Canadian Practice in International Law / Pratique canadienne en matière de droit international

At Global Affairs Canada in 2016

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compiled by / préparé par
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Conventions de Genève — Loi sur les conventions de Genève — *Portée* — *Droit international coutumier*

Dans le mémoire du défendeur dans l'affaire *Turp c Canada (Affaires étrangères)*, 2017 CF 84, déposé le 28 octobre 2016, le Gouvernement du Canada a argumenté (renvois modifiés, mémoire en entier disponible sur requête à jlt@international.gc.ca):

F. La décision du Ministre est compatible avec la Loi sur les Conventions de Genève et les Conventions de Genève

…

a. L'article 1 s'applique seulement à l'égard des parties à un conflit armé international

2. Sauf certaines dispositions précises qui s'appliquent en temps de paix, les Conventions prévoient des obligations qui s'imposent aux États en temps de guerre, c'est-à-dire lorsqu'un État participe à un conflit armé. C'est d'ailleurs la compréhension qu'en avait le gouvernement canadien lorsque la LCG a été adoptée en 1964:

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> Mr Wershof: Senator, the purpose of the conventions is to operate *in wartime*. That is the hope, and that is the way they are worded, to operate *in wartime* and to act as a restraint on foreign governments *in time of war*.[1] (nos soulignés)

3. Comme l'explique le professeur Schmitt en référant abondamment à la pratique des États, l'article 1 commun aux Conventions impose des obligations aux États qui sont parties à un conflit armé international. Plus particulièrement, l'obligation « de faire respecter les conventions » prévue à l'article 1 impose aux États parties à un tel conflit l'obligation de voir à ce que toutes les personnes sous son contrôle, ce qui inclut sa population civile, respectent les règles prévues aux Conventions durant le conflit armé international auquel l'État est partie.[2]

4. Or, le seul conflit invoqué ici par le demandeur est le conflit au Yémen et le Canada n'est pas partie à ce conflit. En conséquence, l'article 1 ne s'applique pas.

5. Le demandeur se fonde uniquement sur des sources auxiliaires de droit international pour prétendre que l'article 1 impose aux États non-parties à un conflit armé international l'obligation de s'assurer du respect des conventions par les parties à ce conflit.[3] Fondamentalement, le demandeur et son expert occultent le fait que des commentaires doctrinaux ne sont pas une source primaire du droit international, contrairement à la pratique des États qui, elle, permet d'interpréter les termes d'un traité et d'établir (lorsqu'elle s'accompagne d'une *opinio juris*) les règles de droit international coutumier.[4]

6. Or, en l'espèce, la pratique des États est incompatible avec la description du DIH préconisée par le demandeur et son expert. Comme l'explique le professeur

[1] Canada, Sénat, Comité permanent des relations extérieures, Débats sur le Projet de loi S-25, "Loi concernant les Conventions de Genève," 26e lég, 2e sess (2 juin 1964) à la p 10.

[2] Dossier du défendeur, Affidavit de Michael Schmitt aux para 7(b)(c), 30–81; voir aussi F Kalshoven, "The Undertaking to Respect and Ensure Respect in All Circumstances: From Tiny Seed to Ripening Fruit" (1999) 2 YB Intl Hum L 3; A Robert, "The Laws of War: Problem of Interpretation in Contemporary Conflicts" (1995–96) 6 Duke J Comp & Intl L 11 aux pp 29–30; T Zych, "The Scope of the Obligation to Respect and Ensure Respect for International Humanitarian Law" (2009) 27 Windsor YB Access Justice 251; C Focarelli, "Common Article 1 to the Geneva Conventions: A Soap Bubble?" (2010) 21 EJIL 125.

[3] Ces sources, de la doctrine et un avis consultatif de la Cour internationale de Justice, n'ont pas de valeur contraignante. C Emmanuelli, *Droit international public*, 2e éd, Montréal, Wilson & Lafleur, 2004 aux para 363–64, 373; JM Arbour & G Parent, *Droit international public*, 6e éd, Québec, Les Éditions Yvon Blais, 2012 aux pp 64–66; *Statut de la Cour internationale de Justice*, 26 juin 1945, 33 RTNU 993, arts 38, 59.

