individually. The special case of other kinds of pluri- or multilateral treaties forms the subject of Article 19 below.

(3) The question of incompatibility or conflict between treaties of the kind specified in paragraph (2) above, may arise in any of the following situations:

(a) In the case both of bilateral and of pluri- or multilateral treaties:

(i) The two treaties have no common parties: no party to the one is also a party to the other.

(ii) The two treaties have common and identical parties: all the parties to the one are also parties to the other.

(iii) The two treaties have partly common and partly divergent parties: some parties are parties to both, some to the earlier only, and some to the later only. In the case of two bilateral treaties this takes the form that there is one party common to both treaties, and that there are two other parties, one of whom is a party to the earlier treaty only, and the other a party to the later only.

(b) In the case of multilateral treaties only, or where at least one of the two treaties is a multilateral treaty:

(iv) Partially common parties, both or all of the parties to the earlier treaty being also parties (but not the only parties) to the later treaty - (case of a later treaty to which both or all of the parties to the earlier agree).

(v) Partially common parties, but where some only of the parties to the earlier one are parties to the later, which has no other parties - (case of a later treaty to which some only of the parties to the earlier agree, i.e. case of a separate and subsequent treaty on the same subject concluded between less than the full number of the parties to the earlier).

Subject to the provisions of paragraph (1) above, inconsistencies or conflicts arising in these cases are resolved in accordance with the provisions of paragraphs (4) - (7) hereunder.

(4) Case (i) in paragraph (3) - The validity of a treaty cannot be affected merely by the existence of a previous treaty to which neither or none of the parties to the later treaty are also parties.

(5) Case (ii) in paragraph (3) - In so far as there is any conflict, the later treaty prevails, and either in effect modifies or amends the earlier, or abrogates some of its provisions, or supersedes it entirely and, in substance, terminates it.

(6) Case (iii) in paragraph (3) - In so far as there is any conflict, the earlier treaty prevails in the relation between the party or parties to the later treaty who also participated in the earlier one, and the remaining party or parties to that earlier one: but the later treaty is not rendered invalid in se, and if, on account of the conflict, it cannot be or is not carried out by the party or parties also participating in the earlier treaty, there will arise a liability to pay damages or make other suitable reparation to the other party or parties to the later treaty not participating in the earlier, provided the other party concerned was not aware of the earlier treaty and of the conflict involved.

(7) Case (iv) in paragraph (3) - The effect is fundamentally the same as in Case (iii). In so far as there is any conflict, the earlier treaty prevails in the relations between the parties to the later treaty and the remaining party or parties to the earlier one. However, where the earlier treaty prohibits, as between any of the parties to it, the conclusion of an inconsistent party, or if the later treaty necessarily involves for the parties to it action in direct breach of their obligations under the earlier one, then the later treaty will be invalidated and deemed null and void.

Article 19 - Legality of the object (conflict with previous treaties - special case of certain multilateral treaties)

In the case of multilateral treaties the rights and obligations of which are not of the mutually reciprocating type, but which are either (a) of the interdependent type, where a fundamental breach of one of the obligations of the treaty by one party will justify a corresponding non-performance generally by the other parties, and not merely a non-performance in their relations with the defaulting party; or (b) of the integral type, where the force of the obligation is self-existent, absolute and inherent for each party, and not dependent on a corresponding performance by the others - any subsequent treaty concluded by any two or more of the parties, either alone or in conjunction with third countries, which conflicts directly in a material particular with the earlier treaty will, to the extent of the conflict, be null and void.

DEPARTMENT OF EXTERNAL AFFAIRS

MEMORANDUM

TO: MR. CADIEUX,
Chairman of the Legal Planning Committee

FROM: J. A. BEESLEY, Secretary

REFERENCE:

Security CONFIDENTIAL

Date April 9, 1963.

File No. 5475-AX-38-40

SUBJECT: Meeting of Legal Planning Committee: 1963 Spring Session of I.L.C.

You have asked that a meeting of the Legal Planning Committee be held to complete consideration of all matters on the I.L.C. Agenda. The following subjects might, if you agree, be usefully considered by the Committee sometime this week. 2 ague.

(a) The "rebus sic stantibus" Principle and the effect of Duress on the conclusion of treaties

2. Mr. Copithorne has added conclusions to his paper of March 4. A copy of the revised paper is attached. Pl. return

(b) Accession to League Conventions

3. The Sixth Committee has asked the I.L.C. to study the question of broadening participation in League of Nations Conventions. Attached is a copy of Mr. Copithorne's paper of April 8 discussing this question. Pl. return.

(c) Conflict of Treaties

4. The general question of conflict of treaties will be amongst those matters discussed by the I.L.C. during consideration of the second third of the proposed draft convention on treaties. A paper by Mr. Copithorne is now in a stage of final revision and will come forward separately tomorrow. Pl. send.

(d) State Responsibility and State Succession

5. As you know, the I.L.C. will not be giving substantive consideration to either of these questions during its next session, although some discussion may take place on the reports of the respective Sub-Committees. You may wish to have position papers prepared on the report on state responsibility, a copy of which you have, and the report on state succession not yet published but reported on in Geneva's letter No. 12 of February 1 (copy attached).

CIRCULATION

6. In addition to the foregoing subjects of direct relevance to the I.L.C., the Committee might, if you agree, consider the proposed government comments on the U.N. Friendly Relations Resolution No. 1815. (Attached are copies of U.N. Division's paper of March 1, 1963 and Legal Division's supplementary paper of April 2.)

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Ext. 326A (6/56)

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7. You may wish to indicate which subjects you would like to have discussed at the next meeting to be held at 3:00 p.m. on Tuesday, April 16.

JB

J. A. Beesley,
Secretary

DEPARTMENT OF EXTERNAL AFFAIRS, CANADA. *(DUPLICATE)*

NUMBERED LETTER

TO: THE UNDER-SECRETARY OF STATE FOR EXTERNAL AFFAIRS, OTTAWA, CANADA.

FROM: CANADIAN DISARMAMENT DELEGATION, GENEVA

Reference: Report on 14th Session ILC--July 3rd, 1962 from Permanent Mission, Geneva.

Subject: International Law Commission: Meeting of Sub-Committees in Geneva, January 7 to January 25, 1963.

Security: CONFIDENTIAL

No: 12

Date: February 1, 1963

Enclosures: as stated

Air or Surface Mail: Air

Post File No:

Ottawa File No.	

References

At its 637th meeting on May 6, 1962, the International Law Commission established two working groups, one on state responsibility and the other on the succession of states and governments. The working group on State Responsibility met in Geneva from January 7 to January 16, under the Chairmanship of Professor Roberto Ago of Italy with the following additional members present: Professor Briggs (USA), Professor Gros (France), Mr. Jiminez de Aréchaga (Uruguay), Mr. de Luna (Spain), Mr. Paredes (Argentina), Mr. Tsuruoka (Japan), Mr. Tunkin (USSR) and Mr. Yaseen (Iraq). The working group on Succession of States and Governments met from January 17 until January 25 under the Chairmanship of Mr. Castren (Finland) with the following members in attendance: Mr. Bartos (Yugoslavia), Professor Briggs (USA), Dr. Elias (Nigeria), Mr. Liu (China), Mr. Rosenne (Israel), Dr. El-Erian (UAR), Mr. Tabibi (Afghanistan) and Mr. Tunkin (USSR). Professor Lachs (Poland) was to have been Chairman of the sub-committee on succession but apparently took ill in Warsaw immediately prior to departure and as a result was absent from both committees. (Professor Lachs was one of the three members--along with Professor Briggs and Mr. Tunkin--who were members of both working groups.) In Professor Lachs' absence, Mr. Castren of Finland was elected Chairman of the Sub-Committee on State Succession, in recognition--we were informed--of his experience in this field.

Internal Circulation

2. The terms of reference of the Sub-Committee on State Responsibility were laid down by the International Law Commission at its 668th meeting on June 26. The Sub-Committee was to devote its time primarily to the general aspects of state responsibility and, on the basis of its discussions and memoranda to be submitted to the Secretariat by members of the Sub-Committee, its Chairman (Professor Ago) was asked to prepare a report on the results achieved, to be submitted to the International Law Commission at its fifteenth session in May 1963. The terms of reference of the working group on Succession were also established by the Commission on June 26. The members of this Sub-Committee were similarly requested to submit memoranda dealing with the approach and scope to be taken to this subject and its Chairman was asked to prepare, first, a working paper containing a summary of the various views expressed in individual memoranda, and second, a report on the results achieved by the Sub-Committee, for submission to the next session of the Commission.

Distribution to Posts

PERMIS, N.Y. (without enc.)
PERMIS, Geneva (without enc.)

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(Ext. 182C(Rev. 2/52)

3. The Sub-Committee on State Responsibility received memoranda from the following six members: Mr. de Aréchaga--submitted on May 28, 1962--(ILC(XIV) SC.1/W.P.1), Mr. Paredes (ILC(XIV) SC.1/W.P.2, Add.1 and A/CN.4/W.P.7), Professor Gros (A/CN.4/SC.1/W.P.3), Mr. Tsuruoka (A/CN.4/SC.1/W.P.6)☆ The Sub-Committee adopted a draft report prepared by Professor Ago--A/CN.4/SC.1/R.1/Rev.1 of January 15, 1963.

☆ Mr. Yasseen (A/CN.4/SC.1/W.P.5), and by Professor Ago (A/CN.4/SC.1/W.P.6).

4. The Sub-Committee on State Succession received memoranda from the following members: Mr. Elias (ILC(XIV) SC.2/W.P.1) and A/CN.4/SC.2/W.P.4) and Mr. Bartos (A/CN.4/SC.2/W.P.5). Mr. Lachs submitted a working paper from Warsaw summarizing the views in the foregoing memoranda (A/CN.4/SC.2/W.P.7). The draft report submitted by Mr. Castren, as approved by the Sub-Committee, is contained in A/CN.4/SC.2/R.1 of January 24. The Sub-Committee also had before it three studies prepared by the Secretariat on: succession of States in relationship to U.N. Membership (A/CN.4/149); succession of States in relation to general multilateral treaties of which the Secretary-General is the depository (A/CN.4/150); digest of decisions of international tribunals relating to State succession (A/CN.4/151).

5. The Sub-Committee on State Responsibility decided that its draft report, together with the various memoranda submitted to it and summary records of its meetings would be published as a document and submitted to the members of the International Law Commission sometime prior to the meeting of the fifteenth session of the ILC. The Secretariat of the ILC (Dr. Liang and his deputy, Mr. Wattles) were unable to say when the document would become public. However, we were able to obtain confidentially (not from the Secretariat) copies of all the documents submitted to the Sub-Committee on State Responsibility (with the exception of Mr. Paredes' study, which, we understand, was of little or no assistance) and of the Sub-Committee's draft report. Copies of these documents are attached to this letter. We would like to emphasize that until the report is officially issued, it will be important to treat as confidential the contents of the attached documents and the fact that we possess them. The working group on State Succession did not apparently come to a firm decision regarding publication of its reports and various documents. It decided that the draft report submitted by Mr. Castren and approved by the Sub-Committee, together with the summary records, memoranda and working papers, should ultimately be made available to the Commission but in the first instance it was decided that the Sub-Committee would meet again with the participation of Professor Lachs at the beginning of the fifteenth session of the ILC in order to adopt the final report. It therefore appears that the various documents and reports will not be made public until sometime during the course of the fifteenth session of the Commission. However, the Secretariat were not entirely certain about this point; they thought that it was possible that the various documents (after seen by Professor Lachs) might also be issued publicly before that time. We also managed to obtain on a confidential basis copies of the various documents submitted to the Sub-Committee and of its report. We would therefore again ask that the contents of these documents and the fact that we possess them be treated confidentially until they are made public. We are not enclosing copies of the three studies made by the Secretariat as we assume that you received them from the Permanent Mission in New York.

6. On the arrival of the Secretariat in Geneva, we asked whether it would be possible for an observer from Canada to be admitted to the meetings. We informed Dr. Liang that Professor Lachs of Poland had earlier told us that he saw no objection to observers being admitted. The Secretariat said that they had received earlier enquiries in New York about the possibility of admitting observers and had taken the view that the Sub-Committees would probably decide not to do so. One of the requests for observer status had

come from the West German Government which was apparently anxious to keep an eye on the work of the Sub-Committee on State Succession. It appears that enquiries for observership were also received from certain international and non-governmental organizations interested in problems of state responsibility, particularly in the economic field. At its first meeting, Professor Ago informed the Sub-Committee on State Responsibility that several enquiries had been received about the possibility of observing the meetings (he did not mention from what sources these came) and asked the views of the members on the matter. It was unanimously decided that since the work of the Committee was exploratory and informal, it would be better to exclude all observers. The Committee on State Succession adopted the same procedure.

7. Although we were unable to obtain copies, even confidentially, of the summary records, the scope and work of the two Sub-Committees and the conclusions reached by them can be clearly seen from its draft reports. In addition, the main outlines of the various views of certain members can appear in the memoranda submitted by them. We had informal discussions with certain members of the Commission and with the Secretariat in order to obtain additional information about the Sub-Committees' work and general atmosphere. We spoke on several occasions to Professor Briggs, Dr. El-Erian, Mr. Rosenne, Mr. Tabibi, Dr. Liang, Mr. Wattles and others about the work of the two Sub-Committees and about the forthcoming session of the Commission. Sir Humphrey Waldock, special rapporteur on the law of treaties, was not in Geneva for the work of these Committees and we were therefore unable to discuss treaties with him. The Secretariat told us that they had been in correspondence with Professor Waldock about when his next report will be ready. As it will be the basis for the Commission's work at its fifteenth session, the Secretariat are very anxious to receive and circulate the report in sufficient time for it to be available before the outset of the next session of the Commission. As Sir Humphrey had apparently not been keeping the Secretariat informed of the progress of his report, the Secretariat seemed rather uncertain about where it could be expected to be received.

8. Unfortunately we were unable to reach Professor Gros prior to his departure from Geneva. He was a member of the Sub-Committee on State Responsibility but attended only the first half of its work, leaving Geneva immediately afterward. We were informed by several persons that Professor Gros is likely to be the French candidate for the International Court of Justice at the elections at the next session of the General Assembly. The present French incumbent--Judge Basdevant--has apparently decided not to stand for re-election and it seems that Professor Gros is expected to be nominated by the French Government.

9. Professor Gros and Professor Ago are being mentioned as possibilities for the Chairmanship of the next session of the ILC as it is considered to be Western Europe's turn. The general consensus seems to be that Professor Ago is the most likely candidate. He informed several members that he has a number of conflicting engagements during the next Commission but did not indicate that he would be unavailable for the post. It appears that no consideration has yet been given to the question of who might be general rapporteur at the next session.

10. It is, of course, expected that the main part of discussions at the fifteenth session of the ILC will be given to the law of treaties. Probably later in the session a few days will also be given to consideration and approval of the two draft reports on state responsibility and state succession and appointment of rapporteurs for the subjects. It will be noted from the draft report of the Sub-Committee on State Succession that it recommended that a special rapporteur be appointed at the next ILC session. It seems to be a foregone conclusion that the chairmen of the two Sub-Committees on

state responsibility and succession--Professors Ago and Lachs--will be named the special rapporteurs for these subjects. Dr. El-Erian told us that he would have ready for the next meeting of the Commission a draft study on relations between states and international organizations for which he is special rapporteur. Although we discussed the work of the next session with a number of members of the Commission and others, we were unable to obtain any views as to what would be likely to be the main controversial issues in Sir Humphrey Waldock's forthcoming report on the essential validity of treaties. It was generally expected that one of the main problems would arise in respect of termination of treaties and that, as at the last session of the General Assembly, the Communist members would give considerable emphasis to the problem of "unequal treaties" and seek recognition of this concept.

11. Both from reading the attached documents and from the reports we received from various persons, we had the impression that the work of neither Sub-Committee proved to be particularly controversial or unduly political in content, nor were the communist members particularly troublesome. Professor Lachs' absence reduced the Communist membership on the Sub-Committee on State Responsibility to one and on Succession to two. During the course of the Committee on State Responsibility Professor Tunkin appeared quite cooperative and did not press his views vigorously. (He did not submit a written statement) In the Committee on Succession Professor Tunkin and Mr. Bartos were apparently often in disagreement on minor points. One particular matter on which they took different lines was the desirability of including within the terms of reference of the rapporteur of State Succession the subject of adjudicative procedures for the settlement of disputes, to be included as an integral part of the regime of succession. Professor Tunkin was strongly opposed to the rapporteur being asked to take up the matter, while, on the other hand, Mr. Bartos was apparently willing that this should be done. The opposing views of the members of the Sub-Committee on this question are described in paragraph 14 of the Sub-Committee's report and it is therein noted that it was decided to defer a final decision until the beginning of the next session. We understand that a vote was taken whether settlement of disputes should be included as a subject for study by the rapporteur and there were four votes in favour and four against so doing. Although we are not entirely certain, it appears that those in favour were Mr. Briggs, Mr. Rosenne, Mr. Castren and possibly Mr. Bartos. It is also our understanding that Mr. Tunkin, Mr. Tabibi and Mr. Erian were among those voting against. During the discussion on state succession, Mr. Tunkin (and Mr. Tabibi as well) gave considerable emphasis to the need for study of "colonial" questions and the subject of sovreignty over natural resources. It appears that these views did not receive support from other members. Some sort of compromise was reached in the formulation appearing in paragraph 6 of the Sub-Committee's report (SC.2/R.7) that there is need to pay special attention to matters of succession arising from the emancipation of many nations and the birth of many new states after World War II. It is also mentioned in the draft report (paragraph 7) that while some members wished to give special emphasis to self-determination and permanent sovreignty over natural resources, others thought that this would be superfluous in view of the fact that these principles are already contained in the U.N. Charter and in resolutions of the General Assembly. In fact, these matters are nowhere else mentioned in the Sub-Committee's report.

12. In the Sub-Committee on State Responsibility Mr. Tunkin was among those who were quite firmly opposed to giving priority to responsibility for injury to persons or property of aliens. He was supported by Mr. Yaseen and Mr. Paredes. Those in favour of giving priority to this topic were Mr. Briggs, Dr. Aréchaga and Mr. Castren. Professors Ago and Gros took a broader approach of a rather conceptual nature but not, of course, similar

to that favoured by Mr. Tunkin. Professor Briggs told us he was surprised that Mr. Tunkin did not press harder for endorsement of his view that State Responsibility should include a study of responsibility for violation of international rules concerning the maintenance of peace. Professor Briggs thought that Mr. Tunkin's specific objective was possibly limited to ensuring that the Sub-Committee would not discuss responsibility for damage to aliens, and that Mr. Tunkin had no special interest in what the Special Rapporteur might do with the subject so long as he kept away from the problem of damage to aliens. Professor Ago's approach, while involving general principles, would not appear to lead directly to a consideration of the type of questions raised by Mr. Tunkin, although conceivably such matters might come up for discussion in connection with Professor Ago's final categories for study--forms of international responsibility,--the duty to make reparation and the question of sanctions. Dr. Liang, characteristically, thought that the whole draft report was so ambiguous and imprecise as to allow the Special Rapporteur to introduce whatever aspects of the subject he wished to. Certainly, the vague reference in the draft report to "possible repercussions which now developments in international law may have had on responsibility" might have satisfied Mr. Tunkin but would seem to have added nothing by way of precision.

13. For your convenience, the main decisions taken by the two Sub-Committees are described below.

14. The Sub-Committee on State Responsibility gave a general endorsement to the approach proposed by Professor Ago in his working paper (WP.6). Professor Ago's approach was of a broadly conceptual nature and seemed to have involved more an analysis of the formal aspects of the concept of state responsibility than of any specific substantive questions. After the problem of how to handle damage to aliens was dealt with, agreement seemed to have been rather easily reached in the Committee, and the meetings tended to be short and relatively non-controversial. We heard the question raised from more than one quarter on the utility of a study of the subject which would be primarily conceptual or theoretical in nature. Professor Briggs seemed to be of the view that it would lead nowhere and that that was why Mr. Tunkin did not appear to mind the fact that his own view was not endorsed. As will be noted, among the topics of study suggested by Professor Ago were those such as determination of an international wrongful act; abuse of rights; imputability of a wrongful act and indirect responsibility; question of ultra vires; degree and nature of responsibility necessary to engage liability, including question of requirement of fault; question of causal relationships; distinctions as to types of international wrongful acts and circumstances in which acts are not wrongful, such as consent, sanctions, self-defence and necessity, the duty to make reparation and the right of sanction. In supporting the final draft report, those members who wished to see primary emphasis given to damage to aliens presumably must have considered that an acceptable compromise was contained in the formulation in paragraph 5 of the draft report (SC.1/R.1 Rev.1) which, although giving priority to the "definition of the general rules governing international responsibility", recognized that there would be no question of neglecting the experience and material in certain special sectors, "specially that of responsibility for injuries to the person or property of aliens". Profess Briggs thought that the Special Rapporteur of the subject would thus inevitably deal largely with the jurisprudence of damage to aliens.

15. The Sub-Committee on Succession adopted a workmanlike approach to its task and seemed to have achieved a substantial measure of success in defining the work of the future rapporteur. For example, the Committee decided to give priority to the question of state succession; succession

of governments would also be studied in so far as it was a necessary complement of the study of state succession. This was a compromise of various views given in the memoranda submitted to the Sub-Committee, for example that of Mr. Castren who wished to postpone the question of succession of governments; Mr. Tabibi who wanted a separate approach to each branch as a matter of priority; and Mr. Rosenne who wanted the subjects discussed together. The Sub-Committee also adopted an important decision in agreeing that succession in respect of treaties should be dealt with in the context of succession of states rather than that of the law of treaties. This appeared to represent the unanimous view of those writers who had submitted memoranda on the subject, and seemed, in fact, an inevitable consequence of taking up state succession as a subject for codification. Some of the memoranda submitted gave considerable emphasis to the various approaches to succession in respect of treaties, e.g. universal versus singular succession, the theory of tabula rasa, the theory of the right of option, the theory of the continuation of the right of renounciation and the theory of the right of a time limit for reflection. It is thus clear that succession in respect of treaties will be one of the principal tasks of the rapporteur of the Commission. The Sub-Committee also agreed that the approach to be taken by the rapporteur should embrace, in addition to succession in respect of treaties, succession in respect of rights and duties arising from other sources, and succession in respect of membership of international organizations. A further general division of the subject was also included in the report which, however, does not seem likely to be of great value. The Secretariat was asked to prepare three further papers which are noted on pages 5 and 6 of the draft report (SC.2/R.1).

16. On the whole, both Sub-Committees seemed to have achieved a rather surprising measure of agreement on the broad outlines of the approach to be taken to codification of the subjects by the special rapporteurs, when appointed. It therefore seems that the holding of these meetings may have proved a useful and worthwhile step in undertaking the difficult and important task of codifying these two branches of international law.

A. E. GOTLIEB

Disarmament Delegation

April 8, 1963.

re: 5475-AX-39-60

MEMORANDUM FOR LEGAL PLANNING COMMITTEE

Subject: 15th Session of I.L.C.: Opening for general participation of multilateral conventions concluded under the auspices of the League of Nations.

BACKGROUND

By Resolution A/C.6/L.508/Rev. 1, adopted November 2, 1962, the General Assembly requested the International Law Commission to "study further the question of extended participation in general multilateral treaties concluded under the auspices of the League of Nations giving due consideration to the views expressed during the discussions at the 17th Session of the General Assembly and to include the results of the study in the report covering the work of the 15th Session of the Commission".

2. The debate in the 6th Committee that gave rise to this resolution had originated in a draft resolution submitted by Australia, Ghana and Israel (A/C.6/L.504/Rev.1; in revised form, A/C. 6/L. 504/Rev. 2) which:

1. Requested the Secretary General to ask the parties to the Conventions enumerated in the list of the multilateral agreements concluded under the auspices of the League of Nations prepared by the Secretariat (A/C.6/L.498) to state within a period of 12 months from the date of the enquiry whether they object to the opening of those of the Conventions to which they are parties, for acceptance by any state member of the United Nations or member of any specialized agency;

2. Authorized the Secretary General, if the majority of the parties to a Convention had not within the period referred to, objected to opening that Convention to acceptance, to receive instruments of acceptance thereto;

3. Recommended that all States parties to the Conventions listed recognize the legal effect of instruments of acceptance deposited in accordance with paragraph 2 and communicate to the Secretary General their consent to participation of States depositing instruments of acceptance;

4. Requested the Secretary General to inform members of communications received by him under this resolution.

3. Another resolution (A/C.6/L.508) submitted by India and Indonesia requested the I.L.C. to study the question and

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to include the results in the report of its 15th Session. After debate the two latter resolutions were withdrawn and the one referred to in paragraph 1 passed.

DEBATE

4. In the course of the debate it was pointed out that the question was of interest to more than half the members of the United Nations, and while many representatives recognized the practical and immediate importance of the question, doubts were expressed as to the proposed procedure as well as the substance. It was clear that the procedure posed constitutional difficulties for Italy and most Latin American countries as amendments to treaties binding those countries had themselves to be submitted to a constitutional process, including approval by Parliament. Thus, the failure of the Governments of those states to object could not be held to be a constitutional exercise of the treaty making power for those states. There was a further objection to this procedure pressed by the Italian representative as to whether the failure to object was an effective formation of consent at international law. Accordingly, it was suggested that protocols be drafted which would open these conventions to broader participation. The protocols would enter into effect when they had been accepted by the number of parties to the Conventions specified in the protocols.

5. The British representative expressed the belief that the intention of the contracting parties to the Conventions under consideration had been to open them to all members of the organized international community, and it was fully consistant with this intention to find a way by administrative action to open them to accession by all members of the U.N. and its specialized agencies. The alternative procedure of using protocols was, she thought, "cumbersome, inappropriate and unnecessary for the purpose" United Nations. Legal Counsel said it was a matter

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of "pure convenience" to use the "failure to object" formula. Many states were slow in replying to enquiries from the U.N. but this should not, he thought, be taken as a sign of unwillingness to permit accession by new states to these Conventions. The Italian representative pointed out that the parties were not so numerous as to make it difficult to obtain their consent and furthermore, that this formula left considerable uncertainty about the effects of accession by new parties in respect of contracting parties which had sent no reply to the Secretary General's communication. The Venezuelan representative wondered whether a resolution of the General Assembly could constitute more than a recommendation to members. If, as he thought, members could not be bound by a resolution, parties remaining silent under the proposed procedure could not be considered bound. The Peruvian representative pointed out contrary to the British statement, that some of the conventions contained clauses restricting participation to particular groups of states. The Chilian representative proposed that a single protocol be drawn up covering all the conventions in question.

6. The question of "all States" arose and it was argued that the use of this term would affirm the principle of universality, but this interpretation was rejected by the Australian co-sponsor of the draft resolution. There was also a brief discussion of the relation of this question to that of the succession of states but it was made clear that this proposal was meant to apply where there were no problems of state succession. With regard to the nature of the acceptance, some representatives felt that no reservations should be admitted as this was a practice that had grown up since the conclusion of conventions under the auspices of the League of Nations. Finally, some representatives had doubts regarding the suitability of referring the question to the I.L.C. and thought that it would be more appropriately resolved by the General Assembly, or if it was a question of determining existing international law, to the

International Court.

7. The United Nations Legal Counsel submitted a statement to the Committee in which he dealt with the question of whether agreement by a majority of contracting states would be satisfactory to open the League of Nations' conventions to new parties or whether it was necessary to have the unanimous approval of the contracting states. He pointed out that the majority rule had already been adopted by the General Assembly in seven protocols between 1946 and 1953 amending various League treaties. All of the protocols provided for the entry into force of the amendments as to accession to the treaties, when either a majority of the parties to the treaties, or a specified number constituting about half the parties, had become parties to the protocol. Thus, from the time that a simple majority of the parties or a fixed number of them constituting approximately a simple majority, accepted the amendments, the Secretary General was authorized to receive instruments of accession from new states.

8. The Legal Counsel noted that the draft resolution before the Sixth Committee followed the majority rule embodied in the seven protocols approved by the General Assembly but went beyond them in regarding the failure of the contracting states to object, as an indication of their consent. However, a number of the protocols made more extensive amendments than opening the old treaties to new parties and "hence a formal procedure for consent was suitable; but where the only object is to widen the possibilities for accession, the Committee may find that no such formality is necessary".

COMMENT

9. The traditional rule of customary international law required unanimous agreement among the contracting states to amend a treaty. However, there has been considerable erosion of this principle, and there appears to be no support in contemporary international practice for the theory that a treaty which

purports to revise an earlier agreement without the previous consent of all the parties, is void ab initio[1]. The attitude of the General Assembly with regard to the seven protocols referred to by the Legal Counsel forms a part of this development away from the traditional rule and, in the light of these precedents a similar majority rule would seem to be appropriate in the present circumstances.

10. It is, however, more questionable whether a simple failure to object within twelve months should be taken as an indication of consent to amend the League conventions to permit acceptance by new States. Such a procedure might perhaps be considered repugnant to traditional legal principles but, on the other hand, there may be a delatoriness on the part of parties to League treaties to take action on this resolution which would make it difficult to get the required simple majority within a reasonable period. However, the adoption of the principle that the agreement of the contracting parties to a revision of a treaty should be inferred from their failure to object, has far reaching implications. It means that where the General Assembly had taken action perhaps by majority vote, to open a treaty for broader participation than that provided for by the contracting states, concerted diplomatic action will be required by those opposing broader participation to obtain the filing of objections by the necessary percentage of contracting states. Under a procedure by which States are required to expressly state their concurrence in the amendment, the initiative would lie in the hands of those who wished to broaden participation in a particular treaty.

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(1) See Hoyt, "The Unanimity Rule in the Revision of Treaties, 1959, particularly pp. 245-252; Leca, "Les Techniques de Révision des Conventions Internationales", 1961, pp. 158-163; Fitzmaurice, Second Report on the Law of Treaties, A/CN.4/107 Article 13, pp. 37-39.

11. Some representatives on the 6th Committee as well as the Legal Counsel, seemed to regard the proposed procedure as purely administrative. However, if by this they mean that it is on a lower legal plane than the alternative procedure of a protocol, its effectiveness as a means of creating binding legal obligations is immediately open to doubt. There is furthermore, the question of whether binding legal obligations can be imposed upon members of the United Nations by resolution of the General Assembly. The procedure proposed in the three state resolution purports to do this and in so doing, would seem to go a long way towards establishing the principle that the General Assembly can amend treaties by resolution. This would be a significant step in the development of the Assembly as a legislative body. We would undoubtedly wish to consider very carefully whether this is a suitable function for the Assembly and whether it is as yet ready to assume it. United Nations Division may wish to comment on this point.

RECOMMENDATION

12. It is submitted that the protocol procedure is more appropriate to the circumstances than the General Assembly resolution procedure embodied in the three state resolution. Under the former, protocols (or a single protocol) would be drawn up to amend the League conventions by broadening their participation provisions, and would enter into force when a given number of the contracting parties to the convention had accepted them. This was the procedure adopted in the case of the seven protocols referred to by the Legal Counsel in his statement. To our mind the objections advanced by the opponents of the protocol procedure (see paragraph 5 above) are not so impressive as to outweigh the difficulties the three state resolution procedure

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would impose on some countries, as well as its potentially far reaching implications for the role of the General Assembly in treaty affairs, and the uncertain state of treaty relations it would create between some groups of states.

CONFIDENTIAL

April 5, 1963.

Minutes of the Fourth Meeting of the
Special Committee to Consider the Report of the
Royal Commission on Government Organization

on

LEGAL SERVICES

Present:	Chairman	-	Jean Miquelon
	Members	-	C. S. Booth Marcel Cadieux F.J.G. Cunningham E. A. Driedger W. H. Huck Col. H.M. Jones R. C. Labarge Lt.-Col. G.L. Lalonde Brig. W. J. Lawson J. G. McEntyre
	EGO Liaison Officer		H.O.R. Hindley
	Secretary		R. E. Williams

The Committee's attention was drawn to the statement in the Minutes of the Third Meeting, appearing at the top of page 10 thereof:

> "It was pointed out again that statute drafting was done exclusively by the Legislation Section of the Department of Justice, and never by departmental solicitors."

Although this was true in a technical sense, yet it was acknowledged that the word "drafting" has a broader meaning which includes all the preparatory work that goes into the planning and drawing of instructions and in this preliminary work departmental solicitors did indeed have a definite part to play. It was felt that the Glassco Report may have used the word in the general sense, rather than in the technical sense, without adequately indicating this.

The Committee next turned briefly to the commentary submitted by Mr. Cadieux and circulated at the last meeting. Considerable interest and approval was evinced in the idea of an expanded legal planning committee as expressed at page 2 of the commentary. The expanded committee would have representation from several departments interested in international matters and would have the over-all task of foreseeing the need for representation at upcoming international conferences and negotiations; ensuring proper notification and liaison with the appropriate departments, including Justice; and assisting in settling representation at such conferences.

As an example of the number and nature of the many international agreements with which such a committee might be concerned, the attached list has been provided to illustrate the agreements that only one department - the Department of Transport - must deal with.

The Committee then turned to the 21st Glassco recommendation:

> "That the Pensions Advocates in the Department of Veterans Affairs be excluded from the integrated legal service, but that other lawyers employed by the Department of Veterans Affairs be included." (p.418)

On this subject, Mr. Lalonde observed that since the Committee had already set its face against the integration scheme proposed by the Commission, there would be nothing with which the "other lawyers" might integrate.

As to the Pension Advocates, he would have agreed in any event that they be excluded from any scheme of integration, but he noted that the Commission felt that these positions ought to be held by laymen rather than lawyers. Mr. Lalonde pointed out that

he was required to use lawyers for these services and had been ever since about 1930 when it became apparent that this service as previously performed by laymen was unsatisfactory.

Rather than turn these services over to laymen again, who take three or four years to train anyway, he proposed that the ordinary departmental solicitors carry out the work done by Pension Advocates. This would in fact be possible because most of the Pension Advocates were approaching retirement age, and only four were presently located in Ottawa, the others being in 18 branch offices across the country. In fact, in some eleven of these field offices the work of the Pension Advocates is being combined with that of the departmental solicitors under a single officer in charge who is responsible for all legal work. Only in the two or three largest field offices would the continuing volume of work make this sort of internal integration difficult.

The Committee agreed that rather than alter the system now, it should be left to run itself out in the course of time as the work of the Pension Advocates is combined with the work of the departmental legal staff.

The 22nd Glassco recommendation was:

> "That a representative of the integrated legal service be seconded to the R.C.M. Police" (p.419)

Here the Committee was prepared to endorse Mr. Driedger's view that there was no need to have an officer from Justice seconded to the Police. Liaison with the Police was already closer than with any other department and a seconded officer would serve no useful purpose either to do the work or to provide liaison.

The 23rd Glassco recommendation was:

> "That consideration be given to establishing branch legal offices of the Department of Justice in centres across Canada where the volume of work justifies such action". (p.421)

The Committee took note of the fact that consideration was already being given to the establishment of branch offices in major centres across the country. Mr. Driedger noted that it would save time and money if a branch office to handle local land work, civil litigation and criminal prosecutions could be set up. In addition, it could possibly take instructions from other local branches of government as well as the Departments of Justice and National Revenue, and serve the purpose of preventing small legal problems from becoming large ones simply because prompt legal advice was not readily available.

Mr. McEntyre noted that consideration had been given for several years past to the creation of branch offices of his Department in the larger centres and he suggested that if Justice was considering this also, perhaps the two departments could get together in the provision of this service.

Mr. Driedger pointed out, however, that in order to set up such an office, it would be essential to have an officer in charge who was capable of going regularly into provincial Supreme Courts, who was thoroughly familiar with the Justice Department and with the operation of government generally, and who was capable of handling a small staff to assist him. He would probably be a person of considerable seniority and approximately of assistant deputy ministerial rank. Just at the moment, no one of this capacity and rank was available nor did it seem likely that any such person would be available in the foreseeable future.

Mr. Driedger suggested a possible stop-gap solution would be to have a single officer stationed in major centres for the sole purpose of handling small and routine matters such as minor criminal charges, food and drug prosecutions, etc. He felt that this would probably result in some worth-while saving of time and money, but there would doubtless be numerous political objections, for this would siphon off much of the small work now performed by local agents. In those circumstances Mr. Driedger felt it highly unlikely that such a scheme would come to be implemented.

On the whole, the Committee agreed that a system of branch offices, adequately staffed, would be worth while and agreed that consideration ought to be given to the establishment thereof, noting nevertheless that staff requirements would probably be prohibitive at any time in the near future.

With respect to the Glassco Commission's 24th recommendation:

> "That a Department of Justice legal officer be posted on a rotational basis in each of the Territories". (p.421)

the Committee noted that a competition for such a position in the Northwest Territories had been set up and a suitable person selected, but the recent freeze on salaries and positions had made his appointment impossible.

The last subject discussed at this meeting was the matter of salaries for senior personnel. Mr. Driedger noted that he had a carefully chosen staff of highly competent legal officers who have shown considerable self-sacrifice in time and effort to cope with a very heavy workload, but salaries, especially at the higher levels, just did not provide sufficient incentive for this kind of effort.

He found that large law firms in the bigger Canadian cities were using the Justice Department as a kind of training ground for their own solicitors and noted that several relatively junior, but promising persons, have been hired away from the Department in the past several years, some at salaries which exceed that of the Deputy Minister.

Although the Committee felt that low levels of remuneration for senior personnel were unfortunately common throughout the service, yet it acknowledged that in the case of legal services, the quality of that service was very closely related to the conditions of service, paramount among them being the matter of salary, and it endorsed Mr. Driedger's view that the low salaries of senior persons deserved vigorous criticism.

Attach/

Jean Miquelon,
Chairman

OTTAWA, Ontario
9th April 1963

Problems of International Law in
the Civil Aviation and Marine Fields.

International Air Law

At the present time Canada is a party to or has an interest in the following:-

Convention on International Civil Aviation
(Chicago Convention 1944)

This is the Convention under which ICAO is established and under which it operates.

Canadian interest is distributed as follows:-

External in respect of international, political and organizational aspects, etc.

D.O.T. - technical and practical aspects. ICAO standards adopted pursuant to the Convention are adopted by way of Canadian regulations.

A.T.B. - has a definite but relatively limited interest in respect of the economic objectives of ICAO.

Air Transit Agreement (Chicago 1944)

This is a multilateral agreement to which Canada is a party in respect of the 1st and 2nd freedoms of the air. This concerns External, DOT and ATB.

The International Air Transport Agreement (Chicago 1944)

Covers 5th freedoms but Canada is not a party.

There are 3 miltilateral agreements covering the joint financing of Air Navigation Facilities & Services:-

1) In Iceland
2) In respect of Greenland
3) North Atlantic Ocean Weather Stations.

These agreements are of primary concern to DOT but have certain international aspects of interest to External.

In respect of all of the foregoing, proposals for amendments etc., should be considered by the departments and agencies concerned and decisions regarding representation at meetings made as the situation requires in each case.

The Legal Committee of ICAO is concerned primarily with private international air law and so far has concluded the following:-

Protocol to the Warsaw Convention (1955)
(our Carriage by Air Act)

The Rome Convention (1952)
(our Foreign Aircraft Third Party Damage Act)

Geneva Convention (1948) on the International Recognition of Rights in Aircraft (the Mortgage Convention). Canada is not a party.

The Committee has on its work programme "Legal Status of the Aircraft" (Aerial Crimes) -

(Justice and ATB will be represented at the forthcoming conference to deal with this.)

Aerial Collisions.

Liability of Air Traffic Control Agencies etc.

Method of Handling -

At the present time ATB has primary responsibility in connection with the work of the Legal Committee of ICAO. The reason for this is that the Committee is concerned primarily with private international air law. It is the responsibility of ATB to consult all departments concerned or likely to be interested in items on the active work programme of ICAO. This has not always been done in the past. It would seem to be useful if such items were referred to an interdepartmental legal committee to ensure that all Canadian interests were adequately looked after.

International Maritime Law

In this field there are a number of international conventions of a public character to which Canada is a party. These include -

The Law of the Sea (High Seas Section)
Safety of Life at Sea
Pollution by Oil
Load Line Convention

While these have certain "international" aspects of interest to External, they are primarily technical and practical in character. Representation at conferences has been from DOT Legal Branch with very occasional representation from External or Canadian Maritime Commission.

There are about 12 Brussels Conventions dealing with private international legal matters including -

Collision
Assistance in Salvage
Limitation of Liability of Owners
Bills of Lading
Maritime Liens & Mortgages
Immunity of state-owned ships
Civil jurisdiction in matters of collision
Penal jurisdiction in matters of collision
Arrest of Seagoing ships
Liability of Owners of Seagoing Ships
Stowaways
Carriage of Passengers by Sea

Canada is a party to some of these and is in process of becoming a party to others.

Representation at conferences has usually been from DOT Legal Branch with occasional representation from CMC. Obviously there is some External interest and Justice is also concerned because of the necessity for incorporation in Canadian statutes. All of the foregoing are more or less active and subject to amendment etc.

There are also a number of labor conventions adopted under the auspices of the ILO which contain provisions relating to working conditions etc. on ships. The Department of Labour has primary responsibility in respect of these conventions but normally calls on DOT to deal with those portions relating to ships.

At present a draft convention in respect of the liability for damage caused by nuclear propelled ships is being considered by an ad hoc committee composed of representatives of the Departments of Justice, Finance, External, Transport and the Atomic Energy Control Board.

By reason of DOT responsibility for telecommunications and meteorology we have a direct interest in existing conventions dealing with these subjects.

There are also U.S. bilateral agreements, e.g., on Great Lakes marine pilotage; on trans-border air traffic control, etc., handled by DOT and External.

(sgd) C. S. Booth,
Senior Assistant Deputy Minister
Department of Transport

Latin American Div./APick/jw

DEPARTMENT OF EXTERNAL AFFAIRS

MEMORANDUM

Mr Beesley
Secret
Mr Chapman to see & file
file
pc.

TO: Mr. Cadieux

Security Confidential

Date April 2, 1963

FROM: Latin American Division

File No. ~~11067-A-40~~ 5475-AX-3F-40

REFERENCE: Your Memorandum of March 21

SUBJECT: Sovereign Immunity of Foreign State-Owned Trading Ships

In your memorandum of March 21 you invited our comments on the problems raised by the doctrine of the sovereign immunity of trading ships owned by foreign states. I do not propose to go into the questions of law involved, or the history of the doctrine which I think in British law probably stems from a medieval respect for the personal possessions of the King.

