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HUMAN RIGHTS LAW

Children's Rights — Juvenile Justice — Committee on the Rights of the Child — Draft Revised General Comment

On 16 January 2019, the Government of Canada provided the following comments to the Committee on the Rights of the Child on a draft revised General Comment no. 10 (2007) on children's rights in juvenile justice:[1]

The Government of Canada appreciates the work of the Committee of the Rights of the Child in monitoring States Parties' implementation of the *Convention on the Rights of [the] Child* (the "Convention") and the work on this General Comment. Canada wishes to thank the Committee for the opportunity to comment on Draft [revised] General Comment No. 10 on juvenile justice. Canada welcomes constructive dialogue and engagement between the United Nations treaty bodies and States Parties on issues such as the content of General Comments.

Canada recognizes the independence and impartiality of the Committee, and its ability to issue General Comments. Canada reiterates, however, that General

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[1] Editor's note: for the final text of the revised general comment, see Committee on the Rights of the Child, *General Comment no 24 (2019) on Children's Rights in the Child Justice System*, UN Doc CRC/C/GC/24 (18 September 2019).

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Comments are capable only of providing guidance to States Parties in their interpretation of their obligations. The Comments do not create binding legal obligations in and of themselves, nor do they reflect an interpretation of the Covenant that is necessarily agreed upon by States Parties.

The specific comments below are not exhaustive, but rather highlight areas for potential further development and identify some areas of concern. Silence in respect of other areas does not constitute acquiescence in the Committee's interpretation of States' obligations.

Canada would suggest using non-gendered language where possible (for example, using the terms "they/them/their" instead of "he/she", "his/her(s)" and "him/her". Using binary gendered language excludes children who identify outside these binary distinctions.

As a general comment, the Committee may wish to add a brief discussion about the use of release and sentencing conditions for young offenders. As a best practice, States should curtail the use of release and sentencing conditions to ensure these are only imposed for valid criminal law purposes (such as securing a young person's attendance, or protection of the public) and not for social welfare purposes. The overuse of conditions risks contributing to an increasing number of young persons (particularly those from vulnerable populations) facing the criminal justice system for behavior that in and of itself would not be criminal in nature.

With regards to the right to education (Article 28), paragraph 9 of the Draft General Comment discusses how youth in conflict with the law face discrimination in the education system. Many youth in conflict with the law are deprived of education through suspension and expulsion from school, or other forms of school exclusion. States should take steps to avoid denying access to education and should ensure that all actors in the justice system recognize the education and skills training needs of youth in conflict with the law.

Comments on Specific Paragraphs

1. Regarding the first sentence of paragraph 8, Canada notes that "treated equally" can be interpreted as "everyone must be treated the same". A youth justice system that ensure[s] everyone was treated the same could in fact lead to further discrimination for some youth, as it would not recognize the diversity of youth, their needs and the interventions/supports that may best fit their needs. Canada would therefore rephrase paragraph 8 as follows: "States parties have to take all necessary measures to **respond to the diverse situations and needs of individual** children in conflict with the law."
2. In the final sentence of paragraph 8, we recommend clarifying that any redress, remedies and compensation would be "for victims".
3. Canada cautions against the broader implications of paragraph 10, which recommends ensuring "any conduct not considered an offence or not penalized if committed by an adult" not be "considered an offence and not penalized if

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committed by a young person" in order to reduce future stigmatization/discrimination against the child. The Draft General Comment cites vagrancy, truancy, and runaways. Canada agrees that this rule should be restricted to status offences and should not apply to measures that protect the well-being of children. Canada would therefore rephrase paragraph 10 as follows: "The Committee recommends that States Parties establish an equal treatment under the law for children and adults by abolishing status offences that do not serve to protect children."

4. In paragraph 18, Canada agrees that parents have the responsibility to provide their child with appropriate direction and guidance in the exercise of their rights, as recognized in the Convention. Canada suggests the addition of "parents and legal guardians" to recognize that children may not always benefit from the presence of parents in their lives.
5. Canada would highlight the importance of targeted programs for racialized or Indigenous groups, who are disproportionately represented in the justice system. Canada would therefore rephrase paragraph 19 as follows: "Prevention programmes should focus on support for families in particular those in vulnerable situations **or belonging to a minority group, including Indigenous families,** the involvement of schools in teaching basic values, and extending special care and attention to young persons at risk."
6. With regard to paragraph 44, Canada agrees that a birth certificate should be provided free of charge in circumstances where there is an inability to pay. There is a cost to the government of producing birth certificates, and in many cases it is reasonable to charge a nominal fee for the provision or replacement of a birth certificate. Canada would therefore rephrase paragraph 44 as follows: "A child who does not have a birth certificate must be provided with one promptly and **at a reasonable cost, or where the child does not have an ability to pay, free of charge,** whenever it is required to prove age."
7. With regard to paragraph 80, while Canada agrees with the automatic removal of youth criminal records, it is not necessarily feasible to remove such records upon a child reaching the age of 18. There are instances where records may need to be kept beyond the age of 18, such as when a young person is still serving a sentence beyond the age of 18. In some cases, records may also be relevant for deciding on appropriate diversions or sentences in incidents of subsequent offending.
8. With regard to paragraph 81, Canada disagrees with the recommendation that youth justice court proceedings be conducted behind closed doors. Allowing members of the public to observe youth court proceedings is important and aligned with the notion that court proceedings should be open and transparent. Canada also notes that freedom of expression, which includes the freedom to seek, receive and impart information and ideas of all kinds, is recognized as a human rights (*sic*) at international law. That being said, consistent with article 40 of the Convention, Canada agrees that children should have their privacy fully respected at all stages of the proceedings. Canada recommends that the

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Committee re-examine its recommendation at paragraph 81 in order to find a better balance between the right of the public to information and the privacy rights of young persons who come into contact with the law.

9. Canada would rephrase paragraph 87 to reflect that States may have multiple different cultures and traditions: "As far as non-custodial measures are concerned, there is a wide range of experience with the use and implementation of such measures. States parties should benefit from this experience, and develop and implement such measures by adjusting them **to their own cultures and traditions**."
10. Canada recommends that paragraph 92 more closely mirror Article 37(a) of the Convention. It is Canada's position that, in some exceptional circumstances, life sentences with possibility of parole for older adolescents are both appropriate and consistent with the Convention. Canada would therefore rephrase paragraph 92 as follows: "Given the likelihood that life imprisonment of a child will make it very difficult, if not impossible, to achieve the aims of juvenile justice despite the possibility of release, the Committee strongly recommends States parties to abolish all forms of life imprisonment **without eligibility for parole** for offences committed by persons who were under the age of 18 at the time of commission of the offence."
11. In paragraph 101, Canada would be hesitant to specify an age below which deprivation of liberty could not be used. While we agree that in all cases the deprivation of liberty should only be used as a measure of last resort, it is our view that circumstances can arise where deprivation of liberty is required, even in cases involving young persons under 16, such as where deprivation of liberty may be necessary in order to ensure public safety. Canada would therefore rephrase paragraph 101 as follows: "The Committee encourages the State parties to fix an age limit for the use of deprivation of liberty and recommends that no child in conflict with the law below the age of 16 years old be deprived of liberty **or create a presumption against the use of deprivation of liberty, for any child in conflict with the law below the age of 16 years old, unless there are legitimate public safety concerns**, either at the pre-trial or post-trial stage."
12. In paragraph 108, it is unclear what is meant by "close, direct, and continuous control". Canada notes that situations can arise whereby the restraint of a child will not always be supervised by a medical or psychological professional. For example, in a group home setting, a child who is being violent may need to be restrained by on-site staff that is trained in conflict de-escalation techniques, but are not medical or psychological professionals. Canada understands that certain restraints may need to be exercised in emergency situations. It is not necessarily feasible to have medical and psychological personnel providing constant and continuous oversight. Canada agrees that staff should be trained and that failures to observe standards should be investigated and addressed.
13. Increased use of restorative justice and Indigenous justice could serve to reduce reliance on the formal justice system and on incarceration for young people, which is likely to be beneficial. Adding recognition of customary justice systems is also broadly consistent with Article 30. Canada would therefore rephrase paragraph 115 as follows:

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"Reconciling custom with state justice may pose difficulties for adherence to human rights standards **in the formal justice system**, but ways should be found to infuse the principles of the Convention into customary law justice mechanisms. Restorative justice responses are likely to be achievable through customary justice systems, and may provide opportunities for learning that can benefit the formal juvenile justice system. In countries where customary justice systems are used by communities, interventions using such systems should be included in all strategies for holistic reform; strategies and reforms should be designed for specific contexts and the process must be driven by national actors. **Further, recognition of customary justice systems can contribute to increased respect for the traditions of Indigenous societies, which could have benefits for children from these societies**."