[4] *Convention de Vienne sur le droit des traités*, 23 mai 1969, 1155 RTNU 331, art 31(3)(b) [*CVDT*]; *Hassan c Royaume-Uni*, CEDH 260 (2014) au para 101; *Bouzari v Iran* (2004), 71 OR (3d) 675 (CA) aux para 77–79; *Jones v Saudi Arabia*, [2006] UKHL 26 au para 27.

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Schmitt à la suite d'un examen approfondi de la question, il est clair que les États ne voient pas dans l'article 1 une obligation de réagir à chaque fois qu'un autre État enfreint les Conventions dans le cadre d'un conflit armé international auquel ils ne sont pas parties. D'ailleurs, si une telle règle existait, la plupart des États seraient constamment en violation de l'article 1 des Conventions.[5] Vu le poids qui doit être accordé à la pratique des États quant à l'interprétation d'une disposition d'un traité, l'interprétation du demandeur qui va à l'encontre de cette pratique doit être écartée[6] …

7. Au surplus, il appert que l'article 1 ne s'applique qu'à l'égard des conflits armés internationaux. Seul l'article 3 commun aux Conventions s'applique aux conflits armés non-internationaux. … Autre fait significatif, le Protocole additionnel no 2, qui vise exclusivement les conflits armés non-internationaux, ne comporte aucune disposition semblable à l'article 1, contrairement au Protocole additionnel no 1 qui vise les conflits armés internationaux. Comme il est indéniable que le conflit au Yémen est un conflit armé non-international, l'article 1 ne trouve pas application pour cette autre raison.

GENERAL PRINCIPLES OF INTERNATIONAL LAW

Res Judicata — *Issue Estoppel* — *Cause of Action Estoppel* — *Exceptions to Cause of Action Estoppel* — NAFTA *Chapter 11 Tribunal*

In the Rejoinder Memorial submission dated 16 December 2016 to the NAFTA Chapter 11 Tribunal in *Mobil Investments Canada v Canada*, ICSID Case no ARB/15/6, Canada argued (footnotes modified for greater clarity in this context; full submission available on request to jlt@international.gc.ca):

Res Judicata Is a General Principle of International Law Consisting of Cause of Action Estoppel and Issue Estoppel

It is a long-standing international legal principle that: "[A] judgment estops not only as to every ground of recovery or defense actually presented in the action, but also as to every ground which might have been presented … when applied to the demand or claim in controversy. Such demand, or claim, having passed into judgment, can not again be brought into litigation between the parties in proceedings at law, upon any ground whatever."[7]

[O]nce an award is rendered and a tribunal is *functus officio*, a claimant cannot again arbitrate for the same cause of action for which it was unable to marshal sufficient evidence to satisfy a tribunal the first time. NAFTA Chapter Eleven tribunals

[5] Dossier du défendeur, Affidavit de Michael Schmitt aux para 7(d)(e), 48–65.

[6] *CVDT*, *supra* note 4, art 31(3)(b); *Hassan*, *supra* note 4 au para 101.

[7] *Company General of the Orinoco Case*, (1905) 10 RIAA 184 at 278.

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do not have continuous and unlimited jurisdiction — they are limited in scope and mandate. This Tribunal must exercise *competence-competence* and determine for itself whether it has authority over this claim.

The rationale for the *res judicata* doctrine is founded on the Latin maxim, *nemo debet bis vexari pro una et eadem causa* ("no one should be proceeded against twice for the same cause").[8]

The "doctrine undoubtedly applies in all principal legal systems to prevent the same claimant bringing the same claim against the exact same respondent."[9] The International Law Association has observed that *res judicata* is "generally applied defensively, to stop a claimant bringing the same claim or seeking further relief."[10] In other words, the rule acts to ensure "that a final judgment rendered by a court of competent jurisdiction on the merits is conclusive as to the rights of the parties and their privies, and, as to them, constitutes an absolute bar to a subsequent action involving the same claim, demand or cause of action."[11] This prohibition on repeated litigation for identical claims is one of the most basic rules of adjudication and has deep roots in public international law.

