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CIVIL AVIATION

Convention on International Civil Aviation — Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation — *State Responsibility* — *Dispute Settlement* — *State-to-state Negotiation* — *International Court of Justice*

In December 2020, the Legal Bureau provided, in English and French, the following review of the international legal framework on international civil aviation for inclusion in the report entitled *Flight PS752: The Long Road to Transparency, Accountability and Justice*, by the Honourable Ralph Goodale, Special Advisor to the Prime Minister:[1]

The International Legal Framework

International law

International law is largely based on the principles of sovereignty and the equality of states. From these principles stem the concepts of exclusive state jurisdiction over a

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[1] The full report is available online: <https://www.international.gc.ca/gac-amc/publications/flight-vol-ps752/>.

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territory and the people living in that territory. With certain exceptions, these principles also impose a duty on states not to intervene in the area of exclusive jurisdiction of another state. Generally, a state must consent to the rules that it will be bound by, whether explicitly through treaties or implicitly through state practice. Of course, all states are bound by peremptory norms. These concepts place limits on the rights of a state to take action against another state. They also explain why international courts and tribunals do not have automatic and general jurisdiction over states.

State responsibility

The breach by a state of a legal obligation contained in a treaty or convention is an internationally wrongful act. As a matter of customary international law, a state that has committed an internationally wrongful act is generally required to make reparations to the injured state(s). Reparations may include a public acknowledgment of wrongdoing on the part of the offending state, an official and public apology, the punishment of the individuals responsible, assurances of non-repetition — including the steps taken to prevent a recurrence — compensation, restitution and any other form of satisfaction. Depending on the nature of the internationally wrongful act, states can resort to various means to ensure that an offending state is held accountable and makes full reparations to the affected states. Typically, states use state-to-state negotiations. However, if negotiations fail, a state may have recourse to dispute settlement mechanisms. Depending on the nature of the internationally wrongful act, these may include referring the dispute to international courts and tribunals or to international bodies, resorting to mediation or arbitration, or to the good offices of a neutral state.

***Convention on International Civil Aviation* (also known as the *Chicago Convention*)**

The *Chicago Convention* (which dates back to 1944) sets out the rules for international civil aviation. It contains legal obligations owed to all contracting states, including the prohibition on the use of weapons against civil aircraft in flight. Annex 13 to the *Chicago Convention* establishes the standards and recommended practices relevant to aircraft accident and incident investigations. A dispute arising from the interpretation or application of the *Chicago Convention* can be referred to the Council of the International Civil Aviation Organization (ICAO). States must first attempt to settle the matter through negotiations before the ICAO Council has jurisdiction to make a decision regarding the dispute. Parties may appeal this decision to the International Court of Justice (ICJ).

***Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation* (also known as the *Montreal Convention 1971*)**

The *Montreal Convention 1971* requires states to prohibit, prevent and punish certain offences against civil aviation, including the destruction of an aircraft in service. States also have international obligations to prosecute or extradite any person

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alleged to have committed an offence against civil aviation and report to the ICAO Council, as promptly as possible, any relevant information in its possession, including the circumstances of any offence against civil aviation. States are also under an obligation to endeavour to take all practicable measures for the purpose of preventing the offences mentioned in Article 1 of this Convention. The Convention also contains a provision that requires all disputes related to the interpretation or application of this treaty to be settled first through negotiation then through arbitration. If the parties cannot agree on the organization of the arbitration within 6 months, the dispute may be referred to the ICJ.

State-to-state negotiation

In the context of the aviation treaties mentioned above, state-to-state negotiation is not only the leading method to hold an offending state accountable and ensure it makes full reparations for its internationally wrongful act, but it is a necessary first step toward any legally binding remedy in the case of a dispute. It is a condition precedent to submitting the matter to the ICAO Council or the ICJ. Historically, states have prioritized state-to-state negotiation on reparations in the case of the destruction of a civilian aircraft as it is considered the most effective mechanism to settle such matters between states.

International Court of Justice

The ICJ is a forum for settling state-to-state disputes. The ICJ addresses state-level violations of international law and does not exercise criminal jurisdiction over individuals. The Court can only settle a dispute when the states concerned have recognized its jurisdiction, either generally or as a party to a treaty that gives the ICJ jurisdiction to settle disputes within that treaty. The *Chicago Convention* and the *Montreal Convention 1971* contain a dispute-resolution-mechanism provision that gives jurisdiction to the ICJ. However, as stated above, this jurisdiction may only be exercised after other measures have failed to settle the matter: negotiation and submission to the ICAO Council in the case of the *Chicago Convention*; negotiation and arbitration in the case of the *Montreal Convention 1971*.

Other relevant treaties

The *Montreal Convention 1999* and the *Warsaw Convention* relate exclusively to the compensation owed by airlines to passengers and do not involve state responsibility or compensation for damage to passengers owed as a result of an internationally wrongful act of a state.

Cadre juridique international

Droit international

Le droit international est en grande partie fondé sur les principes de souveraineté et d'égalité des États. De ces principes émanent les concepts de compétence étatique

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exclusive sur un territoire et sur les personnes qui y demeurent. Outre certaines exceptions, ces principes imposent également aux États un devoir de ne pas intervenir dans un territoire sous la compétence exclusive d'un autre État. Généralement, un État doit accepter les règles auxquelles il sera lié, que ce soit explicitement par des traités ou implicitement par ses pratiques. Évidemment, tous les États sont liés par des normes impératives. Ces concepts établissent les limites des droits d'un État de prendre des mesures contre un autre État. Ils expliquent également pourquoi les cours et tribunaux internationaux n'ont pas un pouvoir automatique et général sur les États.

Responsabilité des États

La violation, par un État, d'une obligation légale contenue dans un traité ou une convention constitue un fait internationalement illicite. En application du droit coutumier international, un État qui se rend coupable d'un fait internationalement illicite se trouve généralement dans l'obligation de réparer les préjudices auprès de l'État lésé ou des États lésés. Les réparations peuvent comprendre une reconnaissance publique du méfait par l'État fautif; des excuses officielles et publiques; la punition des responsables; une assurance de non-répétition, notamment en précisant les mesures prises pour prévenir la récidive; une indemnisation; la restitution; toute autre forme de réparation qui procure satisfaction. Selon la nature du fait internationalement illicite, les États peuvent avoir recours à divers moyens pour garantir qu'un État fautif est tenu pour responsable et procure une réparation complète aux États lésés. En règle générale, les États font appel à un processus de négociation entre États. Toutefois, advenant l'échec des négociations, un État peut opter pour des mécanismes de règlement des différends. Selon la nature du fait internationalement illicite, il peut s'agir de porter le différend devant les cours et tribunaux internationaux ou les organismes internationaux, d'avoir recours à un processus de médiation ou d'arbitrage, ou de demander les bons offices d'un État neutre.

***Convention relative à l'Aviation civile internationale* (aussi appelée *Convention de Chicago*)**

La *Convention de Chicago* (qui remonte à 1944) établit les règles qui encadrent l'aviation civile internationale. Elle contient des obligations juridiques applicables à tous les États contractants, notamment l'interdiction de faire usage d'armes contre des aéronefs civils en vol. L'annexe 13 de la *Convention de Chicago* établit les normes et pratiques recommandées pour ce qui est des enquêtes sur les accidents et les incidents impliquant des aéronefs. Tout différend découlant de l'interprétation ou de l'application de la *Convention de Chicago* peut être soumis au Conseil de l'Organisation de l'aviation civile internationale (OACI). Toutefois, les États doivent d'abord tenter de résoudre le différend au moyen de négociations avant que le Conseil de l'OACI dispose de la compétence nécessaire pour rendre une décision au sujet du différend. Les parties peuvent en outre interjeter appel de cette décision devant la Cour internationale de Justice (CIJ).

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***Convention pour la répression d'actes illicites dirigés contre la sécurité de l'aviation civile* (aussi appelée la *Convention de Montréal de 1971*)**

La *Convention de Montréal de 1971* exige que les États interdisent, préviennent et punissent certaines infractions contre l'aviation civile, y compris la destruction d'un aéronef en service. De plus, les États sont soumis à des obligations internationales visant la poursuite ou l'extradition de toute personne présumée avoir commis un délit contre l'aviation civile, et le signalement au Conseil de l'OACI, aussi rapidement que possible, de tout renseignement pertinent en leur possession, notamment les circonstances de tout délit contre l'aviation civile. En outre, les États sont tenus de prendre toutes les mesures possibles pour prévenir les infractions mentionnées à l'article 1 de la Convention. Finalement, cette Convention contient une disposition qui exige que tous les différends associés à l'interprétation ou à l'application de ce traité soient réglés d'abord au moyen de négociations, ensuite par arbitrage. Si les parties ne peuvent s'entendre sur l'organisation de l'arbitrage dans les six mois, le différend peut alors être soumis à la CIJ.

Négociations entre États

Dans le contexte des traités sur l'aviation mentionnés précédemment, les négociations entre États, en plus d'être la méthode privilégiée pour tenir un État fautif responsable de ses actes et veiller à ce qu'il assure la réparation complète de son fait internationalement illicite, constituent la première étape nécessaire pour obtenir tout règlement juridiquement contraignant en cas de différend. Il s'agit d'une condition qui doit précéder toute demande au Conseil de l'OACI ou à la CIJ. Par le passé, les États ont accordé la priorité aux négociations entre États pour l'établissement des réparations dans les cas de destruction d'aéronefs civils, puisque ce mécanisme est considéré comme le plus efficace pour le règlement de telles questions interétatiques.

Cour internationale de Justice

La CIJ constitue un forum pour régler les différends entre États. La CIJ gère les violations du droit international perpétrées par les États et n'exerce aucune compétence pénale sur les personnes. La Cour peut uniquement régler les différends lorsque les États concernés ont reconnu sa compétence, soit de façon générale ou en qualité de parties d'un traité qui accorde à la CIJ le pouvoir de régler les différends qui en découlent. La *Convention de Chicago* et la *Convention de Montréal de 1971* contiennent une disposition sur les mécanismes de règlement des différends qui confère la compétence voulue à la CIJ. Toutefois, comme il a été indiqué précédemment, cette compétence ne peut être exercée qu'après l'échec d'autres mesures : des négociations et la présentation d'une demande au Conseil de l'OACI dans le cas de la *Convention de Chicago*; des négociations et un processus d'arbitrage dans le cas de la *Convention de Montréal de 1971*.

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Autres traités pertinents

La *Convention de Montréal de 1999* et la *Convention de Varsovie* concernent exclusivement l'indemnisation due aux passagers par les transporteurs aériens et ne traitent pas de la responsabilité des États ou de l'indemnisation à verser pour les dommages aux passagers découlant du fait internationalement illicite d'un État.

DIPLOMATIC LAW

COVID-19 — Public Health Measures — Privileges and Immunities — Vienna Convention on Diplomatic Relations — Vienna Convention on Consular Relations

In 2020, the Legal Bureau wrote, in English and French:

Privileges and Immunities and Mandatory Public Health Measures to Reduce the Transmission of COVID-19

Over the course of 2020, States around the world implemented travel prohibitions and other public health measures aimed at reducing the transmission of COVID-19. The pandemic prompted unprecedented restrictions on the movement of people, both between and within States. From mid-March until the end of December, the Legal Bureau provided legal advice on the diplomatic law implications of mandatory public health measures introduced in more than 100 States where Canada has a foreign mission.

Many of these public health measures engaged the privileges and immunities of the members of Canada's missions abroad and their families under the *Vienna Convention on Diplomatic Relations*, the *Vienna Convention on Consular Relations,* and various instruments governing the privileges and immunities of international organizations. Mindful of the global public health risk posed by COVID-19 and the duty of those enjoying privileges and immunities to respect local law enshrined in both *Vienna Conventions*, Canada recommended that all members of its missions abroad and their families — regardless of their individual privileges and immunities — voluntarily submit to minimally invasive public health screening measures, comply with reasonable movement restrictions, and quarantine or isolate in their own residences in accordance with local public health directives in their countries of accreditation. In all cases, Canada asserted that voluntary compliance with public health measures was without prejudice to an individual's privileges and immunities and that only Canada, as the sending State, has authority to waive those privileges and immunities.