2. Basically, it seems to me that it is not generally desirable that state-owned ships engaged in normal commercial operations should enjoy any privileges or advantages over privately-owned ships doing the same kind of business. It should be understood that the practice of states engaging in commercial shipping operations is by no means confined to the Soviet Bloc. Many, and indeed most, Latin American states have state-owned shipping lines. The reasons may vary a good deal. Many of these states probably consider that, without state-owned vessels, they could not secure a reasonable or indeed any share of foreign trade, including the transport of their own exports, as such business would normally go to the more efficient maritime countries such as the Norwegians, Greeks and Japanese. They also want the prestige that is considered to attach to ships flying the national flag. Finally, these state shipping corporations are often under the navies of these countries, to the benefit of the navy and even to the senior naval officers personally, though frequently at a loss to government treasuries. Be that as it may, we must accept the fact that there are now many ships in international trade which are state-owned. In some cases such as the United States, while the ships may be privately owned they are often very heavily subsidized both in their construction and their continuing operation.

3. I do not know whether any helpful ideas can be derived from international air law. In this case, most civil aircraft, apart from the United States companies, must throughout the world be more or less state-owned. This is true of TCA, SAS and Aeroflot. There will be cases in between the two extremes. Thus, I believe that KLM may be formally a private enterprise though it has some kind of royal patronage and in fact is probably largely owned by the Netherlands state. Surely in the case of aircraft there is no sensible reason for applying the doctrine of sovereign immunity where state and private enterprises are doing the same sort of thing and compete for the same business. Similarly, I would think that, in terms of promoting a better international order, the old distinction between state-owned ships and privately-owned ships should be abandoned as much as possible, certainly where both types of vessels are conducting normal commercial operations.

CIRCULATION

Economic

Latin American Division

Ext. 326A (6/56)

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Alan

M.C.'s idea that the Legal Planning Committee should be the focal point for information and discussion concerning legal representation at international conferences might be developed to include this sort of thing. I don't think it is reasonable to expect the Secretary of the LPC to do both. I am wondering whether we can devise some machinery that can cope with both tasks plus others essentially of coordinating nature

Chris.

DEPARTMENT OF EXTERNAL AFFAIRS Mr Beesley

MEMORANDUM

TO: Mr. Cadieux
Chairman,
Committee on Administration

FROM: Latin American Division

REFERENCE:

SUBJECT: International Organizations and Conferences

Security Confidential

Date March 29, 1963

File No. 5475-AX-3F-40

As you know, Canada is a member of four inter-American bodies: the Inter-American Radio Office, the Inter American Statistical Institute, the Pan American Institute of Geography and History and the Postal Union of the Americas and Spain. We are also a member of the Economic Commission for Latin America. Apart from these, we are invited frequently to attend meetings, conferences and congresses of organizations to which we do not belong. The Department of Public Works, for example, at the suggestion of this Department, is providing a representative to attend the Ninth Pan American Highway Congress in Washington in May. Also, Canada often provides observers to attend meetings in which we have an interest but are not members of the parent organization -- for example, IA-ECOSOC.

2. Since the Second World War, there seems to have been a great upsurge of international meetings and conferences and a multiplicity of international organizations. With regard to those with which this Division is concerned, some are primarily inter-American in character while others are connected with or affiliated to the United Nations, its specialized agencies or other organizations. Presumably, the same is true in areas covered by other divisions in the Department.

3. The problem, as I see it, is that of trying to keep abreast of current developments in the international organizations and meetings field and to ensure that recommendations for attendance or non-attendance at a particular meeting, whether at a full delegation or observer level, is in conformity with current departmental procedures and views. The difficulties are compounded to some extent by the fact that some other departments or agencies of government have apparently joined certain international associations in their own right. Recently, for example, we found that the Unemployment Insurance Commission was sending representatives to attend meetings in Mexico City of the Regional American Commissions of Social Medicine and Methods and Organization to which it had been invited directly in its capacity as a member of the International Social Security Association. Prior to receiving this information, after consulting the two Canadian government departments primarily concerned, this Department had replied in the negative to an official invitation for the Canadian Government to attend.

4. It seems that there may be a need for the introduction of new procedures and perhaps a general tightening of controls regarding Canadian official representation at meetings abroad. I think that in Australia, for instance, a government official is normally not permitted to proceed abroad at government expense to attend an international meeting unless his attendance has been approved by a special committee

CIRCULATION

Mr. Ritchie
Mr. Matheson (Finance Div)
Mr. Mathewson (O/USSEA)

Ext. 326A (6/56)

established for that purpose. Also, of course, the United States State Department publishes in advance a list of international conferences and meetings at which the U.S. Government will be represented. This would lead one to conclude that some type of central machinery has been established in the State Department regarding U.S. participation.

5. I venture to propose, therefore, that some thought might be given in due course to the following suggestions:

(1) Some central agency be established in the Department to maintain up-to-date information on official Canadian participation, whether at the delegation or observer level, at all international meetings which Canada officially attends. A first step in this direction might be the establishment of a central special filing system which would contain the relevant information.

(2) This agency should compile up-to-date information on all international organizations to which the Canadian Government or departments and agencies of the Government belong, as well as the relationship of these organizations to others in similar fields; for example, the relationship of the Postal Union of the Americas and Spain to the Universal Postal Union.

(3) We should attempt to draw up a set of "ground rules" setting forth general considerations applying to the advisability or otherwise of Canadian participation in international organizations and meetings. These ground rules would be applicable to other departments as well as our own.

(4) Procedures should be established governing the methods by which official Canadian attendance is to be approved at international meetings, to apply to some degree at least to all government departments and agencies. It may be found necessary, for example, to re-assert the special position and responsibilities of this Department.

6. If any study is taken along the above lines, consideration might be given at the same time to establishing a similar system of compiling information regarding official departmental representation within Canada at special university seminars, conferences, clubs, etc. Correspondence concerning such attendance now seems to be scattered over a number of files and it is difficult to determine in specific cases the previous pattern of representation that might have been established. If a central record were kept of the official attendance of departmental officers at these types of meetings, it would seem that it would be possible to save a great deal of time and effort on the part of the officers concerned when invitations are received to attend similar meetings.

7. I discussed this matter with Mr. Pick prior to his departure to attend the NATO Experts Meeting in Paris and have also mentioned it to Messrs. Matheson and Mathewson. The "recommendations" are primarily personal suggestions, however, and I would be grateful if they could be considered in that light.

J.A. DOUGAN

Latin American Division

Mr. Carter

(through Mr. Woodsworth)

G. Bertrand/U.S.A. Division

Memorandum of March 21, 1963 from

Chairman of Legal Planning Committee.

SECRET

March 29, 1963.

Sovereign Immunity of Foreign State-owned Trading Ships.

You have asked me for comments on the memorandum under reference in which Mr. Cadieux mentions that the question has arisen as to whether foreign state-owned trading ships should continue to be treated as immune from civil process in Canadian courts in accordance with the "classical" or "absolute" doctrine of sovereign immunity, or whether there are policy reasons for taking measures to terminate such immunity.

2. I have not been able to devote much time to examining this question on account of the I.J.C. April meeting. Offhand, I would say that as far as our Division is concerned, our contribution to the study of the Committee can best be made by an assessment of the practical effects of whichever formula is adopted on shipping on the St. Lawrence Seaway and the Great Lakes. In order therefore to determine which is best - to retain the classical doctrine or to terminate the immunity it grants - one would have to consider, as one of the determining factors, which formula would be less damaging to Canadian interests in the following events given as examples:

(a) damage to locks in the Seaway by foreign state-owned ships;

(b) blockage of the Seaway or the Welland Canal by one of these ships;

(c) dispute with the St. Lawrence Seaway Authority over tolls;

(d) dispute between these ships and Canadian pilots.

In other words, since international claims might result from the above possible occurrence, which formula would provide the best possibilities for a settlement: diplomatic negotiations under the classical doctrine or judgment by a Canadian court if the immunity were abolished?

3. You will note that it is the intention of Mr. Cadieux to call in representatives from Justice and other departments concerned. In view of the above you may agree that it might be advisable to suggest that Mr. Couture, the Legal Adviser of the St. Lawrence Seaway Authority, be invited for some of the meetings. You will note also that the Committee, if it is decided to dispense with the "classical doctrine", will consider the possibility of a public statement's being made that would bring to public notice that change of policy if any. My suggestion for the best forum for a statement of that nature would be the Standing Committee on External Affairs.

for G. Bertrand.

Far Eastern/CJSMall/65

DEPARTMENT OF EXTERNAL AFFAIRS

Legal Division

MEMORANDUM

TO: Mr. Cadieux, Chairman, Legal Planning Committee

FROM: Far Eastern Division

REFERENCE: Your memo of March 21

Security: CONFIDENTIAL

Date: March 26, 1963

File No. 5475-AX-38-40

9 | - | -

SUBJECT: Sovereign Immunity of Foreign State-owned Trading Ships.

cc: 11067-A-40

Apart from legal considerations which we are not competent to discuss, it is our view that immunity for foreign state-owned trading ships could be terminated since the former distinction between commercial and state-owned vessels has disappeared in communist countries.

2. A second reason for this view is that because the western countries have no--or extremely few--state-owned trading ships, the communist countries have an advantage over the west in their treatment of western vessels--an advantage which they do not hesitate to use. In particular, the Communist Chinese frequently subject western vessels and crews to insulting and high-handed treatment of a type which has no current international parallel; nor is there any recourse to unbiased courts in such cases.

3. For these reasons, it would seem only reasonable to permit recourse to the Canadian courts (where foreign vessels would in any case receive objective treatment) in dealing with state-owned trading ships.

J. A. Tremblay

Far Eastern Division.

CIRCULATION

Ext. 326 (6/56)

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arch 22, 1963.

MEMORANDUM TO MR. JEAN MIQUELON, CHAIRMAN,

SPECIAL COMMITTEE ON LEGAL SERVICES

Subject: Commentary by Mr. Driedger on Legal Services and Glassco Commission recommendations concerning the Legal Division of External Affairs.

The two major points raised by Mr. Driedger which touch on the Department of External Affairs are:

(a) the desirability of the Legal Division of External Affairs remaining separate from an integrated legal service operated by the Department of Justice; and

(b) problems of co-ordination with the Department of Justice and with other Departments concerned with International Law.

I concur in the main with Mr. Driedger's recommendations on both points. International law is not readily comparable with the more sophisticated domestic law systems of western states. At its present stage of development there is a very large political component in international law. As pointed out by the Royal Commission on Government Organization "international law is intimately bound up with high policy questions and relationships with other nations" and "there is need...to preserve a balance between policy considerations and legal implications..." (Vol. II, Royal Commission Report, p.415). The problems of international law encountered by the Department of External Affairs are therefore sufficiently different from domestic legal problems encountered by other Departments to warrant separate treatment. This is of course the conclusion of the Glassco Commission and also of Mr. Driedger, and I would concur in the recommendation, on which both seem to be in agreement that the Legal Division not be integrated with the Department of Justice.

Assuming that Legal Division of the Department of External Affairs is not to be integrated with the other legal services of the Federal Government, problems of liaison and co-ordination arise, as pointed out by Mr. Driedger. Under existing practice there is already a good deal of co-ordination and liaison between the

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Departments of External Affairs, Justice, and with other departments concerned in varying degrees with international law, but I would agree that the consultation procedures should be systemized and made more efficient.

Mr. Driedger's suggestion that an International Law Section be set up within the Department of Justice seems a very sound one. I assume from Mr. Driedger's explanation of his suggestion that it is not intended that such a section would merely be a counterpart to the Legal Division of the Department of External Affairs with over-lapping functions, but rather that it should have complementary functions. Without considering these functions in detail I consider that in the main it should operate as described by Mr. Driedger on page 38 of his memorandum. Thus matters of pure international law would be handled by External Affairs while domestic law aspects of international law matters would be handled by the International Law Section of Justice jointly with the Legal division of External Affairs. The proposed International Law Section would, of course, have the function of Liaison and co-ordination between the departments of Justice and External Affairs (through its Legal Division) and with other departments as appropriate.

Certain steps might also be taken by External Affairs to better meet the requirements of consultation with other departments on questions involving international law. There is already in existence a body known as the Legal Planning Committee which could readily lend itself to this function. This Committee has on several occasions met to consider problems of mutual interest to External Affairs and Justice. Its scope and composition could be expanded, however, so as to include representation from other departments, in addition to Justice and External Affairs, in order to consider questions of wider concern. For example, the Secretary of the Legal Planning Committee might prepare a calendar of conferences, prospective treaty negotiations and other developments having possible legal implications for other departments so as to ensure both that other departments, and in particular Justice, ...3

are informed by External Affairs of matters on which liaison and co-ordination is required. This would also be helpful to External Affairs for my department is not always made aware of impending treaty negotiations and participation at conferences. The Committee could also play a useful role (which would not overlap with, or replace, the normal Committee procedures already established) in helping to determine policy on substantive questions, composition of negotiating teams, etc.

Some Departments, other than Justice and External Affairs, have a specialized knowledge of international law in their respective fields of interest and are often better able than External Affairs or perhaps Justice to advise on both questions of substance in prospective international agreements and problems of implementation. Direct participation of such departments in treaty-making is not only desirable but inevitable in view of the increasing number and specialized nature of multilateral agreements. The Legal Planning Committee could exercise surveillance in such cases so as to ensure that those departments having the primary responsibility for development of policy consult fully with the departments of External Affairs and Justice.

Therefore, while concurring with Mr. Driedger's comments, I would offer the following further observations:

(a) on the basis of present procedures and existing machinery, the liaison and co-ordination between External Affairs, Justice and other departments can and should be improved, while other departments should ensure that External Affairs and Justice are always kept informed of developments raising considerations of international or domestic law;

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(b) improved liaison and co-ordination will inevitably impose additional burdens upon the Departments of External Affairs and Justice which will require additional personnel; and

(c) the Legal Planning Committee could well provide the machinery for improved liaison and co-ordination with other departments.

As regards the recommendation of the Royal Commission which appears at the bottom of page 416 of Vol. II of its report, it is necessary to consider this in the light of the "proposed arrangement" that precedes it. With the recommendation I have no quarrel. However, I have serious doubts about the practicability and, in some instances, the utility of the means prescribed to achieve the objective. It may be as well to look at the prescription point by point.

A. The Legal division to be headed by a permanent legal adviser with no responsibility for administration or policy outside the division.

This seems to me to reflect the work of a hand other than that which was responsible for the observation on the preceding page of the report (to which I have referred previously) that "international law is intimately bound up with high policy questions". In any but the largest foreign services it is simply not possible to isolate a legal adviser or a legal branch from considerations of substantive policy. Even among the very large foreign services in only one has such a divorce been attempted and in that case it is more apparent than real.

B. Change the name "Legal Adviser" to "General Counsel".

In the circumstances such a change in nomenclature would do no good and would only cause confusion for the role and status of a "Legal Adviser" is well established by tradition both here and in other countries.

C. Secondment of a member of the integrated legal service to the legal division.

I would welcome the addition of an experienced lawyer from the Department of Justice to the staff of the Legal division of External Affairs. However, I fully appreciate and sympathize with Mr. Driedger on this point. Indeed the alternative arrangement that he has proposed and which I have elaborated above would, in my view, better achieve the objective of improved liaison and co-ordination of international legal work which was the aim of the Royal Commission. In the circumstances, therefore, it does not seem necessary to comment on the duties which the Royal Commission would have this officer perform save to observe that it is unfortunate that the Commissioners seem to have been misled into thinking that because sometimes the liaison between our two departments has not been as close as we would like it to be there was a need to "promote better understanding between the Departments of Justice and External Affairs". This is nonsense.

D. Build up a core of specialists in international law, permanently resident in Ottawa, making a career in this field.

I have already commented on the notion of isolating the legal branch of a foreign service from consideration of substantive matters. This idea of having specialists in international law is, in a way, an extension of that notion. However, the need for an even higher level of expertise in international law exists and steps have been taken over the years to enable members of the foreign service, who demonstrate the aptitude and ability, to acquire eminent expertise through extended service in the legal division and by special training. It must be recognized that unless there were to be an enormous inflation of the establishment of the legal division specialization in international law, permanent residence in Ottawa and a satisfactory career would not

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all be compatible. Even if they were the need for specialists in international law would have to be considered together with the need for specialists in other fields all of which would have to be weighed against the requirements of the service as a whole. Indeed this is being studied in depth within External Affairs at this moment.

E. Satisfy other requirements by posting to legal division for four or five years F.S.O.'s qualified to practice law, providing additional training as required.

It would be unfortunate if, in addition to altering the balance that must be maintained between legal and substantive policy considerations in the conduct of international business, those, who at other times, might be concerned with substantive questions in international relations, were not permitted to concern themselves, during their service in the legal division, with international law questions. Apart from this, I would agree with the desirability of permitting persons in the legal division to remain long enough to achieve optimum efficiency in their work and soundness in their advice. More rapid rotation is not, however, a matter of whim but a stern and inescapable necessity caused by a serious shortage of personnel. When there is sufficient staff available long tours of duty will be much easier to achieve than they are today. As for the matter of having F.S.O.'s in legal division qualified to practice law and of providing special training as required I would only observe that the former hardly seems necessary (many law specialists are never called to the bar) and the latter has been our practice for many years.

In summary therefore, the recommendation of the Royal Commission is acceptable in principle and as an objective. The means suggested for achieving this objective are open to question. Moreover, and this is fundamental, the objective can only be achieved to the extent that the personnel situation and the requirements of External Affairs as a whole will allow.

M. Cadieux

Legal/J.A. Beesley/pm/mk

Legal Corp. file

RESTRICTED

March 21, 1963

DRAFT SECTION FOR INCLUSION IN MEMORANDUM TO MR. JEAN MIQUELON, CHAIRMAN, SPECIAL COMMITTEE ON LEGAL SERVICES FROM MR. CADIEUX

Subject: Commentary by Mr. Driedger on Legal Services

The two major points raised by Mr. Driedger which touch on the Department of External Affairs are:

(a) the desirability of the Legal Division of External Affairs remaining separate from the Department of Justice and

(b) problems of co-ordination with the Department of Justice and with other Departments concerned with international law.

I concur in the main with Mr. Driedger's recommendations on both points. International law is not readily comparable with the more sophisticated domestic law systems of western states. At its present stage of development there is a very large political component in international law. As pointed out by the Royal Commission on Government Organization "international law is intimately bound up with high policy questions and relationships with other nations" and "there is need...to preserve a balance between policy considerations and legal implications..." (Vol. II, Royal Commission Report, p.415). The problems of international law encountered by the Department of External Affairs are therefore sufficiently different from domestic legal problems encountered by other Departments to warrant separate treatment. This is of course the conclusion of the Glassco Commission

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and also of Mr. Driedger and I would concur in the recommendation, on which both seem to be in agreement, that the Legal Division not be integrated with the Department of Justice.

Assuming that Legal Division of the Department of External Affairs is not to be integrated with the other legal services of the Federal Government, problems of liaison and co-ordination arise, as pointed out by Mr. Driedger. Under existing practice there is already a good deal of co-ordination and liaison between the Departments of External Affairs, Justice, and with other departments concerned in varying degrees with international law, but I would agree that the consultation procedures should be systemized and rendered more efficient. Mr. Driedger's suggestion that an International Law Section be set up within the Department of Justice seems a very sound one. I assume from Mr. Driedger's explanation of his suggestion that it is not intended that such a section would merely be a counterpart to the Legal Division of the Department of External Affairs with over-lapping functions but rather that the proposed International Law Section would operate somewhat in the manner as do the two defence liaison divisions in External Affairs. It might be unwise at this stage to attempt to define too clearly the precise functions of the proposed International Law Section beyond assigning to it the function of liaison and co-ordination with the Department of External Affairs (through its Legal Division) and with other departments as may be appropriate.

Certain steps might also be taken by External Affairs to better meet the requirements of consultation with other departments on questions involving international law. There is already in existence a body known as the Legal Planning Committee which readily lends itself to this function. This Committee has on several occasions met

to consider problems of mutual interest to External Affairs and Justice. Its scope and composition could be expanded, however, so as to include representation from other departments in addition to Justice and External Affairs in order to consider questions of wider concern. As a first step the Secretary of the Legal Planning Committee might prepare a calendar of conferences, prospective treaty negotiations and other developments having implications for other departments so as to ensure both that other departments, and in particular Justice, are informed by External Affairs of matters on which liaison and co-ordination is required and vice versa since External Affairs is not always made aware of impending treaty negotiations and participation at conferences. The Committee could also play a useful role which would not overlap with, or replace, the normal Committee procedures already established in determining policy on substantive questions, composition of negotiating teams, etc.

Some Departments, other than Justice and External Affairs, have a specialized knowledge of international law in their respective fields of interest and are often better able than External Affairs or perhaps Justice to advise on both questions of substance in prospective international agreements and problems of implementation. Direct participation of such departments in treaty-making is not only desirable but inevitable in view of the increasingly numerous and specialized nature of multilateral agreements. The Legal Planning Committee could, however, exercise surveillance in such cases so as to ensure that those departments having the primary responsibility for development of policy consult fully with the departments of External Affairs and Justice.

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It might be mentioned in passing that treaty negotiations are often not confined to a particular negotiating team at a particular conference. On some occasions, a draft instrument is circulated prior to a negotiating conference, in which case it is a simple matter to seek the comments of the Department of Justice. However, as each participating state has had an opportunity to consider the draft, it is quite possible that the Conference will be faced with a wide variety of conflicting views which have to be reconciled in a short period of time, if the conference is going to produce an instrument that can be opened for signature. In some cases, the policy decision that Canada should participate in such a conference, takes place only shortly prior to the opening of the conference and the Department of Justice may have only the 2 or 3 weeks notice mentioned by Mr. Driedger quite rightly as being insufficient. Finally, there is the occasional situation in which a Canadian delegation goes off to a conference for which no draft instrument has been prepared and the Conference is expected to draw up the instrument and sometimes indeed sign it, all in a very short space of time. Or, the delegates may go expecting merely to extend or modify an existing instrument, and find instead that the whole instrument is thrown open for renegotiation.

In summary, while concurring with Mr. Driedger's comments, I would offer the following further observations:

(a) on the basis of present procedures and existing machinery, the liaison and co-ordination between External Affairs, Justice and other departments can and should be improved, while other departments should ensure that External Affairs and Justice are kept informed of developments raising considerations of international law;

(b) additional burdens will thereby be imposed upon the Departments of External Affairs and Justice requiring additional personnel; and

(c) the Legal Planning Committee should be utilized to improve liaison and co-ordination with other departments.

Mr. Cadieux

RESTRICTED

March 21, 1963.

M.D. Copithorne

5475-AX-38-40

Your memorandum of March 13.

Classco Report on Government Legal Services

Having had the opportunity of reading the memoranda of the other members of this Committee, it occurs to me that some deliberately provocative comments on Mr. Driedger's Commentary, as it touches on treaty procedure, might be useful. To begin with, I wonder whether some thought should not be given to the nature of the legal services to be given in this field by the Department of Justice, the interested government departments and finally, the Legal Division of this Department.

2. Some of Mr. Driedger's comments seem to be based on the premise that international law and domestic law are mutually exclusive subjects. Such a distinction is clearly not only artificial but it suggests that the Department of Justice does not fully appreciate the degree of interaction of the two systems of law. (The theory of renvoi in treaty law is perhaps a good example of this interrelationship). Mr. Driedger suggests that the negotiation of an extradition treaty for example, requires the services of a lawyer familiar with domestic rather than (by implication) international law. But surely it is just as important that the lawyer be fully acquainted with international law drawn from both customary and treaty norms. In practical terms, it is important that a lawyer concerned with the negotiation of an extradition treaty be cognizant of Canada's other

r. Wershof
r. Kingstone
r. Mathewson
r. Beesley

treaty obligations in the field of extradition, as well as Canadian domestic law on the subject. It seems to me that a further misapprehension as to the nature of the task can be read into Mr. Driedger's suggested use of Department of Justice lawyers as delegation advisers. I believe that the Department of Justice must be prepared to play an active and not necessarily strictly legal role at an international conference convoked to negotiate a multilateral agreement, a role that cannot be considered analogous to the one they fulfill in the field of domestic law. International law is generally agreed to be in a primitive stage of development and cannot be readily compared with the sophisticated domestic law systems of Western States. International law is not as yet very legal in nature and political interests necessarily play a prominent role. This can perhaps most clearly be seen in the Soviet use of international law to justify the activities of Soviet diplomats; Western States must respound to these initiatives not only by attempting to shape international law in clearly legal terms but must be prepared to use international law for essentially political purposes.

3. Secondly, it seems to me that some thought might be given as to the role of the interested government department in the treaty making process. Some Departments with a specialized knowledge of the international law in their field of interest are frequently better placed than this Department to advise on both the substance of prospective international agreements and the problems of implementing their obligations. (This Department is unlikely to be able to play a very helpful role in consideration of the substance, for example of the Safety of Life at Sea Convention and Regulations). I believe that with proper surveillance by this Department, such direct

participation in treaty making is not only desirable but inevitable in view of the increasingly numerous and specialized nature of multilateral agreements. It is reasonable to conclude, therefore, that these Departments should carry the primary responsibility for consultation with the Department of Justice if such consultation is deemed appropriate. In my opinion, interested government Departments should be encouraged to build up a specialized knowledge of treaty law in their own fields. At the present time, however, the situation sometimes arises in which the functional divisions of other government departments expect the Legal Division of this Department to carry the primary responsibility for advising them as to whether for example, prospective treaty obligations are likely to conflict with existing Canadian law. It is submitted that this is the very field in which the legal advisers of the interested government department and if appropriate, the Department of Justice should be consulted.

4. Finally, I wonder whether further study should not be given to the role of Legal Division in the treaty making procedure. At present, functional Divisions sometimes send draft international instruments of a complex and sophisticated nature to Legal Division with the vague imprimatur that Canada should participate in the agreement as it fits in with broad policy consideration and asking Legal Division to undertake an analysis of the substance of the agreement. (In turn, such general requests frequently find their way to treaty section. A recent review of prospective amendments for the constitution of the World Meteorlogical Organization took nine working hours and it is self evident that this attention cannot be lavished on every international agreement with a one officer treaty section). Sometimes, Legal Division is invited to consult other government departments interested

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in the subject matter of a prospective agreement. In my opinion, it should not as a general rule be a function of this Division to give primary advice of a substantive nature but rather, particular advice on specialized questions such as arbitration provisions, final clauses etc.

5. The minor point I might add is that in my opinion, Mr. Driedger does not fully grasp the uncertain nature of treaty negotiations. On some occasions, a draft instrument is circulated prior to a negotiating conference, in which case it is a simple matter to seek the comments of the Department of Justice. However, as each participating state has had an opportunity to consider the draft, it is quite possible that the Conference will be faced with a wide variety of conflicting views which have to be reconciled in a short period of time, if the conference is going to produce an instrument that can be opened for signature. In some cases, the policy decision that Canada should participate in such a conference, takes place only shortly prior to the opening of the conference and the Department of Justice may have only the 2 or 3 weeks notice deemed by Mr. Driedger to be insufficient for proper consideration of the draft agreement. Finally, there is the occasional situation in which a Canadian delegation goes off to a conference for which no draft instrument has been prepared and the Conference is expected to draw up the instrument and sometimes indeed sign it, all in a very short space of time. Or, the delegates may go expecting merely to extend or modify an existing instrument, and find instead that the whole instrument is thrown open for renegotiation.

M.D. Copithorne

DEPARTMENT OF EXTERNAL AFFAIRS

MEMORANDUM

TO: U.S.A., Commonwealth, Far Eastern, ANME, European, Economic, Latin American, D.L.(1), and D.L.(2) Divisions

FROM: Mr. Cadieux, Chairman, Legal Planning Committee

REFERENCE: Legal Division's memorandum of October 31, 1960.

Security CONFIDENTIAL

Date March 21, 1961.

File No. 5475-AX-38-40 ~~11067-A-40~~

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SUBJECT: Sovereign Immunity of Foreign State-owned Trading Ships.

The question has arisen as to whether foreign state-owned trading ships should continue to be treated as immune from civil process in Canadian courts in accordance with the "classical" or "absolute" doctrine of sovereign immunity, or whether there are policy reasons for taking measures to terminate such immunity. (In one Canadian case the doctrine has been applied to a state-owned trading vessel, but Canadian courts have in several cases indicated doubts as to whether the theory so applies or should continue to so apply.)

2. In the light of the extensive incursions into the trading field of such states as the U.S.S.R. and other members of the Soviet bloc, there would seem to be little reason to adhere to the classical or absolute doctrine of immunity with respect to foreign state-owned trading ships. While it is not in the normal course possible or appropriate for the Department to attempt to influence the courts on questions of law, there is a class of facts conveniently called "facts of State", such as the status of a diplomat, recognition of a government or the existence of a state of war, the determination of which is accepted by the courts as being solely in the hands of the Executive. British courts do not treat the immunity of a state-owned trading ships as a fact of state, while U.S.A. courts do, and in the previously mentioned case a Canadian court treated the question as a fact of state. It seems likely, therefore, that a Canadian court would accept the written statement of the Department's views on this question in an appropriate case as determinative of the issue. (No such case is now before the courts; in a recent case involving a dispute over certain C.N.R. ships sold to Cuba, the Supreme Court of Canada handed down judgment on June 11, 1962 upholding the immunity of the ships in question but not touching on the issue whether immunity extends to state-owned property used for commercial purposes.) There may be other possible ways of bringing about a change in the Canadian position such as accession to the 1926 Brussels Convention, or perhaps, the publication of the Department's views in a form similar to the "Tate Letter" issued by the State Department on May 19, 1952.

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CIRCULATION

3. This question will be raised with the Department of Justice and other interested departments through a meeting of the Legal Planning Committee in mid-April. Those divisions wishing to express views on the advisability of continuing to uphold immunity should do so before then through memoranda addressed to me as Chairman of the Legal Planning Committee.

M. CADIEUX

M. Cadieux,
Chairman,
Legal Planning Committee

Legal/M.O. Coulthard/vs.

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Economic Division

CONFIDENTIAL

March 21, 1963.

Legal Division

~~9189-40~~

Your Memorandum dated January 25, 1963 and subsequent discussions.

5495-AX-38-40
ex 10946-40

OECD Draft Convention on the Protection of Foreign Property.

You will recall that when this subject was discussed at a meeting of the Legal Planning Committee on March 11, it was agreed that this Division would prepare a memorandum on the constitutional implications of the Convention for Canada. A study of the substance of the Convention is to be carried on at the same time with the assistance of the Department of Finance.

2. While the Department of Justice has final authority in advising on legislative competence, it seems to us that the subject matter of the OECD Convention on Foreign Property is likely to be largely and perhaps entirely within the legislative competence of the Provinces (legislation touching on this subject might, however, be enacted by the Federal Government under Section 91(25) concerning "Naturalizations and Aliens"). As the Federal Government could probably not implement the obligations of this Convention, it is evident that unless the consent of the Provinces is obtained, some proviso limiting the responsibility of the Federal Government must be inserted. We should point out that even if it were possible to secure the agreement of all the Provinces to implement the Convention (an unlikely event in the light of past experience) there is still the problem of ensuring that the Provinces do not change their laws on this subject, thus placing the Federal Government in default of its international obligations. Occasionally, as in the case of the I.L.O. Forced Labour Convention, the Department of Justice has been of the opinion that in view of the subject matter, the possibility of the Provinces placing the Federal Government in default of its obligations is so slight that, bearing in mind the ultimate power of disallowance, Canada could safely ratify the Convention. The subject matter of that Convention was somewhat unusual, however, and we doubt very much whether the Department of Justice would agree to this line of reasoning in the case of the OECD Convention for the Protection of Foreign Property. Furthermore, we understand that the Department of Justice is reluctant in principle to consult the Provinces with regard to the implementation of treaties, in view of the possibility of this procedure hardening into a constitutional custom.

Mr. Wershof
Mr. Cadieux
Mr. Beesley

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3. The question has been raised as to whether there is any risk of an actual conflict between Canadian domestic law and the following principles embodied in the OECD Convention:

(a) Fair treatment of foreigners;

(b) Just and prompt compensation in the event of nationalization;

(c) Adherence to agreements freely entered into;

We are not in a position to give you a definitive opinion as to potential conflict between these obligations and existing Canadian legislation. In the case of the Invisibles Code, this question was examined by the Department of Finance, which pointed out that it was not competent to carry out a review of provincial legislation in this field nor was it willing to ask the Provinces to do so. The other aspect of this question is whether the federal or provincial governments have the legislative jurisdiction to implement this Convention. This is a question that will have to be referred to the Department of Justice, which may however, find it difficult to give a definitive answer for, while the United States is willing to declare, as in the case of the Invisibles Code, which obligations of an international agreement are within the exclusive legislative jurisdiction of the federal government, the nature of Canadian constitutional law frequently necessitates highly speculative answers to such questions.

4. As you have pointed out, we adopted a different point of view in the case of the United Nations Resolution on Permanent Sovereignty over Natural Resources. In the case of the Resolution, we were in fact merely expressing our concurrence in general rules which we believed to already exist in Canada, whereas in the case of the OECD Convention we would be undertaking specific legal obligations. It must also be remembered that in the case of the Resolution, we were balancing weighty political considerations, favouring our support for the resolution, against legal considerations, which were minimal. Here, the political considerations are much less compelling and the legal considerations, in view of the nature of the obligations, of considerable importance. In our view, the specific legal obligations we would be undertaking by adhering to the OECD Convention, preclude us from taking the risks inherent in our decision to support the Resolution on Permanent Sovereignty.

5. As you know, the OECD Code of Liberalization of Current Invisible Operations posed major constitutional difficulties for Canada. You will remember that Canada's desire for a federal state clause in the Code "met with almost unanimous opposition" with the OECD Council. At that time, we commented at length on the problem in our memorandum dated June 16, 1961 (flagged). We pointed out that as far as we knew, Canada is the only federal state whose constitution precludes the implementation by the federal government of treaty obligations in respect of matters falling within the legislative jurisdiction of its constituent units. Most

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federal states, although they may not always admit as much, have no insuperable difficulties in this regard and in the United States for example, the treaty power of the President and Senate overrides the distribution of legislative powers set out in the Constitution. We also commented on various devices that had been tried to overcome this impediment such as the federal state clause and the federal reservation (see Annex for examples). The former device usually provokes a spirited debate in the course of drafting the agreement, while the latter which accomplishes the same purpose, does not come up for discussion, and unless a signatory feels very strongly about the matter, it is likely to be accepted without comment.

6. There is one other possible procedure which would permit Canadian participation in this Convention without committing Canada to obligations it is unable to fulfill. This procedure which to our knowledge is as yet untried, is what is known as partial ratification by which the Federal Government ratifies (accedes, adheres or signs, as appropriate) a Convention on its own behalf and on behalf of those Provinces which indicate their willingness to be bound by the Convention. This procedure is not free from difficulties, however, as it would appear to draw attention to those constituent units which choose not to participate in the Convention, a situation which might be almost ludicrous if, for example, the Federal Government was in a position to ratify only on behalf of itself and Prince Edward Island. However, a study of this procedure will shortly have to be made in view of developments in connection with a proposed revision of the I.L.O. Constitution, at which time Canada's participation in agreements such as the OECD Convention for the Protection of Foreign Property will be borne in mind.

7. You have commented that the appending of a federal state reservation would make our adherence to the OECD Convention less meaningful. However, if Canada is not in a position to implement its obligations, its participation is clearly quite meaningless. It is self evident that Canada cannot agree to take on treaty obligations which it cannot fulfill.

8. You have asked whether the OECD Convention would impose obligations on Canada of a differing nature from those of the Hague Conventions of 1899 and 1907 which established the Permanent Court of Arbitration. The Hague Conventions were a clear example of an "empire treaty" which the federal government was deemed by the Privy Council to have authority to implement under the provisions of Article 132 and the normal constitutional problems concerning Sections 91 and 92 did not arise in that case.

9. It should also be noted that at one stage in the negotiations over the Invisibles Code, the following wording was proposed by the Council:

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1. "The Government of Canada will take such reasonable measures as may be applicable to it to ensure observance of the provisions of the Code by the regional and local governments and authorities within its territory.

2. If a member considers that its interests under the Code are being prejudiced by the action of a province of Canada and notifies the organization of the circumstances the Canadian Government is prepared to discuss such claims within the organization."

This was held to be unacceptable as the Canadian Government was not prepared to take on an obligation to raise issues of this kind with the Provinces.

10. Assuming that the subject matter is exclusively or even largely within the legislative jurisdiction of the Provinces, it is our view that the Department of Justice will be of the opinion that Canada can undertake the obligations imposed by the Convention for the Protection of Foreign Property only with a suitable safeguard in the form of a federal state clause or reservation. With regard to the former, we suspect that Canada will encounter as much difficulty as it did in the case of the Invisibles Code. You will remember that in that case a compromise was reached by which Canada undertook to carry out the provisions of the Code "to the fullest extent compatible with the constitutional system of Canada", and the OECD Council, after recognizing that the provinces might have jurisdiction to act with respect to certain matters which fell within the purview of the Code, "noted" this undertaking (see Annex for full text of Council decision). We might add that although this compromise was approved by Mr. Fleming, the then Minister of Finance, there is no indication on file that the Department of Justice approved it. Furthermore, the subject matter of the Code differed substantially from that of the present Convention and the Council was evidently able to observe that "there is only a limited area of current invisible operations in which Provincial actions might be relevant to the Code and believing, moreover, that actions by Canadian provinces are unlikely to have a significant practical effect on the operation of the Code". This is clearly not the case with regard to the subject matter of the Convention for the Protection of Foreign Property, a point which has been emphasized by the recent actions of the British Columbia and Quebec Governments.

11. Assuming that we are in sympathy with the substance of the Convention, the practical courses of action would appear to be the following:

(a) To instruct our delegation to sound out the other OECD delegations as to whether the procedure adopted in the case of the Invisibles Code, excluding preambular paragraph 5 of the Council decision concerning the limited provincial interest in this subject matter, would be acceptable in the case of the present Convention; or

(b) to append the federal state reservation at the time of signature of this Convention.

In either event, we feel it is desirable to make a full statement in the OECD Council of the difficulties that this Convention creates for us in view of the nature of our constitution. Such a statement could presumably be based on the statement made in the Council in connection with the Invisibles Code of 1961, the text of which is presumably available to you.

H. COURTNEY KINGSTONE

Legal Division

A N N E X

I. Article 41 of the United Nations Convention relating to the Status of Refugees, signed at Geneva, on 28 July 1951

(Canada is not a party)

FEDERAL CLAUSE

In the case of a Federal or non-unitary State, the following provisions shall apply:

(a) With respect to those articles of this Convention that come within the legislative jurisdiction of the federal legislative authority, the obligations of the Federal Government shall to this extent be the same as those of Parties which are not Federal States;

(b) With respect to those articles of this Convention that come within the legislative jurisdiction of constituent States, provinces or cantons which are not, under the constitutional system of the federation, bound to take legislative action, the Federal Government shall bring such articles with a favourable recommendation to the notice of the appropriate authorities of states, provinces or cantons at the earliest possible moment.

(c) A Federal State Party to this Convention shall, at the request of any other Contracting State transmitted through the Secretary-General of the United Nations, supply a statement of the law and practice of the Federation and its constituent units in regard to any particular provision of the Convention showing the extent to which effect has been given to that provision by legislative or other action.

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II. Federal State Clause (approved by the Department of Justice) drafted for inclusion in the Supplementary International Convention on Slavery (not incorporated in Convention although Canada is now a party

"In the case of a Federal or non-unitary State, the following provisions shall apply:

a) With respect to those articles of this Convention that come within the legislative jurisdiction of the federal legislative authority the obligations of the Federal Government shall to this extent be the same as those of Parties which are not Federal States;

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b) With respect to those articles of this Convention that come within the legislative jurisdiction of constituent States, provinces or cantons which are not, under the constitutional system of the Federation, bound to take legislative action, the Federal Government shall bring such articles with a favourable recommendation to the notice of the appropriate authorities of States, provinces or cantons at the earliest possible moment;

c) A Federal State Party to this Convention shall, at the request of any other Contracting Party transmitted through the Secretary-General, supply a statement of the law and practice of the Federation and its constituent units in regard to any particular provision of the Convention, showing the extent to which effect has been given to that provision by legislative or other action."

x x x x x x x x

III. Federal State Clause suggested by the Deputy Minister of Justice for inclusion in the draft Convention on the Recovery Abroad of Maintenance

"No provision of this Convention shall be deemed to impose any obligation upon any federal state in respect of any matter within the legislative jurisdiction of constituent states, provinces or cantons which are not under the constitutional system of the federation, bound to take legislative action".

Federal State Clause (Article 11) incorporated in the Convention on the Recovery Abroad of Maintenance, signed June 20, 1956 (Canada is not a party)

In the case of a Federal or non-unitary State, the following provisions shall apply:

(a) With respect to those articles of this Convention that come within the legislative jurisdiction of the federal legislative authority, the obligations of the Federal Government shall to this extent be the same as those of Parties which are not Federal States;

(b) With respect to those articles of this Convention that come within the legislative jurisdiction of constituent States, provinces or cantons which are not, under the constitutional system of the Federation, bound to take legislative action, the Federal Government shall bring such articles with a favourable recommendation to the notice of the appropriate authorities of States, provinces or cantons at the earliest possible moment;

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(c) A Federal State Party to this Convention shall, at a request of any other Contracting Party transmitted through the Secretary-General, supply a statement of the law and practice of the Federation and its constituent units in regard to any particular provision of the Convention, showing the extent to which effect has been given to that provision by legislative or other action.

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Annex D

DECISION OF THE COUNCIL

Regarding the application of the provisions of the Code of Liberalisation of Current Invisible Operations to action taken by Provinces of Canada

THE COUNCIL:

Having regard to Articles 2 (*d*), 3 (*a*) and 5 (*a*) of the Convention on the Organisation for Economic Co-operation and Development of 14th December, 1960;

Having regard to the Code of Liberalisation of Current Invisible Operations (hereinafter called the "Code");

Having regard to the Report of the Committee for Invisible Transactions on the Codes of Liberalisation of Current Invisibles and of Capital Movements of 28th October, 1961, and, in particular, paragraphs 18 and 19 thereof and the Comments by the Executive Committee on that Report of 8th December, 1961 [OECD/C(61)37, OECD/C(61)73];

Recognising that in Canada individual Provinces may have jurisdiction to act with respect to certain matters which fall within the purview of the Code;

Believing, however, that there is only a limited area of current invisible operations in which Provincial actions might be relevant to the Code and believing, moreover, that actions by Canadian Provinces are unlikely to have a significant practical effect on the operation of the Code;

Convinced that where instances of this nature arise they will be settled in the tradition of co-operation which has evolved among the Members of the Organisation;

DECIDES:

1. To take note of the undertaking of the Canadian Government to carry out the provisions of the Code to the fullest extent compatible with the constitutional system of Canada.

2. This Decision shall form an integral part of the Code and shall be attached thereto as Annex D. It may be reviewed at any time at the request of a Member of the Organisation which adheres to the Code.

