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compiled by / préparé par

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DIPLOMATIC LAW

Diplomatic Law — Immunities — Legal Process — Service of Originating Documents on Foreign States

On 28 March 2014, the Legal Bureau circulated a diplomatic note to all diplomatic missions in Canada with respect to the service of originating documents on foreign states:

> The Department of Foreign Affairs, Trade and Development (Legal Affairs Bureau) presents its compliments to Their Excellencies the Heads of Diplomatic Missions and notified Chargés d'affaires, a.i. accredited to Canada and has the honour to refer to the matter of service of originating documents in judicial or administrative proceedings against the Government of Canada in other States.

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1. Summary

Customary international law concerning the immunity of States from legal process before the authorities of other States provides for special rules regarding the service of judicial and administrative proceedings on sovereign States. Mainly, proper service of such documents is accomplished diplomatically through transmission by the forum State's Ministry of Foreign Affairs, through its diplomatic mission accredited to the defendant State, to the headquarters of the defendant State's Ministry of Foreign Affairs in its capital, with at least a sixty-day delay before the next step in proceedings. The Department requests the assistance of Their Excellencies the Heads of Diplomatic Missions and notified Chargés d'affaires, a.i. accredited to Canada to inform their respective State authorities in the diplomatic, legal and judicial spheres of the contents of this note.

2. Context

The Department notes that customary international law concerning State immunity from legal process before the authorities of other States provides for special rules regarding the service of judicial and administrative proceedings on sovereign States. State immunity, in its various procedural and substantive manifestations, is an attribute of the sovereignty of each State. This principle of customary international law is therefore intricately tied to the dignity and equality of all States, and to the respect and due regard which States owe each other in the community of nations. The special rules for service on a State speak directly to the fact that they are entitled to greater consideration than private entities …

3. Specific elements of State immunity as it relates to proper service

The Department would therefore like to underscore that proper service of originating judicial or administrative documents on a foreign State is accomplished diplomatically through transmission by the forum State's Ministry of Foreign Affairs, through its diplomatic mission accredited to the defendant State, to the headquarters of the defendant State's Ministry of Foreign Affairs in its capital. Service on a diplomatic mission or consular post is therefore invalid, however accomplished, and additionally constitutes a breach of Article 22 of the *Vienna Convention on Diplomatic Relations* or of Article 31 of the *Vienna Convention on Consular Relations*, which respectively provide for the inviolability of the premises of diplomatic missions and consular posts.

The Department also notes that customary international law requires that States be given an appropriate delay to prepare for the next step

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in proceedings after the service of originating documents. This recognizes the complex and transnational nature of each State's operations and the consequent need for more time to prepare for upcoming litigation in another jurisdiction than would normally be afforded to a local private party … The laws of several States, including Australia, the United Kingdom of Great Britain and Northern Ireland, and the United States of America, as well as that of Canada, provide for a sixty-day or two-month delay between service and the next step in proceedings, and the Department considers that sixty days is the minimum period which could satisfy this requirement of an appropriate delay.

The Department finally notes that Canada's missions abroad have no legal or juridical personality separate from that of the Government of Canada. As such, any judicial or administrative proceedings naming as a defendant a Canadian mission, or anyone other than the "Government of Canada", would be invalid and improperly served.

4. Canadian approach to proper service

The Department has the pleasure of noting that, under Canada's *State Immunity Act*, all other States receive in Canada the protections laid out above with respect to service by diplomatic means to their Ministries of Foreign Affairs in their respective capitals of Canadian originating documents with at least sixty days' notice before the next step in proceedings.

In circumstances where Canada is not served in accordance with the norms laid out above, the Department advises that the Government of Canada reserves the right not to participate in judicial or administrative proceedings. The Government of Canada further reserves the right to restrict the privileges and immunities granted in Canada to other States where these exceed the protections granted to Canada in those other States, as provided under Canada's *State Immunity Act*.

FISHERIES LAW

Fisheries Law — 2002 Yukon River Agreement

In 2014, the Legal Adviser wrote the following in response to a request for legal views regarding the 2002 *Yukon River Agreement* and, in particular, on whether certain requirements laid out in that agreement were legally binding as a matter of treaty law:

I Background and Structure of the 2002 Yukon River Agreement

The 2002 Agreement involved a substantial amendment to the *Pacific Salmon Treaty* ("PST") and created a distinctive regime for Yukon and

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Porcupine River Salmon (unless necessary to distinguish, all references to Yukon River salmon include those originating in the Porcupine River). Note that the 2002 Agreement deals only with Canadian-origin salmon …

To begin, the 2002 Agreement effectively exempts Yukon River Salmon from the purview of the Pacific Salmon Commission ("PSC"), substituting the Yukon River Panel as the primary organ for the management of salmon under its purview. This is accomplished formally through Attachment "A" of the 2002 Agreement. The Panel's relationship with other entities created or designated in the 2002 Agreement provides a substantive overview of the workings of the Agreement.

