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DIPLOMATIC LAW

Immunities — Diplomatic Status of Bank Accounts of Foreign Missions

In a submission to the Court of Appeal for Ontario dated 11 September 2015 in the matter of *Canadian Planning and Design Consultants Inc v Libya*, 2015 ONCA 661, Canada argued (footnotes omitted):

Canada is obliged to accord full facilities for the performance of the mission functions

34. Article 25 of the [*Vienna Convention on Diplomatic Relations* (*VCDR*)] obligates Canada to "accord full facilities" for the performance of the functions of sending states' missions.
35. Article 3 of the *VCDR* provides the following broad, non-exhaustive definition of what constitutes "the functions of a diplomatic mission":

> The functions of a diplomatic mission consist, inter alia, in:
> (a) Representing the sending State in the receiving State;
> (b) Protecting in the receiving State the interests of the sending State and of its nationals, within the limits permitted by international law;
> (c) Negotiating with the Government of the receiving State;
> (d) Ascertaining by all lawful means conditions and developments in the receiving State, and reporting thereon to the Government of the sending State;
> (e) Promoting friendly relations between the sending State and the receiving State, and developing their economic, cultural and scientific relations.

Hugh Adsett, The Legal Adviser (acting), Global Affairs Canada, Ottawa, Canada. The extracts from official correspondence contained in this survey have been made available by courtesy of the Department 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.

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36. Diplomatic missions also fulfil consular functions.
37. [T]he requirement to "accord full facilities" reflects customary international law. In particular, there is international case law to the effect that the obligation under … Art. 25 of the *VCDR* to respect the immunity of embassy bank accounts used for diplomatic purposes is also an obligation under customary international law [*Liberian Eastern Timber Corp (LETCO) v Liberia*, 659 F Supp 606 (DDC 1987) at paras 5–7].
38. Provisions of these conventions that reflect mandatory rules of customary international law are incorporated into the Canadian common law subject only to contrary legislation …

The Minister only accords diplomatic status to bank accounts used for the functions of the sending State's mission ("functional immunity")

49. Embassies may own a number of different bank accounts serving a variety of different purposes. It is not disputed on this appeal that only those embassy accounts that are for the functions of the mission are entitled to immunity from execution under customary international law.
50. If the function of an embassy bank account that had been recognized by the Minister as having diplomatic status changes such that it is no longer used for the functions of the mission, the Minister may withdraw the recognition of diplomatic status of that embassy bank account which will thus no longer be entitled to diplomatic immunity.
51. In Canada, recognition of diplomatic status by the Minister is a precondition of the entitlement to diplomatic immunity. In other words, no immunity will be accorded to accounts that are not recognized as diplomatic. Before recognizing an account as having diplomatic status, the Minister must be satisfied by information received from the sending State that an account is "for the functions of the mission" as generally described in *VCDR*, Art. 3.
52. In the case at bar, the Minister's Certificate specifically references the fact that [the Department of Foreign Affairs, Trade and Development] was satisfied that the Diplomatic Accounts were for diplomatic purposes. It also specifically referenced Canada's obligations under Article 25 of the *VCDR* to "accord full facilities" to Libya's mission as the basis for his recognition of the diplomatic status of the Diplomatic Accounts.

INTERNATIONAL ENVIRONMENTAL LAW

Trail Smelter Emissions — Applicability of US Comprehensive Environmental Response, Compensation, and Liability Act *(*CERCLA*) — Compatibility with Binding International Dispute Settlement Mechanisms —* Convention between Canada and the United States of America Relating to Certain Complaints Arising from the Operation of the Smelter at Trail, British Columbia, *Ottawa, 15 April 1935, Can TS 1935 No 20 (*Ottawa Convention*) — Permanent Regime*

On 11 August 2015, Canada submitted the following *amicus curiae* brief to the US Court of Appeals for the Ninth Circuit in connection with US

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proceedings relating to emissions from the Trail smelter in British Columbia [footnotes omitted]:

Summary of Argument

While Canada fully supports Appellant's position that *CERCLA* is inapplicable to the air emissions for which the Plaintiffs below sought relief, Canada writes to provide this Court with a separate basis under international law for excluding Trail Smelter air emissions from *CERCLA*'s scope of application. Canada does not maintain that the Plaintiffs in this litigation should be deprived of the opportunity to seek redress, only that the appropriate and exclusive forum for providing such redress is the Permanent Regime.

Since 1927, the United States and Canada have resolved Trail Smelter emissions disputes through diplomacy and bilateral agreements. The Permanent Regime was the culmination of a decades-long process, initiated at the instance of the United States, to repair damage done within the State of Washington at a time when no other remedy existed for harm caused by transboundary air pollution. Until the United States and Canada submitted their concerns over the Trail Smelter to the [International Joint Commission] (IJC) in 1928, individuals and municipalities in the United States sought reparations through a piecemeal claims process operated directly by the Trail Smelter. Both governments believed that a more streamlined, bilateral process would facilitate the resolution of claims en masse for damages to land, private property and wildlife.

The resulting Permanent Regime was designed to be binding, perpetual, final and, consistent with its finality, exclusive of other remedies. Anticipating scientific advancement and changes in circumstance, the two countries created procedures within the Permanent Regime for its modification or suspension. The parties to the *Ottawa Convention* have never suspended the Permanent Regime, and the United States Department of State recognizes that the *Ottawa Convention* remains in force today.

The Permanent Regime is fully capable of redressing the injuries alleged by the Fourth Amended Complaints of the State of Washington and the Confederated Tribes of the Colville Reservation (the "WA FAC" and "Colville FAC," together the "FACs"). The FACs modified the prior pleadings of the State of Washington and the Colville Tribes by making new allegations that Trail Smelter air emissions can trigger the application of *CERCLA* liability. Together with a concurrent 2013 case brought against Teck in the Eastern District of Washington [*Anderson v Teck Metals, Ltd*, Case no. CV-13-420-LRS (EDWA)], the FACs represent the first time since the 1940s that United States parties have raised claims regarding Trail Smelter air emissions. Canada notes that the subject of Trail Smelter air emissions was not at issue in this litigation until the recent introduction of the FACs. As such, the Permanent Regime was not relevant to the prior appeal in this action, or to the Court's decision thereupon, both of which were limited to allegations of waterborne pollution. See *Pakootas v. Teck Cominco*, 452 F.3d 1066, 1070 et seq. (9th Cir.2006).

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Precedent already exists in the Decisions of the Trail Smelter Tribunal (the "Tribunal") for compensation of the various damages sought by the FACs. If the United States seeks to recover any new categories of damages in proceedings before the Tribunal, the Permanent Regime provides avenues for doing so, including mechanisms for the modification of the Regime in consultation with a panel of scientists appointed by both parties. Canada urges that the Permanent Regime, not the judiciary of the United States, is the appropriate means of resolving this inherently international dispute. Canada does not ask that Trail Smelter be given immunity — only that it be regulated (as it presently is) by Canadian law, with problems of transboundary pollution resolved through a coordinated bilateral process rather than piecemeal litigation in United States courts.

The District Court's Orders defy principles of international comity by expanding *CERCLA*'s applicability in direct conflict with the *Ottawa Convention*, the Permanent Regime, and the United States' obligations thereunder. *CERCLA* does not express a clear legislative intent to remediate waste caused by air emissions. The District Court has divined this intent from its interpretation of legislative silence and purposes, not from the face of the statute. In making this inferential leap, the District Court ignores the settled rule that a statute should only be construed to violate international law if no other interpretation is available. The District Court, by employing techniques of statutory construction that help resolve textual ambiguities, implicitly acknowledges the availability of other interpretations of *CERCLA*. The District Court makes this acknowledgement more explicit in the portions of its Reconsideration Order certifying questions for appellate review, observing that the question of whether air emissions fall within *CERCLA*'s ambit is one on which "there is a 'substantial ground for difference of Opinion' on the 'controlling question of law.'" Reconsideration Order, *supra*, at 8 (*quoting* 28 U.S.C. § 1292(b)).

While Canada submits that air emissions are unambiguously excluded from *CERCLA*'s definition of "disposal," international law still compels reversal of the Orders if this definition is deemed ambiguous. The courts, consistent with long-established legal principles, should interpret an ambiguous *CERCLA* provision in conformity with the United States' international obligations and should avoid interfering with existing bilateral agreements. This Court should not judicially extinguish the Permanent Regime.

Canada respectfully requests that the Orders of the District Court be reversed, that the allegations of the FACs pertaining to air emissions be stricken or dismissed, and that any disputes concerning Trail Smelter's air emissions be resolved through the bilateral mechanism of the Permanent Regime.

Argument

A. The Governments of Canada and the United States Have Established a Treaty Regime as the Exclusive Means of Resolving Disputes Regarding Air Emissions from Trail Smelter

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The Trail Smelter facility, because of its importance to Canada and its proximity to the Canada-United States border, has long been the subject of bilateral cooperation. The 1991 *Air Quality Accord* between the United States and Canada references the two countries' "tradition of environmental cooperation, as reflected by the *Boundary Waters Treaty*, [and] the Trail Smelter Arbitration of 1941." *Air Quality Accord, supra*, T.I.A.S. No. 11783, 30 ILM at 678. The creation of the Permanent Regime, and the issue of Trail Smelter air emissions, played a central role in the history of cooperation between the two countries on matters of cross-border pollution.

The problem of transboundary air emissions passing from Trail Smelter into the State of Washington was first raised by the United States in 1927, when it proposed to refer the matter to the IJC established by the [*Treaty Relating to the Boundary Waters and Questions Arising along the Boundary Between the United States and Canada*, 11 January 1909, TS No 548, 36 Stat 2448] (*BWT*). Canada, in one of many instances of government-to-government cooperation, joined the United States' request. The result was a 1931 report of the IJC proposing several non-binding recommendations for the remediation of damage caused by Trail Smelter air emissions. *See* "Injury to Property in the State of Washington by Reason of the Drifting of Fumes from the Smelter of the Consolidated Mining and Smelting Company of Canada," in *Trail, British Columbia: Report and Recommendations of the International Joint Commission (U.S. v. Can.)*, 29 R.I.A.A. 365 (International Joint Commission 1931) ("*IJC Report*").