Conclusion

14. In conclusion, Canada reiterates its appreciation of the opportunity to review the Draft General Comment, and more generally its support for the work of the Committee. Canada avails itself of the opportunity to renew to the Committee the assurances of its highest consideration.

INTERNATIONAL TRADE LAW

Canada-United States-Mexico Agreement (CUSMA) — *Amending Protocol of 2019* — *State-to-State Dispute Settlement* — *Arbitral Panels*

In a summary document prepared in December 2019 that included Legal Bureau input, the changes to state-to-state dispute settlement in the Amending Protocol of December 2019 to the 2018 *Canada-United States-Mexico Agreement* (*CUSMA* in Canada; *USMCA* in the United States), negotiated to replace the *North American Free Trade Agreement* (*NAFTA*), were described as follows:

What are the changes to the state-to-state dispute settlement process?

- Changes were made to the provisions on creating arbitral panels to remove the requirement of involvement by the Commission of Minsters.
- This eliminates the possibility that a country could block the creation of an arbitral panel by refusing to engage in a Commission meeting or refusing to join consensus on the establishment of the panel.
- Other changes were made in the panel creation stage so that panelists can be selected from a roster (that the Parties are required to establish before the treaty enters into force) even if a party refuses to cooperate. For example if a party does not pick a panelist when they are required to, the other party can do so.
- An additional provision has also been added to provide direction on the rules of procedure clarify how certain evidentiary questions will be addressed before panels.

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How can a Party block the formation of a panel?

- The *CUSMA* outcome carried forward the dispute settlement process of the *NAFTA*.
- Under both agreements, in order to appoint a dispute settlement panel, after consultations at the officials level, the FTA Commission must first convene to consider the issue.
- If one Party refuses a meeting of the Commission a panel can not be created, thus effectively blocking panel formation.
- The new changes will remove the FTA Commission from the process and allow a panel to be created on request of the complaining party after the consultations stage at the officials level.
- These new measures will improve the effectiveness of dispute settlement and are very much in line with Canada's objectives in the renegotiation of *NAFTA*.

Why weren't the issues with the Commission under *NAFTA* addressed in *CUSMA*?

- Canada made proposals to improve the overall operation of the dispute settlement process as a part of the *NAFTA* modernization process.
- We are pleased that the changes we are now making to the new *NAFTA* will improve the effectiveness of the dispute settlement mechanism to the benefit of all three parties.

What is the relevance of the new requirements related to the rules of procedure?

- The new guidance on the rules of procedure provide greater clarity on procedures regarding the operation of panel hearings, thus ensuring additional flexibility for the Parties.
- These new procedures may be particularly useful in the context of disputes relating to labour obligations, since issues such as the admissibility of anonymous testimony was particularly at issue in a case related to labour obligations that the United States brought against Guatemala.

World Trade Organization (WTO) — 1994 General Agreement on Tariffs and Trade *(*GATT 1994*) — Article III:4 — Less Favourable Treatment* — De Minimis *Standard*

In its first and second written submissions in *Canada – Measures Governing the Sale of Wine* (DS537), dated 14 June 2019 and 30 September 2019 respectively, and in its second oral statement delivered on 3 December 2019, Canada made the following arguments regarding the existence of a *de minimis* standard as part of the less favourable treatment element in Article III:4 of the *GATT 1994* (submissions available upon request to jlt@international.gc.ca):

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[I]f the Panel determines that no evidence of the actual effects of a measure in the market is required, Canada requests that the Panel clearly articulate that the less favourable treatment element in Article III:4 of the *GATT 1994* cannot be met when evidence of detrimental impact is *de minimis*.

Previously, no WTO panels have clearly stated that the less favourable treatment element under Article III:4 is subject to a *de minimis* standard. Rather, they have focused on the actual or potential balance of competitive opportunities and have relied on the complainant to adduce evidence to make a prima facie case of a violation based on such evidence. However, this case, and in particular Australia's challenge of this Quebec measure, provides the Panel with an opportunity to clearly state that the requirement to show that certain measures alter the balance of competitive opportunities in a jurisdiction, thus resulting in less favourable treatment, is subject to a *de minimis* standard.

… [A]n explicit *de minimis* finding under Article III:4 would discourage other Members from bringing cases in the future alleging discrimination where they are unable to demonstrate even a minimal potential market impact. This would also be in keeping with the statement of principle in Article 3.7 of the *DSU* [*Dispute Settlement Understanding*] that Members exercise discretion in limiting action under the *DSU* to situations where the use of WTO dispute resolution procedures would be "fruitful".[1]

A minimum level of actual or potential detrimental impact is required to establish that a measure violates Article III:4. Australia has not established the factual basis to support a finding of such an impact. In conclusion, because they do not alter the balance of competitive opportunities between imported and domestic like products, Quebec's artisanal producer measures do not violate Article III:4.

In other words, a finding of less favourable treatment must be based on evidence of a detrimental impact on competitive conditions for imported products that is more than a negligible impact.[2] Canada presented this argument as an alternative to its main contention, that Australia had failed to establish that the Quebec measure, when taking into account all of the surrounding facts and circumstances, resulted in an actual detrimental impact on the competitive opportunities of imported wine, and Australian imported wine in particular.[3]

Canada acknowledges that previous panels have made findings, albeit in *obiter*, that Article III:4 does not include a *de minimis* element.[4] Canada also notes, however, that none of the panels that made findings with respect to the issue did so on the basis of a rigorous analysis of the question, nor did they cite to previous jurisprudence where such analysis had been done. The panel in *Canada – Wheat Exports and*

[1] Article 3.7 of the *DSU*, under the heading "General Provisions" begins: "Before bringing a case, a Member shall exercise its judgement as to whether action under these procedures would be fruitful."

[2] The ordinary meaning of "negligible" is "so small or unimportant as to be not worth considering." *Oxford English Dictionary* (Oxford: Oxford University Press).

[3] Canada's first written submission, 208–15.

[4] Panel Reports, *Canada – Wheat Exports and Grain Imports*, para. 6.190, fn. 281; *China – Publications and Audiovisual Products*, 7.1537; and *India – Solar Cells*, para. 7.97, fn. 262.

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Grain Imports expressed the view, without any analysis, that "[n]either the text of Article III:4 of the *GATT 1994* nor GATT/WTO jurisprudence indicates that there is a *de minimis* exception to the 'no less favourable treatment' standard in Article III:4."[5] It went on the note, however, that Canada had not argued that Article III:4 contains such an exception. In *China – Publications and Audiovisual Products*, the panel simply stated that, "we note that the phrase 'treatment no less favourable' is not qualified by a *de minimis* standard."[6] Finally, in *India – Solar Cells*, the panel confined itself to reproducing the statement made by the panel in *China – Publications and Audiovisual Products*, again, without offering any real analysis of the matter.[7]

… [A] *de minimis* standard is appropriate under Article III:4, in particular, since the competition-based analysis of market opportunities required under Article III:4 contains an element of subjectivity, and is by its very nature imprecise.

The Appellate Body has read a *de minimis* standard into the second sentence of Article III:2 through the use of the term "not similarly taxed" in Ad Article III:2. This finding undermines the assertion that there is, as a rule, no such thing as a little bit of discrimination under Article III. In some cases, and the Quebec measure is perhaps the quintessential example, a measure is capable of creating only a "negligible" amount of discrimination, if any at all.

In cases where the "discriminatory effect" or "impact on competitive opportunities" is truly negligible, a finding of inconsistency would be at odds with the general principle of Article III. The Appellate Body has explained:

> … the 'general principle' in Article III seeks to prevent Members from applying internal taxes and regulations in a manner which affects the competitive relationship, in the marketplace, between the domestic and imported products involved, 'so as to afford protection to domestic production'.[8]

If a measure has no discernible impact on competition, how can it be said to violate that principle? To the contrary, declining to interpret the "less favourable treatment" element in Article III:4 as including a *de minimis* factor, when Article III:2, second sentence has already been interpreted to include such a factor, risks upsetting the congruity in the scope of these two provisions. And the congruity of scope has been identified by the Appellate Body as critical to the overall balance of Article III.[9] So if there is a level of "discrimination" under which a fiscal measure is deemed not to give rise to a national treatment violation, why should the same not be true for a regulatory measure.

