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Treaty-Making and Treaty Implementation: The Kyoto Protocol

by Donald M. McRae† and John H. Currie‡

Canada's recent ratification of the Kyoto Protocol[1] has led to accusations that the federal government somehow acted improperly, and perhaps even illegally, in ratifying the treaty without first consulting the provinces and obtaining their support. In an opinion piece published in early January in the National Post, Alan Gotlieb and Eli Lederman maintained that the federal government's ratification of the Kyoto Protocol, over the protests of some provinces, was contrary to three quarters of a century of federal government practice amounting to a constitutional convention if not an unwritten, yet enforceable, constitutional rule.[2]

The allegations are surprising. They imply a limitation on the federal government's treaty-making power that is, in fact, quite unprecedented. While Gotlieb's and Lederman's arguments may make for good constitutional politics, they hardly represent good constitutional law.

As correctly observed by Gotlieb and Lederman, central to understanding the issue is the distinction between treaty-making and treaty-implementing powers. It has never been seriously doubted that treaty-making authority rests exclusively with the federal executive branch. No legislative concurrence, either by Parliament or the provincial legislatures, has ever been legally required prior to ratification of treaties by the federal government.[3] That position was confirmed as early as 1936 by the Supreme Court in the *Labour Conventions* case,[4] and has not been seriously doubted since.[5]

*(See **The Kyoto Protocol** on page 5)*

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[1] Kyoto Protocol to the United Nations Framework Convention on Climate Change, U.N. FCCC, Conference of the Parties, 3d Sess., U.N. Doc. FCCC/CP/1997/L.7/Add.1 (1998), (1998) 37 I.L.M. 22 [hereinafter Kyoto Protocol].

[2] A.E. Gotlieb and E. Lederman, "Ignoring the Provinces Is Not Canada's Way", National Post, Jan. 3, 2003, at p. A14.

[3] A.E. Gotlieb, Canadian Treaty Making (Toronto: Butterworths, 1968) at 14; P.W. Hogg, Constitutional Law of Canada, 3rd ed. (looseleaf), (Scarborough: Carswell, 1992) at §11.3(c). See also Hon. P. Martin, Secretary of State for External Affairs, Federalism and International Relations (Ottawa: Queen's Printer, 1968) at 11-33; and G.L. Morris, "The Treaty-Making Power: A Canadian Dilemma" (1967) 45 Can. B. Rev. 478 at 484.

[4] References re The Weekly Rest in Industrial Undertakings Act, The Minimum Wages Act, and The Limitation of Hours of Work Act, [1936] S.C.R. 461 at 488-89, per Duff

Message du Président

President's Message

June/juin 2003

Un bon nombre d'entre nous, qui croyons en l'importance de la règle du droit dans les relations internationales, avons probablement vécu des moments d'angoisse face aux grands événements internationaux des premières années du nouveau millénaire. J'avoue que ma confiance dans le développement inexorable de la règle du droit international, qui semblait presque assuré pendant les années 1990, a cédé place plus récemment au doute, voire même à la crainte, que le système demeure toujours beaucoup trop fragile. Je suis un peu plus hésitant lorsque j'affirme à mes étudiantes et mes étudiants que le droit international est un système de droit en voie de solidification et de maturation. Les événements des deux dernières années m'ont appris à être beaucoup plus circonspect dans mes opinions à cet égard.

However, this spring I have had the good fortune to be teaching international law to a remarkable group of students, drawn from across Canada, at Queen's University's Herstmonceux Castle in southeast England. A particularly striking moment for me during this great experience came shortly after we (or at least I) had been struggling in class with the effectiveness or even existence of international law in the face of national interest, military power and *realpolitik*. Later that day several students spontaneously approached me to say that they felt particularly lucky to be studying international law at such an uncertain time. They were not at all overwhelmed by the obstacles presented by such uncertainty; they were, rather, focused on the opportunities it provided. Rather than being gloomy or cynical about the future of international law, they were galvanized by the challenges that lay before them.

Cet incident m'a rappelé un des grands avantages d'être professeur de droit – celui de pouvoir bénéficier de l'engagement, de l'enthousiasme et de la perspicacité de ses étudiants et étudiantes. Raisons suffisantes pour valoriser, au Conseil, les contributions de nos membres étudiants! L'infusion d'énergie qu'ils ont apportée à nos récents congrès annuels en témoigne. En plus de nous prêter leur énergie et leur optimisme, nos membres étudiants nous rappellent l'importance et la promesse du droit international, voire même du travail du Conseil, malgré les reculs que semble vivre la règle du droit international en ce moment.

And so the Council's work continues apace. This edition of the Bulletin, for example, is the first produced under the direction of Board member Suzanne Lalonde, the Bulletin's new editor-in-chief. Carrying on the outstanding legacy of her predecessor, Executive member Robert McDougall (who is now focusing his energies on redesigning the Council's website), Suzanne has produced a highly readable, informative and professional publication that is one of the highlights, along with the annual conference, of membership in the Council.

De plus, les préparatifs pour notre congrès annuel de l'automne se poursuivent, sous la direction énergique d'Irit Weiser et de Johanne Levasseur. Le thème choisi (qui est des plus propices eu égard à l'actualité internationale) est « Réconcilier le droit, la justice et la politique dans l'arène internationale ». Vous trouverez plus de renseignements à ce sujet sur notre site Web (www.ccil-ccdi.ca). Ceux-ci seront mis à jour durant l'été. Réservez donc les 16-18 octobre 2003 dès maintenant et venez assister au plus important événement annuel en droit international au Canada!

Let me close by noting, with regret, that Executive member Kirby Abbott has had to resign due to work obligations. We will miss his dedication but we look forward to his return when work permits. In his place, the Executive has elected Irit Weiser to serve out the remainder of Kirby's mandate. Irit is a long-time member of the Council and a past member of the Executive. We are delighted to welcome her back and look forward to benefiting from her energy and wisdom in the months to come.

Please accept the Council's best wishes for a safe and rejuvenating summer. Bon été à toutes et à tous!

John H. Currie
President/Président

Congrès annuel du CCDI (2003) Réconcilier le droit, la justice et la politique dans l'arène internationale

La planification du Congrès annuel du CCDI 2003 va bon train sous la direction de Irit Weiser, présidente cette année du Comité organisateur. Nous vous rappelons que le Congrès aura lieu du 16 au 18 octobre 2003 et que nous débuterons les activités du Congrès au ministère des Affaires étrangères et du Commerce international à l'Édifice Pearson. Les 17 et 18 octobre, le Congrès se tiendra dans l'environnement habituel de l'Hôtel Fairmont Château Laurier à Ottawa. Le Congrès portera cette année sur l'art de réconcilier le droit, la justice et la politique dans l'arène internationale.

La session à l'intention des étudiants et étudiantes (carrières en droit international) aura lieu jeudi le 16 à compter de 16h00 à l'Université d'Ottawa, Faculté de droit. Le 16 octobre également, à compter de 17h30, se tiendra la réception offerte par le Jurisconsulte du ministère des Affaires étrangères et du Commerce international, suivie de la table ronde sur un sujet d'actualité. Ces activités se tiendront au ministère des Affaires étrangères et du Commerce international. Vendredi matin, le conférencier chargé du discours-programme, M. David Malone, président de International Peace Academy et ancien ambassadeur du Canada auprès des Nations Unies, explorera le thème du Congrès. Vendredi et samedi, le thème sera approfondi lors des panels portant sur une variété de sujets incluant les institutions financières internationales, le droit commercial international (la sécurité nationale comme justification des restrictions au commerce), le droit de la mer, le droit international des droits de la personne, les droits de la femme, le droit des réfugiés, le droit humanitaire (développement de la doctrine du *jus bellum*), le droit pénal international ainsi que le droit international de l'environnement (responsabilité légale et sociale : l'État et l'entreprise). La Société québécoise du droit international présidera un panel sur « L'aménagement de la violence dans l'arène international ».