Canada's approach to the three most common types of public health measures relevant to its missions abroad was guided by the advice of the Legal Bureau and is generally described below:

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- Movement Restrictions: Many receiving States implemented lockdowns or stay at home orders that were inconsistent with the freedom of movement guaranteed to members of a diplomatic mission under Article 26 of the *Vienna Convention on Diplomatic Relations*. If these measures unreasonably infringed the ability of its missions to carry out their diplomatic functions, Canada's practice was to protest the imposition of these measures to the receiving State. The Legal Bureau advised that a requirement to carry an attestation to justify movement would be considered a reasonable movement restriction.
- Quarantine/Isolation: Most receiving States imposed quarantine requirements on arriving travellers. Canada required all members of its missions abroad and their families to voluntarily quarantine at their home in their receiving State following international travel for at least 14 days in accordance with the recommendations of the Public Health Agency of Canada, even if quarantine was not required by public health directives in their country of accreditation. The Legal Bureau considered that any requirement to quarantine in a government designated facility would be considered a detention and would violate the immunity from any form of detention enjoyed by many members of Canada's missions abroad and their families under the applicable international legal instruments. Canada's practice was to protest any attempt by a receiving State to impose quarantine away from the personal residence of the members of its mission as a violation of this immunity.
- COVID-19 Testing: Many receiving States implemented COVID-19 testing requirements for incoming travellers. Often travellers were required to provide proof of a recent negative COVID-19 test before boarding a flight bound for a particular State and/or were required to submit to COVID-19 testing upon arrival. The Legal Bureau advised that a requirement to produce a negative COVID-19 test as a condition of entry into a receiving State was not a violation of the privileges and immunities of the members of Canada's missions abroad. The Legal Bureau further advised that a requirement to submit to COVID-19 testing on arrival in a country of accreditation would be contrary to the inviolability of the person enjoyed by members of Canada's diplomatic missions and their families under Article 29 of the *Vienna Convention on Diplomatic Relations*. Canada however authorized members of its diplomatic missions and their families to voluntarily submit to COVID-19 testing (administered either by throat or nasal swab) at points of entry, provided it had the assurance of the relevant Ministry of Foreign Affairs that travellers could then proceed to their private residence and remain there for the quarantine period, and that, in the event of a positive COVID-19 test result, they would be permitted to isolate in their private residence and only seek medical treatment if required and on a purely voluntary basis.

When faced with receiving State public health measures inconsistent with the privileges and immunities of its missions and their staff, Canada's practice was to protest the application of those measures and seek the assurances of the receiving State that the privileges and immunities of the members of its missions and their

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families would be respected. These protests were conveyed by diplomatic note sent from the Canadian Embassy or High Commission to the Ministry of Foreign Affairs of the receiving State. Examples of our representations concerning such public health measures follow. …

Extracts:

The [Canadian Embassy/High Commission mission] presents its compliments to the [Ministry of Foreign Affairs of the receiving State] and has the honour to remind the Ministry of [receiving State]'s obligations under the Vienna Convention on Diplomatic Relations (VCDR). The [Embassy/High Commission] acknowledges the seriousness of the COVID-19 pandemic and appreciates the efforts of [receiving State] to prevent the spread of the virus. …

However, the [Embassy/High Commission] notes with concern that the imposition of certain public health measures on diplomatic staff and their family members violates their privileges and immunities and is inconsistent with the obligations of [receiving State] under the VCDR. In particular, diplomats and their families enjoy personal inviolability and immunity from arrest and detention per Articles 29 and 37 of the VCDR, and cannot be compelled to submit to medical testing or subjected to detention or quarantine orders anywhere in [receiving State] unless an express waiver of their immunity is provided by Canada. …

The [Embassy/High Commission] assures the [Ministry] that it expects the members of its mission and their families to voluntarily comply with non-invasive public health screening measures, appropriate movement restrictions and to self-isolate in accordance with public health directives. Global Affairs Canada's Office of Protocol has informed foreign missions in Canada that it has the same expectations for foreign representatives and their family members in Canada. Foreign missions have been advised that a waiver of immunity will be sought if a situation arises requiring compliance with a recommended public health measure that would infringe on the privileges and immunities of a foreign representative or family member in Canada. …

The [Embassy/High Commission] wishes to facilitate the return to [receiving State] of the members of its diplomatic mission and their families who have returned to Canada because of the COVID-19 pandemic. The [Embassy/High Commission] seeks the assurance of the [Ministry] that all members of the diplomatic mission and their families arriving in [receiving State] will be permitted to proceed by private transport directly to their private residences upon arrival where they will self-isolate/quarantine for a 14-day period as recommended by the Public Health Agency of Canada. …

Notwithstanding and without prejudice to their privileges and immunities, the [Embassy/High Commission] will permit the members of its diplomatic mission and their families to voluntarily submit to a COVID-19 PCR test (administered by throat or nasal swab) at the point of entry, provided it has the assurance of the [Ministry] that they may then proceed to their private residence and remain there in self-isolation / quarantine and that, in the event of a positive COVID-19 test result, they will be permitted to isolate in their private residence and only seek medical treatment if required and on a purely voluntary basis. …

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Should any department or agency of [receiving State] have any concerns about the health of a member or family member of the Canadian mission, the [Embassy/High Commission] will work with [receiving State] to ensure that appropriate measures are taken. …

Privilèges et immunités et mesures de santé publique obligatoires visant à réduire la transmission de la COVID-19

Au cours de l'année 2020, les États du monde entier ont mis en œuvre des interdictions de voyage et d'autres mesures de santé publique visant à réduire la transmission de la COVID-19. La pandémie a entraîné des restrictions sans précédent à la circulation des personnes, tant entre les États qu'à l'intérieur de ceux-ci. De la mi-mars à la fin décembre, la Direction générale des affaires juridiques a prodigué des conseils juridiques au sujet des incidences sur le droit diplomatique des mesures de santé publique obligatoires qui ont été établies dans plus de 100 États où le Canada a une mission étrangère.

Bon nombre de ces mesures de santé publique ont porté sur les privilèges et immunités des membres des missions du Canada à l'étranger et de leurs familles en vertu de la *Convention de Vienne sur les relations diplomatiques*, de la *Convention de Vienne sur les relations consulaires* et de divers instruments régissant les privilèges et immunités des organisations internationales. Conscient du risque pour la santé publique mondiale que présente la pandémie de COVID-19 et du devoir de ceux qui jouissent de privilèges et d'immunités de respecter le droit local inscrit dans les deux *Conventions de Vienne*, le Canada a recommandé que tous les membres de ses missions étrangères et leurs familles — quels que soient leurs privilèges et immunités individuels — se soumettent volontairement aux mesures de dépistage de santé publique à invasion minimale, se conforment aux restrictions raisonnables de déplacement et se mettent en quarantaine ou s'isolent dans leurs propres résidences, conformément aux directives locales de santé publique de l'État d'accueil. Dans tous les cas, le Canada a affirmé que la conformité volontaire aux mesures de santé publique était sans préjudice des privilèges et immunités d'une personne et que seul le Canada, en tant qu'État accréditant, avait l'autorité de dispenser des privilèges et immunités.

L'approche du Canada à l'égard des trois types de mesures de santé publique les plus courants qui se rapportent à ses missions à l'étranger a été guidée par les conseils donnés par la Direction générale des affaires juridiques et est généralement décrite ci-dessous:

- Restrictions de déplacement: De nombreux États d'accueil ont mis en œuvre des décrets de confinement ou de séjour à domicile, qui étaient incompatibles avec la liberté de circulation garantie aux membres d'une mission diplomatique en vertu de l'article 26 de la *Convention de Vienne sur les relations diplomatiques*. Si ces mesures portaient atteinte de manière déraisonnable à la capacité de ses missions d'exercer leurs fonctions diplomatiques, la pratique du Canada était de protester

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contre l'imposition de ces mesures par l'État d'accueil. La Direction générale des affaires juridiques a fait savoir qu'une obligation d'être muni d'une attestation pour justifier un déplacement serait considérée comme une restriction de déplacement raisonnable.

- Quarantaine/isolement: La plupart des États d'accueil ont imposé des exigences de quarantaine aux voyageurs à leur arrivée. Le Canada a demandé à tous les membres de ses missions à l'étranger et à leurs familles de se mettre volontairement en quarantaine à leur domicile, dans leur État d'accueil, à la suite d'un voyage international, pendant au moins 14 jours, conformément aux recommandations de l'Agence de la santé publique du Canada, même si la mise en quarantaine n'était pas exigée par les directives de santé publique dans leur pays d'accréditation. La Direction générale des affaires juridiques a estimé que toute exigence de mise en quarantaine dans un établissement désigné par le gouvernement serait considérée comme une détention et violerait l'immunité contre toute forme de détention dont bénéficient de nombreux membres des missions du Canada à l'étranger et leurs familles en vertu des instruments juridiques internationaux applicables. La pratique du Canada a consisté à protester contre toute tentative d'un État d'accueil d'imposer une quarantaine à l'extérieur de la résidence personnelle des membres de sa mission, en violation de cette immunité.
- Dépistage de la COVID-19: De nombreux États d'accueil ont mis en œuvre des exigences relatives au dépistage de la COVID-19 pour les voyageurs à leur arrivée. Souvent, les voyageurs devaient fournir la preuve d'un résultat négatif à un test de dépistage de la COVID-19 récent avant d'embarquer à bord d'un vol à destination d'un État donné ou devaient se soumettre à un test de dépistage de la COVID-19 à leur arrivée. La Direction générale des affaires juridiques a fait savoir qu'une obligation de produire un résultat négatif au test de dépistage de la COVID-19 comme condition d'entrée dans un État d'accueil ne constituait pas une violation des privilèges et immunités des membres des missions du Canada à l'étranger. Elle a aussi fait savoir qu'une obligation de se soumettre au test de dépistage de la COVID-19 à l'arrivée dans un pays d'accréditation serait contraire à l'inviolabilité de la personne dont jouissent les membres des missions diplomatiques du Canada et leurs familles en vertu de l'article 29 de la *Convention de Vienne sur les relations diplomatiques*. Toutefois, le Canada a autorisé les membres de ses missions diplomatiques et leurs familles à se soumettre volontairement à un test de dépistage de la COVID-19 (administré par écouvillonnage de la gorge ou du nez) aux points d'entrée, à condition qu'ils aient l'assurance du ministère des Affaires étrangères concerné qu'ils pouvaient ensuite se rendre à leur résidence privée et y rester en auto-isolement ou en quarantaine et que, en cas de résultat positif au test de la COVID-19 ou de l'apparition de symptômes de la COVID-19, ils seraient autorisés à s'auto-isoler dans leur résidence privée et à ne demander un traitement médical que si cela était nécessaire et sur une base purement volontaire.

Lorsqu'il a été confronté à des mesures de santé publique d'un État d'accueil qui ne respectaient pas les privilèges et les immunités de ses missions et de leurs membres,

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le Canada a eu pour pratique de protester contre l'application de ces mesures et de demander à l'État d'accueil l'assurance que les privilèges et immunités des membres de ses missions et de leurs familles sont respectés. Ces protestations ont été transmises par échanges de notes diplomatiques envoyées de l'ambassade ou du haut-commissariat du Canada aux ministères des Affaires étrangères des États d'accueils concernés. Voici des exemples de protestations officielles que nous avons transmises au sujet de certaines mesures de santé publique. […]

Extraits:

> *L'[ambassade du Canada/le haut-commissariat] présente ses compliments au [ministère des Affaires étrangères de l'État d'accueil] et a l'honneur de rappeler au ministère les obligations de [l'État d'accueil] en vertu de la Convention de Vienne sur les relations diplomatiques (CVRD). L'[ambassade/le haut-commissariat] reconnaît la gravité de la pandémie de COVID-19 et reconnaît à leur juste valeur les efforts déployés par [l'État d'accueil] pour prévenir la propagation du virus. […]*
>
> *Toutefois, l'[ambassade/le haut-commissariat] constate avec inquiétude que l'imposition de certaines mesures de santé publique au personnel diplomatique et aux membres de leurs familles viole leurs privilèges et immunités et est incompatible avec les obligations de [l'État d'accueil] en vertu de la CVRD. En particulier, les diplomates et leurs familles jouissent de l'inviolabilité personnelle et de l'immunité d'arrestation et de détention en vertu des articles 29 et 37 de la CVRD, et ne peuvent être contraints de se soumettre à des tests médicaux ou à des décrets de détention ou de quarantaine, où que ce soit dans [l'État d'accueil], à moins qu'une levée expresse de leur immunité ne soit accordée par le Canada. […]*
>
> *L'[ambassade/le haut-commissariat] assure le [ministère] qu'il attend des membres de sa mission et de leurs familles qu'ils se conforment volontairement aux mesures de dépistage non invasives de la santé publique, aux restrictions de déplacement appropriées et qu'ils s'isolent conformément aux directives de santé publique. Le Bureau du Protocole d'Affaires mondiales Canada a fait savoir aux missions étrangères au Canada qu'il avait les mêmes attentes à l'égard des représentants étrangers et des membres de leur famille au Canada. Les missions étrangères ont été avisées qu'une renonciation de l'immunité sera demandée si une situation exige la conformité à une mesure de santé publique recommandée qui porterait atteinte aux privilèges et immunités d'un représentant étranger ou d'un membre de sa famille au Canada. […]*
>
> *L'[ambassade/le haut-commissariat] souhaite faciliter le retour dans [l'État d'accueil] des membres de sa mission diplomatique et de leurs familles, qui sont rentrés au Canada en raison de la pandémie de COVID-19. L'[ambassade/le haut-commissariat] demande au [ministère] de lui donner l'assurance que tous les membres de la mission diplomatique et leur famille arrivant à [l'État d'accueil] seront autorisés à se rendre en transport privé directement à leurs résidences privées à leur arrivée, où ils s'isoleront/se mettront en quarantaine pendant une période de 14 jours, comme le recommande l'Agence de la santé publique du Canada. […]*

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Nonobstant et sans préjudice à leurs privilèges et immunités, l'[ambassade/le haut-commissariat] autorisera les membres de sa mission diplomatique et leur famille à se soumettre volontairement à un test par analyse moléculaire PCR pour le dépistage de la COVID-19 (administré par écouvillonnage de la gorge ou du nez) au point d'entrée, à condition qu'il ait l'assurance du [ministère] qu'ils puissent ensuite se rendre à leur résidence privée et y rester en auto-isolement/en quarantaine et que, en cas de résultat positif au test de la COVID-19 ou de l'apparition de symptômes de la COVID-19, ils soient autorisés à s'auto-isoler dans leur résidence privée et à ne demander un traitement médical que si cela est nécessaire et sur une base purement volontaire. […]

Si un ministère ou un organisme de [l'État d'accueil] a des préoccupations au sujet de la santé d'un membre de la mission canadienne ou d'un membre de la famille, [l'ambassade/le haut-commissariat] travaillera avec [l'État d'accueil] pour s'assurer que des mesures appropriées sont prises.

