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

At Global Affairs Canada in 2018

Aux Affaires mondiales Canada en 2018

compiled by / préparé par
ALAN H. KESSEL

DIPLOMATIC LAW

Vienna Convention on Diplomatic Relations — *Article 39.2* — *Residual Diplomatic Immunity from Criminal Jurisdiction*

In 2018, the Legal Bureau wrote:

Article 39.2 of the *Vienna Convention on Diplomatic Relations* (VCDR) provides that when the functions of a person enjoying privileges and immunities come to an end, the privileges and immunities will normally cease the moment the person leaves the country, or upon the expiry of a reasonable period to do so: "However, with respect to acts performed by such a person in the exercise of his functions as a member of the mission, immunity shall continue to subsist". Such immunity, often referred to as residual or continuing immunity, is not time limited.

Immunities are granted for the benefit of the sending State. Though individual diplomats will enjoy the protections that immunities afford, it remains for the sending State, as the ultimate beneficiary, to determine whether or not to waive such immunities.

Residual diplomatic immunity is functional, in that it is restricted to official acts performed by a diplomat during the period that he or she was accredited

Alan H. Kessel, Assistant Deputy Minister Legal Affairs and Legal Adviser, Global Affairs Canada, Ottawa, Canada (jfm@international.gc.ca). The extracts from official correspondence contained in this survey have been made available by courtesy of Global Affairs Canada. Some of the correspondence from which extracts are given was provided for the general guidance of the enquirer in relation to specific facts that are often not described in full in the extracts within this compilation. The statements of law and practice should not necessarily be regarded as definitive.

Vol. 56 [2018], doi:10.1017/cyl.2019.18
© The Canadian Yearbook of International Law / Annuaire canadien de droit international 2019
https://doi.org/10.1017/cyl.2019.18 Published online by Cambridge University Press

as a diplomatic agent. Functional immunity essentially shifts responsibility for an impugned act from the diplomat to the sending State on whose behalf the diplomat was acting. A state's immunity under customary international law may not be circumvented by a foreign state bringing a criminal case against a state's agents or officials for acts done by them in their official capacity.

At the same time, an assertion by a sending State that it had instructed a diplomat to carry out impugned acts as part of the exercise of his or her functions, while perhaps persuasive, may not be determinative. To ascertain whether a former diplomat enjoys residual immunity in respect of certain acts, the approach taken by courts is to determine whether the acts in question can properly be categorized as falling within the functions of a diplomatic mission, as set out at Article 3 of the VCDR.

This approach is underscored in Denza's treatise on *Diplomatic Law* where she observes that:

> It is clear that in the light of the contemporary emphasis on the need to restrict immunities in the interests of access to justice for victims and plaintiffs, a more restrictive approach is evident in national courts. This is particularly so where the entitled individual, whether a Head of State or a diplomat, is no longer in office so that any immunity is granted *ratione materiae* rather than *ratione personae*. … In the context of Article 39 of the Vienna Convention it is suggested that the correct approach to determining whether continuing immunity applies should be first to determine whether the entitled person acted 'in the exercise of his functions as a member of the mission', and that the determination should be made in the light of Article 3 of the Convention. The test is not whether the action was carried out under instructions from the sending State, though this may be relevant to state immunity and to state responsibility.

Article 3.1 of the VCDR provides that the functions of a diplomatic mission consist, *inter alia*, in:

a) [r]epresenting the sending State in the receiving State;
b) [p]rotecting in the receiving State the interests of the sending State and of its nationals, within the limits permitted by international law;
c) [n]egotiating with the Government of the receiving State;
d) [a]scertaining by all lawful means conditions and developments in the receiving State, and reporting thereon to the Government of the sending State;
e) [p]romoting friendly relations between the sending State and the receiving State, and developing their economic cultural and scientific relations.

Once granted, immunities *ratione materiae* are equally effective in protecting the actions of currently accredited diplomats and former diplomats. Such immunities are not time limited and apply with undiminished vigour to protect all activity carried out in furtherance of diplomatic functions.

https://doi.org/10.1017/cyl.2019.18 Published online by Cambridge University Press

Taking note of Denza's mention of the "restrictive approach … evident in national courts", some receiving States might be tempted to consider ways to circumvent such immunities, particularly where the immunities may protect diplomatic functions or activities that they may find inconvenient or annoying. A State might assert, for example, that the use of unlawful means to ascertain conditions and developments in the receiving State should operate to exclude those activities from being treated as protected diplomatic functions per Article 3.1(d) of the VCDR. Such an approach would be inconsistent, however, with the intent of the VCDR, established practice for conduct of international relations and case law.

Certainly, such an argument was considered and rejected by the International Court of Justice in the *United States Diplomatic and Consular Staff in Tehran* case. The ICJ held that the regime of diplomatic law contains remedies for states to address concerns about the way in which a diplomat is exercising his or her official functions. A state can raise its concerns with the sending State, it can declare a diplomat *persona non grata*, or it can sever diplomatic relations with the sending State. The ICJ held that alleged illegal activity does not provide a basis for disregarding the privileges and immunities guaranteed to missions and diplomats under the VCDR.

Even in respect of the most serious international crimes – war crimes, crimes against humanity, and genocide – there is no widespread or consistent state practice to deny criminal immunity to individuals who would otherwise be entitled to it by virtue of their office. In the *Arrest Warrant* case, the International Court of Justice held that a former foreign minister could not be prosecuted in a foreign criminal jurisdiction for an official act undertaken while in office.

INTERNATIONAL INVESTMENT LAW

Most-Favoured-Nation Treatment — Agreement between the Government of Canada and the Government of the Republic of Costa Rica for the Promotion and Protection of Investments (Canada–Costa Rica FIPA) — *Article IV(a) — Importation into the* Canada–Costa Rica FIPA *of Substantive Obligations or Procedural Rights in Other International Investment Treaties*

In a non-disputing party submission dated 30 November 2018 in *Infinito Gold Ltd. v Republic of Costa Rica*, Canada argued (citations as they appear in original submission; full submission available upon request to ICSID Secretariat at ICSIDsecretariat@worldbank.org):

III. ARTICLE IV(a) (MOST-FAVOURED-NATION TREATMENT)

A. Article IV(a) Requires a Comparison Between the Treatment Accorded to the Investment of an Investor of a Contracting Party and the Investment of a Third State

Article IV(a) requires the Contracting Parties to grant the investments of the other Contracting Party treatment in accordance with the most-favoured-nation

https://doi.org/10.1017/cyl.2019.18 Published online by Cambridge University Press

("MFN") principle. The purpose of this provision is to prohibit nationality-based discrimination against the investment of investors of a Contracting Party in the territory of the other Contracting Party, when compared to the treatment accorded to the investments of investors of any third State.[1]

Article IV(a) cannot be applied in the abstract. In order to determine if a Contracting Party has breached the MFN obligation, an investor bears the burden of proving that: (1) the Contracting Party has granted both the investments of the investor and an investor of a third State "treatment" with respect to "the enjoyment, use, management, conduct, operation, expansion, and sale or disposition" of their investments; (2) the alleged treatment was granted "in like circumstances"; and (3) the treatment accorded to the investments of the investor was "less favourable" than the treatment accorded to the investment of the investor of a third State.[2] To ensure a proper comparison, the investor must satisfy each of the elements of this test.

B. Article IV(a) Does Not Allow for the Importation of Substantive or Procedural Rights in Other Treaties

When interpreted in good faith, in accordance with the ordinary meaning of the terms of this provision in their context and in light of its object and purpose, Article IV(a) does not allow for the importation into the *Canada-Costa Rica FIPA* of the substantive obligations or procedural rights in other international investment treaties. Nor did the Contracting Parties intend to incorporate the substantive obligations or procedural rights in other international investment treaties.[3]

[1] See, *e.g.*, RL-0051, *Içkale Insaat Ltd. Sirketi v. Turkmenistan*, ICSID Case No. ARB/10/24, Award, 8 March 2016, ¶ 328.

[2] RL-0227, *United Parcel Service of America Inc. v. Government of Canada* (UNCITRAL), Award on the Merits, 24 May 2007 ("UPS – Award on the Merits"), ¶ 83; CL-055, *Loewen Group, Inc. and Raymond L. Loewen v. United States of America*, ICSID Case No. ARB(AF)/98/3, Award, 26 June 2003 ("Loewen – Award"), ¶ 139; CL-013, *Archer Daniels Midland Company and Tate & Lyle Ingredients Americas Inc. v. The United Mexican States*, ICSID Case No. ARB(AF)/04/05, Award, 21 November 2007, ¶ 205; CL-078, *S.D. Myers, Inc. v. Government of Canada* (UNCITRAL) Partial Award, 13 November 2000 ("S.D. Myers – Partial Award"), ¶ 252. The only difference in the language in NAFTA Article 1103 (Most-Favored-Nation Treatment) and NAFTA Article 1102 (National Treatment) is that the relevant comparator treatment is with respect to the investors and investments of a third State.