Ces sujets seront traités par des conférenciers et des modérateurs remarquables et reconnus pour leur expertise, dont Guy Goodwin-Gill, Jutta Brunnée, Marco Sassoli, William Shabas, José Alvarez, Kerry Buck, Ted McDorman et Ross Lekow.

Le Congrès se terminera samedi par l'Assemblée générale annuelle. Un formulaire d'inscription est inclu avec ce numéro du Bulletin.

CCIL Annual Conference (2003) Reconciling Law, Justice and Politics in the International Arena

Preparations for the 2003 Annual CCIL Conference are in full swing under the direction of Irit Weiser, chair of this year's organizing committee. The conference will take place from October 16 to 18, 2003 and the activities will begin at the Department of Foreign Affairs and International Trade at the Pearson Building. On October 17th and 18th, the Conference will be held at its usual setting, at the Fairmont Château Laurier Hotel in Ottawa. The theme of this year's conference is "Reconciling Law, Justice and Politics in the International Arena".

This years Student Job Fair and Forum will be held on Thursday October 16th at 4:00 p.m. at the University of Ottawa, Faculty of Law. On the same day, the reception held by the Legal Advisor of the Department of Foreign Affairs and International Trade will start at 5:30 pm, followed by a roundtable on a matter of pressing concern. Both events will take place at the Department of Foreign Affairs and International Trade. On Friday morning our keynote speaker, Mr. David Malone, President of International Peace Academy and past ambassador of Canada to the United Nations, will give a talk exploring the conference theme. During sessions on both Friday and Saturday, this theme will be examined further in panels on a variety of subjects including international financial institutions, international trade law (national security as a basis for justifying trade restrictions), the law of the sea, international human rights law, women's rights, refugee law, humanitarian law (development of *jus bellum* doctrine), international criminal law and international environmental law (liability and corporate social responsibility). The Société québécoise de droit international will chair a panel on "The place of violence in the international arena".

The Conference will feature an outstanding roster of speakers and moderators, including Guy Goodwin-Gill, Jutta Brunnée, Marco Sassoli, William Shabas, José Alvarez, Kerry Buck, Ted McDorman and Ross Lekow, all renowned for their expertise in their individual fields.

The Conference will close with the Annual General Meeting on Saturday. A registration form is included with this issue of the Bulletin.

Le Congrès vous permettra de discuter des derniers développements en droit international et d'échanger avec les experts à la fine pointe de ces développements, ainsi que d'établir des contacts avec des personnes qui partagent votre intérÍt pour le droit international

Les détails du programme et des formalités d'inscription seront disponibles sur le site Internet du CCDI : htpp://www.ccil-ccdi.ca ≺

The Conference will provide the opportunity to learn about critical recent developments in international law, to exchange views with international law experts, and to establish contacts with persons interested in international law.

Programme and registration details will be posted on the CCIL website as they become available: htpp://www.ccil-ccdi.ca. ≺

Cahier du rédacteur

Editor's Notebook

Editorial debut

It is an honour to be asked to assume the position of editor of the CCIL Bulletin. I must confess that I accepted with some trepidation, following in the footsteps of Rob McDougall. Under his guidance, the CCIL Bulletin has achieved a high standard in analysis and presentation and has thus become a most valuable resource in the field of international law.

As I've discovered over the last few months, much time and effort goes into each issue. I am grateful to Rob for all his advice, support and encouragement in editing this my first issue of the Bulletin. I am also most grateful to the other members of the CCIL Communications committee—Yves Le Bouthillier, Tim Wilson and John Currie—for all their editorial help. Sonya Nigam was also kind enough to share her experience with me. And I wish to thank all those who despite hectic schedules, generously gave of their time to submit articles for this issue. It goes without saying that future contributions will be most gratefully received.

It is with much enthusiasm that I take on the responsibility of ensuring that the CCIL Bulletin continues to be an excellent source of information and analysis on current topics in international law.

CCIL academic internship programme extended

The CCIL internship programme at the University of Ottawa's Law Faculty has been such a success that I was able to convince my own Dean at the University of Montreal to consider a similar arrangement. As of the Fall semester 2003, U of M will provide academic credits for up to ten students to work, under faculty supervision, as intern editors for the CCIL.

Conference 2003

Preparations for the 2003 Annual CCIL Conference, to be held at the Fairmont Chateau Laurier Hotel in Ottawa from October 16th to 18th, are well under way. Irit Weiser, with her organizing committee, is putting together a very interesting programme under the theme "Reconciling Law, Justice and Politics in the International Arena". This year's Conference, as in the past, will feature an impressive roster of expert panelists drawn from a wide range of backgrounds.

Members will find included with this issue of the Bulletin, the conference registration form. Please note that conference registration materials can also be accessed through the CCIL's website. A draft Conference programme will shortly be posted on the website and will be updated in the coming weeks. The finalized programme will be made available at the time of registration. In the interim, members will find useful information pertaining to Conference events, panels and speakers at page three of this Bulletin. We hope that many of you will be able to join us at this year's conference.

La préparation du Congrès annuel 2003 du CCDI, qui aura lieu à l'Hôtel Fairmont Château Laurier à Ottawa du 16 au 18 octobre prochains, va bon train. Irit Weiser avec son comité organisateur, élabore un programme fort intéressant avec pour thème « Réconcilier le droit, la justice et la politique dans l'arène internationale ». La Conférence 2003, comme par le passé, fera intervenir des conférenciers venant d'horizons différents et reconnus pour leur expertise.

Les membres trouveront inclus avec ce numéro du Bulletin, le formulaire d'inscription à la Conférence 2003. Veuillez noter que l'inscription à la Conférence peut également se faire via le site web du Conseil. Une version préliminaire du programme de la Conférence sera affichée sous peu sur le site web et sera mise à jour dans les semaines à venir. La version finale du programme sera distribuée au moment de l'inscription. Les membres trouveront par contre des informations pertinentes sur le déroulement de la Conférence à la page trois de ce Bulletin. Nous espérons que vous serez nombreux à assister à la Conférence annuelle 2003. ≺

Treaty-Making and Treaty Implementation: The Kyoto Protocol

(continued from page 1 - suite de page 1)

By contrast, implementation of treaty obligations into Canadian law is generally considered to require legislative action.[6] If the subject matter of a treaty is within federal legislative jurisdiction as laid out in section 91 of the *Constitution Act, 1867*,[7] it is Parliament that enacts the necessary legislation. If however the subject matter of the treaty is within provincial legislative jurisdiction under section 92, then it is the provincial legislatures that must enact the necessary legislation. This "watertight compartments" view of the distribution of legislative treaty-implementing powers results from the 1937 decision of the Privy Council in the same *Labour Conventions* case.[8] And while that decision has frequently been criticized – usually by those who would favour a much *broader* or perhaps even *exclusive* federal treaty-implementing power – it too has not since been authoritatively reconsidered.[9]

As a result of the inability of the federal government to implement by legislation some of the treaties it is entitled to make, the federal government has naturally been reluctant to enter into treaties that it cannot implement. Where issues are clearly within provincial legislative jurisdiction, as in the case of labour standards, child custody and other such matters of local concern to each province, the federal government therefore consults with the provinces. Often the resulting treaty includes a "federal state" clause which means that the treaty only applies in respect of provinces that have committed themselves to implementing the treaty.[10]

The federal practice of consulting provinces with respect to treaties that will require provincial legislative implementation of course makes good political and practical sense. It minimizes the risk that Canada will end up bound, on the international plane, by a treaty that it cannot implement at the federal legislative level and that the provinces refuse to implement pursuant to their section 92 spheres of legislative authority. However, this cautious and sensible federal practice of consulting the provinces is not, as suggested by Gotlieb and Lederman, evidence of constraints on the federal treaty-*making* power. That practice flows, rather, from the acknowledged limitations on the federal treaty-*implementing* power. In other words, Gotlieb and Lederman draw their conclusions from a false premise: that the federal-provincial practice of consultation and cooperation, driven by the watertight compartments theory of treaty-*implementation*, necessarily implies limitations also for federal treaty-*making*.