[5] Panel Report, *Canada – Wheat Exports and Grain Imports*, para. 6.190, fn. 281.
[6] Panel Report, *China – Publications and Audiovisual Products*, para. 7.1537.
[7] Panel Report, *India – Solar Cells*, para. 7.97, fn 262.
[8] Appellate Body Report, *EC – Asbestos*, para. 98.
[9] *Ibid*, para. 99.

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WTO — Agreement on Subsidies and Countervailing Measures (SCM Agreement) — *Adverse Effects* — *Reference Period*

In Canada's first written submission in *Canada – Measures Concerning Trade in Commercial Aircraft* (DS522), dated 8 May 2019, Canada made the following arguments on the appropriate reference period for determining adverse effects in the context of the *Agreement on Subsidies and Countervailing Measures* (*SCM Agreement*) (submissions available upon request to jlt@international.gc.ca):

A. The reference period in this dispute must represent current factual conditions

1. Introduction

1. Brazil claims that the alleged subsidies cause adverse effects in the form of serious prejudice to its interests, contrary to Articles 5 and 6.3 of the *SCM Agreement*. In its attempt to demonstrate the existence of serious prejudice, Brazil defines the relevant reference period as running for an eleven-year period from 2008 to 2018.[1] Canada disagrees with Brazil's proposed reference period.
2. The term "reference period" describes a temporal concept. In previous disputes, it has been used to define the period within which a complainant must demonstrate that subsidies are presently causing present adverse effects. The jurisprudence clarifies that an appropriate period of time for assessing adverse effects – i.e. the reference period – must reflect "current factual conditions",[2] as Articles 5 and 6.3 of the *SCM Agreement* focus on the present effects of a subsidy.
3. Accordingly, the appropriate reference period for this dispute is one that reflects current industry and market conditions. As explained in the sections that follow, the reference period adopted by Brazil fails to meet this standard, as it ignores the significant developments in the market for single-aisle aircraft that occurred in the 2017–2018 period – most notably, the US anti-dumping and countervailing duty proceedings initiated by Boeing against imports of the then C Series aircraft (Boeing petition), and Airbus' acquisition of a majority stake in CSALP (Airbus investment). Based on a correct application of the legal standard, the Panel should adopt a reference period that runs from July 2018 – when the Airbus investment was concluded – up to the present.

[1] Brazil's first written submission, para. 1075.

[2] Panel Report, *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)*, para. 6.1443 (quoting Panel Report, *US – Upland Cotton (Article 21.5 – Brazil)*, paras. 10.104 and 10.248). See also Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 712; Panel Reports, *US – Upland Cotton (Article 21.5 – Brazil)*, 10.18; *EC and Certain Member States – Large Civil Aircraft*, paras. 7.1694 and 7.1714; *US – Large Civil Aircraft (2nd complaint)*, para. 7.1679.

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2. Legal standard

1. The significance of the reference period as a threshold issue arises from the requirement for a complaining Member to demonstrate that the alleged subsidies are, at present, a genuine and substantial cause of present adverse effects. This requirement is well-established. For example, in *EC and Certain Member States – Large Civil Aircraft (Article 21.5 – US)*, the panel observed:

> [i]t is well established that a panel tasked with reviewing the merits of claims made under Article 6.3(a), (b) and (c) of the SCM Agreement must focus its efforts on determining the extent to which the challenged subsidies are a "genuine and substantial" cause of serious prejudice *in the present*, or as the compliance panel in *US – Upland Cotton (Article 21.5 – Brazil)* termed it, "*under current factual conditions*". However, as we explained in the original proceeding, the unavailability of immediate data means that "it is impossible to assess the 'present' situation, ... and thus a review of the past is necessary to draw conclusions" about the present.[3]

2. The requirement to demonstrate present adverse effects arises from the text of Article 5, which also focuses on the present, as it provides: "[n]o member should **cause** … adverse effects". In *EC and Certain Member States – Large Civil Aircraft*, the panel further noted that "[t]he text of Articles 6.3 (a), (b) and (c) are even more plainly drafted, with reference to the present, as each begins" "the effect of the subsidy **is** ...".[4] Likewise, the panel in *US – Upland Cotton (Article 21.5 – Brazil)* indicated, "[w]hile the *SCM Agreement* does not contain a specific provision on the period to be considered … the use of the present tense logically implies the need to make a determination with respect to the present period."[5] Accordingly, a subsidy that ceases to presently cause adverse effects is outside the purview of Article 5.
3. Although Part III of the *SCM Agreement* does not prescribe a specific period of time for the assessment of adverse effects, the requirement to demonstrate present adverse effects necessarily implies that the reference period must be: (i) a recent period of time; and (ii) representative of the current factual conditions of the market and industry at issue.[6] This is logical, as information not

[3] Panel Report, *EC and Certain Member States – Large Civil Aircraft (Article 21.5 – United States)*, para. 6.1443. (emphasis original) (fns. omitted).
[4] Panel Report, *EC and Certain Member States – Large Civil Aircraft*, fn. 5140 to para. 7.1694 (emphases in the original). See also Panel Report, *US – Upland Cotton (Article 21.5 – Brazil)*, para. 10.18 (While the *SCM Agreement* does not contain a specific provision on the period to be considered … the use of the present tense logically implies the need to make a determination with respect to the present period).
[5] Panel Report, *US – Upland Cotton (Article 21.5 – Brazil)*, para. 10.18.
[6] See Panel Report, *EC and Certain Member States – Large Civil Aircraft (Article 21.5 – US)*, para. 6.1443 (quoting Panel Report, *US – Upland Cotton (Article 21.5 – Brazil)*, paras. 10.104 and 10.248). See also Appellate Body Report, *EC and Certain Member States – Large Civil Aircraft*,

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reflective of current conditions would provide an imprecise, and potentially misleading, basis on which to assess the present effects of the alleged subsidies.

4. While the duration of a reference period does not presuppose or bar what evidence a panel may consider in its analysis of adverse effects, a panel nevertheless must give each piece of evidence its "due weight", "in terms of its context, relevance, and probative value."[7] Given the clear requirement to demonstrate present adverse effects, evidence that does not reflect current factual conditions of the market and industry at issue necessarily has less probative value. It follows that, as a general rule, the more distant evidence is from the reference period characterized by current factual conditions, the less weight it should be afforded in the assessment of present adverse effects.
5. Accordingly, the reference period in this dispute must be recent and reflective of current factual conditions in the commercial aircraft industry and the market for single-aisle aircraft. It is only by assessing the effects of the alleged subsidies based on such a reference period that the present effects of the alleged subsidies can be appropriately assessed.

3. The reference period proposed by Brazil should be rejected

1. Brazil asserts that "the relevant reference period over which the Panel should assess serious prejudice is 2008–2018."[8] According to Brazil, this period of assessment is appropriate based on the long time-frames under which the commercial aircraft industry and market operate, as well as when the alleged subsidies were committed, when the C Series program was launched, and the duration of the period over which it has allegedly experienced adverse effects.[9] Brazil further suggests that such a long reference period is consistent with previous jurisprudence, and is also appropriate in light of the mean and median production life of "western-manufactured commercial passenger aircraft."[10]
2. Canada demonstrates below that Brazil is incorrect. Brazil fails to justify that an eleven-year reference period is appropriate for assessing the present effects of the alleged subsidies. Moreover, Brazil fails to recognize that the dramatic changes in the industry and market brought about by the Boeing petition and the Airbus

para. 712; Panel Reports, *US – Upland Cotton (Article 21.5 – Brazil)*, para. 10.18; *EC and Certain Member States – Large Civil Aircraft*, paras. 7.1694 and 7.1714; *US – Large Civil Aircraft (2nd complaint)*, para. 7.1679.

[7] Panel Report, *US – Large Civil Aircraft (2nd complaint)*, para. 7.1679. In this regard, the Appellate Body has held that, "[i]n carrying out its mandate under Article 11, 'a panel has the duty to examine and consider all the evidence before it, not just the evidence submitted by one or the other party, and to evaluate the relevance and probative force of each piece thereof'." See Appellate Body Report, *US – Continued Zeroing*, para. 331 (quoting Appellate Body Report, *Korea – Dairy*, para. 137).