[3] CAN-001, Campbell McLachlan et al, *International Investment Arbitration: Substantive Principles* (Oxford University Press 2007), pp. 256 and 257; RL-0068, *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction, 8 February 2005, ¶ 223 ("[A]n MFN provision in a basic treaty does not incorporate by reference dispute settlement provisions in whole or in part set forth in another treaty, unless the MFN provision in the basic treaty leaves no doubt that the Contracting Parties intended to incorporate them.")

https://doi.org/10.1017/cyl.2019.18 Published online by Cambridge University Press

The term "treatment" refers to measures adopted or maintained (*i.e.*, "taken or not taken") by the Contracting Party. This is made clear by a number of other provisions in the Agreement. For example, Article XII only provides for claims by an investor "that a measure taken or not taken by the former Contracting Party is in breach of this Agreement."[4] Likewise, Article XII(2)(b) provides that when an investor submits a claim, they will bear the burden of proof to demonstrate, *inter alia*, "that the measure taken or not taken by the Contracting Party is in breach of this Agreement."[5] Read together with the substantive obligations, Article XII makes clear that the Agreement only applies to measures adopted or maintained by a Contracting Party.

The application of the MFN obligation solely to "measures" adopted or maintained by a Contracting Party is also reflected in the language in Article IV(a), which provides that the comparison treatment must be in respect of "investments in its territory of investors of a third State."[6] The requirement that the comparator investment be in the territory of the host State reflects the Contracting Parties' intention that the MFN obligation apply to activities in their territory, which is distinct from the dispute settlement procedures and substantive treaty standards that are contained in other international treaties.[7] Accordingly, international investment tribunals have recognized the limitation imposed by the phrase "in its territory" to be inconsistent with the application of the MFN obligation to expand the scope of international arbitration beyond what is explicitly provided for in the treaty.[8]

Further the *chapeau* of Article IV provides that the "treatment" granted by a Contracting Party must be "with respect to investments and the enjoyment,

[4] Article XII(1) (emphasis added).

[5] Article XII(2)(b) (emphasis added).

[6] Article IV(a) (emphasis added).

[7] RL-0048, *ICS Inspection and Control Services Limited (United Kingdom) v. The Republic of Argentina* (UNCITRAL), PCA Case No. 2010-9, Award on Jurisdiction, 10 February 2012 ("*ICS – Award*"), ¶ 306 ("International arbitration is not an activity inherently linked to the territory of the respondent State.")

[8] RL-069, *Vladimir Berschader and Moïse Berschader v. The Russian Federation*, SCC Case No. 080/2004, Award, 21 April 2006, ¶ 185 ("The use of the expressions "treatment" and "in its territory" should be noted. This language appears to indicate that what the Contracting Parties had in view was the material rights accorded to investors within the territory of the Contracting States."); RL-0048, *ICS – Award*, ¶¶ 305 and 306 ("This practice is highly suggestive. Not only does this create a textual link between all the provisions establishing substantive treatment standards in distinction to the dispute settlement provisions, but it also highlights the non-territorial nature of dispute resolution."); RL-0073, *Daimler Financial Services AG v. Argentine Republic*, ICSID Case No. ARB/05/1, Award, 22 August 2012, ¶¶ 228-230 ("In short, it seems that the very concept of extra-territorial dispute resolution and a Host State's consent thereto are both ill-fitted to the clear and ordinary meaning of the words "treatment in its territory" as found in many BIT's MFN clauses, including those in the present matter.")

https://doi.org/10.1017/cyl.2019.18 Published online by Cambridge University Press

use, management, conduct, operation, expansion, and sale or other disposition thereof." In contrast to the ordinary meaning of the term "treatment," treaty standards are not behaviour in respect of an entity or a person.[9] Thus, absent measures adopted or maintained by a Contracting Party, substantive obligations and procedural rights in other international treaties do not automatically convert to "treatment" for the purposes of the MFN obligation and cannot, themselves, give rise to a breach of Article IV(a).

The context surrounding Article IV(a) confirms this interpretation in accordance with the ordinary meaning of its terms. The *Canada-Costa Rica FIPA* was concluded on March 18, 1998, prior to the award in *Maffezini v. Spain*, wherein the tribunal held that the MFN obligation in the *Agreement for the Reciprocal Promotion and Protection of Investments between the Kingdom of Spain and the Argentine Republic* applied to issues of dispute settlement.[10]

Subsequent to the *Maffezini* Award, Canada's treaty practice has been to include language in its international investment treaties confirming that under the correct interpretation of the MFN clause, "treatment" does not encompass international dispute settlement procedures, nor do the substantive obligations in other treaties, themselves, constitute "treatment" that gives rise to a breach of the MFN obligation.[11] Such language reaffirms Canada's interpretation of the meaning of the MFN provision in all of its treaties. The absence of language clarifying the meaning of Article IV(a) or an interpretive note cannot be interpreted as the Contracting Parties intending the MFN obligation in the *Canada-Costa Rica FIPA* to have a different meaning.[12]

[9] CL-080, *Siemens A.G. v. The Argentine Republic*, ICSID Case No. ARB/02/8, Decision on Jurisdiction, 3 August 2004, ¶ 85.

[10] CL-057, *Emilio Agustín Maffezini v. The Kingdom of Spain*, ICSID Case No. ARB/97/7, Award, 13 November 2000, ¶ 56.

[11] See, e.g., RL-0224, *Comprehensive Economic and Trade Agreement between Canada, of the one part, and the European Union and its Member States, of the other part*, 30 October 2016 (provisional application on 21 September 2017) ("CETA"), Article 8.7(4); CAN-002, *Comprehensive and Progressive Agreement for Trans-Pacific Partnership*, 4 February 2016, Article 9.5(3); CAN-003, *Canada-Korea Free Trade Agreement*, 22 September 2014 (entered into force 1 January 2015), Can. T.S. 2015 No. 3 ("Canada-Korea FTA"), Article 8.4, fn. 2; CAN-004, *Canada-Chile Free Trade Agreement*, 5 December 1996 (entered into force 5 July 1997), Can. T.S. 1997 No. 50 ("Canada-Chile FTA"), Appendix I: Chapter G – Investment, Article G-03(3).

[12] This approach has been confirmed by several NAFTA tribunals, who have rejected the application of the MFN obligation in NAFTA Article 1103 to substantive obligations and dispute settlement procedures, despite the fact that there is no language clarifying the meaning of treatment or an interpretive note issued by the Parties. See, *e.g.*, CL-025, *Chemtura Corporation v. Government of Canada* (UNCITRAL), Award, 2 August 2010 ("*Chemtura – Award*"), ¶ 235 ("The Tribunal can dispense with resolving this issue as a matter of principle.")

https://doi.org/10.1017/cyl.2019.18 Published online by Cambridge University Press

INTERNATIONAL TRADE LAW

Canada–US–Mexico Agreement — *Indigenous Exception — Article 32.5*

In 2018, the Government of Canada prepared an analysis of text that formed the basis of what became Article 32.5 of the *Canada–US–Mexico Agreement* (the renegotiated *North American Free Trade Agreement*), noting:

[The] language is very similar to New Zealand language in the [*Trans-Pacific Partnership Agreement* (*TPP*)] related to their Treaty of Waitangi (*TPP* Article 29.6), though it is not identical: …

1) Most significantly, it is "trilateral" in that it applies to all NAFTA Parties, [… while] the *TPP* language only applies to New Zealand.
2) The initial "arbitrary or unjustified discrimination" or "disguised restriction on trade" is, like the Treaty of Waitangi [language,] derived from "chapeau" language in Exceptions provisions like *GATT* [Article] XX …
3) Unlike the Treaty of Waitangi language this exception does not require that the treatment be "more favourable", which [addresses] one criticism of the previous text.
4) The test of legal obligation is self-judging "it deems necessary", which is a bit similar to the Treaty of Waitangi [language] ...
5) The obligations covered are very general ("legal obligations").

World Trade Organization (WTO) — Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) — *Article 20*

In a third party submission dated 12 October 2018 to the WTO Appellate Body in *Australia – Tobacco Plain Packaging*, Canada made the following argument regarding the correct test applicable to the term "unjustifiably" under Article 20 of the WTO *TRIPS Agreement* (citations as they appear in original submission; full submission available upon request to jlt@international.gc.ca):

The Panel found that a determination of whether the use of a trademark in the course of trade is being "unjustifiably" encumbered by special requirements involves consideration of the following factors:[1]

a) the nature and extent of the encumbrance resulting from the special requirements, bearing in mind the legitimate interest of the trademark owner in using its trademark in the course of trade and thereby allowing the trademark to fulfil its intended function;

[1] Panel Report, *Australia – Tobacco Plain Packaging* (Cuba, Dominican Republic, Honduras, Indonesia), para. 7.2430.

https://doi.org/10.1017/cyl.2019.18 Published online by Cambridge University Press

b) the reasons for which the special requirements are applied, including any societal interests they are intended to safeguard; and
c) whether these reasons provide sufficient support for the resulting encumbrance.

...