To make the federal power to ratify treaties conditional on consulting the provinces and gaining their consent would be a radical rewriting of the federal treaty-making power. There is nothing in the *Labour Conventions* case or in the Constitution that supports such a condition. It would plainly be inconsistent with the Letters Patent of 1947, by which all of the prerogative powers in respect of Canada, including the power to conduct foreign affairs and conclude treaties, were passed exclusively to the Governor General.[11] Indeed, imposing such a condition would be tantamount to wholly surrendering the federal government's treaty-making power to each individual

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C.J. (writing for himself and Kerwin and Davis JJ.), rev'd on other grounds A.-G. Canada v. A.-G. Ontario, [1937] A.C. 326 (P.C.) [hereinafter Labour Conventions case].

[5] Note, however, that some provinces, most notably Québec, have advanced the proposition that their executive branches have some treaty-making powers of their own: see, e.g., J.Y. Morin, "Le Québec et le pouvoir de conclure des accords internationaux" (1966) 1 Études Jur. Can. 136; and J.Y. Morin, "La personalité internationale du Québec" (1984) 1 R.Q.D.I. 163. This is by no means the prevailing view: see Gotlieb, supra, note 2 at 4-6 and Hogg, supra, note 2 at §11.6. In any event even the proponents of such a provincial treaty-making power do not suggest that it is subject to provincial legislative concurrence.

[6] Capital Cities Communications v. Canadian Radio-Television Commission, [1978] 2 S.C.R. 141 at 173.

[7] Constitution Act, 1867 (U.K.), 30 & 31 Vict., c.3, reprinted in R.S.C. 1985, App. II, No. 5.

[8] A.-G. Canada v. A.-G. Ontario, [1937] A.C. 326 at 351, 354 (P.C.).

[9] See, e.g., Hogg, supra, note 2 at §11.5(c); Symposium, (1937) 15 Can. B. Rev. 393ff; Lord Wright, "Rt. Hon. Sir Lyman Poore Duff, G.C.M.G. 1865-1955" (1955) 10 Can. B. Rev. 1123 at 1126-27; MacDonald and Railquip Enterprises Ltd. v. Vapor Canada Ltd., [1977] 2 S.C.R. 134 at 169, per Laskin C.J.C.; Francis v. The Queen, [1956] S.C.R. 618 at 621, per Kerwin C.J.; and J.S. Ziegel, "Treaty-Making and Implementing Powers in Canada: The Continuing Dilemma" in B. Cheng & E.D. Brown, eds., Contemporary Problems of International Law: Essays in Honour of Georg Schwarzenberger on His Eightieth Birthday (London: Stevens, 1988) 333.

[10] See, e.g., Convention on the Recovery Abroad of Maintenance, 10 June 1956, 268 U.N.T.S. 32 (in force 25 May, 1957), art. 11. See also H.A. Leal, "Federal State Clauses and the Conventions of the Hague Conference on Private International Law" (1984) 8 Dal. L.J. 257.

[11] Letters Patent Constituting the Office of Governor General of Canada, R.S.C. 1985, App. II, No. 31.

province's potential veto. Paradoxically, treaty-making would become a more difficult undertaking than amending the Constitution itself.

In any event, the power of Parliament to implement treaties that deal with issues of national concern, even where provincial jurisdiction may be affected, was acknowledged by the Supreme Court in 1988 in the *Crown Zellerbach* case.[12] Marine pollution, the majority opinion said, was "predominantly extra-provincial as well as international in character."[13] In effect, therefore, the federal government is entitled to legislate to implement a treaty under its "peace, order and good government" power where the subject matter of the treaty is a matter of national concern.

"Kyoto is not a treaty for which provincial implementation is essential."

The controversy surrounding Kyoto is reminiscent of the debate surrounding the North American Free Trade Agreement[14] in the 1990s. As in the case of Kyoto, there was widespread public discussion about NAFTA, and some opposition to it. The federal government at the time took the view that the matters covered in NAFTA could, if necessary, be implemented by federal legislation.[15] Ontario disagreed and threatened to take the federal government to court.

In the end, Ontario backed down. No doubt it took account of the fact that challenging the federal government's authority to implement NAFTA might result in a decision of the Supreme Court of Canada that expanded the federal government's implementing power.[16] That was the experience of Australian states some years ago when they challenged the federal government's authority to implement an international treaty. The High Court of Australia, recognizing a practical need for the federal government to have authority not only to make but also to give effect to its international obligations, upheld and expanded a federal treaty-implementing power.[17]

Kyoto is not a case of ratifying a treaty the subject matter of which falls clearly within provincial legislative jurisdiction under section 92. The Kyoto Protocol deals with climate change, with the quality of the air we breathe. Like marine pollution, it has an inherently extra-provincial as well as an international character. The federal government consulted with the provinces. There was a widespread public debate. Ottawa did not get the support of all the provinces. Nevertheless, it went ahead and ratified Kyoto even though the treaty did not include a federal state clause that would have limited the application of the treaty to those provinces that had agreed to implement it.

Kyoto is not a treaty for which provincial implementation is essential. It is a treaty that sets targets and objectives, and leaves states free to choose the means by which those targets are met. In ratifying Kyoto without full provincial support the federal government has signalled that it is prepared if necessary to implement Kyoto through federal legislation.

All of this, the federal government was and is legally entitled to do. It is entitled to do so, first, because it clearly holds the power, with or without provincial consent, to make treaties coming within both federal and provincial spheres of legislative competence; and second, because the Kyoto Protocol most probably comes within a sphere of federal legislative competence in any case, thus giving the federal government the power to both make and implement the treaty.

Ultimately, the issue may end up in the Supreme Court of Canada. However, rather than showing a violation by the federal government of years of practice, or of a constitutional convention, or of some unwritten constitutional rule, history and law on this issue appear to be quite clearly on the federal government's side. ≺

[12] R. v. Crown Zellerbach Canada Ltd., [1988] 1 S.C.R. 401.
[13] Ibid. at 436.
[14] North American Free Trade Agreement, in force January 1, 1994, (1993) 32 I.L.M. 296 [hereinafter NAFTA].
[15] A view on which it ultimately acted: see North American Free Trade Agreement Implementation Act, S.C. 1993, c. 44.
[16] There had already been signs that the Court was so inclined, having given a generous reading to the federal trade and commerce power in General Motors of Canada Ltd. v. City National Leasing, [1989] 1 S.C.R. 641. For arguments supporting a full federal power of implementation of trade agreements, see R. Howse, "NAFTA and the Constitution: Does Labour Conventions Really Matter Any More?" (1994) 5 Const. Forum 54.
[17] Commonwealth v. Tasmania (1983), 158 C.L.R. 1, 57 A.L.J.R. 450 (Aust. H.C.). See further the helpful commentary by T. Strom & P. Finkle, "Treaty Implementation: The Canadian Game Needs Australian Rules" (1993) 25 Ott. L. Rev. 39.

International Human Rights Law in Canada's Courts: The Ahani Case

By Joanna Harrington*

A year ago, the Supreme Court of Canada dismissed the final application for leave to appeal in *Ahani v. Canada*,[1] paving the way for Ahani's deportation on grounds of national security and leaving, in my view, a most regrettable and undesirable precedent. *Ahani*, as readers may remember, is the case of the alleged Iranian assassin whose challenge to his deportation on the grounds of a risk of torture in Iran mirrored that of Mr. Suresh, the alleged fundraiser for the Sri Lankan Tamil Tigers, discussed in the previous Bulletin. Both cases were decided on the same day before the Supreme Court of Canada, but while Suresh gained a new trial,[2] Ahani was approved for deportation.[3]

Having exhausted his domestic remedies, Ahani then proceeded with his international options, filing a "communication" with the UN Human Rights Committee in Geneva, alleging that his deportation would violate Canada's treaty obligations under the *International Covenant on Civil and Political Rights* ("ICCPR").[4] Ahani also requested, and received, a request for interim measures of protection from the Committee (in essence, an interim injunction) to halt the deportation while his case was pending. Canada, however, refused to abide by the interim measures request, prompting Ahani to return once again to the Canadian courts to seek a stay of proceedings. In a 2:1 decision, the Ontario Court of Appeal denied Ahani's request, with leave to appeal later refused by the Supreme Court of Canada.