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contracts or subsequently, on referring disputes arising from the consent to the arbitration or conciliation procedures established under the Convention. As such, the new machinery would complement arbitration and conciliation facilities provided by domestic courts and by the International Court of Justice.

It seems to us that it is in the Canadian interest that the establishment of the Centre should be encouraged. A Centre where states and private nationals of other states could submit investment disputes would fill an obvious need. It could provide better protection for Canadian investors wishing to invest abroad, particularly in the developing countries. It could encourage a greater flow of private capital to the developing countries and thus encourage their economic development and reduce their dependence on foreign public capital.

We believe, however, that Mr. Hodon should be careful to avoid indicating at this stage that the Canadian Government would be prepared to sign such a Convention if it were drawn up. Considering the important role that the provinces would play in relation to this Convention, it would seem necessary to give careful consideration to the capacity of the Federal Government to assume the obligations under a Convention of this sort before we could express any views on possible Canadian adherence. It is possible, for example, that the Federal Government, before it signed such a Convention, would need to (or wish to) enter into written agreements with the ten provinces by which the provinces would undertake to abide by the Convention within their respective provincial jurisdictions. We suggest that Mr. Hodon might take an opportunity to acquaint IBRD officials with the kind of problems involved for Canada arising out of our Federal-Provincial relationships. Presumably the countries with federal systems, such as Australia, or Brazil, would also have difficulties in relation to a Convention of this kind.

Under-Secretary of State
for External Affairs

MR. CADIEUX

RESTRICTED

March 20, 1963.

Secretary, Legal Planning Committee

Your memorandum of March 13.

5475-AX-38-40

Glassco Report on Government Legal Services

Your memorandum under reference mentions the possibility of utilizing the Legal Planning Committee for the co-ordination within the Department (and, perhaps, with other departments) of negotiation of treaties, and invites comments also on the questions raised in Mr. Driedger's commentary attached to your memorandum under reference. The observations which follow are necessarily somewhat tentative and preliminary.

2. The points dealt with by Mr. Driedger which are of direct interest to External Affairs would seem to be:

(a) the desirability of utilizing the Department of Justice in some way in order to influence the form of international agreements in a way more compatible with the requirements of Canadian domestic law;

(b) the role which the Department of Justice might play in providing better legal services abroad;

(c) the desirability or otherwise of seconding a Department of Justice officer to External Affairs to assist in the preparation of legislation and other matters;

(d) the need for earlier notification to Justice of impending treaties;

(e) the desirability of establishing an international law section in the Department of Justice; and

(f) the state of relations between the Departments of External Affairs and Justice.

(a) Utilizing the Department of Justice in some way to influence the form of International Agreements

3. The suggestion that the Department of Justice be brought into the negotiations on treaties in some fashion, (either in pre-negotiation discussions in Ottawa, or as part of the negotiating team, depending on the requirements) would seem to be a sound one. This might

Mr. Wershof
Mr. Mathewson
Mr. Kingstone
Mr. Copithorne

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create more difficulties than it would solve, however, unless the Justice officers in question have some background in international law. The problem seems to be two-fold at present, stemming perhaps from too little knowledge of our domestic law requirements on the part of the negotiators and too little knowledge or receptivity to the requirements of international law on the part of officers in the Department of Justice. The implementation of Mr. Driedger's suggestion on this point would therefore seem to be tied in with his later suggestion concerning the establishment of an international law section in the Department of Justice.

4. On a connected point not raised by Mr. Driedger, but one to which some thought might be given, is the present procedure or lack of any in the negotiation of treaties. A case in point is the commercial treaty now being negotiated with the U.S.S.R. Legal Division received almost no notice of the impending negotiations and as a result difficulties are being encountered. Similarly such interested Departments such as the Department of Transport were not consulted, either when that agreement was first negotiated or when it was renewed or when the present renewal possibility arose (until Legal Division brought them into the picture). Negotiations intended to lead to an international agreement, whether taking place in Ottawa or abroad, should presumably take place only after consultation with all interested divisions in External Affairs and all other interested departments. No doubt this is often done, but the practice should be invariable. The active negotiating team should always include a legal officer either from External Affairs or from Justice or, in some cases, perhaps both. (The Israelis, for instance, make extensive use of one of their Justice officers in international conferences and in treaty negotiations, and have found that the results have been extremely favourable, not merely with respect to the particular conferences or agreements in question, but in terms of their overall long-term relations with their Attorney Genera.) Another case in point is the series of agreements concluded by the External Aid Office which very often have direct Canadian domestic implications which this Department is not competent to deal with. Some efforts have been made to achieve better liaison between External Aid and Legal Division but no satisfactory solution has thus far been worked out.

5. Another related question which has been raised by one of our critics, (Lawford), is the lack of uniformity amongst Departments in recording treaties. Several other departments such as Trade and Commerce and, as I recall, Transport allegedly have their own treaty records, which in some respects differ from our own records. Presumably the External Affairs Treaty Register should be comprehensive, including notation of all those treaties also noted in the files of other departments. (An examination might show this to be now the case, but Lawford has suggested (in private conversation) that there are international agreements to which Canada is a party which are not known to us). It would seem advisable also that the treaty registers of other departments, if it is felt that they are necessary, should follow the pattern of our own, with regular checks made to ensure the correctness of the information on their files.

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(b) Better Legal Services Abroad

6. I am not sufficiently familiar with this problem to comment on it except to concur in Mr. Driedger's remark that the Department of Justice cannot by its own officers give legal assistance in foreign countries where foreign law is involved. It may be, however, that a survey of the means used by our missions abroad and by other departments having the need for legal services abroad could show ways in which our methods could be systemized and made more efficient.

(c) Seconding of Justice Officer to External Affairs

7. The difficulties pointed out by Mr. Driedger would seem to be real although not necessarily insuperable. His view that legislation is not a major problem in the case of External Affairs certainly seems correct as does his point that the need for assistance on legislation would not warrant the full time secondment of a Justice officer. There are other functions which such an officer might fulfil, however, for instance, if he were relatively junior and slated for later service in the international law section in the Department of Justice; he could obtain valuable training by being given assignments involving mixed international and domestic law, (such as our dispute with B.C. over off-shore mineral rights), enquiries concerning Canadian law, claims against foreign countries, extradition matters, etc. There might be some merit, therefore, in spite of the difficulties mentioned, in considering whether a Justice officer should be seconded to External Affairs.

(d) Earlier Notification to Justice of impending treaties requiring domestic legislation

8. The validity of this point seems obvious. It bears out the need for a systemization of procedures on treaty negotiations. Perhaps a system similar to that developed for international conferences, of drawing up a list at the beginning of each year, could be devised for prospective treaties and renewals of presently existing treaties. It would remain necessary, however, to maintain a constant check on agreements. This could be done, as suggested in your memorandum, by the Secretary of the Legal Planning Committee, or by the Head of Treaty Section. Presumably it would be necessary to make regular checks with a co-ordinating officer in other departments also. The Legal Planning Committee might be utilized with good effect on substantive questions arising in connection with prospective treaties, and could be expanded on an ad hoc basis to include other departments as well as Justice, where necessary.

(e) Establishment of International Law Section

9. The range and depth of problems requiring consultation with the Department of Justice suggests the need for a cadre of officers in the Department of Justice having day to day familiarity with principles of international

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law. The proposal ties in also with the suggestion that the Department of Justice be brought into negotiations on treaties in some way. Whether an International Law Section is required or not is a matter for consideration. There would be no point in having within the Department of Justice a counterpart to our Legal Division with no clear dividing line between the responsibilities of each. Perhaps before passing judgment on this recommendation we should elicit from Mr. Driedger some clearer idea of the role he envisages for the proposed international law section.

(f) State of Relations between Justice and External Affairs

10. Our present relations with Justice seem reasonably satisfactory, and there would be little point in raking up past difficulties, particularly in the light of the apparent trend towards better relations.

Other Questions

11. There are some other questions of relevance to External Affairs which were raised in the Glassco Report on Legal Services and which are not touched on by Mr. Driedger.

The extensive involvement of other departments in matters of international law and the lack of collaboration amongst departments in this field (p.415)

12. Assuming that the Commission is correct on its facts on this point it would seem to be up to External Affairs to look into ways of remedying the situation. I query, however, the need of "substantial reforms in the present organization and functioning of External Affairs Legal Division", and doubt that "what is required is a reorganization" (p.416). I would agree that there is a need to meet the "twin objectives of providing a focal point for legal services in the field of international law and at the same time promote proper liaison with the domestic legal services". The present organization of Legal Division lends itself readily to fulfilling these functions. It may be that Treaty Section would have to be expanded to take on additional liaison and co-ordinating functions, but there would seem to be little reorganization required beyond that. The Commission makes the following recommendations:

(a) that the permanent legal adviser should have no responsibility for administrative or policy decisions outside the operation of the division, and that his title be changed to that of "General Counsel".

13. I do not agree with either of these recommendations. The Commission itself recognizes that "international law is intimately bound up with high policy questions and relationships with other nations" and that "there is need ... to preserve a balance between policy considerations and legal implications ...". This suggests that the legal

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adviser should not be divorced from the main stream of departmental thinking and policy planning, but rather the contrary. I see little advantage in isolating the legal adviser from direct contact with and involvement in the "decision making process" in the Department. If legal advice is to be useful it must be realistic. The accusation which the Commission has levelled at the Department of Justice as being overly academic, whether justified or not, has not been directed at this Department's legal advisers. The seeds of such a danger might, however, be latent in the Commission's recommendation on this point. It follows that the term "Legal Adviser", in use by many other foreign offices, aptly describes the function to be performed, which combines elements of both solicitor and barrister. The position of Legal Adviser might perhaps be likened more to that of an active practicing international lawyer rather than to a professor of international law, (as the position seems to be envisaged by the Professors of international law responsible for the Glassco Commission's recommendations on this point.)

(b) the establishment of a senior advisory counsel position to be filled by a Department of Justice officer.

14. The difficulties pointed out by Mr. Driedger on attempting to integrate all legal officers would apply in particular to this proposal, since the "senior advisory counsel" would apparently have administrative duties within Legal Division. The other functions which he would be asked to perform, (acting as a clearing house on matters of domestic law and on references to the Department of Justice, and primary responsibility for initial drafting of changes in legislation or regulations,) would hardly justify the seconding of a senior officer of the Department of Justice. To the extent that there is need for a focal point to which references from other departments on questions involving international law might be sent, and a "central source for experts on treaty matters", it is doubtful if the Department of Justice is qualified to fulfil this function. As suggested above, a less senior officer might perform a number of useful duties, but there seems little merit in the recommendation as proposed.

(c) the modification of the present policy of staffing of Legal Division by the rotation of foreign service officers, and the building up of a "corps of specialists in international law permanently resident in Ottawa and making a career in this special field of law."

15. One of the distinct advantages which is built into our present system whereby Legal Division is staffed in part by permanent legal specialists and in part by rotating foreign service officers with legal training is that this helps to avoid Legal Division becoming isolated from the main stream of departmental thinking. Such a system, if properly used, can have the best of both worlds, since the permanent specialists can provide the necessary continuity and special expertise while the foreign service officers can bring political experience to the Division. Such a system builds up a corps of specialists in international law useable not only in Ottawa but in our missions abroad, where their usefulness can outweigh the advantages of the continuity which would otherwise be provided. (Recent examples, for instance,

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of missions where foreign service officers with legal training have proven invaluable on particular problems are New York, Washington, Paris and Geneva Disarmament Delegation.) Particularly at international conferences, many international law questions turn as much on political considerations as on legal. With the active entry of the Soviet bloc into legal spheres this trend can be expected to continue. The department's needs can best be met, it is submitted, by continuing to staff Legal Division in part with permanent specialists and in part with legally trained foreign service officers.

(d) other requirements of Legal Division should be met by assigning foreign service officers qualified to practice law posted for four to five year periods.

16. I am not persuaded of the need for those foreign service officers serving in Legal Division to be qualified to practice law. Actual experience practicing law, like experience in other fields, can prove extremely valuable, but the qualification of having been called to the Bar would seem an artificial one with little relevance to the department's needs. As to the posting period, this clearly is dependent upon a number of considerations, but it is unlikely that many legal officers would be prepared to serve in Legal Division for such lengthy periods without in some way being compensated for such a utilization of their special qualifications; this could of course raise the whole question of additional compensation for specialists.

(e) "that a strengthened Legal Division of the Department of External Affairs assume responsibility for co-ordinating international legal work of departments and agencies and provide expert assistance required on such matters as treaty negotiation".

17. This recommendation, to the extent that it is not already fulfilled, seems worth following up, although it will presumably involve the Department in increased commitments which may necessitate larger staff.

J. A. Beesley

J. A. Beesley
(Secretary)

O/USSEA/M.H. Wershof:aw

Mr. Kingstone File

RESTRICTED

Ottawa, March 19, 1963

MEMORANDUM FOR Mr. CADIEUX

Glassco Commission Report Vol. 2 -- Legal Services: Commentary dated December 21, 1962, by the Deputy Minister of Justice

You asked Legal Division to comment on some of the points in Mr. Driedger's commentary. As Mr. Kingstone is ill, there may be some delay in Legal Division submitting its views. In the meantime I should like to offer my own comments on pages 26 and 27 of Mr. Driedger's commentary, where he discusses the negotiation of treaties. He says in part:

> "I am not satisfied that Canadian negotiating teams are receiving the advice on local law that they should have. Also, some international agreements are so badly drafted that the preparation of implementing legislation becomes impossible. . .
>
> "A system should be developed whereby lawyers from the Department of Justice will be part of a team negotiating international agreements. This has not been possible until now, first, because we lack the necessary staff, and secondly, the Department or agency charged with the administration of the law to be negotiated has not always welcomed us."

2. Before discussing his proposal that lawyers from the Department of Justice should be part of a team negotiating international agreements, I think that it is necessary to go back a couple of steps and consider whether our own Legal Division is being permitted to play a reasonable part in the negotiation of agreements. If our Legal Division is not playing an appropriate part, it will be necessary to remedy this defect before we figure out just how the Department of Justice should be brought into the operation. Section 318.1 of the Departmental Regulations says in part:

cc. Legal Division
Mr. Mathewson (Committee on Administration)

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"The Legal Division should be consulted on the drafting of a proposed international agreement at the earliest possible stage in the negotiations. Before an agreement is concluded it should be approved in its final form by the Legal Division. . . When the agreement is negotiated in Ottawa, the Head of the Legal Division ought to be consulted on the advisability of assigning a legal officer to attend the meetings."

It is my impression that this provision is not always observed. Legal Division is not in all cases consulted by the action division at an appropriately early stage. We had an example of this only a few days ago when Economic Division consulted Legal Division about the proposed renewal of the Trade Agreement with USSR only after negotiations with the Soviet delegates had commenced. The first trouble is therefore that action divisions are not seeking legal advice at an appropriate stage in most cases. This is complicated by the fact that, in some treaty negotiations, the rôle of our Department as a whole is very slight and the action division in this Department does not have much to say about the manner or content of the negotiations, which are effectively in the hands of another Department.

3. It seems to me that a determined effort, blessed by the Under-Secretary, should be made to ensure that the letter and spirit of section 318.1 are observed. It may not be too difficult to bring this about when negotiations are conducted in Ottawa; I think it will prove more difficult when negotiation, especially for a bilateral agreement, takes place in a foreign country.

4. If we can ensure the reasonable participation of the Legal Division in the preparations for a treaty negotiation, it should then be possible to give more thought in each case to the interests of the Department of Justice. However, it seems to me that the proposition as stated by Mr. Driedger is much too broad and would be unworkable and wasteful of manpower even if the Department of Justice had the necessary staff.

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5. Let us look first at typical multilateral agreements produced under the auspices of the UN. Such an agreement may emerge in draft form after years of labour by the International Law Commission or the Commission on Human Rights or one of the other commissions of the UN. Presumably Mr. Driedger would not expect officers of his Department to take an actual share in negotiations at this stage; on the other hand, it is perfectly feasible and desirable for Justice to be represented on interdepartmental committees in Ottawa concerned with such work; they are so represented in the Interdepartmental Committee which prepares briefs for our delegate to the Human Rights Commission. After a draft agreement has been produced by one of the bodies referred to above, it may be sent to a special diplomatic conference as was the case with the Law of the Sea or it may be debated and adopted in the General Assembly itself. I shall be surprised if Mr. Driedger really thinks that his Department should have been a member of the delegations to the Law of the Sea Conferences or if he thinks that a member of his Department should be attached to the delegation to the General Assembly when a draft convention on, say, Human Rights is being debated.

6. When we look at multilateral agreements in the fields of patents, copyrights and narcotics, I am fairly sure that we will similarly find that it would not be worth-while or sensible for the Department of Justice to be a member of the Canadian delegation at each of the successive stages of preparation. When we turn to bilateral agreements, I think it will be found that only a few provisions of a few agreements have raised the possibility of requiring implementing legislation in Canada. Clearly there ought to be discussion with the Department of Justice at an early stage in respect of such clauses but it does not necessarily follow that the Department of Justice should be a member of the negotiating team.

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7. I suspect that Mr. Driedger is not too well informed on the complexity of the procedures and the length of time frequently involved in the negotiation of agreements. When he speaks of Justice being "part of a team negotiating international agreements" it sounds to me as if he is thinking of a relatively simple and brief negotiation.

8. If we can ensure that our own Legal Division is consulted at an early stage of preparation for eventual drafting or negotiation of an agreement, it should then be the rule that the Legal Division should inform and consult the Department of Justice if there is the remotest possibility of implementing legislation (either by statute or Order-in-Council) being required. This being done, there could be discussion between our Department and Justice at all stages of preparation. If, in a particular case, Justice thought that it ought to have a representative on a drafting team or a negotiating delegation, I see no reason why this could not be arranged (subject to the need of this Department to hold down the size and therefore the cost of delegations going abroad).

M. H. WERSHOF

M.H.W.

CONFIDENTIAL

File: 5475-AX-38-40

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Minutes of Legal Planning Committee Meeting
of March 11

Present at the meeting were: Mr. Cadieux (Chairman), Mr. Wershof (Ass't. Under-Secretary), Mr. Kingstone, Mr. Copithorne (Legal Div.), Mr. Nutt (D.L.(1) Div.), Mr. Wilgress (Economic Div.), Mr. Nutting (U.N. Div.), and Mr. Beesley (Secretary).

The first item discussed was the question of Canadian accession to the OECD Convention. Mr. Wershof enquired as to why the Convention was not more universal and why it had been raised in the OECD forum. Mr. Wilgress confirmed that it had been felt in some quarters that one of the disadvantages of the Convention was its limitation to certain states and the fact that it arose in that particular forum.

Mr. Cadieux pointed out that there were a number of questions which might require consultation with the Department of Justice, whose past position had been that they did not like to consult with provinces on treaty questions, since this could develop into a constitutional practice, and that in a case like this a commitment by a provincial government might not bind its successors.

Mr. Wershof suggested that on the point which had been raised by the OECD Delegation that the Convention did not seem to present federal problems for the U.S.A., that the U.S.A. does not have Canada's constitutional problems respecting treaties. Mr. Wershof enquired as to why there was opposition in OECD to a federal state clause such as had been included on invisibles. Mr. Wilgress explained that there was a feeling that such a clause would render the Convention considerably less meaningful.

A brief general discussion of the merits of acceding to the Convention then ensued. The Chairman summarized the points agreed on, namely, that

(a) if a sufficient number of underdeveloped countries supported the Convention and

(b) if a federal state provision similar to that on invisibles could be obtained, then Canada could participate in the Convention.

Mr. Wershof suggested as a third point that if and when after a study of the Convention on its merits it appears acceptable, we might then inform the provinces concerning it. It was agreed that the delegation be so informed and instructed to raise points (a) and (b). It was also agreed that these instructions be cleared with other departments such as Trade and Commerce and Finance, and that at a later stage Finance, Economic and Legal Divisions

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should consider the Convention clause by clause with a view to providing detailed comments for the delegation.

The next item considered was the proposed government comments on the four questions arising out of the Sixth Committee "Friendly Relations" Resolution. Mr. Nutting explained that Mr. Jay had requested that substantive discussion be deferred until his return from leave unless there were any strong views on any particular aspects of the draft paper prepared by U.N. Division on three of the principles. It was agreed that this question would be deferred for consideration along with a similar paper by Legal Division on the peaceful settlement of disputes.

The next item considered was that of sovereign immunity of foreign state-owned trading ships. Mr. Beesley outlined the background on the question as it had arisen in the Cuban ships case and its possible relationship to the security threat posed by Soviet trading ships.

A brief general discussion occurred on the merits of continuing to adhere to the classical or absolute theory of immunity and it was agreed that a position paper should be developed reviewing the problem and recommending against continued adherence to absolute immunity, and that the views of interested divisions should be sought,by a date to be specified in the paper, after which other departments should be consulted.

An item not on the agenda was then raised by the Chairman because of its possible relationship to the sovereign immunity question, namely, the problem of illegal use of radio by Soviet ships in Canadian ports. In the Chairman's view the question of sovereign immunity could be bypassed by raising the problem with the U.S.S.R. Embassy instead of attempting to take direct action against the ship in question. It was agreed that this course would seem desirable.

The Chairman asked that Legal Division prepare a paper on the question of access to Canadian ports by Soviet ships, such as the fisheries mother ship in question, and that the status of Soviet ships in port should also be examined, as well as the possible relevance of reciprocity.

The next item discussed was the wording of the proposed new Canadian declaration accepting compulsory jurisdiction of the International Court. The Chairman stated that he favoured the wording which had been proposed, in the memorandum circulated prior to the meeting. Mr. Kingstone stated that it was not clear from the Cabinet minutes whether Cabinet intended that a totally unconditional declaration be made or that one intending reciprocity (such as that suggested) be made. Mr. Beesley explained that Mr. Sicotte had followed up this question when Mr. Kingstone had raised it earlier, and had found that the first decision of Cabinet was in favour of the kind of declaration set out in the discussion paper, although the minutes of a later decision of Cabinet (on the question of timing and of introduction by Mr. Genser in the U.N.) could be read as altering the earlier decision. Mr. Wershof expressed doubts as to whether Cabinet had the specific issue of reciprocity in mind on the second occasion. Mr. Cadieux stated again his own

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preference for the formula suggested, since this would leave no doubt as to reciprocity, while still being as acceptable publically, or very nearly so, as an absolutely unconditional declaration.

The next item discussed was state succession. The Committee had before it a working paper on this subject describing the requests of the Secretary General for materials evidentiary of state practice with regard to the succession of states which had acquired their independence since the Second World War. It was agreed that as Canada has not been directly concerned with this subject (it being felt Newfoundland was not a case in point) the Secretary General should be informed that we were unable to provide material which might be useful to the I.L.C. as evidence of state practice on this subject.

J. A. Beesley
(Secretary)

c.c. Mr. Cadieux
Mr. Wershof
Mr. Kingstone
Mr. Copithorne
Mr. Nutt (D.L.(1) Div.)
Mr. Wilgress (Economic Div.)
Mr. Nutting (U.N. Div.)

DEPARTMENT OF EXTERNAL AFFAIRS

MEMORANDUM

Mr. Kingstone / Mr. Copithorne

TO: Legal, Economic, U.N., European, D.L.(1), and D.L.(2) Divisions

FROM: Legal Division

REFERENCE: Mr. Cadieux's memorandum of March 1 and supporting papers since distributed.

Security: CONFIDENTIAL

Date: March 8, 1963.

File No. 5475-AX-38-40

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SUBJECT: Meeting of Legal Planning Committee

Detached from this memo and attached to our memo of Apr 23/63 on Threat of Soviet Trading Vessels on File 11067-A-40

The attached memorandum dated October 31, 1960 discusses the doctrine of sovereign immunity and its relevance to a recent Canadian court case involving a dispute over some C.N.R. ships sold to Cuba. The Supreme Court of Canada handed down judgment in the case on June 11, 1962 upholding the immunity of the ships in question on the grounds that they were owned by a sovereign state recognized by Canada. The decision did not touch on the question whether immunity extends to property owned by a foreign state and used only for commercial purposes, since, according to the reasons for judgment, there was no evidence produced as to the proposed use of the ships. The legal position remains, therefore, as outlined in the attached memorandum of October 31, 1960, that Canadian courts continue to uphold the classical or absolute theory of immunity, while indicating some doubts as to whether it applies to state-owned trading vessels.

2. As you will note, the political divisions were requested in the attached memorandum of October 31, 1960 for their views as to what kind of a certificate should be issued, should a request be received from either party in the Cuban ship case. While most divisions did not reply, Latin American Division stated its view that a certificate rejecting immunity would be untimely and could jeopardize Canadian relations with Cuba and hence a certificate confirming the immunity of the ships in question should be issued; Commonwealth Division suggested that the issue be avoided by confirming recognition of the Cuban Government and leaving the implications for the Court to decide; and European Division recommended that a certificate be issued which stated that the doctrine of sovereign immunity did not extend to foreign state-owned trading vessels.

3. As pointed out in the attached memorandum, there are a number of possible ways of bringing about a change in the Canadian position on this question, such as accession to the Brussels Convention, the publication of the department's views in a form similar to the "Tate letter" issued by the State Department, or by issuing a certificate

CIRCULATION

Mr. Wershof
Mr. Kingstone
Mr. Copithorne

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Ext. 326A (6/56)

in an appropriate court case. Whatever means might be decided on, there would seem to be good reason to abandon our adherence to the classical or absolute doctrine of immunity with respect to foreign state-owned trading ships.

J. A. Beesley,
Secretary,
Legal Planning Committee

DEPARTMENT OF EXTERNAL AFFAIRS

MEMORANDUM

TO: LEGAL ADVISER

FROM: LEGAL DIVISION

REFERENCE:

Security CONFIDENTIAL

Date October 31, 1960.

File No. 11067-A-40

SUBJECT: Court Action in Halifax Admiralty Court over Cuban Purchase of C.N.R. Ships.

The Department has been keeping a watchful eye (through an arrangement with the Judge Advocate's Office) on a court action being heard in the Admiralty Division of the Exchequer court in Halifax. Recent developments in the case, which concerns seven ships sold by the C.N.R. to Cuba, indicate that the Department may receive a request for a certificate confirming that the ships are immune from suit. The response which the Department should make to such a request, if and when received, would appear to turn on two questions:

(a) Does the doctrine of sovereign immunity extend under Canadian law to a foreign state-owned trading vessel, and

(b) To what extent should the Department attempt to guide the court on this question.

2. These questions, which involve political and economic considerations as well as legal issues, are gone into in the attached memorandum, the conclusions of which may be summarized as follows:

(a) International law is unsettled as to whether or not the doctrine of sovereign immunity applies to foreign state-owned trading vessels. British and Canadian courts continue to uphold the classical or absolute theory of immunity but there are indications that they may soon begin to follow the trend apparent in recent U.S. decisions towards a more restrictive view of the doctrine;

(b) There is a class of facts which are conveniently called "facts of state" (such as the status of a diplomat, recognition of a government or the existance of a state of war) the determination of which is accepted by the courts in all three countries as being solely in the hands of the Executive. British courts do not treat the immunity of a state-owned trading ship as a "fact of state", while American courts do, in each case the court being influenced to a large extent by the approach to the question taken by the Executive. In the only

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CIRCULATION

U.S.A. Div.
D.L. I Div.
Commonwealth Div.
Far Eastern Div.
Middle Eastern Div.
European Div.
Economic I Div.
Havana
Latin American Div.

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Canadian precedent where the practice followed is clear, the American rather than the British practice was adopted, and the question was, in effect, treated as a "fact of state" (the court accepted the Department's"suggestion" filed through Justice Department as determinative of the issue).

3. It can be seen therefore that the Department is in reality in a position to predetermine (or not, as it sees fit), the outcome of the Cuban and other similar cases on the basis of policy, or at least non-legal considerations. With this in mind we are sending copies of this memorandum to all the political divisions and Economic I and Defence Liaison I Divisions asking for their views as to whether, if a request is received, a certificate should be issued:

(a) confirming the immunity of the ships in question, or

(b) merely confirming recognition of the present Cuban Government and leaving the question of immunity to the court, or

(c) explaining to the court that the Department considers that sovereign immunity should no longer be considered as extending to foreign state-owned trading vessels.

4. It should be mentioned that although the court would normally accept the Department's certificate as determinative of the issue it purports to deal with, the court might choose to disregard a certificate along the lines of paragraph 3(c) above.

yes 5. We propose, if you agree, to consult the Department of Justice on this question, and we should be grateful for your instructions as to whether other Departments should also be consulted before a decision is reached.

I wonder whether the Dept of Transport and the Maritime Commission should be brought in?

Legal Division

Legal Div./J.A.Beesley/pm

DEPARTMENT OF EXTERNAL AFFAIRS

MEMORANDUM

TO: FILE

FROM: LEGAL DIVISION

REFERENCE:

Security CONFIDENTIAL

Date October 31, 1960.

File No. 11067-A-40

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SUBJECT: Court Action in Halifax Admiralty Court over Cuban Purchase of C.N.R. Ships.

We have been notified by the Deputy Judge Advocate General that the Solicitor for the plaintiff in an action now pending in the Admiralty Division of the Exchequer Court in Halifax intends to approach the Department on the question of Canadian recognition of the sovereign immunity of the Republic of Cuba. As you will note from the attached report dated October 6, (Annex "A" to this memorandum) which was received by the Deputy Judge Advocate General from his representative in Halifax, the plaintiff's Solicitor indicated that he would inquire whether, in the light of recent reports indicating that Cuba does not recognize the diplomatic immunity of the U.S. Embassy employees in Cuba, Canada is still prepared to recognize the sovereign immunity of Cuba. The plaintiff's Solicitor may have since dropped this idea as a result of recent developments in Canadian-Cuban (as distinct from U.S.-Cuban) relations, but should he ask for a certificate confirming that these ships are immune from suit he could raise issues with legal, and political and economic implications. The response of the Department to such a request would turn on two questions:

(a) Does the doctrine of sovereign immunity extend under Canadian law to foreign state-owned trading ships, and

(b) to what extent should the Department attempt to determine this question, and to what extent should it be left to the Judiciary.

2. The background to the court action was set out at some length in the report from the Deputy Judge Advocate in Halifax, (referred to you on September 28,) but it may be of assistance in considering this problem to restate the facts briefly.

I FACTUAL BACKGROUND:

A. Status of Parties Involved

3. In 1954 the Cuban Government set up a company known as the Banco Cubano del Comercio Exterior (Cuban

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CIRCULATION
Legal Adviser
U.S.A. Div.
D.L. I Div.
Commonwealth Div.
Far Eastern Div.
Middle Eastern Div.
European Div.
Economic I Div.
Havana
Latin American Div.

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Bank of Foreign Trade) for the purpose of assisting in the development of Cuban foreign trade. Later, in 1958, when Banco ran into difficulties in the operation of Cuban shipping, a company called the Flota Maritima Browning de Cuba was incorporated in Cuba for the purpose of acquiring and operating the various ships being purchased and built for Banco. Subsequently, on August 19, 1958 Banco purchased 8 ships from the Canadian (West Indies) Steam Ships Ltd. On the same day Banco leased the ships to the Browning Company for a 7 year period on a lease purchase basis, the lease payments to be applied against the purchase price should the Browning Company exercise its option to purchase them. Banco was to pay for the costs of the survey and the repairs made to ships, Cuban crews were to be employed on them, and both parties agreed to submit to Cuban courts, renouncing any other jurisdiction.

4. At the time of the purchase the ships were strike-bound in Halifax, but Cuban crews flown into Halifax crossed the picket lines, and were able to take one of the ships to Baltimore. As a result, the International Seafarer's Union, through sympathetic strikes, tied up Cuban vessels in various ports of the world. The Cuban Government (still the Batista Regime) declined to intervene in the Canadian case, as requested by the Browning company, and the remaining Cuban crews were taken back to Cuba.

5. The other seven ships have ever since remained in Halifax. By now they have reached such a state of disrepair that it has been estimated by the Maritime Commission that the cost of putting the vessels in satisfactory operating condition is as great as their sale price, and they are now worth little more than scrap in value.

B. Legal Proceedings

6. The Browning Company has now brought an action in the Admiralty Court in Halifax against Banco, (and also the ships themselves, as is possible in Admiralty proceedings) for the costs, repairs, wages and loss of profits. The court is still considering the preliminary question of jurisdiction; (Mr. Justice Pothier having fallen seriously ill, his finding that the court did not have jurisdiction has been set aside and the case is now being heard anew.)

7. One of the material allegations by the defendant Banco is that Banco transferred its interests to a Cuban Government Department and that since the ships are the property of the Government of the Republic of Cuba, they are not subject to the jurisdiction of a Canadian court on the grounds of sovereign immunity.

8. The Browning Company had previously commenced action in a U.S. court with respect to the ship in Baltimore and the court there found it had jurisdiction to consider the matter. Certain technical arguments as to the question of Admiralty jurisdiction over the question of sale and leasing of ships were raised in contesting the U.S. court's jurisdiction, and the provision whereby the parties agreed to submit to Cuban courts was also raised, but the doctrine of sovereign immunity was not pleaded

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(although the Attorney for Banco came close to doing so in one of his objections, namely: that the Interventor appointed by the Republic of Cuba had not authorized the action).

9. The court in its judgement referred to the unfriendly attitude of the Castro Regime to the U.S. and to the unlawfulness of takeovers of other commercial undertakings, and one of the foot notes to the judgement consists of the text of a statement issued on January 11, 1960 by the U.S. State Department denouncing the seizures of American-owned property by the Cuban Government. The court states also at one point that:

> "It is very doubtful whether libelant could hope to obtain justice in Cuba. That is the dominant factor to be considered in other cases where such doubt exists"

The U.S. decision does not therefore cast much light on the present action in the Canadian court.

C. Department's Interest in the Case

10. The case has come to the attention of the Department in several ways. In June of last year the Cuban Embassy requested that the contract of sale be cancelled and the money already paid be applied towards the purchase in Canada of agricultural equipment. This request was turned down, presumably on the grounds (not communicated to the Cubans) that the Cubans knew when they purchased the ships they were strike-bound. The C.N.R. indicated at that time that they had little or no interest in the matter, since the payment of the purchase price is guaranteed by the Bank of America International and the instalments are being made according to the contract. Subsequently, after the commencement of the court action the Cuban Embassy requested a certificate confirming that Canada recognizes the Castro Regime as the legitimate government of Cuba. In the event the certificate was not issued since the Judge did not require it. More recently the Department has been giving consideration to the possibility of the Castro government taking reprisal measures against Canadian interests in Cuba to recover the losses on the C.N.R. ship sale. Thus far no such action has been taken, nor, so far as we know, is it likely, at least under the Castro regime. The question of sovereign immunity has now been brought to the attention of the Department, although not as yet by the solicitors for either side. (It should be borne in mind also that although the question has not yet arisen, the possibility exists that Cuba might attempt to take legal proceedings against the C.N.R. for non-completion (i.e. non-delivery) of the contract. Presumably a good defence to such claim is that the Cubans were aware at the time of the contract that the ships were strike-bound; in any event this question will not be considered here.)

II LEGAL ISSUES:

A. Recognition

11. The preliminary question as to whether Canada recognizes Cuba's sovereign immunity presents no difficulty

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since Canada specifically recognized the Castro Regime on the 8th of January, 1959 (see a copy of our note number 2 of January 9, 1959 from the Embassy in Havana attached). There appears to be no objection therefore to the giving of a certificate to that effect at the request of Counsel for the Cuban interests, or the Cuban Embassy here, should that channel be used. (See the attached copy of our (Annex "B") memorandum of August 18 which considers this question). However, should the question eventually put to the Department ask whether the doctrine of sovereign immunity extends to the ships in question, the matter is not so simple.

B. Sovereign Immunity

(1) Basis of the Doctrine

12. The doctrine of sovereign immunity arises, according to most text writers, as a consequence of state equality, from which it follows that no state can claim jurisdiction over another:

> "This rule applies not only to actions brought directly against foreign states, but also to indirect actions, as when, for instance, a suit in rem is brought against a vessel in the possession of a foreign state. Although, in giving effect to this rule, courts occasionally refer to the 'comity of nations' as the basis of their decision, the principle of sovereign immunity of states from the jurisdiction of the courts of other states has in effect been treated by courts of most countries as a rule of international law." (1)

13. Oppenheim goes on to point out, however, that the increasing practice of government ownership or control of merchant ships, either for purposes connected with public services, such as the carriage of the mails or the management of railways, or simply for the purpose of trade, has led to some doubts as to whether they are entitled to the immunities which are enjoyed by men-of-war, and the practice of the courts of different states in this matter is far from being uniform.

(2) The Doctrine as Applied in British Courts

14. Although British Courts have continued to uphold the doctrine of immunity of state-owned trading vessels, (2) the state of the law in the United Kingdom is not altogether certain in the light of the view expressed by three of the five judges in the House of Lords in The Cristine (3) that English law was not settled in favour

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(1) Lauterpacht's Oppenheim, 8th Edition at 266 and 267.

(2) The Porto Alexandre, [1920] p. 30; 89 L.J. adm. 97, The Parlement Belge (1880) L.R. 5 P.D. 197. The Cristine A. C. 485. [1938]

(3) [1938] A.C. 485.

of the immunity of government-owned trading vessels despite lower English court decisions so holding. At least for the time being however, English common law continues to recognize the doctrine in its classical or absolute form.

(3) The Doctrine as Applied in U.S. Courts

15. The U.S. courts have also continued until recently to uphold the classical view of the doctrine,(4) but in a 1945 decision (The Republic of Mexico v. Hoffman,)(5) the U.S. Supreme Court refused to allow immunity to a vessel owned by a foreign government, (but not in its possession and service), where the Department of State did not expressly recognize that vessel's immunity. In a subsequent (1946) decision a U.S. court refused to allow the claim of sovereign immunity made by the Canadian Government with respect to a Canadian ship operated by a Canadian Government corporation with the statement:

> "The court denies the claim of sovereign immunity in this case primarily because the Canadian Government's interest in the transaction was not anything other than an indirect interest in the ordinary commercial operation of a merchant vessel owned but not possessed by that government".(6)

The present state of American law in this question is therefore uncertain and confusing, but the weight of authority in the U.S. now seems to be in favour of the restrictive theory, i.e. against recognition of sovereign immunity with respect to "private acts". (This change in U.S. law, if it proves to be that, will have come about largely as a result of U.S. State Department intervention in certain cases; this will be discussed further below).

(4) The Doctrine as Applied in Canadian Courts

16. There are only two Canadian cases on the question, each of them, unfortunately for the certainty of the law, decisions of single Admiralty Judges. In both cases the doctrine of sovereign immunity was applied to a state-owned trading vessel. The first decision (Brown v. The Indochine)(7) was made at a time (thirty-seven years ago) when there was considerably more certainty in the law on this question. The case concerned a ship owned and operated by the government of Indo-China on a commercial pursuit. After stating the recognized rule that "the person and property of the Sovereign are exempt from the jurisdiction of the courts," MacLennan L.J.A. went on to consider the allegation that the rule did not apply when the libelled ship engaged in commercial adventures. He then went on to make an exhaustive review of British and U.S. case law on the subject, and concluded that they

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(4) The Schooner Exchange 7 C.R.H. 116; The Maipo (1918), 259 Fed. Rep. 367, The Pesaro, 271 U.S. 562; 46SCT 611.

(5) 324 U.S. 30.

(6) The Beaton Park (1946) 65 Fed. S. 211

(7) Brown vs. The Indochine (1922), 21 Ex. C.R. 406

established

> "the general principle that immunity from arrest of a foreign state-owned ship is not affected by the vessel being used for trading purposes and as a cargo carrier, that it matters not how the vessel is being employed and that a Sovereign State cannot be impleaded indirectly by proceedings in rem against its property". (8)

It should be noted that this case preceded the British and American cases casting doubt on the doctrine's application to commercial matters.

17. In Thomas White vs. The Ship Frank Dale (9) the case involved a ship owned by the Government of the United States and operated under a charter party between that Government and West India Sales Limited for commercial purposes. The Canadian Admiralty Court Judge did not mention the earlier Canadian decision in Brown vs. The Indochine but came to the same conclusion on the basis of the British House of Lords decision in The Cristine (10) and the United States Supreme Court decision in The Pesaro. (11) He voiced some misgivings about applying the doctrine, however, in the following passage:

> "In The Cristine case the Courts held that the immunity claimed extended and applied to ships engaged in trade and belonging to a foreign sovereign state. The desirability of modifying the accepted rule so far as it concerned trading ships was pointed out by some of their Lordships and particularly by Lord Maugham, but the House was of opinion that in the case the immunity was properly claimed. That seems to be the principle applied in the United States: Berizzi Bros. Co. vs. S.S. Pesaro, and until changed must be accepted by our Court." (12)

Apart from the doubts which the courts themselves seem to entertain on this question there is a considerable body of criticism by text writers of the absolute or classical

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(8) op cit., at p. 424

(9) Thomas White vs. The Ship Frank Dale [1946] Ex. C.R. 555.

(10) op cit.

(11) op cit.

(12) [1946] Ex C.R. at p. 556.

theory of the doctrine of sovereign immunity (13). It can be seen therefore that international law on this subject is in a state of flux, and although Canadian law still gives effect to claims to immunity of state-owned trading vessels, there is reason to believe the law may in the near future undergo a change in favour of the restrictive theory.

III POLITICAL ISSUES

A. Implications of Applying or not Applying the Doctrine of Sovereign Immunity

18. Apart from the political implications vis a vis Cuba (and Canadian interests there) should it be held that the doctrine of sovereign immunity does not apply in this case, the question has other implications. For instance, the question of the immunity of a Canadian Immigration official is presently before an American court in the Thomson case; since the issue there is an extension of this same principle a decision that an exception exists under Canadian law could conceivably embarass us in that case. Apart from such immediate considerations however, is the more long term question of the possible commercial effects of a decision one way or the other. The question arises as to whether it is in Canada's interest to continue to apply the doctrine in its classical or absolute form or whether the time has come to adopt the more restrictive view.

B. Role of the Executive in Applying the Doctrine

19. There is a class of facts which are conveniently called "facts of state" the determination of which is solely in the hands of the Crown or the Executive. Examples of such "facts of state" are the status of a diplomat, recognition of a government or the existance of a state of war. (14)

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(13) W. Friedman, The Growth of State Control (1938) 19 British Year Book of International Law, 119; F.A. Mann (1955), 18 Modern Law Review 184. See also the note on The Republic of Mexico vs. Hoffmann by Bishop in his Cases and Materials on International Law, 1953 edition at page 443, and the comments by St. J. MacDonald in his article on Public International Law Problems arising in Canadian Courts, in the University of Toronto Law Journal, Vol. 11 No. 2, 1956 at pp. 239-240, and his comment on Rahmintoola vs. Nizam of Hyderabad [1957] 3 All. E.R. 441, (a decision in which the House of Lords unanimously allowed the State of Pakistan to ward off a claim for a debt situated in England on the grounds of sovereign immunity) appearing in Vol. XXXVI 1958 Canadian Bar Review.

