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Dans ce numéro... In This Issue

Commission of Enquiry into War Crimes in Iraq

by René Provost*

I was invited last year to sit as a member of an international commission of inquiry looking at the legality of certain weapons and tactics used by British armed forces in Iraq. The Commission was convened by a UK non-governmental organisation (Peacerights), in the tradition of popular tribunals launched by the philosopher Bertrand Russel during the Vietnam war. The other Commission members were Upendra Baxi (Warwick), Bill Bowring (London Metropolitan), Christine Chinkin (LSE), Guy Goodwin-Gill (Oxford), Nick Grief (Bournemouth), Paul Tavernier (Paris), and William Schabas (Irish Centre for Human Rights), all respected international legal academics. The Commission was assisted in its work by independent leading and junior counsels Nicholas Blake QC and Charlotte Kilroy, both of Matrix Chambers in London.

The impetus for creating the Commission came from concerns expressed in various public and political fora, in the United Kingdom as well as abroad, regarding the legality of some tactics used by British and American forces during the recent armed conflict in Iraq. The United Kingdom and the United States have ratified a number of international humanitarian law treaties by which they renounce the use of certain weapons and tactics, chiefly those which fail to adequately differentiate between civilians and combatants or which cause injuries to civilians which are disproportionate to the anticipated military advantage. Other treaty requirements seek to prevent environmental damage which would cause widespread, severe and long-term harm to the ecosystem. This is completed by a vast array of customary international norms containing general and specific limitations on a belligerent's freedom to use all available means to injure the enemy during war. Violations of these treaty and customary norms may constitute war crimes entailing individual criminal responsibility for those issuing orders and those who carry them out.

The United Kingdom ratified the Statute of the International Criminal Court in 2001, thus giving jurisdiction to the ICC over any acts of genocide, crimes against humanity or war crimes committed by British nationals, whether on British territory or abroad. As such, British military action in Iraq is subject to the jurisdiction of the ICC. States party to the ICC Statute undertake to prosecute before national tribunals any international crimes falling within the jurisdiction of the ICC. Failing that, the ICC itself may prosecute these crimes. Accordingly, the terms of reference of the Commission of Inquiry were to assess whether there existed credible information

*(See **Commission of Enquiry into War Crimes in Iraq** on page 3)*

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President's Message

Fall/automne 2004

As we leave the days of summer behind and turn towards the challenges of yet another "busy season", the Council's annual fall conference looms as a familiar and welcome reference point for those whose studies, careers or interests draw them into the orbit of the sometimes intractable but always fascinating world of international law.

Depuis longtemps, le congrès annuel est à mes yeux une des activités clés de l'automne. C'est un moment stimulant d'échanges et de réflexion sur les nouveautés dans son ou ses domaines d'intérêts, un temps d'ouverture sur des sujets qui autrement pourraient échapper à notre attention en cette ère de spécialisation croissante. C'est surtout une chance inouïe de renouer avec les collègues ou de bâtir des liens avec des gens venant de partout au Canada et ailleurs dans le monde. Mon expérience révèle que le Conseil répond fidèlement à chacune des attentes précitées, et davantage encore, lors de son congrès annuel de l'automne.

Not that this year's conference programme can be considered routine! As I noted in my spring message, conference co-chairs Don McRae and John Hannaford have crafted a varied and exciting programme exploring the timely theme "Legitimacy and Accountability in International Law". You will find further details of the programme elsewhere in this mailing and on the Council's website (www.ccil-ccdi.ca), but among the highlights are keynote speaker Thomas Franck, who will address the topic "Legitimacy After Kosovo and Iraq"; and a host of other high-profile speakers, including Alan Rock, Margaret MacMillan, Yves Fortier, Jonathan Fried, John Jackson, Michael Byers, Jeffrey Simpson and Maude Barlow, to name but a few. This will be a high-profile event, so be sure to mark October 14-16 in your calendars now and take a moment to fill out and return the enclosed conference registration form.

J'aimerais souligner un point particulièrement important qui fera l'objet d'étude lors du congrès de cette année. Je fais référence ici à la révision du programme de recherche du Conseil, annoncée dans le Bulletin de l'hiver 2004. Les membres se souviennent nul doute, qu'à la demande de l'exécutif, Don Fleming, membre du conseil d'administration, a gentiment accepté de mener une consultation dans ce dossier et de préparer un rapport sur l'orientation future de la recherche entreprise sous l'égide du Conseil. Don a déjà invité les membres à lui transmettre leurs commentaires et leurs idées sur le sujet. En outre, un petit-déjeuner de travail libre est prévu lors du congrès de l'automne afin de débattre la question plus longuement. À mon avis, aucun sujet n'est aussi important dans l'avenir que le rôle central que peut jouer le Conseil au Canada dans la promotion et le développement du droit international. J'encouragerais les membres à fait connaître leurs idées sur le sujet directement à Don (dfleming@unb.ca) et à participer au petit-déjeuner de travail précité organisé lors du congrès.

Message du président

It occurs to me as I write that this will be my last "president's message", as my mandate will expire at the Annual General Meeting held at the close of this fall's conference. In my first such message nearly two years ago, I underlined how much I was looking forward to working with all of you to advance the work and profile of the Council, and to that end I invited your active participation in the Council's activities. Your response was enthusiastic and humbling. The strength of the Council indeed lies in the energy and commitment of its diverse and ever-growing membership and it has been a privilege to assist in channelling both. I have also had the indispensable benefit of the immense talent and inexhaustible dedication of a very hardworking Executive, Board and Executive Director, with whom it has been a privilege and honour to serve.

En terminant, je vous annonce à regret que Hugh Adsett, du ministère des Affaires étrangères Canada, a remis sa démission en tant que membre de l'exécutif, après une période trop courte de services très dynamiques au sein du Conseil. Nous lui sommes très reconnaissants pour ses nombreuses contributions et nous espérons qu'il joindra de nouveau nos rangs dès que les pérégrinations imposées par ses affectations à l'étranger le lui permettront! Tout nuage, cependant, cache un coin de soleil. Nous sommes heureux de souhaiter la bienvenue à Valerie Oosterveld, également du ministère des Affaires étrangères Canada, qui nous revient comme membre de l'exécutif après une période d'absence. C'est un plaisir de t'accueillir de nouveau dans l'équipe, Val!

Do plan to join us for an enjoyable and intellectually stimulating autumn weekend in the nation's capital on October 14-16. I look forward to seeing all of you there.

John H. Currie
President/Président

Commission of Enquiry into War Crimes in Iraq

(continued from page 1 - suite de page 1)

reasonably suggesting that violations of the ICC Statute may have occurred in Iraq. The findings of the Commission were directed both to the British Attorney General and the Prosecutor of the ICC.

In the fall of 2003, the Commission was presented with extensive documentary evidence touching on the behaviour of British forces in Iraq and the impact of various weapons and tactics on the civilian population, civilian infrastructures, and the natural environment. The Commission's leading and junior counsels prepared a detailed brief on several legal questions lying at the heart of the inquiry's focus. In November 2003, hearings were held before a large audience at the London School of Economics to hear testimonies from independent observers in Iraq and expert witnesses, including weapons experts. The witnesses, under examination by the Commission counsels and members, testified in particular on the bombing patterns of Iraqi cities by Coalition forces, the impact on the ground of the use of certain weapons, and the technical qualities of several types of ordinance used by British forces in Iraq.

The Commission deliberated in London and a report was drafted collectively by the members of the Commission in the following months. The findings of the Commission touch on six main issues, namely the threshold for investigation by the ICC Prosecutor, specific requirements of war crimes as defined in Article 8 of the ICC Statute, issues of individual criminal responsibility, military objectives and the proportionate use of force, duties of an occupying power, and the rationale for investigation by the ICC Prosecutor.

Most critically, the Commission concludes that the use of cluster weapons in urban areas by British forces does meet the threshold for investigation by the ICC Prosecutor. Two particular features of cluster weapons make their use in urban setting of dubious legality. The first is the inaccurate nature of the weapons, comprised of a large container that opens at a variable altitude to scatter dozens to hundreds of unguided bomblets equipped with small parachutes, which then can be carried up to three kilometres away by the wind. Secondly, cluster weapons suffer from a relatively high rate of 'duds', unexploded bomblets which thereafter pose a great risk to civilians, especially children, when the weapon is used in an urban setting. The Commission was critical in this respect of the conclusion of *non-liquet* arrived at by the committee established by the ICTY Prosecutor to review the NATO bombing campaign over Yugoslavia.