This "absolute bar" to subsequent litigation involving the same claim, demand or cause of action applies whenever the "triple identity" test that was formulated by Judge Anzilotti in his dissent in the *Chorzow Factory* case … is satisfied. The test requires identity of parties, object and grounds of the claim. … [T]he test can also be more simply understood as requiring "identity of the parties and of the question at issue".[12] In practice, international arbitral tribunals have not required exact identity and "have barred claimants from raising closely related claims that they could have raised in an earlier arbitration."[13] … This is commonly referred to as claim or cause of action estoppel/preclusion. …

The *EC–India*, *Machado* and *Delgado* decisions stand for the rule that *res judicata* is an absolute bar to re-litigation of claims or causes of action on the merits. The mere fact that an arbitral tribunal did not make a decision on a specific issue or sub-issue relating to a claim or cause of action does not impair the operation of *res judicata* such that a claimant can commence another arbitration relying on the same underlying injury or cause of action and undecided issues. In *EC–India*, although the first Panel and Appellate Body dismissed the claim on a *prima facie*

[8] Committee on International Commercial Arbitration, "Interim Report: '*Res Judicata*' and Arbitration" in *Report of the Seventy-first Conference Held in Berlin* (London: International Law Association, 2004) at 829.

[9] *Ibid.*

[10] *Ibid.*

[11] August Reinisch, "The Use and Limits of *Res Judicata* and *Lis Pendens* as Procedural Tools to Avoid Conflicting Dispute Settlement Outcomes" (2004) 3:1 *Law & Practice of International Courts and Tribunals* 37 at 43, citing to *Black's Law Dictionary*, 6th ed (1990) at 1305.

[12] *Ibid* at 50, citing *In re SS Newchwang (Great Britain v United States)*, (1922) 16 AJIL 323 at 324.

[13] *Ibid* at 63.

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basis and not because India failed "ultimately to persuade the original [P]anel", India could not reassert its claim in subsequent proceedings. In *Delgado*, despite the fact that the first arbitration had been dismissed before a finding could be made on the underlying substantive issues and despite there having been neither a damages award nor an explicit finding of lack of liability, the second tribunal dismissed the second arbitration on the basis of *res judicata*. In *Machado*, even though damages were initially sought only for a specific time period, and subsequently, the claimant sought damages that were representative of a more permanent and wholesome loss, the second attempt to attain damages was barred.

By barring re-arbitration not only of those claims or causes of action that were actually raised in a prior arbitration, but also of all claims that could have been raised by the claimant in the prior arbitration, cause of action estoppel operates in harmony with the obligation of concentration, pursuant to which "where a given matter becomes the subject of litigation the parties are required to bring forward their whole case in the proceedings which ensue."[14] Parties "cannot pursue the same subject of litigation in later proceedings in respect of a matter which could and should have been brought forward in the earlier proceedings."[15] This reflects

[14] David AR Williams & Mark Tushingham, "The Application of the *Henderson v Henderson* Rule in International Arbitration" (2014) 26 Singapore Academy of Law Journal 1036 at 1036.

[15] *Ibid* at 1036. This obligation constitutes a key legal principle that is contained in a variety of domestic legal systems. The English Court of Chancery noted in *Henderson v Henderson*, (1843) 3 Hare 100 at 319: "The Court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The pleas of *res judicata* applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence might have brought forward at the time." This quote has since been cited with approval by both Canada's Supreme Court in *Maynard v Maynard*, [1951] SCR 346 at 358–59, and the High Court of Australia in *Port of Melbourne Authority v Anshun Pty Ltd*, [1981] HCA 45, para 22. Similarly, the US Supreme Court noted in *Allen v McCurry*, [1980] 449 US 90 at 94: "Under *res judicata*, a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action." The Supreme Court of France also "widened the scope of the *res judicata* effect of arbitral awards by precluding plaintiffs from raising new legal issues which they could have relied upon in the initial arbitration proceedings but which they failed to raise in a timely manner." Elie Kleiman, *Supreme Court Broadens Scope of Res Judicata* (Paris: Freshfields Bruckhaus Deringer, 2 October 2008) at 4. The Supreme Court of Sweden has confirmed that the preclusive effect of *res judicata* also "affects alternative and economically equivalent legal grounds and objections." Kaj Hober, "*Res Judicata* and *Lis Pendens* in National Law" (2014) 366 Collected Courses of the Hague Academy of International Law 137. The principle also exists in Singapore, Hong Kong, Malaysia, and New Zealand. Williams & Tushingham, *supra* note 14 at 1037.

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the basic principle that legal actions cannot be commenced repeatedly in relation to the same factual scenario.