(14) Halsbury, Laws of England, 3rd edition, Vol. 7, section 603 beginning on page 258: Moore, Digest of International Law (1906) Vol. 5 page 243: J. MacLeod Hendry in Sovereign Immunity from the Jurisdiction of the Courts Power in the Canadian Bar Review, Vol. 36 number 2, May 1958 issue at page 163

These questions are considered by the courts as political rather than judicial questions and it is a well established principle that British and American courts will rely on the statements of the Executive organs of Government in questions involving the conduct of international relations.

(1) Role of the Executive in the United Kingdom

20. The practice in the United Kingdom is that the court will request from the Executive a written answer to questions involving "facts of state", and the certificate issued by the Foreign Office is treated as conclusive, the courts taking judicial notice of the facts as stated.

21. Halsbury does not list the question of immunity of a ship among the examples he gives of "facts of state", and a reading of the cases suggests that the United Kingdom Foreign Office appears to take a rather restrictive interpretation of their role in cases involving this question. Their position is illustrated by the following excerpt from a House of Lords decision as to whether or not the doctrine applied to a ship owned by Portugal

> "The Foreign Office stated the precise facts as then existing in regard to recognition by His Majesty's government by the decision of which recognition is given or withheld. The question of law left to the court was what was the effect of those facts on the issue before the court." (15)

There do not appear to be any reported cases where the Foreign Office has intervened on the substantive issue of immunity of a ship.

(2) Role of the Executive in the U.S.

22. The procedure for raising a claim of immunity has been before American courts a number of times; the courts make a distinction between a "suggestion" filed by the parties and one filed by the Department of State; either or both could be filed, but the former was reviewable while the effect of the latter was conclusive for practical purposes (16). In practice the U.S. State Department takes a different view of its position to that taken by the United Kingdom Foreign Office and is prepared to voice a "suggestion" as to whether or not diplomatic immunity applies to the ship in question (17). The rationale of the U.S. State Department position was set out as early as 1918 in a letter to the Attorney General of the United States, dated November 8, 1918, from Secretary of State Lansing, in which

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(15) Lord Wright in the Arantzazu Mendi [1939] p. 37

(16) The Navemar (1937) 303 U.S. 68

(17) The Arminde, Hackworth vol. 2 at page 446, The Attulita, 238 Fed. 919; Hoffmann vs. Mexico, op cit.

he expressed the view "where foreign vessels were engaged in commercial pursuits, they should be subject to the obligations and restrictions of trade if they were to enjoy its benefits and profits," and went on to give his reasons for holding this view.

23. The purpose of his letter was to suggest in a case involving the libel of an Italian Government-owned vessel (18) engaged in commerce and brought before the Supreme Court of the U.S. that the Department of Justice present the doctrine of non-immunity. (The Attorney General declined to accede to the suggestion on the grounds that he could not urge on the court a position which he believed to be unsound).

24. The State Department's position was further developed in a letter dated May 19, 1952 addressed to the Acting Attorney General of the U.S. by the U.S. State Department's Acting Legal Adviser Jack B. Tate. (A copy of this letter is attached as Annex "C" because of its importance in the development of this aspect of international law). It is worth noting that after having recounted the history of the doctrine of sovereign immunity and the distinction between sovereign or public acts (jure imperii) and private acts (jure gestionis) as applied by various countries, and pointing out the trend towards the restrictive theory, as opposed to the classical theory of sovereign immunity, and the reason for this trend, Mr. Tate went on to say:

> "It is realized that a shift in policy by the Executive cannot control the Courts, but it is felt that the Courts are less likely to allow a plea of sovereign immunity where the Executive has declined to do so. There have been indications that at least some justices of the Supreme Court feel that in this matter the Court should follow the branch of the government charged with responsibility for the conduct of foreign relations."

The latter statement may have been a reference to Mexico vs. Hoffmann, a decision which not only restricted the doctrine of sovereign immunity but gave a mandate to American courts to follow the lead of the Executive Department.

C. Role of the Executive in Canada

25. The form of the certificate issued by the Department in the case of the S.S. Elise is given in the attached memorandum dated August 18 (Annex "B"). The questions put to the Department dealt only with the issue of recognition, and the certificate accordingly confined itself to that issue.

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(18) The Attulita 238 Fed. 919.

In Brown vs. The Indochine however, the French Consul General at Montreal sent a Note to the Department stating:

> "Que le vapeur Indochine propriété de l'Etat français (Gouvernement Général de l'Indochine) a été l'objet d'une saisie ordonnée par la Cour d'Amirauté de Québec le 14 août 1922 sur la demande de M. Peter Brown, Jr., propriétaire du vapeur Sarmatia. J'ai l'honneur de faire remarquer que ce vapeur étant la propriété d'un Etat avec lequel le Canada entretient de bonnes relations d'amitié ne saurait être l'objet d'une saisie même conservatoire. Je vous serais donc reconnaisant de bien vouloir porter ce fait à la connaissance de Mr. le Ministre de la Justice",

The Deputy Minister of Justice brought before the Court (just how is not clear) the "suggestion" that "if the Government of France in fact be, as alleged, the proprietor of the steamship the Indochine these proceedings are without jurisdiction upon the authority of the case of The Scotia (1903) AC 501) and the cases there cited by Counsel in argument." In the report of Thomas White vs. The Ship Frank Dale (19) no indication is given of the manner in which the claim to immunity was brought before the Court.

IV CONCLUSIONS

It can be seen from the foregoing that the mere existance of the "certificate" of the Foreign Office or the "suggestion" of the Department of State or of the Department of External Affairs is of considerable importance, since it can predetermine the issue before the court. This is perhaps as it should be in matters of international law which depend so much on customary usage for its development, but it places a heavy onus on the Executive to determine when and how to intervene in court cases. The question arises as to what extent the question should be determined by the Executive and to what extent it should be left to the Judiciary. The case of Brown vs. The Indochine could be considered as a precedent for a certificate affirming that if the ships belong to Cuba as

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(19) The Department's position in this case does not appear to have been entirely consistent with that taken in the U.S. decision The Arminda. (Hackworths Cases, vol. 2 at page 446). In the latter case the Canadian Minister in Washington protested to the State Department (on behalf of the charterer of the steamship Norford, a salvage ship which had incurred expenses in salvaging the Arminda,) against the action of the State Department in filing a suggestion that the court lacked jurisdiction because of the public status of The Arminda The Canadian Note submitted that the State Department should withdraw its suggestion and leave the adjudication in the hands of the court for its sole determination. See also the reference to The Beaton Park supra. This inconsistency appears no worse however that that which exists between the position presently being taken by the State Department in The Thomson case and the position it presumably adopted in White vs. The Ship Frank Dale.

alleged then they are immune from suit. It is submitted, however, that since the effect of a certificate differing in substance from that issued in Brown vs. The Indochine could be the bringing about of a change in Canadian law, such a question should be determined on the basis of policy considerations, perhaps only after consultation with other interested departments. Furthermore, if it is determined that Canadian policy on this question should be changed, then it should be borne in mind that such a change need not be brought about by the form of certificate issued in these cases; it could also be done either by domestic legislation or by adherance to an International Convention. (20)

Legal Division

(20) The Brussels Convention signed on April 10, 1926 exempts from the doctrine of sovereign immunity state-owned or state-operated commercial vessels; Belgium, Brazil, Chile, Estonia, Hungary, Poland, Germany, the Netherlands, Roumania, Denmark and Sweden have become parties to the Convention while the U.S., U.K. and Canada have not;

Article 9 of the Convention on the High Seas adopted at the Geneva Conference in 1958 exempts only ships owned or operated by a state and used solely on government non-commercial services, and does not deal with state-owned commercial ships. Canada did not support the Soviet bloc move to have state-owned trading vessels included in Article 9; attached as Annex D to this Memorandum are excerpts from the Commentary and Report on the Conference, which indicate that some preliminary thinking on this latter question may have already been done by the Department.

ANNEX "A" RESTRICTED

DEPARTMENT OF NATIONAL DEFENCE

Office of the Judge Advocate General

HMC Dockyard, Halifax, N.S.

6 October, 1960.

Captain J.P. Davis, RCN,
Deputy Judge Advocate General (Navy),
Department of National Defence,
Ottawa 4, Ontario.

Request from Department of External Affairs to hold a watching brief on a case in the Admiralty Division of the Exchequer Court in Halifax

Reference is made to our AJAG/O-3 dated 23 September, 1960 and your JAC/N dated 30 September, 1960.

2. Information has now been received of some rather startling developments in this case. Apparently when Mr. Justice Pottier heard this case he was extremely ill and was hospitalized immediately after argument was completed. On 27 Sep 60 Mr. McInnes, who represents the Cuban Government in this case, approached Mr. Justice Pottier in the presence of the solicitors for the plaintiff and obtained a Judgment in favour of the defendants and an Order for the release of the seven ships. The plaintiff immediately filed an Appeal before Chief Justice Illsley who also acts as the judge in Admiralty in the absence of Mr. Justice Pottier.

3. Argument was heard on 30 Sep 60 before Mr. Justice Illsley and as a result of the medical evidence presented, both parties filed under the Admiralty Rules a Consent Order in which it was agreed that the original proceedings, with the exception of the Warrant of Arrest, should be considered null and void. Chief Justice Illsley has concurred in the Consent Order and a trial De Novo has been set down for 14 Nov 60.

4. Incidentally, Mr. Kerr, the solicitor for the plaintiff, has indicated that he intends to approach the Department of External Affairs on the question as to whether the Canadian Government recognizes the sovereign immunity of the Republic of Cuba, bearing in mind that the doctrine of Sovereign Immunity is based upon the comity of nations and the respect by one sovereign state for the immunity of other sovereign states. Apparently he has in mind that the Republic of Cuba, according to recent newspaper reports, has apparently not recognized the sovereign immunity of U.S. Embassy employees in Cuba. Mr. Sicotte will undoubtedly receive this request in the next few days.

Sgd. D.H. Harrison
(D.H. Harrison) Major
Deputy Judge Advocate

DHH/2430/rhr

ANNEX "B"

DEPARTMENT OF EXTERNAL AFFAIRS

MEMORANDUM

TO: MR. SICOTTE

FROM: J.A. BEESLEY

REFERENCE: Enquiry From Mr. Viadero, Cuban Embassy, to the Chief of Protocol.

SUBJECT: Canadian Ships Sold to Cuba.

Security SECRET

Date August 18, 1960

File No. 11067-A-40
10464-A-40

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I Our Practice Re: Giving Certificates:

Our practice in the case of requests for certificates confirming recognition of a Foreign Government followed that of the United Kingdom rather than that of the United States, when the question was presented to the Department in 1946 in the case of the S.S. Elise, (File 1076-A-40)(reported in 1948 Canada Law Reports 435), which involved the question of recognition of Soviet acquisition of Estonia. According to our Embassy in Washington (tel. WA-37447 of Oct 21, 1946 File 1076-A-40R) "it is the practice of the State Department to issue certificates such as the one under reference, not only to courts but also to litigants." On the other hand, the United Kingdom High Commissioner's Office in Ottawa obtained from the Foreign Office, (see letter 850L/206 dated November 7/46) the following information as to the U.K. practice:

"(1) Except where the Crown is party to litigation, the Foreign Secretary does not give certificates at the request of one private party to litigation only. He does however in suitable cases, give certificates or formal answers to questions which are formulated by agreement between both private parties to litigation.

"(2) In other cases the Foreign Secretary refuses to give a certificate at the request of private parties, and replies to the effect that he would prefer that question to be put to him should be formulated by the judge.

"(3) The choice between (1) and (11) depends upon the nature of the case. To refuse to give answers to questions which are formulated by both parties in agreement will sometimes involve the parties in unnecessary trouble and expense. Further it may happen that the answer to questions so put is conclusive to the extent that the litigation is settled in view of the answers so given, and the case need not then come for decision at all.

"On the other hand if the Foreign Secretary is not satisfied that the questions formulated by the two parties in agreement are almost certainly those which the judge would himself formulate, his reply is that he would prefer to await the questions formulated by the Court."

CIRCULATION

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2. The Canadian Cabinet decided in 1946 to follow the United Kingdom rather than the United State's practice in the S.S. Elise case. According to a Cabinet Minute (marked Secret and not to be copied quoted or referred outside the Department of External Affairs) it was agreed at the meeting of the Cabinet on November 15, 1946 "that Canada should not extend de jure recognition to the Estonian Republic but to recognize it as a de facto Government of Estonia. Also that a reply of that effect should be given only on the formulation of an inquiry by a Court of Law." The letter sent to the Solicitor for one of the litigants who had requested a certificate from the Government on the question reads as follows:

> "We have given careful consideration to your request for a certificate regarding the status of Estonia.
>
> "The Secretary of State for External Affairs has come to the conclusion that it would be appropriate for him to do either of the following things in the present case:
>
> 1. To answer questions about the status of Estonia put to him by the Court.
>
> 2. To answer such questions put to him by agreement between all the parties to the action in order that the questions and answers might be included in a stated case. (I understand that the Custodian is not actually a party to the action).
>
> "The Secretary of State for External Affairs is not prepared to answer questions put to him by only one of the parties to this action, or to issue to one of the parties a certificate regarding the status of Estonia."

3. As you will note the letter from the Under-Secretary went further than the minute of the Cabinet meeting seemed to permit, but a subsequent memorandum for the Legal Adviser dated November 29, 1946 from the Assistant Secretary to the Cabinet stated that the decision of the Cabinet on November 15 might also be taken to cover a reply given to questions formulated by an agreement of the parties to the action.

4. The solicitors for all the parties to the S.S. Elise action subsequently agreed on the form of certain questions and submitted them to the Secretary of State for External Affairs. Attached is a photostat of the letter dated January 2, 1947 sent in reply by the Secretary of State for External Affairs to the lawyers for the plaintiffs in the S.S. Elise case.

II Recognition of Present Government of Cuba

Attached is a photostat of a memorandum dated August 11, 1960 from Latin American Division to Mr. Ritchie which gives the background in the case of the Cuban ships in question. The Canadian Government formally recognized the

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provisional Government of Cuba headed by President Urrutia on January 8, 1959. (Attached is a photostat of a circular note dated January 6, 1959 from the Cuban Government requesting recognition and the note number 2 dated January 8, 1959 from our Mission in Cuba sent in reply).

2. The only reference in Hansard to recognition of Cuba that I have been able to find is contained in page 8 of Volume 103 number 2 of the second section of the 24th Parliament when on January 16, 1959 Mr. Hazen Argue referred to Canada's recognition of Cuba in a question concerning the executions then taking place in Cuba. The Prime Minister's reply did not explicitly deal with the question of recognition.

Sgd. J.A. Beesley

Note:

Since dictating the above, I have spoken to Mr. Langille and he has pointed out a possible distinction between this case and that of the S.S. Elise, in that the request in this case has come through the Cuban Embassy, and could perhaps therefore be deemed a request from the Cuban Government.

Presumably such a request from a government recognized by Canada could not be refused.

Havana, Cuba,
January 6, 1959

No. 2

Excellency,

I have the honour to confirm the information which was telephoned to the Protocol Division of the Ministry of State this afternoon advising the Ministry that the Canadian Government had recognized the new Government of Cuba under the provisional Presidency of Dr. Manuel Urrutia Llee.

I have been instructed by my Government to inform Your Excellency that they have noted with satisfaction the assurances given by the new Government of Cuba that all international obligations and treaties at present in force will be respected.

May I also express the hope that the friendly relations which have traditionally existed between the Republic of Cuba and Canada will continue.

Accept, Excellency, the assurances of my highest consideration.

H.E. Dr. Roberto Agremonte Pichardo,
Minister of State,
HAVANA.

ANNEX "C"

(Copy - from the U.S. State Department Bulletin, Vol. XXVI, June, 1952)

CHANGED POLICY CONCERNING THE GRANTING OF SOVEREIGN IMMUNITY TO FOREIGN GOVERNMENTS

Following is the text of a letter addressed to Acting Attorney General Philip B. Perlman by the Department's Acting legal Adviser, Jack B. Tate:

May 19, 1952.

MY DEAR MR. ATTORNEY GENERAL:

The Department of State has for some time had under consideration the question whether the practice of the Government in granting immunity from suit to foreign governments made parties defendant in the courts of the United States without their consent should not be changed. The Department has now reached the conclusion that such immunity should no longer be granted in certain types of cases. In view of the obvious interest of your Department in this matter I should like to point out briefly some of the facts which influenced the Department's decision.

A study of the law of sovereign immunity reveals the existence of two conflicting concepts of sovereign immunity, each widely held and firmly established. According to the classical or absolute theory of sovereign immunity, a sovereign cannot, without his consent, be made a respondent in the courts of another sovereign. According to the newer or restrictive theory of sovereign immunity, the immunity of the sovereign is recognized with regard to sovereign or public acts (jure imperii) of a state, but not with respedt to private acts (jure gestionis). There is agreement by proponents of both theories, supported by practice, that sovereign immunity should not be claimed or granted in actions with respect to real property (diplomatic and perhaps consular property excepted) or with respect to the disposition of the property of a deceased person even though a foreign sovereign is the beneficiary.

The classical or virtually absolute theory of sovereign immunity has generally been followed by the courts of the United States, the British Commonwealth, Czechoslovakia, Estonia, and probably Poland.

The decisions of the courts of Brazil, Chile, China, Hungary, Japan, Luxembourg, Norway, and Portugal may be deemed to support the classical theory of immunity if one or at most two old decisions anterior to the development of the restrictive theory may be considered sufficient on which to base a conclusion.

The position of the Netherlands, Sweden, and Argentina is less clear since although immunity has been granted in recent cases coming before the courts of those countries, the facts were such that immunity would have been granted under either the absolute or restrictive theory. However, constant references by the courts of these three countries to the distinction between public and private acts of the state, even though the distinction was not involved in the result of the case, may indicate an intention to leave the way open for a possible application of the restrictive theory of immunity if and when the occasion presents itself.

A trend to the restrictive theory is already evident in the Netherlands where the lower courts have started to apply that theory following a Supreme Court decision to the effect that immunity would have been applicable in the case under consideration under either theory.

The German courts, after a period of hesitation at the end of the nineteenth century have held to the classical theory, but it should be noted that the refusal of the Supreme Court in 1921 to yield to pressure by the lower courts for the newer theory was based on the view that that theory had not yet developed sufficiently to justify a change. In view of the growth of the restrictive theory since that time the German courts might take a different view today.

The newer or restrictive theory of sovereign immunity has always been supported by the courts of Belgium and Italy. It was adopted in turn by the courts of Egypt and of Switzerland. In addition, the courts of France, Austria, and Greece, which were traditionally supporters of the classical theory, reversed their position in the 20's to embrace the restrictive theory. Rumania, Peru, and possibly Denmark also appear to follow this theory.

Furthermore, it should be observed that in most of the countries still following the classical theory there is a school of writers, influential at least in civil law countries, are a major factor in the development of the law. Moreover, the leanings of the lower courts in civil law countries are more significant in shaping the law than they are in common law countries where the rule of precedent prevails and the trend in these lower courts is to the restrictive theory.

Of related interest to this question is the fact that ten of the thirteen countries which have been classidied above as supporters of the classical theory have ratified the Brussels Convention of 1926 under which immunity for government owned merchant vessels is waived. In addition the United States, which is not a party to the Convention, some years ago announced and has since followed, a policy of not claiming immunity for its public owned or operated merchant vessels. Keeping in mind the importance played by cases involving public vessels in the field of sovereign immunity, it is thus noteworthy that these ten countries (Brazil, Chile, Estonia, Germany, Hungary, Netherlands, Norway, Poland, Portugal, Sweden) and the United States have already relinquished by treaty or in practice an important part of the immunity which they claim under the classical theory.

It is thus evident that with the possible exception of the United Kingdom little support has been found except on the part of the Soviet Union and its satellites for continued full acceptance of the absolute theory of sovereign immunity. There are evidences that British authorities are aware of its deficiencies and ready for a change. The reasons which obviously motivate state trading countries in adhering to the theory with perhaps increasing rigidity are most persuasive that the United States should change its policy. Furthermore, the granting of sovereign immunity to foreign governments in the courts of the United States is most inconsistent with the action of the Government of the United States in subjecting itself to suit in these same courts in both contract and tort and with its long established policy of not claiming immunity in foreign jurisdictions for its merchant vessels. Finally, the Department

feels that the widespread and increasing practice on the part of governments of engaging in commercial activities makes necessary a practice which will enable persons doing business with them to have their rights determined in the courts. For these reasons it will hereafter be the Department's policy to follow the restrictive theory of sovereign immunity in the consideration of requests of foreign governments for a grant of sovereign immunity.

It is realized that a shift in policy be the executive cannot control the courts but it is felt that the courts are less likely to allow a plea of sovereign immunity where the executive has declined to do so. There have been indications that at least some Justices of the Supreme Court feel that in this matter courts should follow the branch of the Government charged with responsibility for the conduct of foreign relations.

In order that your Department, which is charged with representing the interests of the Government before the courts, may be adequately informed it will be the Department's practice to advise you of all requests by foreign governments for the grant of immunity from suit and of the Department's action thereon.

Sincerely yours,

For the Secretary of State

JACK B. TATE
Acting Legal Adviser

ANNEX "D"

Excerpts from Commentary to Canadian Delegation, Law of the Sea Conference, Geneva, February 24, 1958.

The Canadian Commentary on Article 37 (Part II High Seas) which later became Article 9 of the Convention on the High Seas reads as follows:

"Immunity of other government ships

Article 33

For all purposes connected with the exercise of powers on the high seas by States other than the flag State, ships owned or operated by a State and used only on government service whether commercial or non-commercial, shall be assimilated to and shall have the same immunity as warships."

Comment

It is not clear from the Article itself whether it contemplates the exercise of powers "over" assimilated ships or the exercise of powers "by" the assimilated ships. This ambiguity is settled in the Commission's commentary.

> "The Commission thinks it worthwhile pointing out that the assimilation referred to in Article 33 concerns only the immunity of ships for the purpose of the exercise of powers by other States, so that there is no question of granting to ships that are not warships policing rights over other ships, exercisable under international law only by warships."

It might be preferable to clarify this point by rewording the Article as follows:

> "Ships owned or operated by a State and used only on government service, whether commercial or non-commercial, have complete immunity from jurisdiction of any State other than the flag State."

Excerpts from Final Report of the Canadian Delegation to the Geneva Conference, February 24 - April 28, 1958.

The following excerpts from the report of the Canadian Delegation to the Geneva Conference are also apropo:

> "This arrangement is made possible because of the British Commonwealth Shipping Agreement which is a companion document to the Statute of Westminster. Among other things the B.C.M.S.A. provides that all ships of all members of the Commonwealth shall have a common status as regards qualifications for registry.
>
> "Because of this community of interest it was essential that, wherever possible, the attitude adopted by Canada in relation to the work of Committee II, should take fully into account the position of the United Kingdom. Consideration had also to be given

.../2

to the position of other Commonwealth delegations .....

"On proposals to assimilate state-owned ships, used for commercial purposes, to warships, Mexico and Panama were the only delegations, other than the Soviet bloc, in favour. Thirteen states spoke in opposition .....

"Ships owned or operated by a State and used only on government non-commercial service shall, on the high seas, have complete immunity from the jurisdiction of any State other than the flag State."

"The larger Maritime Powers - U.K., U.S.A., the Scandinavians, West Europeans and some others opposed the ILC draft of Article 33 which assimilated state-owned merchant ships to warships for purposes of immunity. The Soviet bloc, Arab States and Mexico supported the ILC text and the principle of immunity for such ships. The question was whether ownership or use was to be the criterion for determining immunity. The argument of the Soviet Union was that a ship was part of the territory of the state and hence, if immunity were denied, it would be a violation of the principle of the sovereign equality of states. The cause of the USSR was supported by the findings of the ILC and the Commission's recommendation in draft Article 33. The Soviet delegate made a strong argument and cited a number of UK and U.S.A. decisions which seemed to support his thesis. The U.S.A. delegate pointed out that the concept of state-owned commercial ships was a relatively new one and that hence a new concept of immunity was required. A proposal of the U.S.A. for an entirely new wording of Article 33 was adopted by 46 in favour (Canada) to 9 against, with 2 abstentions. This new wording provides that state-owned ships used only on government non-commercial service have complete immunity. In plenary the vote was 55 to 11, with 10 abstentions."

CONFIDENTIAL

March 7, 1963.

NOTE FOR FILE 5475-AX-38-40

Legal Planning Committee Subjects:
Telephone Conversation between Mr. Cadieux and Mr. Beesley

Mr. Cadieux would like an analysis prepared by Economic Division on the economic and financial pros and cons involved in acceding to the OECD Protection of Property Convention and the IBRD Investment Insurance Scheme, and a discussion of related questions touching on the U.N. Item Permanent Sovereignty over National Resources, so that a consistent position may be developed on all three questions. After the economic and financial issues are defined the Committee can discuss the desirability of consulting with the Department of Justice on the need for a federal clause or for consulting with provinces on the various matters. (Economic Division has since agreed to prepare a brief paper along the lines above set out).

2. On the withdrawal of reservations to the International Court, a paper should be circulated setting out the suggested form of words.

3. On the U.N. Assembly "Friendly Relations Resolution", the U.N. Division paper is very helpful; perhaps greater emphasis could be laid on the point that the basic principle on which the Charter is founded is sovereign equality of states and that the other principles in question are to some extent an elaboration of that principle flowing from it.

4. On treaty questions, the paper on constitutional problems, considered at an earlier meeting, should be revised so as to incorporate the conclusions of the Legal Planning Committee and expanded so as to cover not only original treaties but revisions. The paper on rebus sic

cc: Mr. Cadieux
Mr. Wershof
Mr. Kingstone
Mr. Copithorne

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stantibus is helpful but conclusions should be suggested at the end of each section e.g. how flexible should we be on a question of termination of treaties. A study will also be required on the question of mutual incompatible treaties.

5. An examination should be made of which subjects are now covered and which still remain to be studied in preparation for the Spring session of the I.L.C. One meeting of the Legal Planning Committee should be devoted to finishing up questions relating to this next session of the I.L.C.

6. On sovereign immunity there should be a short position paper pointing up the problem and making recommendations.

J.A. Beesley

O/USSEA/A. deW. Mathewson/PS

RESTRICTED

March 7, 1963.

File 5475-AY-38 40
1 JB

MEMORANDUM FOR MR. CADIEUX

Glassco Recommendations concerning
the Legal Service of External Affairs

You may wish to keep with you the attached paper giving the terms of reference and membership of the "Legal Service Committee" established by the Bureau of Government Organization.

2. Below I have set out some points that might be worth considering when the Committee reaches the Glassco Commission's views and recommendations on the rôle and composition of the legal branch of this Department. The quotations are taken, sentence by sentence, from the "proposal" and "recommendation" on page 416 of Volume II of the Glassco Commission Reports.

(a) "The Legal Division of External Affairs should be headed, as now, by a permanent legal adviser who would have no responsibility (as he now has) for administration or policy decisions outside the operation of the Division".

3. After reading this one is left in some doubt as to whether the Commissioners were really aware of the organization of the legal service of this Department. Legal Division is not necessarily headed by anybody who is "permanent" nor is he the "legal adviser". That somebody who heads the Legal Division should occupy that position for more than a couple of years is indisputable. This can be said of the head of any division of the Department. However, this does not make the man "permanent" head. Nor can one long sustain the argument that either in theory or in practice it makes sense (within the present hierarchial structure of the Department) to divorce legal advice from consideration of "administration or policy decisions outside the operation of the Division". Indeed the Commissioners themselves, earlier in the text, observe that "International law is intimately bound up with high policy questions and relationships with other nations".

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4. The Commissioners are aiming at the creation of a unit that would be outside the normal service of the Department and would, organizationally speaking, stand to one side of the Department. The conception is, in fact, that of the legal department of a corporation which is concerned exclusively with the legal work of the corporation. The staff is specialist - it does not normally come from or go to other branches of the corporation. It is exclusive - it does not concern itself with any but the legal consideration. This explains the proposal for a change in the current nomenclature of the senior legal officer of the Department and emphasis on specialists to staff the unit.

(b) "The title 'General Counsel' might more appropriately describe the character of this position than the present title of 'Legal Adviser'"

5. - This is quite true if the character of the legal service associated with or attached to this Department were to change. However the "Legal Adviser" is not the head of our Legal Division. The title is given both as an honour and in recognition of the fact that the head of the Department turns to the "Legal Adviser" for legal advice. It is not necessarily the function of the Legal Adviser to direct or supervise the legal work of the Department.

(c) "Under the 'General Counsel' should be a senior advisory counsel seconded by the Department of Justice and a member of the integrated service."

6. - Under the arrangement the Commissioners contemplate this might be very useful. The officer on secondment from Justice would be the No. 2 man in the legal unit divorced from the foreign service. But if we reject the Commissioners' concept of the legal unit of External Affairs it would not be appropriate to have the man from Justice as head of the Legal Division - i.e. No. 2 to the Legal Adviser.

(d) "In addition to administrative duties within the Branch, this officer should, in particular, act as a clearing house on matters of domestic law and on references to the Department of Justice."

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7. - Hurrah! If the Department of Justice will make such a man available to do this work (whatever is meant by the description) this should be helpful.

(e) "He should have primary responsibility for initial drafting of changes in legislation or regulations."

8. - This could be a full time occupation.

(f) "This officer would also provide what is now sadly lacking - a focal point to which references from other departments on questions involving international law would be sent, as well as a central source for experts on treaty matters."

9. - This statement demonstrates as clearly as any the intentions of the Commissioners that regardless of the formal connection the legal service of External Affairs should be divorced from the Department and given a high degree of autonomous or independent existence. It suggests something less than unbounded satisfaction of other departments with the service given in the past by our Legal Division which over the years has led to the reliance by various departments on their own legal resources. Expertise in treaty matters is, of course, difficult and time consuming to acquire but this expertise has been provided in the past by this Department and one wonders whether the Commissioners consider a new legal unit would be providing a new service.

(g) "The presence of a lawyer seconded from the integrated legal service should promote a better understanding between the Departments of Justice and External Affairs ..."

10. - The presence of such an officer in the Legal Division of External Affairs as now organized might be very helpful to relations between our two Departments. However it is questionable whether the legal division as conceived by the Commissioners would be conducive to harmony in relations between External Affairs and Justice. Given such an arrangement it is not difficult to imagine monumental clashes between External Affairs and Justice or perhaps (depending on personalities) between External Affairs and the Legal Division.

(h) "... as well as a coordinating point for the currently dispersed efforts of various departments in this specialized area."

11. - Do the Commissioners think "efforts in this specialized area" should be centralized or should they continue to be dispersed and merely "coordinate" in the External Affairs Law Office? (This unit gets to look more like a branch office of the Department of Justice all the time.) If they are thinking of "coordination" the need for "specialists" in the unit will be modest. However, if it is centralization they are after then other departments will have to surrender some of their lawyers and will have to be directed to turn over their work involving questions of international law to the External Affairs unit.

(i) "The staffing of the Legal Division by the rotation of Foreign Service Officers - some for extremely short periods - should be modified to build up a core of specialists in international law, permanently resident in Ottawa, and making a career in this special field of law."

12. - This observation leads one into the broad field of personnel administration in the foreign service of Canada and poses a number of questions that cannot be answered in relation to international law alone. The whole question of "specialists" in the Department is under study but one is tempted to ask what is meant by "permanently resident in Ottawa" and what sort of a career would be open to somebody who was not only restricted as to his field but also as to his mobility? Of course, if the new organization were large enough ...

(j) "Any other requirements of the Division should be met by assigning Foreign Service Officers qualified to practice law. The posting period should be from four to five years. If more international law training is needed for foreign service officers generally than can be provided under the foregoing conditions, educational leave or special training courses should be employed to meet such need."

13. - Why should service in the Legal Division be limited to F.S.O.'s"qualified to practice law"? It is doubtful whether all "specialists" would be so qualified. Apart

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from this anomaly one must question what is meant by assigning F.S.O.'s to meet "any other requirements". If by this it is meant that F.S.O.'s should be thrown in on an ad hoc basis then the Commissioners were badly misinformed regarding the availability of F.S.O.'s. However, if it is thought that there might be a few F.S.O.'s assigned to do odd jobs then the Commissioners were badly misinformed as to the attraction the Legal Division would have, under such circumstances, for the legally trained F.S.O. Indeed the only attractive aspect of this proposal is the recognition that F.S.O.'s might benefit from educational leave or special training courses in international law. However, this is hardly a new idea for these devices have been used by the Department for years to improve the expertise available in the Department in various aspects of international law.

"We therefore recommend that:

> A strengthened Legal Division of the Department of External Affairs assume responsibility for co-ordinating the international legal work of departments and agencies and provide the expert assistance required on such matters as treaty negotiation."

14. - Amen. However, this is virtually meaningless by itself and, interpreted in the light of what went before, one cannot but have the gravest doubts as to the value of the recommendation.

A. de W. Mathewson
A.deW.M.

DEPARTMENT OF EXTERNAL AFFAIRS

MEMORANDUM

TO: Mr. Cadieux, Chairman,
Legal Planning Committee

FROM: J.A. Beesley

REFERENCE:

Security CONFIDENTIAL

Date March 7, 1963.

File No ~~5004-C-40~~ 5475-AX-3E-40

SUBJECT: Canada's Proposed new Declaration accepting Compulsory Jurisdiction of the International Court unconditionally.

The form suggested for Canada's proposed new declaration is as follows:

> In accordance with paragraph 2 of Article 36 of the Statute of the International Court of Justice, Canada hereby accepts as compulsory ipso facto and without special agreement, in relation to any other state accepting the same obligation, the jurisdiction of the International Court of Justice in all legal disputes (arising) after the _____ day of _____ 1963.

The reasoning in favour of using this particular form, or some variation of it, ~~are~~ is set out in the attached memorandum of March 12, 1962.

JB

J.A. Beesley,
Secretary,
Legal Planning Committee

CIRCULATION

Mr. Wershof
Mr. Kingstone

Ext. 326 (6/56)

8.3.10(05)

CONFIDENTIAL

March 12, 1962.

File: 5004-C-40

Proposed New Canadian Declaration of Acceptance of Compulsory Jurisdiction of the International Court of Justice: Points for Possible Discussion by Legal Planning Committee

Nature of the Reciprocity Condition

The condition of "reciprocity" stands on a different footing from all the other reservations contained in the Canadian Declaration of Acceptance of the Compulsory Jurisdiction of the International Court of Justice in three important respects.

Firstly, it is not just another restriction ruling out a particular class of case. It is a pre-condition to acceptance of jurisdiction covering all classes of cases. It is therefore different in nature from the other conditions.

Secondly, the condition is more important than any of the other conditions, and even, perhaps, all the others taken together, since it provides in essence that Canada shall not be placed at an unfair advantage in litigation with another country. It achieves this by providing that Canada shall not be hailed into court by another country which has not accepted the compulsory jurisdiction of the court. It provides further that Canada shall have the right to invoke against a potential adversary any reservation which that adversary might be able to invoke against Canada on the basis of its own declaration. Clearly, the protection of such a condition is not one which should be lightly cast aside without assuring protection by other means with absolute certainty.

Thirdly, the legitimacy of such a condition is not open to question by other countries or by the

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Canadian public, since it is in no sense an unfair condition but is merely a protection of the basic right (which pertains in domestic law in civilized countries) of equality before the law. Moreover, it in no way impairs the dignity of the court by unduly restricting its jurisdiction, nor would it frustrate the development of the rule of law, since, if every country had no conditions except that of reciprocity, acceptance of compulsory jurisdiction would be absolute and complete. (This illustrates, incidentally, better than anything else the essential distinction between the nature of this condition and that of the others contained in the Canadian declaration.) Consequently, until acceptance of compulsory jurisdiction is more nearly universal, there is little or no odium in a provision which is not, strictly speaking, a reservation so much as an essential pre-condition based on fundamental rights.

It follows from the nature, importance and the legitimacy of this condition that it stands on a different footing from the other conditions and that it should not be abandoned unless there is absolute certainty that the protection which it would afford is available from other means.

Protection of Reciprocity from other Sources

It is argued by Hudson, writing of the Permanent Court (1) and Rosenne writing of the International Court

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(1) Professor Hudson is quite categorical in his opinion that reciprocity is an absolute condition. "Every declaration made under paragraph 2 of Article 36 whether it is made by signature of the potential clause, or otherwise, has this characteristic impressed upon it. It is not a reservation made by the declarant; it is a limitation in the very nature of the declaration which operates or is made "in conformity" with paragraph 2 of Article 36...In a few cases, however, the declaration is made without the use of any such formula, or expressly "without condition". From a legal point of view, the formulae seem to serve no useful purpose; all of the declarations contain the limitation ipso facto, and this is true even though they are said to be

(cont'd)

of Justice (2) that the condition of "reciprocity", contained in one form or another in almost all the declarations of compulsory acceptance which have been filed with the court, is redundant in the light of several decisions of the two courts to the effect that the phrase "in respect to any state accepting the same obligation" occurring in Article 36(2) of the Statute of the court means "reciprocity", in the broad sense of the word: i.e., that any state shall have the right to invoke against any other state the reservations of that other state. Other writers such as Hambro (3)

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(1) cont'd
"without condition". Hudson in The Permanent Court of International Justice, 1943 Ed. at p.465.

(2) Rosenne concurs in this view: "The condition of reciprocity is one commonly inserted specifically, (though, in law, it is probably unnecessary), as is also the condition of ratification ..."The condition of reciprocity specifically mentioned in Article 36(2) applies absolutely; and regardless of whether it is repeated in one or both of the declarations by virtue of which the application is filed. That being so, the jurisdiction of the court will be regulated by the mere limit of the declarations in question, since jurisdiction is conferred on the court only to the extent to which the two declarations coincide in conferring it." Rosenne's "Essay on the International Court of Justice", 1957 Ed. at pp.312 and 315 respectively.

(3) In an Article by Dr. E. Hambro "Some Observations on the Compulsory Jurisdiction of the International Court of Justice" appearing in the British Year Book, 1948, Vol. 25 at p.133 he states at p.136:

"If a state wishes to make its acceptance of the compulsory jurisdiction not subject to any condition, why should it not be able to do so? Is there any rule of international law preventing states from accepting far-reaching unilateral obligations? They may thereby put themselves in a position of inequality as regards other states. They may give up a fraction of their sovereignty. They may consider it laudable for states to give up some of their sovereignty in order to increase the scope of the compulsory jurisdiction of the International Court of Justice.

"The possibility of making declarations which are not based on reciprocity seems, further, to be supported by para. 3 of Article 36, which states unequivocally that the declarations may be made 'unconditionally or on condition of reciprocity on the part of several or certain states'. It is, then, respectfully submitted that it is open to any state to make a declaration accepting the compulsory jurisdiction of the Court in regard to all other states whether or not they have accepted a similar obligation. In view of these considerations it seems safe to assume that it is possible for a state to accept the jurisdiction of the Court without reciprocity, but that such unconditional acceptance cannot be presumed."

and Stone[4] are not so convinced that the statute (of and by itself) provides for reciprocity in the absence of its inclusion also in the declarations of acceptance.

The element of doubt as to whether it is possible to make a totally unconditional acceptance of jurisdiction would seem to rest on four factors:

Firstly and most important, neither court has ever had to pass judgment on a completely unconditional declaration:[5]

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(4) In Julius Stone's "Legal Controls of International Conflict" 1954 Ed. at pp.128 and 129 he states as follows: "A third question is as to the effect of the words "in relation to any other State accepting the same obligation", especially since the paragraph also expressly contemplates that that State may accept the clause on condition of reciprocity of other States. The former words would seem in some senses of both provisions to make such a condition redundant. He goes on to discuss Hambro's views as follows:

"See the acute analysis by E. Hambro, article cited supra n.69, at 136-37; and id. 151-52, on the diverse forms of the reservation and effects thereof. Would a hypothetical State accepting the Optional Clause without conditions be submitting without reservations in relation to other States who have made reservations? Again, do the quoted words not rather mean that as between two litigants the sphere of submission is limited by both sets of reservations; so that either litigant can avail himself of any reservation in the other's acceptance? cf. E. Hambro, op.cit. 952-53. The Court itself adopted this view in the Electricity Company Case, P.C.I.J. Series A/B No.77, at 81, not only with regard to an express reservation of reciprocity, but under the quoted words of Art.36, para. 2 itself. Yet, perhaps, on the other hand, the terms "accept the same obligation" referes merely to the Optional Clause, as it were in gross, regardless of limits within which it is accepted. In addition, some reservations (e.g. of British Commonwealth disputes) are, by their very nature, not reciprocable in favour of non-Members of the Commonwealth.

Mr. Hambro's argument that unconditional submission must be possible since Art. 36 (3) provides that declarations may be made "unconditionally" etc. does not answer this last question. For para. 3 could mean merely that a State would not be bound at all if its condition of reciprocity were not fulfilled, still leaving open the question whether, assuming it to be bound, the words "in relation to any other State accepting the same obligation in para. 2 limit the area within which it is bound to that common to both sides."

(5) It is interesting that Portugal's declaration, while very restrictive, does not contain the express condition of reciprocity. The issue did not arise in the Right of Passage case, however, since while Portugal claimed the right to invoke India's declaration against her, India did not attempt to invoke any of Portugal's declarations against her.

hence any pronouncements to date on the effect and meaning of Article 36(2) are obiter dicta.

Secondly, the court is not bound by the doctrine of stare decisis and is, in fact, specifically exempted by its own statute from the binding effect of its previous decisions:(6) hence its pronouncements on the effect and meaning of Article 36(2) are of even less authority than is usually the case with obiter dicta.

Thirdly, an examination of the actual decisions of the two courts indicates that the present court has been much more cautious than its predecessor in pronouncing on the question in issue and has taken care in all its decisions to stress the importance of the conditions contained in the actual declarations before the court (which are treated as being in the nature of a treaty) and does not merely cite the statute in order to find reciprocity.(7) It

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(6) Article 59 which provides: "The decision of the Court has no binding force except between the parties and in respect of that particular case."

(7) The cases in question are: Phosphates case (Series A/B No.74 at p.22); the Electricity Company case, (Series A/B No.77 at p.81); the Anglo-Iranian Oil Company case, (I.C.J. Reports (1952)); and the Norwegian Loans case (I.C.J. Reports, 1957). See also Right of Passage case.

Although the Permanent Court of International Justice seems to have founded its decisions in the first two cases mentioned in large part on the wording of Article36(2) rather than on the actual condition of reciprocity included by the various countries in question in their declarations accepting compulsory jurisdiction, each of the countries in question, as it happens, had incorporated the actual language of Article 36(2) into their declarations.