One complex legal issue which the Commission had to contend with was the fact that the vast majority of military operations in Iraq had been carried out by US forces or under US command. Given that neither the United States nor Iraq has ratified the ICC Statute, the Commission necessarily had to restrict its recommendations to acts for which UK nationals could be found responsible. The Commission concluded that, above and beyond attacks carried out directly by British forces, UK nationals could be held criminally responsible if they had authorised support for US operations in breach of international law. Thus it was disclosed before a British parliamentary committee that UK authorities validated all targets attacked from British platforms (e.g. airbases), even when the mission was carried out by American planes. More broadly, the Commission noted that the concept of 'joint criminal enterprise' had become an important tool in the repression of international crimes since the *Tadic* decision of the ICTY in 1999. Contrasting the NATO military intervention in Kosovo and the conflict in Iraq, the Commission found that the latter could *prima facie* be labelled an aggression, a crime under customary international law since at least the judgment of the Nuremberg tribunal. Adding a new element to the concept of joint criminal enterprise, the Commission concluded that the ICC's lack of jurisdiction over this crime did not detract from the criminal nature of the enterprise, thus potentially making UK authorities liable for any international crimes committed by US forces in Iraq. The tragic events at Abu Ghraib, made public after this report was issued, underscore the fact that this is more than an abstract possibility.

On the other hand, the Commission did not find that the threshold for investigation by the ICC Prosecutor seemed to have been met regarding the use of depleted uranium ammunition, attacks against media outlets, and the duties of an occupying force.

The executive summary of the Commission's findings was released in the UK House of Commons and at the United Nations Secretariat in New York in January 2004. In March 2004, the full report was communicated to the UK Attorney General and ICC Prosecutor, who indicated that they would study it closely. The Commission's report attracted extensive media attention across the world, including in several Canadian media outlets.

Investigations by this type of 'popular tribunal' of course beg the question of the usefulness and legitimacy of such an exercise. Starting with the latter, the kinds of crimes which fall within the jurisdiction of the ICC - genocide, crimes against humanity, and war crimes - correspond to obligations *erga omnes*, compliance with which the international community as a whole has an interest. Leaving aside an overly reductionist vision of the international community as comprising solely of states, it is difficult to deny that individuals and NGOs have an important role to play in the marshalling of forces needed to endow international law with sufficient compliance pull to affect behaviour on the ground. Beyond the political debates surrounding the creation of the ICC, important as they may be, we must not forget that international criminal law emerged out of lessons painfully learned about man's inhumanity to man. As powerfully put by Elie Wiesel, "the opposite of love is not hate, it is indifference". These are thus issues in which everyone can be said to have a legitimate interest, from a legal as well as moral point of view. What remains to validate the next step of acting as a popular tribunal is that its members attempt to assess fairly both the evidence presented to them and applicable norms of international law. Turning to the usefulness of such an exercise, it should be clear that it cannot simply be measured by whether the UK Attorney General or the ICC Prosecutor investigate and prosecute anyone on the basis of this report. The creation of formal enforcement institutions such as the ICC (and ICTY, ICTR, Sierra Leone Special Court) should not detract from a pluralist vision of international law which sees norms as existing and developing beyond formal structures such as tribunals. A report like this one can be said to be useful if it contributes to debates within the academic, political and military communities as to the lawfulness of a given weapon or tactic, and more broadly to public awareness about the human cost of war.

The full report is available on the McGill Faculty of Law website at <www.law.mcgill.ca/news>.

En Bref / In Brief

Four new judges named to join UN war crimes tribunal for Rwanda

Secretary-General Kofi Annan has appointed four temporary judges to the UN war crimes tribunal for Rwanda to help the court deal with its workload. The ICTR has the power to appoint up to nine temporary judges to help it meet its timetable to finish all trials at the first instance by 2008 and all of its work by 2010. With these new appointments, the court has filled that quota.

Judge Taghreed Hikmat, who has served on Jordan's High Criminal Court since last year, became the first female judge in her country in 1996. Judge Karin Hökborg has been Vice President of Chamber in Sweden's Court of Appeal since 1997 and has also worked in her country's ministries of Foreign Affairs and Justice. Judge Gberdao Gustave Kam is Burkina Faso's National Coordinator of the Democracy, Rule of Law and Good Governance Support and has previously been President of two regional courts and a public prosecutor. Judge Seon Ki Park opened his own law firm in Seoul and has previously held senior legal positions in the Republic of Korea's Army and Ministry of National Defence.

As of August 30th, the Tribunal had 20 suspects on trial and another 22 detainees awaiting trial. On 20th of September, it will begin trying the cases of Father Athanase Seromba, a Catholic priest at the parish of Nyange, and of Augustin Ndindiliyimana, a former Chief of Staff of the Gendarmerie nationale, and other charged along with him. Source <http://www.un.org./News>.

Fijian human rights expert named UN monitor of commercial security consultants

On 20 August 2004, the United Nations announced the appointment of Shaista Shameem, a legal expert from Fiji, as its new Special Rapporteur on the use of mercenaries as a means of impending the exercise of the right of people to self-determination.

Ms. Shameem currently serves as the Director of the Fiji Human Rights Commission. She has worked extensively as a journalist in her country, as a sociology lecturer at the University of Waikaton in New Zealand and as a solicitor and barrister.

She is mandated to consult with States and interested organizations in gathering information on how the right to self-determination is being affected by the activities of private companies offering military assistance, consultancy and security services on the international market. Ms Shameem will annually present public reports to the UN Commission on Human Rights and General Assembly. Source: http://www.un.org/News.

Launch of the Humphrey Student Fellowships in International Human Rights Law and Organization

The Canadian Council on International Law is delighted to announce its new student scholarship programme, the John Peters Humphrey Student Fellowships in International Human Rights Law and Organization. Applications will be invited this fall and winter for the first round of awards to be taken up in the 2005-2006 academic year.

This new scholarship programme is the result of a very generous gift made to the Council by the late John Peters Humphrey. With this gift, the late Professor Humphrey wished to enable the Council to pursue three objectives: (1) to establish a scholarship programme to encourage young scholars to pursue advanced studies in international human rights law and organization; (2) to support the general activities of the Council; and (3) in the longer term, to establish a visiting professorship in public international law to be awarded from time to time to outstanding scholars, officials, or practitioners residing outside Canada in order to allow them to reside at a Canadian university for a full academic session.

The majority of this gift was received by the Council in 2003. With the gift, the Council has established the John Peters Humphrey Canadian Council on International Law Fund and has seen to the sound investment of the Fund. This fall's launch of the Humphrey Student Fellowships marks the first step in the implementation of Professor Humphrey's three-fold vision for the Fund.

Graduating or graduate law students in Canadian law faculties will be eligible to apply for the Humphrey Student Fellowships. The Fellowships will be awarded to outstanding students in order to permit them to undertake or pursue graduate studies in international human rights law and organization. While the precise number of Fellowships and their amounts remain to be determined, they are expected to be major awards facilitating graduate study at leading graduate institutions in Canada or worldwide. While initial awards will be made to support a one-year period of study, applications for renewal of Fellowships may be submitted in subsequent years.

The late John Peters Humphrey was a great among Canada's many great international lawyers. He was a renowned professor of international law, with a particular interest in international human rights law, at McGill University's Faculty of Law. In 1946, he was appointed the first Director of the Human Rights Division in the United Nations Secretariat and in that capacity was the principal drafter of the Universal Declaration of Human Rights. In his 20 years of service with the UN, he was instrumental in efforts to promote wide ratification of the major international human rights instruments. In 1974 he was made an Officer of the Order of Canada «in recognition of his contributions to legal scholarship and his world-wide reputation in the field of human rights», and in 1988 was awarded the UN's Human Rights Award. The late John Peters Humphrey died in 1995 at the age of 89, having devoted his life to the promotion of universal respect for human rights. Through his very generous gift, that devotion lives on.

Further details as to eligibility criteria and application procedures for the John Peters Humphrey Student Fellowships in International Human Rights Law and Organization will be announced throughout the fall, and will be available from the Council's office or on the Council's website (ccil-ccdi.ca). ◅

Lancement du programme de bourses d'études John Peters Humphrey

Cet automne, le Conseil lance son nouveau programme de bourses d'études John Peter Humphrey. Ces bourses d'études permettront à des étudiantes et étudiants en droit de poursuivre des études de 2e ou 3e cycle en droit international de la personne et des organisations internationales, grâce à un très généreux don de la part de feu John Peters Humphrey. De plus amples renseignements sur les critères d'admissibilité et les modalités de mise en candidature seront annoncés au cours de l'automne par le Conseil. Consultez aussi le site internet du Conseil (ccil-ccdi.ca). ◅

September 1, 2004

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L'Accord sur les ADPIC et la décision de la Cour suprême dans *CCH*

par Daniel Gervais*

La décision unanime de la Cour suprême du Canada dans l'affaire *CCH c. Barreau du Haut Canada* (ci-après « CCH »)[1] rendue en mars 2004 marque d'une pierre blanche l'évolution du droit d'auteur au Canada. Rappelons brièvement les faits. Des éditeurs de textes de lois, de jurisprudence et de traités de droit poursuivaient le Barreau de l'Ontario[2] parce que celui-ci mettait des photocopieurs à la disposition des usagers de sa « Grande Bibliothèque ». En outre, sur demande d'un avocat, le Barreau photocopiait et faisait parvenir (par fax ou courrier) une copie de décisions, textes de doctrine, articles ou autres. Une des questions soumises à la Cour était de savoir si les photocopies faites par le Barreau et expédiées à des avocats ou les copies faites directement par les usagers de la Grande Bibliothèque constituent des violations du droit de reproduction. Question subsidiaire : s'il y a violation, l'exception dite d'« utilisation équitable » aux fins « d'étude privée ou de recherche » prévue à l'article 29 de la *Loi sur le droit d'auteur*[3] s'applique-t-elle en l'espèce? La Cour a considéré que toutes les copies faites, que ce soit par le Barreau ou par les usagers, et même avec but lucratif—car les avocats facturent leurs clients (à profit) pour ces copies—étaient permises sans autorisation ni rémunération par l'article 29.