The doctrine of *res judicata* in international law has only recently been accepted as encompassing a related but distinct concept referred to as "issue estoppel/preclusion" … Issue estoppel is generally recognized as a subset of the international law doctrine of *res judicata*.[16] However, rather than using distinct terms to refer to cause of action estoppel and issue estoppel as is commonplace across domestic legal systems, "[i]nternational courts and tribunals [have] not ordinarily deal[t] with issue preclusion explicitly, using only the terminology of *res judicata*."[17]

Issue estoppel stands for the distinct proposition that when "a right, question, or fact [is] distinctly put in issue, and directly determined by a court of competent jurisdiction as a ground of recovery[, it] cannot be disputed in a subsequent suit between the same parties…even if the second suit is for a different cause of action."[18] In other words, unlike cause of action estoppel, which bars re-arbitration of whole causes of actions and associated injuries, issue estoppel only bars re-arbitration of discrete issues or findings/determinations. The *Grynberg* tribunal stated the test for issue estoppel: "a finding [of a prior competent tribunal] concerning a right, question or fact may not be re-litigated (and, thus, is binding on a subsequent tribunal), if, in a prior proceeding: (a) it was distinctly put in issue; (b) the court or tribunal actually decided it; and (c) the resolution of the question was necessary to resolving the claims before that court or tribunal."[19] Issue estoppel "applies only with regard to issues that were actually determined by the international court or tribunal [and] [n]o preclusive effect attaches to issues raised in the proceedings but glossed over by the decision."[20]

Thus, prior arbitrations have preclusive effects on new arbitrations in two distinct ways: (i) the "triple identity" test is satisfied, which triggers cause of action estoppel, and (ii) the "triple identity" test is not satisfied, but one or more issues relevant to the claim was determined in a previous arbitration, which may trigger issue estoppel. … In other words, while cause of action estoppel has preclusive effects at the level of the cause of action or injury, issue estoppel has preclusive effects at the level of issues.

[16] *Rachel S Grynberg, Stephen M Grynberg, Miriam Z Grynberg and RSM Production Company v Grenada*, ICSID Case no ARB/10/6, Award (10 December 2010) at paras 7.1.8, 7.21 [*Grynberg*]; *Apotex Holdings Inc and Apotex Inc v United States of America*, ICSID Case no ARB/(AF)/12/1, Award (25 August 2014) at paras 7.23–7.32; Silja Schaffstein, *The Doctrine of Res Judicata Before International Arbitral Tribunals* (Oxford: Oxford University Press, 2016) at para 2.102; Vaughan Lowe, "*Res Judicata* and the Rule of Law in International Arbitration" (1996) 8 Afr J Intl & Comp L 38 at 41–42.

[17] Schaffstein, *supra* note 16 at para 2.101.

[18] *Grynberg*, *supra* note 16 at para 7.1.3.

[19] Claimant's Reply Memorial at para 100, citing *Grynberg*, *supra* note 16 at para 7.1.1.

[20] Schaffstein, *supra* note 16 at para 2.101.

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Exceptions to Cause of Action Estoppel

Although there is support in public international law for the notion that claims and causes of action are not barred from re-arbitration by *res judicata* when previously dismissed on the basis of jurisdiction or admissibility, it is entirely novel for the Claimant to argue that *res judicata* does not bar re-arbitration when a previous tribunal decided it had jurisdiction over the parties and the subject matter and also found the specific claim to be admissible.

The word "ripe" has been used by some tribunals in discussions surrounding jurisdiction and admissibility to explain findings.[21] When linked directly to jurisdiction or admissibility of a claim, "ripeness" may be relevant to a *res judicata* analysis. However, "ripeness" issues relating to evidentiary matters are unrelated to the suitability of a claim for arbitration and have not been regarded as a distinct legal term that acts as a stand-alone or separate bar to the operation of *res judicata* by any international law court or tribunal.

This is not surprising because when an adjudicative body has jurisdiction over the parties and the subject matter, and finds the specific claims before it admissible, decisions on the merits naturally follow.[22]

In sum, when a previous tribunal decided it had jurisdiction over the parties and the subject matter and also found the specific claim before the second tribunal to be admissible, cause of action estoppel fully operates and the second tribunal is not permitted to make yet another decision on the merits.