It is interesting to note however that in the Anglo-Iranian Oil case the International Court of Justice made specific reference to the declarations, which both contained the condition of reciprocity, as being the basis for the court's jurisdiction, rather than merely Article 36(2). In the Norwegian Loans case also the International Court considered that its jurisdiction depended upon the declarations made by the parties, which were both made on condition of reciprocity, or "the common will of the parties, which was the basis of the court's jurisdiction". Moreover, in the Norwegian Loans case the court refers to Article 36(3) of the statute rather than Article 36(2) in this connection: "In accordance with the condition of

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is important therefore not to take some of the earlier and the fairly categorical assertions of the Permanent Court as indicative of the attitude of the present body.

Fourthly, as is pointed out by Hambro and Stone (8) any country should on principle have the right to make a totally unconditional acceptance of compulsory jurisdiction without even the protection of reciprocity if it so desires, and such a right would (according to normal treaty interpretation rules) have to be removed by the statute in unmistakably clear terms. This can hardly be said to be the case in the light of the voluminous literature on the controversial question whether or not Article 36(2) provides of and by itself for reciprocity.

Fifthly, the ambiguity of the language of Article 36(2) and (3) is clearly apparent on examination. Leaving aside the history of the sections, both as to the original intention of the drafters and the subsequent (and contrary) interpretation by the court, it is not possible on the basis of strict exegesis to say whether Article 36(3) modifies Article 36(2) or vice versa.

Lastly, the interpretation placed on the statute by the court is not consistent with the original intent of the draftsmen (at least according to Waldock)(9) and this, coupled

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(7) cont'd
reciprocity, to which acceptance of the compulsory jurisdiction is made subject in both declarations, and, which is provided for in Article 36 para. 3 of the statute, Norway, equally with France, is entitled to except from the compulsory jurisdiction of the court disputes understood by Norway to be essentially within its national jurisdiction." In other words, although the International Court of Justice appears to have adopted the interpretation of its predecessor the Permanent Court of International Justice on the meaning of the condition of reciprocity it may not be correct to assume that it also founds its decisions on the applicability of reciprocity on the existence of Article 36(2) as did the predecessor court; the actual declarations of acceptance of compulsory jurisdiction may be determinative.

(8) See footnote (4) above.

(9) Waldock's definitive Article in the British Year Book, 1955-56, Vol. XXXII, p.244.

with the fact that a completely unconditional declaration has never been in issue before the court, is of itself a cause for doubt.

Possible Alternative Versions of the new Declaration

If it is agreed that the condition of reciprocity is (a) important legally, (b) unobjectionable politically and (c) not provided for with certainty in the court's statute, then the question arises as to how to provide for it in the proposed Canadian declaration without, if possible, making the declaration seem somewhat restrictive. There would seem to be several possibilities:

The Paraguayan Formula

The Paraguayan formula provides as follows: "Paraguay recognizes purely and simply, as obligatory, as of right and without a special convention, the jurisdiction of the Permanent Court of International Justice, as described in Article 36, paragraph 2 of the Statute."

From a political point of view this formula has a somewhat legalistic sound, incorporating by reference something not contained in the formula itself, but on the whole it seems unobjectionable politically. From the legal point of view, however, the formula merely throws the court back on the statute, thereby failing to meet the doubt which exists as to whether the statute of and by itself provides for reciprocity. In essence, therefore, it is an unconditional acceptance subject to all the difficulties discussed above.

"Reciprocity"

The most obvious and probably the safest procedure would be to spell out the condition by the phrase "subject only to the condition of reciprocity". It may be possible however to achieve the same effect without using the possibly objectionable word "reciprocity". Another possibility

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equally safe and perhaps more salable, would be to use the phrase "with respect to any state accepting the same obligation". From a political point of view this phrase would seem to be readily understandable to the layman, and intrinsically unobjectionable. From a legal point of view, the advantages are: firstly, this phrase has been interpreted again and again by both courts (in connection both with its inclusion in Article 36(2) and in declarations which have been considered by the court) to mean "reciprocity", in the broad sense in which the word is used above.(10) (Indeed, any doubt which exists concerning the phrase is not related to its inherent meaning but only as to whether its inclusion in the statute is of and by itself, sufficient.) Secondly, the meaning of the words have also been much interpreted in state practice by their inclusion in twenty-six of the declarations filed with the court.(11) Moreover, in fourteen of these declarations the phrase is followed by an indication of their intended meaning, by such words as "in relation to any other state accepting the same obligation, that is to say, on condition of reciprocity".(12) Hence, the declarations on file with the court provide independent evidence of the meaning of the term.

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(10) See cases referred to in footnote (7).

(11) Australia, Belgium, Honduras, Liechtenstein, Pakistan, Sweden, Switzerland, U.S.A., Cambodia, Denmark, Dominican Republic, Finland, France, Liberia, Luxembourg, Mexico, The Netherlands, Norway, Panama, Thailand, Turkey, Uruguay, China, Colombia, Japan and the Philippines.

(12) Cambodia, Denmark, Dominican Republic, Finland, France, Liberia, Luxembourg, Mexico, The Netherlands, Norway, Panama, Thailand, Turkey & Uruguay.

In the declarations of China, Colombia, Japan and the Philippines, the words "in relation to any state accepting the same obligation" are combined with a phrase such as "and on condition of reciprocity".

Other formulas might also be worked out which would have the same meaning, but they would lack the certainty of a formula which has been interpreted both in the courts and in state practice, and there would seem therefore to be little advantage in seeking some other wording, merely for the sake of novelty.

Jean Beesley

cc: Mr. Cadieux
Mr. Sicotte
Mr. Kingstone
Mr. Cole
Mr. Lee

Mr. Beesley

A quick glance at this paper leaves me wondering whether I agree with the conclusion expressed in para. 21 that the question of whether a state is fulfilling its obligations under Article 2 of the Charter, is necessarily or exclusively ~~political~~ one

(A court frequently decides facts as well as law, ~~eg~~ ~~does a~~ or questions of mixed fact and law eg. is a given State "Sovereign" within the meaning of this article or not)

(what are a state's obligations under the Charter, if the Charter for example were to conflict with another law making treaty originating from the U.N. ?) etc.

I'm not sure of my argument yet, but I am inclined to feel that a valid legal function @ exists or, (b) should exist.

Legal/M.D.Copithorne/ts.

RESTRICTED

March 4, 1963.

MEMORANDUM FOR THE LEGAL PLANNING COMMITTEE

International Law Commission: Oppressive and Obsolete Treaty Obligations.

Introduction

Among the aspects of treaty law which will probably be discussed by the International Law Commission this year will be

1. The effect of duress on the validity of treaties and
2. The doctrine of rebus sic stantibus.

While these topics are traditionally treated separately, it is suggested that they can be related in terms of their political origins, and that for the purposes of the present I.L.C. discussions it is desirable to consider them in the broader context of the attitude of international law towards oppressive or obsolete treaty obligations. The question might be phrased: is the principle of pacta sunt servanda absolute, or are there circumstances in which one party may bring about the termination of a treaty without the consent of the other, or in which a treaty is terminated by a rule of law.

Brierly formulates the problem in the following terms: "Every system of law has to steer a course between the two dangers of impairing the obligations of good faith by interfering with contractual engagements, and of enforcing oppressive or obsolete contracts".(1) The oppressive contracts are treaties executed under duress, and the obsolete contracts, out-of-date treaties from which the doctrine of rebus sic stantibus provides a potential source of relief. The sanctity of treaties is

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(1) Brierly, "Law of Nations" 5th ed. p. 258.

generally regarded as one of the most fundamental and sacrosanct rules of international law, finding a place even in the "new international law of the Soviet Union. However, it is unrealistic to ignore the fact that circumstances do sometimes change in such a way as to make treaty obligations appear so onerous as to thwart the development to which a state feels entitled. When this happens a state which feels strong enough will disregard these obligations whether it has a legal justification for doing so or not. This is particularly likely to occur when a treaty has been imposed on a state after defeat in war. "While it may be expedient in the present state of international relations to uphold the principle which declares such a treaty to be as binding in law as one voluntarily entered into on both sides, it argues a lack of candour to support that practice by appealing to moral considerations, as we do when we speak of the sanctity of all treaties without distinction".(2)

Domestic law has long since ceased to regard absolute freedom of contract as either possible or socially desirable. Thus, the courts will not enforce contracts which have been induced by fraud or duress, or whose object is contrary to public policy, and legislative interference with contracts becomes more and more active as social relations become more complicated. It may not be possible however, for international law to develop restrictions on the freedom of contract analogous to those which exist in private law in the interests of higher public policy. Nevertheless, while the conditions in which states contract with each other are very different from those in which individuals contract, one of the functions of any system of law is the protection of the weaker members of the community against the physical preponderance of the others. Furthermore, the questionable political and moral value of the source of many inter-

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(2) Ibid.

national obligations of indefinite duration has given rise to a demand for some change in the traditional rules. The objective according to Brierly, is to ensure that no treaty which one party has been coerced into entering has the protection of the law.

Effect of Duress

The traditional view is that international law disregards coercion in the conclusion of treaties, unless it is applied to the person concluding the treaty. (See for example Article 32 of Harvard Draft). This conclusion seemed to be a necessary corollary to the admission of war not only as a means of enforcing rights recognized by international law, but also as a means of challenging and destroying the existing legal rights of states. Such a rule however is clearly obnoxious to the general principle of law which postulates freedom of consent as an essential condition of the validity of consensual undertakings. Over the last half century there has been a complete reversal in the attitude of international law towards the use, or threat, of armed force for the purpose of attaining national objectives. The cumulative effect of the Covenant of the League of Nations, the 1928 General Treaty for the Renunciation of War, and the Charter of the United Nations has been to destroy the foundations of the traditional rule recognizing the validity of treaties imposed by force. Insofar as war is now prohibited, a state that has resorted to war in violation of its obligations under these agreements cannot logically be regarded as applying force in a manner permitted by law. Accordingly, in view of the transformation of the attitude of international law towards the legitimacy of war, many leading western scholars (Brierly, Lauterpacht, McNair) argue that duress should no longer be disregarded and that the absence of freedom of consent in the conclusion of a treaty should be held to vitiate the treaty. The rule formulated by Lauterpacht in his First Report on the Law of Treaties in 1952 is:

Reality of Consent

Article 12

Absence of Compulsion

Treaties imposed by or as the result of the use of force or threats of force against a State in violation of the principles of the Charter of the United Nations are invalid if so declared by the International Court of Justice at the request of any state.

However, not all writers share this view. In his Third Report on the Law of Treaties in 1958, Fitzmaurice while noting the "eloquent and forceful" expression of views by Lauterpacht, argues that the case would have to be confined to physical force to avoid opening a dangerously wide door to such other pressures as economic ones. (Lauterpacht, however, feels that an economic blockade is the very type of force which should have the effect of invalidating a treaty). Fitzmaurice is also concerned about the difficulty of undoing the executed portion of treaties and in such cases perhaps the only practicable remedy is the termination of rights still to be executed.

One of the difficulties faced by those who urge that the use of duress should vitiate a treaty, is that such a principle would inevitably throw doubt upon the validity of peace treaties. Lauterpacht carefully limits his rule to those cases in which treaties are imposed by force in violation of the Charter of the United Nations. Force ceases to have the character of coercion if it is exercised in execution of the law. In such cases, the impersonal authority of the law on behalf of which force is employed, is deemed to supply the element of consent. Thus, argues Lauterpacht, a treaty or any other undertaking imposed by the United Nations in the course of enforcement action upon a state held to be guilty, in the language of Article 39 of the Charter, of "a breach of the peace or act of aggression" does not invalidate the treaty or undertaking. Lauterpacht even forsees the possibility of granting the character of legal sanction to the action of one or more states acting for

what about treaties imposed by ie countries who use force to execute a resolution of the UNSC.

the enforcement of peace or repulsion of aggression in accordance with the Charter. Using much the same reasoning in considering the validity of peace treaties, McNair feels it is necessary to ascertain whether the outbreak of the war involved a breach of the General Treaty for the Renunciation of War or the United Nations Charter by the party invoking the peace treaty. He would however, exempt treaties induced by collective armed force on behalf of the international community, which differ from those induced by coercion for the purpose of securing purely national objectives. It is not known whether Soviet jurists would support this view but Professor Kozhevnikov states that,

> "peace treaties occupy an eminent place within the system of international agreements; they legally terminate the condition of war and determine political and other relations between the contracting parties". (3)

Unequal Treaties

The question of duress is closely linked with the concept of "unequal treaties" which has recently come under heavy attack from the Communist bloc and other countries. While the arguments of the more advanced western legal scholars described above do not appear to have been invoked so far, these arguments could well serve as a juridical base for a condemnation of "unequal treaties". In the Sixth Committee of the United Nations in 1962, the Panamanian representative urged that treaties which were the "fruit of coercion and bad faith" should not be condoned. International law should no longer give unconditional validity to legal instruments which were the products of "unbridled colonialism". He spoke of the "obsolete" concept of respecting treaties concluded through coercion and "violation" particularly the threat of violation "in its most brutal form -- in other words, war". While the Panamanian representative did not refer specifically to the Panama Canal agreement, the Soviet delegate did, using it as an example of a treaty that was not

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(3) Sovetsko Gosudanstuo i Pravo No. 2 March 1954 quoted in 48 A.J.I.L. (1954) p. 640-646.

concluded on the basis of equality and mutual benefit. The I.L.C., he said, should show a readiness to translate this concept of equality of states and mutual benefit into every article of the law of treaties. The Indonesian and Algerian representatives spoke of placing the law of treaties "upon the widest and most secure foundations based on strict respect for principles of the sovereign equality of states". The Czechoslovak representative set out the Communist argument in more juridicial terms:

> "The question of the conditions of substantial validity of international treaties is becoming ever more important at present. The strictest conformity of the treaty with the fundamental objectives and legal principles of the contemporary international community must be considered as the intrinsic condition of its validity and enforceability. Unequal treaties, treaties violating the principles of peaceful coexistence or those endangering otherwise the peaceful and friendly co-operation among peoples cannot be attributed the character of international treaties in the legal sense. What qualified the treaty as a legal relationship between two or more States is among others its inseparable link with international law. The principal prerequisite for the binding force of an international treaty and for its right to be protected by international law is the conformity of its contents and objectives with the fundamental principles of international law.
>
> In our view, the contemporary concept of the legal validity of international treaties must be based upon the above-mentioned foundations. At the same time, it is necessary to strengthen the principle of a consistent fulfilment of international obligations freely entered in; i.e. the principle of pacta sunt servanda."

Soviet jurists have also touched on the question of so-called "unequal" treaties. Vyshinsky has stated that the Soviet theory of international law is based upon the principle of sovereign equality and respect for mutual interests and rights as the fundamental source of international law. The rule of pacta sunt servanda is one of special importance, if a treaty is concluded in full equality, agreement and freedom of the contracting parties.(4) Professor Kozhevnikov has stated flatly

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(4) "Problems of International Law and Politics" 1949, referred to in Korowicz "Introduction to International Law", p. 128.

that, "Respect for equal international obligations is the fundamental principle of the whole of international law".(5) The word "equal" is noteworthy in this otherwise orthodox statement.

> "The classics of Marxism-Leninism did not extend the rule of international law which says that international treaties should be observed, to annexionist and enslaving agreements ... Refusal to abide by these agreements cannot be considered as a violation of the principles of international law".(6)

The introduction of these subjective qualifications would seem to seriously undermine the principle of pacta sunt servanda Indeed, the determination of what is an "unequal" treaty is in practice, unlikely to lend itself to judicial solution. It is evident that "unequal" treaties will probably have been concluded by Western powers with weaker states. Kozhevnikov has given an example:

> "From this point of view [of the nullity of unequal treaties] the unanimous decision of the Egyptian Parliament of October 15, 1951, which denounced the Anglo-Egyptian Treaty of 1836 and the convention of 1899 concerning the condominium over the Sudan, corresponded to the democratic juristic sense of all progressive mankind; these treaties violated the elementary sovereign rights of the Egyptian nation". (7)

Further, it seems possible that in given historic conditions, treaties which had been considered "progressive", could become "reactionary, annexionist and enslaving", a transformation of which the Soviets would appear to be the sole judge. Indeed, even "annexation" is capable of interpretation, for Lenin has pointed out that the incorporation of foreign territory is not necessarily to be regarded as "annexation".(8) The concept of "equality" among treaty partners could be extended to such a

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(5) Kozhevnikov op. cit.
(6) Ibid.
(7) Ibid.
(8) Departmental Paper "Juridical Aspects of Peaceful Coexistence" p. 14.

point as to throw doubt on the regulation by treaty of the relations between great and small states.

Doctrine of Rebus Sic Stantibus

The clausula rebus sic stantibus is an expression of the view that vital changes of circumstances may be of such a nature as to justify a party in demanding to be released from the obligations of a treaty which cannot be abrogated by unilateral notice. While the general principle is widely if not universally acknowledged, its precise nature and role are highly controversial. Its critics point to the danger of it being used as a pretext for the violation of treaty obligations. The practice of states reveals few examples of actual recourse to the doctrine and probably no examples of its recognition by states against whose treaty rights it has been invoked. However, the International Court in the Free Zones case,(9) while finding it unnecessary to consider the application of the doctrine implied that it was a positive rule of law. Writers have found the juridical basis of the doctrine to lie in some fundamental right, in a frustration of the object of the treaty, in an impossibility of performance, in a promotion of state interests, in the nature of certain changes of circumstances, or in a combination of these bases. However, Chesney Hill in an exhaustive study of the doctrine and its origins is of the opinion, which is shared by a majority of writers, that, as understood by states, (ie. lex lata rather than lex feranda) rebus sic stantibus is based juridically upon the intention of the parties at the time of the conclusion of the treaty.(10) In his view, the only definition recognized by states as a rule of customary international law is:

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(9) P.C.I.L. Ser. A/B No. 46, 1932.

(10) "The Doctrine of Rebus Sic Stantibus" p. 75.

"A treaty of perpetual or indefinite duration which contains no provision for revision or denunciation lapses, in the sense that stipulations which remain to be performed cease to bind the parties to the treaty, when it is recognized by the parties to the treaty or by a competent international authority that there has been an essential change in those circumstances which existed at the time of the conclusion of the treaty, and whose continuance without essential change formed a condition of the obligatory force of the treaty according to the intention of the parties".

The 1935 Harvard Draft Convention defined the doctrine as follows:

Article 28 Rebus sic stantibus

a) A treaty entered into with reference to the existence of a state of facts the continued existence of which was envisaged by the parties as a determining factor moving them to undertake the obligations stipulated, may be declared by a competent international tribunal or authority to have ceased to be binding, in the sense of calling for further performance, when that state of facts has been essentially changed.

b) Pending agreement by the parties upon and decision by a competent international tribunal or authority, the party which seeks such a declaration may provisionally suspend performance of its obligations under the treaty.

c) A provisional suspension of performance by the party seeking such a declaration will not be justified definitively until a decision to this effect has been rendered by the competent international tribunal or authority.

The 1962 "Proposed Official Draft" of the American Law Institute's Restatement of the Foreign Relations Law of the United States formulates the doctrine thus:

"156. Change in State of facts: Rebus Sic Stantibus

(1) An international agreement will be interpreted as subject to an implied condition that a substantial change, of a temporary or permanent nature, in a state of facts existing at the time of its making relieves the parties, temporarily or permanently as the case may be, from the duty of performing their obligations under the agreement, but only if it is clear that

a) the parties could not have intended that they should have performed their obligations under the changed circumstances and

b) the continuance without substantial change of such state of facts was essential to the achievement of the objectives of the agreement.

> (2) A party to an international agreement may rely on interpretation of the agreement pursuant to subsection (1) as a basis for suspending or terminating the performance of its obligations under such agreement only if:
>
> a) it did not cause the change in the state of facts, and
>
> b) it has sought in good faith to obtain the assent of the other parties to its interpretation of the agreement pursuant to Subsection (1), except when this was impossible under the circumstances.
>
> (3) When the continuing existence of a state of facts is essential to the achievement of the objectives of only a part of the agreement, subsections (1) and (2) are applicable only to that part of the agreement if it is seperable from the rest of the agreement".

However, typical of the differing views on this doctrine, Fitzmaurice argues in his Second Report on the Law of Treaties that rebus is not a matter of perceiving the intention of the parties, but is an independent and objective principle of law.

> "If the particular treaty itself, as a matter of its normal and correct legal interpretation, does actually require to be read as containing such an implied provision, the case is not one of termination by operation of law, but of termination provided for by the treaty itself, through an implied resolutory condition$".

In Fitzmaurice's view, it is necessary to have an essential change of circumstances which either vitiates the objects and purposes of the treaty itself, or relates to fundamental considerations that were basic to the treaty for both parties and moved them jointly to conclude it. It could certainly be argued that if duress is not relevant to the essential validity of international agreements, that is to say, if the test of the validity of treaties is not necessarily what the parties freely intended, it is unreasonable to make an assumption as to their intentions with regard to the contents of the treaty.

In pointing to the close connection between the disregard of duress and the doctrine of rebus sic stantibus, Lauterpacht (11) observes that as a matter of historical

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(11) "The Function of Law in the International Community" p. 271.

experience, the occasion for invoking the doctrine has usually been in connection with treaties imposed by force;

> "treaties which as a rule do not contain any limitation of their operation in point of time, whose provisions are not invariably the product of far seeing statemenship, which are as a rule dictated by the victor after a trial of physical strength, and which, in consequence of the nature of the conditions imposed by them, perpetuate the consciousness of their origin".

The solution of the difficulties created by the existence of obligations arising out of treaties imposed by force inso far as they are unjust or obsolete, would seem to lie with the appropriate political agencies rather than in a judicial remedy capable of application by an international tribunal. However, there remains in Lauterpacht's view a legal residuum which although of limited compass, is capable of application by a judicial tribunal in which the law will recognize that the contract has, as a result of an unforseen change in circumstances, failed to realize the true will of the parties and that it cannot be maintained wholly or in part.

Lord McNair in his 1930 essay entitled "The Functions and Differing Legal Character of Treaties" draws the well known distinction between contractual and law making treaties. He suggests that a change in circumstances in the case of contractual treaties may demand the exercise of the juridical function. He defines this type of treaty as embodying bargains between the parties regulating their future conduct or conferring mutual rights of trading or fishing, extraterritorality treaties, or treaties creating rights in the nature of servitudes of a non political nature. McNair views the problem as one of the revision of treaties and while he believes some means of revision is essential, he doubts whether the legislative function required for the revision of law making treaties is to be deduced from the principles of the law of obligations. The clausula, he points out, was the product of an era when arbitration was virtually non existent and that it evolved as guidance for statesmen and diplomats rather than advocates and judges.

The argument that circumstances have changed since a bargain was made, makes a stronger appeal to diplomats and statesmen than to lawyers.

In 1921 three jurists prepared a report for the 2nd Assembly of the League of Nations as to the action the League might take under Article 19 of the Covenant:

> "The Assembly may from time to time advise the reconsideration by Members of the League of treaties which have become inapplicable and the consideration of international conditions whose continuance might endanger the peace of the world".

It was their view that the League might take action when treaties had become "inapplicable, that is to say, when the state of affairs existing at the moment of their conclusion had subsequently undergone, either materially or morally, such radical changes that their application has ceased to be reasonably possible".(12) Article 19 would seem to be evidence of a desire for a power to modify treaty obligations under certain circumstances.

Although no cases are known in which Canada has invoked the doctrine of rebus sic stantibus, it is a potentially useful argument for this country. Canada has tacitly accepted that she is bound by a large and as yet undefined number of British Empire treaties. Few of these form a part of Canada's active treaty relations but occasionally one of them is resurrected by a foreign government in support of a privilege that Canada does not feel in its interests to grant. The Netherlands, for example, has for some years been arguing in support of certain consular privileges in Toronto, that the 1856 Anglo-Netherlands Consular Treaty was binding upon Canada. This contention has been rejected on other legal grounds but it is clearly in Canada's interest to have in reserve the arguments of desuetude, rebus sic stantibus etc. for use in such cases.

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(12) Quoted in Fischer Williams "The Permanence of Treaties" 22 A.J.I.L. (1228) p. 101.

What about the decision on the acceptance of the Court's jurisdiction in 1929

Soviet Attitude to Rebus Sic Stantibus

As soon as it was accorded a measure of recognition, Soviet diplomacy turned to the rules of traditional international law to establish its legal relations with other countries. On occasion, the Soviets claimed rights arising from international treaties signed by the former Russian government; on others it refused to adhere to treaties signed by the Imperial and Kerensky governments. In the field of treaties as in others facets of international law, it thus became necessary to rationalize the activities of Soviet diplomats. Soviet jurists while never denying completely the traditional rules of international law, at least with regard to relations between the Socialist and Capitalist countries, felt that they had to be revised. In the words of Korovin one of the early theorists, "The Proletariat did not destroy the old principles of international law but reformed them for its own use."(13) Speaking specifically of Russia's international agreements Lenin stated, "We reject all provisions sanctioning international robbery and oppression, but all provisions relating to good neighbourly relations we willingly accept, we cannot reject them."(14)

Because of the fundamental idealogical differences between the Soviet State and other countries, Korovin regarded the treaty as the only reliable source of international legal relations, and he enjoined strict obedience of pacta sunt servanda. This view of the sanctity of treaties is one aspect of Soviet theory which has survived the years.(15) There are, however, a number of potential loopholes though which a Soviet

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(13) Quoted in Snyder and Bracht "Co-existence and International Law" 7 I.L.Q. 1958.

(14) Lenin: Works, Third Edition, quoted by Tunkin in "Role of International Law in International Relations".

(15) See for example, Krylov "The U.S.S.R. attaches a great importance to the strict observance of international treaties by contracting parties". 70 Hague Recueil 1947, 407. Also, the statement of Czechoslovak representative in the 6th Committee of U.N. p. 5 above.

jurist can escape should he find the principle pressing too tightly around him. One of these is the clausula rebus sic stantibus. The traditional Soviet view as expressed by Korovin, is that state obligations remain absolutely binding as regards the political regime that entered into them, but lose their binding force once the social structure of the state changed so categorically that the fulfillment of the rights acquired by them, contradicted the fundamental principles of the new regime.(16) This view suggests that international law should consist of a certain number of norms, including the admission of all obligations whose fulfillment is compatible with the social structure of the state, and the right of every nation to decide upon its own internal regime. The Soviet view of the clausula proceeds from an identification of the state as a subject of international law, with the state as an organ of the ruling class. It is therefore logical for the Soviets to deny the continuity of the state personality after a revolution that involved a change in the ruling class. This has permitted the Soviets to repudiate onerous Czarist debts but it has not completely coincided with Soviet political practice which abandoned Czarist rights abroad (e.g. capitulations in Iran and China) only by special agreement.

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(16) "Every international agreement is the expression of an established social order, with a certain balance of collective interests. So long as this social order endures, such treaties as remain in force, following the principle pacta sunt servanda, must be scrupuously observed. But if in the storm of a social cataclysm one class replaces the other at the helm of the state, for the purpose of reorganizing not only economic ties but the governing principles of internal and external politics, the old agreements, in so far as they reflect the pre existing order of things, destroyed by the revolution, become null and void. To demand of a people at last freed of the yoke of centuries the payment of debts contracted by their oppressors for the purpose of holding them in slavery would be contrary to those elementary principles of equity which are due all nations in their relations with each other. Thus in this sense the Soviet doctrine appears to be an extention of the principle of rebus sic stantibus, while at the same time limiting its field of application by a single circumstance -- the social revolution". 22 A.J.I.L. (1928) p. 763.

While elaborating theories to explain the change in the rights and obligations of a state which undergoes a radical change in its internal structure, Soviet international lawyers have always emphasized the strict binding force of agreements entered into by a certain regime. However, there was a short lived interruption in this attitude in 1935 when Pashukanis attempted to introduce the clausula in a broader sense then that defined by Korovin, in order to justify the annulment of the Brest-Litovsk Treaty which the Soviet government had itself concluded. He implied that a change in the relations of power which had conditioned the original agreement might render it invalid. However, this was the same justification that Nazi Germany used in declaring that various previous treaties were no longer binding due to "changed circumstances". After 1937, Pahukanis was sharply criticized, and the clausula dismissed as a pseudo juridical pretext for the imperialist practice of violating treaty obligations.(17) Pashukanis's error seems to have lain in his failure to distinguish between the usual application of the principle, and the repudiation after a class revolution of obligations contracted to prevent that revolution. While Korovin was himself attacked and discredited, he now appears to be regaining his former position of influence, but in any event there is no reason not to believe that his skillful legitimizing of the Soviet repudiation of Russian debts, has withstood the vicissitudes of Soviet legal theory.

CONCLUSION:

The following considerations might be kept in mind in the formulation of a policy to be adopted in the I.L.C.

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(17) Schlesinger "Soviet Legal Theory" p. 285. Kozhevnikov (op. cit.) for example, rejects the doctrine which he states "is used by the aggressive countries for the justification of their predatory foreign policy".

1. The pressure of western legal thought for a revision of the traditional disregard of duress on the validity of treaties.

2. The desire of the developing states for the eradication of the vestiges of colonialism in the form of onerous treaty obligations considered to have been imposed by force or threat of force and to be a continuing impediment to the full exercise of sovereignty.

3. The Soviet willingness to exploit this discontent and their attempt to have discarded the absolute legal principles of traditional international law in favour of more flexible Soviet inspired rules which can be used in the attainment of Soviet political objectives.

If western jurists in the I.L.C. resist all change and insist on the maintenance of the traditional rules of international law, they are not only unlikely to prevail, but will probably engender further support among the developing states for the new international law of the Soviet Bloc. For political reasons therefore, as well as the desire to resist the erosion of the already limited legal nature of international law, western jurists should take the initiative in formulating rules which, while of an essentially legal nature, will be politically acceptable to the developing countries.

With these considerations in mind it is recommended that:

(a) The use of duress be regarded as vitiating an international agreement, except where such duress is in the form of legitimate force, that is to say, force that is lawful in accordance with the United Nations Charter;

(b) The doctrine of rebus sic stantibus be accorded formal recognition and incorporated in the draft Convention;

(c) Bearing in mind that the Convention on the law of treaties may become accepted as a superior norm of international law (jus congens), thus, perhaps, carrying rights and obligations for non participating states, a suitable formula be devised to discourage the application of its principles retroactively, particularly those concerning the use of duress, in order to avoid opening to scrutiny the many existing agreements with undoubtedly would fall before this rule, - the so called "unequal treaties", - thus seriously prejudicing existing international settlements.

Mr. Wershof
Mr. Sicotte
Mr. Kingstone
File No. AX-37-40)
Diary ✓

MEMORANDUM FOR LEGAL DIVISION

Meeting of the Legal Planning Committee

1. Another question which will arise at the next session of the I.L.C. relates to the "clausula" and to "unequal treaties" (see McWhinney's article p. 956-957 on Peaceful Co-existence).

2. I think that some preliminary research is needed on this to define the issue so that we can determine whether there is a national interest.

3. Fitzmaurice argues in favour of acceptance of the clausula within certain defined limits but this may open the door to a wholesale repudiation of "unequal" treaties.

4. There is also a problem as to the effects of "violence" in the validity of treaties. Fitzmaurice and Lauterpacht hold widely divergent opinions on the issue. Again, is there a national interest involved?

5. Fitzmaurice and Lauterpacht disagree also as to the solution when treaties are incompatible. The former holds for concurrent validity and the latter for the validity of the subsequent instrument because of lack of capacity of the parties. Again, do we have a stake in the controversy and an interest in promoting one rather than the other solution.

M. Cadieux

United Nations Division/R. Harry Jay/G

DEPARTMENT OF EXTERNAL AFFAIRS

MEMORANDUM

TO: Mr. Cadieux

FROM: United Nations Division

REFERENCE:

SUBJECT: Legal Planning Committee - "Sovereign Equality"

Security: Confidential

Date: March 1, 1963

File No. 5475-AX-38-40 | 9 | - | -

cc: 5475-AX-37-40

You will recall that at the meeting on January 15, 1963, Mr. Jay agreed to raise with me the possibility of this Division preparing a short preliminary paper on the first of the principles enunciated in paragraph 3 of Resolution 1815(XVII). Examination of this question revealed both the inseparability of the various principles of Article 2 of the Charter selected by the resolution for priority study and of the degree to which the principle of "sovereign equality" can be said to embrace all the others.

2. Accordingly, after discussions with Mr. Beesley, we agreed to draft suggested Canadian comments on the principles which would (a) stress the fundamental character of all the principles in Article 2 and their inter-relationship and (b) set the stage for suggesting that further codification is required only in respect of the second principle - dealing with the obligation to settle international disputes by peaceful means. It was understood that Mr. Beesley would prepare complementary comments dealing more thoroughly with that principle and the related intention of Canada to accept the compulsory jurisdiction of the International Court.

3. Attached is a copy of our paper. Paragraphs five to the end are couched in the form of a suggested reply to the anticipated request from the Secretary-General for Canadian comments. We envisage that Mr. Beesley's paper could follow readily on from the concluding paragraph of our draft. If you are agreeable, Mr. Beesley might wish to ensure that the attached will be discussed at the next meeting of the Legal Planning Committee. With that in mind, copies have been sent to those who participated on January 15.

United Nations Division.

CIRCULATION
Mr. Wershof
Mr. Sicotte
Mr. Kingstone
Mr. Brossard
Mr. Beesley
Dept.of Justice:
Miss Ritchie

Ext.326A (6/56)

000570

March 1, 1963

CONFIDENTIAL

BACKGROUND PAPER: SOVEREIGN EQUALITY

After the lengthy and sometimes controversial debate at the seventeenth session on the "Friendly Relations" item, which had its origin in politically motivated Soviet pressure for general acceptance of its version of peaceful co-existence, unanimity on Resolution 1815(XVII) was only made possible by compromise. Moreover, this was essentially a procedural compromise, deliberately seeking to do the least disservice to either of the opposing positions of the Soviet bloc and Western-oriented countries in the Sixth Committee.

2. On the face of it, the Soviet bloc did appear to let slip its substantive position, in as much as the resolution favoured an approach based on the Charter rather than on "peaceful co-existence" as such. However, the USSR has never said that the two were mutually exclusive. To the extent that the Charter includes the conception of "peaceful co-existence" it can be supported by the socialist camp. Where, however, the United Nations seeks to give expression to a broader philosophy of international co-operation than that encompassed in the Soviet view of "peaceful co-existence", - the Organization, - in Soviet eyes, stands revealed as the tool of imperialism. As such it is accused of following in the footsteps of the League of Nations which is said to have fallen apart because it was used as a screen to mask the preparations of the Western powers for a new war.

3. This is the logic which the Soviet bloc could, with customary selectivity as to facts, pursue during the further study that is to be given to the question of friendly relations and co-operation among states. This would, of course, reflect the basic Soviet mistrust of any international

organization it does not control. It would also give further evidence that the USSR, (despite aberrations which have occurred from time to time largely as a result of a misreading of the likely position of the non-aligned states), has much preferred the safety of its veto-protrected position in the Security Council to the risks of majority decision in the Assembly, or in any other purely democratic forum.

4. In preparing Canadian comments for the Secretary-General in accordance with the resolution, the above Soviet bias should be borne in mind, since it will continue for the foreseeable future to prevent the Soviet bloc from foresaking its political approach to the study of "friendly relations". The West, on the other hand, should try to keep the exercise within its legal perspective. To this end it is useful to recall that the resolution sets the stage for Assembly study of principles of international law concerning friendly relations and co-operation among states in accordance with the Charter with a view to their progressive development and codification so as to secure their more effective application. On this basis member states will be asked to comment before July 1, 1963 on four principles.

SUGGESTED CANADIAN COMMENTS

5. In response to the request for comments addressed to it by the Secretary-General pursuant to Resolution 1815(XVII), the Government of Canada wishes at the outset to underline the importance it attaches to the universal acceptance and application of international law. It is convinced that the well known principles of international law, including those now incorporated as binding obligations in the Charter of the United Nations, lie at the very root of peaceful and mutually beneficial relations among states.

These principles, while as yet imperfect, tend to form a composite and fairly balanced framework within which, given good faith, peace-loving states can regulate their affairs and can work out amicable solutions to such differences as may arise from time to time between them.

6. Priority has been given to only four of the principles of international law that were selected after careful negotiation in San Francisco in 1945 to form Article 2 of the Charter.

(a) the principle that States shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations;

(b) the principle that States shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered;

(c) the duty not to intervene in matters within the domestic jurisdiction of any State, in accordance with the Charter;

(d) the principle of sovereign equality of States.

7. Each of the principles, however, can be adequately studied only in relation to other intimately associated conceptions in that article and in the light of the Charter as a whole. Thus, for example, it is not possible to give fruitful consideration of any of the principles listed in the resolution except in the context of paragraph 2 of Article 2 which states:

> "All members in order to ensure to all of them the rights and benefits resulting from membership, shall fulfill in good faith

the obligations assumed by them in accordance with the present Charter".

8. Reflected throughout Article 2 and, indeed, throughout the Charter is the determination of member states to maintain "international peace and security". At first the United Nations were a handful of war-weary states to which co-operation meant not only joint effort to defeat an enemy in immediate conflict, but also collective action to preserve the peace once their military partnership had overcome the aggressor. Since then, many new members have joined the Organization; but the fundamental purpose of the United Nations has not changed. Article 2 is, therefore, central to their undertaking, for it lays down a binding code of national conduct designed (a) to facilitate collective action in the interests of peace and (b) still to safeguard the kind of sovereign individuality which member nations had fought bitterly to achieve and to preserve. It is interesting to recall in this connection that in 1934, when the USSR at last joined the League of Nations, Mr. Litvinov had made a point of stressing that his government was, nevertheless, "preserving its personality".

9. In the close aftermath of the war, the nations assembled in San Francisco were prepared voluntarily to relinquish a reasonable degree of sovereignty in order to move towards "collective security". Nevertheless, although a few were willing to go quite far in this, none wished to run the risk of losing its national identity in a corporate organization and many, including the Great Powers, were intent on retaining full freedom of action in the defence of their own vital interests.

10. The organic growth of the United Nations in the face of challenges and opportunities only dimly foreseen

in 1945 has been remarkable. It has led to significant developments in the attitudes of member governments to the United Nations. Yet it is as true today as it was in 1945 that Article 2 probably represents the limit of the willingness of member states to surrender elements of their sovereignty even for the compelling interests of a collective effort to foster and defend international peace and security.

11. Accordingly, it is useful to go back to San Francisco to observe the original scope and intention of the important principles embodied in Article 2. It was not by accident that the first principle was particularly addressed to the question of sovereignty. The enjoyment of the rights and benefits of sovereignty are, by definition, of primordial interest to national states. However, as formulated in the first principle, the outline of sovereignty so familiar in international law has been subtly altered by the addition of the notion of "equality". Taken together the two words "sovereign equality" convey a meaning of justice, democracy and order for the sake of both individual and common good, that is of the very essence of the United Nations conception.

12. The phrase first emerged to public importance in the 1942 Moscow Declaration. It is fair to say that it was deliberately chosen to reassure, not only the Great Powers as to their reciprocal intentions at the end of the war, but more importantly also to dispel the apprehensions of the smaller powers which had begun to feel uneasy that their future might be arbitrarily decided for them by a handful of states having a preponderance of military and economic power. Paragraph 4 of that Declaration therefore read:

> "That they, (the Governments of the USA, the United Kingdom, the Soviet Union and

China) recognize the necessity of establishing at the earliest practicable date a general international organization, based on the principle of the sovereign equality of all peace-loving states, and open to membership of all such states, large and small, for the maintenance of international peace and security."

13. This first formulation at once established two notions which have ever since been linked to "sovereign equality". The first was the suggestion that only "peace-loving states" were sovereign equals. The second was recognition of the necessity that each member would have to accord mutual respect to other member states, if there was to be any hope of forming a durable association to serve the cause of peace.

14. Both at Dumbarton Oaks and at San Francisco the terminology "sovereign equality" was the subject of some discussion. In the event, it was incorporated unchanged in the Charter on the assumption and understanding, recorded in the report of the rapporteur of sub-committee I/1/A to Committee I/1, that it conveyed the following:

(1) that states are juridically equal;

(2) that they enjoy the rights inherent in their full sovereignty;

(3) that the personality of the state is respected, as well as its territorial integrity and political independence;

(4) that the state should, under international order, comply faithfully with its international duties and obligations.

15. It will be apparent that "sovereign equality" explicitly and implicitly sums up the other principles in Article 2. Put the other way around, Article 2 can be

said to be a codification of the fundamental notion of sovereign equality on which, in turn, the whole United Nations system is predicated.

16. How, for example, could any member state enjoy a status of sovereign equality if others did not fulfill their solemn obligations in good faith? Each failure to do so would inevitably diminish the rights of others. Again, how could juridicial equality have practical meaning if powerful states were free to advance their interests by resorting to threats or the use of force rather than by recourse to the rule of law through peaceful procedures? Certainly sovereign equality would be meaningless if the territorial integrity and the political independence of member states - which are indispensable aspects of national "personality" - were not held to be inviolate. Nor would the status be of real comfort if the United Nations either singly or in concert were entitled to intervene in the essentially domestic affairs of member states. It is, of course, only natural that an exception to this latter principle should have been carefully recorded in the Charter in respect of enforcement measures under Chapter VII. Without such an exception, the central objective of effective collective security would be quite out of the reach of the Organization.

17. Another important derogation from the full freedom of action normally associated with national sovereignty was the decision that the United Nations should act by majority vote. In 1963, it is perhaps difficult to appreciate what a daring step forward was taken in 1945 when the United Nations agreed - in the interest of collective security - to relinquish the rule of unanimity which had governed the activities of the League of Nations. Once having taken this step, most of the states in San Francisco were reluctant to accept the view that, after

all, the realities of power required that the Great Powers had to be accorded a special position. However, once again with the real interests of the peace-keeping functions in mind, it was agreed (a) to give the Great Powers permanent seats in the Security Council and (b) that the rule of Great Power unanimity should apply to the important decisions of that organ.

18. While practical considerations have dictated a few exceptions to the principle of "sovereign equality", member states have been quick to defend their right to juridicial and political equality against any further encroachment. The obligations comprehended in the principles of Article 2 are in part obligations assumed by member states and in part limitations on the corporate activities of the Organization as such. It is significant that the objective of both is to protect the principle of "sovereign equality" and that this springs from a realization that, in the final analysis, the world organization could not exist without the continued mutual respect of all members.

19. Article 2 represents a codification of "sovereign equality" but the Charter as a whole must also be taken into account in assessing the full value of that fundamental principle. In this connection it is germane to recall that the Charter does not seek to stamp an imutable status-quo on the world. As the Bolivian representative said at San Francisco, the attempt to secure peace on such a basis would be "anti-human and, therefore, impossible and would in any case constitute a new form of oppression". On the contrary, the Charter seeks in many ways to recognize the need and inevitability of peaceful change. To this end it stresses the necessity of co-operative action to advance human rights and social and economic well-being for all peoples. To this end, also, it offers in place of the

right to resort to threat or the use of force, a variety of methods for the peaceful settlement of international disputes.