These other entities consist of:

- a "management entity" designated by each party and responsible for the harvest of Yukon River Salmon (in the case of Canada the Department of Fisheries and Oceans ("DFO") and by the USA, the Alaska Department of Fish and Game);
- the "Joint Technical Committee" (established in 1985, the JTC was created through the Memorandum of Understanding annexed to the PST; from 1985 to 2002 it gathered data on the status of Yukon River Salmon for the Parties. Thereafter the Committee's work was subordinated to the Yukon River Panel);
- the Parties to the 2002 Agreement and the PST, Canada and the USA.

Attachment "B" to the 2002 Agreement establishes Yukon River Salmon as its own separate chapter to the PST, along with other chapters that deal with other salmon species and their geographic spawning regions. Additionally it creates the basic regime under which the species is to be managed.

II Role of the Yukon River Panel:

As the Attachment "B" regime is implemented, the JTC is responsible for making recommendations respecting the stock to the Yukon River Panel. "Based on" these recommendations, the Yukon River Panel has various duties vis-à-vis the management entities:

- the Yukon River Panel shall make recommendations to the management entities concerning the conservation and co-ordinated management of salmon originating in the Yukon River in Canada (Section 14);
- based on the recommendations of the JTC, the Yukon River Panel may from time to time recommend spawning escapement objectives for implementation by the Parties through their management entities

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(Section 16). Where escapement objectives set by the Yukon River Panel are not met, the Panel can revise the spawning escapement objectives in order to rebuild the stocks. When the stocks have been rebuilt, then the Panel may revise these objectives in order to meet the allocation objectives for Canadian-origin Yukon River Salmon provided in Appendices 1 and 2 of the 2002 Agreement;

- the Yukon River Panel shall annually review the performance of the fishery management regimes of both parties for the proceeding season with a view to making recommendations to the respective management entities for improving management performance in order to achieve agreed objectives in future years (Section 17).

Section 14 empowers the Panel to make recommendations, but given that it is a bi-national entity with both USA and Canada having an equal vote, the absence of a consensus will likely frustrate the Panel from fulfilling its obligation to recommend. That frustration is a distinct possibility is apparent both from the negotiation history as well as the failure to provide for either an arbitration clause or the designation of a third entity to break ties …

[I]n the case of a strong run, the Panel has alternative procedures … At present there is not an issue at all of a strong run so our further commentary is confined to the regime as it is applied on a general basis (Sections 14, 16 and 17) …

In contrast [to the PSC], recommendations made by the Yukon River Panel to the two management entities must be accepted by them by some mechanism but their actions do not constitute a treaty or agreement amending the 2002 Yukon River Agreement ...

[Under] the treaty the Canadian government obtained a percentage of those salmon spawned in Canada as well as compensation through a unilateral USA obligation to provide financial assistance on either side of the boundary for protection and enhancement of habitat. It is true that the USA obligation is qualified by whether or not Congress appropriates funds for that purpose (Section 5); however the failure to do so entirely relieves both of the Parties of their obligations under the Agreement until such time as the USA makes good on its contribution for that year (Section 6).

III Relationship of the Panel to the Management Entities:

[T]he text of the 2002 Agreement imposes on the management entities either an obligation to proceed as recommended by the Panel, as in Sections 22 and 26 or provides them with a broad discretion on what options to take, as in Sections 15 and 19.

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IV Role of the Parties in the 2002 Yukon River Agreement:

Lastly the Parties themselves continue to play a role as they have the capacity to make amendments to the Agreement (e.g. amendments under section 8 and 9 to the harvest-sharing arrangements set out in Appendix 1 and 2). Other Party obligations include sections 10-12 (fisheries research and management programs). There are also important obligations owed by the parties in sections 30–35 vis-à-vis maintenance and restoration and enhancement of habitat which are to an extent dictated by the recommendations of the Yukon River Panel unless the parties themselves jointly decide otherwise.