ENVIRONMENTAL LAW

Transboundary Environmental Harm — Customary International Law — Respect for the Environment of Other States — Environmental Impact Assessment — Principle of "Do No Harm"

In 2020, the Legal Bureau wrote:

Analysis of the International Law Obligations Resulting from the Transboundary Environmental Impacts of Canadian-origin Projects

I. Summary and Conclusion

1. Under international law, while States enjoy sovereignty over their natural resources, this is balanced by an obligation under customary international law for States to ensure activities within their jurisdiction and control respect the environment of other States or of areas beyond their national juridiction. The scope of this obligation is not well defined, but likely requires States to conduct impact assessments, to consider and take appropriate mitigation measures, and to notify and allow affected States to provide views before a decision is taken to proceed with an activity which may cause transboundary harm.

2. Canada will also need to ensure its specific obligations under applicable treaties have been met, and may wish to evaluate whether to take additional steps consistent with its obligations under customary international law.

II. Background

3. Canada has obligations at international law to avoid transboundary environmental harm. These obligations stem from customary international law, treaties with other states, and from multilateral treaties to which Canada is a party.

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III. Customary International Law

4. The International Court of Justice (ICJ) has stated that: "The existence of the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control is now part of the corpus of international law relating to the environment."[1] While the content of the obligation has not been precisely defined, decisions of the ICJ and the International Tribunal for the Law of the Sea (ITLOS), provide guidance on what would reasonably be expected in order to meet the obligation. We would summarize that guidance as follows (a detailed overview of the decisions relied upon is provided in the Annex):

a. States should have reasonable and appropriate rules in place regarding activities within their jurisdiction which may cause transboundary environmental harm.
b. These rules should include environmental impact assessment, notification to and consultation with the affected State.
c. An environmental impact assessment should be done prior to the implementation of a project, and ongoing monitoring of environmental impacts may also be required.
d. How notification and consultation are to be carried out with the affected State is not defined. In our view, this would depend on what is appropriate in the particular circumstances of the situation at hand.
e. If the affected State has concerns about transboundary environmental harm, the State in whose territory the project takes place should consider those concerns and discuss with the affected state, in good faith, reasonable mitigation measures to address those concerns.
f. A state which failed to evaluate the risk of harm and took no appropriate action to mitigate significant harm will be at greater risk for liability.
g. In all cases the prevention of transboundary harm is also tempered by State sovereignty. The possibility of transboundary harm can not be used by one state to prevent a project in another.

IV. Conclusion

5. As relates to customary international law, Canada will want to adhere to its international obligations, which include taking measures to avoid severe transboundary environmental harm, acting in good faith, and notifying and consulting with the affected state as appropriate. The extent and precise requirement of these obligations of customary international law are not clearly defined. As such, when implementing Canada's obligations, there may be value in considering the past practices of the affected state and Canada regarding transboundary environmental

[1] See *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, [1996] ICJ Rep 226 at para 29; *Gabčikovo-Nagymoros Project (Hungary/Slovakia)*, Judgment, [1997] ICJ Rep 7 at para 53.

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issues. Canada could choose to act in a manner that mirrors the behaviour of the affected state in like situations, or could act in a manner that demonstrates how Canada would wish to be treated, if the roles were reversed.

Annex — Overview of international jurisprudence related to the "do no harm" principle

1. Guidance regarding the customary international law of transboundary environmental harm can be drawn from decisions of the International Court of Justice (ICJ) and commentaries of the International Law Commission (ILC). Decisions of the ICJ are not binding on states which are not parties to the case, and ILC commentaries are not binding at all, but both express views which assist in understanding to some extent the state of international law on a given point.

a. Prevention of Transboundary Harm

2. In decisions from 1938 and 1941, a tribunal convened to resolve a dispute over air pollution between Canada and the United States ruled in what is known as the Trail Smelter Arbitration. As a result of emissions from a smelter in Trail, British Columbia, Canada was found responsible for air pollution it caused as the fumes crossed the border to the United States. This decision was an expression of **the no harm principle, or *sic utere tuo ut alienum non laedas* ("so use your own property as not to injure another's property"). It is essentially a limitation on the sovereignty of a state to allow its territory to be used in a manner which would cause harm to another state.** The principle stated in the Trail Smelter decision reads: "no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence."

3. This principle has been repeated in other international legal instruments and decisions since that time. The International Court of Justice (ICJ) established, in a decision on transboundary waters called the *Gabčikovo-Nagymaros [Project]* case of 1997, that "[T]he existence of the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control is now part of the corpus of international law relating to the environment." Decisions such as the 2010 *Pulp Mills Case* of the ICJ,[2] and the 2013 [*sic*] *San Juan River Case* (Costa Rica v Nicaragua)[3] are among the most recent applications of the long-established international law principle preventing transboundary environmental harm.

4. The Court in the *Pulp Mills Case* reiterated decisions of the ICJ in other instances and wrote "… the principle of prevention [of transboundary harm], as a customary

[2] *Pulp Mills on the River Uruguay (Argentina v Uruguay)*, [2010] ICJ Rep 14 [*Pulp Mills*].

[3] *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v Nicaragua) and Construction of a Road in Costa Rica along the San Juan River (Nicaragua v Costa Rica)*, [2015] ICJ Rep 665 [*Costa Rica v Nicaragua*].

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rule, has its origins in the due diligence that is required of a State in its territory. It is "every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States" (*Corfu Channel (United Kingdom v Albania)*, Merits, Judgment, I.C.J. Reports 1949, p. 22). **A State is thus obliged to use all the means at its disposal in order to avoid activities which take place in its territory, or in any area under its jurisdiction, causing significant damage to the environment of another State**. This Court has established that this obligation "is now part of the corpus of international law relating to the environment" (*Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, I.C.J. Reports 1996 (I), p. 242, para. 29)." [emphasis added].

5. The *Pulp Mills Case* elaborates somewhat on the contents of the customary international law obligation of due diligence and identifies five elements for States to consider. These are: adoption of appropriate rules and measures; vigilance in enforcement; exercising administrative control over private operators; consideration of the technology being used; and an environmental impact assessment and notification. … More ambiguous is the concept of appropriate rules and measures which find some elaboration in the 2011 ITLOS advisory opinion titled *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area* (the "Seabed Mining Case") which is an opinion on the extent of the international law obligations to prevent environmental harm when extracting minerals from the seabed in the high-seas. That advisory opinion is interpreting obligations of UNCLOS [*United Nations Convention on the Law of the Sea*], but some of the principles for determining reasonableness and appropriateness could be applied by analogy to the present instance. The Tribunal indicates that generally, reasonably appropriate means that "The appropriateness of the measures taken may be justified only if they are agreeable to reason and not arbitrary." This means the State is responsible for a good faith, objective review of the options available to it and make a decision which is reasonable, relevant to the situation at hand, and for the general good.

b. Environmental Assessments

6. In the *Costa Rica v Nicaragua* case the court repeated portions of its decision in *Pulp Mills* and added that "… to fulfil its obligation to exercise due diligence in preventing significant transboundary environmental harm, a State must, before embarking on an activity having the potential adversely to affect the environment of another State, ascertain if there is a risk of significant transboundary harm, which would trigger the requirement to carry out an environmental impact assessment."[4] **The prevention of transboundary environmental harm is a principle of international law which States must respect, but which has limitations**, the extent of these limitations are not definitively established. These limitations include the severity of the damage — it is generally understood that the severity of the damage determines the liability — and due diligence. A state which failed to evaluate the risk of harm and took no

[4] *Ibid* at 706, para 104.

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appropriate action to mitigate harm will be at greater risk for liability. In all cases the prevention of transboundary harm is also tempered by State sovereignty. The possibility of transboundary harm can not be used by one state to prevent a project in another.

7. In discussing the content of the environmental assessment required, the court in *Pulp Mills* wrote that: "… it is for each State to determine in its domestic legislation or in the authorization process for the project, the specific content of the environmental impact assessment required in each case, having regard to the nature and magnitude of the proposed development and its likely adverse impact on the environment as well as to the need to exercise due diligence in conducting such an assessment. The Court also considers that an environmental impact assessment must be conducted prior to the implementation of a project. Moreover, once operations have started and, where necessary, throughout the life of the project, continuous monitoring of its effects on the environment shall be undertaken."[5]

c. Notification and Consultation

8. The *Costa Rica v Nicaragua* case explains that "If the environmental impact assessment confirms that there is a risk of significant transboundary harm, the State planning to undertake the activity is required, in conformity with its due diligence obligation, to notify and consult in good faith with the potentially affected State, where that is necessary to determine the appropriate measures to prevent or mitigate that risk."[6] The parties to the case agreed that there was a general obligation in international law to notify, and consult with, the potentially affected State when activities may cause transboundary environmental harm. **Consistent with interpreting the obligation to notify in good faith, a State should ensure this obligation is met by confirming that other relevant States have received notice of the project and the panel's report.** It is worth noting at this point that this obligation is incumbent on subjects of international law, which includes sovereign states but does not include indigenous groups located in other states. The primary obligation at international law is to consult with other States.

9. The parameters and details of how the consultation should occur are not explicitly set out, but the ILC commentaries on the *Draft Articles on the Prevention of Transboundary Harm from Hazardous Activities*[7] … provide suggestions for best practices for this type of notification. Neither these draft articles nor the commentaries are binding. It is notable here, that draft article 13 suggests that States undertaking a project likely to result in transboundary environmental harm should "… provide the public likely to be affected…with relevant information relating to that activity, the risk involved and the harm which might result and ascertain their

[5] *Pulp Mills*, *supra* note 2 at 83, para 205.

[6] *Costa Rica v Nicaragua*, *supra* note 3 at 707, para 104.

[7] Published in *Report of the International Law Commission on the Work of its Fifty-third Session*, UN Doc A/56/10 (2001) at ch 5, section E, paras 97–98.

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views." The commentary to the draft articles defines public broadly, and is similarly open-ended on what constitutes consultation.

10. The ILC's commentaries to its draft articles proposes possible elements of a state's responsibility when engaging in an activity which may cause transboundary environmental harm. Article 8 of the draft articles reads: "1. If the [environmental] assessment … indicates a risk of causing significant transboundary harm, the State of origin shall provide the State likely to be affected with timely notification of the risk and the assessment and shall transmit to it the available technical and all other relevant information on which the assessment is based. 2. The State of origin shall not take any decision on authorization of the activity pending the receipt, within a period not exceeding six months, of the response from the State likely to be affected." The commentary on this article goes on to suggest that the notification to the affected state should be accompanied by "… available technical information on which the assessment is based. The reference to "available" technical and other relevant information is intended to indicate that the obligation of the State of origin is limited to transmitting the technical and other information which was developed in relation to the activity." **This would mean that, according to these non-binding proposed guidelines, a State may be expected to provide only what it has been able to determine to the best of its ability, in good faith, and with due diligence.** Assuming that the information produced in the panel report is as fulsome and accurate as possible, then it would likely be sufficient to meet the criteria set out in the ILC`s draft articles. The draft articles are flexible on the suggested form that notification to other states should take.