20. In the view of the Canadian Government, most of the principles of international law embodied in Article 2 of the Charter require little if any further codification. What is required to secure their more effective application, and thus the progressive development of the system which is founded on these principles, is not their further elaboration but the fulfilment by all members in good faith of "the obligations assumed by them in accordance with the present Charter".

21. The question of whether or not those obligations are, in fact, being fulfilled in any particular situation is, of course, a political one. Indeed it is implicit in many of the important issues raised in the debates which do, and should, take place elsewhere than in the Sixth Committee of the General Assembly. The Canadian Government believes that it would serve no useful purpose to impinge on political discussions of this kind in the context of Resolution 1815 (XVII).

22. However, there is one principle which does lend itself readily to study from the more strictly legal point of view. That is the obligation on member states to "settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered". The Canadian Government is convinced that it would be rewarding to concentrate the studies enjoined by Resolution 1815(XVII) at this time on improving and making more readily usable the various means provided in the Charter for the effective application of that principle. The provisions of Article 33 would, of course, require careful examination. Perhaps of even greater

importance would be an intensive study of the role of the International Court of Justice, including in particular the part that can be played by the compulsory jurisdiction clause of the Court's statute, in furthering the application of the rule of law to an ever widening area in the affairs of states.

LEGAL SIV./J.A.BEESLEY/PM

DEPARTMENT OF EXTERNAL AFFAIRS

MEMORANDUM

TO: Legal, Economic, U.N., European, D.L.(1) and D.L.(2) Divisions

FROM: MR. CADIEUX

REFERENCE:

SUBJECT: Meeting of Legal Planning Committee

Security CONFIDENTIAL

Date March 1, 1963.

File No. 5475-AX-38-40

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cc. 10946-40

A meeting of the Legal Planning Committee will be held on Monday , March 11, 1963 at 2.30 p.m. in my office to consider the following questions:

Economic & Legal Divs. ✓

1) Canadian position on the OECD Draft Convention on the Protection of Foreign Property; (See memorandum from Economic Division to Legal Division dated January 25 and Mr. Copithorne's two memoranda dated February 14 and 15 respectively.) As you will recall, this question was considered by the Committee last fall in the context of the preparation of our brief on the U.N. agenda item Permanent Sovereignty over National Resources and it was agreed at that time that together with the Department of Finance a co-ordinated position on these questions and on the IBRD Investment Convention and the I.L.C. studies on State Responsibility should be developed. There are now a number of questions requiring decision, as appears from the above-mentioned memoranda.

Legal & U.N. Divs. ✓

2) Proposed comments by Canadian Government on U.N. Resolution 1815 (Friendly Relations); By agreement between U.N. and Legal Divisions, U.N. Division is preparing a preliminary working paper discussing three of the four subjects on which comments of governments have been requested (respect for territorial integrity and political independence, non-intervention, and sovereign equality of states), while Legal Division is preparing the paper on peaceful settlement of disputes. It is hoped that both of these papers will be available in first draft form for discussion at the meeting.

Legal, D.L.(1), D.L.(2), & European Divs. ✓

3) Sovereign immunity of state-owned ships: Soviet Trawlers; (See Legal Division's memoranda dated February 22, 1963 and D.L.(1)'s memorandum of February 20, 1963.) This question, which has, as you know, been under consideration from time to time in the Department for several years has been brought to a head by D.N.D. in connection with illegal activities of U.S.S.R. fishing trawlers within Canadian territorial and internal waters. There would seem to be a number

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CIRCULATION

Mr. Wershof
Mr. Kingstone
Mr. Copithorne

Ext. 326A (6/56)

4.3.30(05)

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of possible ways, from a legal point of view, of handling this question, and the course of action to be decided on requires consideration not only of legal factors but also relevant political, economic and other policy questions.

Legal Div.

4) U.N. request for documentation on Canadian state practice and succession of states; Treaty Section's memorandum of February 26, 1963 is self-explanatory.

Legal & U.N. Divs.

5) Wording of proposed new declaration of acceptance of compulsory jurisdiction of the International Court of Justice; (See Legal Division's file note previously referred to you.) Although the Minister has indicated that no action was to be taken on this question for the time being, we are continuing to receive replies from the Commonwealth countries approached on this question, three of whom (Uganda, Pakistan and Australia) have made specific enquiries as to the reciprocity question. It would seem advisable therefore to try and decide, at least at the official level, on the wording of the proposed new declaration, if and when filed.

M. Cadieux

February 26, 1963.

Our File: 5475-AX-39-40
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cc: 5475-AX-39-40

MEMORANDUM FOR LEGAL PLANNING COMMITTEE

United Nations Request for Documentation on Canadian State Practice with regard to the Succession of States

The Secretary General is collecting documentation on the practice of states with regard to state succession, for the use of the I.L.C. We have been asked to provide

> "The texts of all treaties, acts, decrees, regulations etc. [to which group were subsequently added the texts of domestic judicial decisions and diplomatic correspondence] which relate to the process of succession as it affects States which have attained their independence since the Second World War."

The likeliest sources of material from which to deduce state practice on this subject, would seem to be colonial powers and newly independent states. However, some other states (eg. United States) have concluded agreements with newly independent states whereby the two acknowledge the succession of treaty rights and obligations from the former colonial power vis à vis the third state, to the newly independent state. There is no record of Canada having entered into such agreements with newly independent countries, and we therefore have nothing useful to contribute in the way of evidence of state practice.

It has been suggested that Newfoundland is "a state which has attained its independence since the Second World War". There is no doubt that the people of Newfoundland have achieved independence in the broad sense of the word and perhaps it can be said that they exercized this independence in voting to become a part of Canada. It is obviously difficult, however, to maintain that there now exists an independent state of Newfoundland, although perhaps there was a point in time at which Newfoundland theoretically achieved an independent status prior to merging itself with Canada. This conclusion, however, is inconsistent with the view of the Department and subsequently the Government at the time, [illegible] that the process by which Newfoundland became a part of Canada was a form of cession, i.e. that the United Kingdom and Colonies ceded part of its territory to Canada.

However leaving aside these arguments for the moment, the case of Newfoundland is worthy of attention on its merits. The view of the Canadian government as noted above, was that the process by which Newfoundland

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became a part of Canada was a form of cession and the appropriate rules of international law regarding the succession of treaties therefore applied, ie. agreements binding upon Newfoundland prior to Union lapsed, except for those obligations arising from agreements locally connected, which had established proprietary or quasi proprietary interests. (It is not apparent whether other aspects of state succession such as debts, contracts, and nationality arose in connection with Newfoundland's entry into Confederation.) While the view of the Canadian government was made known to interested governments, no public statement was ever made as to the legal nature of the process by which Newfoundland became a part of Canada. (In passing, it is interesting to note that one writer - R.W.C. De Muralt, The Problem of State Succession with Regard to Treaties - has deduced "...in treaty matters, the Canadian Government have acted in a similar manner as most annexing states; they applied the principle of moving treaty borders ...")

In view of the fact that Newfoundland is not really a case directly on the point of the Secretary General's request, and secondly, that any statement in this connection would presumably entail a government decision to make known the 1949 policy of the government of the day, it is recommended that no mention be made of Newfoundland in the reply to the Secretary General. If this is agreed, an answer might take the following form:

> "As Canada has not been directly concerned with the question of state succession affecting states which have attained their independence since the Second World War, there has been no occasion for the type of material requested by the Secretary General as evidence of state practice, to come into existence in Canada. Accordingly, the Secretary of State for External Affairs is unable to provide the Secretary General with material which might be useful as evidence of state practice on this subject."

LEGAL DIV./J.A.BEESLEY/PM

DEPARTMENT OF EXTERNAL AFFAIRS

MEMORANDUM

TO: MR. CADIEUX

FROM: J. A. BEESLEY

REFERENCE:

SUBJECT: Meeting of Legal Planning Committee

Security CONFIDENTIAL

Date February 25, 1963.

File No. 5475-AX-38-40 | 9 | — | —

There are several questions which might usefully be considered by the Legal Planning Committee, if you agree, such as:

--- (a) Canadian position on the OECD Draft Convention on the Protection of Foreign Property; (See attached memoranda from Economic Division to Legal Division dated January 25 and Mr. Copithorne's two memoranda dated February 14 and 15 respectively). As you will recall, this question was considered by the Committee last fall in the context of the preparation of our brief on the U.N. agenda item Permanent Sovereignty over National Resources and it was agreed at that time that together with the Department of Finance a co-ordinated position on these questions and on the IBRD Investment Convention and the I.L.C. studies on State Responsibility should be developed. There are now a number of questions requiring decision, as appears from the attached memoranda. yes

--- (b) Wording of proposed new declaration of acceptance of compulsory jurisdiction of the International Court of Justice; (See attached file note of March 12, 1962.) Although the Minister has indicated that no action was to be taken on this question for the time being, we are continuing to receive replies from the Commonwealth countries approached on this question, three of whom (Uganda, Pakistan and Australia) have made specific enquiries as to the reciprocity question. It would seem advisable therefore to try and decide, at least at the official level, on the wording of the proposed new declaration, if and when filed. yes

--- (c) U.N. request for documentation on Canadian state practice and succession of states; Treaty Section's memorandum (attached) of February 26, 1963 is self-explanatory. yes X

(d) Sovereign immunity of state-owned ships: Soviet Trawlers; (See Legal Division's memoranda dated February 22, 1963 ~~already sent to you~~ and D.L.(1)'s attached memorandum of February 20, 1963.) This question, which has, as you know, been under consideration from time to time in the Department for several years has been brought to a head by D.N.D. in connection with illegal activities of U.S.S.R. fishing trawlers within Canadian territorial and internal waters. There would seem to be a number ...2

X as to this, if the [illegible] in this summer [illegible] on state succession, we should know more: what is the deadline. [illegible]

27. 2.29(05) we had it, could we send comment [illegible]

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of possible ways, from a legal point of view, of handling this question, and the course of action to be decided on requires consideration of legal factors, ~~in conjunction with the~~ relevant political, economic and other policy questions.

(e) Proposed comments by Canadian Government on U.N. Resolution 1815 (Friendly Relations); By agreement between U.N. and Legal Divisions, U.N. Division is preparing a preliminary working paper discussing three of the four subjects on which comments of governments have been requested (respect for territorial integrity and political independence, non-intervention, and sovereign equality of states), while Legal Division is preparing the paper on peaceful settlement of disputes. It is hoped that both of these papers will be available in first draft form for discussion at the ~~next~~ meeting of ~~the Legal~~ Planning Committee.

2. You may wish to indicate which of these subjects you would like discussed and when you would like the meeting to be held.

J. A. Beesley

1. I here are all good subjects. I assume that (a) and (e) rate priority treatment. Perhaps also b?
2. A number of issues will arise at the next meeting of the I.L.C. We have a position paper agreed in principle on one of these e.g. failure to observe contractual requirements. Are other papers being prepared? (on the damages, on "unequal" treaties, on conflict between treaties, on the effect of reliance etc)
3. Would next Wednesday P.M. or 3 be suitable?

V./J.A.BEESLEY,

DEPARTMENT OF EXTERN[illegible] LIBRARY

MEMORANDUM

SECRET

TO: D.L. (2) DIVISION

Security (Not to be circulated outside Dept.)

Date February 22, 1963.

FROM: LEGAL DIVISION

File No. ~~11067-A-40~~ 5475-AX-38-40

REFERENCE: Your memorandum of February 20, 1963.

SUBJECT: Security Threat posed by Soviet Trawler Activities: Sovereign Immunity and Territorial Limits"

We share your misgivings concerning the intelligence brief attached to your memorandum under reference which seems to us to be based on a number of false premises which, when coupled with quotations out of context of various memoranda produced by this Division, result in an erroneous view of the legal position. (We have had some previous experience with this same problem as appears from the attached extract of an internal divisional memorandum dated September 14, 1962.)

2. The major premise on which the brief is based appears to be that the recent decision of the Supreme Court of Canada in the Cuban ships case upheld the doctrine of sovereign immunity with respect to foreign state owned trading ships. The judgment specifically avoided this issue, however, and found that since no evidence had been adduced as to whether the ships in question were intended for trading purposes the question did not arise. The Court indicated, however, particularly in the judgment of Mr. Justice Locke, reservations similar to those expressed in earlier Canadian and British decisions as to the applicability of the doctrine of sovereign immunity to state owned ships engaged in normal trading ventures. Although, as pointed out in our memorandum of February 22, 1962 (flagged on the attached file), the Cuban ships case might have settled the issue in Canadian law it did not do so, as is presumably known to the Judge Advocate Branch of the R.C.N., who have copies of the decision.

3. The second premise on which the brief is based appears to be that either on the basis of the Cuban ships case or earlier Canadian decisions upholding the doctrine of sovereign immunity, Soviet fishing vessels would be held immune in event of any attempt to take Court action against them for illegal activities in Canadian ports. As pointed out in the attached memorandum (flagged) of February 22, 1962 this premise is open to question since the courts might well hold that, as is the case with respect to diplomatic immunity, a foreigner is bound to observe the laws of the receiving state. It should not therefore be assumed that a Canadian court would decline to assume jurisdiction over a Soviet "fishing vessel" or members of its crew charged with illegal activities in a Canadian port. It is worth noting too that we were not

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CIRCULATION

Mr. Cadieux
D.L.(1) Div.
European Div.

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prevented by any legal or political scruples from delivering a rather stiff aide memoire to the U.S.S.R. (copy attached) on June 26 last, on unauthorized entries into territorial waters, since the date of which such infractions have virtually ceased.

4. The next premise on which the brief is based appears to be that if court action were taken against a Soviet vessel or its Master the Executive Branch of the government would be helpless to influence the decision of the court. This is not the case, as is explained in the flagged memorandum of October 31, 1960. The question of the applicability of the doctrine of sovereign immunity to a foreign state owned ship has been treated in at least one Canadian decision as a "fact of state", the determination of which falls to the Executive Branch of the government. While it would be a matter which might require a policy decision, there is no reason to doubt that if a certificate stating that immunity did not apply to a particular Soviet ship were filed in the appropriate court by the Department of External Affairs or by the Department of Justice the Court would accept such a certificate as conclusive on the issue. (This would not get around difficulties arising out of lacuna in Canadian legislation, but presumably no charge would be laid unless there were legislation authorizing such action.)

5. Another premise on which the brief appears to be based is that five years of fishing activities by the Soviet fleet off Canadian shores would automatically convey upon the U.S.S.R. "historic fishing rights" in Canadian waters. Quite apart from doubts expressed to us by the Department of Fisheries as to whether the U.S.S.R. has in fact carried out such fishing activities in the "six-to-twelve mile zone" for the past five years, it would not in the absence of an international agreement so providing follow automatically from an extension of Canada's territorial sea to six miles and exclusive fishery zone to twelve miles that a ten-year fishing privilege would be thereby conferred on all countries who could show that they had fished in the waters in question for five years prior thereto. Turkey, for instance, is said to be contemplating "six-plus-six" legislation on a reciprocal basis, with the U.S.S.R. specifically in mind; under the proposed Turkish legislation those countries which permit Turkish vessels to fish up to six miles off their coasts would be permitted to do so in Turkish waters, whereas those countries, such as the U.S.S.R., which exclude foreign vessels beyond the twelve-mile limit would have the same conditions imposed on them by Turkey.

6. The next, (and one of the most surprising), premise on which the memorandum appears to be based, assumes that if "historic fishing rights" were granted to the U.S.S.R., various other rights, including presumably, the right to conduct illegal activities in Canadian ports, would also follow. We know of no basis in international law for this belief.

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7. Another premise on which the brief appears to be based is that the normal rules of customary international law permitting access to ports in peace time hamper us in dealing with security problems posed by the activities of Soviet trawlers. Although, as pointed out in our memorandum of October 12, 1961 (flagged) the issue of freedom of access to internal waters is by no means clear-cut (and indeed, as stated in that memorandum, two diametrically opposed opinions have been obtained on the question from the Department of Transport), nevertheless, assuming that such a right of free access does exist, (and we lean to this view), it would not follow from this that the activities of members of the crew of a Soviet ship docking in a Canadian port would be completely unrestricted by Canadian law. (See para. 2 of our memorandum of February 22, 1962 flagged.) Moreover, it is not clear that the right of access to ports in general applies also to naval ports, (see para. 2, note 141, iii of Annex "A" to our memorandum of October 12, 1961) nor that restrictions cannot be imposed on entries of naval vessels to non-naval ports (see para. 2, note 141, iv of same memo). It would be relevant, for instance, to note the restrictions applied with respect to entry into U.S.S.R. ports, naval and otherwise, by foreign ships, naval and otherwise. Whether or not Canadian naval vessels actually visit Soviet naval ports, the restrictions which it is known would be imposed upon Canadian ships, were they to do so, might well be justifiable under international law if imposed on a reciprocal basis by Canada against U.S.S.R. ships.

8. Another and rather less important premise on which the brief is based is that Canada, the U.K. and the U.S.A. all equally uphold the doctrine of sovereign immunity. As pointed out in the flagged memorandum dated October 31, 1960 there are marked differentiations in the juris prudence of the three countries on this question. Indeed, much of the memorandum is devoted to the question whether Canada should continue to adhere to the "classical" or "absolute" doctrine of immunity as still applied in British courts, or whether we should adopt the "restrictive" theory of immunity as applied in U.S.A. courts.

9. In the light of the foregoing we are rather pleased to learn that the D.N.I. Intelligence Brief was withdrawn from J.I.C. consideration.

10. We should be pleased to take such further steps as you may consider advisable to assist in defining the legal issues attendant upon attempts to meet the security problems posed by Soviet ships.

H. COURTNEY KINGSTONE

Legal Division

Legal/M.D. Copithorne

DEPARTMENT OF EXTERNAL AFFAIRS

MEMORANDUM

TO: Mr. Sicotte

FROM: M.D. Copithorne

REFERENCE: Economic Division Memorandum dated January 25, 1963.

Security CONFIDENTIAL

Date February 15, 1963.

File No. 5475-AV-35-40 10946-40

SUBJECT: Treaty Section Comments on OECD Draft Convention on the Protection of Foreign Property.

This convention reaffirms what are referred to as "recognized fundamental principles relating to the protection of foreign property". In brief terms, the convention would provide for equitable treatment and security of foreign property in a signatory state, would include the principle of just compensation in the event of expropriation under due process of law, and would provide for full reparation in cases of breaches of the convention. The draft includes rules designed to render the above principles effective and provides for machinery for the determination of disputes.

2. It is perhaps worth noting briefly some of the history of this convention which has been under discussion in an OECD Committee since 1959. Canada did not participate in the discussions and while a United States representative attended the meetings, he did not play any part in the drafting. The committee submitted a final draft of the convention to the OECD Council in November 1962 and it is to come up for consideration by the Council in March 1963.

CIRCULATION

3. In 1958 before the committee started work Canada and the United States expressed doubt about the application of this convention to non-member and, more specifically, less developed countries. Both countries have made it clear that they might not be able to subscribe to such a convention. Certain member states have recently been soliciting the views of some non-member, less developed countries and the Canadian delegation is of the view,

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depending on the results of the survey, that opposition, to the substance of the Convention (which is not confined to Canada and the United States), may have dropped sharply by the time it comes up for discussion this March in the OECD Council.

4. In the meantime I am given to understand by Economic Division that a Mr. J.A. Macpherson in the Department of Finance has been studying this convention for that Department. I assume therefore that whoever is going to consider the substance of this convention will wish to consult with Mr. Macpherson (see paragraph three of Economic Division memorandum). I might also add that the delegation is expecting instructions in time for the March meeting and that we may receive an urgent request at any time for our views.

Should consult him in the first instance via Economic Division?

5. As requested, I have looked over the convention from the point of view of the Treaty Section. The final clauses of the draft (Articles 10 to 14) seem appropriate and do not call for any special comment. The convention is to be open to any member of the United Nations, its specialized agencies, or parties to the statute of the International Court of Justice. The "all states" issue does not arise unless a broader membership clause should be proposed by an OECD member at the forthcoming discussions but this seems a most unlikely turn of events.

6. The present draft has a colonial application clause (Article 11) but not a federal state clause. As the subject matter of the convention is probably largely with the legislative competence of the provinces - "Property and Civil Rights" - it is evident that if Canadian participation is going to be meaningful, the legislative interests of the provinces will have to be considered. The first step would appear to be a request to the Department of Justice for an opinion as to whether the subject matter of the convention lies wholly or partly within the legislative competence of the provinces. Assuming an affirmative answer, the second step would be the drafting of a suitable federal state clause. However, in the same forum (OECD) a request in 1961 by Canada and the United States for the inclusion of a federal state clause in the OECD Code of Invisible Transactions was met by "almost unanimous opposition" of other member states. After protracted discussion, a compromise was reached by which Canada undertook to carry

premature?

out the provisions of the Code "to the fullest extent compatible with the constitutional system of Canada" and the OECD Council took a decision "noting" this undertaking, after recognizing that the provinces might have jurisdiction to act with respect to certain matters which fell within the purview of the Code. (See Annex for full text of Council decision.) This compromise was approved by Mr. Fleming, the then Minister of Finance, but there is no indication on file that the Department of Justice gave its blessing to it.

yes

7. For the immediate purposes of instructions to our Delegation, I would propose that they be asked to sound out from the other delegations whether the procedure adopted in the case of the Invisibles Code might be acceptable in this case. It should be made clear that Canadian officials are still studying the question but it would be helpful to know before it is put up to the Ministers, whether such a procedure was likely be acceptable to other member states.

Legal Division

Annex D

DECISION OF THE COUNCIL

Regarding the application of the provisions of the Code of Liberalisation of Current Invisible Operations to action taken by Provinces of Canada

THE COUNCIL:

Having regard to Articles 2 (*d*), 3 (*a*) and 5 (*a*) of the Convention on the Organisation for Economic Co-operation and Development of 14th December, 1960;

Having regard to the Code of Liberalisation of Current Invisible Operations (hereinafter called the "Code");

Having regard to the Report of the Committee for Invisible Transactions on the Codes of Liberalisation of Current Invisibles and of Capital Movements of 28th October, 1961, and, in particular, paragraphs 18 and 19 thereof and the Comments by the Executive Committee on that Report of 8th December, 1961 [OECD/C(61)37, OECD/C(61)73];

Recognising that in Canada individual Provinces may have jurisdiction to act with respect to certain matters which fall within the purview of the Code;

Believing, however, that there is only a limited area of current invisible operations in which Provincial actions might be relevant to the Code and believing, moreover, that actions by Canadian Provinces are unlikely to have a significant practical effect on the operation of the Code;

Convinced that where instances of this nature arise they will be settled in the tradition of co-operation which has evolved among the Members of the Organisation;

DECIDES:

1. To take note of the undertaking of the Canadian Government to carry out the provisions of the Code to the fullest extent compatible with the constitutional system of Canada.

2. This Decision shall form an integral part of the Code and shall be attached thereto as Annex D. It may be reviewed at any time at the request of a Member of the Organisation which adheres to the Code.

Legal/M.D.Copithorne/cs.

DEPARTMENT OF EXTERNAL AFFAIRS

MEMORANDUM

TO: Mr. ~~Sicotte~~ BS
Mr. Kingstone
Mr. Beesley

FROM: Legal Division

REFERENCE:

Security ....UNCLASSIFIED....

Date ...February 14, 1963.

File No. 5475-AX-3E-40

7

SUBJECT: Formulation of Canadian Policy on Foreign Investment Conventions and Related Matters.

While working out some comments on the OECD Convention on the Protection of Foreign Property, which are attached, it became apparent that there are a number of recent initiatives in the field of protection of foreign property which might usefully be examined together with the intention of formulating a general policy on this subject. The following conventions or resolutions would seem to touch in whole or in part on this subject:

(1) Convention on the International Responsibility of States for Injuries to Aliens. (Sohn & Baxter for the International Law Commission)

(2) Convention on the Protection of Foreign Property. (OECD)

(3) The General Assembly resolution of December 14, 1962 on Permanent Sovereignty over Natural Resources.

(4) Convention for Settlement of Investment Disputes (I.B.R.D.)

2. I should like to suggest that consideration be given to having this subject placed on the agenda of the Legal Planning Committee.

Legal Division

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CIRCULATION

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Date July 23, 1962

DEPARTMENT OF EXTERNAL AFFAIRS

MEMORANDUM

Dec 10/62

TO: Legal Division

Security Restricted

Date January 25, 1963

FROM: Economic Division

File No. 5475-AK-38-40 ~~0180-40~~

REFERENCE: OECD letter 0-361 of December 17, 1962

9

SUBJECT: OECD Draft Convention on the Protection of Foreign Property

In recent months we have brought to your attention on several occasions the latest version of the OECD draft Convention on the Protection of Foreign Property. From the letter under reference you will see that the Council has now agreed that the draft Convention (subject to the deletion of Article 14) may now be made available by Member countries and the Secretary-General to governments of non-Member states and other interested circles. It is being done of course on the explicit understanding that the draft does not bind Member governments and that its circulation is for the specific purpose of obtaining comments which might be taken into account in a re-draft.

2. At this time we would welcome your assistance on two matters:

3. First, we would be grateful for any detailed comments on the draft which you would be prepared to offer for the benefit of the Delegation when this subject is next discussed in the OECD. The document has already been referred to other interested Departments and it would be appreciated if you would undertake to consult with the appropriate officials of these Departments in the preparation of a Canadian position on the contents of the Convention.

4. Second, we would be grateful for your views on the extent to which outside circulation of the draft Convention should be made in Canada. The Department of Trade and Commerce will, we understand, provide copies to representatives of the business community, such as the Canadian Manufacturers' Association and the Chamber of Commerce, but will not attempt to place copies with legal associations. The letter under reference suggests that reprints will shortly be available for the purpose of public circulation. If you wish to have copies which you might distribute to appropriate individuals or associations, the Delegation should be informed accordi

CIRCULATION

Mr. Cadieux

Economic Division

P.S. - We have learned today that copies have been sent by sea bag and these will be forwarded to your Division on arrival.

Ext. 326A (6/56)

DEPARTMENT OF EXTERNAL AFFAIRS

CROSS REFERENCE SHEET

Security ....UNCLASSIFIED.....

5475-AX-38-40		

Type of Document.....Memorandum..... No.....Date..December 21, 1962.

From....Mr. E.A. Driedger, Deputy Minister of Justice.....

To.....

Subject: Commentary on the Report of the Royal Commission on Government Organization on Legal Services.

Original on File No...9941-40.....

Copies on File No.....

Other Cross Reference Sheets on.....

Prepared by.....Mr. G. Sicotte.....
Legal Division

Ext. 308

Legal Planning Committee
(Mr. Cadieux, Mr. Wershof, Mr. Sicotte, Mr. Kingstone, Mr. Jay, Mr. Rutting, Mr. Brossard, Miss Ritchie (Justice)).

Legal Division

CONFIDENTIAL

January 22, 1962.

5475-AK-38-40

Attached for your information is a copy of the minutes of the meeting of the Legal Planning Committee held on Tuesday, January 15.

2. Also attached, as suggested by Mr. Wershof, is a copy of General Assembly Resolution 1815 (which embodies the decision to study the four subjects discussed at the committee meeting), and, for purposes of comparison, copies of the "Canadian" draft resolution L-507 Rev. 1, the "Yugoslav" draft resolution L-509 Rev. 1, and the "Czech" draft resolution L-505, together with an explanatory background note, and the rather more lengthy report of the Rapporteur.

GILLES SICOTTE

Legal Division

Minutes of Meeting of Legal Planning Committee
on Tuesday, January 15, 1963

Present: M. Cadieux (Chairman)
M.H. Wershof
G. Sicotte
Miss Ritchie (Dept. of Justice)
R.H. Jay
S.C.H. Nutting
H.C. Kingstone
J.E. Brossard
J.A. Beesley (Secretary)

The Committee considered the following items:

ITEM II - Non-observance of Constitutional Limitations on Treaty Making Power and its affect on the validity of Treaties

The Chairman pointed out that this was an issue soon to be faced by the I.L.C.; the first question was whether there was a Canadian national interest in one solution over the other. The Chairman outlined briefly two theories (one whereby constitutional defects were considered as invalidating treaties and the other whereby they did not) and suggested that the better rule both from the point of view of the Canadian government and of international law would seem to be one giving supremacy to the international considerations. It might, however, be necessary to have some exceptions in the case of federal countries such as Canada.

Mr. Jay enquired as to whether the issue was not already largely settled for Canada by the Radio case and other precedents. Miss Ritchie explained that if a test case were put to the Supreme Court now it is possible that the Court might take a different view from that taken in earlier cases and the issue is not necessarily therefore settled for all time.

The Chairman pointed out that a decision by the I.L.C. to give precedence to the international rule could create additional pressure towards a new approach by Canadian courts. Miss Ritchie explained out that as the situation now stands such a decision might create difficulties for Canada.

Mr. Jay commented that so long as treaties are tabled in the House in accordance with present constitutional practice the question of compliance with domestic constitutional provisions did not arise for Canada.

Miss Ritchie pointed out that the Department of Justice were reluctant in principle to consulting the provinces as a regular constitutional practice and also to signing treaties on the basis of prior assurances from the provinces.

Mr. Wershof expressed his own support for the theory giving supremacy to international rather than domestic law and recommended that Canada adopt that position.

To Mr. Jay's query whether the issue was one of the right to conclude treaties or one of the right to implement them, the Chairman pointed out that in Canadian practice the distinction did not exist since for all practical purposes either issue raised the other.

Mr. Wershof expressed further views as to why Canada as a nation should support the doctrine of ignoring constitutional defects.

The meeting agreed that apart from the preference for that doctrine from a legal point of view it would seem to be in Canada's national interest to support it. It was agreed also that the preliminary working paper prepared by the Treaty Section would be referred to the Department of Justice for comments and the question would be discussed again in greater detail.

ITEM I - Government comments on the four topics decided on for study by the UN. General Assembly on Human Relations

The Chairman explained that comments of governments were required on four topics (Respect for Territorial Integrity and Political Independence", "Peaceful Settlement of Disputes", "Non-Intervention", and "Sovereign Equality of States").

The Chairman pointed out that we were well prepared on the "Peaceful Settlement of Disputes" question, since the Cabinet had decided to withdraw Canada's reservations to the compulsory jurisdiction of the international court, and the Minister had agreed to make this known in our comments on this item and to solicit support within the Commonwealth of conserted action of Commonwealth countries.

The Chairman suggested therefore that the Canadian comments concentrate on this item but that preliminary studies be made of the other three topics with a view to further discussion at a later meeting to determine the Canadian interest and the line to be taken. His own view was that the Sixth Committee was unlikely to have time to discuss all four subjects fully.

Mr. Jay, while agreeing with the Chairman's views, suggested that Canadian position might focus also on the working methods to be followed.

General agreement was expressed with the views of the Chairman and Mr. Jay on these points.

It was decided that U.N. Division would give consideration to the possibility of preparing preliminary studies of the "Non-use of Force and Non-intervention" questions and that Legal Division would do similarly on the other two questions, the main emphasis to be placed on "Peaceful Settlement of Disputes".

It was agreed also that discussions should be undertaken with friendly countries and that it might be suggested to them that the principles of respect for territorial integrity and of peaceful settlement of disputes could be pursued concurrently in the Sixth Committee, at the 18th UNGA with the other two topics being deferred for later action.

ITEM III - Planning for 1963 I.L.C. Session

The Chairman suggested that that topic be discussed at the next meeting. He explained that on the question of State responsibility and State succession all that the I.L.C. would be doing would be to approve rapporteurs and lay down procedures. It was hoped that Treasury Board would authorize the hiring of a law professor for the summer months to do research on these two questions with a view to future sessions of the I.L.C.

CONFIDENTIAL

Files: 5475-AX-38-40
5475-AX-37-40

Explanatory Note on General Assembly Resolution A/RES/1815 (XVII) of Jan. 3, 1963 on Item 75: Consideration of Principles of International Law concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations

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Draft resolution L-507 (Rev. 1), introduced by Canada, and generally referred to in the Sixth Committee as the Canadian resolution was co-sponsored by 14 countries(1); Draft resolution L-509 (Rev. 1), introduced by Yugoslavia, and generally referred to as the Yugoslav resolution was also co-sponsored by 14 countries(2); Draft resolution L-505 was introduced and co-sponsored by Czechoslovakia The Canadian and Czech resolutions were filed well prior to the opening of the debate on the Friendly Relations item, while the Yugoslav resolution was filed approximatel half way through the debate.

The general debate on the item, which was in many respects a debate on the resolutions, due to their having been filed so early in debate, centered around two main issues:

(a) Whether peaceful co-existence constituted a legal concept, (the item having originated from a resolution by a number of Afro-Asian countries proposing that the Sixth Committee study co-existence as a legal topic);

(b) Whether the resolution to be adopted should embody the declaration approach (as in the Czech and a Yugoslav resolutions) or the emperical study approach (embodied in the Canadian resolution).

In most but not all cases the proponents of peaceful co-existence as a legal concept supported the declaration approach, while those questioning its validity as a legal concept supported instead the emperical study of areas of the law in need of clarification and development. Some countries, such as Burma, made clear that while fully supporting the Bandung and Belgrade declarations, in their view peaceful co-existence constituted a political and social rather than a legal concept. Many neutralist countries such as Cambodia and some potential western supporter such as Cyprus and Iran called for a compromise resolution; (while the Yugoslav resolution had been introduced as a compromise resolution it was generally recognized that it did not constitute one).

The trend of debate indicated, as it developed, that the Canadian resolution seemed fairly certain of achieving a majority, that the Czech resolution could command little or no support outside the Soviet bloc, and that while the Yugoslav resolution/ notlikely to

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(1) Cameroon, Canada, Central African Republic, Chile, Congo (Leo)., Dahomey, Denmark, Japan, Liberia, Nigeria, Pakistan, Sierre Leone and Tanganyika.

(2) Afghanistan, Algeria, Cambodia, Ceylon, Ethiopia, Ghana, India, Indonesia, Mali, Morocco, Somalia, Syria, the United Arab Republic and Yugoslavia.

obtain a two-thirds vote, (as normally required for a declaration), it seemed fairly certain of obtaining a simple majority. Somewhat to the surprise of the western group and the co-sponsors of the Canadian resolution, (treated by Canada throughout as two distinct groups), the sponsors of the Yugoslav resolution made clear in corridor discussions towards the end of the debate that they were prepared to settle for a simple majority, to fight the issue whether a two-thirds vote was needed for their resolution, and to raise the question whether it was needed for the Canadian resolution. The danger of the Yugoslav resolution passing, coupled with increasing pressure for a compromise (from the chairman of the Sixth Committee and from the Legal Counsel of the U.N., both of whom called for negotiations in statements to the committee as well as from a number of speakers in the debate), persuaded the western group and the Canadian co-sponsor group to agree to negotiate with the co-sponsors of the two competing resolutions.

During the week-long negotiations which ensued, the efforts of the Soviet bloc and the Yugoslav group (whose position throughout the negotiations was virtually indistinguishable from that of the Soviet bloc) were directed towards maintaining the declaration approach, retaining their wording on the principles (which in many cases were not only inconsistent with the Charter but were postulated as superseding the Charter) and maintaining the various elements of the Soviet version of co-existence embodied in the resolutions, as well as many instances of co-existence terminology contained in them. The efforts of the Canadian co-sponsor group and of the western non-sponsor supporters were directed toward retaining the references to the rule of law, (not previously included in any U.N. resolution), and to the Charter as the fundamental statement of principles of friendly relations, (rather than the principles of co-existence), maintaining the emperical study approach, opposing the declaration approach and replacing it by a reaffirmation of Charter principles, (and, as a consequence, amending the wording of the principles as contained in the Czech and Yugoslav resolutions and replacing them with Charter language), and eliminating the Soviet-bloc inspired co-existence terminology contained in the Czech and Yugoslav resolutions.

In the event, agreement was reached on a comprised OM resolution which re-affirmed a number of Charter principles, (but not in declaration form), drew attention to the importance of the rule of law and to the Charter as the fundamental statement of principles of friendly relations, ~~the co-existence terminology~~), and decided to begin at the 18th General Assembly with the study of four areas of the law requiring clarification and development. (Apart from some non sequitors on disarmament and colonialism, not objected to by the western group, the co-existence terminology had been eliminated) Resolution A/Res/1815 (XVII) embodying the compromise agreement was adopted unanimously (France abstaining) on January 3, 1963.

cc: Mr. Sicotte
Mr. Beesley

File 5475-AX-38-40

NOTE TO MR. COPITHORNE

CONFIDENTIAL

January 21, 1962.

Subject: Meeting of Legal Planning Committee (January 15) - Law of Treaties.

I attach one copy each of the following papers:

1) a) Memorandum of January 7 from Mr. Beesley to Mr. Cadieux;

b) Actual Agenda of the meeting held on January 15.

2) With reference to your paper on "the non-observance of constitutional limitations ...": an undated Note from Mr. Cadieux;

3) An undated Memorandum from Mr. Cadieux, raising three additional questions relating to the Law of Treaties.

2. Although you will see no doubt a copy of the Minutes prepared by Mr. Beesley, the following additional Notes taken at the meeting might be of more immediate concern to you:

1) With reference to your paper, Mr. Cadieux suggested that Fitzmaurice was more in line with modern practice. He concluded the discussion on "the non-observance of constitutional limitations ..." by noting that, on balance, the second theory (b) outlined in your paragraph two might be preferable from the viewpoint of ~~Canada in relation to the provinces~~ the Canadian government and from the standpoint of international law. Miss Ritchie mentioned that the Department of Justice preferred not to consult the provinces except on secondary matters and when their support could be expected, and was reluctant to put "the federal government at the mercy of the provinces" by signing agreements under the understanding that the provinces would agree. (In this connection, you might wish to see copies of our memorandum of January 17 to U.N. Division on a proposed revision of Article 35 of the ILO Convention, and of our letter of January 18 to Miss Ritchie).

2) Mr. Cadieux also raised the questions outlined in his memorandum referred to in my first paragraph above. With regard to the termination of treaties in which there is no provision to that end, he noted that members cannot be compelled to stay in the U.N. (for instance if the Charter is amended or circumstances have changed) although there is no provision in the Charter in that respect.

J.E. Brossard

file - appropriate treaty section file

c.c. Mr. Wershof.
Mr. Brossard
Miss Ritchie (Dept. Justice)
File 5475-AX-38-40

NOTE FOR LEGAL DIVISION

Re: The Paper prepared by Mr. Copithorne.

1. At its last session, in adopting article 4 which specifies that Heads of States, Heads of Governments and Foreign Ministers do not have to prove their authority to sign and ratify a treaty the I.L.C. suggests to a certain extent that abuse of authority on the part of these persons cannot be pleaded to withdraw from the obligation.

2. The same considerations apply as regards the validity of the various procedures which can be resorted to to amend or cancel a treaty: must they be identical to the original instrument? If so will the constitutional requirements be mandatory?

3. De Visscher has another relevant book De la Conclusion des Traites internationaux 1944. He argues in favour of la theorie du renvoi: i.e. there is a rule of law which requires compliance with constitutional provisions. This is the result of expanding democratic rule.

4. Jean Leca in his recent (1961) book on les Techniques de la revision des Traites internationaux has a good deal to say about this point.

M. C.

c.c. Mr. Brossard
Miss Ritchie (Dept. Justice)
File 5475-AX-38-40

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H. C.

Chris Maggins(?); Please also ~~typed copies~~ to Mr Broom(?), Neil Ritchie for file JB

[illegible] Bagley - You may wish to bring these useful notes to Mr Ritchie's notice - ditto for Mr Copithorne [illegible]

file JB

5475-A4-38-40 JB

Note for Legal Division

Re the paper prepared by Mr Copithorne

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000607

MC [illegible]

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2. Jean Leca in his recent (1961) book on Les Techniques de la révision des Traités internationaux has a good deal to say about this point.

MC

referred to: Mr. Cadieux, Mr. Wershof, Mr. Scott, Mr. Ringuette, Mr. Bissonnette, U.N. Division, Disarmament Div.

Please make copy and file Jan 11/63

A G E N D A

I) U.N. Assembly Resolution on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter (copy attached). Governments comments are required by July 1, 1963 on the four topics decided on for study namely:

(a) the principle that States shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the United Nations;

(b) the principle that States shall settle their international disputes by peaceful means in such a manner that international peace and security and justice are not endangered;

(c) the duty not to intervene in matters within the domestic jurisdiction of any State, in accordance with the Charter;

(d) the principle of sovereign equality of States.

Matters for Discussion

(1) the extent of the Canadian interest in the various topics;

(2) the terms of reference for each of the studies to be made on the four topics;

(3) the extent to which studies on these questions overlap with and should be co-ordinated with other work being done in the Department (e.g. peace-keeping machinery at the U.N.; implementing action on the Cabinet decision on International Court).

Certain procedural questions could also be discussed such as

(4) the work methods to be followed on these questions including their assignment to appropriate divisions for action and the desirability of consulting with other departments such as Justice and National Defence.

II) The Non-Observance of Constitutional Limitations on Treaty making Power and its effect on the Validity of Treaties

III) Planning for 1963 Spring Session of I.L.C.

(1) Law of Treaties;

(2) State Responsibility; (proposed study by summer professor)

(3) State Succession

LEGAL DIV./J.A.BEESLEY/FM

DEPARTMENT OF EXTERNAL AFFAIRS

MEMORANDUM

TO: MR. CADIEUX,
Chairman of Legal Planning Committee

FROM: MR. BEESLEY

REFERENCE: nil

Security CONFIDENTIAL

Date January 7, 1963.

File No. 5475-AX-38-40

c.c. 5004-C-40
5475-AX-37-40
5475-AX-36-40

SUBJECT: Proposed Meeting of Legal Planning Committee

As you have requested, the following is a note on the various topics which you might wish to have considered by the Legal Planning Committee at its next meeting:

A) Friendly Relations Resolution yes.

2. Government comments to be given by July 1, 1963 on the four topics decided on for study by the UNGA, namely: the obligation not to threaten or use force against the territorial integrity or political independence of any state; the obligation to settle disputes by peaceful means; the principle of "non-intervention"; and the principle of sovereign equality of states.

3. As you know, the Department has played a particularly active role in connection with the I.L.A. discussions of co-existence and the Sixth Committee debate on Friendly Relations; in the absence of strong representation on the I.L.C. by other Western countries this organizing and co-ordinating role may fall to Canada to an increasing extent in the next few years. It would seem advisable, therefore, to continue to take a strong interest in matters clearly touching on the future development of international law. In any event, quite apart from such considerations, the Assembly decision to study these four questions was brought about by the resolution initiated, sponsored and carried through by Canada, particularly the first two topics, which flow directly from our original resolution, and it might cause misunderstanding of our motives if we were not to follow through with the next step in the operation.