Four years later, the United States and Canada signed the *Ottawa Convention*, adopting certain recommendations of the *IJC Report*, including the recommendation that Canada pay the United States indemnity in the sum of USD $350,000 for damages caused by Trail Smelter air emissions prior to 1932. *See Ottawa Convention, supra*, Article I, 4 U.S.T. at 4010. For damages arising after this date, the *Ottawa Convention* established the Tribunal to "finally" decide, *inter alia*:

> Whether damage caused by the Trail Smelter in the State of Washington has occurred since the first day of January, 1932, and, if so, what indemnity should be paid therefor? ... [W]hether the Trail Smelter should be required to refrain from causing damage in the State of Washington in the future and, if so, to what extent? ... In the light of the answer to the preceding Question, what measures or regime, if any, should be adopted or maintained by the Trail Smelter?

Id. at 4011, Article III. The *Convention* provided that "[t]he Tribunal shall apply the law and practice followed in dealing with cognate questions in the United States of America as well as International Law and Practice, and shall give consideration to the desire of the [United States and Canada] to reach a solution just to all parties concerned." Id. at 4011, Article IV. It also vested the Tribunal with jurisdiction to hear "claims for indemnity for damage, if any, which may occur subsequently to the period of time" covered by the Tribunal's initial decision. Id. at 4012, Article XI.

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The Tribunal rendered its initial decision in 1938, requiring Canada's payment of a further indemnity of USD $78,000 for damage caused by Trail Smelter air emissions from January 1, 1932 through October 1, 1937. *See* 1938 Decision, *supra*, 3 R.I.A.A. at 1933. Finding the research of the Tribunal's scientists insufficiently conclusive to provide guidance for a long-term solution, the Tribunal deferred implementation of a Permanent Regime for two years, prescribing measures for an "experimental period" (the "Temporary Regime") during which experts would conduct further monitoring of Trail Smelter air emissions. Id. at 1934.

In its 1941 Decision, the Tribunal reviewed the findings of the Temporary Regime to develop the framework of the Permanent Regime that remains in place today. Although the Tribunal found that damage had not been caused by Trail Smelter air emissions from October 1, 1937 through October 1, 1940 (*See* 1941 Decision, 3 R.I.A.A. at 1959), it expressly contemplated that such damage might arise again in the future, holding:

> So long as the present conditions in the Columbia River Valley prevail, the Trail Smelter shall be required to refrain from causing any damage through fumes in the State of Washington; *the damage herein referred to and its extent being such as would be recoverable under the decisions of the courts of the United States in suits between private individuals.*

Id. at 1966 (emphasis added). To promote compliance, the Tribunal further determined "that a regime or measure of control shall be applied to the operations of the Smelter and shall remain in full force unless and until modified in accordance with the provisions of ... this decision." Id. This determination created what the Tribunal called its "Permanent Regime." Id.

1. The Permanent Regime Was Implemented Indefinitely, Has Not Been Suspended or Modified, and Remains in Force

The Permanent Regime, by its own terms, remains in effect "unless and until modified in accordance" with the protocols of the 1941 Decision. Id. The Tribunal reserved to itself "the power to provide for alteration, modification or suspension" of the Permanent Regime. Id. at 1973. Anticipating the potential need for modification or suspension of the Permanent Regime after the Tribunal had disbanded, it established procedures for reconstituting a special Commission "for the purpose of considering and acting upon such request." Id. at 1978.

Following the 1941 Decision, the United States and Canada engaged in an exchange of notes concerning disposition of the undistributed indemnity funds deposited by Canada. *See* Exchange of Notes at Washington November 17, 1949, and January 24, 1950, *entered into force* January 24, 1950, 3.1 U.S.T. 539, T.I.A.S. No. 2412, 151 U.N.T.S. 171 (the "1950 Note Exchange"). The 1950 Note Exchange left the Permanent Regime undisturbed, and confirmed Canada's ongoing obligation to make repayments if further valid claims were presented by United States

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property owners for the relevant time period. Id. at 539–40. There have been no claims under the Permanent Regime since 1950.

2. The Ottawa Convention and Permanent Regime Impose Binding International Obligations on the United States

A treaty entered between two sovereigns imposes binding international legal obligations on the parties thereto from the time it enters into force, and continuing indefinitely into the future, until such time as the parties mutually agree to take affirmative steps to modify those obligations. *See* Rest. 3rd, Restatement of the Foreign Relations Law of the United States §§ 301, 312 (defining binding nature of international agreements). Neither the United States nor Canada has ever requested to modify or suspend the *Ottawa Convention* or the Permanent Regime, which was intended to be a final and exclusive remedial process for damage caused by Trail Smelter air emissions. To the contrary, upon learning of the new allegations propounded by the FACs, Canada initiated an exchange of diplomatic notes aimed at invoking the mechanisms of the Permanent Regime. Twice in the past year Canada has insisted that the appropriate resolution of the issues before this Court lies in bilateral, diplomatic consultation that does not impinge on the sovereignty of Canada. Further proceedings in the U.S. federal courts are antithetical to the "enhanced consultative role" for the Government of Canada that has been the essence of Canada's position on this litigation for more than 10 years.

Per the terms of the *Ottawa Convention*, the United States and Canada agreed to be permanently bound by the decisions of the Tribunal. *See Ottawa Convention*, *supra*, Article XII, 4 U.S.T. at 4012. It was the intent of both governments that the Tribunal would "finally decide" certain questions, including whether Trail Smelter should be subjected to ongoing restraint from causing damage in the State of Washington, and if so, under what framework. Id., Article III, 4 U.S.T. at 4011. The Permanent Regime was established in response to these two questions, in what the sovereigns had agreed would be a final, binding decision. *See* 1941 Decision, *supra*, 3 R.I.A.A. at 1966. In keeping with this intention of finality, the Permanent Regime directed that further claims of indemnity for damage caused by Trail Smelter air emissions be allowed "only when and if the two Governments shall make arrangements for the disposition of claims for indemnity under the provisions of Article XI of the Convention." Id., at 1980. Accordingly, the *Ottawa Convention* reflects the express intent of the United States and Canada to be bound by the 1941 Decision and the exclusive Permanent Regime established thereby.

3. The Permanent Regime Was Intended to Facilitate Diplomatic Resolution of the Types of Harm Alleged in This Suit

Any judicial interpretation of *CERCLA* purporting to apply that statute, and the rights and remedies it creates, to air emissions originating from the Trail Smelter conflicts with the finality of the Permanent Regime and the United States' binding

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obligations thereunder. The Permanent Regime was intended to provide an exclusive and permanent diplomatic solution with respect to air emissions at the Trail Smelter, for the same types of injury that *CERCLA* redresses with respect to "disposals" of "solid waste or hazardous waste into any land or water." 42 U.S.C. § 6903(3).

The legal issue before the District Court was whether the term "disposal" in *CERCLA* may be interpreted to include passive migration of particulate waste that originates as air emissions — a question the District Court answered in the affirmative. *See* Dismissal Order, *supra*, at 2–3; Reconsideration Order, *supra*, at 24. As explained in Section C, *infra*, the District Court's interpretation, if not incorrect as to all air emissions, is at minimum improper to the extent it is applied to the Trail Smelter in contravention of the United States' binding obligations under the Permanent Regime.

i. The Permanent Regime Sought to Avoid Piecemeal Reparation of Private and Public Claims

The diplomatic process established by the Permanent Regime was intended to supersede the system of fragmented claims that had existed prior to 1928, when the two countries resolved to submit the matter of Trail Smelter air emissions to the IJC. *See* 1938 Decision, *supra*, 3 R.I.A.A. at 1917 (detailing initial steps taken toward elimination of system of individual claims through municipal creation of a county-wide Citizens' Protective Association). The Tribunal considered a wide spectrum of public and private interests when computing the amounts of indemnity to be paid by Canada to the United States. *See* Id. at 1924–31. The Tribunal considered damage done to privately held crops and timber reserves (*see* Id. at 1925, 1928–29). The Tribunal considered damage done to natural resources, including soil, flora and livestock (*see* Id. at 1925–26, 1931). The Tribunal considered damage done to particular species, the propagation of which had been retarded by Trail Smelter air emissions (*see* Id. at 1929–30). The Tribunal also considered the costs of remediating contaminated soil and awarded indemnity based on such costs. Id. at 1925–1931). The Tribunal initially demurred to award indemnity based on the United States' "investigation" costs (id. at 1932), but amended this decision in its formulation of the Permanent Regime, permitting recovery of assessment costs if those assessments demonstrated that further damage had occurred (*see* 1941 Decision, *supra*, 3 R.I.A.A. at 1980–81). The indemnity collected from Canada was used to repay individual claimants, and was sufficient to pay all claims with a margin of resulting surplus. *See* 1950 Note Exchange, *supra*, 3 U.S.T. at 539. Each of these items of indemnity is consistent with and parallel to the costs and damages recoverable under *CERCLA*.