11. The draft articles suggest a maximum period of 6 months of notification, in which time the notified states should be able to examine the report and come to their own conclusions. Such a timeline is, however, not prescribed. The intention of the notification period is to allow for consultations which allow for good faith discussions with the aim of developing an acceptable solution for the prevention or mitigation of transboundary harm. A decision of the international tribunal in the Lake Lanoux case between France and Spain noted that "Consultations and negotiations between the two States must be genuine, must comply with the rules of good faith and must not be mere formalities."[8] A State should therefore show a willingness to accept comments from the affected state and to have good faith discussions on the potential harm in question. It **may, however, wish to adjust the degree to which it proactively consults with the affected state based on considerations of reciprocity and the historic conduct of the affected state on similar matters.**

12. The obligation to avoid transboundary harm and consult is not a veto on behalf of the affected state against the proposed project. The commentaries to the ILC draft articles continue in their analysis of the Lake Lanoux decision by writing that "the State of origin is permitted to go ahead with the activity, for the absence of such an alternative would, in effect, create a right of veto for the States likely to be

[8] *Lake Lanoux Arbitration (France v Spain)*, (1957) 12 RIAA 281, 24 ILR 101.

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affected. The State of origin, while permitted to go ahead with the activity, is still obligated, as measure of self-regulation, to take into account the interests of the States likely to be affected." The commentaries to the draft articles go on to suggest how the consultations should be conducted. They propose that "The parties should obviously aim, first, at selecting those measures which may avoid any risk of causing significant transboundary harm or, if that is not possible, which minimize the risk of such harm." A State **would improve its arguments for compliance with international law, as expressed in decisions of international tribunals and customary international law, by working in good faith with the affected state to reduce damage to the environment.**

EXPORT PERMITS

Export and Import Permits Act (EIPA) — *Section 7.4* — *Substantial Risk* — Arms Trade Treaty (ATT) — *Implementation* — *Overriding Risk*

Under section 7.4 of the *Export and Import Permits Act* (*EIPA*),[1] the Minister of Foreign Affairs is not permitted to issue an export permit in respect of arms or munitions "if, after considering available mitigating measures, he or she determines that there is a substantial risk that the export of the goods … would result in any of the negative consequences referred to in subsection 7.3(1)" of the Act, such as a serious violation of either international humanitarian law or international human rights law. In the *Final Report: Review of Export Permits to Saudi Arabia* published on 9 April 2020,[2] the Government of Canada stated as follows:

> 1. Given that the *Export and Import Permits Act* ("*EIPA*") does not define the concept of "substantial risk" as it appears in section 7.4, the Department must adopt a definition of that term for the purpose of its review of arms exports to KSA [Kingdom of Saudi Arabia].
>
> 2. In developing a working definition of "substantial risk", the Department has examined a wide variety of sources, including: the relevant jurisprudence of international bodies; Canadian legislation employing the concept of "substantial risk" or similar concepts; Canadian jurisprudence interpreting the concept of "substantial risk" or similar concepts; Canadian policy instruments using the concept of "substantial risk" or similar concepts; as well as the practice of other States Parties to the *ATT* [*Arms Trade Treaty*] in implementing the concept of "overriding risk" as it appears in the *ATT*. …
>
> 4. In light of the above, the Department is of the view that the concept of "substantial risk" should be interpreted and applied as follows:

[1] RSC 1985, c E-19.

[2] The full report is available online: <https://www.international.gc.ca/trade-commerce/controls-controles/memo/annex-a-ksa.aspx?lang=eng>.

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- "Substantial risk" means a direct, present and foreseeable risk that the specific good or technology proposed for export would result in one or more of the negative consequences specified in subsection 7.3(1) of the *EIPA*.
- In order to be "substantial", the risk must be well-grounded in the evidence and must be more than mere possibility, theory or suspicion; however, it does not need to be highly likely. In most cases, the standard of "substantial risk" will be satisfied when it is more likely than not that the export would result in any of the negative consequences specified in subsection 7.3(1) of the *EIPA*.
- "Substantial risk" is an absolute concept, not a relative one. Even where the predictable positive consequences of the arms export outweigh its negative consequences, the Minister must refuse to issue a permit if she finds there is a "substantial risk" that the export would result in any of the negative consequences specified in subsection 7.3(1).
- A key element of any determination of "substantial risk" is whether the country of end-use has shown a pattern of repetitive behaviour with respect to any the negative consequences specified in subsection 7.3(1) in relation to similar arms exports.

INTERNATIONAL TRADE LAW

World Trade Organization — Agreement on Subsidies and Countervailing Measures (SCM Agreement) — *Article 2.1(a)* — De Jure *Specificity*

In its third-party submissions in *United States — Anti-dumping and Countervailing Duties on Ripe Olives from Spain* (DS577), Canada provided its views on the interpretation of Article 2.1(a) of the *Agreement on Subsidies and Countervailing Measures (Annex 1A to the Marrakesh Agreement Establishing the World Trade Organization)* (*SCM Agreement*),[1] which sets out the requirements of a determination that a subsidy is *de jure* specific to "certain enterprises." In its oral statement at the first substantive meeting of the panel on 20 October 2020, Canada summarized its views as follows:[2]

We now turn to the obligations of an investigating authority when determining whether a subsidy is *de jure* specific under Article 2.1(a).

Article 2.1(a) provides that a subsidy is *de jure* specific where there is an explicit limitation on "access" to "certain enterprises". Both the European Union and the United States appear to agree that the word "access" within Article 2.1(a) means "[t]he right or opportunity to benefit from or use a system or service".[3]

[1] 15 April 1994, 1869 UNTS 14 (entered into force 1 January 1995) [*SCM Agreement*].

[2] The full submission is available upon request to jlt@international.gc.ca.

[3] "access, n." *OED* [*Oxford English Dictionary*] *Online*. Oxford University Press, Exhibit USA-29. See European Union's response to advance Panel question No. 2, para 4; United States' response to advance Panel question No. 2, para. 5. See also Canada's response to advance Panel question No. 2, para. 2.

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The question of whether an enterprise has a "right to benefit" from a subsidy does not exist on a spectrum. It is a yes-no question. Even if an enterprise receives a lower amount of subsidy by virtue of a distinction in the relevant legislation, that enterprise still has *access* to the subsidy by virtue of having the "right or opportunity to benefit" from it.

The United States argues that legislation that favours certain enterprises would be considered *de jure* specific under Article 2.1(a).[4] However, Article 2.1(a) does not use the word "favour". The inquiry under Article 2.1(a) is not whether there is an explicit limitation that "favours" certain enterprises. Instead, Article 2.1(a) asks whether there is an explicit limitation on *access* to a subsidy to "certain enterprises", which necessarily means that the subsidy is *not accessible* outside of that defined group of "certain enterprises".

With respect to the interpretation of Article 2.1(a), Canada also considers it important to recall that the "explicit limitation" on access must identify "certain enterprises".[5] Not *any* explicit limitation will satisfy the requirements of Article 2.1(a) — the explicit limitation on access must be directed "to certain enterprises". As affirmed by the panel in *EC and certain member States — Large Civil Aircraft*: "Article 2.1(a) requires the establishment of the existence of a limitation that expressly and unambiguously restricts the availability of a subsidy to 'certain enterprises' …"[6]

If the granting authority or its legislation does not expressly limit access to "certain enterprises", and therefore exclude other enterprises by not granting them access, the subsidy is not *de jure* specific pursuant to Article 2.1(a).

The ordinary meaning of Article 2.1(a) that we have articulated does not allow governments to evade the subsidy disciplines of the SCM Agreement.[7] If a subsidy does not contain an explicit limitation on access, but instead "favours" certain enterprises by granting those enterprises disproportionately large amounts of subsidy, it makes sense for an investigating authority to conduct a *de facto* specificity analysis pursuant to Article 2.1(c). In fact, Article 2.1(c) expressly provides that an investigating authority may consider "the granting of disproportionately large amounts of subsidy to certain enterprises" as a factor in its *de facto* specificity analysis. To consider this factor under Article 2.1(a) would render Article 2.1(c) redundant and *inutile*.[8]

[4] United States' response to advance Panel question No. 2, paras. 5-7; United States' responses to further Panel questions, paras. 2 and 3.

[5] See Canada's response to Panel question No. 2, paras. 5-8.

[6] Panel Report, *EC and certain member States — Large Civil Aircraft*, para. 7.919.

[7] United States' response to advance Panel question No. 2, para. 8; United States' responses to further Panel questions, para. 2.

[8] See Canada's response to advance Panel question No. 2, para. 11.

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INVESTOR-STATE DISPUTE SETTLEMENT

North American Free Trade Agreement (NAFTA) — *Articles 1102, 1105 — National Treatment — Evidence of Discrimination — Good Faith Principle — Causation — Proof*

In the comments of the Government of Canada in response to the second *North American Free Trade Agreement* (*NAFTA*) Article 1128 submissions of the United States and the United Mexican States in *Resolute Forest Production Inc. and Government of Canada*, dated 8 May 2020, Canada submitted the following (original headings have been altered to facilitate reading):[1]

National Treatment (*NAFTA* Article 1102)

2. With respect to *NAFTA* Article 1102, both the United States and Mexico reaffirm what they have already submitted previously in this arbitration[2] and fully support what Canada has argued since the beginning of this case: Article 1102, *including* subparagraph 3 which applies to states and provinces, is intended to prevent discrimination on the basis of nationality.[3] The mere fact there is less favourable treatment between a domestic investor and foreign investor (or their investments) in like circumstances does not establish a breach of Article 1102. Rather, for a breach of the national treatment obligation to be found, there must be evidence that the discrimination was based on nationality. This is the longstanding and consistently-held position of all three *NAFTA* Parties,[4] and it is supported by *NAFTA* tribunals and academic commentary.[5]

3. Furthermore, the submissions by the United States and Mexico support what Canada argued previously and what the Tribunal found in its Decision on Jurisdiction and Admissibility with respect to Article 1102(3), namely that this provision

[1] Full submission available online: <https://pcacases.com/web/sendAttach/12692>.

[2] *Resolute Forest Products Inc., v. Government of Canada* (UNCITRAL) Submission of the United States of America, 14 June 2017, ¶¶ 15–17 ("United States First Article 1128 Submission"); *Resolute Forest Products Inc., v. Government of Canada* (UNCITRAL) Submission of Mexico Pursuant NAFTA Article 1128, 14 June 2017 ("Mexico First Article 1128 Submission"), ¶¶ 12–13.

[3] *Resolute Forest Products Inc., v. Government of Canada* (UNCITRAL) Second Submission of the United States of America, 20 April 2020 ("United States Second Article 1128 Submission"), ¶¶ 4-6; *Resolute Forest Products Inc., v. Government of Canada* (UNCITRAL) Second Submission of the United Mexican States, 23 April 2020 ("Mexico Second Article 1128 Submission"), ¶¶ 3–9. *See Resolute Forest Products Inc., v. Government of Canada* (UNCITRAL) Canada's Counter-Memorial on Merits and Damages, 17 April 2019 ("Canada's Counter-Memorial"), ¶¶ 250–253; *Resolute Forest Products Inc., v. Government of Canada* (UNCITRAL) Canada's Rejoinder Memorial on Merits and Damages, 4 March 2020 ("Canada's Rejoinder"), ¶¶ 90–102.

[4] *See* Canada's Counter-Memorial, ¶ 250 and references cited therein; United States Second Article 1128 Submission, ¶ 5 and references cited therein.

[5] See Canada's Counter-Memorial, ¶¶ 250–251 and references cited therein; Canada's Rejoinder Memorial, ¶ 99 and references cited therein.

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"should not be read so as to impose, *vis-à-vis* foreign investments, a requirement of uniformity of treatment by the different component units of the three federal States which are Parties to *NAFTA*."[6]

Minimum Standard of Treatment (NAFTA Article 1105)

4. With respect to Article 1105 and the minimum standard of treatment of aliens, the submission of the United States is fully concordant with what Canada has previously argued regarding customary international law, particularly with respect to general principles of good faith, proportionality and non-discrimination.[7] Regarding good faith, … there is no basis in *NAFTA* Chapter Eleven or in customary international law to make a bare claim of a breach of good faith.[8] … The United States also takes the same position as Canada with respect to proportionality and non-discrimination: there is no state practice and *opinio juris* establishing an obligation of proportionality or a prohibition on economic discrimination under the customary international law minimum standard of treatment of aliens.