Or, du point de vue du droit international, toute exception aux droits exclusifs des auteurs[4] dans les lois nationales doit pouvoir passer le filtre du « test en trois étapes » prévus à l'article 13 de *l'Accord sur les ADPIC (TRIPS)*, administré par l'Organisation Mondiale du Commerce (OMC)[5]. Les États membres de l'OMC qui ne respectent pas les dispositions de *l'Accord sur les ADPIC* doivent se soumettre sur demande d'un autre État membre au mécanisme de règlement des différends, dont les décisions sont obligatoires. Le Canada a déjà dû modifier par deux fois sa *Loi sur les brevets* suite à des décisions de l'OMC appliquant l'*Accord sur les ADPIC*[6].

L'article 13 de cet Accord se lit comme suit :

« Les Membres restreindront les limitations des droits exclusifs ou exceptions à ces droits à certains cas spéciaux qui ne portent pas atteinte à l'exploitation normale de l'oeuvre ni ne causent un préjudice injustifié aux intérêts légitimes du détenteur du droit. »

Pour déterminer si une exception au droit d'auteur est admissible, il faut donc impérativement considérer ce qui constitue une « exploitation normale », y compris à mon avis l'existence de mécanismes d'autorisation. Sans entrer dans les détails, il faut savoir que cet article 13 a été mis à l'épreuve du mécanisme de règlement des différends de l'OMC dans une affaire opposant les États-Unis et l'Union européenne au sujet d'une exception dans la loi états-unienne permettant à la plupart des bars, hôtels, restaurants et supermarchés du pays de ne pas payer de redevances aux sociétés d'auteurs administrant le droit d'exécution publique de la musique (p. ex. la SOCAN au Canada). Dans sa décision[7], le groupe spécial (aussi appelé « panel ») de l'OMC a décidé qu'une atteinte à l'exploitation normale se mesurait par la perte (démontrable) de revenus.

Le groupe spécial explique ainsi sa décision sur ce point :

« …l'expression 'exploitation normale' signifie à l'évidence un peu moins que le plein usage d'un droit exclusif. …il semble qu'une façon d'évaluer la connotation normative du terme exploitation normale consiste à examiner, outre celles qui génèrent actuellement des recettes significatives ou tangibles, *les formes d'exploitation qui, avec un certain degré de probabilité et de plausibilité, pourraient revêtir une importance économique ou pratique considérable.*

…

Nous estimons qu'une exception ou limitation concernant un droit exclusif qui est prévue dans la

*(Voir **L'Accord sur les ADPC…** en page 14)*

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* Professeur agrégé à la section de common law de la Faculté de droit de l'Université d'Ottawa

[1] *CCH Canadienne Ltée c. Barreau du Haut-Canada*, [2004] 1 R.C.S. 339.

[2] Officiellement, « Barreau du Haut-Canada ».

[3] L.R.C. 1985, c. C-42.

[4] Hormis certaines exceptions précises continues dans la Convention de Berne et dont il n'est pas nécessaire de faire état ici.

[5] Voir Mihály Ficsor, « Combien de quoi ? Les 'trois conditions cumulatives' et leur application dans deux affaires récentes de règlement de différends dans le cadre de l'OMC », (2002) 192 RIDA 111-251.

[6] Voir Daniel Gervais. The TRIPS Agreement: Drafting History and Interpretation, 2nd ed. Londres: Sweet & Maxwell, 2003.

[7] États-Unis - Article 110 5) de la Loi sur le droit d'auteur - Rapport du Groupe spécial, document OMC WT/DS160/R du 15.6.2000.

2ND ANNUAL MEETING WITH DEPARTMENT OF JUSTICE OFFICIALS

An Invitation to Professors of International Law:

To coincide with the presence in Ottawa of many international law professors attending the CCIL conference, the Department of Justice is planning to hold its second annual meeting of Justice officials and Canadian academics working in the field of international law on October 14th, 2004 between 12:30 and 15:30.

Department of Justice officials will provide academic participants with an update and overview of the Department's key current activities in international law, including developments in such areas as general public international law, international criminal law, national security and privacy, war crimes and immigration law, international human rights law, international private law, international environmental law, and international trade law.

The purpose of this meeting is to discuss issues of common interest and continue to build and strengthen relations between government officials and academics working in the field of international law. The meeting will be held at the Department of Justice in Room 1021, East Memorial Building, 284 Wellington Street, Ottawa, from 12:30 - 3:30 - lunch will be served. As the room can only accommodate 50 persons, a maximum of two participants per law faculty can register. To register please contact Tania Nesrallah by phone ((613) 957-4922) or by email at tania.nesrallah@justice.gc.ca.

As a follow up to the meeting in October 2003, the Department of Justice has been working with the Law Commission of Canada and several academics to develop a collection of essays on the topic of the relationship between international and domestic law, with a view to publishing a report and holding a conference in 2005. A roundtable discussion of essay outlines will take place from 8:30 to 12:30 on the morning of October 14th, 2004 at the same location. If you wish to participate in this activity please contact Tania Nesrallah for additional information.

2e RENCONTRE ANNUELLE AVEC LES FONCTIONNAIRES DU MINISTÈRE DE LA JUSTICE

Une invitation lancée aux professeurs de droit international :

Profitant de la présence à Ottawa de nombreux professeurs de droit international qui participent au congrès du CCDI, le ministère de la Justice prévoit tenir le 14 octobre 2004, de 12 h 30 à 15 h 30, sa deuxième rencontre annuelle entre ses fonctionnaires et des universitaires canadiens oeuvrant dans le domaine du droit international.

Les fonctionnaires du ministère de la Justice donneront aux universitaires un compte rendu et un aperçu des principales activités que le Ministère mène actuellement en droit international, notamment les progrès dans des domaines comme le droit international public général, le droit pénal international, la sécurité nationale et la protection des renseignements personnels, les crimes de guerre et le droit de l'immigration, le droit international en matière de droits de la personne, le droit international privé, le droit international de l'environnement, et le droit commercial international.

L'objet de cette réunion est de discuter de questions d'intérêt commun et de continuer à créer et à resserrer les liens entre les fonctionnaires du gouvernement et les universitaires oeuvrant dans le domaine du droit international. La rencontre aura lieu au ministère de la Justice dans la salle 1021 de l'Édifice commémoratif de l'Est, au 284, rue Wellington, à Ottawa, de 12 h 30 à 15 h 30 - un déjeuner y sera servi. Comme la salle peut accueillir seulement 50 personnes, un maximum de deux participants par faculté de droit peuvent s'inscrire. Pour vous inscrire, veuillez communiquer avec Tania Nesrallah par téléphone en composant le (613) 957-4922 ou par courriel à tania.nesrallah@justice.gc.ca .

Pour faire suite à la rencontre d'octobre 2003, le ministère de la Justice a travaillé en collaboration avec la Commission du droit du Canada et plusieurs universitaires à rassembler une série d'articles portant sur les liens entre le droit international et le droit interne, en vue de la publication d'un rapport et de la tenue d'une conférence en 2005. Une table ronde où seront discutées les grandes lignes des articles aura lieu le 14 octobre 2004, de 8 h 30 à 12 h 30, au même endroit. Si vous désirez participer à cette activité, veuillez communiquer avec Tania Nesrallah pour obtenir de plus amples renseignements.

Canada's New Model Foreign Investment Protection Agreement

By Andrew Newcombe*

1. Introduction

Canada has released a new model Foreign Investment Protection Agreement (FIPA) - the Canadian equivalent of a bilateral investment treaty (BIT). The new model FIPA builds on the investment chapter in the North American Free Trade Agreement (NAFTA) and Canada's «growing experience» with investment arbitrations under NAFTA. Canada's stated objectives in redrafting its model FIPA were to clarify substantive investment obligations and to maximize transparency and efficiency in the dispute settlement process. This article briefly reviews and comments on the innovations in the new Canadian model FIPA.

2. Canada's investment treaty practice to date

Canada has signed 23 BITs since 1989, when it first began negotiating investment treaties. Five of these BITs were concluded before 1995 and are based on the OECD model. The remaining 18 are based on NAFTA Chapter 11.