Canada submits that it is essential that the test established to determine whether a requirement is "unjustifiable" safeguards the integrity of the obligation under Article 20 while ensuring regulatory flexibility to protect, *inter alia*, public health. In this light, Canada proposes additional components (highlighted in *italics* below) to parts b) and c) of the Panel's test to ensure that this critical and deliberate balance reflected in the provision and intended by the drafters is achieved:

b) the reasons for which the special requirements are applied, including any societal interests they are intended to safeguard. *This element should also include an examination of whether the "reasons" are legitimate. Such a component ensures that the requirement is motivated by reasons of sufficient importance in order for it to be "justifiable" in the light of all relevant factors, including the nature and extent of the encumbrance (i.e. part a) of the Panel's test). The more vital or important the reasons for the special requirement, the easier it may be to find that the requirement is "justifiable".*
c) whether these reasons provide sufficient support for the resulting encumbrance. *This component should involve an examination of the nexus or connection between the requirement and the reasons, and whether the requirement contributes to or is capable of contributing to the reasons or goals that the Member is seeking to achieve. These components assist in a determination of whether the requirement is "reasonable"/"is justified by good evidence"/"is well founded"[2] in the light of all relevant factors. The greater the connection and contribution to the reasons, the more easily the requirement may be considered to be "justifiable".*

The exercise in determining whether a special requirement is "unjustifiable" involves a weighing and balancing of these factors. …

Canada wishes to emphasize that the test to determine whether a requirement is "justifiable" should *not* include a comparative analysis of the requirement at issue and the existence of alternative requirements that may be available, less trademark encumbering, and capable of making an equivalent contribution. Canada notes that the ordinary meaning of the term "justifiable" signifies something that is defensible, supportable, fair, and reasonable. ... The concept of "justifiable" in

[2] The Oxford English Dictionary defines "unjustifiable" as something that "cannot be shown to be just, right, or reasonable; lacking justification". Similarly, "justifiable" is defined as "supported or justified by good evidence or convincing reasoning; well-founded". Therefore, whether something is "justifiable" involves whether it [is] defensible, supportable, reasonable, fair, and well founded.

https://doi.org/10.1017/cyl.2019.18 Published online by Cambridge University Press

Article 20 is therefore fundamentally concerned with the relationship between the requirement and the encumbrance, rather than with how the requirement compares with other possible alternatives with respect to the degree of encumbrance.

World Trade Organization (WTO) — Measure — Ongoing Conduct

In its response dated 14 September 2018 to a US appeal in *United States – Countervailing Measures on Supercalendered Paper from Canada*, claiming that a measure, challenged by Canada and found to be WTO inconsistent by a panel, could not be challenged under the WTO dispute settlement system, Canada argued (citations as they appear in original submission; full submission available upon request to jlt@international.gc.ca):

The Panel Correctly Identified That "Ongoing Conduct" Can Be Subject to WTO Dispute Settlement

[T]he Panel correctly relied on the Appellate Body's conclusion that "[i]n principle, any act or omission attributable to a WTO Member can be a measure of that Member for purposes of dispute settlement proceedings".[1] The Appellate Body has also confirmed that a measure need not be written, nor be legally binding, to be subject to dispute settlement.[2] Neither requirement exists in the DSU. The Panel understood that a narrow definition of a "measure" is not supported by the text of the DSU or by any decision in the Appellate Body's jurisprudence.

Indeed, the Appellate Body has explained repeatedly that part of the rationale for allowing challenges against measures that are broader than "as applied" claims is that "the disciplines of the GATT and the WTO, as well as the dispute settlement system, are intended to protect not only existing trade but also the security and predictability needed to conduct future trade".[3] This understanding serves the objective of avoiding a multiplicity of litigation and eliminating the root of WTO-inconsistent behaviour.[4]

[1] Panel Report, *US – Supercalendered Paper*, para. 7.302 (citing Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 81. See also Appellate Body Reports, *US – Softwood Lumber IV* (Article 21.5 – Canada), para. 67; and *US – Anti-Dumping Methodologies (China)*, para. 5.122).

[2] Appellate Body Reports, *Guatemala – Cement I*, fn. 47 to para. 69; *US – Corrosion-Resistant Steel Sunset Review*, paras. 85 and 88; and *US – Zeroing (EC)*, paras. 192-194.

[3] Appellate Body Reports, *US – Corrosion-Resistant Steel Sunset Review*, para. 82; and *US – Anti-Dumping Methodologies (China)*, para. 5.126. The Appellate Body has made this statement with reference to Article 3.2 of the DSU, which refers to the objective of bringing "stability and predictability to the multilateral trading system".

[4] Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 82.

https://doi.org/10.1017/cyl.2019.18 Published online by Cambridge University Press

The Panel correctly identified that a complainant seeking to prove the existence of a measure, whether written or unwritten, will be required to prove the attribution of that measure to a Member and its precise content. Depending on the specific measure being challenged and how it is characterized by the complainant, other elements may need to be proven.[5] The Appellate Body has found repeatedly that complainants challenging measures of "ongoing conduct" would need to provide evidence of the repeated application of the measure, and of the likelihood that the measure will continue.[6]

The United States claims that the Panel's finding that "ongoing conduct" may constitute a measure amounts to a determination that a panel can consider the WTO-consistency of future measures.[7] This claim is false. The Panel properly considered whether the Other Forms of Assistance-AFA measure had been repeated in the past and was likely to continue in the future. The Panel examined the evidence, including [the U.S. Department of] Commerce's past determinations, actions, and statements, to find that the measure existed at the time of the panel request—not that it was a future measure. Consequently, the United States' objection—that measures that do not exist at the time of the panel request are not subject to dispute settlement—is simply not relevant in this case.[8] Nor is this the first time that the United States has attempted to argue "ongoing conduct" cannot be challenged because it consists of future measures. Panels and the Appellate Body have repeatedly rejected this argument.[9]

Citing to a single statement in a single panel report, the United States argues that "ongoing conduct" cannot be subject to challenge as a measure and that a "measure" must be an "instrument with a functional life of its own".[10] This narrow understanding of a measure has no legal support in the DSU or in any decision of the Appellate Body. The body of WTO jurisprudence deciding what can be challenged as a "measure", as set out above, has developed since the panel made its decision in *US – Export Restraints*. Moreover, the United States has taken the panel statement in *US – Export Restraints* out of context. The panel was not determining whether the subject of the claim was a "measure" under the DSU. In the relevant paragraph, the panel was determining whether the challenged measures were capable of giving rise to a violation of WTO obligations, having already found

[5] Panel Report, *US – Supercalendered Paper*, para. 7.303 (citing Appellate Body Reports, *Argentina – Import Measures*, para. 5.110).

[6] Panel Report, *US – Supercalendered Paper*, para. 7.304 (citing Appellate Body Reports, *US – Continued Zeroing*, para. 191; and *Argentina – Import Measures*, para. 5.108).

[7] United States' appellant submission, paras. 9-15.

[8] United States' appellant submission, paras. 11-14 (citing Articles 3.3 and 4.2 of the DSU, and Panel Report, *US – Upland Cotton*, paras. 7.158-7.160).

[9] Appellate Body Report, *US – Continued Zeroing*, paras. 181 and 185; Panel Report, *US – Orange Juice (Brazil)*, para. 7.176.

[10] United States' appellant submission, para. 10 (citing Panel Report, *US – Export Restraints*, para. 8.85).

https://doi.org/10.1017/cyl.2019.18 Published online by Cambridge University Press

that there was no reason why any given type of instrument or action could not be the subject of claims in dispute settlement.[11]

In *EC and certain member States – Large Civil Aircraft*, the United States itself attempted to challenge a measure as "ongoing conduct" that was not explicitly found in an "instrument". The United States alleged that the European Communities' "ongoing conduct" was made up of contributions from four separate countries, each with the same "core characteristics".[12]

...

The Panel Properly Applied "Ongoing Conduct" as Expressed in Previous Appellate Body Decisions

… The Panel properly found that Canada identified and substantiated the constituent elements of "ongoing conduct",[13] based on the Appellate Body's guidance in *Argentina – Import Measures* and *US – Continued Zeroing*, that a "complainant that is challenging a measure characterized as 'ongoing conduct' would need to provide evidence of its repeated application, and of the likelihood that such conduct will continue".[14]

The analytical tools identified by the Appellate Body and used to characterize a measure, such as "ongoing conduct", facilitate the understanding of the measure at issue.[15] The Appellate Body has found that "'[m]easures' need not be compartmentalized into categories in order to be challengeable in WTO dispute settlement".[16] They do not constitute "rigid legal standards or criteria".[17] As such, they are flexible constructs that can be applied in varied factual circumstances.

1. The constituent elements of an analytical tool, in this case "ongoing conduct", differ from the particular precise content and evidence of a challenged measure.

[11] Panel Report, *US – Export Restraints*, paras. 8.80-8.82 and 8.85. The panel was analyzing whether four measures (some relating to legislation and some relating to practice) could individually or taken together give rise to a violation of WTO obligations.

[12] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, paras. 781 and 794-795. The Appellate Body ultimately decided that the challenged measure fell outside the Panel's terms of reference, but did not "exclude the possibility that concerted action or practice could be susceptible to challenge in WTO dispute settlement".