[8] Brazil's first written submission, para. 1075.

[9] Brazil's first written submission, paras. 1072, 1074.

[10] Brazil's first written submission, paras. 1072, 1074.

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investment separate its proposed "2008 to the present" reference period into two periods with distinct competitive conditions. Given the present-oriented nature of the adverse effects disciplines under Articles 5 and 6.3, the competitive conditions after the Airbus investment must be the focus of the Panel's assessment of the present effects of the alleged subsidies. Accordingly, the Panel should adopt a reference period that runs from July 2018 – when the Airbus investment was concluded – up to the present.

WTO — Agreement on Subsidies and Countervailing Measures (SCM Agreement) — *Benefits Calculation* — *"Subsidy Zeroing"*

In its response to panel questions in *US – Countervailing Measures on Softwood Lumber from Canada,* dated 12 November 2019, Canada responded to the question noted below as follows:

1. Could the USDOC [United States Department of Commerce] have disregarded certain comparison results when determining the benefit amount by comparing individual transactions of the provision of the good in question to a monthly average benchmark price if the benchmark was based on BCTS [British Columbia Timber Sales] auction prices? Could Canada give an example of a situation where the application of this method by an investigating authority would be consistent with Article 14(d) of the *SCM Agreement* even though the authority compares individual transactions of the provision of the good in question to a benchmark price that represents the average price of multiple transactions?
2. In response to the Panel's question, determining whether the provision of a good was made for less than adequate remuneration is an inherently fact-intensive exercise that must occur on a case-by-case basis.[1] The requirement to assess adequacy of remuneration in relation to prevailing market conditions for the government-provided good recognizes the fact-specific nature of the inquiry, and seeks to ensure that any benefit calculation methodology controls for differences in market conditions as much as possible.
3. There are a number of variables that will affect whether a benefit calculation methodology is consistent with Article 14(d), which are difficult to account for in the abstract. For example, the frequency of sales of the good, the unit in which it is sold, the degree of variation in market conditions for the good, the contractual arrangement or arrangements under which the good is sold, and the manner in which the financial contribution is defined, are all factors that could affect whether the method an investigating authority uses to assess adequacy of remuneration is consistent with Article 14(d). Each of these factors, and others, will necessarily inform the choices that an investigating authority makes in determining the method that it will use to ascertain the amount of benefit as accurately as possible.

[1] Panel Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 11.59.

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4. When the good in question is heterogeneous, and transacted in a large volume of line items under particular contractual arrangements, over long periods of time — like standing timber — the assessment is likely to be more complex than where the good in question is relatively homogenous. For example, consider a good that is relatively homogenous and participates in large geographic markets, like flash memory chips. Flash chips are a standardized product used in computers, cameras, and other electronic devices. The transportation costs of this product are low relative to their value, so that prices in different geographic regions are similar. In these kinds of circumstances, an investigating authority may be able to compare individual transactions in a market to an average benchmark price in a manner that accurately isolates or ascertains the benefit in accordance with Article 14(d).
5. However, this assessment is dependent on the context, and, as such, it is difficult to assess complex hypotheticals in the abstract. … Indeed, the fact-specific nature of the exercise is precisely why Canada is not arguing for a general rule of average-to-average comparisons in all cases, and the Panel need not create a general rule that would apply in all cases. To the contrary, to do so would be inconsistent with the flexibility provided to investigating authorities under Article 14, and the necessity for any method that determines adequacy of remuneration in relation to prevailing market conditions to reflect the specific characteristics of the good in question. Instead, the focus should be on the "careful matching" that the panel in *US – Anti-Dumping and Countervailing Duties (China)* explained that Article 14(d) requires.[2]
6. The United States takes a narrow view of what "careful matching" means, arguing that it is only in the selection of the benchmark and its comparison to a single transaction.[3] However, ensuring that a method for calculating benefit relates to prevailing market conditions can be accomplished in different ways, as Article 14 recognizes. Choosing a better benchmark is one option—and, to be clear, it is one that Canada maintains that [the Department of] Commerce was separately required to do. But, having chosen the benchmarks that it did, Commerce was obligated to ensure that its method of calculating benefit reflected the prevailing market conditions in New Brunswick and British Columbia by either: (1) grouping relevant government transactions to ensure symmetry of information on both sides of the comparison before it made the comparisons; or (2) grouping relevant comparison results after the comparison to ensure that that same symmetry of information was reflected.
7. … The United States argues that the "solution to any purported problem with selecting or matching benchmarks and transactions would be to fix the selection or matching problem," and not to impose an obligation to provide offsets for

[2] Panel Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 11.53.
[3] See e.g. United States' opening statement at the second substantive meeting of the Panel, para. 42.

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negative comparison results.[4] Canada agrees that better benchmark selection and careful matching could be one way of fixing the problem in some circumstances. For example, in British Columbia, Commerce could have compared the actual unit of transaction — the stand of trees — to a weighted average species benchmark that reflected the composition of the stand, rather than creating artificial "species-specific prices" to compare to individual species benchmark prices. This is precisely what Commerce did in its last investigation into softwood lumber after a bi-national *NAFTA* panel rejected the very same approach that Commerce used here.[5]

8. However, in other cases, practical limitations may mean that it is not possible to select benchmarks that closely match the market conditions of each individual transaction. It may be that an average benchmark price that captures a range of market conditions is the best benchmark. In those circumstances, the best way to achieve the requisite "careful matching" is to ensure that groups of transactions that were made under conditions that are comparable on both sides of the comparison are evaluated together. The aim here is to accurately assess the adequacy of remuneration for the good in question. Having chosen the benchmarks that it did, and chosen to carry out the specific comparisons that it undertook, Commerce could not accurately assess the adequacy of remuneration for each individual transaction in isolation.
9. This fact also explains why Canada is not asking for "offsets" to account for unsubsidized transactions, as the United States posits. Instead, Canada is seeking a benefit calculation methodology that creates symmetry in the market conditions for the heterogeneous goods on each side of the comparison. In other words, Canada is seeking an accurate determination of the adequacy of remuneration for Crown standing timber. The choices that Commerce made were such that its comparison results were not reliable indicators of the amount of any benefit for the examined transactions.

WTO — National Security Exceptions — Article XXI of the GATT 1994 *— Article XIV of the* General Agreement on Trade in Services *(*GATS*) — Article 73 of the* Agreement on Trade-related Aspects of Intellectual Property Rights *(*TRIPS Agreement*)*

In its third party submissions in *United Arab Emirates – Goods, Services and IP Rights* (DS526), dated18 February 2019, *Saudi Arabia – Measures Concerning the Protection of Intellectual Property Rights* (DS567), dated 5 June 2019, and *Russia – Pigs (EU) (Article 21.5 – EU)* (DS475), dated 17 June 2019, Canada set out its views on the correct order of analysis and the test and standard of

[4] United States' second written submission, para. 325.
[5] Commerce, Second Remand Determination, Lumber IV Investigation, Exhibit CAN-299, pp. 10–15. See also NAFTA Panel, "Lumber IV Investigation, Decision on Remand Determination," Exhibit CAN-300, pp. 17–19.

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review for the security exceptions under Article XXI of the *GATT 1994*, Article XIV of the *GATS*, and Article 73 of the *TRIPS Agreement*. Canada argued as follows (submissions available upon request to jlt@international.gc.ca):

Order of Analysis[1]

The Panel should first examine a Complainant's claims, and if it finds that the Complainant's measures are in violation of the relevant agreement(s), then it should proceed to examine whether the security exceptions can be successfully invoked to justify the violation. The provisions under the *DSU* [*Dispute Settlement Understanding*], the principle of judicial economy, and the nature of the essential security exceptions dictate that the order of the Panel's analysis must begin with the Complainant's claims under the agreements. The case law further confirms that this is the correct analytical order.

The nature of the relationship between substantive obligations under the agreements and the security exceptions available to justify a violation of those obligations require that a panel's analysis begin by determining whether the measures at issue are inconsistent with the relevant obligations. This order of analysis is not only logical but required given that the potential availability of an "exception" is ripe in law only when there is a finding of a violation. It is solely in instances where a Member concedes that its measure violates an obligation that a panel may begin its analysis with an invoked exception.