V Comment:

With respect to whether or not provisions in the 2002 Agreement are binding, it is an Agreement between Canada and the United States that is governed by the *Vienna Convention on the Law of Treaties* ("VCLT"). Article 26 of the VCLT provides that "every treaty is binding upon the parties to it and must be performed by them in good faith." That the obligations of the Parties are in this instance mostly undertaken by subordinate entities does not relieve their governments of their obligations at international law. This is intimated by Article 27 of the VCLT that states that a party may not "invoke the provisions of its internal law as justification for its failure to perform a treaty".

Any agreement may have provisions that create obligations that are fixed and unambiguous … Other obligations are softer and allow for considerable leeway to the parties and/or their management entities. As we have also noted, section 15 deals with regulations and vis-à-vis the Panel's recommendations to the management entities, such recommendations "shall be taken into account" and if adopted "shall ensure" their enforcement. Here is a softer obligation "to take into account" linked to a stronger, "ensuring enforcement" …

Aside from the one instance of congressional appropriations, the parties (or management entities) implementing the 2002 Agreement may not treat "soft obligations" as "non-binding" for the VCLT provides that the terms of agreements shall not only be binding but also performed in good faith.

VI Conclusion:

The 2002 Agreement is binding [on] the Parties at international law and its obligations must be carried out in good faith by the Parties and their subordinate entities. A refusal to carry out an obligation and a failure to

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acknowledge the existence of one is an apparent violation of the agreement. However, where the obligation is not clear or there is no mechanism to find consensus, performance of certain obligations may be frustrated. And as noted above many of the obligations provide considerable leeway in implementation.

This agreement, as with many, does not have a penalty clause that is activated upon the commission of certain acts. Nevertheless, a violation of an agreement binding at international law is appropriately pursued by the aggrieved Party against the perpetrator through the various channels that diplomatic advocacy has provided.

INTERNATIONAL ECONOMIC SANCTIONS

International Economic Sanctions — UN Sanctions

In a legal opinion delivered on 7 February 2014, the Legal Bureau wrote:

Interpreting Article 41 of the *Charter of the United Nations*: Article 41 is part of Chapter VII of the *Charter of the United Nations* ("UN Charter"). This Chapter covers "action with respect to threats to the peace, breaches of the peace, and acts of aggression." Article 41 provides:

> The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio and other means of communication, and the severance of diplomatic relations.

The wording of Article 41 contemplates the ability to take actions beyond the blanket sanctioning of states or state actors. First, Article 41 refers to actions comprising "complete or partial interruption of economic relations." It does not say that the economic relations have to be with the state itself, and it also anticipates that only a portion of any economic relations might be disrupted. Second, the article explicitly anticipates interrupting "rail, sea, air, postal, telegraphic, radio and other means of communication." In many states, such enterprises are (and were, at the time of the drafting of the UN Charter) owned or controlled, in whole or in part, by private entities and individuals. It thus cannot be said that Article 41 only anticipates that actions will be taken against states.

Article 41 also does not indicate that the disruption of economic relations or other services can only be reactions to the actions of a state.

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The impetus for decisions taken under Article 41 is found in Article 39, the wording of which is clear that actions taken under Article 41 need not be limited to curtailing actions by states:

> The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.

Article 39 allows the Security Council to determine the existence of *any* threat to the peace or breach of the peace, and to decide what measures shall be taken to maintain or restore international peace and security.

The possibility that non-state actors (including individuals) could be the target of such measures has been widely accepted and welcomed by UN member states. The UNSC has used Article 41 to take measures with direct effect on the liberty of individuals, such as the creation of *ad hoc* criminal tribunals. With respect to economic sanctions, UNSC practice has moved towards more "targeted" (rather than comprehensive) sanctions designed to mitigate collateral impacts and avoid humanitarian consequences as much as possible.

INTERNATIONAL HUMAN RIGHTS LAW

International Human Rights Law — International Covenant on Civil and Political Rights — Article 9

On 6 October 2014, the Government of Canada provided the following comments to the United Nations Human Rights Committee concerning Article 9 of the *International Covenant on Civil and Political Rights* (*ICCPR*):

1. The Government of Canada appreciates the work of the Human Rights Committee in promoting human rights and wishes to thank the Committee for the opportunity to comment on Draft General Comment No. 35 on Article 9: Liberty and Security of Person ("the Draft General Comment").[1] Canada welcomes constructive dialogue and engagement between the United Nations treaty bodies and States parties on issues such as the content of General Comments ...
3. Canada has six main areas of comment in relation to the Draft General Comment.

[1] Gerald L Neuman, Revised Draft Prepared by the Rapporteur for General Comment No 35, Doc CCPR/C/GC/R.35/Rev.3 (10 April 2014), online: <http://www.ohchr.org/EN/HRBodies/CCPR/Pages/DGCArticle9.aspx>.