4. As you know, each of the four topics encompasses an area of the law of considerable scope and importance, and will require more than cursory treatment if meaningful comments are to be supplied. The Legal Planning Committee

/ ...2

CIRCULATION

Mr. Wershof
Mr. Sicotte
Mr. Kingstone
U.N. Division
European Division
Disarmament Division

Ext. 326A (6/56)

7.1.45(us)

might, if you agree, usefully consider:

(a) the extent of the Canadian interest in the various topics;

(b) the terms of reference for each of the studies to be made on the four topics; | Cmte drafts be prepared on this?

(c) the extent to which studies on these questions overlap with and should be co-ordinated with other work being done in the Department (e.g. peace-keeping machinery at the U.N.; implementing action on the Cabinet decision on International Court).

Certain procedural questions could also be discussed such as

(d) the work methods to be followed on these questions including their assignment to appropriate divisions for action and the desirability of consulting with other departments such as Justice and National Defence

B) Action to be taken as a result of the Cabinet decision to withdraw Canada's reservations to the compulsory jurisdiction of the International Court of Justice — see reservations suggested

5. As you know, a number of countries (not necessarily merely those Commonwealth countries formerly notified, but others, to whom information may have leaked) are expecting some action by Canada on this question. (See for example, the attached copy of Note No. 73 from the Australian High Commission dated December 24, 1962 confirming that the Australian Government has no objection to our abandonment of the Commonwealth disputes reservations and "will study the question whether the Australian Government might follow the Canadian Government lead in the new year upon the return of the Solicitor General, Sir Kenneth Bailey").

6. One possibility might be to link this question with the comments we would make on peaceful settlement of disputes. If it is desired to act in conjunction with other Commonwealth countries, it might be possible to carry out the necessary consultations in time to incorporate the results, (insofar as they are relevant) in our comments by the deadline of July 1, 1963.

7. Another possibility might be to raise the question at a Commonwealth Prime Ministers' Conference, as originally intended; the continuing pre-eminence of the common market issue would however seem to have some bearing on this possibility.

8. Attached is a draft memorandum to the Minister setting out the pros and cons of various lines of action which could, if you wish, be discussed by the Legal Planning Committee.

If thus necessary

/ ...3

C) Continuing Matters previously considered by the Legal Planning Committee e.g.

(1) Summer professor ; ✓ no action pressed pending T.B decision.

(2) Right of provinces to conclude international agreements ; ✓ yes

(3) Empire treaties ; (studies by Lawford etc.) ✓ is this urgent?

(4) Reply to Swiss proposal for a bilateral treaty of arbitration ; ✓ related to Baboro Dossier

D) Planning for next I.L.C. Session

(1) Law of Treaties ; ✓ yes hq

(2) State responsibility ; (proposed study by summer professor) ✓

(3) State succession. ✓

We must await a) a decision on C (1) and b) Grt Cttee's report.

JB

J. A. Beesley

& the Memo to the Minister should also indicate that other Commonwealth Countries were not fooled that we would make an announcement in Cttee No 6 : we must not, in any event, explain to them why we did not proceed as expected and what we propose to do.

hq

CONFIDENTIAL

AUSTRALIAN HIGH COMMISSION,
OTTAWA,
CANADA.

HIGH COMMISSIONER

No. 73/62

The Australian High Commission presents its compliments to the Department of External Affairs and has the honour to refer to a recent request from the Canadian authorities for the reaction of the Australian Government to Canada's intention to withdraw all reservations at present attaching to its acceptance of compulsory jurisdiction. The High Commission has been instructed to advise that the Australian Government has no objection, and to add that in particular, abandonment of the Commonwealth disputes reservation would cause the Australian Government no embarrassment.

The High Commission has further been instructed to advise that the Australian Government will study the question whether the Australian Government might follow the Canadian Government lead in the New Year upon the return of the Solicitor-General, Sir Kenneth Bailey.

The Australian High Commission takes this opportunity to renew to the Department of External Affairs the assurances of its highest consideration.

R-778

Australian High Commission
Ottawa

24th December, 1962.

CONFIDENTIAL

Legal/G.Sicotte/hf

November 23, 1962

NOTE TO MR. BEESLEY (ON RETURN) -

Mr. Cadieux is very anxious to convoke the Legal Planning Committee as soon as possible after your return, with a view particularly to planning the preparatory work for position papers to be given him on the items coming up at the next session of the I.L.C. There will also be the question of the employment of a summer professor (which Marc Baudouin has on hand and on which Maurice Copithorne has certain proposals to submit to the Committee) and that of state succession, state responsibility, etc. On the latter, Mr. Cadieux thought that we might perhaps ask Gotlieb to report to us on the results of the meeting of the Working Group in Geneva next January. The more immediate preparatory work seems to involve certain studies in the field of the law of treaties, which Maurice knows about. He also has certain topics to propose, in the constitutional law field, for discussion by the Committee. No doubt you will have others to suggest yourself.

2. Is there a cause also to discuss in the Committee the implications of the Cabinet decision of recent date on the acceptance of the jurisdiction of the I.C.J. and the related matter of the Swiss proposal for a bilateral arbitration treaty? - Mr. Kingstone will no doubt have views on this.

(Gilles Sicotte)

Mr. Cadieux
c.c. Mr. Kingstone
Mr. Copithorne
Mr. Brossard

LEGAL DIV./J.A.BEESLEY/PM

c.c. Mr. Lee (Protocol Division)
Files: 12966-40
5475-AX-37-40
5475-EW-40
5475-AX-36-40

CONFIDENTIAL

September 13, 1962.

Minutes of Meeting of the Legal Planning Committee at 11:00a.m., Wednesday, September 5, 1962.

Present at the meeting were: Mr. Cadieux, Chairman, Mr. Sicotte, Mr. Kingstone, and Mr. Copithorne of Legal Division, Mr. Jay of U.N. Division, Mr. Lee of Protocol Division, and Mr. Beesley (Secretary) of Legal Division.

Item 74

The first question discussed was "Friendly Relations and Co-operation among States". The Chairman explained that as a result of our discussions with the Americans and the British, beginning last February, and in particular the developments at the recently concluded Conference of the International Law Association, a general line of policy had been developed. The present thinking of the State Department on tactics on this item is as follows:

(1) advantage should be taken as occasion offers during the debate to affirm that international law must now, as in the past, continue to be developed along constructive lines so as to keep abreast of evolving patterns in the international community; to stress the fact that the Charter is the basis of much of contemporary international law and the framework within which new concepts should be developed; to point out that new theories incompatible with the Charter are not acceptable; to counter claims that the "new international law" of peaceful co-existence must replace the "old international law" of the imperialists by drawing attention to the fallacies in current Soviet theories of international law and distinguishing them from more generally accepted theories and by pointing out that the great body of international law, including, for instance, the law of treaties, consular and diplomatic relations, etc., is neither new nor based on colonialist concepts and should not be discarded and replaced by a few selected political slogans;

(2) to oppose the codification of general principles on essentially legal grounds along the bases developed at the I.L.A. Conference i.e. agreement on general principles with respect to topics not "ripe" for codification could be misleading and dangerous through papering-over differences and appearing to bring about agreement on specifics where in fact none might exist;

(3) to stress instead the desirability of making empirically-based studies of specific subjects, including some of the five principles of co-existence, i.e. non-intervention;

/ ...2

(4) the U.S.A. preference for a specific topic remains non-intervention, although they would probably accept peaceful settlement of disputes, if we were to propose it;

(5) to attempt some initiative, perhaps through the Secretariat, to "make international law operational" by extending technical assistance in this field; i.e. donations of legal librairies, scholarships in international law etc., and

(6) to refrain from taking a wholly negative stand on the codification question and to develop, if the feeling in the Sixth Committee seems to favour such an approach, a proposal based on the I.L.C. Draft Declaration on Rights and Duties of States, i.e. a resolution referring to the desirability of continuing to develop international law in conformity with the Charter, referring to the Draft Declaration, and to the fact that few states had submitted comments on it as requested by the Assembly, recalling that many new states had since become members of the U.N., and recommending that governments now submit comments on it.

Some discussion took place on:

(a) <u>The Selection of a Specific Topic for Study</u>

Little enthusiasm was expressed for "non-intervention"; Mr. Jay queried it on a number of grounds; the Chairman pointed out that the whole line of approach depended on coming up with an alternative to the Soviet approach and if a proposed topic was not acceptable to the Afro-Asians then our approach would not succeed; it seemed likely that the State Department would soon learn of the views of the Afro-Asians on their proposed topic; it was the general feeling of the meeting that an acceptable alternative topic might be peaceful settlement of disputes; another possibility might also be Charter revision.

(b) <u>Technical Assistance in the Field of International Law</u>

It was agreed that, in the light of the austerity programme, while we could support this proposal we would have to point out that contributions would be on a voluntary basis.

(c) <u>Friendly Relations - Fall-back Position</u>

It was agreed that point 5 above should be held in readiness as a fall-back position and that our ultimate decision on this question should be based on the results of consultations with other countries, particularly the uncommitted countries and on instructions from Ottawa.

<u>Consular Relations</u>

The next item discussed was that of consular relations. Mr. Lee pointed out that Canada had submitted comments on the Draft Convention in July as requested but that the comments of other states had not yet been published. The Committee agreed that it seemed likely, therefore, that there could be little substantive discussion of this item since:

(a) it was a technical one better left for a Conference;

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(b) comments would probably not have been published in time; and

(c) there is a Conference in Vienna in SIX months time.

Some discussion occurred on whether or not Canada should make its position known again on the federal state clause question. Mr. Sicotte suggested that one approach would be that consular relations presents a good example of the kind of matter better left to the I.L.C. and to Conferences convened for the specific purpose, and that the Sixth Committee should not get involved in an article by article discussion, particularly in the light of the forthcoming Vienna Conference. He also suggested that the point might be made again that too much recognition had been given to the Chief of Consular Missions as such.

Mr. Kingstone pointed out that it would be unwise to take the line that the whole question should be left to the Conference, since this would not be acceptable to a number of countries and we should therefore steer a course between leaving the whole matter to a conference and going over the draft code in detail. He suggested that the approach could be that delegations give guide lines to get the conference underway.

Some further discussion took place on the desirability of saying in the Sixth Committee what would in any event be said in Vienna, and it was the feeling of the Committee that, on balance, it would be necessary to make some of these points on both occasions in order to enable the Sixth Committee to play a role in giving guidance and assistance to the Conference, and save its time by giving governments points to consider in the meantime. It was decided, in the light of these considerations, that an effort should be made to say in general terms in the Sixth Committee what would be said in more detail at the Conference.

Report of the I.L.C.

The next item discussed was the report of the I.L.C. The Chairman pointed out that the Draft Convention on Treaties (representing approximately one-third of the whole of the proposed draft) and the I.L.C. Commentary is to be circulated to governments for comments, and that in the meantime there is little that could be said or done on the question.

On "future work", however, the Sixth Committee should note the views of the I.L.C. on the question, that it was giving priority to treaties, state responsibility and state succession, and that the I.L.C. was fully loaded with work for the next ten years.

On methods of work it should be noted that the I.L.C. had set up a number of working groups to give guidance to a number of rapporteurs on specific subjects, and these groups would be holding mid-term meetings in Geneva in January with the probable result that the work of the I.L.C. should be speeded up.

On the general question of the role of the Sixth Committee, in the light of the heavy work load of the I.L.C., the point should be made that while the Sixth Committee could

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usefully debate certain questions, those requiring detailed codification should be left to the I.L.C. It could be pointed out also that there are a number of other agencies, such as the Legal Sub-Committee on Outer Space giving attention to legal problems.

The Chairman pointed out that considerable thought would have to be given to the approach to be taken (after consultation with European and U.N. Division) on the I.L.C. decision that any state can accede to a multilateral treaty. One factor to consider was the advisability of making it possible for countries such as East Germany and Communist China to bind themselves by treaties laying down civilized lines of conduct, another being the problem of recognition of these same countries thereby raised. The I.L.C. Draft article in question contained a safeguard to the effect that a multilateral convention which specifically disaffirmed the right of all states to accede would constitute an exception to the general rule. Some discussion took place on the problems, both legal and political, raised by this article. The question whether this article was declaratory of the law or not was also discussed and it was agreed that if it was intended to be retrospective then the problems were much more serious than otherwise.

The Chairman pointed out that another question to which thought should be given is that of reservations. The I.L.C. decision was that there need be no unanimity nor even two-thirds agreement on the permissibility of a reservation; in effect it permitted a multilateral treaty to become a series of bilateral agreements. On the whole, in the light of Canada's federal-provincial problems, this is a not unacceptable compromise however.

Permanent Sovereignty

The next item discussed was the Second Committee item of Permanent Sovereignty over Natural Resources. A letter had been received from the Department of Justice which, while not taking issue with the draft commentary prepared by Legal and Economic Divisions, by implication queried the acceptability of the proposed resolution on the grounds that Canadian domestic law on compensation for expropriation might not be in accord with international law on the question. After considerable discussion it was agreed that the actual possibility of conflict between Canadian domestic law and international law on this subject was very slight, and that in such event the matter would be one for determination by Cabinet as a matter of policy, and hence it was not on that ground necessary to oppose or abstain on the proposed resolution as drafted. It was agreed, however, that it would be advisable for Economic Division to ascertain from Finance Department if they concur with the commentary in the light of the views of the Department of Justice.

Juridical Yearbook

It was agreed that Canada should continue to support this item in the light of the active support we had in the past given it, but that here also because of the question of cost the financing should be handled on a voluntary basis.

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Summer Professors

It was agreed that we should begin now to make arrangements for a professor to be hired by the Department next summer to study the law of state responsibility and that Mr. St. John MacDonald was the first choice. The Chairman directed that a memorandum to the Minister be prepared requesting authorization to proceed with this matter.

P. Maguire
for J. A. Beesley

5475-AX38 -40

file Legal Planning Committee file JB Conf'd

Aug 14/62

Mr Cadieux ① ~~Mr Wershof~~ ✓
② Personnel & Legal ~~file~~ Please note underlined section below RC

If we had the money, would there be any merit in having, as the USA does, outside legal consultants who can do, presumably, leisurely legal papers to supplement the good memoranda we turn out in the Dept.? (Whether or not we used the consultants at meetings)

M Wershof

We have a plan to bring a legal expert from the University for the summer months. There is no reason why such papers can not be prepared by these experts. Last year (ie this summer season) we were too late but I plan to return to the charge soon so that we have someone for the 1962 [3] summer period.

RC

FM DISARMDELGVE AUG14/62 CONFD

TO EXTERNAL 1411

INFO WASHDC PERMISNY NATOAPRIS EMBPARIS LDN ROME BONN

TT CCOS(JS/DSS)OTT FM OTT

BAG MOSCOW FM LDN

REF WASHDC TEL 2037 JUL10 PARA2(E)

DISARMAMENT--PROPOSED MTG LEGAL EXPERTS ON PEACEKEEPING

YOU WILL RECALL THAT ITALIANS SUGGESTED IN WASHDC DISCUSSIONS IN JUL THAT MTG OF LEGAL EXPERTS FROM WESTERN DELS BE HELD IN GENEVA IN ORDER TO DISCUSS PEACEKEEPING PROVISIONS OF USA PLAN.AT RECENT FOUR POWER MTG ITALIAN DEL ASKED IF USA AUTHORITIES APPROVED THIS SUGGESTION.

2.USADEL HAS BEEN INFORMED THAT ITALIAN SUGGESTION HAS BEEN ACCEPTED IN WASHDC.UK HAVE ALSO AGREED IN PRINCIPLE TO HOLDING SUCH A MTG.USADEL HAS SUGGESTED THAT,IF AGREEABLE TO OTHER WESTERN DELS,MTG COULD BE HELD IN GENEVA IN LATE NOV.USA APPARENTLY PLAN TO SEND TWO LEADING EXPERTS TO PARTICIPATE--PROF SOHN OF HARVARD LAW SCHOOL AND PROF HENKIN,DEAN OF PENNSYLVANIA LAW SCHOOL,BOTH OF WHOM HAVE BEEN CONSULTANTS TO USA GOVT IN THIS FIELD.

3.WE WERE TOLD BY MEMBER OF USADEL THAT PEACEKEEPING PROVISIONS OF USA PLAN HAVE BEEN UNDER CONTINUING CONSIDERATION BY VARIOUS AUTHORITIES IN WASHDC AND THAT THERE IS A POSSIBILITY OF FLEXIBILITY ON SOME POINTS IF PROGRESS IS MADE IN CONFERENCE ON DISARMAMENT MEASURES.

4.WHILE USA DO NOT RPT NOT INTEND TO SUBMIT ANY FORMAL AGENDA OF TOPICS FOR DISCUSSION,WE UNDERSTAND THAT ITALIAN DEL MAY WISH TO DO SO.

5.GRATEFUL IF YOU WOULD INFORM US WHETHER ITALIAN SUGGESTION IS ACCEPTABLE TO YOU AND,IF SO,WHETHER PROPOSED TIME FOR MTG IS CONVENIENT,SHOULD IT BE DECIDED TO SEND SOMEONE FROM OTT?°

CONFIDENTIAL

Your file: 195546

Ottawa, July 6, 1962.

Dear Miss Ritchie:

Thank you for your letter of July 4 concerning the meeting of the Legal Planning Committee held on June 20, 1962.

I now enclose a copy of the report on this meeting for your files.

Yours sincerely,
(Signed) M.C. Copithorne
Maurice Copithorne

Miss M.E. Ritchie,
Department of Justice,
Justice Building,
Ottawa, Ont.

file

CONFIDENTIAL

5475-AX-38-40
11589-40

Report of Meeting of Legal Planning Committee, June 20, 1962.

Subject: Capacity of the Provinces to enter International Agreements

Mr. Wershof, Assistant Under-Secretary of State for External Affairs, Chairman

Miss Ritchie, Department of Justice

Mr. Sicotte, Legal Division

Mr. Bertrand, U.S.A. Division

Mr. Beesley, Legal Division

Mr. Copithorne, Legal Division, Secretary.

Mr. Wershof opened the meeting by suggesting three heads of discussion; the present legal position, the nature of the federal interest, and possible courses of action open to the federal government. The Chairman then commented on the present legal position and reviewed the opinions given by the Department of Justice in the following cases; North Eastern Interstate Forest Fire Compact, the Nova Scotia Land Settlement Board, the Great Lakes Compact, and the Interstate Civil Defence and Disaster Compact. He concluded this review by mentioning Mr. Fulton's letter of January 26, 1962 to the Attorney General of Prince Edward Island. Mr. Wershof noted that the general view of the Department of Justice, which he thought was shared by External Affairs, was that the provinces did not have the capacity to enter legally binding international obligations and that any such agreements which the provinces purported to make were therefore invalid. Mr. Wershof commented that an attempt had been made to define the type of contract entered into by the provinces which might be valid in private international law, eg. rental agreements, but without success. He noted that the basis for the conclusions of the Department of Justice seemed to be that under the Canadian constitution, the provinces did

not have an international personality (and, therefore, capacity) although, in the Department's most recent letter of January 26 to the Attorney General of Prince Edward Island, the Department seemed to say that the reason for the provinces incapacity was to be found in international law rather than in the Canadian constitution.

2. Miss Ritchie said that there had been no developments in her Department's attitude since the opinion rendered in 1957 concerning the Nova Scotia Land Settlement Board. She noted, however, that Mr. Driedger, who had become Deputy Minister since that time, had not so far had occasion to consider this question in its broad context. She noted that the Department of Justice in its consideration of these cases in earlier years had approached the problem from many points of view but had not been able to come up with a satisfactory method of distinguishing international agreements from ordinary commercial contracts which it was generally felt the provinces should be able to enter if they were not to be in a less advantageous position than that of private individuals. Various possible distinctions had been explored - e.g., whether the distinction could be based upon the argument that some Agreements were intended to be capable of being taken before the domestic courts and others were not; whether a distinction could be made between Agreements to which private international law principles would apply and those to which public international principles would be applicable; whether Agreements could be distinguished by considering whether they were such as to require the advice of Her Majesty's Federal Ministers or Provincial Ministers, etc. Research into each of these approaches had not so far shown that any one of them was clearly more satisfactory than the others. In addition to the legal difficulties, there were serious practical and policy considerations. For example, some possible views might necessitate examination of all Agreements entered into by the Provinces but External Affairs would probably want to consider

...

whether it would be able to (or want to) take on such a massive job. Some brief consideration had been given at the time of the Great Lakes Basin Compact to the question whether a workable distinction between acceptable and unacceptable Agreements between Provinces and foreign Governments could be formulated and incorporated into some form of federal legislation. However, Mr. Varcoe had deferred expressing any opinion pending the submission of a concrete proposal. It was therefore decided by Justice at the time that the best approach for the moment was that of setting out the basic proposition that the Provinces did not have the capacity to enter into international agreements, and deferring giving an opinion on other aspects of this problem until a concrete case arose."

3. The attitude of the provinces to this subject was then raised and the opinion of the senior solicitor of Nova Scotia in the Nova Scotia Land Settlement Case was mentioned. The general approach of Nova Scotia in that case was that the provinces by implication from an extension of their powers under section 92, and in view of the Labour Relations case, had a share of the treaty making power. Miss Ritchie commented that although this point had not been debated with the Nova Scotia authorities, this argument was totally unacceptable to the Department of Justice which regarded it as having most serious implications for the Canadian federal system. It was noted that we did not know the opinion of most of the provinces. In some cases, as in that of the Prince Edward Island legislation, objectionable provisions in legislation may come to the attention of the federal government before agreements are entered into but it was felt that this would be exceptional. Mr. Bertrand reminded the meeting that the provinces had a capacity to establish offices to carry on certain types of business abroad as set out in the opinion given by the Department of Justice dated August 26, 1955.

4. Mr. Wershof then summed up the discussion by saying that

the Department of Justice was of the opinion, which was shared by the Department of External Affairs, that the provinces did not have the capacity to make international agreements with foreign governments or units thereof. However, there appeared to be a class of private contracts between provinces and foreign governments which the provinces should, on a basis of reasonableness and logic, be capable of entering, although it had so far not been possible to define the distinguishing line between this group and true international agreements.

5. Mr. Wershof then suggested that the meeting move on to a consideration of what was the federal interest in this field. Mr. Bertrand suggested that federal interest arose from areas of jurisdiction which were of common interest to the federal and provincial governments and secondly, it arose because of the potential responsibility of the federal government to make good the default of the provinces of their international obligations. In this context, Mr. Sicotte wondered whether there was a distinction between torts and contracts. Mr. Beesley commented that he was not aware of such a distinction in the matter of State responsibility. He put forth as a third basis of federal interest in this field, the defence of the treaty making power, which was vested in the federal government. Miss Ritchie expressed agreement with Mr. Beesley and said that perhaps it was the most important consideration from the point of view of the Department of Justice. Mr. Bertrand then illustrated his remarks about areas of common interest with reference to water resources which either inherently, or because they affected more than one province were of interest to the federal government. Mr. Wershof agreed and said that it was desirable to ensure that provinces did not get into quasi-political fields or embark on matters which either now or in the future might run counter to federal interests.

... 5

6. Mr. Beesley raised the question of state responsibility and recalled the widely recognized concept that states could not hide behind their constitutions. It therefore followed that the federal government might be considered to have a degree of responsibility for all the actions of the provinces having international implications, which was a basis for a federal interest in this subject. Mr. Wershof noted that the making of international agreements was an aspect of foreign affairs and that while the BNA Act was silent on the point, it could be argued forcibly that the conduct of foreign affairs had been vested solely in the Parliament and Government of Canada.

7. Mr. Wershof then suggested that the meeting turn its consideration to the third question which was, assuming there to be a federal interest in this field, what courses of action were open to the federal government? He outlined the following possibilities:

a) Disallowance - This was really a limited course of action because in general, the international agreements entered into by the provinces did not stem from obviously objectionable provincial legislation. There were also serious policy considerations in connection with the exercise of this power.

b) The amendment of the BNA Act to give exclusive jurisdiction in this field to the federal government or perhaps to the federal government with provision for parliamentary approval of Provincial agreements, comparable to provisions in the U.S. constitution.

c) Federal legislation of a general character which would state the federal government's exclusive jurisdiction in this field, or its exclusive jurisdiction but subject to the right of the provinces to enter international agreements with the express approval in each case of the federal government.

d) Sending a formal letter to the provinces stating the federal government's position that provinces lack the

capacity to enter international agreements. Such a statement might be followed with a qualification that there were, however, ways to achieve meritorious objectives and inviting the provinces to consult the federal government on each case.

e) A reference to the Supreme Court either on the basis of a hypothetical case or in connection with a case that came to the attention of the federal government, or in conjunction with general legislation or the formal letter to the provinces outlined in (c) and (d) above.

f) The last possible course of action was to "live with the problem" and deal with cases on an ad hoc basis as they arose.

8. Miss Ritchie agreed with Mr. Wershof's outline of possible approaches. With respect to possibility (b), she commented that other amendments to the B.N.A. Act had been discussed with the Provinces at various times and that alternative (b) was therefore timely. In connection with alternative (c) and the discussion as to the various courses that might be followed (e.g., requiring the consent of Parliament in a way similar to the U.S. requirement of the consent of Congress to various types of compacts or agreements by the individual States, or requiring the consent of the Governor General in Council), she noted that the U.S. solution does not automatically dispose of all problems but evidently raises difficulties from the political point of view as to whether certain agreements will or will not be approved by Congress. She commented that a reference to the Supreme Court on a hypothetical question might, of course, be subject to difficulties both because the Supreme Court did not like hypothetical questions and because the material presented to the Court would have to be much more satisfactory than any so far encountered in research into this subject. Miss Ritchie noted that the letter to the Provinces was a very promising course of action, adding that all the possibilities listed by Mr. Wershof were worth serious consideration."

...

9. Mr. Sicotte expressed the view that each of the various courses of action seemed to have serious drawbacks and that the present ad hoc approach therefore might have to be continued.

10. Mr. Bertrand wondered whether action in the legislative field might not take the form of an amendment to the External Affairs Act. This suggestion was favourably received.

11. Consideration was then given as to what form a letter to the provinces might take and in particular, whether it should be a "ringing" declaration of federal jurisdiction in this field which would put the provinces and perhaps, if published, foreign governments as well, on notice. An alternative approach was a gentle one which would merely express the interest of the Department of External Affairs in this field and request the provinces to consult External Affairs when they were considering an agreement with international implications.

12. It was agreed that the Department of External Affairs would give further consideration to this approach which seemed to be the most promising.

M.D. Copithorne

Seen and approved by Mr. Wershof

cc: DIV
DIARY
FILE ✓

Legal/M.D. Copithorne/bjw

~~9-110-40~~-X
37 | 37

5475-AX-38-40
96 | 96

Ottawa, June 15, 1962.

Dear Miss Ritchie,

I attach an index of the documentation I have assembled for the meeting next Wednesday, and a short introductory memorandum. I also attach copies of the Manitoba-Minnesota Highway Agreement and of the two agreements between the Province of Ontario and the State of Michigan concerning the levying of tolls on certain international bridges.

If there are any other documents on this list which you do not have and which you would like to see prior to the meeting on Wednesday afternoon, please let me know by telephone and I shall be pleased to send them up.

Yours sincerely,

ORIGINAL SIGNED BY
M. D. COPITHORNE

Maurice Copithorne

Miss M.E. Ritchie,
Department of Justice,
Justice Building,
OTTAWA, Ontario.

Legal Division

UNCLASSIFIED

June 13, 1962

5475 - AX-38-40

96 | ✓

U.S.A. Division/ H.H. Carter

Your Memorandum of June 11, 1962

Legal Planning Committee

Mr. Bertrand will represent the U.S.A. Division at the meeting of this Committee to be held on June 20 at 2:30 p.m. in the small conference room of the East Block.

H. H. CARTER

U.S.A. Division.

DEPARTMENT OF EXTERNAL AFFAIRS

MEMORANDUM

TO: U.S.A. Division

FROM: Legal Division

REFERENCE:

SUBJECT: Legal Planning Committee

Security: UNCLASSIFIED

Date: June 11, 1962

File No. 5475-AX-38-40

There will be a meeting of the Legal Planning Committee under the chairmanship of Mr. Wershof on Wednesday, June 20 at 2:30 p.m. in the small conference room of the East Block. Miss M.E. Ritchie of the Department of Justice will attend the meeting together with representatives of this Division. The subject will be the capacity of the provinces to enter into agreements with foreign governments, particularly states of the United States. This subject has come up in connection with a recently concluded highway agreement between the Province of Manitoba and the State of Minnesota.

2. It is hoped that your Division will be able to send a representative to this meeting. Mr. Copithorne of this Division is preparing background material which will be available in advance of the meeting.

LEGAL DIVISION

CIRCULATION

No. 3 Bethune should attend me

Harvey I would be interested in attending for my own edification but it would probably be more useful & the division if someone more "permanent" went. Murray

Ext. 326 (6/56)

000632

U.S.A. Division

UNCLASSIFIED

June 11, 1962

Legal Division

5475-AX-38-40
37

Legal Planning Committee

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GILLES SICOTTE

LEGAL DIVISION

Mr. M. Wershof

UNCLASSIFIED

May 29, 1962

Legal Division

5475-AX-38-40

37 | ✓

Legal Planning Committee

...

We attach a letter from Legal Division to Miss Ritchie of the Department of Justice suggesting a meeting of the Legal Planning Committee. This is the procedure suggested by Mr. Driedger in his letter of March 27, 1962.

2. At the moment the topic proposed for this meeting, i.e., the capacity of the provinces to enter into international agreements, seems to be the only topic suitable for discussion by the Committee. If, however, other topics come up before the meeting, we would add them to the agenda.

3. In connection with the substance of this topic, we have flagged memoranda dated April 17, 1962 and January 21, 1957 which discuss the problem.

4. If you agree to the discussion of this topic by the Legal Planning Committee under your chairmanship and if the 14th or 15th of June would be convenient, we should be grateful if you would release this letter. These dates have been suggested with an eye to the fact that the officers most concerned, Mr. Thorson, who will probably represent Justice and Mr. Copithorne, will be in Washington June 3rd to 6th and there is little hope that background material can be assembled before their return.

GILLES SICOTTE

LEGAL DIVISION

cc: DIV
DIARY
FILE

5475-AX-38-40
37 | 37

Ottawa, May 29, 1962.

Our file 5475-AX-38-40

Dear Miss Ritchie,

You will remember that in an exchange of letters in March this year, Mr. Driedger agreed to have an officer from the Department of Justice attend meetings of the Legal Planning Committee established in this Department, when matters of interest to the Department of Justice were to be discussed.

It is now hoped to have a meeting in the near future which, we think at the moment, might concern itself solely with the question of the power of the provinces to make international agreements. This topic has come up again recently in connection with a highway agreement between Manitoba and Minnesota which has been discussed informally with Mr. Thorson. We would, of course, prepare some background material on the particular and the general subject for the meeting.

We should be grateful for confirmation of your interest in this subject and we should like to suggest the 14th or 15th of June for a meeting, if one of these dates would be convenient for your representative.

Yours sincerely,

GILLES SICOTTE

Legal Division

Miss M.E. Ritchie,
Department of Justice,
Justice Building,
OTTAWA, Ontario.

P.S. Afternoon of 14th not available

000635

Return

DEPARTMENT OF EXTERNAL AFFAIRS

MEMORANDUM

TO: Mr. M. Wershof

FROM: Legal Division

REFERENCE:

SUBJECT: Legal Planning Committee

Security UNCLASSIFIED

Date May 29, 1962

File No. 5475-AX-38-40

37

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CIRCULATION

Am Copithorne
Dr. Beesley
Dr. Scott

Letter released with P.S. saying afternoon of 14th NOT available. Please have one week prior to meeting 30.5.9(US)

Marion Smith

LEGAL DIVISION

Week of May 30

000636

Ext. 326 (6/56)

Legal/G.Sicotte/hf

May 10, 1962

NOTE TO: Mr. Wershof
Mr. Murray
Mr. McIlwraith
Mr. Beesley

Reference: My memorandum of May 8, 1962, to Mr. Wershof.

Subject: Proposed meeting of Legal Planning Committee.

This is to confirm that arrangements have been made for a meeting in Mr. Wershof's office to discuss this topic on Tuesday, May 15, at 3 p.m.

GILLES SICOTTE

Legal Division

DEPARTMENT OF EXTERNAL AFFAIRS FILE COPY

MEMORANDUM

5475-AX-38-40
37

TO: Mr. Merchof

FROM: Legal Division

REFERENCE: Our memorandum of March 8, 1962, to the Under-Secretary.

Security CONFIDENTIAL

Date May 8, 1962

File No.
50261-X-40
5475-AX-37-40
5475-AX-38-40

SUBJECT: Legal studies in context of U.N. and Disarmament negotiations.

Legal Division has been under a sort of standing instruction from Mr. Cadieux since the beginning of the year to follow the trends in the discussions at United Nations and elsewhere which might seem to affect recent developments in the theory and application of international law, particularly in the light of the active promotion - mostly by Communist countries - of a "new" legal concept of "peaceful coexistence".

2. Our position on these matters is explained in telegram No. L-49 of April 20, 1962, signed by the Under-Secretary. It suggests in particular that consideration ought to be given to a possible Western initiative, - probably to be presented in the Sixth Committee of the next U.N. Assembly, - in the form of a draft declaration on the supremacy of international law. (See paragraph 6 and following), and that "positions (which) could perhaps be developed on such questions as disarmament (etc....) based on the primary obligations of all states to observe the provisions of the U.N. Charter..." (paragraph 5). - Further background to this whole programme will be found in our letter to certain missions dated February 12, together with its annex (blue flag).

3. Lately the Disarmament Division requested our comments on a series of telegrams from Geneva (Nos. 701 of April 16, 707 of April 17, 725 of April 29, and 768 of April 26 particularly para. 7), which touched in several respects upon subject matters relating to the future of international law (sovereignty and equality of states). We gave them our views in a memorandum dated May 1, 1962 (flagged on file 50261-X-40), the reaction to which is given in their own memo in reply of May 3 (attached); this exchange seems to reflect a distinct difference of approach to the question of the relevance of considerations of international law to disarmament. The Disarmament Division's approach is generally shared by the U.N. Division, as indicated in their memorandum of May 7 to us, a copy of which you have received and on which we shall comment in writing. Our three Divisions are now agreed that a meeting is required to iron out this situation. I have the assent of Messrs. McIlwraith and Murray to such a meeting being held under your chairmanship, this week if possible, should you so agree, at your convenience of course.

4. Although we do not have in mind a rigid agenda for the meeting other connected questions could, I think, be appropriately taken up, if not at the same time, possibly immediately prior to the discussion of the disarmament talks.

GILLES SICOTTE

Legal Division

CIRCULATION

Mr. McIlwraith
Mr. Murray
European Div.

Ext. 326A (6/56)

DEPARTMENT OF EXTERNAL AFFAIRS

MEMORANDUM

1 of 3

TO: MR. CADIEUX

FROM: MR. BEESLEY

REFERENCE:

Security CONFIDENTIAL

Date April 18, 1962.

File No. 5475-AX-38-40
5475-AX-40
c.c. 5475-AX-37-40
5475-AX-36-40
5475-AX-25-40
11647-A-40

5475-AX-38-40 ←

SUBJECT: Today's Meeting of the Departmental Legal Planning Committee.

The subjects you might wish to raise at today's meeting would seem to be as follows:

State Responsibility and Permanent Sovereignty over National Resources.

2. A copy of Legal Division's background paper dated April 17 discussing briefly (a) the appointment of a new Rapporteur, (b) the scope of the topic and (c) the merits of Garcia Amador's study, is attached. (A copy has been sent to Geneva for inclusion in the Commentary for your guidance.)

3. Economic Division has been meeting with representatives of other departments this week to discuss the economic aspects of State Responsibility (including the O.E.C.D. proposed Convention on the Protection of Foreign Property) and may have a paper ready for presentation today incorporating the results of these discussions.

4. We have now received replies to our telegram L-38 to Washington, London, and Oslo, suggesting the possibility of linking the topics of State Responsibility and Permanent Sovereignty over National Resources (flagged on the attached file).

5. Telegram 1073 of April 6 from Washington (flagged on the attached file) reports that the State Department would be agreeable to the topics being interrelated in the I.L.C. provided UNGA were prepared to refer the question of Sovereignty over National Resources to the I.L.C., the likelihood of which could depend on who was named as Rapporteur to replace Garcia Amador. (If a Rapporteur who might be more acceptable to the West were appointed, it was thought that UNGA might be more reluctant to pass the questions to the I.L.C.)

6. London's telegram 1412 of April 16 (flagged) says merely that Sir Humphrey Waldock is well aware of the Foreign Office position and that the Foreign Office considers that "it would be a good idea if Mr. Cadieux could work in close co-operation with him and, of course, with the other Western members of the I.L.C. The telegram also makes the point that there may be a danger of the Communists capturing the position of Rapporteur on this question.

CIRCULATION

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Ext. 326A (6/56)

7. Oslo's telegram 95 of April 12 (flagged) reports that in the view of Evanson, Director of Legal Division of the Norwegian Foreign Ministry it is possible that broadening the subject of state responsibility to include sovereignty over national resources might assist in providing a basis for general agreement, but Evanson is doubtful of any real use being made of Amador's paper which he regards as destructive of traditions of international law and "almost as dangerous as the work of the Communists".

8. Geneva's telegram 743 of April 16 (flagged) reports that according to El Erian, the U.A.R. member of the I.L.C., one of the Communist members (probably Lachs of Poland) might propose that the subject be split in two, so that one part would deal with state responsibility in the narrower sense of responsibility for damage to aliens, and the broader part would cover the general subject of responsibility for non-compliance with obligations under treaties and general international law. This telegram also passes on the views of Professor Sohn that Lachs might have some support in the I.L.C. for splitting the subject of state responsibility into two parts. Sohn thought Professor Ago of Italy was sympathetic to this line of approach, and he himself tended to the view that splitting the subject might help to consolidate and forward the work already done in the I.L.C. on the subject of state responsibility for damage to aliens; he was rather dubious, however, about the idea of undertaking the codification of state responsibility in the wider sense as used by the Communists.

Peaceful Co-existence

9. A copy of Legal Division's background paper dated April 11, (a copy of which has also been forwarded to Geneva), is attached. This paper incorporates European Division's memorandum of April 10 on Political Aspects of Co-existence.

Colonialism

10. Some background papers, including a New Zealand paper on the topic, have been forwarded to Geneva. African and Middle Eastern Division are preparing a position paper on the question, a first draft of which may be ready for today's meeting.

Asylum

11. The position paper prepared by Consular and U.N. Divisions has been forwarded to Geneva. Some revisions and additions to the paper are now being made by Latin American Division, to incorporate the Latin American political approach to the problem, and by European Division to incorporate the Soviet bloc position on the question.

International Law Association

12. As you know, a registration form has been sent to you relating to the Brussels Conference in August of the I.L.A.

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13. The question of semi-official representation by Western countries has been raised in Washington, London and Oslo. Oslo's telegram 75 of March 26 reported that the Norwegians had not been giving much thought to the problem of representation at the I.L.A. Conference but that they would be considering the question in the light of our comments. London's telegram 1412 of April 16 reports that the Foreign Office shares our concern about the attempts which the Soviet bloc have been making to capture the I.L.A. and that while so far the Foreign Office have not sent any representatives to it, they agree that this is well worth considering. They are now looking into it and shall let us know their conclusions as soon as they can. Washington's telegram 1073 of April 6 reports that the U.S.A. had not in the past appointed delegates as such, although a representative of the U.S.A. Consulate in Hamburg had attended that meeting purely for reporting purposes. The U.S.A. would want to have a representative attend the Brussels meetings, at least for reporting purposes, and they would also consider in the light of our discussions with them whether it might be desirable to have someone attend who might seek to influence the substance of discussion in any Western caucus that might be organized. They were conscious of some of the difficulties involved, but aware also that Soviet bloc representatives had taken advantage of this situation, and their Legal Department would therefore give immediate attention to possible representation at the Brussels meeting this summer.

Summer Employment of Professors

14. Since Professors Morin and MacDonald are not available background information is being obtained on Professors Castel and Pharand and this question can perhaps be discussed at the conclusion of today's meeting.

J. A. Beesley

Legal/J.A.Beesley/hf

CONFIDENTIAL

April 5, 1962

X REF: 5004-C-40
X REF: 5475-EW-40

5475-AX-38-40

NOTE TO MR. SICOTTE -

The Prime Minister has okayed the Memorandum on the Optional Clause with great enthusiasm and intends to take it to Cabinet.* ~~Just one other point,~~ Mr. Cadieux would like this drawn to the attention of U.N. Division even before Cabinet considers it, because of the use to which it could be put in the 6th Committee this Fall as a separate initiative, and because their assistance will be needed in promoting the idea amongst the Commonwealth countries. Mr. Cadieux does not wish the topic to be discussed by the Legal Planning Committee until after the Cabinet decision.

JAB

(J.A. Beesley)

* He particularly likes the idea of introducing it at the forthcoming Commonwealth Conference

Bill Hall

OFFICE OF THE
DEPUTY MINISTER OF JUSTICE
AND
DEPUTY ATTORNEY GENERAL OF CANADA

CANADA

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Please circulate
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DEPARTMENT OF JUSTICE

OTTAWA 4, March 22, 1962.

Dear Mr. Robertson:

Thank you for your letter of March 20th in which you inform me that you have recently established in your department a Legal Planning Committee and in which you invite some participation by the Department of Justice in the studies to be carried out.

I am, of course, much interested in this Committee and I would be pleased to have an officer of my Department attend meetings of the Committee when matters in which my Department might be concerned are discussed. You will, I am sure, appreciate that the subject-matter of these discussions, in so far as they may be of interest to the Department of Justice, might relate primarily to any one of a number of Sections of the Department of Justice, and I do not think that it would be feasible for me to designate one officer of my Department to attend all such meetings. I think I would prefer to select an officer on an ad hoc basis according to the subjects to be discussed at any particular meeting. If an arrangement such as this appears to you to be feasible, perhaps you could arrange to send me a copy of the agenda for any meeting in which you think the Department of Justice might be interested, and then I will arrange to have an appropriate officer from this Department attend.

N. A. Robertson, Esq.,
Under-Secretary of State
for External Affairs,
Department of External Affairs,
OTTAWA, Ontario.

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27.3.16(JS)

I appreciate your offer to send me the Minutes of past meetings and I should be happy to receive them.

I am asking Miss Ritchie to act as a liaison officer and the foregoing Minutes as well as subsequent material might therefore be sent to her in the first instance.

Yours truly,

Deputy Minister of Justice.