If the District Court's decision is upheld, application of *CERCLA* to Trail Smelter air emissions will again result in the profusion of piecemeal claims that Canada and the United States had worked for decades to prevent. This would be damaging not only to Teck, but also to Canada's sovereign interests in its domestic environmental protection laws, and most importantly to the integrity of the

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diplomatic process between the United States and Canada. Principles of comity and of statutory construction require rejection of the District Court's interpretation. *See* Section C, *infra*. This is especially so where the District Court's reading of *CERCLA* does not follow inexorably from the language of the statute, adequate remedies exist under international law, and the result reached by the Orders is ultimately avoidable.

ii. The Permanent Regime Provides the Same Remedies for Trail Smelter Air Emissions that *CERCLA* Provides for Disposals into Land or Water

The damages compensable by the Permanent Regime are coextensive with those that *would be* available under *CERCLA if* that law were applied to Trail Smelter air emissions. *CERCLA* permits recovery of four categories of damages:

> (A) all costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe not inconsistent with the national contingency plan; (B) any other necessary costs of response incurred by any other person consistent with the national contingency plan; (C) damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from such a release; and (D) the costs of any health assessment or health effects study carried out under section 9604(i) of this title.

42 U.S.C. § 6907(a)(4). The FACs request damages in three categories: costs of "removal or remedial actions" pursuant to § 6907(a)(4)(A) (WA FAC ¶¶ 5.1-6.3; Colville FAC ¶¶ 6.1-7.3); "natural resource damages" pursuant to § 6907(a)(4)(c) (WA FAC ¶¶ 9.1-10.2; Colville FAC ¶¶ 10.1-11.2); and costs of assessing natural resource damages pursuant to § 6907(a)(4)(c) (WA FAC ¶¶ 7.1-8.3; Colville FAC ¶¶ 8.1-9.3). The decisions of the Tribunal demonstrate that analogous remedies are available under the Permanent Regime.

The award of indemnity made by the 1938 Decision encompassed damages for removal and remediation costs, and damage to natural resources, including harm to reproduction of particular species. *See* 1938 Decision, 3 R.I.A.A. at 1924–31. The 1941 Decision subsequently brought assessment damages within the purview of the Permanent Regime. *See* 1941 Decision, 3 R.I.A.A. at 1980–81. As such, the Permanent Regime has both the mandate and the competence to redress the claims of damage advanced by the FACs. In fact, certain damages requested by the FACs, both of which are predicated on allegations of air emissions occurring "[f]rom approximately 1906 to the present time," have already been redressed by the *Ottawa Convention*, the 1938 Decision and the 1941 Decision. WA FAC ¶ 4.2; Colville FAC ¶ 4.2. *See also Ottawa Convention, supra*, 4 U.S.T. at 4010, Article I (awarding indemnity for the period prior to January 1, 1932); 1938 Decision, *supra*, 3 R.I.A.A. at 1933 (awarding indemnity for the period from January 1, 1932 through October 1, 1937); 1941 Decision, *supra*, 3 R.I.A.A. at 1959 (holding that

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insufficient damage had been caused between October 1, 1937 and October 1, 1940 to warrant payment of further indemnity). In view of the availability of suitable remedies within the strictures of the Permanent Regime, the District Court's recourse to *CERCLA* expansion is not only contrary to comity, it is simply unnecessary. The Permanent Regime is well equipped to account for the claims for damages raised in the FACs.

iii. The Permanent Regime Was Meant To Adapt to Progress and Changing Circumstance

Canada acknowledges that scientific developments since the creation of the Permanent Regime have brought about a more sophisticated understanding of environmental injury than prevailed in the 1930's and 40's. Neither the *Ottawa Convention* nor the Permanent Regime excludes consideration of such advancements. To the contrary, the 1941 Decision anticipated that "scientific advance in the control of fumes [c]ould make it possible and desirable to improve upon the methods of control hereinafter prescribed." Id. at 1973. The Tribunal considered it important that the Permanent Regime be flexible, opining that "[i]t would clearly not be a 'solution just to all parties concerned' if its action in prescribing a regime should be unchangeable and incapable of being made responsive to future conditions." Id.

The Tribunal thus made provision for the Permanent Regime's modification, in consultation with a panel of environmental experts appointed by the two parties. *See* Id. at 1978. Evidence of the Tribunal's dynamic nature is apparent from the 1941 Decision, which permitted awards of assessment damages that the 1938 Decision had denied. *See* 1938 Decision, *supra*, 3 R.I.A.A. at 1932–33; 1941 Decision, *supra*, 3 R.I.A.A. at 1980. The adaptive nature of the Permanent Regime would enable the United States to seek, and if warranted obtain, damages based on scientific theories and advancements unavailable to the Tribunal when it rendered its previous Decisions.

B. Insofar as *CERCLA* Can Be Interpreted To Apply to Air Emissions, This Interpretation Would Require Construing Ambiguities in the Statute

Canada submits that the *CERCLA* definition of "disposal" unambiguously excludes airborne emissions of particulate matter, even if that matter, through passive migration, results in depositions "into land and water." 42 U.S.C. §§ 6903(3); 9607(a)(3). *Amicus* offers this brief, however, to articulate an alternative basis for reversing the District Court: principles of statutory construction strongly disfavor any interpretation of *CERCLA* that conflicts with the United States' obligations under the *Ottawa Convention* and the Permanent Regime. For even if *CERCLA* does not unambiguously exclude air emissions from its ambit, it cannot be said that the statute unambiguously *includes* them. Any interpretation of *CERCLA* that purports to apply that statute to air emissions necessarily requires resolution of textual ambiguities in the legislation.

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This much is confirmed by the Orders, which infer much from the legislature's silence on specific issues and rely on a diverse array of interpretive techniques to support the District Court's desired reading of *CERCLA*. These techniques share one common thread: they need not be invoked where statutory text is clear. The District Court, in certifying its interpretation of this term for interlocutory appellate review, concedes that "there is a 'substantial ground for difference of opinion'" regarding the construction of "disposal." Reconsideration Order, *supra*, at 8 (*quoting* 28 U.S.C. § 1292(b)).

CERCLA's provisions for "arranger" liability, which underlie Plaintiff's claims below, attach only to defendants who arrange for the "disposal ... of hazardous substances ... at any facility." 42 U.S.C. § 9607(a)(3). *CERCLA* defines "disposal" by reference to the *Resource Conservation and Recovery Act*, 42 U.S.C. § 6901, *et seq.* ("*RCRA*"), which in turn states that "'disposal' means the discharge, deposit, injection, dumping, spilling, leaking, or placing of any solid waste or hazardous waste into or on any land or water so that such solid waste or hazardous waste or any constituent thereof may enter the environment or be emitted into the air or discharged into any waters, including ground waters." 42 U.S.C. § 6903(3). *RCRA* does not facially include air emissions in its definition of "disposal," and indeed, the Ninth Circuit has held in the context of *RCRA* that "disposal" excludes such emissions. *See generally*, *CCAEJ*, *supra* n. 10, 764 F.3d 1019.

The District Court's Reconsideration Order distinguishes *CCAEJ*, by holding that *RCRA*'s definition of "disposal" must be understood differently in the context of *CERCLA*. *See* Reconsideration Order, *supra*, pp. 4–5. In making this leap, the District Court emphasizes that its reading is "not contrary" to *CERCLA*'s text and legislative history, that Congress did not express a clear intent to exclude air emissions from *CERCLA*, and that no court had ever held that air emissions were outside the scope of *CERCLA*. *See* Dismissal Order, pp. 6–7; Reconsideration Order, p. 6. Yet by relying on a combination of context, judicial and legislative silence, and techniques of statutory construction, the District Court demonstrates that its interpretation depends on the resolution of perceived ambiguities in *CERCLA*.

The District Court's Dismissal Order relies upon certain portions of *CERCLA*'s legislative history and purpose to inform its interpretation of § 9607. *See* Dismissal Order, *supra*, at 6 (determining that its holding was "not contrary" with *CERCLA*'s "legislative history" and "'overwhelmingly remedial statutory scheme' which is intended to allow the government to respond promptly and effectively to problems resulting from hazardous waste disposal"). If the letter of *CERCLA* were unambiguous, this discussion would be extraneous. "When the statutory language is clear, and there is no reason to believe that it conflicts with the congressional purpose, then legislative history need not be delved into." *Heppner v. Alyeska Pipeline Serv. Co.*, 665 F.2d 868, 871 (9th Cir. 1981). *See also*, *Jonah R. v. Carmona*, 446 F.3d 1000, 1005 (9th Cir.2006) ("If the statute's terms are ambiguous, we may use canons of construction, legislative history, and the statute's overall purpose to illuminate Congress's intent") (*citing Milne v. Stephen Slesinger, Inc.*, 430 F.3d 1036, 1045 [9th Cir.2005]).

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The District Court also relied on other provisions of *CERCLA* to construe the meaning of "disposal," specifically cross-referencing § 9601(14)'s definition of "hazardous substance." *See* Dismissal Order, *supra*, at 7. This "canon[] of statutory construction is *noscitur a sociis*, which counsels that an ambiguous term 'is given more precise content by the neighboring words with which it is associated.'" *Probert v. Family Centered Servs. of Alaska, Inc.*, 651 F.3d 1007, 1011 (9th Cir.2011) (quoting *United States v. Williams*, 553 U.S. 285, 294, 128 S.Ct. 1830, 170 L.Ed.2d 650 [2008]). By definition, this technique is unnecessary where the meaning of the statutory text is unambiguous. Implicit in the District Court's recourse to these interpretive techniques is the acknowledgement that its interpretation of "disposal" requires a look past the language of the statute.