Proof of Damage Requires Showing Causation

5. Finally, the United States' submission with respect to limitations on loss or damage is in agreement with Canada's submissions.[9] Inherent to the *NAFTA* requirement that recovery be limited to loss or damage "by reason of, or arising out of" a breach[10] is the need for the Claimant to show both factual causation and proximate causation. As the United States points out, the former test will not be met if the same result would have occurred had the breaching State acted in compliance with its obligations, and the latter test will not be met where any loss or damage is based on an assessment of acts, events or circumstances not attributable to the alleged breach.

[6] *Resolute Forest Products Inc., v. Government of Canada* (UNCITRAL) Decision on Jurisdiction and Admissibility, 30 January 2018 ("Decision on Jurisdiction and Admissibility"), ¶ 290; United States Second Article 1128 Submission, ¶¶ 10–12; Mexico Second Article 1128 Submission, ¶¶ 3-9. Canada has advocated precisely that position: "It is untenable to argue that the NAFTA Parties intended for the treatment by one state or province would become the national standard for the entire country." (*Resolute Forest Products Inc., v. Government of Canada* (UNCITRAL) Canada's Reply Memorial on Jurisdiction, 29 March 2017, ¶ 161). In its Decision on Jurisdiction and Admissibility, the Tribunal also agreed with the *Merrill & Ring* tribunal's conclusion that Article 1102(3) only applies to the same regulatory measures under the same jurisdictional authority (Decision on Jurisdiction and Admissibility, ¶ 290). Canada has argued the same. *See Resolute Forest Products Inc., v. Government of Canada* (UNCITRAL) Canada's Memorial on Jurisdiction, 22 December 2016, ¶¶ 120–121; Canada's Counter-Memorial, ¶ 268.

[7] United States Second Article 1128 Submission, ¶¶ 20–24; Canada's Counter-Memorial, ¶ 288; Canada's Rejoinder Memorial, ¶¶ 73–75, 134–138.

[8] United States Second Article 1128 Submission, ¶¶ 21–22.

[9] United States Second Article 1128 Submission, ¶¶ 29–33; Canada's Counter-Memorial, ¶¶ 325–338 and references cited therein; Canada's Rejoinder Memorial, ¶¶ 208–211 and references cited therein.

[10] NAFTA Articles 1116 and 1117.

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Since SC paper prices dropped for many reasons other than the alleged breach, the Claimant's case fails to satisfy both grounds.

6. As Canada has previously argued,[11] and as both the United States and Mexico have reaffirmed, customary international law, as codified in Article 31(3) of the *Vienna Convention on the Law of Treaties,* requires the Tribunal to take into account the subsequent agreement and subsequent practice of the three *NAFTA* Parties when it comes to the interpretation of the treaty.

NAFTA — *Articles 1101(1), 1116(1) and 1117(1) — Temporal Jurisdiction*

In its memorial on jurisdiction in *Westmoreland Mining Holdings LLC v Government of Canada* dated 18 December 2020, Canada made the following argument concerning the temporal jurisdiction of a *NAFTA* tribunal:[1]

1. A Claimant Must Be an Investor of a Party When the Alleged Breach Occurred

(a) Articles 1101(1), 1116(1), and 1117(1) Require a Claimant to Be an Investor of a Party When the Alleged Breach Occurred

48. Articles 1116(1) and 1117(1) set out the circumstances under which an "investor of a Party" may bring a claim under Section B of *NAFTA* Chapter Eleven. Under Article 1116(1), an investor of a Party may, on its own behalf, bring a claim "that another Party has breached an obligation under: (a) Section A".[2] Under Article 1117(1), an investor of a Party may, "on behalf of an enterprise of another Party that is a juridical person that the investor owns or controls directly or indirectly", bring a claim "that the other Party has breached an obligation under: (a) Section A".[3] Accordingly, both Articles 1116(1) and 1117(1) require that a claim pertain to the alleged breach of an obligation under Section A.

[11] *Resolute Forest Products Inc., v Government of Canada* (UNCITRAL) Reply of the Government of Canada to the NAFTA Article 1128 Submissions of the Government of the United States and the United Mexican States, 12 July 2017, ¶¶ 4–8.

[1] Full submission available online: <http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C8473/DS15633_En.pdf>.

[2] Article 1116(1) provides in full: "An investor of a Party may submit to arbitration under this Section a claim that another Party has breached an obligation under: (a) Section A or Article 1503(2) (State Enterprises), or (b) Article 1502(3)(a) (Monopolies and State Enterprises) where the monopoly has acted in a manner inconsistent with the Party's obligations under Section A, and that the investor has incurred loss or damage by reason of, or arising out of, that breach.

[3] Article 1117(1) provides in full: "An investor of a Party, on behalf of an enterprise of another Party that is a juridical person that the investor owns or controls directly or indirectly, may submit to arbitration under this Section a claim that the other Party has breached an obligation under: (a) Section A or Article 1503(2) (State Enterprises), or (b) Article 1502(3)(a) (Monopolies and State Enterprises) where the monopoly has acted in a manner inconsistent with the Party's obligations under Section A, and that the enterprise has incurred loss or damage by reason of, or arising out of, that breach."

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49. Section A opens with Article 1101(1), the "gateway" to *NAFTA* Chapter Eleven,[4] which sets out the scope and coverage of the Chapter. Article 1101(1) circumscribes the application of the obligations of Section A and of the dispute settlement mechanism in Section B. In relevant part, it reads:

> 1. This Chapter applies to measures adopted or maintained by a Party relating to:
>
> (a) investors of another Party;
>
> (b) investments of investors of another Party in the territory of the Party; …

50. The obligations contained in Section A thus apply to measures that "relat[e] to" investors of another Party and investments held by investors of another Party. Read together with Articles 1116(1) and 1117(1), a measure alleged to breach an obligation under Section A must "relat[e] to" the "investor of a Party" bringing the claim, or to the investments held by that "investor of a Party". *NAFTA* tribunals have consistently required this connection between the claimant, its investments, and Article 1101(1).[5]

51. Accordingly, for a claim to meet the requirements of Articles 1101(1), 1116(1), and 1117(1), it must allege a breach of an obligation that applies to the "investor of a Party" bringing the claim or to the investments of that investor of a Party. If the investor of a Party did not exist or did not have an investment at the time of the challenged measure, then the threshold connection between the challenged measure and the claimant under Article 1101(1) cannot be met, and there are no substantive obligations in Section A that apply with respect to that claimant and its investments.

52. *NAFTA* Chapter Eleven provides further guidance with respect to when a person or entity becomes an "investor of a Party", and when an "investment of an investor of a Party" is established, such that they might fall within the scope of the Chapter. *NAFTA* Article 1139 defines these terms, in relevant part, as follows:

[4] RLA-026, *Methanex Corporation v. United States of America* (UNCITRAL) Partial Award, 7 August 2002, ¶ 106(i). *See also* RLA-027, *Grand River — Award*, ¶¶ 76–80; RLA-028, *The Canadian Cattlemen for Fair Trade v. United States of America* (UNCITRAL) Award on Jurisdiction, 28 January 2008, ¶¶ 118–128; RLA-029, *Bayview — Award on Jurisdiction*, ¶ 85.

[5] *See e.g.*, RLA-046, *Apotex Holdings Inc. and Apotex Inc. v. United States of America* (ICSID Case No. ARB(AF)/12/1) Award, 25 August 2014, ¶ 6.3 ("It is necessary to address [Article 1101(1)] within the context of NAFTA's Chapter Eleven and the Claimants' substantive claims in this arbitration. … Accordingly, the [challenged measure] (as adopted and maintained by the Respondent) must relate to the Claimants as investors or to their investments in the territory of the USA within the meaning of NAFTA Article 1101(1)") and ¶¶ 6.22–6.24; RLA-033, *Resolute — Jurisdictional Decision*, ¶¶ 222 and 244 (under Article 1101(1) a measure must "have some specific impact on the claimant" or "directly address, target, implicate, or affect the Claimant"). *See also* RLA-047, *Cargill, Incorporated v. United Mexican States* (ICSID Case No. ARB(AF)/05/2) Award, 18 September 2009, ¶ 175.

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> **investor of a Party** means … an enterprise of such Party, that seeks to make, is making or has made an investment;
> **investment of an investor of a Party** means an investment owned or controlled directly or indirectly by an investor of such Party;

53. *NAFTA* Article 1139 also defines "enterprise of a Party" by reference to the term "enterprise" defined in *NAFTA* Article 201, which means "any entity constituted or organized under applicable law, whether or not for profit, and whether privately-owned or governmentally-owned, including any corporation, trust, partnership, sole proprietorship, joint venture or other association".[6]

54. A corporate entity thus becomes an "investor of a Party" under *NAFTA* Chapter Eleven when it is both: (a) constituted or organized under the applicable law; and (b) seeks to make, is making, or has made an investment. Similarly, an "investment of an investor of a Party" is established when the relevant "investor of a Party": (a) qualifies as such under *NAFTA*; and (b) acquires ownership or control of the enterprise or other interest forming the basis of its "investment". Before these requirements are met, *NAFTA* Chapter Eleven does not apply with respect to the corporate entity.

55. Articles 1101(1), 1116(1), and 1117(1) therefore set a temporal limitation on a tribunal's jurisdiction, and a claimant must demonstrate that it was an investor of a Party when the alleged breach occurred.

(b) *NAFTA* and Other International Investment Jurisprudence Confirm that a Claimant Must Be a Protected Investor When the Alleged Breach Occurred

56. *NAFTA* tribunals have consistently confirmed the temporal limitation imposed by Articles 1101(1), 1116(1), and 1117(1) and have found that they lacked jurisdiction *ratione temporis* where a claimant sought to make a claim concerning alleged breaches that pre-date its existence as a protected "investor of a Party."

57. For example, the *Mesa v. Canada* tribunal found that it lacked jurisdiction under *NAFTA* Articles 1101(1) and 1116(1) over claims challenging certain measures that occurred before the claimant in that case became an investor of a Party.[7] The tribunal found that "the investor must establish that it was seeking to make the very investment in respect of which it makes its claims" before the alleged breaches,[8]

[6] Under Article 1139, "enterprise of a Party means an enterprise constituted or organized under the law of a Party, and a branch located in the territory of a Party and carrying out business activities there", and "enterprise means an 'enterprise' as defined in Article 201 (Definitions of General Application), and a branch of an enterprise".

[7] RLA-020, *Mesa — Award*, ¶ 333 ("TTD and Arran were incorporated on 17 November 2009. North Bruce and Summerhill were incorporated on 6 April 2010. Hence, for the reasons set forth above, the Tribunal concludes that its jurisdiction is limited to claims based on measures which occurred after 17 November 2009 for TTD and Arran and after 6 April 2010 for North Bruce and Summerhill." (footnotes omitted))

[8] RLA-020, *Mesa — Award*, ¶ 330 ("It is obviously implied in the definition [of "investor of a Party" and "investment of an investor of a Party] quoted above that there must be a link between the investor that seeks to make an investment, and the investment that the investor seeks to make").

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explaining that its "jurisdiction *ratione temporis* is limited to measures that occurred after the Claimant became an 'investor' holding an 'investment'."[9] The tribunal further explained that investment arbitration tribunals have "repeatedly found that they do not have jurisdiction *ratione temporis* unless the claimant can establish that it had an investment at the time the challenged measure was adopted."[10]

58. Similarly, in *Gallo v. Canada*, the tribunal found that it lacked jurisdiction under Articles 1101(1) and 1117(1) over the claim because the claimant, an American investor, did not own or control the enterprise on whose behalf he was bringing a claim at the time of the alleged breaches. The tribunal stated that, "[i]n a claim under Art. 1117 the investor must prove that he owned or controlled directly or indirectly the 'juridical person' holding the investment, at the critical time," with the "critical time" being the date of the alleged breach.[11] Similar to the tribunal in *Mesa*, the *Gallo* tribunal held that "[i]nvestment arbitration tribunals have unanimously found that they do not have jurisdiction unless the claimant can establish that the investment was owned or controlled by the investor at the time when the challenged measure was adopted."[12]

59. The tribunal in *B-Mex v. Mexico* also found that an "investor of a Party" must demonstrate its ownership or control of the enterprise (i.e. its investment) at the time of the alleged breaches in order for the tribunal to have jurisdiction under Article 1117(1). The tribunal confirmed that "the Claimants must establish that they owned or controlled the Mexican Companies [the relevant enterprises] at the time of the treaty breaches".[13]

60. In line with *NAFTA* tribunals, other international investment tribunals have consistently found that their jurisdiction does not extend to claims alleging breaches that pre-date the claimant's protection under the relevant treaty. For example, in *Renée Rose Levy v. Peru,* decided under the France-Peru BIT, the Tribunal explained that a claimant must have an investment at the time of the alleged breach for the tribunal to have jurisdiction:

> … [I]t is clear to the Tribunal that, where the claim is founded upon an alleged breach of the Treaty's substantive standards, a tribunal's jurisdiction is limited to a dispute between the host state and a national or company which has acquired its protected investment before the alleged breach occurred. In

[9] RLA-020, *Mesa — Award*, ¶ 327.