[13] Appellate Body Reports, *Argentina – Import Measures*, para. 5.111.

[14] Appellate Body Reports, *Argentina – Import Measures*, para. 5.108; and *US – Continued Zeroing*, para. 191.

[15] Appellate Body Reports, *US – Continued Zeroing*, para. 179; and *Argentina – Import Measures*, para. 5.102.

[16] Appellate Body Report, *US – Anti-Dumping Methodologies (China)*, para. 5.125.

[17] Appellate Body Reports, *Argentina – Import Measures*, para. 5.110.

https://doi.org/10.1017/cyl.2019.18 Published online by Cambridge University Press

2. [T]he Appellate Body has stated that "the elements a panel needs to review in ascertaining the existence of an unwritten measure will depend on the specific measure challenged and how it is described and characterized by the complainant, rather than on the type of challenge".[18] … Canada was not limited to submitting the same type of evidence as the European Communities did in *US – Continued Zeroing* to demonstrate that this measure existed.[19] …

[The U.S. Department of] Commerce's determinations—which formed only part of the evidence before the Panel—demonstrate that Commerce had repeatedly applied its Other Forms of Assistance-AFA measure whenever the relevant circumstances arose and that each application of the measure was not a "qualitative determination". In every determination, the respondent was asked the same "other forms of assistance" question, did not have the opportunity to submit evidence concerning the discovered assistance, and Commerce relied exclusively on AFA to determine the existence of a subsidy. Commerce did not collect, and did not provide the respondent any opportunity to submit, information that would have enabled Commerce to make a "fact-specific" determination. Finally, in rejecting this U.S. argument, the Panel also observed that the panel in *US – Anti-Dumping Methodologies (China)* rejected an argument similar to the one advanced by the United States here. That panel found that a series of Commerce determinations demonstrated the precise content of the "AFA Norm" challenged in that case.[20]

WTO — National Security Exception — General Agreement on Tariffs and Trade *(*GATT*) Article XXI*

In an oral submission dated 25 January 2018 to the WTO Panel in *Russia – Measures Concerning Traffic in Transit*, Canada argued (citations as they appear in original submission; text of full submission available upon request to jlt@international.gc.ca):

[18] Appellate Body Reports, *Argentina – Import Measures*, para. 5.112.

[19] The Appellate Body has stated that "the specific measure challenged and how it is described or characterized by a complainant will determine the kind of evidence a complainant is required to submit and the elements that it must prove in order to establish the existence of the measure challenged". See Appellate Body Reports, *Argentina – Import Measures*, para. 5.110.

[20] Panel Report, *US –Supercalendered Paper*, fn. 579 to para. 7.316 (citing Panel Report, *US – Anti-Dumping Methodologies (China)*, para. 7.454, as modified by Appellate Body Report, *US – Anti-Dumping Methodologies (China)*, para. 5.164).

https://doi.org/10.1017/cyl.2019.18 Published online by Cambridge University Press

Use of Article XXI

Canada is of the view that Article XXI is a needed part of the international rules-based trading system and that Members should be prudent and sparing in their use of Article XXI. Calibrating the provision to permit measures truly needed for security reasons and avoid measures that are abuses of the exception was a concern in its negotiation. During the Preparatory Committee discussions, the Chairman of Commission A noted: "the atmosphere inside the ITO [International Trade Organization] will be the only efficient guarantee against abuse"[1] of this kind. In Canada's view, the essence of this observation remains compelling today and Members should not lightly invoke Article XXI. While Members must be able to take actions necessary for their security, they must also not abuse the international rules-based trading system of which they are willing parties and beneficiaries.

The WTO is not intended or equipped to resolve security issues or conflicts and, as a general matter, Canada urges Members involved in such situations to proactively and constructively engage to peacefully resolve the situation and avail themselves of any means that may assist them in doing so.

Justiciability of Article XXI

If Article XXI is invoked by a Member in a dispute then its applicability is justiciable unless consideration of the Article has been excluded from a panel's terms of reference. In a letter to the Chairman of the Panel, Canada observed that: "the DSU makes it clear that panels do not have the discretion to decline exercising the jurisdiction conferred on them by those terms of reference, nor do they have the discretion not to discharge the obligations imposed on them by Article 11."[2] …

Interpretation of Article XXI

All obligations in the WTO Agreements must be interpreted in good faith and in light of their object and purpose.[3] The object and purpose of the WTO Agreements includes "the substantial reduction of tariffs and other barriers to trade" and "the elimination of discriminatory treatment in international trade relations".[4] Each Article must also be interpreted on its own merits. Canada cautions against importing tests developed in jurisprudence to interpret other Articles, such as

[1] Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, Verbatim Report, Thirty-Third Meeting of Commission A, 24 July 1947, E/PC/T/A/PV/33, p. 21.

[2] Canada's letter to the Chairman of the Panel, 14 November 2017.

[3] The *Vienna Convention on the Law of Treaties*, done at Vienna, 23 May 1965, 1155 U.N.T.S. 331, Art. 31(1).

[4] *Marrakesh Agreement Establishing the World Trade Organization*, preamble.

https://doi.org/10.1017/cyl.2019.18 Published online by Cambridge University Press

Article XX, as tools to interpret Article XXI. With respect to Article XX, the negotiating history also bears this out as the security exception text was originally part of the list of general exceptions that became Article XX[5] but was moved into a separate Article with a different chapeau.

Canada recognizes that, like Article XX, Article XXI is an exception and thus can be invoked by a WTO Member to justify measures that would not otherwise be compliant with WTO obligations. However, Article XXI is structurally and textually different from Article XX. Unlike Article XX, the chapeau of Article XXI does not include any conditions and is thus broad in scope, though still subject to interpretation in the overall context of the treaty and its object and purpose. Article XXI(b), of which subparagraph (iii) has been invoked by Russia, provides for a subjective standard with the following language: "... any action which it considers necessary for the protection of its essential security interests". It is the invoking Member which determines the interests, the actions and the necessity of the actions. Canada is of the view that this subjective standard also applies to the language of sub-paragraph (iii) as it completes the phrase begun in the opening words of paragraph (b) and it would defeat the broad discretion accorded to the invoking Member if the assessment of the situation that gave rise to the need for the action were to be subject to a different standard from that set out in the chapeau.

A panel is tasked under the WTO Dispute Settlement Understanding to make an objective assessment of the matter before it.[6] As such, for Article XXI, the panel should make an objective assessment of a subjective perspective; in other words, the panel's task is to determine whether the Member invoking Article XXI believes in good faith that the elements required to invoke Article XXI exist.

The subjective standard and the particularly sensitive nature of the subject matter of Article XXI mean that an invoking Member must be accorded a high level of deference by a panel. However, to guard against abuse of the provision, Canada is of the view that an invoking Member must substantiate its good faith belief that the elements for invoking the Article exist, for example with regard to Article XXI(b)(iii), that there is an "essential security interest", that the action taken is necessary and relates to the protection of this essential security interest, and that the action is "taken in a time of war or other emergency in international relations". The threshold required for substantiation would be low and appropriate to the factual situation but would need to be more than a simple assertion that Article XXI is invoked. A complete lack of substantiation would be grounds for finding that use of the Article is not justified.

[5] See for example E/PC/T/31, Report of the Drafting Committee of the Preparatory Committee of the United Nations Conference on Trade and Employment, 5 March 1947, p. 77.

[6] Dispute Settlement Understanding, Article 11.

https://doi.org/10.1017/cyl.2019.18 Published online by Cambridge University Press

In responses to Panel questions dated 20 February 2018 in *Russia – Measures Concerning Traffic in Transit*, Canada responded to the Panel question noted below as follows (full responses available upon request to jlt@international.gc.ca):

Q. Several third parties have expressed views that the Panel should review whether a Member invoking Article XXI(b) honestly considers, or believes in good faith, that the action taken was necessary for the protection of its essential security interests. If that is the case, what type of evidence would satisfy this requirement?

Canada suggests that, depending on the case, the following types of evidence could be considered:

- records of consideration in the invoking Member's legislature;
- speeches from the leader or other high-ranked government members of the invoking Member, such as the Minister of Foreign Affairs, Minister of International Trade, or Minister of Defence;
- language contained in the measure that indicates the measure's purpose;
- documents that accompany the measure that were produced as part of the invoking Member's legal processes to institute the measure, e.g. impact assessments;
- decisions of courts in the invoking Member's territory;
- decisions of international courts (e.g. International Court of Justice) or international dispute settlement mechanisms;
- documentation from other relevant international fora, e.g. resolutions, speeches; and
- news reports from media outlets.

The above examples are illustrations only and not an exhaustive list. The examples are also not presented in any particular order.

LAW OF THE SEA

United Nations Convention on the Law of the Sea (UNCLOS) — *Maritime Boundaries — Delimitation of the Continental Shelf beyond 200 Nautical Miles*

In October 2018, the Legal Bureau wrote (citations as they appear in original text):

Introduction

Article 83(1) of the *UN Convention on the Law of the Sea* (*UNCLOS*) deals with delimitation of the continental shelf between states with opposite or adjacent coasts. It provides that delimitation shall be effected by agreement on the basis

https://doi.org/10.1017/cyl.2019.18 Published online by Cambridge University Press

of international law, in order to achieve "an equitable solution". What specifically constitutes an "equitable solution" was not described in the convention text and is subject to interpretation.