The primary basis given for refusing Ahani's request was the fact that neither the ICCPR, nor its *Optional Protocol*[5] (the side-agreement providing for the right of individual petition), are incorporated into Canadian law. According to Laskin J.A., for the majority, "neither has any legal effect in Canada"[6] and he also noted that, "neither the Committee's views nor its interim measures requests are binding on Canada as a matter of international law, much less as a matter of domestic law."[7] He therefore concluded that it would be "an untenable result" to "convert a non-binding request, in a Protocol, which has never been part of Canadian law, into a binding obligation enforceable in Canada by a Canadian court, and more, into a constitutional principle of fundamental justice."[8]

And yet, the relevant jurisprudence of the Human Rights Committee, to which no citation is made in *Ahani*, does view non-compliance with an interim measures request as a serious breach of the *Optional Protocol* and an act of bad faith with respect to the obligations under the ICCPR.[9] Non-compliance also runs counter to the long-standing principle recently affirmed by the International Court of Justice in the *LaGrand Case* that the parties to a case must abstain from measures that would aggravate a pending dispute.[10] As for the constitutional aspect, the Judicial Committee of the Privy Council, in a series of cases on this issue, has held that the interests of justice and due process do provide the basis for a constitutional stay of proceedings while a case is pending before the Human Rights Committee.[11]

But aside from the issue of interim measures, the *Ahani* precedent also raises broader concerns about the very appreciation of the nature of international law, and in particular, international human rights law, by Canada's courts. Referring to the non-binding nature of the Committee's views, Laskin J.A. comes to the conclusion that "the international community has agreed to binding

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*Joanna Harrington is a law professor at the University of Western Ontario. Her article on the Ahani case as an illustration of Canada acting in bad faith with respect to its treaty obligations in the field of international human rights has just been published in (2003) 48 McGill L.J. 2-32.

[1] (2002), 58 O.R. (3d) 107 (C.A.), leave to appeal to S.C.C. refused, [2002] S.C.C.A. No. 62 (Q.L.).

[2] *Suresh v. Canada*, [2002] 1 S.C.R. 3, 208 D.L.R. (4th) 1.

[3] *Ahani v. Canada*, [2002] 1 S.C.R. 72, 208 D.L.R. (4th) 57.

[4] Adopted 19 December 1966, 999 U.N.T.S. 171, Can. T.S. 1976 No. 46 (entered into force 23 March 1976, accession by Canada 19 May 1976).

[5] Adopted 16 December 1966, 999 U.N.T.S. 302, Can. T.S. 1976 No. 47 (entered into force 23 March 1976, accession by Canada 19 May 1976).

[6] *Ahani v. Canada*, *supra* note 1 at para. 31.

[7] *Ibid.* at para. 32.

[8] *Ibid.* at para. 33

[9] For the strongest affirmation of this position, see the views of the Committee adopted on 19 October 2000 in *Piandiong v. The Philippines*, Communication No. 869/1999, reproduced in *Report of the Human Rights Committee*, A/56/40, vol. II, annex X.R (2001). See also, the Committee's annual report for 2001 under the heading "Breach of Optional Protocol Obligations": *Report of the Human Rights Committee*, A/56/40, vol. I at paras. 128-130 (2001).

[10] *LaGrand Case (Germany v. United States of America)* (2001), 40 I.L.M. 1069 at para. 103.

[11] For the latest case, see *Lewis v. Jamaica* (2000), [2001] 2 A.C. 50, [2000] 3 W.L.R. 1785 (P.C.).

obligations in other treaties. But in the Covenant and the Protocol, it made a policy decision to do otherwise."[12] He also states that, "Canada agreed to sign an international covenant and protocol that was not binding."[13] This is both incorrect and very worrisome for the domestic prospects of the world's leading human rights treaty of universal application. The "Covenant" and "Protocol" nomenclature do not make these treaties any less binding than say a trade "Agreement" and one would have thought it trite to remind the court that every treaty in force is binding upon the parties and must be performed by them in good faith.

Moreover, the lack of an enforcement mechanism of the kind we are accustomed to seeing in domestic law does not make a treaty, including a human rights treaty, any less binding on a state. Canada, in acceding to the'*Optional Protocol*, agreed to accept an international complaints procedure for individuals alleging breaches of the ICCPR. Canada is acting in bad faith when it takes actions that gut this right of individual petition of any and all utility. ≺

[12] *Ahani v. Canada*, *supra* note 1 at para. 37.
[13] *Ibid*. at para. 49.

En Bref

WTO arbitration panel allows Brazil to impose sanctions against Canada in the longstanding aircraft dispute

On 18 March 2003 the WTO Dispute Settlement Body granted Brazil the authorization to impose US$248 million in retaliatory sanctions against Canada for a failure to comply with a WTO ruling on a subsidy program for regional aircrafts. Interestingly, the arbitration panel also noted that in view of the ongoing consultations between the parties to the dispute, achieving a mutually satisfactory agreement addressing the issues in "their broader context would be the most appropriate solution."

The arbitration decision was made available to the public on 17 February 2003 (WT/DS222/ARB) and is available at http://docsonline.wto.org. (CF)

Rapport annuel de la Commission interaméricaine des droits de l'Homme

La Commission interaméricaine des droits de l'Homme (CIADH) a présenté son rapport annuel pour l'année 2002 au Comité des affaires juridiques et politiques du Conseil permanent de l'Organisation des États américains, le 3 avril 2003.

Le rapport fait état de la détérioration des institutions démocratiques dans les pays d'Amérique. En déposant le rapport, la présidente de la commission, Marta Altolaguirre, a déclaré que les problèmes de la corruption, de la pauvreté et de l'exclusion, de la discrimination envers les minorités et les femmes contribuent à l'effritement de la confiance des citoyens en leur système judiciaire et par conséquent, à l'instabilité sociale. Cette situation est exacerbée, ajoute la présidente, par le manque d'accès à la justice qu'éprouvent les membres de groupes vulnérables.

Dans ce contexte hémisphérique, qui reflète la réalité à l'échelle globale, les mécanismes de protection des droits de la personne doivent continuer à jouer un rôle fondamental.

Le rapport est disponible au www.cidh.org. (MJB)

L'Affaire relative au mandat d'arrêt du 11 avril 2000 (République démocratique du Congo c. Belgique)

La Cour internationale de Justice a rejeté, le 14 février 2002, le mandat d'arrêt lancé par la Belgique contre Abdulaye Yerodia Ndombasi, ancien ministre des affaires étrangères de la République démocratique du Congo.

Dans son arrêt, la Cour décide par treize voix contre trois que l'émission à l'encontre de M. Ndombasi d'un mandat d'arrêt « et sa diffusion sur le plan international, ont constitué des violations d'une obligation juridique du Royaume de Belgique à l'égard de la République démocratique du Congo, en ce qu'elles ont méconnu l'immunité de juridiction pénale et l'inviolabilité dont le ministre des affaires étrangères en exercice de la République démocratique du Congo jouissait en vertu du droit international ».