Canada's direct experience with arbitration under investment treaties has been as a respondent in four NAFTA Chapter 11 arbitrations: *Ethyl, Pope & Talbot, S.D. Myers* and *UPS*.[1] *Ethyl* was settled after an award on jurisdiction. The *Pope & Talbot* and *S.D. Myers* arbitrations resulted in awards of damages against Canada. There has been a jurisdictional award in the *UPS* claim, which is now proceeding on its merits. In addition, Canada's application for judicial review of the *S.D. Myers* award was dismissed by the Federal Court in January 2004. Finally, Canada has been an active participant in other NAFTA investment treaty arbitrations against the United States and Mexico by virtue of Article 1128 of NAFTA which allows it to make submissions regarding interpretation of the treaty.

Investment claims under Chapter 11 have been controversial.[2] A variety of civil society groups and commentators, notably the International Institute for Sustainable Development (IISD), have raised concerns regarding the effect of investment obligations on public policy and sustainable development. The critiques have focused on the themes of legitimacy, accountability and transparency.[3] Concerns continue to be expressed that NAFTA and other investment treaties create a «regulatory chill» that impede public policy innovations. The most recent addition to this debate is the claim that the government of New Brunswick did not to implement public auto insurance because foreign investors could claim that the creation of a public insurance monopoly is a compensable expropriation.[4]

The NAFTA parties have responded to concerns about Chapter 11 in a variety of ways. In July 2001, the NAFTA Free Trade Commission (FTC) issued an interpretive statement on Chapter 11. Two years later, it issued guidelines on non-disputing party (amici curiae) participation in Chapter 11 arbitrations. In 2003, Canada, along with the United States, committed to making NAFTA arbitrations open to the public. Most recently, the NAFTA parties made the draft negotiating texts of NAFTA publicly available. For its part, Canada established an Ad Hoc Experts Group on Investment Rules, whose members produced papers on expropriation, national treatment and amici curiae. Canada also held multi-stakeholder public consultations on Chapter 11 in 2003.

The concerns expressed by various commentators have

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[1] A number of other claims have been made but they have not resulted in the establishment of an arbitral tribunal. Information on the investment claims against the NAFTA parties is available online: http://www.dfait-maeci.gc.ca/tna-nac/gov-en.asp and <www.naftaclaims.org> (last accessed 30 July 2004). Publicly available awards of all known NAFTA and BIT arbitrations are also available on Investment Treaty Arbitration <http://ita.law.uvic.ca> (last accessed, 1 August 2004). There is also one reported claim under a Canadian FIPA (Canada/Venezuela). See press release dated 9 July 2004, Vannessa Commences International Arbitration process, online: http://www.newswire.ca/en/releases/archive/July2004/09/c2104.html (last accessed 1 August 2004.)

[2] Jeffery Atik, «Legitimacy, Transparency and NGO Participation in the NAFTA Chapter 11 Process» in Todd Weiler ed., NAFTA Investment Law and Arbitration: Past Issues, Current Practice, Future Prospects (Ardsley: Transnational Publishers, 2004) 135.

[3] See Howard Mann, Aaron Cosbey, Luke Eric Peterson and Konrad von Moltke. Investment and Sustainable Development: A Guide to the Use and Potential of International Investment Agreements. (Winnipeg: IISD, 2004). Online: < http://www.iisd.org/investment/> (last accessed 30 July 2004).

[4] See press release dated 30 June 2004, Trade treaty 'chill': New Brunswick abandons public auto insurance in face of trade treaty threats, online: <http://www.policyalternatives.ca/whatsnew/autoinsurancepr.html> (last accessed 30 July 2004).

focused on a number of substantive and procedural issues, in particular, the scope of expropriation, the minimum standard of treatment, public access to hearings and documents, and non-disputing party submissions. Not surprisingly, the new model treaty addresses many of these concerns. In most respects the new Canadian model closely tracks the new US model, which was also released in early 2004,[5] although, as discussed below, there are some important differences.

3. Innovations in Substantive Obligations

The scope of the new treaty follows the standard investment treaty model: it applies to government measures relating to investors of the other party and their investments. The scope of the treaty is limited by the definitions of «investment» and «investor of a Party». The only significant change in the definition of «investment» in the new model is the exclusion of government issued debt securities. Government issued bonds, like Canada Savings Bonds, would not be covered investments under the new model.

The minimum standard of treatment (MST) provision, which provides the «floor» guarantee of internationally acceptable treatment, has been changed to reflect the FTC's 2001 interpretative statement to the effect that MST means the «customary international law minimum standard of treatment of aliens». The model thus equates «fair and equitable treatment» with the customary international minimum standard. The MST provision also provides, as did the FTC interpretation, that a breach of another international obligation does not establish a breach of MST. The new FIPA makes no attempt to clarify the content of the MST. Recent investment treaty jurisprudence on the MST, such as *Mondev* and *ADF*,[6] confirming that it is an evolutionary standard will thus remain relevant in elaborating the applicable legal standard for government measures.

There are no significant changes to the national and most-favoured nation treatment standards (NT and MFN). However, two provisions limit their application. First, Annex III provides that MFN does not extend to treatment accorded under existing treaties. The MFN guarantee is therefore prospective. This ensures that foreign investors under the new model cannot reach back and try to obtain the protection afforded by previous treaties. This provision seeks to avoid investment treaty shopping - the argument that MFN applies not only to the actual treatment of other foreign investors but also to the protection guaranteed to other foreign investors in other FIPAs.[7]

Second, unlike NAFTA Chapter 11 and the new US model BIT, the model includes a modified GATT Article XX-like general exceptions provision that applies to all obligations in the model treaty. The general exceptions cover measures to protect human, animal or plant life or health, to ensure compliance with law and for conservation purposes. This type of general exceptions provision, while common in trade treaties, has not been used extensively in BITs.[8]

The inclusion of the general exceptions raises a number of interpretative issues. Most notably, the express inclusion of general exceptions in the new model raises the issue of the significance of its omission in earlier treaties. For example, earlier treaties such as NAFTA have a general NT clause which requires non-discrimination between host country and foreign investors where the investments are «in like circumstances». There is no general health or conservation exception to this obligation. Paradoxically, by trying to protect regulatory powers by including a general exceptions provision, their absence from older treaties becomes more problematic, particularly if tribunals interpret NT provisions in older treaties using GATT NT trade jurisprudence.

The conceptual difficulty with the general exceptions clause is also apparent with respect to expropriation. Under customary international law, if land is expropriated for conservation purposes (such as to establish a national park), compensation must be paid. The general exceptions provide that the agreement does not prevent a party from adopting measures for conservation purposes, provided they are non-discriminatory. Therefore, if both Canadian and foreign investors are expropriated without discrimination based on nationality for a valid conservation objective, a literal reading of Article 10 suggests that no international responsibility arises. One assumes, however, that Canada still intends to be bound by customary

[5] See press release dated 5 February 2004, Update of U.S. Bilateral Investment Treaty, online: <http://www.state.gov/e/eb/rls/prsrl/2004/28923.htm> (last accessed, 1 August 2004). For a discussion of innovations in US investment treaty practice see David A. Gantz. «The Evolution of FTA Investment Provisions: From NAFTA to the United States - Chile Free Trade Agreement» (2004) 19:4 Am. U. Int.'l L. Rev. 679.

[6] *Mondev International Ltd. v United States*, (2002), 42 I.L.M. 85 (2003), 6 ICSID Reports 192; *ADF Group, Inc. v. United States of America*, (2003), 6 ICSID Reports 470.

[7] See *Maffezini v. The Kingdom of Spain*, (2001), 40 I.L.M. 1129.

[8] But note that some of Canada's newer FIPAs based on the NAFTA model include a general exceptions provision.

international law with respect to takings of property. Another interpretation would be that while Canada is not «prevented» from taking the measure, it must pay compensation for doing so. This would seem to be a very convoluted way of clarifying what it already clear: a tribunal cannot order an offending measure to be removed - its jurisdiction extends only to damages.

With respect to the scope of expropriation, the model FIPA includes an interpretive annex providing guidance on the meaning of indirect expropriation, one of the more hotly contested issues in investment treaty arbitration. The model follows closely (almost word for word in the operative sections) the new US model. The annex states that the determination of an indirect expropriation is a case-by-case, fact-based inquiry that considers, among other factors, the economic impact of the government measure, the extent to which the measure interferes with distinct, reasonable investment-backed expectations and the character of the government measure. This is essentially a codification of the US regulatory takings test as set out in *Penn Central Transportation Co. v. City of New York*.[9] The Annex then states that non-discriminatory measure taken to protect legitimate public welfare objective such as health, safety and the environment will not constitute indirect expropriation, except in rare circumstances.The elaboration of criteria for the determination of the scope of expropriation is to be commended, although, in my view, the criteria are already extant in the existing international expropriation jurisprudence.

4. Procedural innovations

The new model elaborates the investor-state arbitration mechanism to address two major criticisms of the process: public access to hearings and documents, and submissions by non-disputing parties. Article 38 provides that all documents are to be publicly available and arbitral hearings are to be open to the public, subject in both cases to limitations necessary to protect confidential information. The article also provides that a Tribunal cannot require a state to disclose information contrary to the state's laws regarding Cabinet confidences and personal privacy, a provision clearly spawned by Canada's experience in NAFTA arbitrations.[10]

Article 39 establishes a process for non-disputing parties to file written submissions with a tribunal, which is essentially identical to the one established in October 2003 by the FTC for NAFTA Chapter 11 arbitrations.