There have been numerous maritime boundary delimitation cases decided by the International Court of Justice (ICJ) and arbitral tribunals over the years as well as a growing number of judgments by the International Tribunal for the Law of the Sea (ITLOS). To date, only five have dealt with the continental shelf beyond 200 nautical miles (M).[1] Of these, three considered outer shelf delimitation in a substantive manner – *Bangladesh/Myanmar* 2012 (ITLOS) and *Bangladesh/India* 2014 (arbitral tribunal), also known as the *Bay of Bengal* cases, along with *Ghana/Cote d'Ivoire* 2017 (ITLOS). This is clearly a new area for the courts/tribunals and a developing area of international law.

Application of the equidistance/relevant circumstances methodology by courts/tribunals

In the *Bay of Bengal* cases and *Ghana/Cote d'Ivoire*, the equidistance/relevant circumstances delimitation methodology developed by the courts/tribunals over the years[2] was used. This involves: 1) drawing a provisional equidistance line based on coastal baselines; 2) application of relevant circumstances to assess the equity of the result of the first stage and determine if the provisional line should be adjusted; and, 3) undertaking a dis-proportionality test by comparing the ratio of coastal lengths and relevant maritime areas allocated to each side. While several other judgments have indicated that the equidistance/relevant circumstances approach is neither mandatory nor a method that has privileged status in relation to other methods,[3] it has become increasingly relied on by the courts/tribunals, as it was in the above-noted cases, due to its transparency, predictability and relative simplicity.

Regarding the continental shelf beyond 200M, the judgment in *Bangladesh/Myanmar* declared that the delimitation method to be applied "should not differ" from that within 200M and, as such, the equidistance/relevant circumstances method continues to apply. Notably, there is little reasoning to support the tribunal's conclusion; however, it could stem from the tribunal's heavy reliance earlier in the judgment, when determining whether it has jurisdiction to

[1] *Barbados/Trinidad & Tobago* 2006 (arbitral tribunal); *Bangladesh/Myanmar* 2012 (ITLOS); *Nicaragua/Columbia* 2012 (ICJ); *Bangladesh/India* 2014 (arbitral tribunal); and *Ghana/Cote d'Ivoire* 2017 (ITLOS Special Chamber).

[2] The genesis of this approach can be traced back to the ICJ's decision in the *North Sea continental shelf* case of 1969. The three-step approach was clearly enunciated by the ICJ in *Romania/Ukraine* in 2009 and used widely since then.

[3] E.g. *Tunisia/Libya* (ICJ 1982); *Libya/Malta* (ICJ 1985); *Guinea/Guinea-Bissau* (arbitral tribunal 1986) among others.

https://doi.org/10.1017/cyl.2019.18 Published online by Cambridge University Press

delimit the continental shelf beyond 200M, on the assertion that "in law there is only one single continental shelf". Further, neither party argued that there should be a difference in methodology or approach within or beyond 200M and the tribunal determined that the use of the same delimitation method could address the problem of the cut-off effect of Bangladesh's markedly concave coast. As a result, it could be argued that the conclusion on methodology in this case may be fact specific, thus leaving the door open for different outcomes in future continental shelf delimitations beyond 200M involving different facts. Note that the above approach was followed in *Bangladesh/India* without further elaboration.

In *Ghana/Cote d'Ivoire*, the most recent decision by ITLOS relating to the delimitation of the continental shelf within and beyond 200M, the tribunal followed its approach in *Bangladesh/Myanmar*, but went further on the issue of delimitation approaches when it said "… there is only one single continental shelf. Therefore it is considered inappropriate to make a distinction between the continental shelf within and beyond 200 nm [*sic*] as far as the delimitation methodology is concerned" (emphasis added). There is no further reasoning provided, but it is interesting that the tribunal has now explicitly linked the single continental shelf argument to the assertion that the delimitation methodology needs to remain the same for the continental shelf within and beyond 200M.

This is a questionable logical leap because Article 76 clearly sets out a different basis for determining entitlement to the shelf within and beyond 200M (i.e. distance from coastal baselines in the former vs geoscience in the latter) and Article 82 sets out differences in the exploitation regime (with Article 82 payments applying only to the shelf beyond 200M). In essence, the convention has created a juridical EEZ, where entitlement to the water column and seabed coincide and are automatic up to a distance of 200M from coastal baselines and a juridical outer shelf beyond 200M, where coastal states must determine and prove the outer limits using the formulae in the convention and sophisticated geoscientific evidence. Yet, the tribunal completely glosses over these significant differences and jumps to an arguably simplistic conclusion on delimitation methodology without properly considering that an equitable result may not always be possible through an equidistance line/relevant circumstances approach beyond 200M given that an equidistance line is created from coastal baselines, which is not at all relevant in determining entitlement to a continental shelf beyond 200M.

Taking into account geoscientific factors in delimitation beyond 200M

In 1985, the ICJ in *Libya/Malta* put an end to arguments that geological and geomorphological factors are relevant in continental shelf boundary delimitations within 200M (due to the *UNCLOS* regime providing automatic rights to coastal states for the seabed/subsoil and water column of the EEZ, which is determined by distance from coastal baselines). Nevertheless, the court left open the question

https://doi.org/10.1017/cyl.2019.18 Published online by Cambridge University Press

as to whether such factors could be relevant in cases involving the outer shelf, in the search for an equitable solution.

Delimitation of only the outer shelf (where other zones were determined at an earlier time): a special case?

There has not yet been a case in front of the courts/tribunals where the only zone to be delimited is the shelf beyond 200M, with the other zones (e.g. EEZ or Territorial Sea) having been determined earlier by treaty or dispute resolution. Some commentators have suggested that the direction of the line beyond 200M need not necessarily be the same in such cases and that having only one issue at play could lead to a more flexible choice of methodology. However, others suggest the opposite since some courts/tribunals might feel compelled to follow the same method that was used for the area within 200M.

While commentators differ in their predictions on how the courts/tribunals might handle delimitations beyond 200M in the future, it is quite clear that in bilateral negotiations, states are free to choose whatever methods they deem appropriate.

State practice

Compared to the relative paucity of decisions by the courts/tribunals relating to delimitations of the continental shelf beyond 200M, over a dozen bilateral delimitation agreements relating to the shelf beyond 200M have been concluded over the years as well as a growing number of provisional arrangements.[4] It is clear from the various agreements that geoscientific factors have played a role in several cases while in some instances states have extended previously concluded boundary lines within 200M without a change in direction beyond 200M. In several agreements an equidistance line was used, whereas others have used lines of longitude or latitude, and still others have used a mixture of methods. What is abundantly clear is that no delimitation method dominates and states have used the flexibility inherent in negotiations to adopt the delimitation method(s) and draw the boundary line in a way that they believe achieves an equitable solution.

United Nations Convention on the Law of the Sea (UNCLOS) — *Maritime Zones — Marine Protected Areas — Marine Scientific Research — Special Rights and Jurisdiction in the Arctic*

On 13 December 2018, the Legal Bureau provided the following review of the law of the sea considerations related to the creation of marine protected areas in Canada (citations as they appear in original text):

[4] For an excellent overview of the trends in state practice in the delimitation of the continental shelf beyond 200M see Bjarni Mar Magnusson 2013, ICLQ vol 62 pp 345-372.

https://doi.org/10.1017/cyl.2019.18 Published online by Cambridge University Press

I. Introduction

In 2010, Canada committed to the marine conservation targets established under the *UN Convention on Biological Diversity* known as Aichi Target 11. This target commits Canada to conserving 10 percent of coastal and marine areas through networks of protected areas and other area-based conservation measures by 2020. This target was also included in 2015 by the UN General Assembly's 2030 Agenda for Sustainable Development under Goal 14. As of December 2017, Canada has protected 7.75% of its marine areas.

This paper is intended to familiarize Canadian officials contemplating measures to protect marine areas with the relevant international law of the sea rules. A snapshot reference guide and an illustrative list of questions for officials to ask themselves are provided in annexes. The Oceans and Environmental Law Division of Global Affairs Canada stands ready to provide more detailed advice.

This paper uses the term "marine protected area" (MPA) as shorthand for any area-based management measures in marine areas. The term is meant in a generic sense and does not necessarily align with the definition of "marine protected area" in the *Oceans Act*.[1] There is no internationally accepted legal definition of "marine protected area", nor is there a universally applicable and comprehensive international legal regime for establishing MPAs.[2] The *UN*

[1] Canadian domestic law defines a "marine protected area" in the *Oceans Act* as an area of sea that forms part of the internal waters of Canada, the territorial sea of Canada or the exclusive economic zone (EEZ) of Canada and has been designated for special protection for one or more of the following reasons:

- the conservation and protection of commercial and non-commercial fishery resources, including marine mammals, and their habitats
- the conservation and protection of endangered or threatened marine species, and their habitats
- the conservation and protection of unique habitats
- the conservation and protection of marine areas of high biodiversity or biological productivity
- the conservation and protection of any other marine resource or habitat as is necessary to fulfill the mandate of the Minister of Fisheries and Oceans Canada.