[10] RLA-020, *Mesa — Award*, ¶ 326.

[11] RLA-021, *Gallo — Award*, ¶ 325 ("… ownership or control must exist at the time the measure which allegedly violates the Treaty is adopted or maintained.").

[12] RLA-021, *Gallo — Award*, ¶ 328.

[13] RLA-022, *B-Mex, LLC and Others v. United Mexican States* (ICSID Case No. ARB(AF)/16/3) Partial Award, 19 July 2019, ¶ 145. The disputing parties also agreed that the claimants needed to establish ownership or control of the relevant enterprises at the time of the alleged breaches. Mexico further argued that ownership or control must also be shown at the time of the submission of the claim to arbitration, in addition to at the time of the alleged treaty breach. The tribunal agreed. RLA-022, *B-Mex — Partial Award*, ¶ 147.

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> other words, the Treaty must be in force and the national or company must have already made its investment when the alleged breach occurs, for the Tribunal to have jurisdiction over a breach of that Treaty's substantive standards affecting that investment.[14]

61. The tribunal proceeded to explain that, because the BIT is "at the same time the instrument that creates the substantive obligation forming the basis of the claim before the Tribunal and the instrument that confers jurisdiction upon the Tribunal, a claimant bringing a claim based on a Treaty obligation must have owned or controlled the investment when that obligation was allegedly breached."[15]

62. Similarly, in *GEA Group v. Ukraine*, a case decided under the Germany-Ukraine BIT, the German claimant acquired its investment by acquiring the shares of an enterprise (KCH) from another potentially protected investor (SF Beteiligungs-GmbH).[16] Ukraine argued that, to the extent any alleged breaches occurred before the acquisition of KCH, the tribunal lacked jurisdiction.[17] The tribunal affirmed that it had no jurisdiction over alleged breaches that occurred before the claimant became an investor: "for the Tribunal to hear the Claimant's claims, the Claimant must have held an interest in the alleged investment before the alleged treaty violations were committed."[18] Like the tribunals in *Mesa* and *Gallo*, the tribunal observed that investment arbitration tribunals have "consistently applied" this principle.[19]

63. The principle that a claimant must have been a protected investor at the time of the alleged breaches is such a widely-accepted principle that it is frequently common ground between the parties. For example, in *Cementownia v. Turkey*, the tribunal explained that "[i]t is undisputed that an investor seeking access to international jurisdiction pursuant to an investment treaty must prove that it was an investor at the relevant time, *i.e.*, at the moment when the events on which its claim is based occurred."[20] Similarly, it was "common ground" between the parties in *Libananco v. Turkey* that the tribunal's jurisdiction depended on whether the claimant had acquired its investment before the alleged breaches.[21]

[14] RLA-048, *Renée Rose Levy and Gremcitel S.A. v. Republic of Peru* (ICSID Case No. ARB/11/7) Award, 9 January 2015 ("*Renée Rose Levy — Award*"), ¶ 146 (emphasis added).

[15] RLA-048, *Renée Rose Levy — Award*, ¶ 147.

[16] RLA-023, *GEA Group Aktiengesellschaft v. Ukraine* (ICSID Case No. ARB/08/16) Award, 31 March 2011 ("*GEA Group — Award*"), ¶¶ 33-40, 150, 172.

[17] RLA-023, *GEA Group — Award*, ¶ 166.

[18] RLA-023, *GEA Group — Award*, ¶ 170. In applying the governing principle quoted, the GEA Group tribunal found that it had jurisdiction over certain alleged breaches because they occurred after the claimant had made its investment in Ukraine. *See e.g.*, ¶¶ 192-193, and 198.

[19] RLA-023, *GEA Group — Award*, ¶ 170.

[20] RLA-049, *Cementownia "Nowa Huta" S.A. v. Republic of Turkey* (ICSID Case No. ARB(AF)/706/2) Award, 17 September 2009, ¶ 112.

[21] RLA-050, *Libananco Holdings Co. Limited v. Republic of Turkey* (ICSID Case No. ARB/06/8) Award, 2 September 2011, ¶ 127 ("It is common ground between the Parties that the Tribunal's jurisdiction over the merits depends on whether Libananco owned ÇEAŞ and Kepez shares at the time of the alleged expropriation (i.e. 12 June 2003).")

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64. Consequently, *NAFTA* and other international investment law jurisprudence confirms that a claimant must have been a protected investor at the time of the alleged breach in order to establish a tribunal's jurisdiction *ratione temporis*.

NAFTA — *Articles 1101(1) and 1116(1)* — *Temporal Jurisdiction*

In its memorial on jurisdiction in *Tennant Energy LLC v Government of Canada*, dated 21 September 2020, Canada made the following argument concerning a *NAFTA* tribunal's temporal jurisdiction:[1]

A. NAFTA's Dispute Settlement Provisions Limit the Tribunal's Temporal Jurisdiction to Claims from a Claimant Who Qualified as an "Investor of a Party" When the Alleged Breach Occurred

1. Article 1116(1) Requires a Claimant to be an "Investor of a Party" When the Alleged Breach Occurred

64. Article 1116(1) sets out the circumstances under which an investor of a Party may bring a claim on its own behalf, as follows:

> 1. An investor of a Party may submit to arbitration under this Section a claim that another Party has breached an obligation under:
>
> (a) Section A or Article 1503(2) (State Enterprises), or
>
> (b) Article 1502(3)(a) (Monopolies and State Enterprises) where the monopoly has acted in a manner inconsistent with the Party's obligations under Section A,
>
> and that the investor has incurred loss or damage by reason of, or arising out of, that breach. …[2]

65. To submit a claim under Article 1116(1), a claimant must therefore satisfy the requirements of Article 1101(1) (Scope and Coverage). This provision is located in Section A, and establishes the scope and coverage of the substantive protections accorded to investors and investments as well as the scope of the rights to submit disputes to arbitration, as follows:[3]

> 1. This Chapter applies to measures adopted or maintained by a Party relating to:

[1] Full submission available online: <https://pcacases.com/web/sendAttach/22330>.

[2] Similarly, Article 1117(1) (Claim by an Investor of a Party on Behalf of an Enterprise) sets out the circumstances under which an investor of a Party may bring a claim on behalf of an enterprise of another Party that is a juridical person that the investor owns or controls directly or indirectly, alleging that another Party breached an obligation under Section A of NAFTA Chapter Eleven and that the enterprise has incurred loss or damage by reason of, or arising out of, that breach. …

[3] RLA-001, *Mesa — Award*, ¶ 252.

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(a) investors of another Party;
(b) investments of investors of another Party in the territory of the Party; and
(c) with respect to Articles 1106 and 1114, all investments in the territory of the Party.

66. Article 1101(1) therefore provides that *NAFTA* Chapter Eleven applies to measures adopted or maintained by a Party that relate to "investors of another Party" and "investments of investors of another Party". Article 1139 (Definitions) defines these terms as follows:

> **investor of a Party** means a Party or state enterprise thereof, or a national or an enterprise of such Party, that seeks to make, is making or has made an investment;
> **investment of an investor of a Party** means an investment owned or controlled directly or indirectly by an investor of such Party;

67. The proper interpretation of the term "investor of a Party" as it operates within Article 1116(1) is that a tribunal's jurisdiction *ratione temporis* is limited to claims submitted by a claimant who qualified as an "investor of a Party" when the alleged breach occurred. Articles 1116(1) and 1101(1) set a temporal limitation on a tribunal's jurisdiction over claims concerning the substantive obligations in Section A of Chapter Eleven. A measure that occurred before the date when a claimant became an "investor of a Party" cannot breach the substantive obligations in Section A in relation to that claimant, because a *NAFTA* Party did not owe those obligations to that claimant before it became an "investor of a Party". Thus, for the substantive obligations of Chapter Eleven to apply to a measure relating to an investor or its investment, and for a claimant to bring a claim under Article 1116(1), the claimant must have owned or controlled the investment when the alleged breach occurred.

2. International Investment Jurisprudence Confirms that a Claimant Must Be an "Investor of a Party" When the Alleged Breach Occurred

68. International investment tribunals, including those established under *NAFTA* Chapter Eleven, as well as international investment arbitration scholars, have consistently held that if a claimant cannot establish it was a protected investor with a protected investment when an alleged breach occurred, a tribunal lacks temporal jurisdiction.[4] For example, in *Phoenix Action v. Czech Republic*, the tribunal held:

[4] Zachary Douglas states: "the timing of the investor's acquisition of its investment determines the commencement of the substantive protection afforded by the investment treaty and hence the temporal scope for the tribunal's adjudicative power over claims based upon an investment treaty obligation." RLA-117, Zachary Douglas, *The International Law of Investment Claims* (New York: Cambridge University Press, 2009), ¶ 303; ¶ 631; and Rule 32. *See also*, RLA-137, Hanno Wehland, "The Transfer of Investments and Rights of Investors under International Investment Agreements — Some Unresolved Issues", in *Arbitration International*, Volume 30, Issue 3, 1 September 2014, p. 568: ("Investors can only claim protection with regard to breaches taking place after they become protected …");

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> The Tribunal is limited *ratione temporis* to judging only those acts and omissions occurring after the date of the investor's purported investment. The proposition that bilateral investment treaty claims cannot be based on acts and omissions occurring prior to the claimant's investment results from the nature of the host State's obligations under a bilateral investment treaty. All such obligations relate to the host State's conduct regarding the investments of nationals of the other contracting party. Therefore, such obligations cannot be breached by the host State until there is such an investment of a national of the other State.[5]

69. Similarly, the tribunal in *Cementownia v. Turkey* stated, "[i]t is undisputed that an investor seeking access to international jurisdiction pursuant to an investment treaty must prove that it was an investor at the relevant time, *i.e.*, at the moment when the events on which its claim is based occurred."[6] The tribunal in *Levy v. Peru* also maintained:

> [I]t is clear to the Tribunal that, where the claim is founded upon an alleged breach of the Treaty's substantive standards, a tribunal's jurisdiction is limited to a dispute between the host state and a national or company which has acquired its protected investment before the alleged breach occurred. … a claimant bringing a claim based on a Treaty obligation must have owned or controlled the investment when that obligation was allegedly breached.[7]

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and RLA-138, Nelson Goh, "The Assignment of Investment Treaty Claims: Mapping the Principles", in Thomas Schultz (ed), *Journal of International Dispute Settlement*, 2019, Volume 10, Issue 1, p. 35.

[5] RLA-005, *Phoenix Action — Award*, ¶ 68 (emphasis added).

[6] RLA-139, *Cementownia "Nowa Huta" S.A. v. Republic of Turkey* (ICSID Case No. ARB(AF)/06/2) Award, 17 September 2009, ¶ 112.

[7] RLA-140, *Renée Rose Levy and Gremcitel S.A. v. Republic of Peru* (ICSID Case No. ARB/11/17) Award, 9 January 2015, ¶¶ 146-147 (emphasis added). *See also*, RLA-141, *Philip Morris Asia Limited v. Commonwealth of Australia* (UNCITRAL) Award on Jurisdiction and Admissibility, 17 December 2015, ¶ 529: ("whenever the cause of action is based on a treaty breach, the test for a *ratione temporis* objection is whether a claimant made a protected investment before the moment when the alleged breach occurred."); RLA-142, *Indian Metals & Ferro Alloys Ltd v. Republic of Indonesia* (UNCITRAL) Award, 29 March 2019, ¶ 107; RLA-143, *Libananco Holdings Co. Limited v. Republic of Turkey* (ICSID Case No. ARB/06/8) Award, 2 September 2011, ¶¶ 121-128: ("In order to establish jurisdiction, the Claimant must prove that it owned ÇEAŞ and Kepez shares during the time at which it claims the acts constituting a violation of the ECT were committed by the Respondent"); RLA-144, *Société Générale In respect of DR Energy Holdings Limited and Empresa Distribuidora de Electricidad del Este, S. A.v. The Dominican Republic* (UNCITRAL) Award on Preliminary Objections to Jurisdiction, 19 September 2008, ¶¶ 106-107: ("the Tribunal lacks jurisdiction over acts and events that took place before the Claimant acquired the investment"); RLA-145, *ST-AD GmbH v. Republic of Bulgaria* (UNCITRAL) Award on Jurisdiction, 18 July 2013, ¶ 300: ("a tribunal has no jurisdiction *ratione temporis* to consider claims arising prior to the date of the alleged investment, since a BIT cannot be applied to acts committed by a State before the claimant invested in the host country. … According to the well-known principle of non-retroactivity

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70. Under the *NAFTA*, the *Mesa* tribunal held that it lacked jurisdiction *ratione temporis* over certain measures that occurred before Mesa's enterprises were incorporated in Canada, and thus, before Mesa became a protected investor with respect to those investments.[8] The tribunal stated unequivocally:

> [I]nvestment arbitration tribunals have repeatedly found that they do not have jurisdiction *ratione temporis* unless the claimant can establish that it had an investment at the time the challenged measure was adopted. … Accordingly, this Tribunal's jurisdiction *ratione temporis* is limited to measures that occurred after the Claimant became an "investor" holding an "investment".[9]

71. Moreover, in describing Article 1101(1), the *Mesa* tribunal held that:

> The scope of application so defined limits the Tribunal's jurisdiction for the obvious reason that the latter derives from the dispute settlement provisions embodied in Chapter 11. Consequently, there is no jurisdiction if disputed measures are not "relating to investors" or to "investments of an investor." In addition to these express provisions of Chapter 11, the same conclusion arises as a general matter from the principle of nonretroactivity of treaties. State conduct cannot be governed by rules that are not applicable when the conduct occurs.[10]

72. As the *Mesa* tribunal noted, provisions such as Article 1116(1) and Article 1101(1) are consistent with the general rule under international law on the non-retroactive application of international treaties.[11] The tribunal in *GAMI v. Mexico* reached a similar result, stating, "*NAFTA* arbitrators have no mandate to evaluate laws and regulations that predate the decision of a foreigner to invest."[12] Moreover,

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of treaties in international law, a BIT cannot apply to the protection of an investor before the latter indeed became an investor under said BIT").