Articles 7.2, 11, 3.2, and 3.4 of the *DSU* reinforce that, in order to fulfil a panel's function of adjudicating the matter before it so as to assist the DSB [Dispute Settlement Body] in discharging its responsibilities under the *DSU* and the covered agreements, a panel must first address a Complainant's claims regarding violations of the covered agreements before examining any exceptions that are invoked by a Respondent.

Moreover, the objectives of the *DSU* may be frustrated if the analytical order starts with the security exceptions, particularly if the Panel should find that the security exceptions can be successfully invoked, and if these findings are reversed upon appeal. The Appellate Body would then be called upon to examine the claims made by the Complainant without those claims having been given a full airing before the Panel, and in the absence of legal interpretations and findings that would normally form the basis for an appeal. In addition, this examination would require a complex factual assessment and the weighing of evidence submitted by the parties — an exercise that could go beyond the jurisdiction of the Appellate Body and make it impossible for the DSB to provide recommendations and rulings on all legal claims. Therefore, to fully address the "matter" and to meet the objectives and requirements

[1] Canada's third party submissions in *United Arab Emirates – Goods, Services and IP Rights* (DS526); *Saudi Arabia – Measures Concerning the Protection of Intellectual Property Rights* (DS567).

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of the *DSU*, it is incumbent upon the Panel to address the Complainant's claims first before proceeding to examine the exceptions invoked by the Respondent.

The Test and Standard of Review for Paragraph (b) of the Security Exceptions[2]

Given the text of the essential security exceptions, its negotiating history, and the particularly sensitive nature of the subject matter of these exceptions, the test and standard of review for these exceptions must be interpreted in a manner that accords a high level of deference to an invoking Member while ensuring that the object and purpose of the agreements are not undermined.

The correct test and standard of review for the essential security exceptions available under paragraph (b) involves a combination of subjective and objective elements. These are broken down as follows:

- The subjective element of the test is found in the chapeau of paragraph (b), such that the invoking Member need demonstrate only that it considered its measures to be necessary to protect its essential security interests.
- The objective element of the test is contained in the subparagraphs and in the relationship between the subparagraphs and the measures adopted by the invoking Member.

A panel must objectively determine that there is a "war or other emergency in international relations" for a measure to fall within the scope of the provision. Further, a panel's assessment of whether the requirements of subparagraph (b) have been met must include a determination of whether there is a "sufficient nexus" between the measure adopted by the invoking Member and the circumstances set out in subparagraph (iii). This is an objective assessment that goes beyond a "good faith" plausibility test. Examining whether there is a "sufficient nexus" involves, first, a determination that the measures were taken contemporaneously with the "war or other emergency in international relations." The words "taken in" in the text indicates the need for this temporal connection. Second, a panel must be satisfied that there is a sufficient link or substantive nexus between the measures at issue and the war or other emergency. For example, that the design and scope of the measures pertain to the war or other emergency. In other words, a Member could not use an existing emergency as a pretext to implement a trade-restrictive measure completely unrelated to that emergency.

The standard of review for subparagraph (iii) cannot be satisfied with a mere assertion by the invoking Member that there is a "war or other emergency". A meaning must be ascribed to the fact that Members chose to specify circumstances in which the security exceptions could be invoked. An interpretation that fails to require a Member

[2] Canada's third party submissions in *United Arab Emirates – Goods, Services and IP Rights* (DS526); *Saudi Arabia – Measures Concerning the Protection of Intellectual Property Rights* (DS567); *Russia – Pigs (EU) (Article 21.5 – EU)* (DS475).

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to demonstrate that such a circumstance objectively exists, and that there is a sufficient connection between the measures and that circumstance, would be at odds with the general rules of treaty interpretation that require meaning be given to each term and provision.

STATE RESPONSIBILITY

Attribution of Acts of Private Persons or Entities — 2001 Articles on the Responsibility of States for Internationally Wrongful Acts — Article 8 — Direction or Control Test

In its counter-memorial on merits and damages in *Resolute Forest Products Inc. v Government of Canada*, dated 17 April 2019, Canada made the following argument with regard to the attribution of the acts of private entities under international law, invoking the *Articles on the Responsibility of States for Internationally Wrongful Acts*, adopted by the International Law Commission (ILC) in 2001 (submission available at https://pcacases.com/web/sendAttach/2596):

1. State Responsibility under International Law Only Arises When a State has "Effective Control" and "Instructs a Private Person or Entity to Do Something on Its Behalf"

172. In order for a measure to be within the scope and coverage of *NAFTA* Chapter Eleven, Article 1101(1) requires that the impugned measure be both "adopted or maintained by a Party" and "relating to" an investor or its investments.[1] A measure is "adopted or maintained by a Party" only if it is attributable to the respondent State.[2] Whether a measure that has been found attributable to a Party constitutes a violation of Chapter Eleven involves an analysis under international law, which is reflected in the ILC Articles.[3]

[1] *NAFTA* Article 1101(1) (Scope and Coverage) states: "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; and (c) with respect to Articles 1106 and 1114, all investments in the territory of the Party."

[2] RL-032, International Law Commission, *Draft Articles on the Responsibility of States for Internationally Wrongful Act, with Commentaries* (2001), pp. 34–35; RL-069, *Gustav F.W. Hamester GmbH & Co KG v Republic of Ghana* (ICSID Case No. ARB/07/24), Award, 18 June 2010 ("*Hamester – Award*"), ¶¶ 143, 147, 173; RL-112, *CC/Devas (Mauritius) Ltd., Devas Employees Mauritius Private Limited and Telecom Devas Mauritius Limited v India* (PCA Case No. 2013-09) Award on Jurisdiction and Merits, 25 July 2016 ("CC/Devas – Award"), ¶ 283; RL113, *Electrabel S.A. v Republic of Hungary* (ICSID Case No. ARB/07/19) Decision on Jurisdiction, Applicable Law and Liability, 30 November 2012 ("Electrabel – Decision"), 7.58, 7.61.

[3] RL-032, International Law Commission, *Draft Articles on the Responsibility of States for Internationally Wrongful Act, with Commentaries* (2001), pp. 34–35; RL-069, *Hamester – Award*, ¶¶ 143, 147, 173; RL-112, *CC/Devas – Award*, ¶ 283; RL-113, *Electrabel – Decision*, ¶¶ 7.58, 7.61.

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173. Resolute relies exclusively on Article 8 (Conduct directed or controlled by a State) of the ILC Articles, which provides: "The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct."[4]

174. The rationale underlying the customary rule articulated in ILC Article 8 is that by acting on the instructions of the State when carrying out the internationally wrongful conduct, private persons or entities "become the extended arm of the instructing State organ and therefore the attribution in the sense that the conduct is to be considered as State action is a matter of consequence."[5] State responsibility thus arises "where a state instructs a private person or entity to do something *on its behalf*."[6]

175. While Article 8 expresses the three terms "instructions", "direction" and "control" disjunctively, "instructions, direction or control must relate to the conduct which is said to have amounted to an internationally wrongful act."[7] An abstract argument that a State gave an "instruction" is insufficient.

176. As the International Court of Justice (ICJ) found in the *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, in order to satisfy the test of "effective control"[8] set out in its prior decisions and in ILC Article 8, instructions from the State must have been given "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."[9]

177. The international legal threshold to attribute actions of private parties to a State is very demanding because it requires 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 in question.[10] In the investor-State context, arbitral tribunals have applied

[4] RL-032, International Law Commission, *Draft Articles on the Responsibility of States for Internationally Wrongful Act, with Commentaries* (2001), pp. 47–49.

[5] CL-111, James Crawford, *State Responsibility: The General Part* (Cambridge University Press 2013), p. 141.

[6] CL-111, James Crawford, *State Responsibility: The General Part* (Cambridge University Press 2013), p. 144 (emphasis added).

[7] RL-032, International Law Commission, *Draft Articles on the Responsibility of States for Internationally Wrongful Act, with Commentaries* (2001), p. 48 (emphasis added).

[8] RL-114, *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)*, Judgment, 27 June 1986, ("*Nicaragua v United States – Judgment*"), ¶ 115.

[9] 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, 26 February 2007, ¶ 400.