La Belgique avait accusé M. Ndombasi d'avoir commis des crimes contre l'humanité lorsqu'il était en exercice et avait émis le mandat d'arrêt en vertu de sa loi de 1993, modifiée en 1999, qui permet la poursuite en Belgique de responsables d'atrocités commises à l'étranger. (MJB) ≺

In Brief

Le naufrage du *Prestige* face au défi du droit de la responsabilité en cas de pollution marine

Par Cissé Yacouba*

Après les tragédies écologiques les plus spectaculaires et les mieux connues - *Torrey Canyon* (1967), *Amoco Cadiz* (1978), *Exxon Valdez* (1989), *Braer* (1993), *Sea Empress* (1996), *Erika* (1999), et *Baltic Carrier* (2001) - voilà qu'au palmarès des catastrophes maritimes vient de s'inscrire une nouvelle marée noire causée par le naufrage du navire *Prestige* (2002). Au-delà des émotions que ces marées noires ont toujours suscitées ici et là, on continue de s'interroger sur l'efficacité des instruments juridiques en matière de protection de l'environnement marin, notamment sur le droit de la responsabilité dans ce domaine. Le naufrage du *Prestige* fera-t-il évoluer le droit dans le sens d'une responsabilité plus accrue des acteurs de l'industrie maritime ou va-t-il simplement militer pour le *statu quo* au péril de la mer, de ses héritiers que sont les États côtiers et de la sauvegarde de la vie humaine ?

De la complexité des faits

Le *Prestige* a été construit en 1976. Le 13 novembre 2002 il a fait naufrage au large du Cap Finistère en Espagne, alors qu'il transportait 77 000 tonnes de fuel lourd. Il était immatriculé au Libéria, avait pour armateur *Mare Shipping Inc*. de nationalité grecque (famille Couloutros) et était une propriété de la société *Universe Maritime*. Nulle part cependant, à tout le moins pas de manière officielle, est-ce que le nom de ce navire apparaissait comme faisant partie du patrimoine de *Universe Maritime*. Ainsi, le propriétaire apparent du *Prestige* était *Mare Shipping Inc*. Immatriculé au Libéria,[1] il battait le pavillon de complaisance des Bahamas.[2] Au moment du naufrage, les membres de l'équipage étaient de nationalité roumaine et philippine et le capitaine, de nationalité grecque. Le certificat de navigabilité avait été délivré par la société de classification américaine, la *American Bureau of Shipping*. L'affréteur du *Prestige* était un conglomérat russe appelé *Alpha*, dont la filiale suisse, du nom de *Crown Resources* était le propriétaire du pétrole à transporter entre la Lettonie et Singapour en transitant par le détroit de Gibraltar. C'était la société Petriam, en tant que courtier maritime de *Crown Resources* et spécialiste des affrètements (marché *spot*), qui avait proposé à *Crown Resources* le *Prestige*, déjà très vieux[3] (26 ans d'âge) et doté d'une seule coque. Pour certains frais afférents au transport, *Crown Resources* avait sollicité et obtenu un financement auprès d'une banque qui n'avait pas hésité à le lui accorder compte tenu de la rentabilité de l'opération[4].

À la suite du naufrage, il a été rapporté que *Crown Resources* n'avait plus d'existence juridique, ayant changé de nom pour devenir *Energy Resources and Commodities* (ERC)[5]. En effet, pour tenter d'éluder sa responsabilité, le conglomérat russe *Alpha*, en sa qualité d'affréteur du navire, s'était *in extremis* débarrassé de sa filiale *Crown Resources* en la revendant[6]. Quant au Protection & Indemnity Club (P & I Club) du *Prestige*, c'est-à-dire le London P&I Club assureur-responsabilité du navire, il a lui aussi cherché à minimiser les réclamations susceptibles de lui être adressées. Ainsi, a t-il refusé jusqu'à maintenant de libérer les 24 millions d'euros prévus pour l'indemnisation en cas de préjudice.

Devant tous ces faits, il convient de rappeler que le *shipping* reste avant tout une aventure commerciale où de nombreux propriétaires de navires, des affréteurs, des armateurs et d'autres intermédiaires de la chaîne de transport maritime ne cherchent qu'à augmenter par tous moyens, fussent-ils illégaux, leurs profits et à réduire d'autant leurs coûts d'opération dans une industrie où rentabilité fait bon ménage avec clandestinité. C'est une réalité bien perceptible dans les affrètements au voyage (marché *spot*), d'autant plus qu'on « interdit même le plus souvent à l'affréteur de connaître les qualités du navire auquel il confie sa cargaison. La concurrence a ici ses lois, dont l'éthique n'est pas le trait principal »[7].

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[1] *Le Monde*, 22 novembre 2002

[2] M. ROCHE : « Prestige » : Les pratiques douteuses des intermédiaires et des affréteurs, in *Le Monde* du 26 novembre 2002.

[3] On explique le choix des vieux navires par les *traders* par le fait que « travaillant sur des marges très faibles, les traders en pétrole sont souvent contraints de se rabattre sur les vieux bateaux à simple coque », in *Le Monde*, 26 novembre 2002.

[4] « Les *traders* en matières premières sont amenés à payer la traversée et l'assurance de la cargaison en empruntant auprès de grandes banques internationales spécialisées dans ce type d'opération. Il ne s'agit pas d'une ligne de crédit, mais d'un prêt à court terme, très lucratif pour la banque », in *Le Monde*, 26 novembre 2002.

[5] http://www.lci.fr/news/economie

[6] M. ROCHE : « L'affréteur russe du Prestige s'est mis à l'abri des poursuites », in *Le Monde*, 7 janvier 2003.

Le problème de fond, au-delà de tout cet *imbroglio* juridico-financier, est celui de savoir qui est le débiteur de l'obligation de réparer les dommages.

De la responsabilité civile

Qui devra payer pour les frais de remise en état des lieux? La *Convention internationale sur la responsabilité civile pour les dommages dus à la pollution par les hydrocarbures* (CRC 1969 ou Convention), amendée en 1984 et de nouveau en 1992, a établi le système de la « canalisation de la responsabilité » sur le propriétaire du navire. Mais cette Convention présente une double faiblesse : d'une part elle permet au propriétaire du navire de limiter sa responsabilité par la constitution d'un fonds selon la jauge du navire. D'autre part, elle dégage de toute responsabilité d'autres acteurs du transport maritime qui, pourtant, peuvent juridiquement assumer la qualité de transporteur maritime responsable de dommages à l'environnement marin. C'est l'exemple typique des affréteurs. En effet, conformément aux dispositions de canalisation de la Convention, telle que modifiée en 1992 (CRC 1992), ces derniers ne paient rien dans la mesure où seul le propriétaire est responsable de son navire[8] en ce qui a trait à son exploitation, son entretien et sa navigabilité. Qui alors poursuivre dans le cas en espèce? Est-ce *Mare Shipping* (armateur), *Universe Maritime* (société-mère ou propriétaire du navire), ou enfin *Crown Resources* (propriétaire du pétrole)?

"Toute révision éventuelle de la Convention devrait permettre aux victimes de poursuivre indifféremment et solidairement non seulement le propriétaire immatriculé du navire, mais aussi le gérant ou l'exploitant du navire…"

• *L'action en responsabilité contre Mare Shipping*

Elle a peu de chance d'aboutir car la CRC 1992 l'exonère en tant qu'armateur.

• *L'action en responsabilité contre Alpha*

En sa qualité d'affréteur du navire, le conglomérat russe n'encourt aucune responsabilité en vertu de la CRC 1992. Même en agissant comme société-mère (du propriétaire du pétrole), *Alpha* reste, au regard du droit, un simple affréteur qui, en droit de la responsabilité civile pour dommages à l'environnement, n'endosse aucune responsabilité.

• *L'action en responsabilité contre Universe Maritime*

Est-il est possible d'intenter l'action en responsabilité civile contre la société-mère *Universe Maritime* en allant au-delà des apparences (*lifting de corporate veil*)? On peut répondre par l'affirmative. *Universe Maritime* apparaît ici comme étant le propriétaire du navire *Prestige* et, en dépit des apparences, elle sera tenue responsable des dommages à l'environnement marin. Telle a été l'approche dans l'affaire de l'*Amoco Cadiz* où la société-mère a été civilement tenue responsable pour les dommages à l'environnement marin. En effet, le Tribunal de Chicago a « levé le voile » et a découvert que derrière la société de transport *Amoco Cadiz*, se trouvait la société transnationale *Standard Oil* qui, parce qu'ayant le contrôle sur le navire et sur le transport,[9] a été tenue civilement responsable de la pollution marine.