C. Canons of Construction Require that Statutory Ambiguities Be Resolved, to the Extent Possible, in Accordance with the United States' Binding International Obligations

The District Court's reliance on perceived ambiguities in *CERCLA* is significant because "[w]hile Congress may legislate beyond the limits posed by international law, it is also well settled that an act of Congress should be construed so as not to conflict with international law where it is possible to do so without distorting the statute." *Munoz v. Ashcroft*, 339 F. 3d 950, 958 (9th Cir.2003) (*citing Murray v. The Schooner Charming Betsy*, 2 Cranch 64, 6 U.S. 64, 118, 2 L.Ed. 208 [1804] [*Charming Betsy*]. If *CERCLA* had expressed an unambiguous intent to redress air emissions and displace the exclusivity of the Permanent Regime, it would, as a subsequently enacted statute, supersede the *Ottawa Convention* and the obligations following therefrom. *See In re Premises Located at 840 140th Ave. NE, Bellevue, Wash.*, 634 F.3d 557, 568 (9th Cir.2011) ("a later-in-time self-executing treaty supersedes a federal statute and ... a later-in-time federal statute supersedes a treaty") (*citing Medellin v. Texas*, 552 U.S. 491, 509 n. 5 & 518, 128 S.Ct. 1346, 170 L.Ed.2d 190 [2008]); *Serra v. Lappin*, 600 F.3d 1191, 1198–99 (9th Cir 2010) ("The *Charming Betsy* canon comes into play only where Congress's intent is ambiguous") (*quoting United States v. Yousef*, 327 F.3d 56, 92 [2d Cir.2003]). But *CERCLA* does not unambiguously express this intent, and because an inference of such intent would place *CERCLA* in conflict with the United States' international legal obligations, the District Court should have avoided this leap.

The District Court's error is encapsulated in the portions of its Dismissal Order concerning reference of the matter to the IJC:

> [F]or 'cross-border air issues,' Defendant says the 'proper forum' is the 'International Joint Commission' pursuant to treaty. Had Congress intended that *CERCLA* not apply to remediating contamination resulting from aerial emissions, it would have made something that significant abundantly clear in the statute.

Dismissal Order, *supra*, at 7. By holding that clear intent is required to *avoid* superseding a prior treaty, the District Court inverts the central presumption

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of the *Charming Betsy* doctrine. Because "an act of congress ought never to be construed to violate the law of nations, if any other possible construction remains," it is incumbent on Congress to eliminate "other possible constructions" by *affirmatively expressing* an unambiguous intent to supersede prior treaties. *Charming Betsy*, *supra*, at 118. *See also United States v. Pinto-Mejia*, 720 F. 2d 248, 259 (2d Cir.1983) ("[I]n enacting statutes, Congress is not bound by international law. ... If it chooses to do so, it may legislate with respect to conduct outside the United States, in excess of the limits posed by international law ... [a]s long as Congress has *expressly indicated* its intent to reach such conduct") (emphasis added).

The *Charming Betsy* doctrine applies with greatest force in cases such as this, where the courts' interpretation of a statute implicates the foreign policy interests of another nation. "The purpose of the *Charming Betsy* canon is to avoid the negative 'foreign policy implications' of violating the law of nations." *Serra*, *supra*, 600 F.3d at 1198–99 (*quoting Weinberger v. Rossi*, 456 U.S. 25, 32, 102 S.Ct. 1510, 71 L.Ed.2d 715 [1982]). *See also Arc Ecology v. US Dept. of Air Force*, 411 F. 3d 1092, 1102 (9th Cir.2005) (*Charming Betsy* canon properly invoked to "avoid embroiling the nation in a foreign policy dispute unforeseen by either the President or Congress"); *U.S. v. Corey*, 232 F. 3d 1166, 1179 n. 9 (9th Cir.2000) (same).

When presented with such foreign policy concerns, the Ninth Circuit has consistently found *Charming Betsy* principles both persuasive and controlling. *See In re Korean Air Lines Co., Ltd.*, 642 F.3d 685, 696 (9th Cir.2011) (refusing to adopt statutory reading urged by plaintiffs because it would "would discriminate against foreign air carriers in favor of domestic ones, contrary to U.S. treaty obligations mandating nondiscrimination"); *Kim Ho Ma v. Ashcroft*, 257 F. 3d 1095, 1114 (9th Cir.2001) (refusing, "out of respect for other nations," to interpret ambiguous provision of *Illegal Immigration Reform and Immigrant Responsibility Act* as permitting indefinite detention of removable aliens) (*citing United States v. Thomas*, 893 F.2d 1066, 1069 [9th Cir.1990]; *Chua Han Mow v. United States*, 730 F.2d 1308, 1311 [9th Cir.1984]; *In re Simon*, 153 F.3d 991, 998 [9th Cir.1998]).

Canada is uniquely positioned to comment on the foreign policy implications of this litigation, since the international obligations jeopardized by the District Court's Orders are obligations owed to Canada. In this connection, Canada reiterates its view that the Orders: (1) trample upon Canada's sovereign rights, such as those related to its implementation of CEPA, by subjecting Canadian companies to new spheres of regulation administered by U.S. courts; (2) undermine the long-standing and continuing bilateral agreements between Canada and the United States on issues of transboundary air and water pollution, including the *BWT*, the *Air Quality Accord* and the *Ottawa Convention*; and (3) judicially extinguish a Permanent Regime that Canada and the United States have expended considerable time and energy implementing, thereby casting doubt on the future of bilateral agreements brokered by the two nations.

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Conclusion

The *Ottawa Convention* and the Permanent Regime reflect Canada's strong record of diplomatic cooperation and bilateral agreement with the United States in an era predating widespread adoption of environmental laws. In the absence of other means of redress, Canada's cooperation has been instrumental to the vindication of the United States' interests and those of its citizens. In keeping with principles of comity and reciprocity, this Court should uphold this system of cooperation.

Accordingly, Canada respectfully requests that the Orders of the District Court be reversed, that the allegations of the FACs pertaining to air emissions be stricken or dismissed, and that any disputes concerning Trail Smelter's air emissions be resolved through the bilateral mechanism of the Permanent Regime.

Marine Pollution — Customary International Law — United Nations Convention on the Law of the Sea *(*UNCLOS*) — State Responsibility*

On 21 October 2015, the Legal Bureau wrote:

Legal Framework:

8) While customary law has some guidance on marine pollution, relevant specific rules are few. In the Trail Smelter Arbitration [1938–41], which related to the emission of harmful fumes from a Canadian smelter drifting into US territory, the Tribunal held that "no state has the right to use or permit the use of its territory, in such a manner as to cause injury by fumes in or to the territory of another State." Later in the *Corfu Channel* case [1949], the ICJ noted that States were under an obligation "not to allow knowingly its territory to be used for acts contrary to the rights of other States." Churchill and Lowe have argued that taking these two cases together with Article 2 of the *High Seas Convention* (1958) which states that the freedoms set out therein are to be exercised by all States with reasonable regard to the interests of other States, support the contention that there is a general rule of customary international law that States must not permit their nationals to discharge into the sea matter that could cause harm to the nationals of other States.
9) This general principle is also included in the 1972 *Stockholm Declaration* (UNEP) Principle 21 which states, in part, that States "have the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction". It is repeated in Principle 2 of the *Rio Declaration* (1992), the preamble of the 1992 *UN Framework Convention on Climate Change* and Article 3 of the 1992 *UN Convention on Biodiversity*. Scholars have argued that given the ICJ's advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons* (1996), the contention that States' obligation to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control is now an established rule of customary international law. [See page 242 of the decision].

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10) State responsibility for environmental damage is based on the existence of a breach of an international legal obligation under treaty or customary international law. The *Draft Articles on State Responsibility for Internationally Wrongful Acts* [*ILC 2001*] state that "Every internationally wrongful act of a State entails the international responsibility of the State". An internationally wrongful act is defined as consisting of an action or omission that is attributable to a State under international law and constitutes a breach of an international obligation of that State. Circumstances that preclude the wrongfulness of a breach of an international obligation include consent, self-defence, force majeure, distress, necessity and compliance with peremptory norms. [See Chapter V]. States are required to make full reparation for the injury caused by the wrongful act by restitution, compensation and satisfaction [See Chapter II].

UNCLOS

11) Pursuant to Article 192 of the *United Nations Convention on the Law of the Sea* (*UNCLOS*), States parties have a general obligation to protect and preserve the marine environment. In fulfilling this obligation, States have a duty to prevent, reduce and control pollution in the marine environment from any source using the best practicable means at their disposal [Art. 194(1)]. States further have an obligation to ensure that activities under their jurisdiction or control are conducted in a manner that does not cause damage to other States or to their environment [Art. 194(2)]; to cooperate directly or through competent international organizations (in this case the IMO) in formulating international standards, rules and recommendations for the protection and preservation of the marine environment [Art. 197]; and to notify other States likely to be affected by cases where there is actual or imminent danger to the marine environment [Art. 198]. Pollution of the marine environment is broadly defined in *UNCLOS* [Art. 1 (4)] as "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".
12) In relation to compliance and enforcement, *UNCLOS* confirms flag State competence to prescribe regulations and legislation for their vessels (wherever they may be) and requires that they adopt and enforce laws and regulations for the prevention, reduction and control of pollution in the marine environment from vessels flying their flag or of their registry, such laws being as effective as "generally accepted international rules and standards established through the competent organization or diplomatic conference" [Art. 211 (2)]. A detailed list of measures flag States must take, including preventing vessels flying their flag from sailing ... should they be non-compliant with international standards, rules and regulations are set out in Article 217. They include requiring that their flagged vessels carry required certificates on board, carrying out investigations into and, where

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appropriate, institut[ing] proceedings in cases of violations. Liability and responsibility for fulfilling international obligations regarding the protection and preservation of the marine environment is set out in Article 235 as follows:

1. States are responsible for the fulfilment of their international obligations concerning the protection and preservation of the marine environment. They shall be liable in accordance with international law.
2. States shall ensure that recourse is available in accordance with their legal systems for prompt and adequate compensation or other relief in respect of damage caused by pollution of the marine environment by natural or juridical persons under their jurisdiction.
3. With the objective of assuring prompt and adequate compensation in respect of all damage caused by pollution of the marine environment, States shall cooperate in the implementation of existing international law and the further development of international law relating to responsibility and liability for the assessment of and compensation for damage and the settlement of related disputes, as well as, where appropriate, development of criteria and procedures for payment of adequate compensation, such as compulsory insurance or compensation funds.