Like NAFTA, the model provides for the establishment of a commission to supervise the implementation of the treaty. Under the new model, the commission can make rules to supplement the applicable arbitral rules, amend these rules, and make rules relating to expenses incurred by the tribunal. As in NAFTA, the commission's interpretation of a provision of the BIT is binding on the tribunal. The model further clarifies that any award must be consistent with the commission's interpretation. This change addresses the applicability of a commission interpretation to arbitrations commenced before the interpretation is issued, again a contested issue in NAFTA arbitrations.

Other innovations include a requirement that consultations be held in the capital of the state against which a claim is made, provision for a tribunal to decide objections to jurisdiction and admissibility before proceeding to the merits,[11] and specifying criteria for the selection of arbitrations and conduct of arbitrators, including a provision for a code of conduct for arbitrators to be agreed upon between the parties.

5. Comment

Unlike in the case of the new US model BIT,[12] there were no public consultations regarding the draft model FIPA. This is surprising and disappointing given the significant public controversy surrounding investment obligations. Public consultation would have promoted discussion on a number of issues that have not been addressed in the treaty. For example, unlike the US model, the Canadian model does not address the relationship between investment and labour.

Unlike previous FIPAs, the preamble of the new model refers to sustainable development: *«the promotion and the protection of investments ... will be*

[9] 438 U.S. 104 (1978).

[10] See Gustavo Carvajal Isunza and Fernando Gonzalez Rojas, «Evidentiary Issues in NAFTA Chapter 11 Arbitration: Searching for the Truth Between States and Investors» in Todd Weiler ed., *NAFTA Investment Law and Arbitration: Past Issues, Current Practice, Future Prospects* (Ardsley: Transnational Publishers, Inc., 2004).

[11] The new US model has much stricter and more detailed provisions on preliminary objections. See Art. 28 of the draft US model BIT.

[12] See Report of the Subcommitee on Investment Regarding the Draft Model Bilateral Investment Treaty available at http://www.ciel.org/Publications/BIT_Subcmte_Jan3004.pdf (last accessed 2 August 2004) and letter to Wesley Scholz and James Mendenhall from NGOs regarding deficiencies in draft model BIT dated 16 January 2004 available at <http://www.ciel.org/Publications/BIT_Comments_Jan1604.pdf> (last accessed 2 August 2004).

conducive ... to the promotion of sustainable development». Is the new model BIT a better model for sustainable development? Notwithstanding the conceptual and interpretative difficulties surrounding the potential incorporation of GATT Article XX jurisprudence into an investment framework, general exceptions for conservation and health regulation are a positive development.

On the other hand, there are other innovative ways to promote sustainable development that the model does not adopt. To date, BITs have been decidedly one-sided treaties - foreign investors are guaranteed investment protections by the host state, which the foreign investor can enforce through investor-state arbitration. There are no corresponding obligations on foreign investors or the home state of the foreign investor. There is a certain truth in Professor José Alvarez's critique of Chapter 11 as a «human rights treaty for special interest groups.»[13] If foreign investors have such powerful international rights, it is not unreasonable to seek ways to make them more accountable for breaches of international law, in particular, international human rights and environmental law, through a binding international dispute mechanism. An investment treaty that promotes sustainable development would place international obligations on foreign investors and their home states to ensure that the foreign investment in question is sustainable. Furthermore, it would back up these obligations with a binding international dispute settlement mechanism.

6. Conclusion

BITS practice has evolved since 1959 when the first modern BIT was signed between Germany and Pakistan.[14] The original BITs were short (seven or eight pages) and did not provide for investor-state arbitration. While many short form BITs are still being concluded, the advent of investor-state arbitration has shifted the terrain. Challenges to a wide range of government measures are raising difficult interpretive issues. The disputes are increasingly factually and procedurally complex. It is therefore understandable that the legal tools must become more detailed, nuanced and refined to address these issues. The new Canadian and US model BITs now run to 40 some pages.

The evolution of BITs should nevertheless continue. Investment treaties have shown the power of binding international dispute settlement. The problem that now exists is not that BITs go too far, it is in the unwillingness of government to extend international responsibilities to other actors, namely, transnational corporations (TNCs) and the foreign investor's home state. At the very least, a new generation of investment treaties could make TNCs accountable for violations of basic international human rights and international environmental law, through a binding and enforceable dispute settlement process. That would be an international legal development to cheer. ≺

[13] José E. Alvarez, «Critical Theory and The North American Free Trade Agreement's Chapter Eleven», (1997) 28 U. Miami Inter-Am. L. Rev. 303.
[14] The first modern bilateral investment treaty was concluded between Germany and Pakistan in 1959.

Launch of a new website

A new website on international investment law and arbitration has been established by Professor Andrew Newcombe, University of Victoria. The website provides online access to publicly available investment treaty awards, international investment law documents and links to further international investment law resources. The website's address is http://ita.law.uvic.ca.

Comments and queries regarding the website can be adressed to Professor Newcombe at the Faculty of Law, University of Victoria, PO Box 2400, Victoria BC, V8W 3H7 (email newcombe@uvic.ca). ≺

Lancement d'un nouveau site web

Un nouveau site web sur le droit international des investissements et de l'arbitrage a été créé par le professeur Andrew Newcombe de l'Université de Victoria. Le site web donne accès aux décisions publiques rendues en vertu des divers traités, aux principaux instruments du droit international des investissements et à des liens vers d'autres sources d'informations sur le droit international des investissements. L'adresse du site web est http://ita.law.uvic.ca.

Tous commentaires ou toutes questions concernant le site web peuvent être addressés au Professor Newcombe à la Faculté de droit de l'Université de Victoria, C.P. 2400, Victoria, CB V8W 3H7 (email: newcombe@uvic.ca). ≺

Congrès annuel du CCDI (2004) L'imputabilité et la légitimité en droit international

Le congrès du CCDI 2004 aura lieu cette année à Ottawa, du 14 au 16 octobre. La grande ligne de réflexion du congrès sera « L'imputabilité et la légitimité en droit international ». Élaborant à partir de ce thème, les co-présidents du congrès, le professeur Don McRae et John Hannaford, sont à mijoter un programme à la fois varié et stimulant. Le professeur Thomas Franck, de la Faculté de droit de la New York University, prononcera le discours-programme lors de la séance inaugurale du congrès; il fera une réflexion sur son ouvrage de pionnier, « The Power of Legitimacy Among Nations », un peu plus d'une décennie après sa publication. L'ambassadeur Allan Rock, c.p., c.r., partagera lors du dîner ses impressions en tant que représentant permanent du Canada auprès des Nations Unies et en tant que membre émérite du Barreau canadien. Le professeur John Jackson, du Law Centre de la Georgetown University, prononcera une allocution lors de la seconde séance plénière sur les questions liées à la souveraineté, à la subsidiarité et à la gouvernance internationale.

En plus de ces séances plénières, les organisateurs ont prévu un forum sur l'emploi à l'intention des étudiants et des étudiantes et un bon nombre de séances de spécialistes pour la discussion de sujets divers se rattachant aux thèmes des séances plénières. Parmi ceux-ci, mentionnons le trafic de personnes, la protection diplomatique, la prise de décision internationale et la réglementation interne, les normes de travail internationales, la souveraineté et le tiers monde ainsi que la transparence.

Cette année, le congrès du CCDI favorisera donc une participation engagée, en offrant maintes occasions d'échanger sur une grande variété de sujets d'intérêts pour les juristes et les spécialistes du droit international du milieu universitaire, de la pratique privée, de la communauté des organisations non gouvernementales et de la fonction publique.

CCIL Annual Conference (2004) Accountability and Legitimacy in International Law

The 2004 CCIL Conference will be held this year in Ottawa between October 14 and 16. The conference will focus on « Accountability and Legitimacy in International Law ». Building on this theme, conference co-chairs Professor Donald McRae and John Hannaford are organising a varied and stimulating programme. Professor Thomas M. Franck of the New York University School of Law will deliver the keynote address to the first plenary session of the conference reflecting on his seminal work "The Power of Legitimacy Among Nations" more than ten years on. Ambassador Allan Rock, P.C., Q.C., will at the luncheon share his reflections as Canada's Permanent Representative to the United Nations and as a senior member of the Canadian bar. Professor John Jackson of the Georgetown University Law Centre will address the second plenary session on issues relating sovereignty, subsidiarity and international governance.

In addition to these plenary presentations, the organisers have arranged for a student job forum and for a range of panel discussions, which will be thematically linked to the plenary presentations. These include a panel on human trafficking, diplomatic protection, international decision making and domestic regulation, international labour standards, sovereignty and the third world, and transparency.

This year's CCIL conference thus promises to be an engaging forum for discussion of a wide range of topics of interest to academics, members of the private bar, the NGO community and government counsel.