[8] RLA-001, *Mesa — Award*, ¶ 333: ("TTD and Arran were incorporated on 17 November 2009. North Bruce and Summerhill were incorporated on 6 April 2010. Hence, for the reasons set forth above, the Tribunal concludes that its jurisdiction is limited to claims based on measures which occurred after 17 November 2009 for TTD and Arran and after 6 April 2010 for North Bruce and Summerhill.")

[9] RLA-001, *Mesa — Award*, ¶¶ 325–327 (emphasis added).

[10] RLA-001, *Mesa — Award*, ¶ 325 (emphasis added).

[11] Under international law, treaties do not apply retroactively unless stated otherwise. The ILC Articles on State Responsibility, Article 13 states: "[a]n act of a State does not constitute a breach of an international obligation unless the State is bound by the obligation in question at the time the act occurs." (CLA-185, International Law Commission, *Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries*, 2001, Article 13). Similarly, the Vienna Convention on the Law of Treaties, Article 28 states: "[u]nless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party. (RLA-031, *Vienna Convention on the Law of Treaties*, 1155 U.N.T.S. 331, 23 May 1969, Article 28).

[12] CLA-135, *GAMI Investments, Inc. v. The Government of the United Mexican States* (UNCITRAL) Final Award, 15 November 2004, ¶ 93.

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the tribunal in *B-Mex v. Mexico* agreed with the disputing parties in that case that, "Claimants must establish that they owned or controlled the [relevant investment] at the time of the treaty breaches".[13]

73. The authorities above apply the general rule on the non-retroactive application of international treaties in various circumstances — including where an alleged investment was incorporated after the alleged breach, or where a previous owner of an investment lacked the requisite nationality to be a protected investor. Nevertheless, as explained below, the Claimant appears to maintain that there was continuous American nationality over the investment … Similar circumstances arose in *GEA Group v. Ukraine*.[14] The claimant in that case invested in the investment (a conversion contract) by acquiring the shares of an enterprise (KCH) from another potentially protected investor (SF Beteiligungs-GmbH).[15] Ukraine argued that to the extent any alleged breaches occurred before the acquisition of KCH, the tribunal lacked jurisdiction.[16] The tribunal affirmed that it had no jurisdiction over alleged breaches that occurred before the claimant became an investor, as follows: "for [a] tribunal to hear the Claimant's claim, the Claimant must have held an interest in the alleged investment before the alleged treaty violations were committed".[17] The tribunal observed that investment arbitration tribunals have consistently applied this principle.[18]

74. Accordingly, this Tribunal has no jurisdiction to consider an alleged breach that occurred before the Claimant became an "investor of a Party" in Canada. Nothing in the text of Article 1116(1) expresses an intention from the *NAFTA* Parties to derogate from the general rule on the non-retroactive application of international treaties.[19]

[13] RLA-121, *B-Mex — Partial Award*, ¶ 145.

[14] RLA-146, *GEA Group Aktiengesellschaft v. Ukraine* (ICSID Case No. ARB/08/16) Award, 31 March 2011 ("*GEA Group — Award*").

[15] RLA-146, *GEA Group — Award*, ¶¶ 36–40, 150, 172.

[16] RLA-146, *GEA Group — Award*", ¶ 166.

[17] RLA-146, *GEA Group — Award*", ¶¶ 168–170 (emphasis added). In applying the governing principle quoted, the *GEA Group* tribunal found that it had jurisdiction over certain alleged breaches because they occurred after the claimant had made its investment in Ukraine. (*See e.g.*, ¶¶ 192 to 193, 198). …

[18] RLA-146, *GEA Group — Award*, ¶ 170, *citing*: RLA-147, *Limited Liability Company Amto v. Ukraine* (SCC Arbitration No. 080/2005) Final Award, 26 March 2008, ¶ 48(c); CLA-115, *Saluka Investments BV (The Netherlands) v. The Czech Republic* (UNCITRAL) Partial Award, 17 March 2006, ¶ 244; RLA-005, *Phoenix Action — Award*, ¶ 67.

[19] It is well recognized that "[a]n important principle of customary international law should [not] be held to have been tacitly dispensed with [by international agreement], in the absence of words making clear an intention to do so." (RLA-148, *Case Concerning Elettronica Sicula S.p.A. (ELSI) (United States of America v. Italy)*, I.C.J. Reports 1989, Judgment, 20 July 1989, p. 42); CLA-138, *The Loewen Group, Inc. and Raymond L. Loewen v. United States of America* (ICSID Case No. ARB(AF)/98/3) Award, 26 June 2003, ¶ 162: ("It would be strange indeed if sub silentio the international rule were to be swept away.")

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STATE RESPONSIBILITY

Attribution to a State — Effective Control — Good Faith Principle — Deference to National Authorities — Proportionality

In its rejoinder memorial on merits and damages in *Resolute Forest Production Inc. and Government of Canada*, dated 4 March 2020, Canada made the following arguments on issues of attribution, good faith, and deference to national authorities under public international law (original headings have been altered to facilitate reading):[1]

Attribution of Private Acts to the State under International Law

24. First, as Canada has argued previously, it is an essential element of jurisdiction for a *NAFTA* Chapter Eleven Tribunal that the impugned measure be "adopted or maintained by a Party relating to" an investor and its investment. The Claimant cannot side-step this requirement under *NAFTA* Article 1101(1) by taking a simple "ensemble" approach that relies on other measures to establish jurisdiction over a measure that would not otherwise stand on its own.

25. … ILC Article 2 [of the 2001 *Articles on the Responsibility of States for Internationally Wrongful Acts*] sets out the elements of an internationally wrongful act of a State: There is an internationally wrongful act of a State when conduct consisting of an action or omission: (a) is attributable to the State under international law; and (b) constitutes a breach of an international obligation of the State.[2]

26. This approach, reflecting customary international law and applied by the ICJ [International Court of Justice] in *Diplomatic and Consular Staff in Tehran (United States v Iran), Application of Genocide Convention (Bosnia and Herzegovina v Serbia and Montenegro)* and *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)*,[3] requires that a tribunal first determine whether the action or omission is attributable to the State, and then determine whether a breach of international law has occurred. In other words, the inquiries are distinct and cannot

[1] Full submission available online: <https://pcacases.com/web/sendAttach/10513>.

[2] RL-032, ILC Articles, Article 2.

[3] *See* CL-210, *Case Concerning United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran)*, Judgment, I.C.J. Reports 1980, 24 May 1980 ("*Diplomatic and Consular Staff in Tehran Case*"), ¶ 56: ("[f]irst, it must determine how far, legally, the acts in question may be regarded as imputable to the Iranian State. Secondly, it must consider their compatibility or incompatibility with the obligations of Iran under treaties in force or under any other rules of international law that may be applicable."); RL-194, *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* Judgment, I.C.J. Reports 2005, 19 December 2005, ¶ 215: ("[t]he Court, having established that the conduct of the UPDF and of the officers and soldiers of the UPDF is attributable to Uganda, must now examine whether this conduct constitutes a breach of Uganda's international obligations."); RL-115, *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, I.C.J. Reports 27, 26 February 2007 ("*Genocide Convention Case*"), ¶ 379.

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be conflated even if there are other measures over which the State does not contest attribution. …

30. … In the *Military and Paramilitary Activities* case, the ICJ determined that, despite the United States' extensive support, involvement with and influence over the *contra* rebels in Nicaragua, it did not effectively control them and thus could not be responsible for specific acts alleged to violate international law.[4] The *Application of Genocide Convention (Bosnia and Herzegovina v Serbia and Montenegro)* case affirmed that rigorous standard, requiring that instructions given by the State be "in respect of each operation in which the alleged violations occurred, not generally in respect of the overall actions taken by the persons or groups of persons having committed the violations."[5] Tribunals in investor-State cases such as *Jan de Nul*, *Hamester*, *White Industries*, *Almas* and others have applied the demanding "effective control" standard as requiring "both a general control of the State over the person or entity and a specific control of the State over the act the attribution of which is at stake."[6] …

38. ILC Article 4 outlines when the conduct of a State organ is necessarily an act of the State and thus attributable thereto:

> *Article 4: Conduct of organs of a State*
>
> (1) The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization

[4] RL-114, *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* Judgment, I.C.J. Reports 1986, 27 June 1986 ("*Military and Paramilitary Activities Case*"), ¶ 115. As Judge Ago noted in his separate opinion, "[o]nly in cases where certain members of those forces happened to have been specifically charged by the United States authorities to commit a particular act, or carry out a particular task of some kind on behalf of the United States, would it be possible so to regard them" as attributable to the United States. (RL-195, *Military and Paramilitary Activities Case,* Separate Opinion of Judge Roberto Ago, 27 June 1986, ¶ 16.) The ICJ held the United States responsible for its own acts of support for the *contras*, but a "general situation of dependence and support would be insufficient to justify attribution of the conduct to the State." *See* RL-032, ILC Articles, pp. 47–48.

[5] RL-115, *Genocide Convention Case,* ¶ 400.

[6] CL-105, *Jan de Nul N.V. and Dredging International N.V. v. Egypt* (ICSID Case No. ARB/04/13) Award, 6 November 2008 ("*Jan de Nul — Award*"), ¶ 173, *cited with approval in* RL-116, *White Industries Australia Limited v. The Republic of India* (UNCITRAL) Final Award, 30 November 2011 ("*White Industries — Award*"), ¶¶ 8.1.16–8.1.18. *See also* RL-069, *Gustav F Hamester GmbH and Co KG v. Ghana* (ICSID Case No. ARB/07/24) Award, 18 June 2010, ¶ 179 (describing the effective control test in terms identical to the *Jan de Nul* tribunal); RL-120, *Almas v. Poland* (UNCITRAL) Award, 27 June 2016, ¶¶ 268–269; RL-118, *Tulip Real Estate and Development Netherlands B.V. v. Republic of Turkey* (ICSID Case No. ARB/11/28) Award, 10 March 2014, ¶¶ 304–305; RL-119, *Teinver v. Argentina* (ICSID Case No. ARB/09/01) Award, 21 July 2017, ¶ 722–724; RL-117, *Gavrilovic v. Croatia* (ICSID Case No. ARB/12/39) Award, 26 July 2018, ¶¶ 828–829.

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> of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State.
> (2) An organ includes any person or entity which has that status in accordance with the internal law of the State.[7]

40. But determining whether an entity is a State organ is not by itself sufficient to satisfy the inquiry iterated under ILC Article 4 because consideration must also be given to what is the specific *conduct* that is alleged to be wrongful under international law. … Just as "the instructions, direction or control must relate to the conduct that is said to have amounted to an internationally wrongful act" under ILC Article 8,[8] so too must there be a nexus between the specific conduct of the State organ and the internationally wrongful act under ILC Article 4. …

50. … [T]he rules of state responsibility for internationally wrongful acts recognize that distinctions should be made between the conduct of a State organ and attribution of conduct of non-State actors to the State. Just as the ICJ and other international tribunals have distinguished between the consequences flowing from conduct attributable to State organs from consequences flowing from the conduct attributable solely to private actors,[9] so too must this Tribunal maintain the distinction when considering ILC Article 4 and Article 8. …

56. ILC Article 11 is entitled "Conduct acknowledged and adopted by a State as its own" and states:

> Conduct which is not attributable to a State under the preceding articles shall nevertheless be considered an act of that State under international law if and to the extent that the State acknowledges and adopts the conduct in question as its own.