INTERNATIONAL INVESTMENT LAW

North American Free Trade Agreement (NAFTA) — *Article 1110 — Expropriation — Requirement of Domestic Legal Entitlement*

In a submission dated 27 January 2015 to the Tribunal in *Eli Lilly and Company v Government of Canada*, Canada argued (footnotes omitted) (full submission available at <http://www.icsid.worldbank.org/apps/ICSIDWEB/cases/Pages/casedetail.aspx?CaseNo=UNCT/14/2&tab=DOC>):

The first step in the expropriation analysis is to determine the existence, nature, and scope of the property rights alleged to have been taken. … *NAFTA* Article 1110(1) protects investments against expropriation. … Claimant alleges that its patents for the use of atomoxetine and olanzapine fall within this category. While it is not in dispute that intellectual property rights may qualify as investments under *NAFTA*, nothing in *NAFTA* answers whether an investor actually holds a property interest, including an intellectual property right, protected by *NAFTA* Article 1110(1), or the nature and scope of that right. In other words, there must be validly "acquired" "property" in order for there to be an investment capable of expropriation.

Thus, under *NAFTA* as under general public international law, when faced with a claim of expropriation, an international tribunal must first undertake a necessary *renvoi* to domestic law to determine the existence, nature, and scope of the property interests that the claimant alleges were taken. If there is no property right at domestic law, then there is nothing that can be taken. Similarly, any conditions

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and limitations inherent to an asserted property right may bear on whether there has been a taking of that property. …

Tribunals have recognized the need to defer to domestic court determinations of legal entitlements under domestic law. When a domestic court determines that the claimed domestic property right was invalid, the expropriation analysis simply cannot get off the ground, because there is no property interest that can be taken. … [T]here is an exception … if the court decision is reached through a denial of justice, then the determination of domestic rights need not be deferred to in the expropriation analysis, as the process for determining rights at domestic law has fallen below the fundamental international minimum standard for the judicial process. …

[T]he declaration of Canadian courts [that] asserted domestic law rights are invalid cannot amount to an expropriation in the absence of a denial of justice. Claimant does not, and could not, allege that a denial of justice occurred in the determination that its patent rights were invalid. … Claimant received full due process, extensive appellate review, and the courts issued thoroughly reasoned judgments determining that Claimant's asserted patent rights were not valid under Canadian law.

NAFTA — *Article 1105 — Minimum Standard of Treatment*

In a submission dated 14 May 2015 to the Tribunal in *Mesa Power Group, LLC v Government of Canada*, responding to an invitation to comment on the recent decision of the *Bilcon* Tribunal, Canada argued (footnotes omitted) (full submission available at <http://www.pcacases.com/web/view/51>):

[T]he majority of the *Bilcon* Tribunal … failed to determine the positive content of Article 1105 by looking to customary international law. Instead, the majority looked to the decisions of other international tribunals in order to conclude that the "international minimum standard has evolved over the years towards greater protection for investors" [*Bilcon* Award, para. 435], [A]s all three *NAFTA* parties have consistently agreed, decisions of arbitral tribunals can describe and examine customary international law, but they are not themselves a source of customary international law. … In order to establish a breach of Article 1105 the Claimant must prove, using state practice and *opinio juris*, that the complained of treatment falls below the treatment required by customary international law. …

The majority in *Bilcon* facially acknowledged that "the mere breach of domestic law or any kind of unfairness does not violate the international minimum standard" [*Bilcon* Award, para. 436] and that "errors, even substantial errors, in applying national laws do not generally, let alone automatically, rise to the level of international responsibility vis-à-vis foreign investors" [*Bilcon* Award, para. 738]. However, it then … base[d] its entire decision on the mere fact that, in its view,

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the [Joint Review Panel] erred in its application of the criteria it was required to consider under Canadian law. …

As Professor McRae notes in his dissent, the majority did not evaluate whether the purported breach was inconsistent with customary international law. Instead, despite its protestations to the contrary, the way the majority applied Article 1105 makes it clear that in its view a "[b]reach of NAFTA Article 1105 … is equated with a breach of Canadian law" [Dissenting Opinion of Professor Donald McRae, para. 37]. … Essentially, the analysis of the majority in the *Bilcon* Award transforms Article 1105 into grounds for undertaking a *de novo* review of any and all judicial or administrative action. In so doing, the majority decision in *Bilcon* applies a standard not found in customary international law and grossly oversteps the authority given to Chapter 11 tribunals. This Tribunal should not follow suit. *NAFTA* Chapter 11 tribunals have no jurisdiction to make determinations with respect to whether Canadian law has been respected. That authority rests only with Canadian courts. This Tribunal should instead analyse only whether or not Canada has respected the customary international law minimum standard of treatment.

NAFTA — *Interpretation — Relevance of Submissions of Parties*

In a second submission dated 26 June 2015 to the Tribunal in *Mesa Power Group, LLC v Government of Canada*, commenting on submissions by Mexico and the United States, Canada noted:

The Article 1128 submissions of the United States and Mexico confirm that all three *NAFTA* Parties are in agreement — the *Bilcon* tribunal was incorrect in its interpretations of *NAFTA* Article 1102 (National Treatment) and Article 1105 (Minimum Standard of Treatment). This unanimous agreement reflects an authoritative interpretation of the *NAFTA* that must be taken into account by this Tribunal in accordance with Article 31 of the *Vienna Convention on the Law of Treaties* ("*Vienna Convention*"). …

Article 31(3) of the *Vienna Convention* provides that in interpreting a treaty, a Tribunal "shall … take [ ] into account, together with the context: (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions" and "(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation."

The use of the word "shall" indicates the mandatory nature of this provision. In other words, subsequent agreements and practice of the treaty parties regarding the interpretation of their obligations must be taken into consideration by the Tribunal. They cannot be ignored or cast aside.

Article 31(3)(a) does not limit the form of any subsequent agreement and, in the context of the *NAFTA*, such subsequent agreements on interpretation may

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be evidenced through submissions by non-disputing parties pursuant to *NAFTA* Article 1128. By agreeing with Canada's pleadings in this arbitration, the submissions of the United States and Mexico have created a subsequent agreement within the meaning of Article 31(3)(a) of the *Vienna Convention*.

INTERNATIONAL LEGAL PERSONALITY

Capacity to Enter into Treaty Relations — Statehood — Recognition — Purported Palestinian Accession to Rome Statute of the International Criminal Court

On 16 January 2015, Canada communicated the following to the Secretary-General of the United Nations regarding the purported Palestinian accession to the *Rome Statute of the International Criminal Court*:

The Permanent Mission of Canada to the United Nations presents its compliments to the Secretary-General of the United Nations and has the honour to refer to the *Rome Statute of the International Criminal Court* and the Secretary-General's communication of 6 January 2015, C.N.13.2015.TREATIES-XVIII.10, relating to that treaty. The Permanent Mission of Canada notes that this communication was made pursuant to the Secretary-General's capacity as Depositary for the *Rome Statute of the International Criminal Court*. The Permanent Mission of Canada notes the technical and administrative role of the Depositary, and that it is for States Parties to a treaty, not the Depositary, to make their own determination with respect to any legal issues raised by instruments circulated by a depositary.

In that context, the Permanent Mission of Canada notes that 'Palestine' does not meet the criteria of a state under international law and is not recognized by Canada as a state. Therefore, in order to avoid confusion, the Permanent Mission of Canada wishes to note its position that in the context of the purported Palestinian accession to the *Rome Statute of the International Criminal Court*, 'Palestine' is not able to accede to this convention, and that the *Rome Statute of the International Criminal Court* does not enter into force, or have an effect on Canada's treaty relations, with respect to the 'State of Palestine'.

INTERNATIONAL ORGANIZATIONS

Immunities — Interpretation of Article VII, Section 5 of the World Bank's Articles of Agreement — *Inviolability of Archives*

In a submission to the Supreme Court of Canada filed on 23 October 2015 in the matter of *World Bank Group v Wallace*, 2016 SCC 15, Canada argued (footnotes omitted):

Interpretation of inviolability of archives (Section 5 of Article VII)

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The judge below came to the conclusion that the principle of inviolability of archives entrenched in Section 5 of Article VII does not preclude compelled production by the World Bank in the instant case. The Crown disagrees. Properly interpreted, Section 5 does prohibit compelled production, short of waiver.

a. Principles of interpretation in international law: the *Vienna Convention*

[T]he interpretation of a provision of an international treaty incorporated into Canadian law is governed by Articles 31 and 32 of the *Vienna Convention on the Law of Treaties* ("*Vienna Convention*") the fundamental principle of which is … set out in Article 31(1):

Article 31. *General rule of interpretation*	Article 31. *Règle générale d'interprétation*
1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.	1. Un traité doit être interprété de bonne foi suivant le sens ordinaire à attribuer aux termes du traité dans leur contexte et à la lumière de son objet et de son but.

b. Meaning of the terms of Section 5

Section 5 provides that:

Section 5. *Immunity of archives*	Section 5. *Inviolabilité des archives*
The archives of the Bank shall be inviolable.	Les archives de la Banque seront inviolables.

First, Section 5 uses the expression "shall" which is to be construed as imperative. The French version is to the same effect as it is conjugated in the indicative future tense which expresses an obligation.

Second, the provision is devoid of any qualifying language susceptible of limiting the scope of the immunity afforded to the World Bank's archives.

Third, the two key words of that Section are "archives" and "inviolable". Properly interpreted, the term "archive" is not restricted to historical documents … but comprises all internal documents produced by the World Bank. Similarly, the term "inviolable" is not confined to protecting documentation only to the extent of "being attached or confiscated". … It encompasses protection against any kind of access by third parties, including inspection pursuant to a judicial order, as is the case here. …

A proper interpretation of the provision requires a determination of the meaning of the words "archives" and "inviolable". In the absence of a specific definition in the *Articles of Agreement*, which is the case here, ordinary and specialized dictionaries are a useful tool in interpreting a word or expression.