John Hannaford
Conference co-chair
(translation by Hélène Laporte)

Résultats des concours francophones en droit international

Concours René Cassin – Concours européen des droits de l'homme

Le concours Cassin a été créé en 1985 par l'Association Juris Ludi. Son but est de promouvoir la connaissance et la pratique des droits de l'Homme, plus particulièrement de la Convention Européenne, par des étudiants de droit venus du monde entier.

La XXe édition du Concours Européen des Droits de l'Homme René-Cassin s'est déroulée au Conseil de l'Europe à Strasbourg du 13 au 16 avril 2004. L'équipe de l'UQAM, composée de Rainbow Miller, Ricardo Hrstchan et Ornella Saravalli, sous la supervision de Olivier Delas et Nino Karamaoun, a remporté le prix de meilleure équipe hors Europe. Source : <http://www.juris.uqam.ca/nouvelles/index.htm> et <http://www.concourscassin.org>.

Concours Charles Rousseau – Concours de procès simulé en droit international

Fondé en 1985, le Concours en droit international Charles Rousseau est un concours francophone de procès simulé en droit international ouvert aux universitaires d'établissements d'enseignement supérieur de tous pays et destiné à développer la connaissance et la maîtrise du droit international public. Il est devenu en 2004 une activité du Réseau Francophone de Droit international. (RFDI).

L'édition 2004 s'est déroulée du 3 au 7 mai 2004 à Genève. Le Canada y était représenté par l'Université McGill et l'Université de Montréal. La finale a eu lieu entre l'Université Paris-Sud-XI et l'Université Paris I-Sorbonne. Parmi les prix décernés, l'équipe de l'Université de McGill s'est vue attribuer le prix du 2e meilleur mémoire et le prix de la 1ère meilleure équipe. Rébecca St-Pierre, de McGill, a également remporté le prix du 3e meilleur plaideur. L'édition 2005 du Concours Rousseau aura lieu à Québec. Source : <http://www.rfdi.net/rousseau/rousseau-accueil.htm>.

Concours Jean-Pictet – Plaidoiries et simulation en droit international humanitaire

Créé en 1989, le Concours Jean-Pictet est une compétition destinée aux étudiants en droit, en sciences politiques et d'académies militaires, visant à leur faire mieux connaître le droit international par le biais de jeux de rôle et de simulations.

La session francophone de l'édition 2004 s'est déroulée du 3 au 10 avril à Méjannes-le-Cap (France). Le Canada y était représenté par des équipes de l'École du Barreau du Québec à Montréal, de l'École du Barreau du Québec à Québec et de l'Université du Québec à Montréal (UQAM). La session anglophone a eu lieu la semaine suivante, toujours à Méjannes-le-Cap. Le Canada y était représenté par une équipe de l'Université d'Ottawa. Lors de chacune des sessions, les deux meilleures équipes ont été sélectionnées pour se rencontrer à Genève lors de la finale en début juillet 2004. Les vainqueurs de la session francophone ont été l'Université libre de Bruxelles et le Centre Universitaire de Droit International Humanitaire (Genève) et du côté anglophone, l'Université des Philippines et l'Université de Cambridge. Source : <http://www.concourspictet.org>. ≺

L'Accord sur les ADPIC et la décision de la Cour suprême dans *CCH*

(suite de page 6)

législation nationale va jusqu'à porter atteinte à l'exploitation normale de l'œuvre … si des utilisations, …constituent une *concurrence aux moyens économiques dont les détenteurs du droit tirent normalement une valeur économique* ***de ce droit sur l'œuvre (c'est-à-dire le droit d'auteur) et les*** *privent de ce fait de gains commerciaux* ***significatifs ou tangibles.»***[8]

Or, si un mécanisme d'autorisation existe et est utilisé (au moins par des catégories d'utilisateurs de nature similaire à ceux bénéficiant d'une exemption complète[9]) mais que cette exception fait échec au marché pour les licences, on est autorisé à penser que cette exception porte atteinte à l'exploitation normale de l'œuvre et donc pourrait violer le second volet du test. Le Canada n'est donc pas à l'abri d'une plainte déposée à l'OMC pour non respect de l'article 13[10]. ≺

[8] *Ibid.*

[9] Il en irait autrement si les ayants droit offrait une licence théorique mais non acceptée par un segment quelconque du marché des utilisateurs uniquement dans le but d'éviter qu'une utilisation soit éventuellement considérée comme équitable.

[10] Il y aurait beaucoup plus à dire sur ce sujet. Il faudrait aussi analyser la première et la troisième branche du test. Dans les deux cas, il est loin d'être évident que l'article 29, tel qu'interprété dans *CCH*, soit compatible avec l'article 13 de *l'Accord sur les ADPIC*.

How the International System is Addressing Indigenous Traditional Knowledge: A Brief Overview

By Stefan Matiation[1]

Over the course of twenty five years or so, indigenous people have become prominent "non-State" actors in the international theatre. Although indigenous people still experience discrimination and continue to be over-represented in data measuring ill health and lower quality of life, today representatives of indigenous groups are more frequently able to express their views in various international fora alongside representatives of States, international organizations more comprehensively integrate consideration of indigenous issues in their work and activities, and States more often experience recriminations internationally for any ill treatment of indigenous groups living within their borders.

A specific matter worth watching for anyone interested in international indigenous issues and in the development of domestic law and policy addressing aboriginal people in Canada, or even for those interested in the process of international norm creation more generally in an age when multiple players can have a real impact, is the manner in which the international community is addressing the knowledge, innovations and practices of indigenous peoples.

What is Traditional Knowledge?

Through an intimate relationship with their natural surroundings and long intergenerational practice, indigenous communities in all parts of the world have developed knowledge, innovations and practices that have traditional and contemporary applications. The term "traditional knowledge" or "TK" is used in this overview as a helpful short hand for a broad conception of knowledge, innovations and practices with roots in the past, but an evolving nature. The term "traditional knowledge" has not been the subject of a widely accepted definition internationally or domestically. Instead, it has been applied in different ways to suit the many different contexts and diffuse policy frameworks within which it is discussed. The Secretariat of the World Intellectual Property Organization (WIPO), for example, uses the term to refer to "tradition-based literary works, artistic or scientific works; performances; inventions; scientific discoveries; designs; marks, names and symbols; undisclosed information; and all other tradition-based innovations and creations resulting from intellectual activity in the industrial, scientific, literary or artistic fields."[2] The Secretariat has described "tradition-based" as referring to:

… knowledge systems, creations, innovations and cultural expressions which: have generally been transmitted from generation to generation; are generally regarded as pertaining to a particular people or its territory; and are constantly evolving in response to a changing environment.[3]

For indigenous peoples, however, TK issues are about more than knowledge – they are about culture, customary laws and practices, social organization, relationships with lands and natural resources, and collective self-determination. Drawing on this broad conception, indigenous peoples are concerned that their TK is being used without their consent and without any sharing of the benefits of its utilization with the communities that hold it. Although not necessarily excluded from protection through intellectual property laws, traditional knowledge does not fit well with a system that rewards the creation of novelty with time limited rights. TK is regarded as a community asset that is held for time immemorial even as it evolves to address changing circumstances. A broader approach to TK protection than that afforded by intellectual property law, in keeping with the broad conception of its place within indigenous communities, is sought by indigenous groups.[4]

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[1] Stefan Matiation is a lawyer with the Department of Justice Canada. The views expressed in the article are those of the author alone. They do not necessarily reflect those of the Department of Justice or of the Government of Canada, and may not be attributed to them.

[2] WIPO/GRTKF/IC/3/9, at 11, available on the website of the World Intellectual Property Organization at www.wipo.org.

[3] Ibid.

[4] Other approaches that have been proposed, and in some cases tried, include the recognition of customary laws and practices respecting the disclosure of traditional knowledge, the application of tests in domestic legal systems for the existence of aboriginal rights, contractual arrangements with researchers, companies or governments, amendments to intellectual property laws and access to information legislation, the negotiation of self-government arrangements that address traditional knowledge, the incorporation of disclosure of origin requirements in intellectual property regimes, consultation requirements, and others. Different problems arise in relation to traditional knowledge that has already been used or is already known outside of the community from which it originated, and that which is not.

The International Context

The WIPO Secretariat notes that "TK arises as an issue in relation to food and agriculture, biological diversity and the environment, biotechnology innovation and regulation, human rights, cultural policies and trade and economic development."[5] A number of international organizations address TK, albeit often described according to the particular lexicon in use in each field.[6] The most significant international processes addressing the topic of traditional knowledge, however, are playing out primarily in two venues: the *Convention on Biological Diversity* (the CBD) and WIPO. A big part of the debate in this regard is focused on access to non-human genetic resources in biodiversity-rich countries, together with associated traditional knowledge, and the sharing of benefits from the use of these resources. Besides indigenous peoples, "access and benefit sharing" issues are of interest to biotechnology companies and researchers, industry and research host countries, and mega-biodiverse countries in which biological raw materials are found.