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4. The first is with respect to paragraph 57, which addresses States parties' obligations under the ICCPR in the context of the removal of foreign nationals … Canada is of the view that it does not sufficiently emphasize the requirement of a real *and personal* risk for the individual subject to removal. Canada is also of the view that the paragraph does not make it sufficiently clear that it would be the removal – and not the treatment upon return – that would potentially constitute a violation.
5. Canada would therefore suggest the following rephrasing of paragraph 57: "Returning an individual to a country where there are substantial grounds for believing that they face a real and personal risk of a severe violation of liberty or security of person amounting to inhuman treatment, such as prolonged arbitrary detention, may amount to a real risk of irreparable harm constituting a violation of Article 7 of the Covenant."
6. Canada's second area of comment is on paragraph 62 of the Draft General Comment, which addresses the territorial scope of Article 9 in light of Article 2(1) of the ICCPR. Canada would insist on the language of Article 2(1): "all individuals within its territory and subject to its jurisdiction" in the first sentence.
7. In the second sentence of paragraph 62, Canada is unable to agree that the test is "effective control over the person." The State in whose territory the detention occurs retains the obligations to respect and to protect Article 9 rights against arbitrary detention by another State within its territory. Canada would therefore suggest a rephrasing of the second sentence of paragraph 62, to remove the reference to "effective control." In the third sentence, the Committee may indicate its view that States parties "should not arbitrarily or unlawfully arrest or detain individuals outside their territory." Canada would remove the fourth sentence of paragraph 62.
8. Canada's third area of comment is on paragraphs 7 and 8 of the Draft General Comment. Paragraph 7 mixes the analysis of State and non-State action … In Canada's view, the Draft General Comment would benefit from a more careful articulation of States parties' obligations to take reasonable measures to protect individuals from threats to their security of the person by non-State actors, as distinct from the discussion of Article 9 as it applies to governmental action. In the same vein, Canada does not view the examples in paragraphs 7 and 8 as providing clear or consistent guidance to States parties on the scope of their obligations with respect to State and non-State action.
9. Canada notes the statement in paragraph 7 that States parties "should also prevent and redress unjustifiable use of force in law

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enforcement" … Canada is of the view that in this instance the use of "should" is an incorrect statement of States parties' obligations under the ICCPR, for example as defined in Articles 2(1) and 2(3). Rather, States parties "must take measures to prevent and redress unjustifiable use of force in law enforcement."

10. Canada is unable to agree with the vague statement in paragraph 8 that States parties "should do their utmost to take appropriate measures to protect personal liberty against the activities of another State within their territory." In Canada's view, a clearer and more correct statement would be that a State party "must take measures to ensure its officials do not acquiesce or participate in abuses committed by another State's officials in the State party's territory."
11. Canada's fourth area of comment relates to international humanitarian law. Consideration of obligations under Article 9 must take into account the fact that international humanitarian law is the *lex specialis* in factual situations of armed conflict and therefore the controlling body of law in armed conflict. Due weight must be given to the controlling body of law throughout the Draft General Comment. Alternatively, the references to the application of Article 9 to situations of armed conflict should be removed.
12. Fifth, Canada has difficulties with the discussion of security detention in paragraph 15. Canada is concerned by the suggestion that international humanitarian law only applies to international armed conflicts. The relevant international humanitarian law rules governing detention, prosecution and any remedy available to the individual will govern in the case of armed conflict, whether international or non-international. Therefore Canada would replace "international armed conflict" with "armed conflict" in the second sentence. Likewise, in the fifth sentence of paragraph 65, Canada would replace "international armed conflict" with "armed conflict" …
13. Canada sees no basis at international law for the statement that security detention "would normally amount to arbitrary detention" for the sole reason that "other effective measures of addressing the threat, including the criminal justice system, would be available." In both international and non-international armed conflicts, a State may detain enemy combatants consistent with the law of armed conflict until the end of hostilities. Canada would not agree with the proposition that, in an armed conflict situation, conduct that is otherwise lawful under international humanitarian law is rendered unlawful simply because law enforcement mechanisms continue to operate effectively. Similarly, to the extent that paragraphs 15 and

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66 are intended to address detention in situations of armed conflict, Canada would not agree that, in all cases, there is a "right to take proceedings before a court to enable the court to decide without delay on the lawfulness of detention" in situations of armed conflict.