57. … ILC Article 11 requires "clear and unequivocal" acknowledgement *and* adoption of conduct by the State, and it will not be sufficient if a state "…merely acknowledges the factual existence of conduct or expresses its verbal approval of

[7] RL-032, ILC Articles, Article 4. ILC Article 4 is considered to be reflective of customary international law. *See* RL-115, *Genocide Convention Case,* ¶ 385.

[8] RL-032, ILC Articles, Article 8, Commentary (7).

[9] *See e.g.*, RL-114, *Military and Paramilitary Activities Case*, ¶¶ 93–112, 115: ("For this conduct to give rise to legal responsibility of the United States, it would in principle have to be proved that that State had effective control of the military or paramilitary operations in the course of which the alleged violations were committed. … It takes the view that the contras remain responsible for their acts, and that the United States is not responsible for the acts of the contras, but for its own conduct vis-à-vis Nicaragua, including conduct related to the acts of the contras."); CL-105, *Jan de Nul — Award*, ¶¶ 172–175 (distinguishing between the conduct of the Suez Canal Authority and other State organs); RL-116, *White Industries — Award*, ¶¶ 8.1.18-8.1.21, 10.2.3, 10.4.2 (distinguishing the conduct of the Indian Government and courts from the conduct of Coal India).

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it."[10] For example, in the *Diplomatic and Consular Staff in Tehran* case, the ICJ recognized that once the Iranian Government maintained the occupation of the U.S. Embassy and the detention of hostages for the purpose of exerting pressure on the United States, the legal nature of the situation was "fundamentally transform [ed]" whereby "the approval given to these facts by the Ayatollah Khomeini and other organs of the Iranian State, and the decision to perpetuate them, translated continuing occupation of the Embassy and detention of hostages into acts of that State."[11]

Good Faith in International Law

73. While good faith forms part of general international law,[12] it does not constitute a separate source of obligation where none would otherwise exist. As the ICJ explained in the *Case Concerning Border and Transborder Armed Actions (Nicaragua v Honduras)*:

> The principle of good faith is … "one of the basic principles governing the creation and performance of legal obligations" … it is not in itself a source of obligation where none would otherwise exist.[13]

74. The ICJ confirmed this principle in the *Case Concerning the Land and Maritime Boundary Case between Cameroon and Nigeria (Cameroon v Nigeria)*.[14] In that case, Nigeria contended that Cameroon had violated the principle of good faith by "omitt[ing] to inform it that it intended to accept the jurisdiction of the Court, then

[10] RL-032, ILC Articles, Article 11, Commentaries (6) and (8). *See also*, RL-196, James Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (Cambridge University Press, 2002) ("*Crawford, ILC Commentary*"), Article 11(6)(8) at p. 123. *See also*, CL-210, *Diplomatic and Consular Staff in Tehran Case*, ¶¶ 73, 91; RL-197, *Affaire relative à la concession des phares de l'Empire ottoman*, UNRIAA, vol. XII, 24/27 July 1956, at p. 198; RL-198, James Crawford, *State Responsibility: The General Part* (Cambridge University Press, 2013), p. 187 (stating that the act of adoption may be express, as in *Diplomatic and Consular Staff in Tehran* or implied, as in the *Affaire relative à la concession des phares de l'Empire ottoman (Lighthouses)* arbitration).

[11] CL-210, *Diplomatic and Consular Staff in Tehran Case*, ¶ 74.

[12] *See e.g.*, Article 26 ("*Pacta sunt servanda*") of the *Vienna Convention on the Law of Treaties* ("*VCLT*") provides that "[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith." (RL-086, *Vienna Convention on the Law of Treaties*, May 23, 1969, 1115 U.N.T.S. 31, 27 January 1980, Article 26).

[13] RL-202, *Case Concerning Border and Transborder Armed Actions (Nicaragua v. Honduras)* Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1988, p. 69, 20 December 1988, ¶ 94, quoting CL-209, *Nuclear Tests Case (Australia v. France)* Judgment, I.C.J. Reports 1974, p. 268 ("*Nuclear Tests Case*"), ¶ 46.

[14] RL-134, *Case Concerning the Land and Maritime Boundary Between Cameroon and Nigeria (Cameroon v. Nigeria)* Preliminary Objections, Judgment, I.C.J. Reports 1998, 11 June 1998 ("*Land and Maritime Boundary Case*").

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that it had accepted that jurisdiction and, lastly, that it intended to file an application".[15] Nigeria also alleged that Cameroon prepared itself to address the Court while it maintained bilateral contact with Nigeria on border issues.[16] The Court did not accept Nigeria's argument and repeated the holding in the *Nicaragua v Honduras* case cited above and noting further that:

> In the absence of any such obligations and of any infringement of Nigeria's corresponding rights, Nigeria may not justifiably rely upon the principle of good faith in support of its submission.[17]

Minimum Standard of Treatment under Customary International Law

127. It is axiomatic that merely causing economic loss to a foreign investor is insufficient to result in a violation of the minimum standard of treatment.

130. … Even those tribunals applying autonomous fair and equitable treatment clauses, which are more stringent than what is required under Article 1105(1),[18] have affirmed that "the host State is not required to elevate unconditionally the interests of the foreign investor above all other considerations in every circumstance."[19] The *BayWa* tribunal, endorsing the conclusion of the *Antaris* tribunal, said the same:

> *The host State is not required to elevate the interests of the investor above all other considerations*, and the application of the [Energy Charter Treaty, Article 10(1)] FET [Fair and Equitable Treatment] standard allows for a balancing or weighing exercise by the State and the determination of a breach of the FET standard must be made in light of the *high measure of deference which international*

[15] RL-134, *Land and Maritime Boundary Case*, ¶ 36.

[16] RL-134, *Land and Maritime Boundary Case*, p. 296.

[17] RL-134, *Land and Maritime Boundary Case*, p. 297.

[18] RL-214, *Liman Caspian Oil BV and NCL Dutch Investment BV v. Republic of Kazakhstan* (ICSID Case No. ARB/07/14) Excerpts of Award, 22 June 2010 ("*Liman — Excerpts of Award*"), ¶ 263: ("[T]he Tribunal considers that the purpose of ECT Article 10(1), second sentence, is to provide a protection which goes beyond the minimum standard of treatment under international law. The ECT was intended to go further than simply reiterating the protection offered by the latter. In this respect, ECT Article 10(1), second sentence, differs from NAFTA Article 1105 (in its interpretation given by the Free Trade Commission on 31 July 2001) which contains an express reference to international law. Therefore, when assessing Respondent's actions, a specific standard of fairness and equitableness above the minimum standard must be identified and applied for the application of the ECT."); CL-141, *Dumberry*, pp. 262-263: (NAFTA tribunals "are required, under Article 1105, to apply the minimum standard. This standard involves a higher threshold of liability than an unqualified FET clause.")

[19] CL-230, *Electrabel — Award*, ¶ 165. The *Electrabel* tribunal was applying Article 10(1) of the Energy Charter Treaty, which is an autonomous "fair and equitable treatment" clause and not the same as the minimum standard of treatment in customary international law.

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law generally extends to the right of national authorities to regulate matters within their own borders.[20]

131. … [U]nder Article 1105, the customary international law minimum standard of treatment of aliens *is* the limit on State action, so unless a measure falls below that minimum threshold, there is no liability for a NAFTA Party. The "high measure of deference" that international law allows for States to make good faith policy decisions[21] ensures that a tribunal does not have "unfettered discretion to decide for itself, on a subjective basis, what was 'fair' or 'equitable' in the circumstances in each particular case … it may not simply adopt its own idiosyncratic standard of what is 'fair' or 'equitable' without reference to established sources of law."[22] As the tribunal in *Feldman* observed:

> [G]overnments must be free to act in the broader public interest through protection of the environment, new or modified tax regimes, *the granting or withdrawal of government subsidies*, reductions or increases in tariff levels, imposition of zoning restrictions and the like. Reasonable government regulation of this type cannot be achieved if any business that is adversely affected may

[20] RL-215, *BayWa R.E. Renewable Energy GmbH and BayWa R.E. Asset Holding GmBH v. Kingdom of Spain* (ICSID Case No. ARB/15/16) Decision on Jurisdiction, Liability and Directions on Quantum, 2 December 2019 ("*BayWa — Decision*"), ¶ 459 (emphasis added), *citing* RL-216, *Antaris GMBH (Germany) and Dr. Michael Göde (Germany) v. The Czech Republic* (UNCITRAL) Award, 2 May 2018 ("*Antaris - Award*"), ¶ 360(9).

[21] *BayWa — Decision*, ¶ 459. In addition to the statement by the *BayWa* tribunal, *see* RL-059, *S. D. Myers — First Partial Award*, ¶¶ 261–263 (explaining that a "high measure of deference generally extends to the right of domestic authorities to regulate matters within their own borders"); CL-025, *Glamis — Award*, ¶ 762 (holding that "it is not for an international tribunal to delve into the details of and justifications for domestic law."); CL-026, *Chemtura — Award*, ¶ 123 (taking into account that "the fact that certain agencies manage highly specialized domains involving scientific and public policy determinations."); RL-173, *Gemplus, S.A., et al. v. Mexico* (ICSID Case No. ARB(AF)/04/3 and ARB(AF)/04/4) Award, 16 June 2010 ("*Gemplus — Award*"), ¶ 6–26: ("Fourth, as to 'deference', the Tribunal accepts the Respondent's submissions to the effect that this Tribunal should not exercise 'an open-ended mandate to second-guess government decision-making', in the words of the arbitration tribunal in *S.D. Myers*."); CL-230, *Electrabel — Award*, ¶ 181: ("It is all too easy, many years later with hindsight, to second-guess a State's decision and its effect on one economic actor, when the State was required at the time to consider much wider interests in awkward circumstances, balancing different and competing factors."); RL-122, *Mercer — Award*, ¶ 7.42: ("as a general legal principle, in the absence of bad faith, a measure of deference is owed to a State's regulatory policies."); RL-174, *Philip Morris — Award*, ¶ 418: ("[t]he fair and equitable treatment standard is not a justiciable standard of good government, and the tribunal is not a court of appeal."); RL-052, *Mesa — Award*, ¶ 553: ("the deference which NAFTA Chapter 11 tribunals owe a state when it comes to assessing how to regulate and manage its affairs.")

[22] RL-029, *Mondev — Award*, ¶ 119.

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> seek compensation, and it is safe to say that customary international law recognizes this.[23]
>
> 134. … As Professor Dumberry succinctly noted:
>
> *[T]he proportionality test presupposes that the objective behind a consented measure taken by a State is legitimate.* The 'suitability for a legitimate government purpose' is indeed the first question to be examined by a tribunal when applying the proportionality test. *It is difficult to conceive how a measure considered as 'sufficiently egregious and shocking' could ever be deemed by a tribunal as serving a legitimate government purpose.* In other words, because under Article 1105 the threshold of severity is so high, it is submitted that the contested measure will never satisfy the first step of the proportionality test. *When faced with an egregious and shocking measure, a NAFTA tribunal need not apply the proportionality test.*[24]
>
> 135. … [R]eliance on *ADM*[25] is entirely misplaced. In that case, the tribunal was applying the principle of proportionality in the context of *countermeasures*, an area where the requirement of proportionality is part of customary international law.[26]
>
> 138. The "principle of proportionality" is not a legal test that any *NAFTA* tribunal has applied to determine whether an impugned measure is consistent with the minimum standard of treatment of aliens in customary international law. Just as a *NAFTA* Chapter Eleven tribunal should not seek to replace the rational policy decisions of a *NAFTA* Party by its own judgment (an issue discussed further below), it should also not engage in a determination as to whether a measure was "proportionate" under Article 1105.

[23] RL-021, *Feldman — Award,* ¶ 103 (emphasis added).

[24] CL-141, *Dumberry,* p. 264 (emphasis added).

[25] Claimant's Reply, ¶ 205 fn. 302.

[26] RL-092, *ADM — Award*, ¶¶ 124–126, 133. Proportionality is a customary international law principle applicable in the context of countermeasures and self-defence. *See* RL-032, ILC Articles, Article 51 and commentary thereto at pp. 294–296; RL-114, *Military and Paramilitary Activities Case*, ¶ 176 (affirming that it is well established in customary international law that "self-defence would warrant only measures which are proportional to the armed attack and necessary to respond to it.").

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