At the time of writing, Bill C-55 is pending. It would amend the *Oceans Act* to add an additional purpose for marine protected area designations: "the conservation and protection of marine areas for the purpose of maintaining ecological integrity."

[2] A definition commonly used in international settings is that of the International Union for Conservation of Nature (IUCN). IUCN is a membership union composed of both government and civil society organisations. Their definition is as follows: "Marine Protected Areas (MPAs) involve the protective management of natural areas so as to keep them in their natural state. MPAs can be conserved for a number of reasons including economic resources, biodiversity conservation, and species protection. They are created by delineating zones with permitted and non-permitted uses within that zone."

https://doi.org/10.1017/cyl.2019.18 Published online by Cambridge University Press

Convention on the Law of the Sea (*UNCLOS*), for example, contains no references to MPAs. It does, however, say that states have an obligation to protect and preserve the marine environment.[3]

Within Canada there exists a spectrum of legal and policy tools to establish and manage MPAs. The creation of "Marine Protected Areas" under the *Oceans Act*, National Marine Conservation Areas,[4] and marine refuges[5] are perhaps the most important among them. Three federal departments and agencies – Fisheries and Oceans Canada, Parks Canada Agency and Environment Canada – have specific mandates to protect marine and coastal areas. The *Oceans Act* provided Fisheries and Oceans Canada with a leading and coordinating role in this endeavour.

The international law of the sea places certain restrictions on the protection measures that Canada can impose in certain maritime zones. This paper examines, in general terms, what those limitations are. It considers first those that apply in normal circumstances, and then discusses the special rights coastal states have in ice-covered areas.

It is important to keep in mind that the rules described in this document do not apply to *Canadian* activities in each zone, including the activities of Canadian-flagged vessels. These relate only to the prohibitions or restrictions the Government of Canada can or cannot impose on *foreign* activities and vessels.

In addition, we would flag the particular regime applying to vessels that have "sovereign immunity". Sovereign immunity is a legal doctrine that reflects a long-standing rule of international law that any warship or state owned or operated vessel on government, non-commercial service, cannot be subject to the enforcement power of another state.

Finally, we note that beyond the law of the sea regime highlighted in this paper, other treaties (e.g. on navigation or fisheries) to which Canada is Party may also affect Canada's ability to take protective measures in its waters.

II. Complying with the law of the sea

The marine protection measures that Canada can impose in compliance with the law of the sea are dependent in part on whether the protected area lies within our territorial sea, exclusive economic zone (EEZ), or on the high seas.

[3] Art. 192 of *UNCLOS*.

[4] See *Canada National Marine Conservation Areas Act* (S.C. 2002, c. 18). Parks Canada is responsible for managing NMCAs.

[5] A "marine refuge" is a fisheries management measure that is put in place to protect important species and their habitat. Currently, to create a marine refuge in our oceans, Fisheries and Oceans Canada uses licence conditions or variation orders to restrict fishing in a specified area.

https://doi.org/10.1017/cyl.2019.18 Published online by Cambridge University Press

i. Internal waters

International law places relatively few limits on Canada's ability to impose measures to protect its internal waters, including lakes, rivers, and other areas landwards of Canada's territorial sea baselines. Examples of Canada's internal waters include Hudson Bay and the Gulf of St. Lawrence. Unlike Canada's territorial sea, other states do not enjoy a right of innocent passage in our internal waters.[6] However, there are a few potential constraints on Canada's regulatory authority in internal waters. Canada, for instance, has a series of treaties with the United States that guarantee "free and open navigation" in specific waters, including the Great Lakes. Measures involving extensive restrictions on navigation in Canada's internal waters may also engage Canada's obligations under international trade agreements.[7]

ii. Territorial sea

Canada's territorial sea extends 12 nautical miles (nm) (22.2 km) seaward from our baselines. States enjoy sovereignty in their territorial sea, subject to the right of all foreign ships to "innocent passage". Passage means navigation for the purpose of traversing a sea area and is "innocent" so long as it is not "prejudicial to the peace, good order or security of the coastal State."[8] Passage must be "continuous and expeditious", but can include stopping and anchoring if these actions are incidental to ordinary navigation, or are rendered necessary by *force majeure* or distress.[9]

States are allowed to adopt laws and regulations relating to innocent passage through the territorial sea in respect of, *inter alia*, the conservation of the living resources of the sea, the prevention of infringement of fisheries laws, and the preservation of the environment.[10] Those laws, however, cannot apply to construction, design, equipment, and manning (CDEM) unless the rules are giving effect to "generally accepted international rules and standards"[11] — e.g. those established through multilateral treaties and through the International Maritime Organization (IMO). The reasoning behind this is avoiding ships having to adjust to different countries' CDEM standards during a voyage.

[6] There are narrow exceptions to this rule — see art. 8(2) of *UNCLOS* — but they do not apply to any of Canada's internal waters.

[7] See article V of the *General Agreement on Tariffs and Trade* (*GATT*). Please consult with Global Affairs' Trade Law Bureau (JLT) if there are doubts in this respect.

[8] Art. 19 of *UNCLOS*.

[9] Art. 18(2) of *UNCLOS*.

[10] Art. 21(1) of *UNCLOS*.

[11] Art. 21(2) of *UNCLOS*.

https://doi.org/10.1017/cyl.2019.18 Published online by Cambridge University Press

Aside from CDEM standards, Canada's right to pass laws and regulations to protect marine life is only limited by our obligation to not impose requirements on foreign ships "which have the practical effect of denying or impairing the right of innocent passage."[12] This rule is essentially restated in article 211(4) of *UNCLOS*:

> Coastal States may, in the exercise of their sovereignty within their territorial sea, adopt laws and regulations for the prevention, reduction and control of marine pollution from foreign vessels, including vessels exercising the right of innocent passage. Such laws and regulations shall … not hamper innocent passage of foreign vessels.

Imposing measures that do not have the effect of hampering the innocent traversing of a state's territorial sea, such as restrictions or bans on activities like fishing, extraction, marine scientific research, seismic testing, and lightering, is almost certainly permissible. A state could also, for example, impose a ban on tourism activities (like whale watching) in a particular area or create a permit scheme for visitors.

When coastal states are contemplating measures that would restrict navigation in their territorial sea, they must balance their right to adopt legislation related to the protection of the environment and the right of foreign vessels to innocent passage. There is no consensus internationally about how exactly to go about doing so. Some have referred to this as the "equilibrium dilemma". Analysis dating to the early 2000s suggests that there had been a tradition of prioritizing freedom of navigation over environmental concerns. Indeed, numerous states including the US, the UK, France, and Norway appear to have legislation that prohibits impairing or denying navigation when imposing measures aimed at protecting marine environments.[13] There are, however, signs that this prioritization is changing.[14] A substantial number of states in the past 20 years have prohibited navigation in certain designated areas, including some states that have legislation in place prohibiting them from impairing freedom of navigation. Monaco has prohibited navigation entirely in two MPAs in its territorial sea. Greece has prohibited all vessel traffic in a particularly sensitive area for May to October. An Israeli regulation states that all vessel traffic is banned in their marine reserves unless one obtains a permit. The US, a strong proponent of freedom of navigation, has prohibited vessel traffic in

[12] Art. 24(1) of *UNCLOS*.

[13] See F. Spadi, "Navigation in Marine Protected Areas: National and International Law" Ocean Development and International Law, 31:3 at 288. We would note that in the case of the US, the restrictions are qualified by the savings clause in 16 U.S.C. § 1435, which roughly provides that the regulations only apply to non-Americans in circumstances that accord with international law.

[14] *Ibid.*

https://doi.org/10.1017/cyl.2019.18 Published online by Cambridge University Press

certain parts of their marine sanctuaries.[15] None of these measures appear to have been subjected to a formal challenge by another state.

Despite the uncertainty about how to go about balancing navigational and environmental protection rights, two things appear clear. One is that proposed restrictions navigation should be evaluated on a case-by-case basis.[16] Second, a complete ban on navigation throughout the entire breadth of the territorial sea that is unilaterally imposed would be a violation of international law.[17]

iii. Exclusive economic zone (EEZ)

Canada's EEZ extends 200 nautical miles out from our coastal baselines. Pursuant to *UNCLOS*, Canada does not have "sovereignty" over its EEZ, but does have rights in relation to its natural resources, whether living or non-living.[18] The most obvious examples of natural resources in question are the fish in the waters and the oil and gas in the subsoil of the seabed. *UNCLOS* refers to these rights as "sovereign rights". Subject to certain considerations (see "Restricting fishing in the EEZ" below), a state would normally be acting within its rights if it were to ban fishing, drilling, and other forms of resource exploitation in its EEZ.