14. Canada's sixth area of comment concerns derogation. Article 4(2) explicitly lists the ICCPR articles that are non-derogable. Canada accepts that any derogations from a State party's obligations under the Covenant must always be consistent with Article 4(1) of the Covenant, which requires that any derogation be "strictly required by the exigencies of the situation" and "not inconsistent with their other obligations under international law," including international humanitarian law as applicable. Canada also accepts that States parties may not invoke Article 4 as justification for acting in violation of international humanitarian law or peremptory norms of international law. Canada is unable to agree, however, with the sweeping proposition in paragraph 65 that: "The fundamental guarantee against arbitrary detention is non-derogable." Article 9 is not included in Article 4(2), and Canada considers that there is insufficient evidence to establish that there is a rule of *jus cogens* in respect of the right not to be subject to arbitrary detention. Additionally, Canada sees no basis in international law for the standard of "necessity and proportionality" proposed in paragraph 65.
15. More generally … Canada recommends clarifying the text to ensure that a consistent approach is used for detention in the criminal law context and for detention in the non-criminal context … Canada also recommends consistency with the ICCPR terms …
16. Canada assumes that paragraphs 31 and 40 are not intended to discuss detentions in the context of situations of armed conflict and would recommend more precise terms for the discussion of offences under military law. In paragraph 31, Canada suggests "military prosecutions that are criminal rather than disciplinary in nature" in the second sentence. This clarification would recognize that "military prosecutions" in respect of minor disciplinary offences are outside the scope of Article 9(3), while recognizing that military offences which are truly criminal in nature are captured by Article 9(3). In paragraph 40, Canada would suggest "detention in connection with offences under military law," rather than "military detention."
17. In paragraph 26, Canada does not accept that explicit notification of the reasons for arrest could be "superfluous." Anyone who is arrested shall be informed, at the time of the arrest, of the reasons for his

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arrest, even if those reasons are "evident" or this information may appear "superfluous" in the circumstances.

18. In paragraph 45, the reference to "disciplinary detention of a soldier on active duty" is under-inclusive. It would be preferable to refer to "disciplinary detention of an individual who is subject to the jurisdiction of military tribunals" so as to include all those who fall within military jurisdiction at various times. Canada, amongst other States, currently has, and exercises, military jurisdiction over reserve force members and civilians in limited circumstances, such as civilians accompanying the armed forces.
19. Canada respects the importance of ensuring that all individuals arrested on criminal charges appear before a judge or justice of the peace. In Canadian practice, both civil and military, first appearances are frequently conducted by video conference. Appearance by video conference provides safeguards against ill-treatment and ensures a prompt judicial review of the legality or necessity of detention. In Canada's experience, it reduces the hardships and risks for the individual, particularly during transportation. Therefore, Canada recommends that the Committee mention the merits of appearance by video conference in paragraph 34.

INTERNATIONAL TRADE LAW

International Trade Law — World Trade Organization (WTO) — Proper Legal Test to Be Applied under the Chapeau of Article XX of the General Agreement on Tariffs and Trade (GATT)

In a submission dated 24 January 2014 to the WTO Appellate Body in *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products,* Canada argued:

The Panel erred in relying on its test and findings under TBT Article 2.1 to determine whether the EU Seal Regime is applied in a manner that arbitrarily and unjustifiably discriminates against Canadian non-Inuit seal products

The Panel erred in its legal analysis under the chapeau in its determination that the discrimination under the EU Seal Regime was not justified under Article XX(a). In making its determination, the Panel relied exclusively on its reasoning and determinations under Article 2.1 and, in particular its findings with respect to the legitimacy of the regulatory distinctions embodied in the Indigenous Communities ("IC") and Marine Resource Management ("MRM") exceptions. The Panel's

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findings — that the IC exception was not designed and applied in an even-handed manner and that the distinction between commercial and MRM seal hunts is not rationally connected to the objective, not based on any other justifiable grounds, and not designed and applied in an even-handed manner — provided the sole bases to support its conclusion that the IC and MRM exceptions were inconsistent with the chapeau requirements[2] ...