• *L'action en responsabilité contre Crown Ressources*

Pourrait-on exercer un recours contre *Crown Resources* en sa qualité de propriétaire de la cargaison, et qui, avant le naufrage était une filiale du groupe russe *Alpha*, affréteur du *Prestige*? Une telle démarche impliquerait, cependant, de procéder à un difficile exercice d'identification juridique du propriétaire de la cargaison dans la mesure où lors du transport maritime, la marchandise peut à tout moment changer de propriétaire selon les transactions effectuées sur le marché d'affrètement. Ces changements peuvent aussi intervenir dans des conditions de fraudes maritimes à travers le phénomène des *phantom ships*[10]. Toutefois, la difficulté majeure viendrait surtout du fait que, selon la

[7] R. GOUILLOUD: « Le contrôle de la qualité de l'exercice par les États de leurs compétences maritimes », dans IFREMER : Prévention technique et couverture financière des risques maritimes, Actes de la journée d'études du Conseil Supérieur de la marine Marchande, Paris, 1er juillet 1993, p. 78.

[8] Rapport sur les activités des Fonds Internationaux d'Indemnisation pour les dommages dus à la pollution par les hydrocarbures au cours de 2000, Rapport annuel de 2000, Grande-Bretagne, p. 112.

[9] S. MURASE : « Perspectives From International Economic Law on Transnational Environmental Issues », (1995) Recueil des Cours de l'Académie de Droit International, t. 253, p. 381.

[10] Shipping & Trade Law, 2002, vol. 2, no. 5, p. 2.

CRC 1992, le propriétaire de la cargaison ne supporte, lui non plus, aucune responsabilité civile.

Les victimes du *Prestige* saisiront de droit le FIPOL,[11] un fonds alimenté par les propriétaires de la cargaison, notamment les sociétés pétrolières. Toutefois, le FIPOL n'interviendra que pour compléter l'indemnisation due par les assureurs des propriétaires du navire et, uniquement pour les frais de nettoyage et des dommages causés aux victimes, à l'exclusion des préjudices écologiques. En général les indemnisations du FIPOL et des P&I Clubs sont si insuffisantes que les grands perdants sont toujours les victimes, c'est-à-dire les États côtiers, ainsi que les individus et autres collectivités publiques ou privées ayant pris part au nettoyage.

Les leçons du *Prestige*

Toute révision éventuelle de la Convention devrait permettre aux victimes de poursuivre indifféremment et solidairement non seulement le propriétaire immatriculé du navire, mais aussi le gérant ou l'exploitant du navire, c'est à dire l'armateur. Les actions en responsabilité pourraient être dirigées contre la société de classification du navire pour n'avoir pas rempli ses obligations de contrôle et d'inspection du navire; contre l'affréteur et le sous-affréteur (cas de TotalFinaElf dans le naufrage de l'*Erika*) pour avoir affrété un navire hors normes; contre le P&I Club pour avoir assuré des navires présentant des risques prévisibles pour la sécurité de la navigation et la protection du milieu marin; contre l'État du pavillon pour avoir accordé des immatriculations de complaisance.

Généralement, le conservatisme de l'industrie maritime et du droit qui le régit sont tels que tout progrès juridique se fait à pas de tortue. Par contre, dans la question qui nous occupe, l'espoir est permis, car « les chartes-parties pétrolières contiennent des dispositions sur la protection de l'environnement par lesquelles les grandes compagnies pétrolières et les principaux affréteurs imposent aux armateurs certaines exigences en matière d'âge des navires et de gestion de la sécurité »[12]. Mais ce n'est pas tout. Il faudrait, à partir de l'affaire du *Prestige*, tirer des leçons à travers quelques options fondamentales :

- Sortir de la clandestinité le transport maritime par une harmonisation des législations maritimes nationales par rapport aux conventions maritimes internationales relatives à la sécurité de la navigation.
- Améliorer le régime juridique d'indemnisation en relevant le plafonds de la responsabilité civile (création d'un troisième niveau d'indemnisation).
- Maintenir le principe de la responsabilité du propriétaire du navire, tout en n'excluant pas la responsabilité de d'autres intermédiaires du transport maritime (armateur, affréteur, propriétaire de cargaison, assureur maritime, société de classification, courtier maritime, etc.).
- Privilégier la notion de transporteur maritime plutôt que de propriétaire. Le transporteur maritime est une notion juridique plus large, contrairement à celle de propriétaire du navire.
- Définir le régime juridique des navires en détresse en relation avec les obligations de l'État côtier dans les eaux duquel se trouve ce navire. Dans le cas du'*Prestige* par exemple, l'État espagnol était plus préoccupé à se débarrasser du navire en l'amenant dans les eaux portugaises, plutôt que de lui apporter l'assistance nécessaire en vue d'éviter son naufrage et la pollution marine.
- Neutraliser les diktats des pavillons de complaisance représentant en général les intérêts des grandes puissances maritimes qui bloquent, grâce à leur pouvoir financier et leurs cotisations à l'Organisation maritime internationale, toutes les tentatives de réformes initiées par celle-ci.
- Exiger le principe du lien substantiel entre l'État du pavillon et le propriétaire du navire (contrôle réel).
- Renforcer l'indépendance des sociétés de classification vis-à-vis des armateurs, et des armateurs, et des États du pavillon.
- Obliger les sociétés de classification à divulguer toutes les informations pertinentes sur les navires.
- Harmoniser les lois et règlements en matière de contrôle des navires par les États du port.
- Promouvoir le code ISM (*International Safety and Management*) en vue d'assurer de meilleures conditions de travail des marins. En effet, les facteurs humains sont à l'origine de nombreux sinistres maritimes.
- Rendre plus effectif l'exigence de double-coque pour les navires pétroliers.

[11] Fonds international d'indemnisation pour les dommages dus à la pollution par les hydrocarbures.

[12] Y. TASSEL : "Responsabilité du propriétaire du navire", (2002) 32 Revue Générale de Droit 641, p. 657.

Canadian Proposals for Changes to the WTO Dispute Settlement Understanding

by Cezary Fudali*

The Doha Round of Trade Negotiations

During the current Doha Round of international trade negotiations, members of the World Trade Organization (WTO) have the option of suggesting amendments to the wording of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (DSU)[1] to clarify its provisions and make procedural improvements. As talks on modifying the DSU are not tied to the success or failure of negotiations in other areas of the free trade regime, this should facilitate introduction of changes to the provisions of the DSU.[2] WTO members were expected to complete the DSU review process before May 31, 2003, although it is now apparent that a postponement of this deadline will occur.[3] On January 23, 2003, Canada submitted its proposals for changes to the WTO dispute settlement mechanism.[4] Canada's proposals contemplate enhancements in three major areas: transparency, treatment of business confidential information (BCI) and selection of panelists.

Canadian proposals on improvements in transparency

One Canadian proposal is intended to increase transparency in the dispute settlement process. It emphasizes that the significant ramifications of the Dispute Settlement Body decisions, often involving changes to domestic legislation, necessitate that the WTO become more open to public scrutiny. This type of reform is also seen by Canada as an opportunity for some of the lesser developed countries to become more familiar with the dispute settlement system.

Particularly, Canada proposes that the public should be able to access documents such as a WTO member's written submissions and be permitted to observe panel and Appellate Body proceedings. Additionally, Canada argues that access to submissions of third parties to a dispute should be unrestricted at the time of filing. The WTO Secretariat would be responsible for handling these tasks.