[21] Eg, the Award in *Ickale Insaat Limited Sirketi v Turkmenistan*, ICSID Case no ARB/10/24, Award (8 March 2016) at para 242 states: "A claim that has not been first submitted to local courts may be said to be inadmissible before an international tribunal on grounds that it is not yet ripe for such submission as all the required procedural steps have not yet been taken." Further, the award in *Mr Franck Charles Arif v Republic of Moldova*, ICSID Case no ARB/11/23, Award (8 April 2013) at para 348 states: "[T]he Tribunal finds that Mr. Arif's claims for complete expropriation and breach of specific undertakings regarding the border duty free stores are jurisdictionally ripe for arbitration." See also *Glamis Gold, Ltd v United States of America* (UNCITRAL), Final Award (8 June 2009) at para 328; *Achmea BV v Slovak Republic [II]* (UNCITRAL), Award on Jurisdiction and Admissibility (20 May 2014) at paras 235–36, where tribunals used the term ripeness in relation to the question of jurisdiction; *Hochtief AG v Argentine Republic*, ICSID Case no ARB/07/31, Decision on Liability (29 December 2014) at para 206, where a tribunal used the term ripeness in relation [to] the question of admissibility.

[22] As stated by the *Vivendi* annulment tribunal: "It is settled … that an ICSID tribunal commits an excess of powers not only if it exercises a jurisdiction which it does not have under the relevant agreement or treaty and the ICSID Convention, read together, but also if it fails to exercise a jurisdiction which it possesses under those instruments. … [T]he failure by a tribunal to exercise a jurisdiction given it by the ICSID Convention and a BIT, in circumstances where the outcome of the inquiry is affected as a result, amounts in the Committee's view to a manifest excess of powers." See *Compañia de Aguas del Aconquija SA and Vivendi Universal SA v Argentine Republic*, ICSID Case no ARB/97/3, Decision on Annulment (3 July 2002) at para 86.

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IMMUNITIES

International Organizations — Disputes of a Private Character — State-owned Cultural Property on Loan — Special Missions

On 8 September 2016, the Legal Bureau provided materials for the Council of Europe's Committee of Legal Advisers on Public International Law (CAHDI) (see further <http://www.coe.int/en/web/cahdi>) concerning the settlement of disputes of a private character to which an international organization is a party, the immunity of state-owned cultural property on loan, and the immunities of special missions:

Settlement of disputes of a private character to which an international organization is a party

Canadian courts have recognized that immunity is essential to the efficient functioning of international organizations (IOs), acknowledging that without immunity, an IO would be vulnerable to intrusions into its operations by the host state and that state's courts. Courts have therefore upheld the immunities of IOs.

In cases involving disputes of a private character to which an IO is a party, Canadian courts conduct a contextual analysis to determine the specific scope of immunity enjoyed by that organization. In some instances, Canadian courts have provided remedies to litigants by finding that an activity falls outside the scope of the immunity enjoyed by the IO. Where the scope of immunity enjoyed by an IO is broad, Canadian courts have held that while it is unfortunate that a litigant may not have a forum in which to seek a remedy, it is the nature of immunities to shield certain matters from the jurisdiction of the host state's courts.

Cases in Canada have tended to arise in the employment context. In *Amaratunga v. Northwest Atlantic Fisheries Organization*, [2013 SCC 66, [2013] 3 SCR 866,] for example, a former senior employee of NAFO sought damages for, *inter alia*, breach of his employment contract for wrongful dismissal. NAFO claimed immunity under the *Northwest Atlantic Fisheries Organization Privileges and Immunities Order*, SOR/80-64, which grants NAFO immunities "to such extent as may be required for the performance of its functions". The Supreme Court of Canada found that the Order granted NAFO "a functional immunity … [which was] required to enable NAFO to perform its functions without undue interference" [para 49]. The Court ruled that to permit Amaratunga's claim, which asked the Nova Scotia Supreme Court to pass judgment on NAFO's management of its employees, would constitute undue interference with NAFO's internal management.

Other employment-related cases in Canada include *Trempe c. Association du personnel de l'OACI*, [Nos 500-05-061028-005 and 500-05-063492-09,] where the Superior Court of Quebec (as confirmed by the Court of Appeal [in *Trempe c. Canada*, 2005 QCCA 1031]) found that the International Civil Aviation Organization (ICAO) enjoyed almost absolute immunity from the jurisdiction of Canadian courts under its Headquarters Agreement with Canada, with the only exception being where ICAO was involved in a commercial activity and

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had not provided for modes of settling disputes, and *Institut de l'énergie et de l'environnement de la francophonie c. Kouo*, [2006 QCCA 50], where the Quebec Court of Appeal held that the Institut enjoyed immunity from the jurisdiction of Canadian courts under the *Organisation internationale de la Francophonie and the Institut de l'énergie et de l'environnement de la Francophonie Privileges and Immunities Order*, [SOR/88-574].