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i. Definition of "archives"

The most relevant definition for our purposes is found in the *Dictionnaire de droit international public* [Jean Salmon, *Dictionnaire de droit international public* (Bruxelles: Bruylant, 2001) at 80] which offers a definition of "archives" that is specific to international organizations. According to that definition, "international organizations' archives" are basically the records kept by that organization for the conduct of its functions; it does not restrict it, or even refer, to historical documents. It reads:

> **Archives d'une organisation internationale –** Pièces et documents se rattachant au fonctionnement d'une organisation internationale et dont le statut est déterminé par les textes conventionnels applicables à celle-ci.

The general English and French dictionaries diverge. While some clearly support this broad definition, others appear to restrict "archives" to historical documents. …

In the absence of a specific definition in a particular treaty, it is appropriate to consider definitions of the same word or expression found in other treaties. The *Vienna Convention on Consular Relations* contains a definition of "consular archives" that does not restrict its scope to historical documents, but that encompasses contemporaneous records. ...

ii. Definition of "inviolable"

The meaning of "inviolable" is straightforward. All dictionaries, whether English or French, ordinary or specialized, define it as something that cannot be broken or transgressed. …

[N]o limitation to the scope of the World Bank's archival immunity can be inferred from the term "inviolable"; that word connotes an absolute prohibition to compelled access to the Bank's records, short of waiver. …

c. Context of section 5

i. Immediate context

The immediate, and most relevant, context of Section 5 is the whole of Article VII. That article provides for the Bank's legal status as well as all of its various immunities and privileges.

Section 2 of Article VII says that the Bank possesses full juridical personality, including the capacity to institute legal proceedings. Section 3, however, specifies a number of conditions required to validly bring an action against the Bank and provides to it an immunity against pre-judgement civil seizures.

Section 4 protects the Bank's property and assets by making them "immune from search, requisition, confiscation, expropriation or any form of seizure by

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executive or legislative action." The protection granted by this provision could hardly be expressed in broader terms. It would be paradoxical to conclude that the Bank's archives benefit from a lesser protection than that conferred upon its property and assets, when one considers that both are essential for the Bank to efficiently discharge its functions.

Section 6 further renders the Bank's property and assets free from restrictions, control or regulations "of any nature", to the extent necessary to carry out the Bank's operations and subject to the provisions of the Agreement. The immunity contained in this section is limited to what is necessary for the Bank's operations, similar to the qualifying phrase analysed in *Amaratunga* and discussed above. Section 6 can be contrasted with Section 5 which contains no such restriction. Section 6 also illustrates the fact that the original member states that concluded the Agreement expressly provided limits to immunities when they considered them to be appropriate.

The judge below noted that Section 5 falls between Section 4 (which deals with the immunity of assets from seizure) and Section 6 (which provides for the freedom of assets from restrictions). According to him, the positioning of Section 5 suggests that it is intended to deal with the protection of documents from being attached or confiscated only, and not from being produced for inspection. With deference, the judge reads too much into the relative positioning of Section 5 between two other provisions that deal with property and assets, as opposed to archives. If any inference can be drawn from the relative positioning of Section 5, it is that it follows Section 4 which is drafted in limpid and absolute terms concerning property and assets, as Section 5 is for archives.

Finally, Section 10 imposes on all member states that they implement the immunities and privileges into their domestic law and that they inform the Bank of the "detailed actions" taken in that regard. These obligations, particularly the requirement to account for the implementation steps adopted, demonstrate the importance given by member states to the Bank's immunities.

ii. Comparison with other international organizations

The doctrine of archival immunity is not exclusive to the World Bank. Other international organizations benefit from the same immunity. The interpretation adopted of the Bank's immunities in the context of this appeal may spill on other international organizations, hence the usefulness of examining the provisions conferring archival immunity to other international organizations.

The agreements that govern the other four agencies that constitute the World Bank Group all contain inviolability of archives provisions which mirror that of Section 5. The same is true for the Inter-American Development Bank the relevant provision of which states that: "The archives of the Bank shall be inviolable".

Other international banking organizations, however, have provisions which state that the principle of inviolability applies to their archives, but add that it applies to all documents belonging to them. …

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[W]hile some provisions speak only of "archives", others add the expression "and in general all documents". This latter approach has arguably been adopted out of an abundance of caution to ensure that all documents, whether past, present or future be inviolable. In the end, both formulations must have the same meaning. Otherwise, international banking organizations, which all conduct the same business of supporting economic development in various parts of the world, would benefit from more or less immunity depending on the use of the expression "all documents" in their archival immunity provisions. This distinction, just like the restrictive "historical" interpretation of "archives" adopted by the judge below, leads to an absurd result that must be avoided. …

d. Object and purpose of section 5

[T]he purpose of the immunities and privileges afforded to international organizations is to protect them from unwarranted interference by member states. The World Bank's immunities, and its archival immunity in particular, serve this very purpose.

The World Bank, as other international organizations, owes its existence to a treaty that provides it with legal status and various powers and duties. It conducts its business through individuals, who have their own nationality, on the territories of its member states, as it does not have its own territory and population. In order to fulfill its mandate efficiently, it must be able to operate free of direct implication by its member states, including judicial orders made by domestic courts. *Bowett's Law of International Institutions* [P Sands & P Klein, *Bowett's Law of International Institutions*, 6th ed (London: Sweet and Maxwell, 2009) at 501–02] conveniently summarizes the rationale for the inviolability of international organizations' archives to domestic judicial production orders:

> The inviolability of archives and other official documents, for its part, is similarly affirmed in all agreements, and also constitutes an important element in ensuring the good functioning of international organisations. Without it the confidential character of communication between states and the organisation, or between officials within the organisation, would be less secure. *As a consequence of this principle, international organisations are under no duty to produce any official document or part of their archives in the context of litigation before national courts.* [Citations omitted] [Our underlining]

In the instant case, the documents ordered to be produced were created as part of the World Bank's core function to maintain the integrity of its contracting process. Corruption investigations are essential to the proper and effective functioning of the World Bank. A narrow reading of the Bank's immunities and privileges, or a finding that it waived its immunities and privileges, would potentially reduce the member states' trust in the confidentiality of the Bank's records and deter information sharing respecting corruption on Bank funded projects. A narrow

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reading also opens the Bank to potentially onerous and divergent judgments, tethering the organization to the whims of its member states. …

Immunités — Organisation des Nations Unies (ONU) — Organisation de l'aviation civile internationale (OACI)

Dans une soumission à la Cour supérieure du Québec (Chambre civile) datée du 2 mars 2015 dans l'affaire *Ferrada c International Civil Aviation Organization*, 2015 QCCS 3121, le Canada a affirmé:

Immunité de poursuites et de juridiction de l'ONU

11. L'ONU est une organisation internationale créée à l'origine par 51 États membres fondateurs, dont le Canada, aux termes de la *Charte des Nations Unies*, signée le 26 juin 1945 et entrée en vigueur le 24 octobre 1945 …
12. Le paragraphe 105(1) de la *Charte des Nations Unies*, prévoit que l'ONU « jouit, sur le territoire de chacun de ses Membres, des privilèges et immunités qui lui sont nécessaires pour atteindre ses buts. »;
13. La mise en œuvre de cette disposition a été détaillée dans la *Convention sur les privilèges et les immunités des Nations Unies* (ci-après la « *Convention* »), adoptée le 13 février 1946 par l'Assemblée générale des Nations Unies et à laquelle le Canada a accédé le 22 janvier 1948 …
14. La *Convention* prévoit, à son article II.2 que « [l'ONU], ses biens et avoirs, quels que soient leur siège et leur détenteur, jouissent de l'immunité de juridiction, sauf dans la mesure où l'Organisation y a expressément renoncé, dans un cas particulier. Il est toutefois entendu que la renonciation ne peut s'étendre à des mesures d'exécution. »;
15. Les paragraphes 5(a) et (b) de la *Loi sur les missions étrangères et les organisations internationales*, L.C. 1991, ch. 41 (ci-après « *LMEOI* »), … octroient au gouverneur en conseil le pouvoir de reconnaître des organisations internationales et de disposer, par décret, qu'une organisation internationale bénéficie, dans la mesure spécifiée, des privilèges et immunités prévues à la *Convention*;
16. Le *Décret d'adhésion aux privilèges et immunités (Nations Unies)*, C.R.C., ch. 1317, … adopté aux termes du paragraphe 5(b) de la *LMEOI*, octroie à l'ONU, en droit interne canadien, les privilèges et immunités énoncés aux articles II et III de la *Convention*, comme en atteste le certificat délivré aux termes de l'article 11 de la *LMEOI* …
17. L'immunité dont jouit l'ONU au Canada est absolue, comme le rappelait la Cour suprême dans l'arrêt *Amaratunga c. Organisation des pêches de l'Atlantique Nord-Ouest.* Elle ne connaît aucune exception;
Amaratunga c. Organisation des pêches de l'Atlantique Nord-Ouest, [2013] 3 R.S.C. 866, para 49.
18. Par ailleurs, comme le reconnaissait la Cour supérieure du Québec dans un jugement par lequel elle se déclarait sans compétence à l'égard de l'Association

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du personnel de l'OACI, l'immunité des organisations internationales s'étend à leurs structures internes :

> [L'Association du personnel de l'OACI est une] structure interne qui n'est qu'une émanation de l'OACI et qui n'a pas plus de personnalité juridique que pourrait avoir un comité à qui l'on confierait des responsabilités en matière de budget, de finances, etc. En d'autres termes, l'Association n'a pas d'autre personnalité juridique que celle de l'OACI dont elle dépend entièrement pour son existence. Ceci étant, le Tribunal conclura que l'Association bénéficie des privilèges et immunités de l'OACI et n'est pas assujettie à la compétence de cette Cour.