[10] CL-105, *Jan de Nul N.V. and Dredging International N.V. v Arab Republic of Egypt* (ICSID Case No. ARB/04/13), Award ("*Jan de Nul – Award*"), ¶ 173; RL-069, *Hamester – Award*, ¶ 179; RL-116, *White Industries Australia Limited v Republic of India* (UNCITRAL), Final Award, 30 November 2011 ("*White – Final Award*"), ¶ 8.1.18; RL-113, *Electrabel – Decision*, ¶ 7.69;

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this high threshold, requiring claimants to demonstrate a "close link" between the impugned act and the State [11] through "effective control,"[12] "direct command,"[13] "direct order"[14] or "direct control."[15]

178. Resolute has failed to meet the high threshold of the "effective control" test. Instead, it argues that ILC Article 8 merely requires proof of "clearance and guidance" by the State to a person or private entity with respect to a particular act.[16] In *Bayindir v Pakistan*, the only case cited by Resolute in support of this position, the tribunal stated that a finding of attribution may be made "if the specific facts of an investment dispute so warrant."[17] While *Bayindir v Pakistan* is a departure from the "effective control" test deeply entrenched in international jurisprudence, it is also a highly fact-specific finding of attribution in the circumstances where the Chairman of the government-controlled National Highway Authority[18] (himself a military general) received "express clearance"[19] from Pakistan's military chief executive to terminate a contract, which could not have happened without approval by the highest levels of the Pakistani government.[20]

179. On the other hand, numerous tribunals have endorsed the two-part effective control test where there is "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." [21]

RL-117, *Gavrilovic v. Croatia* (ICSID Case No. ARB/12/39), Award, 25 July 2018 ("*Gavrilovic – Award*"), ¶ 828.

11 CL-105, *Jan de Nul – Award*, ¶ 157; RL-069, *Hamester – Award*, ¶ 172.

12 RL-069, *Hamester – Award*, ¶ 172; RL-118, *Tulip Real Estate and Development Netherlands B.V. v. Republic of Turkey* (ICSID Case No. ARB/11/28) Award, 10 March 2014, ("*Tulip – Award*"), ¶¶ 304–305; RL-120, *Almas v. Poland*, (UNCITRAL) Award, 27 June 2016, ¶ 269; RL-119, *Teinver v. Argentina* (ICSID Case No. ARB/09/01) Award, 21 July 2017, ¶¶ 722–724; RL-117, *Gavrilovic – Award*, ¶¶ 828–829.

13 RL-069, *Hamester – Award*, ¶¶ 198, 200, 203.

14 RL-121, *Bernhard von Pezold and Others v Republic of Zimbabwe* (ICSID Case No. ARB/10/15), Award, 28 July 2015 ("*Pezold – Award*"), ¶ 448.

15 CL-105, *Jan de Nul – Award*, ¶ 157.

16 Claimant's Memorial, ¶¶ 177–178.

17 CL-112, *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v Islamic Republic of Pakistan* (ICSID Case No. ARB/03/29), Award, 27 August 2009, ("*Bayindir – Award*"), ¶ 130.

18 CL-112, *Bayindir – Award*, ¶ 9 (The NHA is a "public corporation" established by a statute and "controlled by the Government of Pakistan").

19 CL-112, *Bayindir – Award*, ¶¶ 9 and 125.

20 Claimant's Memorial, ¶¶ 34, 128, 206, 217, 236. See R-404, *Dawn*, "Islamabad: Progress on M-1, M-3 reviewed" (29 October 2011); R-405, *Los Angeles Times*, "Military Inc. Dominates Life in Pakistan" (7 October 2002).

21 CL-105, *Jan de Nul – Award*, ¶ 173. See also RL-120, *Almas v Poland*, (UNCITRAL), Award, 27 June 2016, ¶¶ 268–269. Similarly, the *White Industries v India* tribunal held that the claimant had to prove India had both "general control" over the State-entity "as well as specific control over the particular acts in question" in order for ILA Article 8 to apply. The Tribunal in *Almås v Poland* endorsed the same. Similarly, the *White Industries v. India* tribunal held that the claimant had to prove India had both "general control" over the

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180. In *von Pezold v Zimbabwe*, the tribunal held that the acts of the persons who settled on the claimants' land were not attributable to the respondent State despite "ample evidence of Government involvement and encouragement."[22] While the government "appears to have encouraged (and endorsed) the action once it had begun," the tribunal was "not persuaded that the acts of the invaders were based on *a direct order or under the direct control* of the Government when they initially invaded the Claimants' properties" and stated that "[e]ncouragement would not meet the test set out in Article 8."[23]

181. International tribunals have also emphasized that there is a difference between an "instruction" and other actions taken by a State. In *Electrabel v Hungary*, the tribunal held that "the fact that a State acts through a State-owned or State-controlled company over which it exercises some influence is by itself insufficient for the acts of such entities to be attributed to the State."[24] In that case, the tribunal found that a letter sent by the Hungarian Energy Office ("HEO") to MVM (a State-owned electricity supplier) could not be considered an "instruction" because "its purpose was to encourage Dunamenti [power plant owner and operator] and MVM to negotiate in the direction favoured by HEO, as opposed to instructing them to do so."[25] The tribunal concluded that "an invitation to negotiate cannot be assimilated to an instruction"[26] and "just an invitation to negotiate is not an instruction, influence is also not an instruction."[27]

182. Resolute's exclusive reliance on the *Bayindir v Pakistan* decision and failure to recognize that international law requires the effective control test to be met before acts of private parties may be attributable to a State evidences the weakness of its attribution argument.

TREATY LAW

Vienna Convention on the Law of Treaties (VCLT) — *Anniversary of Adoption — Role of the Convention — Treaty Interpretation — State Succession — Withdrawal and Termination*

On 23–24 May 2019, the Government of Canada hosted an event to mark the fiftieth anniversary of the adoption of the *VCLT*. Remarks by the parliamentary secretary to the minister of foreign affairs, Pamela Goldsmith-Jones, paid tribute to the role played by the ILC in encouraging the progressive development and codification of public international law

State-entity "as well as specific control over the particular acts in question" in order for ILC Article 8 to apply (RL-116, *White – Final Award*, ¶ 8.1.18). The Tribunal in *Almås v Poland* endorsed the same.

[22] RL-121, *Pezold – Award*, ¶ 448.
[23] RL-121, *Pezold – Award*, ¶ 448 (emphasis added).
[24] RL-113, *Electrabel – Decision*, ¶ 7.95.
[25] RL-113, *Electrabel – Decision*, ¶ 7.107.
[26] RL-113, *Electrabel – Decision*, ¶ 7.111.
[27] RL-113, *Electrabel – Decision*, ¶ 7.113.

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and noted that the *VCLT* remains instrumental and relevant 50 years later to help tackle contemporary challenges not necessarily envisaged in 1969 – from climate change to terrorism, from economic inequality to pandemics, from protracted crises to humanitarian emergencies. The following event report was prepared:

I. **Summary**

To mark the 50th anniversary of the *Vienna Convention on the Law of Treaties* (*VCLT* or the Convention) on Thursday, May 23, 2019, Canada and Colombia partnered to organize several events in New York City. The proceedings included a high-level event at the United Nations (UN) Headquarters with keynote addresses by UN, Canadian, and Colombian officials. Afternoon technical sessions included a panel discussion on the future of the *VCLT*; a presentation by the UN Office of Legal Affairs, Treaty Section; and a series of four Roundtable Discussions with treaty experts and practitioners.

II. **High-Level Event with Keynote Addresses**

Invited speakers included: Miguel de Serpa Soares, Under-Secretary-General [USG] for Legal Affairs and UN Legal Counsel, representing the Secretary-General; Alejandra Valencia Gärtner, Director International Legal Affairs, Ministry of Foreign Affairs of Colombia; [and] Olufemi Elias, Assistant Secretary-General [ASG] and Registrar of the UN International Residual Mechanism for Criminal Tribunals.
…

(i) The Convention Today and Role as Depositary

USG Soares noted that most of the *VCLT*'s provisions are widely regarded as customary international law. The Convention establishes a versatile regime of flexible residual rules, which are relied upon in treaty-making. The *VCLT* reserves its role to those situations where States have not agreed otherwise. But, its flexibility and residual nature are among its strengths that have kept the *VCLT* vital 50 years after its adoption.

USG Soares stated that the Office of Legal Affairs (OLA) refers to the *VCLT* at all stages of the treaty-making process, from negotiation to adoption, and later when called on for the interpretation and application of treaties. The *VCLT* has also codified the obligation contained in the UN Charter for all States to submit to the Secretariat of the UN their treaties in force for registration and publication, and determines the Secretariat's functions as the depositary of a treaty. The Secretariat's registration and publication function, and the functions of the Secretary-General as depositary of over 600 multilateral treaties, are carried out by the OLA.