Despite the substantial jurisprudence available, the Panel made its ruling under the chapeau without applying the interpretative approach set out in that jurisprudence. The Panel committed an error in law by relying solely on the Legitimate Regulatory Distinction ("LRD") test it had devised under Article 2.1 of the *Technical Barriers to Trade Agreement* ("TBT") — a test, furthermore, that Canada has already shown to be incorrect as a matter of law. Further, the Panel erred by not providing any reasoning on how the LRD test under TBT Article 2.1 conforms with the "three types of situations" that the Panel identified could lead to a finding of inconsistency with the chapeau.[3]

The Panel specifically failed to adequately explain why its analysis under Article 2.1 of the TBT regarding the legitimacy of the IC and MRM exceptions was relevant and applicable to its assessment of "exceptions for its consistency with the requirements under the chapeau."[4] Although the Appellate Body has observed that the TBT and the GATT 1994 "overlap in scope and have similar objectives,"[5] and even if the Panel was correct in concluding that they have a "close relationship,"[6] this is not a sufficient basis to import the results of the LRD test directly into the analysis of the chapeau requirements. This error is compounded when, in doing so, the Panel ignores crucial elements of the test for arbitrary or unjustifiable discrimination, such as the requirement that the rationale for the discrimination not undermine the objective of the measure.

Further, the Panel failed to provide a valid explanation why it was of the apparent view that the LRD test is not only directly applicable but actually replaces the test applied specifically to the chapeau requirements

[2] Panel Report, *EC – Seal Products* at para 7.650.

[3] *Ibid* at para 7.644, referring to the Appellate Body Report in *US – Shrimp* at para 150. The three situations are: (a) arbitrary discrimination between countries where the same conditions prevail; (b) unjustifiable discrimination between countries where the same conditions prevail; or (c) a disguised restriction on international trade.

[4] Panel Report, *EC – Seal Products* at para 7.649.

[5] See Appellate Body Report, *US – Clove Cigarettes* at paras 91–101.

[6] Panel Report, *EC – Seal Products* at para 7.258.

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established by the WTO Appellate Body. The Panel did not provide any comparison between the texts of the TBT and GATT Article XX to support the application of the LRD test to its chapeau analysis.

The wording of the chapeau contains similar wording to what is found in the sixth recital of the preamble of the TBT. The Appellate Body looked to the chapeau in developing the principle that a regulatory distinction cannot be designed and applied in an even-handed manner when it is designed or applied in a manner that constitutes a means of arbitrary or unjustifiable discrimination.[7] Yet, there is no explanation, and it would appear to be counterintuitive, that the wording of the sixth recital of the preamble of the TBT, created in 1994, should affect the interpretation of the chapeau requirements of Article XX, which dates back to 1947. Further, it is curious that the LRD test, which is the product of an interpretation of TBT Article 2.1 rather than something expressed in the text of Article XX, would supplant the chapeau requirements that explicitly use the "arbitrary and unjustifiable discrimination" language. The Panel merely referred to the general relationship between the TBT and the GATT as observed by the Appellate Body.[8] The Panel thus committed an error in legal reasoning by failing to satisfactorily explain why the analysis under Article 2.1 is applicable to the chapeau.

Ultimately, the Panel failed to properly apply the rules of treaty interpretation set out in the VCLT. This includes an assessment of the ordinary meaning of the chapeau in its context and in the light of its object and purpose.[9] Although the sixth recital in the preamble of the TBT contains similar language to the chapeau, the Panel did not establish a need to refer to the sixth preamble to interpret the chapeau requirements. The meaning of the chapeau requirements is clear, as set out in the WTO jurisprudence. The Panel did not have a proper basis under the customary international law rules of treaty interpretation to read into the text of the chapeau requirements the LRD test applicable to another agreement.

In addition, there is no concern with conflicting obligations under the TBT and the GATT, or a need to ensure that Article 2.1 and the chapeau are interpreted in a coherent and consistent manner,[10] that would warrant the application of the LRD test to the chapeau. Absent a specific problem of incoherency, there is no reason to invoke the analysis under

[7] Appellate Body Report, *US – COOL* at para 271.

[8] Panel Report, *EC – Seal Products* at para 7.649.

[9] VCLT, art 31(1).

[10] Appellate Body Report, *US – Clove Cigarettes* at paras 90-91, referring to Panel Report, *EC – Seal Products* at para 7.582.

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the LRD test for the analysis under chapeau requirements rather than applying the requirements themselves ...

The Panel erred in finding that the discrimination between non-Inuit Canadian seal products and Greenlandic seal products is justifiable even though the reasons for that discrimination are not rationally connected to the identified objective, and in fact fundamentally undermine that objective

The LRD test developed by the Panel for TBT Article 2.1 did not properly assess the justifiability of the rationale for the regulatory distinction in the light of the identified objective of the measure. The Panel repeated its error by transplanting its findings under the LRD test to the Article XX chapeau analysis. Unlike the analysis of the chapeau requirements under Article XX, the Panel's LRD test does not give the assessment of a rational connection between the discrimination and the objective of the measure a primary role. The Appellate Body has confirmed in *Brazil – Retreaded Tyres* that a determination of whether discrimination is arbitrary or unjustifiable under the chapeau depends on whether the discrimination has a rational connection to one of the policy objectives set out in Article XX. The Panel committed an error of law and legal reasoning by simply importing the LRD test into the chapeau analysis.