Trempe c. Association du personnel de l'OACI, [2003] J.Q. 16617, par. 68, conf. par *Trempe c. Canada (Procureure générale)*, 2005 QCCA 1031 (CanLII).
19. L'[United Nations, Health and Life Insurance Section (ci-après « UN-HLI »)] n'est qu'une structure administrative interne de l'ONU;
20. Comme l'indique la Circulaire du Secrétaire générale de l'ONU ST/SGB/2003/16, … l'UN-HLI est une section de la Division de la comptabilité au sein du Bureau de la planification des programmes, du budget et de la comptabilité, qui relève du Sous-Secrétaire général, Contrôleur;
Circulaire du Secrétaire général ST/SGB/2003/16, … art. 2.1-2.3, 3.1, 3.2 et 5.2(f).
21. Le Bureau de la planification des programmes, du budget et de la comptabilité fait partie du Département de la gestion, sous la direction du Secrétaire général adjoint à la gestion. Le Département de la gestion est un des départements et bureaux du Secrétariat de l'ONU, organigramme du système des Nations unies …
22. Le Secrétariat de l'ONU est l'un des six organes principaux constituant l'ONU. Il est décrit au chapitre XV de la *Charte des Nations Unies*;
Charte des Nations Unies, … art. 7, 97–101.
23. L'UN-HLI n'est donc qu'une sous-division du Secrétariat de l'NU et elle n'a pas de personnalité juridique distincte de celle de l'ONU. De ce fait, elle bénéficie de la même immunité de poursuites et de juridiction absolue que l'ONU;

Immunité de poursuites et de juridiction de l'OACI

24. L'OACI est un organisme spécialisé de l'ONU créé aux termes d'une convention internationale signée le 7 décembre 1944 à Chicago et connue sous le nom de *Convention relative à l'aviation civile internationale*;
25. L'OACI a son siège à Montréal et est reconnue par le gouvernement du Canada comme une organisation internationale aux termes du droit international;
26. En droit international, les rapports entre l'OACI et le gouvernement du Canada, en sa qualité d'État hôte, sont régis par l'*Accord de siège entre le gouvernement du Canada et l'Organisation de l'aviation civile internationale*, R.T. Can. 1992 n^0 7, signé à Calgary et Montréal les 4 et 9 octobre 1990 et complété par les Accords supplémentaires de 1999 et de 2013 (ci-après « l'*Accord de siège* ») …

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27. L'*Accord de siège* prévoit que « [l'OACI], ses biens et avoirs, en quelque endroit qu'ils se trouvent et quel qu'en soit le détenteur, jouissent de la même immunité de poursuites et de juridiction que celle dont jouissent les États étrangers »; *Accord de siège* … art. 3(1).
28. L'*Accord de siège* a été mis en œuvre en droit interne canadien par le *Décret sur les privilèges et immunités de l'OACI*, DORS/94-563 (ci-après « *Décret OACI* ») … adopté le 16 août 1994 aux termes du paragraphe 5(b) de la *LMEOI*;
29. C'est ainsi qu'aux termes de l'article 3 du *Décret OACI*, « [l]'OACI possède, au Canada, la capacité juridique d'une personne morale et y bénéficie, dans la mesure spécifiée aux articles 2, 3, 4 (1) à (3), 5, 6, 8 et 9 de l'[*Accord de siège*], des privilèges et immunités énoncés aux articles II et III de la *Convention* », comme en atteste le certificat délivré aux termes de l'article 11 de la *LMEOI* …
30. À ce titre, l'OACI bénéficie, aux termes de l'article 3 de *l'Accord de siège*, de la même immunité de poursuites et de juridiction que celle dont jouissent les États étrangers au Canada, en vertu de la *Loi sur l'immunité des États*, L.R.C., 1985, c S-18 …
31. Tout comme un État étranger, l'OACI, ses biens et avoirs bénéficient donc, sous réserve des mêmes exceptions, toutes inapplicables en l'espèce, de l'immunité de juridiction devant tout tribunal au Canada;
32. Dans un contexte où ses biens avaient fait l'objet d'une saisie judiciaire, l'immunité de juridiction de l'OACI a été plus particulièrement décrite comme suit par la Cour d'appel du Québec :

> L'immunité dont jouit l'OACI est absolue. Elle n'existe pas à l'égard d'un tribunal plutôt qu'un autre, de la Cour du Québec plutôt que de la Cour supérieure. Elle vaut à l'égard de l'ensemble du système judiciaire canadien. L'OACI n'est pas assujettie et ne peut être contrainte, non plus que son personnel jouissant du statut diplomatique, à la compétence ratione materiae ou ratione personae de quelque tribunal canadien que ce soit.

Canada (Procureur général) c. Lavigne, [1997] R.J.Q. 405, para 14.

33. Dans l'arrêt *Miller c. Canada*, faisant suite à l'action d'un ancien employé de l'OACI contre le Procureur général du Canada pour la mauvaise qualité de l'air à son ancien lieu de travail, la Cour suprême a rappelé l'immunité dont jouit l'OACI dans le contexte particulier des réclamations provenant des relations de travail :

> L'intimé n'a intenté aucune action contre l'OACI devant la Cour supérieure. Il ressort clairement de l'Accord de siège, les règles du personnel de l'OACI et le Code du personnel de l'OACI ainsi que des arrêts qui précèdent que, *s'il l'avait fait, son action aurait été rejetée.* L'OACI jouit de l'immunité contre toute poursuite en raison des accords internationaux qu'elle a signés avec le Canada[.]
>
> [S]i l'OACI était partie à la présente action ou *s'il y avait enquête sur les actes de l'OACI*, sur son utilisation de l'immeuble ou sur la façon dont elle rémunère ou *traite ses employés*, [l'argument de l'immunité] serait convaincant.

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Miller c. Canada, [2001] 1 R.C.S. 407, para. 42 et 50 [nous soulignons].
34. Le droit international et le droit interne canadien confèrent à l'OACI une immunité de poursuites et de juridiction empêchant tout recours comme celui intenté par la demanderesse.

INTERNATIONAL TRADE LAW

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

In a third party submission dated 10 April 2015 to the WTO panel in *Australia – Tobacco Plain Packaging*, Canada argued (full submission available on request to jlt@international.gc.ca):

The proper interpretation of "special requirements" under TRIPS Article 20

The non-exhaustive list provided in the first sentence of Article 20 helps to inform the meaning of the term "special requirements". The rule of *ejusdem generis* applies to situations where the general word or phrase follows or precedes the specified list and indicates that the general word or phrase will be interpreted to include only persons or things of the same type as those listed. The specific examples listed in Article 20 therefore provide an indication as to the types of requirements that are meant to be captured by the term "special requirements".

The listed examples of requirements relate to how a trademark can be used (use with another trademark, use in a special form, and use in a manner detrimental to the trademark's capability to distinguish goods). Notably, the list does not include restrictions on whether or where trademarks may be used. This is because WTO Members sought to preserve regulatory flexibility to determine whether and where a trademark can be used. … The preservation of this regulatory freedom is coherent throughout Section 2 of the *TRIPS Agreement*. It is clear that restrictions related to whether a trademark can be used (e.g. prohibiting use on goods or in advertising) or where a trade mark can be used (e.g. designating use on specified parts of product packaging) are not "special requirements" for the purposes of Article 20. …

The proper interpretation of "unjustifiably" under TRIPS *Article 20*

Where a panel concludes that a measure is a "special requirement" that "encumbers" the "use of a trademark in the course of trade", it must then determine whether the measure is justifiable …

Whether something is "justifiable" involves whether it can be defended, supported — in essence whether it is reasonable. In contrast, the term "necessary", in its ordinary meaning, signifies something "that cannot be dispensed with or done

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without, requisite, essential, needful". When the meanings of "necessary" and "justifiable" are compared, it is evident that the threshold to establish that a measure is "necessary" must be higher and more stringent than the threshold to establish that a measure is "justifiable" …

Having regard for the ordinary meaning of the words, existing case law, and relevant context, including other *TRIPS* provisions and the Doha Declaration on Public Health, Canada proposes that the elements to be examined in determining whether a special requirement is "unjustifiable" under Article 20 constitute the following:

- Is the objective of the requirement legitimate? This element involves identifying the objective of the requirement and determining whether it is "legitimate". Such an examination ensures that the requirement is motivated by an objective of sufficient importance in order for it to be "justifiable". With respect to this element, the more vital or important the objective, the easier it would be to accept the requirement as "justifiable". In the context of the case at hand, it is important to recall that the Appellate Body has found that the protection of health is an objective of vital importance.
- Is there a rational connection between the requirement and the legitimate objective? This involves an examination of whether the requirement is designed to achieve the objective and whether there is evidence to support a connection between the requirement and the objective. If the requirement is not rationally connected to the objective, then it is not "justifiable".
- Does the requirement contribute to the objective? This element is concerned with determining the degree of contribution of the requirement to the objective. The greater the contribution to the objective, the more easily the requirement might be considered to be "justifiable".
- To what extent does the requirement encumber how a trademark can be used? This element would require a determination of the level of encumbrance of the requirement on how a trademark can be used. A requirement with a relatively slight encumbrance on how a trademark may be used might more easily be considered as "justifiable" than a requirement with intense or broader restrictive effects.