Indigenous groups are increasingly having some success in giving voice to their concerns in the "access and benefit sharing" debate. As is discussed in more detail below, both the Parties to the CBD and the members of WIPO have created space for indigenous participation in a process that links environmental conservation, intellectual property protection and trade rules, international economic development, and indigenous peoples' concerns.

TK at the CBD and WIPO:

Traditional knowledge was given early prominence internationally in connection with the topic of sustainable development. At the 1992 United Nations Conference on the Environment and Development in Rio de Janeiro, a number of instruments were elaborated that include consideration of TK issues.[7] The most important of these is the *Convention on Biological Diversity*, which was signed by most of the 178 governments that attended the Rio Conference. Today the CBD is one of the most widely ratified international treaties in force.[8] It includes three main objectives: (1) the conservation of biological diversity; (2) the sustainable use of its components; and (3) the fair and equitable sharing of the benefits arising out of the utilization of non-human genetic resources.[9]

The CBD includes recognition of the unique contribution indigenous people and their traditional knowledge make to sustainable development. First, in the preamble to the Convention the Parties recognize "the close and traditional dependence of many indigenous and local communities embodying traditional lifestyles on biological resources, and the desirability of sharing equitably benefits arising from the use of traditional knowledge, innovations and practices relevant to the conservation of biological diversity and the sustainable use of its components." Article 10(c) states that each Contracting Party shall, "as far as possible and as appropriate", "[p]rotect and encourage customary use of biological resources in accordance with traditional cultural practices…"[10] Most importantly, the CBD squarely addresses traditional knowledge in Article 8j, which provides:

Each Contracting Party shall, as far as possible and as appropriate

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5 WIPO document, *supra* note 14, at 6.

6 For example, the UNESCO General Conference adopted the *Universal Declaration on Cultural Diversity* in November 2001, which links the protection of traditional knowledge with human rights; the World Health Organization is undertaking work on traditional medicines; and the *International Treaty on Plant Genetic Resources*, which was negotiated under the auspices of the Food and Agriculture Organization, addresses issues of interest to traditional farmers, including indigenous traditional farmers.

7 Besides the CBD, the *Rio Declaration on the Environment and Development* and *Agenda 21*, a comprehensive plan of action for the world with respect to sustainable development address TK. Principle 22 of the Rio Declaration proclaims that: "Indigenous people and their communities and other local communities have a vital role in environmental management and development because of their knowledge and traditional practices. States recognize and duly support their identity, culture and interests and enable their effective participation in the achievement of sustainable development." Chapter 26 of Agenda 21 is entitled "Recognizing and Strengthening the Role of Indigenous People and their Communities". It includes the following objective, which governments "should aim at fulfilling", "in full partnership with indigenous people and their communities", "where appropriate": "26.3(a) Establishment of a process to empower indigenous people and their communities through measures that include: (iii). Recognition of their values, traditional knowledge and resource management practices with a view to promoting environmentally sound and sustainable development." The full texts of the Rio Declaration and of Agenda 21 are available at www.un.org/esa/sustdev/documents.

8 There are 188 Parties to the CBD. Canada ratified the Convention on April 12, 1992. A noteworthy non-Party is the United States, which has signed the Convention, but not ratified it, and participates as an observer in COP and working group meetings.

9 CBD, Article 1, available at www.biodiv.org.

10 Ibid., Article 10(c).

(j) Subject to its national legislation, respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge, innovations and practices.[11]

Although it is qualified by the words "as far as possible and as appropriate" and by reference to national legislation, Article 8j establishes important State obligations respecting the utilization of traditional knowledge: (1) TK should be respected, preserved and maintained; (2) the approval and involvement of traditional knowledge holders should be sought in the promotion of the wider application of TK; and (3) the equitable sharing of the benefits arising from the utilization of TK should be encouraged.

Article 8j is reinforced by the steps taken by the Parties to the CBD in furtherance of the implementation of its provisions. First, the Conference of the Parties (COP) of the CBD meet every two years when they negotiate, consider and adopt pages of decisions aimed at the progressive implementation of the commitments they accepted when they ratified the Convention.[12] References to traditional knowledge, and to the need to "respect the rights of indigenous and local communities", to the notion of prior informed consent with respect to access to traditional knowledge, and other themes of interest to indigenous groups, have increased over time in COP decisions.[13]

Second, in 1998, the COP established the Working Group on Article 8j and Related Provisions (WG8J), with a mandate to provide advice to the COP on the development of legal and other forms of protection for TK and on the implementation of Article 8j, to develop a program of work on the topic, to recommend priorities and to provide advice on measures to strengthen cooperation at the international level among indigenous and local communities on TK issues.[14] In addition to providing a venue for discussion about traditional knowledge and its relationship to the conservation of biological diversity, WG8J has permitted extensive indigenous participation alongside States in negotiations and debate respecting Article 8j, although States retain ultimate decision making authority.

Participation in WG8J has allowed indigenous groups to articulate their views about TK and get their concerns on the agenda. Indigenous groups also anticipate a heightened level of participation in another venue established by the COP, the Working Group on Access and Benefit Sharing (WGABS).[15] Based on WGABS recommendations, a decision initiating the negotiation and elaboration of an international access and benefit sharing regime with respect to genetic resources was adopted by the COP at its seventh session in February 2004. A paragraph of the relevant COP decision calls for increased indigenous participation in that process.[16]

Besides establishing a framework of obligations related to TK, at least for the States that have ratified it, the CBD, and the process that States are engaged in through the biannual COP meetings, and regular working group sessions on various matters, has helped in the identification of key issues respecting TK.

Meanwhile, traditional knowledge is also on the agenda at WIPO. In 2000, the members of the organization established the Intergovernmental Committee on Genetic Resources, Traditional Knowledge and Folklore (the IGC) as an international forum for debate and discussion about the interplay between intellectual property and genetic resources, traditional knowledge and folklore.[17] Although they are

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[11] Ibid, Article 8j. Other articles of particular interest in relation to traditional knowledge include Article 15, which addresses genetic resources, Article 16 on transfer of technology and Article 22 on the relationship between the CBD and other international conventions.

[12] The Conference of the Parties (COP) was established pursuant to Article 23 of the CBD. Its mandate is to "keep under review the implementation of" the Convention. It considers amendments to the Convention, establishes and amends protocols, establishes subsidiary bodies to address specific issues, among other things. It therefore generally carries out a legislative or normative function.

[13] See generally, the COP decisions on Article 8j and on genetic resources. Decisions on protected areas, tourism, and mountain biological diversity are also of interest. COP decisions are available at the CBD website: www.biodiv.org.

[14] CBD, COP Decision IV/9, available at www.biodiv.org.

[15] The Working Group on Access and Benefit Sharing was established by the COP at its fifth meeting, held in 1998, to develop guidelines and other approaches to address access to genetic resources and benefit-sharing, the topics covered by Article 15 of the CBD. See CBD, COP Decision V/26, available at www.biodiv.org. Based on a recommendation from the WGABS, the COP adopted the *Bonn Guidelines on Access to Genetic Resources and Fair and Equitable Sharing of the Benefits Arising out of their Utilization* at its sixth meeting in 2000. See COP Decision VI/24, available at www.biodiv.org.

[16] The final decisions from the seventh meeting of the COP, held in February 2004, can be found at www.biodiv.org.

[17] For information about the IGC, visit the WIPO website at www.wipo.org. The initial mandate is contained in WIPO document: WO/GA/26/6, para. 14.

independent of each other, on the basis of direction received from the members of WIPO and the Parties to the CBD, who are not all the same, the IGC and the CBD COP (and WG8J) are engaged in something of a strained dialogue between themselves about traditional knowledge issues. The CBD process is generally regarded as leading on questions about the relationship between TK and the conservation of biological diversity, while WIPO, via the IGC in large part, leads on questions about the relationship between TK and intellectual property law.

In fact the situation is more complex. The IGC finds itself in the middle of a divide between major power blocs in global intellectual property issues. Some countries are not convinced that the intellectual property system requires significant alteration to accommodate intellectual property rights in TK. Others, mostly from the developing world, believe the *status quo* is not effective and seek modifications to the World Trade Organization's *Agreement on Trade-Related Aspects of Intellectual Property Rights*.[18]

The IGC amounts to a compromise of sorts – it was established to examine genetic resource, TK and folklore issues, but not to create a venue for the negotiation of an intellectual property or *sui generis* regime to address them. On the basis of direction from the IGC, the WIPO Secretariat has produced useful documents on the subject of TK and intellectual property. However, some countries may feel that its research reports, albeit well crafted and thoughtful, do not amount to much, and are anxious for accelerated movement towards the development of an international regime addressing traditional knowledge.[19]

Rights-Elaboration at the CBD and WIPO?