MR. CADIEUX

CONFIDENTIAL

March 21, 1962.

MR. BEESLEY

Ang 5475-AX-40

Tomorrow's Meeting of the I.L.C. Legal Planning Committee.

The subjects which you might wish to raise at to-morrow's meeting would seem to be as follows.

Asylum

There is little further work to be done on this question. Some of Legal Division's past memoranda on the question has been forwarded to Latin American Division, and the latter Division is preparing a section on the Latin American political approach to the problem. An Annex has been prepared setting out, very briefly, the Soviet bloc position , and this might usefully be commented on by European Division. This topic is not on the agenda of the I.L.C., however, and is not therefore as urgent as some others.

Treaties

This would seem to be one of the two most urgent questions. As you know Mr. Grenon has prepared a study which will form the subject of a separate meeting next week. (You may wish to consider whether it would be appropriate to invite the Department of Justice to be represented at this meeting.)

Ad hoc Diplomacy

This is the other question likely to be discussed substantively by the I.L.C. As you know, Mr. Lee has prepared a draft Commentary which will be discussed at next week's meeting.

State Responsibility and Permanent Sovereignty over National Resources

Further discussions have occurred between Legal Division and Economic Division and a paper will be presented by Economic Division at to-morrow's meeting. Legal Division's paper is not yet finished but the "political" section is complete, and since it seems likely that the I.L.C. discussion will be basically political, there would seem to be less urgency about completing the detailed article by article commentary, which is still under preparation.

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Colonialism

It is understood that African and Middle Eastern Division may have a preliminary paper ready for discussion by the meeting, but this may not prove possible, in which case they will bring some earlier papers for discussion.

Peaceful Co-existence

Legal Division's paper on the juridical basis of peaceful co-existence has been expanded and developed since the last meeting of the Committee (and since you saw it earlier this week) on the basis of further research, and little further work on it would seem to be required except to shorten it and footnote it further. It is understood that European Division will prepare a political introduction to this paper on the return of Mr. Roberts.

Summer Employment of Professors

It is understood that while the particular professor in question has been selected, security clearance has not yet been received and that as a consequence he has not yet been approached.

International Law Association

Either before or after the general meeting you might consider it appropriate to discuss and if possible reach agreement, subject to the Under-Secretary's approval, on the nature and extent of departmental representation at the Brussels Conference of the International Law Association in August.

I.L.C. Elections

One of the general questions which will arise at the I.L.C. session will be the election of officers and the appointment of a Rapporteur on state responsibility. You may consider it worthwhile to raise this question at tomorrow's meeting with a view to consulting with other countries before the commencement of the I.L.C. meetings. (Attached is a list of the present membership of the I.L.C., together with a short relevant extract from Rosenne's Monograph on the I.L.C.)

J. A. Beesley

J. A. Beesley

DEPARTMENT OF EXTERNAL AFFAIRS

MEMORANDUM

TO: THE UNDER-SECRETARY

(through Mr. Cadieux)

FROM: LEGAL DIVISION

REFERENCE: Our memorandum of March 8.

SUBJECT: Legal Planning Committee

Security CONFIDENTIAL

Date March 20, 1962.

File No. ~~12996-40~~ 6

c.c. 5475-AX-40
5475-AX-37-40
5475-EW-40
11647-A-40
5475-AX-38-40

Our informal discussions with the Department of Justice on the dispute with B.C. over off-shore mineral rights (suggested in your letter to Mr. Driedger of February 20) have progressed satisfactorily. We have now been told informally by the appropriate desk officer in the Department of Justice that we would be consulted if and when a reference to the Supreme Court takes place and that our memorandum of law would prove extremely valuable in the event that the issue goes to the Supreme Court.

2. The informal discussions have not, however, been confined to the substantive legal points in issue but have touched also on the general question of relations between the two departments and the desirability of increasing the informal contacts between them. The time would seem to be ripe, therefore, to make some gesture to provide further opportunities for informal exchanges of views on questions of mutual interest.

--- Sent 21.3.62

3. With this in mind I have drafted the attached letter to Mr. Driedger for your signature, if you agree, informing him of the recent establishment of the Departmental Legal Planning Committee and inviting informal representation on it by a member of his Department when questions of interest to his Department are under discussion. (I understand that Mr. Cadieux and Mr. Driedger have discussed this suggestion on the telephone and agreed that it would be helpful if it were made in writing by you.)

Noted R

Stella Smith

Legal Division

CIRCULATION

Mr Driedger was cordial. He received his suggestion very well. This scheme may lead to an improvement in our working relations with justice

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Ext. 326A (6/56)

20.3.53(DS)

CONFIDENTIAL

cc: 5475-AX-40
5475-AX-37-40
5475-EW-40
11647-A-40

Our File: ~~12996~~-40

Ottawa, March 20, 1962.

Dear Mr. Driedger,

You may be interested in knowing that we have recently established in this Department a Legal Planning Committee for the purpose of achieving greater efficiency in the planning, co-ordination and implementation of policies on international legal matters. It is intended that the Committee will be an informal working group composed initially of Mr. Gadieux, Mr. Wershof, Mr. Sicotte and the appropriate desk officers from Legal and other divisions concerned.

The kinds of questions which are to be handled by the Committee are: co-ordination of Canadian policy in the Sixth (Legal) Committee of the United Nations Assembly, the International Law Commission, and also the International Law Association, on questions now before these bodies; problems of drafting and implementation of international agreements; the proposed new Canadian declaration of compulsory jurisdiction of the International Court of Justice; the desirability of Canada continuing to uphold the classical doctrine of sovereign immunity on state-owned trading ships; status of foreign vessels (state and private owned) with regard to entry and

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E. A. Driedger, Esquire,
Deputy Minister,
Department of Justice,
Ottawa.

sojourn in Canadian Ports and territorial waters; variations proposed by other departments to international conventions / e.g. Commonwealth Merchant Shipping Agreement/ to which Canada is a party; and interpretations of Canadian legislation provided on request to foreign missions in Ottawa.

It has occurred to me that you might welcome an opportunity for some participation by your Department in the studies to be carried out by this small Committee. If so, then I should be pleased if one of your officers could be made available to attend those meetings of the Committee in which your Department might have an interest. It would be understood, of course, that such an officer would not be considered as an official empowered to give legal opinions binding on your Department but would be attending meetings merely for the purposes of following those aspects of our work of interest to you, and exchanging views in an informal manner on questions as they arise. If you think that this might be useful then we could begin by sending you the agenda of proposed meetings and the minutes of past meetings so as to enable you to determine when it would be of interest to you to be represented.

I should be interested in your views on this suggestion.

Yours sincerely,

N. A. ROBERTSON

N. A. Robertson

CONFIDENTIAL

March 12, 1962.

File: 5475-AX-38-40

Proposed New Canadian Declaration of Acceptance of Compulsory Jurisdiction of the International Court of Justice: Points for Possible Discussion by Legal Planning Committee

Nature of the Reciprocity Condition

The condition of "reciprocity" stands on a different footing from all the other reservations contained in the Canadian Declaration of Acceptance of the Compulsory Jurisdiction of the International Court of Justice in three important respects.

Firstly, it is not just another restriction ruling out a particular class of case. It is a pre-condition to acceptance of jurisdiction covering all classes of cases. It is therefore different in nature from the other conditions.

Secondly, the condition is more important than any of the other conditions, and even, perhaps, all the others taken together, since it provides in essence that Canada shall not be placed at an unfair advantage in litigation with another country. It achieves this by providing that Canada shall not be hailed into court by another country which has not accepted the compulsory jurisdiction of the court. It provides further that Canada shall have the right to invoke against a potential adversary any reservation which that adversary might be able to invoke against Canada on the basis of its own declaration. Clearly, the protection of such a condition is not one which should be lightly cast aside without assuring protection by other means with absolute certainty.

Thirdly, the legitimacy of such a condition is not open to question by other countries or by the

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Canadian public, since it is in no sense an unfair condition but is merely a protection of the basic right (which pertains in domestic law in civilized countries) of equality before the law, Moreover, it in no way impairs the dignity of the court by unduly restricting its jurisdiction, nor would it frustrate the development of the rule of law, since, if every country had no conditions except that of reciprocity, acceptance of compulsory jurisdiction would be absolute and complete. (This illustrates, ~~incidentally, better than anything else~~ also the essential distinction between the nature of this condition and that of the others contained in the Canadian declaration.) Consequently, until acceptance of compulsory jurisdiction is more nearly universal, there ~~is~~ would seem to be little or no odium in a provision which is not, strictly speaking, a reservation so much as an essential pre-condition based on fundamental rights.

It follows from the nature, importance and the legitimacy of this condition that it stands on a different footing from the other conditions and that it should not be abandoned unless there is absolute certainty that the protection which it would afford is available from other means.

Protection of Reciprocity from other Sources

It is argued by Hudson, writing of the Permanent Court (1) and Rosenne writing of the International Court

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(1) Professor Hudson is quite categorical in his opinion that reciprocity is an absolute condition. "Every declaration made under paragraph 2 of Article 36 whether it is made by signature of the potential clause, or otherwise, has this characteristic impressed upon it. It is not a reservation made by the declarant; it is a limitation in the very nature of the declaration which operates or is made "in conformity" with paragraph 2 of Article 36...In a few cases, however, the declaration is made without the use of any such formula, or expressly "without condition". From a legal point of view, the formulae seem to serve no useful purpose; all of the declarations contain the limitation ipso facto, and this is true even though they are said to be

(cont'd)

of Justice (2) that the condition of "reciprocity", contained in one form or another in almost all the declarations of compulsory acceptance which have been filed with the court, is redundant in the light of several decisions of the two courts to the effect that the phrase "in respect to any state accepting the same obligation" occurring in Article 36(2) of the Statute of the court means "reciprocity", in the broad sense of the word: i.e., that any state shall have the right to invoke against any other state the reservations of that other state. Other writers such as Hambro (3)

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(1) cont'd
"without condition". Hudson in The Permanent Court of International Justice, 1943 Ed. at p.465.

(2) Rosenne concurs in this view: "The condition of reciprocity is one commonly inserted specifically, (though, in law, it is probably unnecessary), as is also the condition of ratification ..."The condition of reciprocity specifically mentioned in Article 36(2) applies absolutely; and regardless of whether it is repeated in one or both of the declarations by virtue of which the application is filed. That being so, the jurisdiction of the court will be regulated by the mere limit of the declarations in question, since jurisdiction is conferred on the court only to the extent to which the two declarations coincide in conferring it." Rosenne's "Essay on the International Court of Justice", 1957 Ed. at pp.312 and 315 respectively.

(3) In an Article by Dr. E. Hambro "Some Observations on the Compulsory Jurisdiction of the International Court of Justice" appearing in the British Year Book, 1948, Vol. 25 at p.133 he states at p.136:

"If a state wishes to make its acceptance of the compulsory jurisdiction not subject to any condition, why should it not be able to do so? Is there any rule of international law preventing states from accepting far-reaching unilateral obligations? They may thereby put themselves in a position of inequality as regards other states. They may give up a fraction of their sovereignty. They may consider it laudable for states to give up some of their sovereignty in order to increase the scope of the compulsory jurisdiction of the International Court of Justice.

"The possibility of making declarations which are not based on reciprocity seems, further, to be supported by para. 3 of Article 36, which states unequivocally that the declarations may be made 'unconditionally or on condition of reciprocity on the part of several or certain states'. It is, then, respectfully submitted that it is open to any state to make a declaration accepting the compulsory jurisdiction of the Court in regard to all other states whether or not they have accepted a similar obligation. In view of these considerations it seems safe to assume that it is possible for a state to accept the jurisdiction of the Court without reciprocity, but that such unconditional acceptance cannot be presumed."

and Stone[4] are not so convinced that the statute (of and by itself) provides for reciprocity in the absence of its inclusion also in the declarations of acceptance.

The element of doubt as to whether it is possible to make a totally unconditional acceptance of jurisdiction would seem to rest on four factors:

Firstly and most important, neither court has ever had to pass judgment on a completely unconditional declaration:[5]

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(4) In Julius Stone's "Legal Controls of International Conflict" 1954 Ed. at pp.128 and 129 he states as follows: "A third question is as to the effect of the words "in relation to any other State accepting the same obligation", especially since the paragraph also expressly contemplates that that State may accept the clause on condition of reciprocity of other States. The former words would seem in some senses of both provisions to make such a condition redundant. He goes on to discuss Hambro's views as follows:

"See the acute analysis by E. Hambro, article cited supra n.69, at 136-37; and id. 151-52, on the diverse forms of the reservation and effects thereof. Would a hypothetical State accepting the Optional Clause without conditions be submitting without reservations in relation to other States who have made reservations? Again, do the quoted words not rather mean that as between two litigants the sphere of submission is limited by both sets of reservations; so that either litigant can avail himself of any reservation in the other's acceptance? cf. E. Hambro, op.cit. 952-53. The Court itself adopted this view in the Electricity Company Case, P.C.I.J. Series A/B No.77, at 81, not only with regard to an express reservation of reciprocity, but under the quoted words of Art.36, para. 2 itself. Yet, perhaps, on the other hand, the terms "accept the same obligation" referes merely to the Optional Clause, as it were in gross, regardless of limits within which it is accepted. In addition, some reservations (e.g. of British Commonwealth disputes) are, by their very nature, not reciprocable in favour of non-Members of the Commonwealth.

Mr. Hambro's argument that unconditional submission must be possible since Art. 36 (3) provides that declarations may be made "unconditionally" etc. does not answer this last question. For para. 3 could mean merely that a State would not be bound at all if its condition of reciprocity were not fulfilled, still leaving open the question whether, assuming it to be bound, the words "in relation to any other State accepting the same obligation in para. 2 limit the area within which it is bound to that common to both sides."

(5) It is interesting that Portugal's declaration, while very restrictive, does not contain the express condition of reciprocity. The issue did not arise in the Right of Passage case, however, since while Portugal claimed the right to invoke India's declaration against her, India did not attempt to invoke any of Portugal's declarations against her.

hence any pronouncements to date on the effect and meaning of Article 36(2) are obiter dicta.

Secondly, the court is not bound by the doctrine of stare decisis and is, in fact, specifically exempted by its own statute from the binding effect of its previous decisions:(6) hence its pronouncements on the effect and meaning of Article 36(2) are of even less authority than is usually the case with obiter dicta.

Thirdly, an examination of the actual decisions of the two courts indicates that the present court has been much more cautious than its predecessor in pronouncing on the question in issue and has taken care in all its decisions to stress the importance of the conditions contained in the actual declarations before the court (which are treated as being in the nature of a treaty) and does not merely cite the statute in order to find reciprocity.(7) It

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(6) Article 59 which provides: "The decision of the Court has no binding force except between the parties and in respect of that particular case."

(7) The cases in question are: Phosphates case (Series A/B No.74 at p.22); the Electricity Company case, (Series A/B No.77 at p.81); the Anglo-Iranian Oil Company case, (I.C.J. Reports (1952)); and the Norwegian Loans case (I.C.J. Reports, 1957). See also Right of Passage case.

Although the Permanent Court of International Justice seems to have founded its decisions in the first two cases mentioned in large part on the wording of the Article36(2) rather than on the actual condition of reciprocity included by the various countries in question in their declarations accepting compulsory jurisdiction, each of the countries in question, as it happens, had incorporated the actual language of Article 36(2) into their declarations.

It is interesting to note however that in the Anglo-Iranian Oil case the International Court of Justice made specific reference to the declarations, which both contained the condition of reciprocity, as being the basis for the court's jurisdiction, rather than merely Article 36(2). In the Norwegian Loans case also the International Court considered that its jurisdiction depended upon the declarations made by the parties, which were both made on condition of reciprocity, or "the common will of the parties, which was the basis of the court's jurisdiction". Moreover, in the Norwegian Loans case the court refers to Article 36(3) of the statute rather than Article 36(2) in this connection: "In accordance with the condition of

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is important therefore not to take some of the earlier and the fairly categorical assertions of the Permanent Court as indicative of the attitude of the present body.

Fourthly, as is pointed out by Hambro and Stone (8) any country should on principle have the right to make a totally unconditional acceptance of compulsory jurisdiction without even the protection of reciprocity if it so desires, and such a right would (according to normal treaty interpretation rules) have to be removed by the statute in unmistakably clear terms. This can hardly be said to be the case in the light of the voluminous literature on the controversial question whether or not Article 36(2) provides of and by itself for reciprocity.

Fifthly, the ambiguity of the language of Article 36(2) and (3) is clearly apparent on examination. Leaving aside the history of the sections, both as to the original intention of the drafters and the subsequent (and contrary) interpretation by the court, it is not possible on the basis of strict exegesis to say whether Article 36(3) modifies Article 36(2) or vice versa.

Lastly, the interpretation placed on the statute by the court is not consistent with the original intent of the draftsmen (at least according to Waldock)(9) and this, coupled

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(7) cont'd
reciprocity, to which acceptance of the compulsory jurisdiction is made subject in both declarations, and, which is provided for in Article 36 para. 3 of the statute, Norway, equally with France, is entitled to except from the compulsory jurisdiction of the court disputes understood by Norway to be essentially within its national jurisdiction." In other words, although the International Court of Justice appears to have adopted the interpretation of its predecessor the Permanent Court of International Justice on the meaning of the condition of reciprocity it may not be correct to assume that it also founds its decisions on the applicability of reciprocity on the existence of Article 36(2) as did the predecessor court; the actual declarations of acceptance of compulsory jurisdiction may be determinative.

(8) See footnote (4) above.

(9) Waldock's definitive Article in the British Year Book, 1955-56, Vol. XXXII, p.244.

with the fact that a completely unconditional declaration has never been in issue before the court, is of itself a cause for doubt.

Possible Alternative Versions of the new Declaration

If it is agreed that the condition of reciprocity is (a) important legally, (b) unobjectionable politically and (c) not provided for with certainty in the court's statute, then the question arises as to how to provide for it in the proposed Canadian declaration without, if possible, making the declaration seem somewhat restrictive. There would seem to be several possibilities:

The Paraguayan Formula

The Paraguayan formula provides as follows: "Paraguay recognizes purely and simply, as obligatory, as of right and without a special convention, the jurisdiction of the Permanent Court of International Justice, as described in Article 36, paragraph 2 of the Statute."

From a political point of view this formula has a somewhat legalistic sound, incorporating by reference something not contained in the formula itself, but on the whole it seems unobjectionable politically. From the legal point of view, however, the formula merely throws the court back on the statute, thereby failing to meet the doubt which exists as to whether the statute of and by itself provides for reciprocity. In essence, therefore, it is an unconditional acceptance subject to all the difficulties discussed above.

"Reciprocity"

The most obvious and probably the safest procedure would be to spell out the condition by the phrase "subject only to the condition of reciprocity". It may be possible however to achieve the same effect without using the possibly objectionable word "reciprocity". Another possibility

equally safe and perhaps more salable, would be to use the phrase "with respect to any state accepting the same obligation". From a political point of view this phrase would seem to be readily understandable to the layman, and intrinsically unobjectionable. From a legal point of view, the advantages are: firstly, this phrase has been interpreted again and again by both courts (in connection both with its inclusion in Article 36(2) and in declarations which have been considered by the court) to mean "reciprocity", in the broad sense in which the word is used above.(10) (Indeed, any doubt which exists concerning the phrase is not related to its inherent meaning but only as to whether its inclusion in the statute is of and by itself, sufficient.) Secondly, the meaning of the words have also been much interpreted in state practice by their inclusion in twenty-six of the declarations filed with the court.(11) Moreover, in fourteen of these declarations the phrase is followed by an indication of their intended meaning, by such words as "in relation to any other state accepting the same obligation, that is to say, on condition of reciprocity".(12) Hence, the declarations on file with the court provide independent evidence of the meaning of the term.

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(10) See cases referred to in footnote (7).

(11) Australia, Belgium, Honduras, Liechtenstein, Pakistan, Sweden, Switzerland, U.S.A., Cambodia, Denmark, Dominican Republic, Finland, France, Liberia, Luxembourg, Mexico, The Netherlands, Norway, Panama, Thailand, Turkey, Uruguay, China, Colombia, Japan and the Philippines.

(12) Cambodia, Denmark, Dominican Republic, Finland, France, Liberia, Luxembourg, Mexico, The Netherlands, Norway, Panama, Thailand, Turkey & Uruguay.

In the declarations of China, Colombia, Japan and the Philippines, the words "in relation to any state accepting the same obligation" are combined with a phrase such as "and on condition of reciprocity".

Other formulas might also be worked out which would have the same meaning, but they would lack the certainty of a formula which has been interpreted both in the courts and in state practice, and there would seem therefore to be little advantage in seeking some other wording, merely for the sake of novelty.

Jean Beesley

cc: Mr. Cadieux
Mr. Sicotte
Mr. Kingstone
Mr. Cole
Mr. Lee

DEPARTMENT OF EXTERNAL AFFAIRS

MEMORANDUM

TO: THE UNDER-SECRETARY

FROM: LEGAL DIVISION

REFERENCE:

SUBJECT: Establishment of Legal Planning Committee

Security CONFIDENTIAL

Date March 8, 1962.

File No.	
	5475-AX-40
c.c.	5475-AX-37-40
	5475-EM-40
	11647-A-40

Legal Plann Com fpb

It has become apparent during the course of the various legal studies now being made in the Department (prompted initially by Mr. Cadieux's election to the International Law Commission, but since undertaken on a somewhat broader basis) that there is a need for improved methods in the co-ordination and planning of Canadian policy on legal and quasi legal questions. There is some reason to believe that there may have been an insufficient use of the elaborate and efficient U.N. consultation process on legal questions, (in the case of other countries as well as Canada). (It is not unusual, for instance, for international legal conferences (such as those on the Law of the Sea) to begin with little or no prior consultation or agreement on such questions as elections of officers, procedural rules, etc. in contrast to conferences on other matters. In some cases the procedures followed have not been consistent with those at other U.N. Conferences, seemingly through lack of awareness of the usual procedures. The same lack of prior consultation is sometimes evident on substantive questions to be discussed. The explanation may be the separation in many countries between legal branches and foreign ministries.) There may also have been occasions also on which more systematic interdepartmental consultation on legal questions at an early stage would have been useful in anticipating problems which have arisen.

2. Quite apart from the desirability, per se, of increasing wherever possible the efficiency of our internal and external consultation process on international legal matters, it has become evident that there are certain undesirable trends and developments in contemporary international law which cannot be adequately met by ad hoc consultation, as a result of which certain measures would seem to be required in order to improve our planning. Firstly, it would seem desirable to increase and extend our consultation with friendly countries on legal questions. (This process has already been begun by our letter of February 12, on Future Development of International Law, a copy of which is attached.) A second and related step is to include legal matters within the regular U.N. consultation process.

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CIRCULATION

Ext. 326A (6/56)

8.3.41 (U.S.)

(Arrangements have been made for this to be done.) A third step might be the creation of a departmental legal planning committee, a continuing body whose terms of reference would include the planning, formulation and implementation of Canadian foreign policy on important legal and quasi-legal questions.

3. Examples of the kind of question which such a committee might consider are: co-ordination of Canadian policy in the Sixth Committee, the International Law Commission and the International Law Association on questions now before these bodies; the desirability of Canada continuing to uphold the classical doctrine of sovereign immunity on state-owned trading ships; status of foreign vessels (state and private owned) with regard to entry and sojourn in Canadian Ports and territorial waters; constitutional limitations on ratification of the law of the sea conventions; international conventions limiting liability of operators of nuclear power installations (land based reactors and nuclear powered ships); new extradition conventions; variations proposed by other departments to international conventions (e.g. Commonwealth Merchant Shipping Agreement) to which Canada is a party; and interpretations of Canadian legislation provided on request to foreign missions in Ottawa.

4. One of the chief functions of such a committee, (indeed, one of the main reasons perhaps for establishing it) is the opportunity it could afford for an informal exchange of views on current questions of a high legal content, the nature of which might not lend themselves to reduction in writing. In the light of the changes taking place in contemporary international law this could prove increasingly useful.

5. Initially, the Committee might comprise Mr. Cadieux, Mr. Wershof, the appropriate desk officer in Legal Division and myself. Other officers of this Department and other Departments could attend meetings of the committee, as appropriate, when questions of concern to them are considered. The basis for such a committee already exists in the group meeting regularly to discuss questions related to the work of the International Law Commission. The preparation for this work has already carried over into the other aspects of the work of the Department, such as that relating to the UNGA Sixth and Second Committees, liaison with the International Law Association, etc.

6. I would suggest, if you agree, that the International Law Commission Committee be used as the basis for the establishment of a Legal Planning Committee, along the lines above suggested, its operations to begin immediately.

There seem little seen sible objections & I shd welcome the setting up of the Committee suggested in paras 5 & 6 R 14.5.62

Legal Division

DEPARTMENT OF EXTERNAL AFFAIRS, CANADA.

NUMBERED LETTER

TO:.....

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FROM: THE UNDER-SECRETARY OF STATE FOR EXTERNAL AFFAIRS, OTTAWA, CANADA.

Reference: Our telegram V-41 of February 11....

Subject: Future Development of International Law.....

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Security: CONFIDENTIAL

No: L-

Date: February 12, 1962.

Enclosures:.....

Air or Surface Mail:.....

Post File No:.....

Ottawa File No.	
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~~Reference~~

Similar Letter Sent to:

London
Washington
Oslo

Internal Circulation

Mr. Cadieux
European Div.
D.L.(2) Div.
Commonwealth Div.
U.N. Div.
A&ME Div.

Distribution to Posts

Permis Geneva
Paris (NATO)
Paris (Emb)

In our telegram under reference we outlined our proposed consultation programme on the general question of the future of the U.N. This letter deals with a separate but related question, namely, the future development of international law. It has become apparent during the course of various legal studies now being made in the Department (prompted initially by Mr. Cadieux's election to the International Law Commission, but since undertaken on a somewhat broader basis) that there is some cause for concern over certain trends in international law which may be inimical to the future development of the rule of law along orderly lines. These tendencies emanate, as we see it, from three sources:

(a) the direct attacks being made by the Soviet bloc upon many of the established bases of international law, (as illustrated in the attached excerpts from a departmental working paper on the juridical basis of peaceful co-existence);

(b) the less direct, but perhaps more effective inroads upon traditional concepts of international law occurring through the state practice and theories advanced in justification thereof on the part of some of the more recently independent countries on certain questions relating to colonialism and treaty obligations;

(c) the lack of a clearly formulated and well-co-ordinated overall policy on the part of the western powers and other like-minded countries to cope with these developments, (as illustrated in the attached excerpts from a report by one of our officers who attended the recent Hamburg Conference of the International Law Association).

2. A recent occasion during which tendencies emanating from all three sources may have been to some extent discernible was the recent debate in the Sixth Committee; the item "peaceful co-existence" was included (although under another name) on the Sixth Committee Agenda, in spite of Western opposition.

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Quite apart from objections on political or legal grounds to the item or to some of the elements allegedly embodied in the concept of "peaceful co-existence", the U.S.S.R. delegate when arguing in support of the item drew a distinction between "old international law" and "new international law". He described the former as being based on suppression of colonial peoples and primarily concerned with sanctioning unequal colonial arrangements, while the latter, dating from the emergence of "socialist states", formed the basis of a "purification" of the entire field of law. The clear impact of his remarks is that much of traditional international law should be eliminated in the process of the development of international law. The resolution nevertheless received the support of a number of countries, some of whom appeared to equate "peaceful co-existence" with the Bandung principles.

3. It is possible that in opposing the item the Western countries may have appeared in Afro-Asian eyes to be overly conservative, if not reactionary, thereby enabling the Soviet bloc to appropriate to themselves the credit for all the constructive developments and trends in contemporary international law. It is conceivable that an approach could have been worked out beforehand which might have been equally or more effective in opposing the inclusion of the topic, on primarily legal grounds, while avoiding giving unnecessary offence to the Afro-Asian supporters of the item by drawing a clear distinction between the unobjectionable and constructive elements allegedly embodied in the term peaceful co-existence, many of which find support amongst the Afro-Asians, and those essentially retrograde and destructive tendencies which appear unlikely to get much support outside the Soviet bloc. The discussions of the International Law Association provide an interesting comparison in this respect.

4. Such developments suggest the need for closer consultation and greater co-ordination on legal and quasi-legal questions. A pragmatic approach would seem to be inadequate in developing responses to such initiatives of the Soviet bloc or others on legal questions, whether in the Committees of the U.N., the International Law Commission, or non-governmental bodies such as the International Law Association. There seems to be a need rather for the formulation on the part of western powers of a comprehensive position on the many inter-related questions arising in the various legal and quasi-legal forums mentioned above, with a view to mustering advance support for a firm stand on those questions of law and principle which are considered vital, resisting attempts to subvert or replace traditional concepts of international law on such questions, and developing, where possible, a more bold, imaginative, dynamic and essentially progressive approach to the development of the rule of law.

5. In terms of tactics, these objectives would seem to call for a three-pronged approach to the problem along the following lines:

(a) the development of positive lines on specific questions on which developing practices may be unsatisfactory;

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(b) the prior garnering of support and the elucidation (and, perhaps, the sharing) of arguments on questions on which valid principles and rules of law may be exposed to unfair attack; and especially

(c) the encouragement of genuinely constructive attempts to initiate new developments in contemporary international law.

6. Such an approach, to be successful, would have to be implemented:

(a) in all the organs of the U.N., including especially the Second, Third, Fourth and Sixth Committees;

(b) in the International Law Commission, to the extent possible, (bearing in mind the personal status of its members), through consultations between foreign ministries and national representatives);

(c) in private bodies, such as the International Law Association, where an effort could usefully be made towards a better formulation of policies, closer consultation between western representatives, and perhaps greater official participation by western countries.

7. We are at present engaged in an analysis and development of the Canadian position on the legal questions which have recently arisen or are likely soon to arise in the various bodies mentioned. We propose, at a later stage, to consult with the country to which you are accredited (and the others indicated in the margin on page 1) to compare notes and work out detailed positions on specific questions. In the meantime, would you please explain to the appropriate local officials our interest in exchanging views on the broad issues touched upon above, and, at a later stage, when we have had an opportunity to formulate our views in greater detail, discussing them in more specific terms. You may wish to make clear that while we appreciate that many of these questions may already be under consideration, we would hope that these proposed discussions would provide an opportunity of re-examining both broad policies and more detailed positions on the various legal questions mentioned above. Any suggestions as to how these discussions might proceed or as to particular subjects which might usefully be included would be welcomed.

Under-Secretary of State
for External Affairs

CONFIDENTIAL

Excerpt from Working Paper on
Juridical Basis of Peaceful
Co-existence

...The juridical basis for "peaceful co-existence" (which would seem in Soviet eyes to encompass virtually all international law) is a rather mixed bag based in part on the Soviet doctrine of quasi-absolute sovereignty and in part on Soviet socio-economic theories. In political terms, for example, in the words of the Ukranian S.S.R. delegate to the Sixth Committee at the 15th Session "the basis of international law is agreement between sovereign states, and supra-nationality is a denial of sovereignty". Not surprisingly, The Draft on Arbitral Procedure produced by the International Law Commission and the proposals of the I.L.C. for the establishment of an International Criminal Court were criticized by the Soviet bloc as attempts to infringe the sovereignty of other countries. Similarly, the Soviet bloc approach towards the acceptance of compulsory jurisdiction of the International Court of Justice is also consistent with this preoccupation with protection of its sovereignty. In economic (and legal) terms, in the words of the Roumanian delegate to the Sixth Committee at the 15th Session "the right of peoples to self-determination includes permanent sovereignty over their natural resources, and, consequently, the right to nationalize them". In emphasizing the sovereignty of a country over its natural resources the Soviet bloc go some ways towards denying that nationals of other countries can have property rights connected with these resources. Several of the Soviet bloc representatives at the 15th Session of the Sixth Committee, for instance, not only called in question the international obligation to compensate foreign nationals affected by nationalization measures but suggested that the colonial powers should begin "to restore in part at least what they have taken".

The Soviet version of the law of state responsibility seems to reflect Soviet views both on sovereignty and on private ownership of property and provides, therefore, an example of the concrete application of the principles of "peaceful co-existence". In the Soviet view the question of violation of rights of states is much more important than the question of violation or rights of individuals, and this theme runs through their whole approach to this topic. For this reason they query the terms of reference of the I.L.C. Rapporteur as being too narrow. They go further, however, and challenge the Rapporteur's conclusions on their merits.

On the first question, according to the Soviet bloc version of the Law of State Responsibility it embodies the "fundamental principles of contemporary international law" of the right to peace, to sovereignty, to exploitation of a country's own natural resources, to territorial integrity and to self-determination of peoples, (many of the principles also put forth as fundamental to the notion of "peaceful co-existence"). The Soviet bloc criticize

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the I.L.C. therefore for concentrating on acts encroaching on rights of aliens while ignoring those infringing on rights of states. In developing this theme, they allege that the I.L.C. has "assumed that state responsibility can be expressed only in the form of financial reparation" without taking into account that the "dignity of man and the essential rights of people cannot be evaluated in monetary terms".

On the merits of the Rapporteur's conclusions, the Soviet bloc would eliminate any provisions in a draft convention "giving colonial powers the right to claim against underdeveloped countries". In keeping with this approach, they question whether foreign nationals can have "rights" to natural resources of states, whether compensation is payable upon nationalization, whether contemporary international law sanctions espousal by states of claims of individuals and whether espousal constitutes the claim as international in character. In other words, they question much of the basis of the traditional Law of State Responsibility.

On particular issues, they argue that:

(a) Article 19 of the I.L.C. draft articles on state responsibility, stipulating that a claim by an alien against a particular state is international in character is invalid;

(b) Article 20, providing for the bringing of an international claim by the state of the national interfered with, is a pretext for interference in internal affairs and attempts to stifle nationalist aspirations in the interests of colonial powers;

(c) Instead of dwelling on the compensation payable by the nationalizing state, the I.L.C. should have begun with the two Draft International Conventions on Human Rights, which proclaim the right of peoples to self-determination, "including permanent sovereignty over their national wealth and resources and consequently the right to nationalize them";

(d) International Law on state responsibility has been based almost entirely on the unequal relations between great powers and small states, and the basis of the I.L.C. studies should be the requirement to restore in part what has been taken by the colonial powers;

(e) The development of the Socialist economic system co-existing with the capitalist system, and the achievement of independence of many colonial territories, have rendered the concepts of state responsibility, in so far as they are concerned with the protection of aliens, almost entirely obsolete.

(f) The essential principle of state responsibility is that aliens must be subject to the law of the country of residence and have no special privileges.

CONFIDENTIAL

MR. CHAPUT'S REPORT

From my attendance at the Hamburg Conference in the summer of 1960, I got the impression that the ILA is a going concern. This is perhaps due to the fact that it is, to my knowledge at least, the only organization of its kind. Unless I am mistaken, the Institut de Droit International has a limited membership consisting of jurists of high repute who concentrate on specialized subjects often of a theoretical nature, whereas the ILA, whose membership now exceeds 3,800, puts the accent more on down to earth aspects of day-to-day international problems.

A good deal of the dynamism currently shown by the ILA is no doubt the result of intensive efforts on the part of the present administration, particularly its Secretariat headed by Mr. J.B.S. Edwards. The work of some members of the Executive Council and of national branches also accounts for the results achieved. Among those present at Hamburg, the British, Germans, Americans, Belgians and Yugoslavs seemed particularly active. Some of the subjects having an obvious political connotation are the legal aspects of coexistence and of the peaceful use of atomic energy, United Nations Charter problems (e.g. U.N. forces), nationalization of foreign property, etc. In the present context of international relations, more specifically as a result of the constant addition of non-Western members to the international community, the number of legal subjects having political overtones is steadily increasing. In other words, the West is no longer able, despite its experience in the field, to dictate more or less the course of developments in the realm of international law. For this reason alone, the interest of Western governments in participating in ILA activities is becoming more real.

Western interest is immeasurably greater as a result of the participation of Soviet bloc countries in ILA conferences. As a newcomer, this was the feature which struck me most in Hamburg. While they did it in a quiet and unobtrusive manner, delegates from Soviet bloc countries participated actively and efficiently in the deliberations. Their performance was obviously the result of a concerted plan laid down before the meetings. Each of their speakers emphasized different points and as usual there was a division of labour in the use of the English and French languages.

In the face of this concerted effort, there seems to have been no deliberate effort on the part of the Western delegations to present a united front or provide effective counteraction. Indeed it is not clear whether more than a token number of Western lawyers who participated actively saw anything behind Soviet manoeuvring or if they did they chose not to show any concern about it. Those who followed the latter course may have figured that Soviet bloc delegates (even when added to the 15-odd delegates from neutral countries) represented such a small percentage of the total number (450) of delegates that they could not constitute a real danger. Bearing this in mind, it is conceivable that a good many Western lawyers deemed it preferable in the long run to have Soviet bloc lawyers present, whatever risks might be involved; they were consequently anxious to refrain from any action which might prejudice what they regarded as a desirable development.

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Be that as it may, there is no doubt that Soviet bloc delegates were able to carry more weight at Hamburg than their number normally warranted. This presumably is due to the fact that all delegates from Soviet bloc countries are government servants who come to the meetings with a clear purpose in mind and who are well prepared to do their job. The number of individuals from Soviet bloc countries who appeared on the rostrum exceeded by far the number appearing on the delegates' list and a rough guess of their total number would be between 25 and 30. In contrast there were, as far as I could make out, no representatives from Western governments other than myself and the United States Consul-General in Hamburg.

Notwithstanding Western lawyers' good intentions and in spite of the limited number of Soviet bloc delegates, it is clear that the presence of the latter at ILA conferences presents a problem. Perhaps this presence has not had up to now unduly damaging results for the West. Yet, to give one example, Soviet bloc delegates probably thought they had a field-day in Hamburg on the subject of coexistence. They succeeded not only in having the concept of coexistence further entrenched in ILA activities but convinced the conference to adopt the orthodox wording "peaceful coexistence" to describe this concept. They were also successful in their aim of having the legal aspects of disarmament studied by the Association. Irrespective of their progress in having their texts adopted, the conferences provide a useful rostrum for expounding communist themes and ideas, particularly now that Afro-Asian countries are attending in increasing numbers.

In the light of the above, I think the time has come for some, if not all, Western delegations to co-ordinate their action at ILA meetings with or without the direct assistance of government delegates. The Soviet bloc is represented in the Committees on the United Nations Charter, Coexistence, Nationalization of Foreign Property, Air Law, Family Relations, International Commercial Arbitration, Inter-National Medical Law, and Enforcement of Foreign Judgments. There are eighteen committees in all; the British and Americans have representatives on each of them; the Yugoslavs are represented on nine committees.

LEGAL DIV. / J.A. BEESLEY / PM / HS

cc: Geneva

CONFIDENTIAL

December 27, 1961

Notes of Second Meeting on the International Law Commission, December 19, 1961

Present: Mr. Cadieux, Mr. Sicotte, Mr. Lee and Mr. Beesley

The question under discussion was that of special missions. Mr. Cadieux said that three points had occurred to him:

(1) What is the legislative authority in Canada for granting privileges and immunities to experts from the U.N., ICAO, etc.?

Mr. Lee said that except for I.L.O. and ICAO, other experts are not covered by specific legislation and their privileges and immunities rest on generally recognized principles of international law and common law. The Privileges and Immunities (U.N.) Act does not apply to U.N. experts as it now stands. (Proposals to amend the Privileges and Immunities (U.N.) Act to include all international organizations and the U.N. as well as their experts, are presently under discussion with the Departments of Finance and National Revenue).

(2) What is the position of Commonwealth officials? Would the Privileges and Immunities (Commonwealth Countries) Act require amendment to cover special missions or should they be covered under legislation implementing the Vienna Convention?

It was suggested that insofar as Commonwealth representatives are concerned the Privileges and Immunities (Commonwealth Countries) Act would have to be amended and that no action should be taken on this until the draft convention had been produced. With regard to the Vienna Convention, it was explained that no specific legislation would probably be required to implement it, other than the introduction in Parliament of a simple resolution recommending ratification.

(3) How should the question of special missions be handled at this stage?

It was agreed that the first step would be for the I.L.C. at its next session to request written comments from various governments on the draft convention on special missions (perhaps as amended at the next Session); that the I.L.C. should subsequently consider such comments, and revise the draft in the light of them, and make a recommendation back to the Sixth Committee, which could then decide whether to adopt a convention immediately or convene a special conference.

(4) What is the best procedures for handling the question of privileges and immunities relating to conferences and congresses (apart from special missions)?

Mr. Lee pointed out that the question of special missions had been treated urgently, by the I.L.C., separately from the other questions to which it was logically related, because of the I.L.C.'s desire to have a draft convention produced in time for consideration by the Vienna Conference on Diplomatic Relations. It was difficult to say whether the I.L.C. would want to continue with this piecemeal approach or would prefer to return to a more logical exposition.

28.12.22(US)

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It was the view of the meeting that the logical position to take on this question would seem to be

(1) for the I.L.C., at its next session, determine whether or not to charge a Special Rapporteur (preferably the same Rapporteur who prepared the Report on Ad Hoc Diplomacy)

(a) to produce a draft convention on privileges and immunities for congresses and conferences,

(b) make a report recommending whether or not the draft convention on special missions should be consolidated with the draft convention on congresses and conferences and taking into account the relation of this subject to the present conventions on the subject relating to the U.N. Organizations.

(2) the I.L.C. might then, at its following session, make its recommendations on this subject and request written comments from governments, by which time the I.L.C. should be in a better position to determine how to correlate the two draft conventions on special missions and congresses and conferences with the Conventions on Diplomatic Relations and Consular Relations and the Conventions concerning congresses and conferences held under U.N. auspices.

It was felt that the most expeditious immediate plan would be for the I.L.C. to charge the Rapporteur with producing a draft on conferences and congresses and in the meantime obtain governments' comments on special missions.

In summary, it was agreed:

(a) to suggest that the comments of governments of the draft on special missions be obtained as soon as possible,

(b) that we could raise the question whether conferences and congresses should be included as well; but

(c) that we could decide either way on this latter question.

Summer Employment of Professors

After a considerable discussion on the most logical subject to assign to a professor during the coming summer, it was agreed that, since it could not be said in advance how long it would take to deal with treaties, or what line would be taken on state responsibility, State Succession would be the only one which could be selected with any certainty that the work to be done would be timely.

In response to Mr. Sicotte's suggestion, it was agreed that notes should be prepared on all the topics discussed by the I.L.C. for possible use in connection with the summer employment of Law Professors.

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It was explained by Mr. Cadieux that at a later stage, he proposed to compare notes with representatives of other countries such as France, Italy, the U.S.A. and Great Britain on general policy questions, and that after that we would proceed with a more detailed analysis of certain of the questions.

For the next meeting, he wished to have the members of the Committee familiarize themselves with the Sixth Committee discussion on peaceful co-existence and future work.