The Panel's analysis under Article 2.1 wrongly examines the rationale for the discrimination "despite the absence of a connection"[11] to the objective of the EU Seal Regime. According to the Appellate Body, a rationale that purports to explain discrimination cannot be justified under Article XX where there is no rational connection to the objective or if it goes against the objective.[12] If the measure is applied in a manner that "goes against," that is, undermines, the identified objective, the measure "constitutes arbitrary or unjustifiable discrimination."[13] Thus the Panel's LRD test under TBT Article 2.1 cannot simply be substituted for the rational connection test developed by the Appellate Body for the chapeau analysis.

International Trade Law — WTO — Proper Interpretation of Articles I:1 and III:4 of GATT

In a submission dated 11 February 2014 to the WTO Appellate Body in *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products,* Canada argued:

[11] Panel Report, *EC – Seal Products* at para 7.259.

[12] Appellate Body Report, *Brazil – Retreaded Tyres* at para 228.

[13] *Ibid.*

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The EU's argument that the Panel's interpretation of Articles I:1 and III:4 of the GATT is contrary to the jurisprudence and is without merit

The European Union argues that the Panel suggests diverging tests for *de facto* violations of Article 2.1 of the TBT and for Articles I:1 and III:4 of the GATT 1994. Under Article 2.1 of the TBT, "treatment no less favourable" allows a detrimental impact on competitive opportunities of imports to be justified if the impact stems from a legitimate regulatory distinction. Under GATT Article I:1 and III:4, detrimental impact is sufficient to find discrimination. The European Union argues that the Panel's interpretation is "contrary to established Appellate Body jurisprudence on Article III:4 of the GATT 1994".[14]

The European Union relies on comments made by the Appellate Body in *Dominican Republic – Import and Sale of Cigarettes* and *EC – Asbestos* to support its argument. However, the European Union's interpretation of the jurisprudence is incorrect.

With respect to *Dominican Republic – Import and Sale of Cigarettes*, the European Union refers to the Appellate Body's comment that:

> [t]he existence of a detrimental effect on a given imported product resulting from a measure does not necessarily imply that this measure accords less favourable treatment to imports if the detrimental effect is explained by factors or circumstances unrelated to the foreign origin of the product, such as the market share of the importer in this case.[15]

However, in *US – Clove Cigarettes*, the Appellate Body clarified this statement, rejecting an argument made by the United States that is very similar to the one being made by the European Union in its other appellant submission:

> [a]lthough the statement referred to by the United States, when read in isolation, could be viewed as suggesting that further inquiry into the rationale for the detrimental impact is necessary … in that [*Dominican Republic – Import and Sale of Cigarettes*] dispute … the Appellate Body merely held that the higher *per unit* costs of the bond requirement for imported cigarettes did not conclusively

[14] European Union's other appellant submission at paras 288–90.

[15] Appellate Body Report, *Dominican Republic – Import and Sale of Cigarettes* at para 96.

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> demonstrate less favourable treatment, because it was not attributable to the specific measure at issue but, rather, was a function of sales volumes.[16]

In other words, the statement by the Appellate Body in *Dominican Republic – Import and Sale of Cigarettes* cannot be interpreted, in the case of Articles I:1 and III:4, as requiring panels to inquire into the rationale of a measure causing a detrimental impact in a manner similar to the LRD test under Article 2.1 of the TBT Agreement.

Further, the Appellate Body in *US – Clove Cigarettes* noted that, in *Thailand – Cigarettes (Philippines)*, after finding a detrimental impact under Article III:4, it "eschewed an additional inquiry as to whether such detrimental impact was related to the foreign origin of the products or explained by other factors or circumstances".[17]

Thus, in *US – Clove Cigarettes*, the Appellate Body found that the "'treatment no less favourable' standard of Article III:4 of the GATT 1994 prohibits WTO Members from modifying the conditions of competition in the marketplace to the detriment of the group of imported products vis-à-vis the group of domestic like products".[18]

In contrast, the Appellate Body has been clear that with respect to Article 2.1, "the context and object and purpose of the TBT weigh in favour of interpreting the 'treatment no less favourable' requirement of Article 2.1 as not prohibiting detrimental impact on imports that stems exclusively from a legitimate regulatory distinction".[19]

Therefore, the Appellate Body has rejected the idea that, under Article III:4 of the GATT 1994, an additional inquiry into whether the detrimental impact was related to the foreign origin of the products or explained by other factors must be undertaken. Further, the Appellate Body has clarified that under Article 2.1, it is the context, object and purpose of the TBT, including, prominently, the absence of a general exceptions clause, that lead to the conclusion that an additional inquiry as to whether the detrimental impact stems from a legitimate regulatory distinction should be undertaken. Thus, the Appellate Body has articulated two distinct tests, with the LRD element only applicable to Article 2.1 of the TBT.