An important constraint on a state's authority to exercise its rights and duties in its EEZ is that it must have "due regard" to the rights and duties of other States, including their freedom of navigation.[19] The meaning of "due regard" is not entirely settled but many experts suggest it has the same meaning as "reasonable regard".[20] The analysis will be unique to every situation, as explained by Churchill and Lowe:

> The requirement of "due regard" seems to require that where there is a potential conflict between two uses of the high seas, there should be a case-by-case weighing of the actual interests involved in the circumstances in question, in order to determine which use is the more reasonable in that particular case.[21]

In addition to its sovereign rights, Canada also has jurisdiction in its EEZ in relation to the protection of the marine environment.[22] But that jurisdiction is limited. One permissible approach is for coastal states to adopt laws and regulations to protect marine life from pollution that conform and give effect to "generally accepted

[15] *Ibid* at 291 to 293.

[16] See Ingvild Jakobsen, "Marine Protected Areas in International Law" at 328.

[17] *Ibid* at 290.

[18] Art. 56(1)(a) of *UNCLOS*.

[19] Arts 56 (2), 58 and 87 of *UNCLOS*.

[20] See e.g. Churchill and Lowe, *The Law of the Sea*, 3rd ed. at 206.

[21] *Ibid*.

[22] Art. 56(1)(b)(iii) of *UNCLOS*.

https://doi.org/10.1017/cyl.2019.18 Published online by Cambridge University Press

international rules and standards established through the competent international organization", such as the IMO.[23] Where those "generally accepted international rules and standards established through the competent international organization" are inadequate, a state may elect to submit a "communication" to the IMO making the case why it should be permitted to adopt more stringent laws and regulations to control vessel pollution in a particular area.[24] The requirements involved with this option are onerous. The area to be protected must be "clearly defined", the pollution prevention must be for "recognized technical reasons" and must be supported by "scientific and technical evidence".[25] After receiving such a communication, the IMO has 12 months to determine whether the conditions conform to the necessary requirements. If the IMO determines that the requirements have been met, the state may proceed to adopt their proposed laws, but those laws cannot be applicable to foreign vessels until 15 months after the submission was made.[26] It is also important to note that while the proposed protections may relate to discharges or navigational practices (including routing measures), they cannot require foreign vessels to observe design, construction, manning or equipment standards other than generally accepted international rules and standards.[27]

Canada has gone to the IMO in the past to obtain approval to take protective measures. In 2002, for example, Canada proposed the establishment of a Traffic Separation Scheme (TSS) in the Bay of Fundy to protect the right whales. The proposal was adopted, as was our 2007 proposal to create an "Area To Be Avoided" (ATBA) in the Roseway Basin for the same purpose. There is another option for protecting marine areas in the EEZ that also involves shipping and the IMO. The IMO has established a process for designating "particularly sensitive sea areas" (PSSAs).[28] When an area is approved as a PSSA, specific measures can be used

[23] Art. 211(5) of *UNCLOS*. While article 211(5) of *UNCLOS* is specific to "pollution", that term has a broad meaning in article 1 of *UNCLOS*: "'Pollution of the marine environment' means the introduction by man, directly or indirectly, of substances or energy into the marine environment, including estuaries, which results or is likely to result in such deleterious effects as harm to living resources and marine life, hazards to human health, hindrance to marine activities, including fishing and other legitimate uses of the sea, impairment of quality for use of sea water and reduction of amenities."

[24] Article 211(6)(a).

[25] *Ibid.*

[26] *Ibid.*

[27] Art. 211(6)(c).

[28] For more info about the IMO's authority to designate PSSAs, see http://www.imo.org/en/OurWork/Environment/PSSAs/Pages/Default.aspx. The IMO has issued guidelines for the identification and designation of PSSAs. These guidelines include criteria to allow areas to be designated a PSSA if they fulfil a number of criteria, including: ecological criteria, such as unique or rare ecosystem, diversity of the ecosystem or vulnerability to degradation by natural events or human activities; social, cultural and economic criteria, such as significance of the area for recreation or tourism; and scientific and educational criteria, such as biological research or historical value.

https://doi.org/10.1017/cyl.2019.18 Published online by Cambridge University Press

to control the maritime activities in that area, such as routing measures; strict application of certain discharge and equipment requirements for ships, such as oil tankers; and installation of vessel traffic services. While it is clear that states can legitimately impose routing measures that prohibit navigation in designated PSSAs within their EEZ with the approval of the IMO, experts have suggested that a proposal to close off an entire EEZ, or one that would cause significant interference with an existing navigational route, would not receive approval at the IMO.[29]

Another option for imposing mandatory measures for the prevention of pollution that would otherwise be impermissible under international law is having an area designated as a "special area" under the *International Convention for the Prevention of Pollution from Ships* (*MARPOL*).[30] "Special areas" should not be confused with PSSAs, despite the similar-sounding names. Canada currently does not have any *MARPOL* "special areas" in waters under our jurisdiction.

In addition to jurisdiction to protect the marine environment from pollution, *UNCLOS* gives states wider jurisdiction to prevent or regulate a particular *form* of pollution: dumping.[31] "Dumping" is defined in *UNCLOS* as "any deliberate disposal of wastes or other matter from vessels, aircraft, platforms or other man-made structures at sea."[32] It does not, however, include the disposal of wastes or other matter derived from the "normal operations" of vessels, aircraft, platforms or other man-made structures.[33]

In addition to Canada's *jurisdiction* to protect and preserve the marine environment in the EEZ, coastal states also hold "sovereign rights" in their EEZ which may also support the imposition of measures that are aimed at protecting economically valuable natural resources.[34] For example, the United States and the Netherlands have imposed restrictions on anchoring over sensitive areas of seabed beneath their EEZs. The strength of this justification will depend on whether the measures are necessary to protect the coastal state's interest in exploiting its natural resources, and also on ensuring that they interfere with navigational activities as little as possible.

It is worth noting that even if the pollution prevention laws adopted by a coastal state are in full compliance with that state's international obligations, there are certain limitations on their ability to *enforce* such rules.[35] This is true in both the territorial sea and the EEZ. There are, for example, a series of steps to follow

[29] See Spadi *supra* note 13 at 297.

[30] For more information about *MARPOL* Special Areas, see http://www.imo.org/en/OurWork/Environment/SpecialAreasUnderMARPOL/Pages/Default.aspx.

[31] Art. 210 of *UNCLOS*.

[32] Art. 1 of *UNCLOS*.

[33] *Ibid*.

[34] Canada's "sovereign rights" in its EEZ are listed in article 56(1)(a) of *UNCLOS*.

[35] See Section 6 of *UNCLOS*, and more specifically, articles 216, 218, 219, and 220.

https://doi.org/10.1017/cyl.2019.18 Published online by Cambridge University Press

before a vessel suspected of violation [of] the coastal state's laws can be inspected or detained in port in relation to marine pollution violations.[36]

a. Restricting fishing in MPAs

A common protective action that states have taken in MPAs is the imposition of fishing conservation and management measures. Pursuant to *UNCLOS*, states have sovereign rights for the purpose of conserving and managing their resources in their EEZ.[37] These rights also come with duties. These include determining the "allowable catch" (often referred to as the "total allowable catch", or "TAC") in their EEZ, and a requirement that states promote the objective of "optimum utilization of the living resources" in the EEZ.[38] Article 62(2) provides that where a coastal state does not have the capacity to harvest the TAC, it must give other states access to the surplus.

Together, these provisions may raise questions about whether, if a coastal state were to determine that the TAC in their EEZ is zero or very low, other states might accuse the coastal state of violating their duty under *UNCLOS* to promote the optimum utilization of the natural resources in their EEZ. While this may be possible, it appears to be a rather remote risk. States have very broad discretion in relation to setting the TAC and leading experts have suggested that the management objectives identified in *UNCLOS* are so heavily qualified that states could legitimately set "practically any size of allowable catch".[39] It is also worth noting here that these duties on coastal states are not subject to the compulsory settlement of disputes established in *UNCLOS*.[40] So while a coastal state could be challenged *politically* for having set a TAC of zero, it does not appear that this determination could be subject to a *legal* challenge. Furthermore, we could find no examples of a state complaining publicly about a coastal state having set an allowable catch that is too low.

iv. The continental shelf

Canada's continental shelf consists of the seabed beneath the EEZ (out to 200 nm), as well as extended areas beyond 200 nm in the Arctic and Atlantic Oceans. States have exclusive sovereign rights over their continental shelf for the purpose of "exploring" it and "exploiting" its resources.[41] No other state can

[36] Art. 220(5) and 220(6).

[37] Art. 56(1)(a).

[38] Art. 62(1).

[39] Churchill and Lowe *supra* [note] 20 at 289.

[40] Art. 297(3)(a) of *UNCLOS*.