It has not been Canada's experience that further initiatives are required to strengthen the settlement of private disputes to which an IO is a party.

With respect to taking [other] possible measures … regarding the settlement of private claims in UN peace operations, should such steps be contemplated, it would be important to ensure that they do not fundamentally compromise the ability of the UN to carry out its mandate. Any such measures must be in compliance with the UN Charter, including Article 105, which stipulates that the UN shall enjoy in the territory of each of its members such privileges and immunities as are necessary for the fulfilment of its purposes, and with the *Convention on the Privileges and Immunities of the United Nations*.

Finally, it would be important to question whether an IO can effectively be sanctioned separately from the countries carrying out the UN peace operation, in the sense that the UN levies funds through contributions by member states. It would also be essential to consider that the potential increase in exposure to claims and/or claims resulting in large or numerous compensation awards could impact the UN's funding, and its willingness and ability to operate. It would be essential to consider the possibility of the unintended result that the UN would avoid engaging in peace operations when it could not meet a certain elevated standard of care or level of due diligence. There could in particular be an impact on the ability and willingness of the UN to undertake higher risk operations in areas where it may nevertheless have an important role to play.

Immunity of State-owned cultural property on loan

The doctrine of state immunity has historically enjoyed broad support under Canadian law. Under section 12 (1)(d) of the *State Immunity Act* (SIA), [RSC 1985, c S-18], the property of a foreign state that is located in Canada is immune from attachment and execution, and in the case of an action *in rem*, is immune from arrest, detention, seizure and forfeiture. However, the 2012 *Justice for Victims of Terrorism Act*, [SC 2012, c 1, s 2], amended the SIA such that state immunity no longer applies to claims related to acts of terrorism against states listed by Canada as supporters of terrorism. …

The SIA contemplated the application of the terrorism exception, and explicitly provides that state-owned cultural and historic property that is located in Canada will continue to enjoy protection. Thus, although foreign state property may be subject to the jurisdiction of Canadian courts in the context of terrorism-related claims, even in those cases cultural property on loan would remain protected.

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It should also be noted that under section 12(2) of the *State Immunity Act*, the property of an agency of a foreign state does not enjoy immunity from attachment, execution, arrest, detention, seizure or forfeiture. This would include any legal entity that is an organ of the foreign state but that is separate from the foreign state itself. There is no exception for cultural or historic property owned by that agency. Thus, it appears that cultural property owned by the separate agency of a foreign state, potentially including a state museum, may not enjoy the same protection.

Immunities of special missions

Canada … is not a signatory or a party to the 1969 *UN Convention on Special Missions*, it does not have national legislation addressing the immunities of special missions, and it has not formulated a comprehensive position with respect to the immunities of special missions. In general, however, to the extent that immunities of special missions exist under customary international law, they are present within Canada. It would rest with the courts to determine the extent of any such immunity, although the Government would likely assert a role for the executive in determining whether it had consented to the presence of a special mission in the first place.

Special Envoys – Doctrine of State Immunity

On 17 October 2016, the Legal Bureau wrote, in response to a question concerning the immunities of special envoys:

It would be safe to conclude that special envoys [appointed by Canada] would at least benefit from immunity from jurisdiction similar to that accorded to Canada as a state; that is, official acts of the special envoy performed in the exercise of their functions would be immune from the jurisdiction of the receiving state, under the doctrine of state immunity. State immunity in Canada is limited in certain circumstances, such as in the case of death or personal [or] bodily injury, or damage to or loss of property (*State Immunity Act*, RSC 1985, c S-18, s 6), so it would be fair to expect similar limitations on jurisdictional immunity if the special envoy does something overseas resulting in any of the above. The special envoy would not have any other privileges and immunities, such as those enjoyed by diplomatic agents.