Despite the considerable success that indigenous people have had in making their voices heard at the international level in recent times, a widely accepted elaboration of their rights at international law has not yet occurred. Instead, references to indigenous rights come up piecemeal in various instruments, before various treaty bodies and through various processes. The lack of a widely accepted elaboration – a declaration endorsed by the members of the United Nations, for example – does not mean that international norms respecting international indigenous rights are not evolving. Indeed, some commentators argue that such norms have already emerged and are part of customary international law. This view is not shared by everyone. Differences of opinion exist not only regarding which possible norms have attained such status, but even whether any norms in relation to international indigenous rights have become part of customary international law. However, it cannot be denied, in the words of Bob Dylan, that "something is happening", even if we "don't know what it is"[20], or at least don't all agree on what it is, in relation to the process of international norm creation respecting indigenous rights.

Along these lines, something seems to be happening at the venues established under the CBD and by WIPO to discuss the implementation of Article 8j and to consider the relationship between TK and intellectual property. Although neither the CBD COP nor the WIPO IGC is a human rights elaborating venue, discussion about indigenous rights is increasingly prevalent in both. Part of the reason for this is that traditional knowledge is regarded as linked to other issues – land, culture, self-determination, for example. However, references to rights in CBD and WIPO documents are made largely without analysis or definition. Some States may think that these references simply recall international human rights instruments that describe rights to which every individual is entitled. Indigenous participants in these processes likely think the references do more than that – recalling collective rights that differentiate indigenous peoples and their rights claims from others, and "challenge the imagination" of international law.[21]

The CBD, focused as it is on aspects of environmental conservation, and WIPO, tilted perhaps by its understandable preoccupation with intellectual property protection, are not well suited to lead internationally on the elaboration of the rights to land, cultural integrity and self-determination, and others that are claimed by indigenous peoples. The likely result – vague references, easily ignored or apt to contribute to misunderstanding

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[18] For a recent overview of debates about the relationship between the CBD, WIPO and TRIPS, see Volume 4, Number 5 of *Bridges Trade BioRes*, available at: www.ictsd.org/biores/04-03-19/story2.htm,.

[19] A new "accelerated" mandate for the WIPO IGC was adopted by the WIPO General Assembly in September 2003. The African Group submitted a proposal to the sixth IGC session, held in March 2004, respecting an accelerated process. See www.wipo.int/documents/en/meetings/2004/igc/pdf/grtkf_ic_6_12.pdf.

[20] B. Dylan, *Ballad of a Thin Man*, Copyright 1965.

[21] Patrick Macklem speaks of the challenge posed by indigenous rights to the imagination of international law. *Indigenous Rights and Multinational Corporations at International Law*, 24 Hastings Int.'L. & Comp. L. Rev. at 475 (2001).

– could be unsatisfactory for States and for indigenous people alike. More useful, it seems, would be for State and indigenous representatives to attend to consensus building at the UN working group on a draft declaration on the rights of indigenous peoples[22], and its regional cousin process at the Organization of American States. Even if the declarations that might result will not be legally binding, they would be comprehensive and would mark the conclusion of a sustained effort by representatives of States and indigenous groups over the years that the working group has been meeting. As the UN Decade on the World's Indigenous Peoples draws quickly to a close this year, failure to make progress at the working group would be a real shame, and might by default leave the international venues addressing TK issues to attempt to take on the job of not only assisting with the implementation of Article 8j and with the development of a better understanding about the relationship between TK and intellectual property regimes, but of also describing rights they have so far referred to in vague and qualified ways, something they are not best suited to do. ≺

[22] The UN open ended inter-sessional Working Group of States on the draft declaration on the rights of indigenous peoples was established by ECOSOC resolution 1995/32 for the purpose of elaborating a draft declaration, considering the draft Declaration on the Rights of Indigenous Peoples annexed to resolution 1994/45 of 26 August 1994 of the Subcommission on Prevention of Discrimination and Protection of Minorities. Somewhat like WG8J, indigenous representatives participate in the working group sessions, but decision making is formally the domain of State delegations. The working group's mandate expires at the end of this year.

Language, Constitutionalism and Minorities Conference Faculty of Law, University of Ottawa November 12-13, 2004

An important conference is being organized at the Faculty of Law of the University of Ottawa on the occasion of the book launch of the second edition of Les droits linguistiques au Canada and Language Rights in Canada, edited by the Honourable Michel Bastarache, justice of the Supreme Court of Canada.

An interesting collection of speakers, from the legal profession and related disciplines from Canada and abroad, academics as well as private and public sector professionals, will examine key issues and lead participants in an in-depth discussion of the relationships between language rights, constitutionalism and minorities.

Among many other interesting panels, Errol Mendes will chair a panel on Minorities and Constitutionalism with professors Robert Dunbar of the University of Aberdeen, Joseph Magnet of Ottawa University and John Packer of the Fletcher School at Tufts University which will include a discussion of the definition of minorities in public international law.

Detailed information about the organizing committee, conference objectives, detailed program and registration can be found at the following website address: http://www.linguisticrights.uottawa.ca. ≺

Colloque Langues, constitutionnalisme et minorités Faculté de droit, Université d'Ottawa 12 et 13 novembre 2004

Un colloque de grande envergure vous est offert à la Faculté de droit de l'Université d'Ottawa à l'occasion du lancement de la deuxième edition des ouvrages Les droits linguistiques au Canada et Language Rights in Canada, realises sous la direction de l'honorable Michel Bastarache, juge à la Cour supreme du Canada.

Une riche brochette de conférenciers et de conférencières, spécialistes du droit et de disciplines connexes, du Canada et d'ailleurs, des milieux universitaires, public et privé, vous entretiendront de sujets importants pour l'approfondissement des rapports entre droits linguistiques, le constitutionnalisme et les minorities.

Parmi plusieurs séances d'intérêt pour les internationalistes, Errol Mendes présidera une séance sur "Minorités et constitutionnalisme" avec les invités Robert Dunbar de la Faculté de droit de l'Université d'Aberdeen, Joseph Magnet, de la Faculté de droit de l'Université d'Ottawa et John Packer de la Fletcher School at l'Université Tufts. La séance abordera la question de la definition des minorities en droit international public.

Des renseignements supplémentaires sur les buts recherchés du colloque, le programme et l'inscription sont disponibles à l'adresse suivante: http://www.droitslinguistiques.uottawa.ca. ≺

Au Calendrier — Upcoming Events

Canadian Council on International Law 2004 Conference

October 14-16, 2004, Ottawa. This year's CCIL Conference, which will address the theme of "Legitimacy and Accountability in International Law" promises to be an interesting forum for discussions of this timely topic. The wide-ranging programme will address such international legal issues as international environmental law, trade and investment law, the use of force and humanitarian law, international procedures and will also include Professor Thomas Franck of the New York University School of Law as keynote speaker. As in past years, the schedule will also include a Student Job Fair and Form. Further details and registration information can be found on the CCIL's website at: <http://www.ccil-ccdi.ca>.

ILA (American Branch) International Law Weekend

October 14-16, 2004, New York. Entitled "Worlds in Collision? International Law and National Realities", this conference will explore the actual and potential conflicts between international law norms and decisions and countervailing domestic pressures, both public and private. Over forty panels, consisting of practitioners, academics, government officials, NGO members, and United Nations diplomats will focus on issues ranging from the law of war in light of the Iraq War to recent developments in private litigation to the internationalization of lesbian and gay rights. More information about the Conference is available at: <http://ambranch.org>.

The First Trudeau Public Policy Conference

October 14-16, 2004, Montreal. Entitled "Ideas *Move*: Sharing Knowledge Across Cultural Boundaries and Security Barriers", the conference, hosted by the Trudeau Foundation, will explore the choke points and channels that affect the ebb and flow of ideas, and participants will identify opportunities for social, political and cultural action. Further information about the Trudeau Foundation and the Conference can be found at <http://www.trudeaufoundation.ca>.

ILSA 2004 Fall Conference

October 21-23, 2004, Boulder, Colorado. Titled "Challenges Facing Developing Countries", the Conference will bring together scholars on topics such as constitution-building, international environmental law, the rule of law, cultural relativism, in an attempt to address how the frequent conflict between international standards and developing countries' needs can be resolved. The 2004 ILSA Fall Conference will be sponsored by the Nicholas R. Doman Society of International Law at the University of Colorado School of Law and the Colorado Journal of International Environmental Law & Policy. For more information, visit <http://www.colorado.edu/law/ilsa-2004>.

2nd International Law Conference

November 14-17, 2004, New Delhi. Hosted by the Indian Society of International Law, the conference will consider the following themes: the emerging world order and the United Nations; international economics, trade (WTO) and investment laws; international terrorism, human rights and humanitarian law; private international law - jurisdiction, applicable laws and enforcement; and international law of the environment and sustainable development. Further information is available at <http://www.isil-aca.org>.

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Créé en 1972, le CCDI est une association indépendante, sans allégeance politique, qui cherche à promouvoir l'étude et l'analyse de questions de droit international par les spécialistes dans les milieux universitaires et gouvernementaux de même qu'en pratique privée. Publié quatre fois par an, le *Bulletin* contient des renseignements relatifs aux développements du droit international et aux activités se rapportant à ce domaine au Canada et ailleurs.