World Trade Organization (WTO) — Subsidies and Countervailing Measures Agreement (SCM Agreement) — *Prohibited Import-Substitution Subsidies and Intermediate Goods*

In a third party submission dated 15 September 2015 to the WTO Appellate Body in *Brazil – Certain Measures Concerning Taxation and Charges*, Canada argued (footnotes omitted) (full submission available on request to jlt@international.gc.ca):

A subsidy contingent on the *purchase* of domestic goods constitutes an import-substitution subsidy under Article 3.1(b) … However, … Canada considers that a

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WTO Member is not prohibited from providing subsidies to its domestic producers, including where the subsidy to the producer of a final good is contingent on the production of an intermediate good by that same producer.

Nothing in the *General Agreement on Tariffs and Trade* (*GATT*) or the *Agreement on Subsidies and Countervailing Measures* (*SCM Agreement*) prohibits a subsidizing Member from making the granting of a subsidy contingent on a recipient producing goods in its territory. In fact, *GATT* Article III:8(b) explicitly allows WTO Members to provide subsidies to their domestic producers. A producer of a final good that is required to produce an intermediate good is obviously also a producer of the intermediate good. Therefore, a subsidy can be made contingent on the production of an intermediate as well as a final good ...

A Member's ability to condition the provision of a subsidy on a production requirement would be significantly curtailed if a Member could not require the production of an intermediate good. A production requirement would then have to be limited to simple assembly operations.

This position is supported by the Appellate Body's report in *Canada – Autos*. In that dispute, … the Appellate Body distinguished between the cost of labour and the cost of domestic goods. It found that the CVA requirement would violate Article 3.1(b) only if it required the manufacturer to use domestic goods. However, it did not consider that a requirement to use domestic labour, regardless of whether that requirement may imply the production of intermediate goods, would violate Article 3.1(b).

World Trade Organization (WTO) — Anti-Dumping Agreement — *Targeted Dumping*

In a third party submission dated 8 May 2015 to the Panel in *US – Certain Methodologies and Their Application to Anti-Dumping Proceedings Involving China*, Canada argued (full submission available on request to jlt@international.gc.ca):

Any methodology used to determine whether targeted dumping exists should be rigorous enough to reflect the fact that situations of targeted dumping are exceptional in nature. That methodology must also meet the criteria enunciated in the second sentence of Article 2.4.2. …

The text of Article 2.4.2 makes it clear that the pattern to be identified is one "of export prices". [T]he US Department of Commerce [USDOC]'s ["Nails test"] averages export prices instead of comparing them to each other. The very nature of an average is that it creates a typical value and by so doing obfuscates differences. In averaging export prices, the USDOC conceals whether or not there is a form or sequence to those prices. …

Article 2.4.2 requires a pattern of export prices which "differ significantly". In order for prices to "differ", there must be a point of comparison. … [T]he USDOC

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distorts its gap test when it ignores lower prices among non-targeted prices, thereby eliminating non-targeted prices that may be similar to alleged targeted prices.

... Canada submits that, in addition to the inconsistencies described above, the USDOC's use of zeroing when applying the exceptional average-to-transaction methodology is inconsistent with Articles 2.4.2 of the *Anti-Dumping Agreement*.

When employing the average-to-transaction methodology, the USDOC calculated an intermediate result for each export transaction compared to the weighted average normal value. When aggregating these results, the USDOC did not offset the intermediate results of transactions for which the export price is lower than the normal value with intermediate results of transactions for which the export price is found to exceed normal value. Aggregation without offsetting is commonly referred to as "zeroing".

The Appellate Body has found numerous times that the practice of "zeroing" is inconsistent with the *Anti-Dumping Agreement*. ... The principles espoused in those decisions on zeroing demonstrate that zeroing is also not permissible even when an investigating authority employs the exceptional average-to-transaction methodology set out in Article 2.4.2 in the context of initial investigations.

... The United States argues that zeroing is permissible when applying the average-to-transaction methodology because failing to do so would lead to results that are mathematically equivalent to those obtained through the standard methodologies. We note that the Appellate Body has already rejected such reasoning. Moreover, it does not follow from the fact that a given methodology may yield a mathematical difference, that this methodology is permissible under the *Anti-Dumping Agreement*. This simple fact does not cure the deficiencies in the U.S. methodology, including those identified in this submission.

World Trade Organization (WTO) — Dispute Settlement Understanding (DSU) — *Article 22.6 — Determining Level of Suspension of Concessions — Use of Economic Modelling*

In a submission dated 12 August 2015 to the Arbitrator in *United States — Certain Country of Origin Labelling (COOL) Requirements*, Canada argued (full submission available on request to jlt@international.gc.ca):

The Methodology Paper submitted by Canada has correctly determined the level of nullification or impairment and the United States has failed to undermine its accuracy. ... The methodology used by Canada was developed from sound, standard and well-accepted economic and statistical principles and practice. Econometric analysis has long been a standard part of trade policy economics. ...

Econometric modelling is useful for forecasting and for measuring causal relationships. It has been used in the context of WTO panel decisions, as recognized by the United States. The United States suggests that this means it should be confined to usage during an assessment of WTO violations, rather than an assessment

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of losses during a *DSU* Article 22.6 calculation. This suggestion is groundless. First, econometric estimations have never been dismissed as inconsistent with *DSU* Article 22.6. Rather, Arbitrators have suggested that there is no reason not to use the methodology, provided the results were relevant to the proceedings and data were available to support the econometric estimation, as is the case in the current proceeding. Second, implementation of the United States' own model relies in part on econometric estimates. There is no theoretical or practical reason why econometrics should be used solely for determining response parameters, such as supply and demand elasticities (as is done by the United States), and not as a key contributor to the calculation of losses in an Article 22.6 arbitration. Third, Canada uses a model in this case that is similar to that employed in the Original Panel proceedings, which the Panel found to be "robust". …

Canada and the United States agree that the level of nullification or impairment should be calculated based on the benefits that would accrue to Canada "but for" the amended COOL measure. … It is important that the methodology used to measure the level of nullification or impairment account for any lingering effects of the COOL labelling requirements. …

An econometric approach requires data on the situation that prevailed with and without the measure at issue in place. With respect to the amended COOL measure, such data do exist and this is why examining actual data is the preferred way to estimate actual impacts. Therefore, the econometric or statistical approach is the most accurate way to estimate the actual impacts of a trade policy and this is why it is the most appropriate model in this case. …

In some cases, this approach will not work. For example, in *US – Upland Cotton*, Brazil complained of a U.S. policy that had been in place long before Brazil became a significant producer of cotton. The offending policies were not newly imposed and there was no opportunity to observe in the market the impact of adding or removing those policies. Brazil therefore appropriately developed a simulation tailored carefully to capture the market impacts of the U.S. measure and project the likely impacts of removing the offending policy on the domestic price within Brazil. That is, absent actual data on what the measure did to reduce the price within the Brazilian market, the only recourse for measuring the level of price suppression was to use a carefully constructed simulation. The present case is completely different because here there are real data on real market impacts to use to assess the actual level of nullification or impairment.

LAW OF THE SEA

United Nations Convention on the Law of the Sea (UNCLOS) — *Article 82 — Extended Continental Shelf — Payments to International Seabed Authority*

On 10 December 2015, the Legal Bureau wrote:

Payments for offshore resource exploitation beyond 200 nautical miles

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Under Article 76 of the *United Nations Convention on the Law of the Sea* (*UNCLOS*), coastal states have sovereign rights over the resources of the seabed and subsoil of the continental shelf beyond 200 nautical miles from shore, known as the extended continental shelf (ECS), if the continental shelf in that area is a natural prolongation of their land territory. As a quid pro quo for accepting these additional rights for broad shelf states, Article 82 of *UNCLOS* provides that payments must be made to the International Seabed Authority for exploitation of resources of the ECS, for redistribution to least developed and land-locked states on an equitable basis. Payments begin after the fifth year of production at 1% of the value of production, increasing at 1% for each following year, to a maximum of 7%, until the end of production at that site. With recent discoveries by Statoil and others in the Flemish Pass Basin on Canada's ECS in the Newfoundland & Labrador offshore area, and the potential for future exploration and petroleum development on Canada's Atlantic ECS, Canada will very likely be the first party to UNCLOS to be obliged to make payments under Article 82.

USE OF FORCE

Jus ad Bellum — *Self-Defence* — United Nations Charter — *Article 51 — Canada's Use of Force in Syria*

On 31 March 2015, the Permanent Mission of Canada, in accordance with Article 51 of the *Charter of the United Nations*, submitted the following letter to the President of the Security Council regarding Canada's military actions in Syria:

I am writing to report to the Security Council that Canada is taking necessary and proportionate measures in Syria in support of the collective self-defence of Iraq, in accordance with Article 51 of the Charter of the United Nations.

On June 25 and September 20, 2014, Iraq wrote to the Security Council, making clear that it was facing a serious threat of continuing attacks from Islamic State in Iraq and the Levant (ISIL) emanating from safe havens in Syria. This threat persists and the attacks by ISIL from safe havens in Syria continue. The Government of Iraq asked the United States to lead international efforts to strike ISIL sites and military strongholds in Syria in order to end the continuing attacks on Iraq, to protect Iraqi citizens, and ultimately to enable Iraqi forces to regain control of Iraq's borders. The efforts of the international coalition have succeeded in degrading ISIL's capabilities and restricting ISIL's operations, but much more remains to be done.

ISIL also continues to pose a threat not only to Iraq, but also to Canada and Canadians, as well as to other countries in the region and beyond. In accordance with the inherent rights of individual and collective self-defence reflected in Article 51 of the *United Nations Charter*, States must be able to act in self-defence when the Government of the State where a threat is located is unwilling or unable to prevent attacks emanating from its territory.

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Canada's military actions against ISIL in Syria are aimed at further degrading ISIL's ability to carry out attacks. These military actions are not aimed at Syria or the Syrian people, nor do they entail support for the Syrian regime.

I would be grateful for you to circulate this letter as a document of the Security Council. I am also copying this letter to the Secretary-General of the United Nations.

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