However, this wider access would not apply to consultations occurring at the outset or at any other time during dispute settlement proceedings. This proposed restriction makes sense, since otherwise counsel could appeal to the wider audience, wanting to appear tough and leaving little room for the flexibility and diplomacy that are required at this stage.

Introduction of special procedures for protection of business confidential information

Identification of problems

In view of the expected increased transparency and openness of the procedures to the public, the Canadian proposal stresses the need for a more rigid protection of privileged trade information related to private stakeholders than exists under the current DSU provisions. The basic presumption underlying this submission is that the public release of confidential data regarding private enterprises in the midst of dispute settlement proceedings might cause irreparable harm to some stakeholders. Therefore, the need for adequate rules on disclosure is directly linked to the willingness of domestic businesses to provide their governments with specific information which might prove necessary for the successful resolution of a trade dispute.

Canadian proposals

Canada proposes the establishment of "an effective procedure to protect BCI" in a new Annex to the DSU that would apply to all WTO dispute settlement proceedings where an exchange of submissions containing BCI takes place, provided that a party acts in good faith and exercises restraint.[5] An important consequence of designating information as confidential would be to restrict its access to individuals who have signed a declaration of non-disclosure and who either represent disputing parties (i.e., employees of a party and its legal counsel), sit as panelists, work in the WTO Secretariat or act as experts appointed by the panel.

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[1] Annex 2 to GATT Secretariat Final Act Embodying the Results of the Uruguay-Round of Multilateral Trade Negotiations, April 15, 1994, reprinted in 33 I.L.M. 1226.

[2] See The Doha Declaration explained, searchable online at http://www.wto.org/english/tratop_e/dda_e/dohaexplained_e.htm#dispute (last accessed March 25, 2003).

[3] See Ministerial Declaration, adopted on 14 November 2001, searchable online at http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_e.htm (last accessed March 25, 2003).

[4] See Dispute Settlement Body Special Session, "*Contribution of Canada to the Improvement of the WTO Dispute Settlement Understanding*", TN/DS/W/41TN/DS/W/41, 24 January 2003 [hereinafter "Canadian proposal"], searchable online at http://docsonline.wto.org.

[5] Ibid. at 2-4.

The Canadian government also proposes that the party concerned about BCI should clearly identify what portions of a document require protection. Secondly, in addition to the document containing BCI, the concerned party should be required to submit within two business days "a version of the document with the BCI redacted".[6] Amended Article 18.2 of the DSU would allow only those modified versions of parties' written submissions to be distributed to the public.[7]

If another party to the dispute considers the BCI designation unjustified, then the panel may ask the party seeking protection to justify the designation. It seems that in case of a failure to provide adequate justification, the party seeking to protect the confidential information will be allowed to either withdraw the designation of the information as BCI, or withdraw the information altogether.

Comments

Increased protection of sensitive information, as provided for in the Canadian proposal, should make it less likely that states bluntly refuse to submit relevant evidence. Yet, since the mechanism for challenging the soundness of a designation of information as deserving protection seems to be quite weak, a party may be tempted to classify certain information as confidential simply to limit disclosure of evidence to non-governmental experts of other parties.[8]

Additionally, the proposal does not directly address the issue of what would happen if a party, motivated by questionable security concerns or lobbied by domestic business, refuses to release information that a panel has requested pursuant to Article 13.1 of the DSU.[9] It is perhaps worth noting at this point that detailed rules on these issues are currently provided for in Chapter 19 of the *North American Free Trade Agreement*, which may serve as an example of how in practice, the protection of confidential information provision could be implemented.[10]

The panel selection process – the creation of a permanent panel roster

Identification of the problems

Another major proposal of the Canadian government is to introduce changes to the procedures for selecting panelists. Amendments in this area are long overdue since the problems of finding an adequate number of qualified panelists have been apparent from the early days of the WTO.[11] Moreover, despite having rigid rules on the maintenance of a roster of potential panelists embedded in the DSU, the names of officials included on that list are, in practice, often disregarded.[12]

Canadian proposals

In view of those practices, Canada proposes the establishment of a permanent "streamlined panel roster" to replace the current *ad hoc* method of panel selection.[13] It further suggests that a rigorous system of selection, similar to the one used for the selection of Appellate Body members, be put in place.[14]

More significantly, each WTO member would have the right to select one and only one candidate for the roster. The same WTO Committee that currently selects the

(continued on page 16 - suite page 16)

[6] Ibid. at 3.

[7] Ibid. at 2 and 7.

[8] Importantly, the Canadian proposal recognizes that this might be a problem by stating that: "The indiscriminate designation of information as business confidential could limit the ability of a party to fully include in its litigation team individuals who have particular knowledge and expertise relevant to presenting the party's case, impede the work of the panel and complicate the panel's task in formulating credible public findings and conclusions." See Canadian proposal, supra note 4 at 8.

[9] This seems to be an important issue of concern since under the current provisions there is every so often uncertainty as to whether the requested facts were fully disclosed by a party. For example, in the recent Canada-Export Credits and Loan Guarantees for Regional Aircraft case, Brazil alleged that access to certain documents on the activities of a Canadian export credit agency from Quebec was denied. The panel for its part stated that although Canada was not obliged to provide details it "might have hoped that Canada would be more forthcoming." See Canada- Export Credits and Loan Guarantees for Regional Aircraft, Report of the Panel, WT/DS222/R, 28 January 2002, paragraphs 7.379 and 7.384.

[10] North American Free Trade Agreement (Canada-Mexico-United States), 1993, 32 I.L.M. 605.

[11] See C. Fudali, "*The Dispute Settlement Mechanism of the World Trade Organization: Two Years Later*", (Winter 1997-1998) 24 CCIL Bulletin 1 at 24 ff.

[12] It has been noted that so far the matter of panelists' selection remains under the political control of the interested governments, which often prefer appointing persons with recent trade policy experience from diplomatic missions in Geneva. See R.L. Bernal, D.P. Steger & A.L. Stoler, "*Key Procedural Issues: Resources Comments*", (1998) 32 Int'l Law 871 at 876.

[13] See Canadian proposal, supra note 4 at 4.

[14] Accordingly, Article 8.1 of the DSU could be amended by placing additional requirements on the candidates, which would have to demonstrate that they posses "expertise in law, international trade, and the subject matter of the covered agreements generally."

Compliance Matters
Recent Developments Relating to Compliance under Multilateral Treaties
• *The Markland Group* •

Edited by Douglas Scott*

I. Targeted Sanctions – The Report Of The Stockholm Process

Dated February 2003, the Report presents the results of a year-long study by a committee of 123 experts from 35 countries drawn from academia, national governments, NGO's, intergovernmental organizations and the UN Secretariat. Financed by the government of Sweden, the participants met in a series of working groups and plenary meetings.

Entitled *Making Targeted Sanctions Effective – Guidelines for the Implementation of UN*–Policy *Options*, the Report, edited by Peter Wallensteen, was published by the Department of Peace and Conflict Studies at Uppsalla University. It is available on the Internet at www.peace.uu.se.

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The Stockholm Process was a continuation of two previous initiatives, the first of which was sponsored by the government of Switzerland in 1998 and 1999 under the name Interlaken Process which focused exclusively on financial sanctions. This was followed in December 2000 by the Bonn-Berlin Process sponsored by Germany, which studied arms embargos, aviation bans and travel bans. The results of these two initiatives were presented to the UN Security Council in two volumes in October 2001[1], at which time Sweden announced its intention to sponsor a third process, concentrating on the implementation aspects of targeted sanctions of all types.