LAW OF THE SEA

United Nations Convention on the Law of the Sea (UNCLOS) — *Article 83(3) — Provisional Arrangements in Overlapping Areas of the Continental Shelf — Commission for the Limits of the Continental Shelf*

In 2016, the Legal Bureau advised:

Under Article 83(1) of UNCLOS, there exists an obligation for states to delimit an overlapping continental shelf by agreement on the basis of international law to

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achieve an equitable solution. Article 83(3) obligates states, pending such agreement and in a spirit of understanding and cooperation, to "make every effort to enter into provisional arrangements of a practical nature and … not to jeopardize or hamper the reaching of a final agreement". Such arrangements are without prejudice to the final delimitation (i.e. activities included in a provision arrangement cannot create acquired rights in the area or regarding its resources). There is nothing in the Article suggesting that such provisional arrangements cannot be entered into even before coastal states start to negotiate a final delimitation agreement, and in fact, there is some state practice in this regard. Normally, the obligation in Article 83(3) would form when the existence of overlapping claims becomes apparent, after neighbouring and/or adjacent coastal states have filed submissions with the Commission for the Limits of the Continental Shelf or have otherwise defined and made public the outer limits of their continental shelves.

The purpose of Article 83(3) is to further the provisional use of the area to be delimited. There are a number of elements that could be included in provisional arrangements relating to areas of overlapping extended continental shelf, bearing in mind that the content should remain of a practical nature (i.e. providing practical solutions to actual or foreseeable problems regarding the use of an area) and not touch upon the delimitation issue itself:

- Types of allowable and restricted activities;
- Joint activities (e.g. joint research, joint development of resources);
- Understandings/procedures related to Marine Scientific Research (MSR);
- Resource conservation, environmental cooperation, strategic environmental assessment;
- Notification and reporting; and
- Information sharing.

TREATY LAW

Treaty Obligations — Treaty Interpretation — Unilateral Declarations — Unilateral Interpretive Declarations — Reservations — Legal Effect

In the context of advice provided in 2016, the Trade Law Bureau provided some analysis of the legal effect of unilateral declarations at international law, noting that (footnotes modified for greater clarity in this context):

Article 31(2)(b) [of the *Vienna Convention on the Law of Treaties*] contemplates that certain unilateral declarations may form part of the interpretative context of a provision. For this to be the case the declaration must not only be in connection with the conclusion of the treaty but it must also have been "accepted by the other parties as an instrument related to the treaty".

The issue of unilateral declarations and reservations to treaties, [including] the distinction between the two, form requirements, legal effect, and responses, was considered by the International Law Commission (ILC). The ILC ultimately

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adopted a Guide to Practice on Reservations to Treaties, including guidelines and a detailed commentary thereto.[23]

The Guide defines a unilateral interpretative declaration as a "unilateral statement, however phrased or named, made by a State … whereby that State … purports to specify or clarify the meaning or scope attributed to a treaty or to certain of its provisions" [guiding principle 1.2]. A reservation, for its part, is defined as "a unilateral statement, however phrased or named, made by a State … when signing, ratifying, formally confirming, accepting, approving or acceding to a treaty … whereby the State … purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State …" [guiding principle 1.1]. In order to distinguish between the two, one looks to the "legal effect that its author purports to produce" [guiding principle 1.3.1], which can be derived by the terms of the statement.

An interpretative declaration does not modify treaty obligations.[24] It may only specify or clarify the meaning or scope that its author attributes to a treaty or to certain provisions and may, as appropriate, constitute an element to be taken into account in interpreting the treaty in accordance with the general rule of interpretation of treaties. In interpreting the treaty, account shall also be taken, as appropriate, of the approval of, or opposition to, the interpretative declaration, by other contracting states [guiding principle 4.7.1].

In reaction to an interpretative declaration in respect of a treaty formulated by a state, the other contracting states may "oppose" the interpretative declaration by making a unilateral statement disagreeing with the interpretation formulated in the interpretative declaration, including by formulating an alternative interpretation [guiding principle 2.9.9.2].

Contrary to the case of reservations (for which there can be tacit approval of the reservation if no objection is formulated, usually within a period of 12 months), approval or opposition to, an interpretative declaration shall not be presumed [guiding principle 2.9.8]. An approval of an interpretative declaration or an opposition thereto may be inferred, in exceptional cases, from the conduct of the states taking into account all relevant circumstances [guiding principle 2.9.9]. Aust, in *Modern Treaty Law and Practice* [(Cambridge: Cambridge University Press, 2000) at 103], recognizes the possibility of tacit acceptance in certain circumstances. That being said, silence by a state alone cannot be taken to suggest that the unilateral declaration was accepted. Indeed silence is a common reaction to a unilateral interpretative declaration and it can express either

[23] International Law Commission (ILC), *Guide to Practice on Reservations to Treaties*, UN Doc A/66/10/Add.1 (2011). The UN General Assembly took note of the *Guide to Practice* in Resolution 68/111 (16 December 2013).