USG Soares noted that in 2018 around 1000 treaty actions were discharged by the OLA. Since the year 2000, 2,200 signatures, ratifications and similar actions have been undertaken by States in the context of the UN's annual Treaty Event in relation to hundreds of treaties covering all facets of human existence: from protection of

human rights and gender equality to environmental sustainability, disarmament, and the prevention of terrorism.

(ii) [Application in Latin American States]

… Ms. Gärtner highlighted, as a main source of concern for many Latin American States, the interplay between the Convention and these States' internal regulations on negotiation, signature, and entry into force of treaties. For these States, international agreements may take several years to enter into force, and provisional application is uncommon or restricted. Ms. Gärtner speculated that these challenges may stem from Latin American States' civil law traditions, which require them to issue codified statutes and follow strict legal procedures.

(iii) [Global Reach, Flexibility and Central Role of the VCLT*]*

… ASG Elias highlighted that while the *VCLT* is a crucial set of rules that covers all aspects of treaty-making, the *VCLT* does not cover all aspect of treaty law. He noted that the *VCLT* has remained untouched despite the fact the basic text was drafted over a period of 15 years more than 50 years ago. In his remarks, three main points were highlighted: (i) the global reach of the *VCLT*; (ii) the flexibility of the *VCLT*, and (iii) the central role played by treaties in relations between States.

Global Reach of the *VCLT*: ASG Elias noted that while most rules contained within the Convention were based on customary international law, some rules reflected the progressive development of international law (i.e., adoption, reservations, amendments to multilateral treaties, invalidity, termination, etc). ASG Elias stated that, over the last 50 years, many of these developments have become established, due in part to case law decided on the basis of the *VCLT*, even in some instances where neither party in a dispute were parties to the *VCLT*. As a result, the *VCLT* can be considered a unifier of international legal rules, which is significant in light of the fragmented nature of many aspect[s] of international law.

Flexibility of the *VCLT*: ASG Elias continued by stating that it would appear the *VCLT* is well equipped to deal with any challenges presented by contemporary relations and international law. The *VCLT* provides this flexibility, in part, by relying on the ordinary meaning of a treaty. Moreover, rules of production of full powers; authentication; means of expressing consent to be bound; entry into force, and amendments are also clarified. Residual issues appear only in the absence of an agreement.

Central Role Played by Treaties in Relations between States: ASG Elias noted that despite the proliferation of international norms, States will continue to be confronted with issues surrounding treaty interpretation. As a result, States will continue to rely on the *VCLT* as a common point of reference. This makes the *VCLT* as relevant today as 50 years ago. While a number of issues remain, such as objections to reservations (i.e., human rights); fundamental change of circumstances; rules of interpretation in articles 31–33; all the discussions acknowledge the essential features of the rules contained in the *VCLT* are the cornerstone of modern international law.

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III. **Technical Sessions: Second International Conference on Treaty Practice**

Summary: Afternoon technical sessions, attended by treaty experts and practitioners from 30 countries and organizations, [were] held with a goal to contribute to an international legal order supported by clear treaty-making practices.

(i) Panel Discussion: The Future of the VCLT*: A Basis for Cooperation or Source of Conflict?* (Moderator: Gary Luton, Director, Treaty Law Division, Canada)

1. The *VCLT* as a Triptych for the Law of Treaties (Professor Duncan B. Hollis)[1]

Professor Hollis explored the idea of the *VCLT* as a "triptych" for the law of treaties. He did so for two reasons: First, the religious connotations of triptychs, given their presence in Christian, Islamic and Buddhist art, serves as a reminder of how much international lawyers have come to regard the *VCLT* as "received wisdom" – a document held in universally high regard and treated in many ways as sacrosanct. Second, as a triptych, the *VCLT*'s legacy may be imagined through three discrete images: "settlements", "stumps", and "semantics".

… [I]n terms of "settlement", Professor Hollis recalled just how much the *VCLT* settled outstanding issues (e.g., defining the treaty concept to include exchanges of notes, delineating the processes for its formation and termination). At the same time, looking across its provisions, there are also "stumps" – areas where the *VCLT*'s original vision (e.g., dispute settlement procedures, including conciliation provisions) never matured and now lie fallow. Third, the *VCLT*'s main image – its main legacy – may be in terms of "semantics"; establishing shared language and logics for not just all treaty lawyers, but all public international lawyers. Concepts like "object and purpose" and article 31 of the *VCLT* structure legal arguments, whether or not the participants opt to create their own treaty rules or turn to the *VCLT* by default. Professor Hollis concluded by predicting all three trend lines will continue – with future settlements, future stumps, and new iterations of semantics. …

2. The Politics of Treaty Conflict and the International Law Commission's Project of International Law (Dr. Surabhi Ranganathan)[2]

In her remarks, Dr. Ranganathan reflected on the context in which the *VCLT* was drafted. She suggested that looking back to the challenges that confronted the ILC, as it set about codifying and developing the law of treaties, is important for evaluating the *VCLT*'s success. She noted that in some ways similar to the present, that period was also one raising many questions about the durability of a rules-based international order (RBIO). The doubts were owed to the immediate past (i.e. the failure of

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[2] University Lecturer in International Law and a Fellow and Director of Studies in Law at King's College, University of Cambridge.

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the League of Nations), the context of the Cold War, and, with decolonization, the express articulation of third world disenchantment with international legal rules and institutions. The ILC faced many questions about the legitimacy and likely effectiveness of its codification project.

Dr. Ranganathan noted the dominant voices in the ILC who shared not just a liberal orientation — a belief that international relations should be founded on the rule of law — but also a constructivist sensibility. They took the view that the more intensely States might be brought to participate in a legal discourse — a practice of claim-making and justification in the idiom of the law — the more they would become habituated users and respecters of international law. This intuition not only leavened their overtly expressed anxieties about the impact that the failure of codification might have on their project of international law, it also afforded them a strategy for addressing tricky questions. This was to avoid stipulating rigid outcomes, but rather to provide a platform — and subtle encouragement — for States to engage in legal discourse. Dr Ranganathan illustrated this by reference to the VCLT's rules on treaty conflicts, particularly in the situation where the treaties have non-identical parties (i.e. a State "A" has concluded conflicting treaties with States "B" and "C").

Drawing on her book, *Strategically Created Treaty Conflicts and the Politics of International Law* [Cambridge University Press, 2014], Dr. Ranganathan explained that writing the "principle of political decision" into the law of treaties (article 30 of the VCLT) reflected a considered choice that moved away from earlier efforts that had sought to determine the order of priority between such conflicting treaties. Dr. Ranganathan noted that the book additionally explores how such treaty conflicts have played out in the contexts of nuclear governance, international criminal justice, and the law of the sea.

In conclusion, Dr. Ranganathan noted that the ILC's strategic approach was material not only to the acceptability of the *VCLT*, but also to the development of a densely networked RBIO. Our current concerns about its decline must acknowledge the feat — and underlying assumptions — of its building in the first place. …

3. The Life and Times of Consensualism in Treaty Commitments: Reassessing the *Vienna Convention on the Law of Treaties* (Dr. Fuad Zarbiyev)[3]

After defining consensualism in its procedural (a State is not bound by a treaty without its consent to be bound by it) and substantive dimensions (a State cannot be bound by a content to which it has not consented), Dr. Zarbiyev argued that some choices made by the ILC and later at the Vienna Conference on the Law of Treaties have significantly reduced the place of substantive consensualism in the law of treaties. He illustrated this phenomenon with respect to two issues: interpretation and reservations.

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The *VCLT* did not make a decisive choice among competing schools of treaty interpretation. Dr. Zarbiyev noted that it is true that the Special Rapporteur described the text as "the dominant factor in the interpretation of the treaty" and referred to the "primacy of the text." But commentators often overlook that the ILC did so because it viewed the text as "evidence of the intentions" of the parties, and that for the ILC, the primacy of the text was a matter of its primacy as evidence of the intention of the parties. Most commentators and third party adjudicators operate on the assumption that the intention of the parties is not a relevant parameter in treaty interpretation. The recent conclusions of the ILC on Subsequent Practice and Subsequent Agreements take this approach to its logical extreme by challenging the wide-spread view that interpretive agreements entered into by all the treaty parties are binding. This invites reflections, since the intention of the parties is the closest thing to consensualism in the interpretive regime set forth in the *VCLT*.