Targeted sanctions are defined in the Report as those "directed against significant national decision-makers (political leaders and key supporters of particular regimes) and resources that are essential for their rule" (p. iii). The Report is comprised entirely of a series of detailed recommendations directed to members of the UN Security Council intended to improve the efficacy of future regimes involving targeted sanctions. Four types of sanctions are considered:

- financial sanctions – freezing assets held abroad
- travel sanctions – restricting travel by designated individuals
- aviation sanctions – restricting air travel generally
- arms embargo – focused on conventional weapons

The Report recommends the creation of expert panels to monitor compliance by member States and to offer them assistance in complying. Also recommended is greater precision on the part of the Security Council in defining what is required of member States. Another recommendation would have the Council appoint a UN sanctions coordinator who would be available to all the Sanctions Committee chairpersons[2].

Also, the Report recognizes the necessity of national legislation in the implementation of most types of targeted sanctions. It therefore recommends that the Security Council adopt a model law to guide member States in the enactment of their legislation. A detailed text of the model law is offered (with provisions for civil law countries that differ from those for common law countries)[3].

The Report makes no attempt to assess the efficacy of targeted sanctions assuming its recommendations were put in place. Also, it has very little to say about the success of

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[1] Security Council documents S/7183 and S/7187

[2] Report: paragraphs 30 and 46

[3] Report: paragraphs 236 to 243

[4] S/RES748 and 883

[5] For an assessment of the efficacy of targeted sanctions imposed by the Security Council up to the end of 2001, see David Cortright and George A. Lopez (eds): Smart Sanctions: Targeting Economic Statecraft (Lanham, MD.: Rowman and Littlefield, 2002). For a history and accounting of UN sanctions in general in the 1900's, see David Cortright and George A. Lopez Sanctions and the Search for Security: Challenges for UN Action (Boulder, CO.: Lynne Reinner, 2002)

past efforts to impose targeted sanctions. For instance, it gives none of the details of the aviation sanctions imposed on Libya from 1992 to 1999[4] - despite the fact that this particular sanctions effort was an obvious success[5].

Nor is there any mention of the travel ban that was imposed upon certain government officials in the last stages of the sanctions regime against Iraq. The episode was significant, because this was the last time the Security Council made any effort to penalize Iraq for its non-cooperation with inspections and it was followed by increasing obstruction of the inspections[6]. (Although authorized by the Security Council[7], the travel ban was never actually enforced, because the Iraqis appear to have persuaded their friends on the Security Council to block approval of the list of individuals that would be targeted).

Notwithstanding the absence of any assessment of the results that could be expected from carefully designed and monitored targeted sanctions, the Report should be of great value to busy diplomats when faced with the next call for targeted sanctions.

As with the two previous processes, the results of the Stockholm Process were presented to a closed meeting of the UN Security Council. The published report of that meeting[8] indicates that, although all the speakers expressed general approval of its recommendations, the Council took no formal action on the Process.

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II. Booknote

An important study of the Chemical Weapons Convention has recently come to our attention:

Jocelyn Clerckx, *la vérification de l'élimination de l'arme chimique – essai d'analyse et d'évaluation de la Convention de Paris du 13 janvier 1993*, Paris, Librairie générale de droit et de jurisprudence, 2001, 307 pp. ISBN 2.275.02047.0

The book offers a valuable summary, analysis and commentary mainly focused on the transparency obligations under the Chemical Weapons Convention. In the preface, Raymond Goy *professeur émérite de l'Université* de Rouen, alludes to the broad perspective taken by the author: *Il explique le droit par tout un constat extrajuridique; il discute, interprète, critique ce droit; il propose, outre diverses interprétations, un système de règlement juridictionnel; mais surtout, il compare, et évalue les comparaisons entre divers modes de vérification en droit du désarmement*.

The first two parts are largely analytical, whereas the third compares the powers of the OPCW with those of the IAEA and concludes that there is an important *disparité de fonction* between these two organizations. Professor Clerckx is particularly interesting in his treatment of the inspectors' rights of access (pages 116 to 138), a topic on which there are some unresolved disputes currently confronting the Executive Council of the OPCW.

Jocelyn Clerckx holds the degree of *docteur en droit* from *l'Université de Rouen*. Currently, he is lecturing at *the l'Université du Havre* with the position of *maître de conférences en droit publique*.

The book is fully annotated with an extensive bibliography, lacking only an index. There are no plans currently to publish an English translation. It is available in Canada through Librairie Champlain, Toronto, www.librairiechamplain.com. Approximately $110 (delivery six to eight weeks).

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III. Death Of Paul Szasz

The death of Paul Szasz on 30 April 2002 has only recently come to our attention. A valued member of the Markland Group's Committee of Occasional Consultants, Professor Szasz was for many years until 1966 the Legal and Safeguards Officer at the IAEA, after which he held various posts culminating in his position as Principal Legal Officer and Deputy to the Legal Counsel at the United Nations in New York. At various times, he was an adjunct professor or visiting fellow at several universities, including the New York University School of Law.

He was a valued consultant to the Markland Group, especially in matters relating to the need to strengthen the enforcement provisions of the NPT and the IAEA (a topic that seems likely to receive renewed attention in the coming months).

A detailed tribute can be seen in Cornell International Law Journal, Vol. 35, No. 3

[6] Richard Butler, The Greatest Threat (New York, Public Affairs, 2000) pp. 153 to 221
[7] S/RES1137 (12 November 1997)
[8] S/7672, 25 February 2003

(continued from page 13 - suite de page 13)

Appellate Body members would subsequently verify those nominations.[15] The candidates would then have to be confirmed by the General Council. An individual's name would remain on the roster for as long as five years with the possibility of an extension for another five years.

Additionally, Canada proposes that it would be the responsibility of the WTO Secretariat to decide who will join a particular panel based on the list of names included in the panel roster. Nevertheless, the WTO members would still be able to propose candidates from outside the roster. In case of disagreements on the composition of a particular panel, it would be up to the Director General to decide, within 15 days after the establishment of the panel (instead of 20 days under the current rule), on the final composition of the panel.[16] Canada also suggests that an increase in remuneration of panelists be introduced in order to provide an "adequate level of compensation" to the experts serving on panels.[17]

Comments

It is likely that the Canadian proposals, if implemented, will facilitate the selection of the right group of people for panels, and create "greater flexibility of both resources and representation".[18] In particular, the introduction of a strict–"one WTO member - one panelist" rule could have significant ramifications by strengthening the position of less prominent WTO members, which, at least in theory, would have the same input on the final list of panelists as the biggest trading nations. This approach could reinforce the multilateral aspect of the WTO system.

One of the reasons why the number of qualified panelists remains insufficient is the rule that in a particular dispute, the selected panelists must be citizens of non-disputing countries, unless the disputing countries agree otherwise.[19] Thus, another possible solution to this problem may involve disregarding the nationality of panelists. In order to secure the "objective" assessment of facts, it should simply be asserted that the selected panelists will be more representative of WTO members. The suggested reforms to the mechanism for selecting panelists probably have the greatest chance of being implemented as many WTO members appear to share the view that this change is needed.

Conclusions

Overall, the Canadian proposals provide a practical approach to the provisions of the DSU that reconciles the seemingly conflicting interests of protecting confidential information on the one hand and allowing more public scrutiny of WTO proceedings on the other. Nevertheless, it might be expected that any modifications to the existing formula of the DSU will be difficult as the negotiations in this round seem to be progressing at a very slow pace on all fronts.[20]

[15] It would include the Chairs of the WTO Councils on Goods, Services, TRIPS, the DSB and the General Council. In principle, the Director General would have to choose a candidate from the roster, unless he or she determines that there are not enough candidates with the required expertise. See Article 8.7 of the DSU, supra note 1.

[16] See Canadian proposal, supra note 4 at 5.

[17] However, one could argue that the proposed increases in remuneration of panelists will not contribute to the expected reduction of costs. See Canadian proposal, supra note 4 at 5.

[18] Article 8.2 of the DSU, supra note 1.

[20] See Heavy Workload in DSB Negotiating Session, Bridges Weekly Trade News Digest, Vol. 7, Number 4. See also Frances Williams, Tobias Buck, John Mason, "*Farm tariffs failure sparks Doha fears*", Financial Times published on 31 March 2003.

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