[24] In a situation where an interpretative declaration purports, in fact, to exclude or to modify the legal effect of certain provisions of the treaty or of the treaty as a whole with respect to certain specific aspects in their application to its author, it is not an interpretative declaration but a reservation, which should be treated as such and must therefore meet the conditions for the permissibility and formal validity of reservations.

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agreement or disagreement with the proposed interpretation. As the [ILC's] commentary aptly notes:

> States may consider it unnecessary to respond to an interpretative declaration because they share the view expressed therein, or they may feel that the interpretation is erroneous but that there is no point in saying so since, in any event, the interpretation would not, in their view, be upheld by an impartial third party in case of a dispute. It is impossible to determine which of these two hypotheses is correct.[25]

Where a unilateral declaration has not been accepted by the other treaty parties, it will have a relatively limited interpretative value. In *European Communities – Customs Classification of Certain Computer Equipment*,[26] the WTO Appellate Body noted:

> The purpose of treaty interpretation under Article 31 of the Vienna Convention is to ascertain the common intentions of the parties. These common intentions cannot be ascertained on the basis of the subjective and unilaterally determined "expectations" of one of the parties to a treaty.

Nonetheless, although such interpretative declarations do not fall under Articles 31 and 32 of the Vienna Convention, they still constitute the (unilateral) expression of the intention of one of the parties to the treaty and may play an auxiliary role in the process of interpretation. For example, such unilateral declarations have been used by the International Court of Justice to corroborate a conclusion as to the interpretation of a provision reached through the application of Articles 31 and 32 of the Vienna Convention.[27] …

There is no guarantee that a Tribunal would agree with an interpretation put forward by a party in a unilateral declaration. If the Tribunal reaches a different interpretation, such declarations cannot be used to justify a breach of the Agreement. The fact of proposing an interpretation [that] is not in accordance with the provisions of the treaty in no way changes the position of its author with regard to

[25] ILC, *supra* note 23 at 328.

[26] *European Communities – Customs Classification of Certain Computer Equipment*, WTO Doc WT/DS62-67-68/AB/R (Decision, 5 June 1998) at para 84.

[27] In its advisory opinion on the *International Status of South-West Africa*, [1950] ICJ Rep 128 at 135–36, the International Court of Justice noted, on the subject of the declarations of the Union of South Africa regarding its international obligations under the Mandate: "These declarations constitute recognition by the Union Government of the continuance of its obligations under the Mandate and not a mere indication of the future conduct of that Government. Interpretations placed upon legal instruments by the parties to them, though not conclusive as to their meaning, have considerable probative value when they contain recognition by a party of its own obligations under an instrument. In this case the declarations of the Union of South Africa support the conclusions already reached by the Court."

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the treaty, who remains bound by it and must respect it.[28] This is reflected in the dictum of the European Commission of Human Rights in the *Belilos* case, in which the Commission held that an interpretative declaration "may be taken into account when an article of the Convention is being interpreted; but if the Commission or the Court reached a different interpretation, the State concerned would be bound by that interpretation."[29] In other words, a state may not escape the risk of violating its international obligations by basing its conduct on an interpretation that it put forward unilaterally.

[28] DM McRae, "The Legal Effect of Interpretative Declarations" (1978) BYBIL 156 at 160: "The State has simply indicated its view of the interpretation of the treaty, which may or may not be the one that will be accepted in any arbitral or judicial proceedings. In offering this interpretation the State has not ruled out subsequent interpretative proceedings nor has it ruled out the possibility that its interpretation will be rejected. Provided, therefore, that the State making the reservation still contemplates an ultimate official interpretation that could be at variance with its own view, there is no reason for treating the interpretative declaration in the same way as an attempt to modify or to vary the treaty."

[29] *Belilos v Swtizerland*, Appl no 10328/83 (7 May 1986) at para 102 (Eur Comm Hum Rts).

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