Turning to the issue of reservations, Dr. Zarbiyev focused on the broad ramifications of the rule limiting the possibility of formulating a reservation to the time when the State expresses its consent to be bound. The premise of this choice is that a State is always in a position to appreciate the meaning and implications of a treaty provision on the face of it. The ILC did not contemplate and could not have contemplated the rise of third party adjudication of treaty rights and obligations. One consequence of that phenomenon is that a third party adjudicator may interpret a treaty provision in a way that could not have been contemplated or accepted by the parties or a party when they joined the treaty. The *VCLT* provides no mechanism for that more-than realistic scenario. In such circumstances, the option of leaving a treaty and re-joining it with reservations to react to third party interpretations is likely to look attractive. This will come at the price of decreased stability in treaty relations. …

(ii) Roundtable Discussions on Treaty Practice

1. Internal Procedures for the Entry into Force of Treaties (Chair: Naomi Elimelech, Director, Treaties Department, Israel)

… The goal of this roundtable was to learn about the differences and similarities between the entry into force process in the various States. Key points:

- The nature of internal procedures for entry into force of treaties varies widely between States. Democratic involvement in procedures between participants' States range from silent tabling of treaties in one chamber of Parliament to obtaining the consent of one or both chamber(s) of Parliament. In some instances, States obtain the consent of the President, while in others, the consent of both federal and sub-federal legislatures is required in some cases.
- Some participants noted that the level of participation or consent required from democratic institutions depends on the treaty's subject matter. One participant noted that bringing a treaty into force in the participant's State requires the consent of the King.

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- A representative from Europe also outlined the EU's processes. For the EU, the European Parliament is involved in bringing a treaty into force but is less involved for areas under the EU's Common Foreign and Security Policy.

Questions Raised: The issue was raised that the length and complexity of a State's internal procedures for entry into force often influences the State's decision of whether to pursue a legally binding instrument or a non-legally binding instrument. This ties into the concerns raised at the high-level panel regarding the rise of non-binding instruments as a means of avoiding democratic treaty-making procedures.

Possible Next Steps: A more detailed discussion on this topic in the future would be beneficial, such as examining comparative approaches between federal States. A study by the Inter-American Juridical Committee of the Organization of American States (OAS) currently underway on binding and non-binding instruments is to be shared among the Working Group.

2. State Succession (Chair: Anne Frenette, Deputy Director, Treaty Law Division, Canada)

… The chair noted that treaties are at the heart of succession of States, and, as a result, succession to treaties is highly politicized. The context of decolonization and the Cold War provide examples. Furthermore, there is little generalized practice or established customary international law surrounding state succession. As a result, succession questions can lead to disagreements between States as to which treaties are in force between them. Key points:

- Several participants noted that they had entered into exchanges of notes (whether binding or non-binding) with other States on the issue of succession to treaties (and in some cases, to non-binding instruments), setting out which instruments continue to apply. Some of the participants present represented successor States.
- One participant pointed out that trying to set out every treaty that is eligible to continue in force, via an exchange of notes or a list of treaties, can create issues if some treaties are inadvertently omitted. Another issue that arises is whether to continue to apply treaties that are now obsolete. Participants noted that even obsolete or old treaties often raise questions for practitioners regarding State succession.
- Participants identified several categories that could be identified in relation to succession to treaties, including: succession to multilateral and bilateral treaties, the latter being perceived as more political; subject matter of a treaty, and dissolution of a State versus separation.

Questions Raised:

- A key question the chair raised was whether States should enter into agreements [and/or] arrangements with other States on the issue of succession to treaties (and non-binding instruments). A different approach would be to rely on successor States' general declarations of their continued adherence to treaty obligations, such as declarations filed with the UN Secretary-General. Another potential

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approach would be to simply assume a rule of devolution (perhaps time-limited) or, by contrast, *tabula rasa* (e.g. because of illegal annexation).
- When asked by the chair, several participants generally agreed a distinction should be made based on subject matter. Most participants agreed that human rights treaty obligations continue. It was recognized that similar arguments could be made that obligations under other treaties with third party beneficiaries, such as investment treaties, may also continue.

Possible Next Steps: There was a consensus that the *Vienna Conventions on Succession of States* (1978 and 1983) were not very successful, in part, due to limited State practice at the time. For instance, automatic succession, as prescribed by the 1978 Convention, has not been generally accepted by States. As a result, some participants suggested that a new conference on succession should be considered.

3. Legal Effects of Non-Legally Binding Instruments/MOUs (Chair: Jongin Bae, Visiting Professor, McGill University, and former Director-General, International Legal Affairs, Korea)

… Non-binding instruments are increasingly used by States and international organizations and raise a number of important issues for treaty practitioners. A comparative survey on this topic was prepared by Canada and distributed to the Working Group of Treaty Experts and Practitioners the following day. Key points:

- There was a general agreement that the title of Memorandum of Understanding (MOU) should not be a decisive factor in determining the legal status of an instrument, and that its substance and language have to be examined. Some participants pointed out the importance of verifying the other Party's "intention" to avoid any misunderstanding as to its legal effect.
- Some States have comprehensive guidelines [and/or] databases in place regarding non-binding instruments. Most participants expressed concern that those types of instruments are being signed as "deliverables", often during high-level visits, without proper oversight (or even knowledge) by the treaty authorities at the foreign ministry. Participants agreed on the importance of improving consistency in the practice surrounding non-binding instruments.

Questions Raised:

- The discussion raised issues such as the "fine line" between treaties and non-treaties, whether practitioners should try to revitalize the institution of treaties, and how practitioners should engage or intervene in the making of non-binding instruments.
- Some States authorize their respective ministries to conclude legally binding international instruments, which raises the question of whether such inter-ministry/agency agreements entail liability for either the specific ministry or the whole State. In a similar vein, the capacity of a sub-territorial entity to conclude international agreements was also raised.

- The chair inquired as to States' parliamentary control over non-binding instruments. Several participants responded that their parliaments had recently shown interest in the non-binding Global Compact on Migration.

Possible Next Steps: Given the keen interest shown on this topic, it would be advisable to continue to discuss non-legally binding instruments in a more focused and structured way, for instance, by highlighting best practices, focusing more on the status of inter-ministry/agency agreements, and further exploring ways to understand [and] compare participants' respective experiences. A regional approach might be also useful in this regard. For example, the Inter-American Juridical Committee of the OAS is in the process of drafting guidelines on international instruments and distinguishing between treaties, political commitments, and contracts. Asian and African States can consider sharing the OAS guidelines or the results of Canada's Survey on Binding and Non-binding International Instruments to bring attention to this topic at the Asian-African Legal Consultative Organization (AALCO).

4. Withdrawal and Termination (Chair: Jules van Eijndhoven, Deputy Head, Treaties Division, Netherlands)

… Questions surrounding withdrawal and termination create uncertainty for Parties to a treaty. The chair noted that while the number of treaties being concluded is growing, States rarely withdraw from or terminate treaties. Nonetheless, we are seeing withdrawals or threats of withdrawal from major treaties such as the *Paris Agreement* (on climate change), the *Rome Statute of the International Criminal Court* and the *North American Free Trade Agreement* (*NAFTA*). Key points:

- Several participants noted the difficulties in ensuring that governments' online treaty databases contain complete and up-to-date lists of all treaties that are currently in force for that State.
- One participant noted that, when compiling lists of treaties in force with other States, other States often wish to terminate a treaty because it is obsolete, for instance, because the project established under the treaty has been completed.
- It was pointed out that, given events like the UK's exit from the European Union (Brexit), in which a State withdraws from some of its treaties, it can be useful to have other treaties already in place that were previously viewed as obsolete, as these treaties regain their relevance.

Questions Raised: A question was posed as to how to address treaties that become obsolete. Several States agreed that it would be worth exploring the possibility of including a clause on the automatic termination of a treaty at a pre-determined time. This was of particular interest in relation to "project agreements", that is, agreements that govern the funding and operation of a project, because projects are usually expected to be completed at some point in time.

Possible Next Steps: Further discussion of issues surrounding withdrawal and termination, including best practices on keeping treaty databases up-to-date and clauses on automatic termination, should be considered.

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