[41] Art. 77(1) of *UNCLOS*.

https://doi.org/10.1017/cyl.2019.18 Published online by Cambridge University Press

exploit the coastal state's natural resources without the coastal state's permission.[42] The term "resources" in the section of *UNCLOS* on the continental shelf includes not just the non-living seabed and subsoil (e.g. minerals, oil, and gas), but also "living organisms belonging to sedentary species".[43] It would appear, therefore, that a coastal state could create an MPA covering its continental shelf, not only up to its 200 nm boundary but also beyond that limit, if it is imposing measures aimed at preserving those sedentary species so that Canada can exploit them.[44] Any such measure, however, cannot infringe or unjustifiably interfere with the rights of other states in relation to the water column, including their freedom of navigation.[45] States also have the right to lay submarine cables and pipelines on other states' continental shelves.[46] Coastal states have control over the routes used by submarine pipelines but are more constrained in relation to cables.[47] Whether Canada can restrict activities relating to cables and pipelines in a marine protected area depends on the circumstances.

These rights in relation to the natural resources of the shelf beyond 200 nm do not affect the legal status of the "superjacent waters" (i.e. the water column above the shelf).[48] Therefore, Canada cannot establish an MPA beyond the limits of its EEZ aimed at protecting the non-sedentary living resources in the superjacent waters.

v. High Seas

All states have a number of freedoms on the high seas. These include the freedom of navigation, freedom of overflight, freedom to lay submarine cables and pipelines, the freedom to construct artificial islands and other installations permitted under international law, the freedom of fishing, subject to conditions, and the freedom of scientific research.[49] As a consequence, no State can unilaterally establish a protected area on the high seas and enforce its rules unilaterally against foreign states (e.g. against their ships). States can apply and enforce regulations related to marine protection on the high seas only towards ships flying their own flag or towards foreign ships if the restrictions are recognized by customary international

[42] Art. 77(2).

[43] Art. 77(4). Examples include oyster, crabs, sea cucumbers, coral, sponge and seaweed.

[44] Because of the wording of art. 77(1) of *UNCLOS*, it may be that measures proposed in the name of environmental protection, with no economic element, are not permissible. This is an unsettled question in international law.

[45] Art. 78 of *UNCLOS*.

[46] Art. 79 of *UNCLOS*.

[47] Art. 79(2) and (3) of *UNCLOS*.

[48] Art. 78(1).

[49] Art. 87 of *UNCLOS*.

https://doi.org/10.1017/cyl.2019.18 Published online by Cambridge University Press

law or have a legal basis in a convention to which both states are a party.[50] As the jurisdiction to regulate and enforce is very limited with regard to foreign ships on the high seas international cooperation is crucial in order to enhance the protection of vulnerable areas of the high seas.

III. Restricting marine scientific research in MPAs

There are no restrictions on states' authority to restrict marine scientific research (MSR) in their territorial sea.

In their EEZ and on their continental shelf, coastal states have jurisdiction to regulate, authorize and conduct MSR.[51] States also have a duty, however, to "promote and facilitate" MSR conducted in accordance with *UNCLOS*.[52] *UNCLOS* provides that coastal states shall, in normal circumstances, grant their consent for MSR projects conducted by other states.[53] There are a number of bases on which states have the discretion to withhold their consent, including when the project involves drilling or the construction of an artificial island.[54]

IV. Canada's special rights and jurisdiction in the Arctic

The international legal rules applicable to the marine protection measures that Canada can take are different in the Arctic because *UNCLOS* gives coastal states a heightened level of environmental control over vessels in ice-covered areas. Article 234, which is sometimes informally called "the Arctic exception", gives states the right to make and importantly, *enforce* laws for the prevention, reduction and control of marine pollution from vessels within the limits of their EEZ. Such laws, however, must be based on the "best available scientific knowledge" and have "due regard to navigation". Here is the article in its entirety:

Article 234
Ice-covered areas

> Coastal States have the right to adopt and enforce non-discriminatory laws and regulations for the prevention, reduction and control of marine pollution from vessels in ice-covered areas within the limits of the exclusive

[50] The *International Convention for the Prevention of Pollution from Ships of 1973* (*MARPOL*) and regional fisheries management organizations are examples.

[51] Art. 246(1) of *UNCLOS*.

[52] Art. 239 of *UNCLOS*.

[53] Art. 246(3) of *UNCLOS*.

[54] Art. 246(5) of *UNCLOS*.

https://doi.org/10.1017/cyl.2019.18 Published online by Cambridge University Press

> economic zone, where particularly severe climatic conditions and the presence of ice covering such areas for most of the year create obstructions or exceptional hazards to navigation, and pollution of the marine environment could cause major harm to or irreversible disturbance of the ecological balance. Such laws and regulations shall have due regard to navigation and the protection and preservation of the marine environment based on the best available scientific evidence.

While article 234 speaks to coastal states' right to take steps to control marine pollution, it should be kept in mind that "pollution" from vessels has a very broad meaning in UNCLOS:

> 'Pollution of the marine environment' means the introduction by man, directly or indirectly, of substances or energy into the marine environment, including estuaries, which results or is likely to result in such deleterious effects as harm to living resources and marine life, hazards to human health, hindrance to marine activities, including fishing and other legitimate uses of the sea.[55]

A large number of activities can result, or are likely to result, in harm to living resources and marine life.

As previously mentioned in this document, the doctrine of "sovereign immunity" is an important exception to the normal rules about the laws that a state can adopt or enforce with regards to marine protection. Pursuant to article 236 of *UNCLOS*, the provisions regarding the protection and preservation of the marine environment "do not apply" to any warship, naval auxiliary, other vessels or aircraft owned or operated by a State and used, for the time being, only on government non-commercial service.

i. Territorial sea

Article 234 gives states special rights in areas "within the limits of the exclusive economic zone". Whether this language includes the territorial sea is not completely settled but the preponderance of expert opinion is that it does.[56]

If indeed article 234 applies in the territorial sea, Canadian laws put in place to prevent pollution must meet the test of having "due regard" to navigation.

[55] Art 1(3) of *UNCLOS* [(emphasis added)].

[56] See e.g. R.R. Churchill and A.V. Lowe, *The Law of the Sea*, 3rd ed. (Manchester: Juris Publishing, 1999) at 348; R. D. Brubaker, *The Russian Arctic Straits* (Leiden: Martinus Nijhoff, 2005) at 227. For a more in depth discussion, see e.g. Donat Pharand, *The Arctic Waters and the Northwest Passage: A Final Revisit*, Ocean Development & International Law, 38:1-2, 3-69. The reasoning is that if art. 234 does not apply in the territorial sea, it would give coastal states greater rights in their EEZ than their territorial sea, which runs contrary to the framework of *UNCLOS*. Brubaker goes so far as to call it "absurd".

https://doi.org/10.1017/cyl.2019.18 Published online by Cambridge University Press

This would create a less onerous obligation than the obligation in the normal, non-Arctic, territorial sea, of not imposing requirements on foreign ships which would have the practical effect of "denying or impairing" the right of innocent passage. In other words, the normal "innocent passage" regime may not apply in areas to which article 234 applies.[57]

ii. EEZ

As discussed above, Canada's rights under international law to unilaterally prohibit or restrict various activities in our EEZ in the name of environmental protection, and to enforce those laws against foreign vessels, [are] limited. Article 234, however, gives Canada special rights to adopt and enforce laws to control marine pollution in certain ice-covered areas. As a result, it appears that Canada can impose routing measures, limits on the frequency of transit, mandatory reporting requirements, and even certain construction, design, equipment, and manning (CDEM) in the EEZ, and holds a broader authority to enforce those measures, so long as the requirements of article 234 are met.[58] Recall that in the EEZs not covered by article 234, the coastal state must cooperate with the IMO to obtain approval for pollution control measures. Just as in a non-Arctic environment, article 234 specifically requires that any legislation or regulations created by Canada for the prevention or reduction of pollution must have "due regard" for other states' rights to freedom of navigation.

iii. The High Seas

There is no provision in *UNCLOS* that creates special rights to impose measures in the Arctic in the name of environmental protection. The normal regime (discussed above) applies.

[57] See e.g. the article on "Innocent Passage" published by the Max Planck Institute on Public International Law at para 41 which says, "This … suggests that neither the regime of innocent passage within the territorial sea nor the freedom of navigation within the exclusive economic zone is fully to apply to such areas." https://www.ilsa.org/Jessup/Jessup18/Second%20Batch/OPIL_Innocent_Passage.pdf. This is also the conclusion reach by Kristin Bartenstein in "The "Arctic Exception" in the Law of the Sea Convention: A Contribution to Safer Navigation in the Northwest Passage?" 2011 Ocean Development & International Law, 42:1: "In short, the acknowledgment of navigation, applicable to the ice-covered areas encompassed by Article 234, would give the coastal states broader powers than the regime of innocent passage, at least in some respects and notably in respects that are of particular importance for Arctic navigation such as design, construction, crewing, or equipment of vessels.

[58] *Ibid.* With respect to mandatory reporting requirements, Canada cited article 234 in making NORDREG mandatory in 2010. Canada did not seek the IMO's approval in doing so.

https://doi.org/10.1017/cyl.2019.18 Published online by Cambridge University Press

V. Conclusion

How the international law of the sea affects Canada's ability to impose measures to protect marine areas is highly situation-dependent. The rules can be complex and sometimes even appear contradictory. This document is intended to provide a quick overview of some of the legal considerations that need to be kept in mind.

https://doi.org/10.1017/cyl.2019.18 Published online by Cambridge University Press