[16] Appellate Body Report, *US – Clove Cigarettes* at para 179, n 372.

[17] *Ibid.*

[18] *Ibid* at para 179.

[19] *Ibid* at para 181.

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International Trade Law — WTO — Interpretation of the Term "Public Body" under Article 1.1(a)(1) of the Agreement on Subsidies and Countervailing Measures (SCM Agreement)

In a third party submission dated 3 September 2014 to the WTO Appellate Body in *United States – Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products from India*, Canada argued:

The interpretation of the term "public body" under Article 1.1(a)(1) of the *SCM Agreement*

The Panel found that the United States Department of Commerce ("USDOC") properly concluded that the National Mineral Development Corporation ("NMDC") is a "public body" within the meaning of Article 1.1(a)(1) of the SCM Agreement. Canada submits that the Panel's finding is correct but agrees with the United States' request that, in the course of this appeal, the Appellate Body clarify the interpretation of "public body" given by the Panel. In this regard, Canada submits that an entity controlled by a government, for example through whole or majority ownership or shareholding, should constitute a "public body" within the meaning of Article 1.1(a)(1) ...

Canada's position according to which an entity controlled by the government (either through whole or majority ownership) constitutes a "public body" is consistent with the ordinary meaning of the expression, the context of Article 1.1(a)(1), and the object and purpose of the SCM Agreement. This position gives sense to the reference to the term "public body" in Article 1.1(a)(1). Moreover, it ensures that the disciplines of the SCM Agreement are given a sufficiently broad scope in terms of the entities to which they apply.

The Appellate Body indicated in *US – Anti-Dumping and Countervailing Duties (China)* that the dictionary definitions of the words that are combined to create the composite term "public body" in English, French, and Spanish accommodate a broad range of potential meanings.[20] These definitions permit the interpretation of the term advocated by Canada.

Canada's interpretation gives sense to the reference to "public body" in Article 1.1(a)(1) because it maintains the *effet utile* of the term and distinguishes it from a "private body" entrusted or directed by a government under Article 1.1(a)(1)(iv).

Pursuant to India's interpretation, where an entity is vested with governmental authority and sells goods, its actions would constitute a financial

[20] Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)* at para 285.

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contribution by a "public body" under Article 1.1(a)(1)(iii). However … India's interpretation of the term "public body" would essentially make the term inutile. Such an interpretation would be contrary to basic principles of treaty interpretation as reflected in the Appellate Body's admonition not to interpret treaties so as to reduce their terms to inutility.[21]

Moreover, India's interpretation would allow circumvention of the SCM Agreement because it would permit the government to easily avoid its disciplines. Indeed, a government could simply have entities it controls perform the functions listed under Article 1.1(a)(1) instead of performing them itself. Such an interpretation would defeat the object and purpose of the SCM Agreement.

For the above reasons, Canada respectfully submits that, in this instance, a clarification of the meaning of the term "public body" in Article 1.1(a)(1) of the SCM Agreement is warranted.

In the alternative, Canada submits that the Appellate Body should endorse the Panel's finding that the evidence on the record supported the USDOC's determination that the NMDC constitutes a public body.

Canada notes that, in upholding the USDOC's determination that the NMDC is a "public body," the Panel relied not only on the Government of India's shareholding in the NMDC but also on other indicia of government control such as the appointment of directors and information indicating that the NMDC was under the "administrative control" of the Government of India.[22]

Canada submits that the indicia identified by the Panel in reviewing the USDOC's determination with respect to the NMDC are sufficient when combined with state ownership to properly determine that an entity is a "public body."

International Trade Law — WTO — Proper Legal Test Applied under TBT Article 2.2

In a submission dated 12 December 2014 to the WTO Appellate Body in *United States – Certain Country of Origin Labelling (COOL) Requirements: Recourse to Article 21.5 of the Dispute Settlement Understanding (DSU),* Canada argued:

The Compliance Panel erred by failing to correctly articulate the relational component of the analysis under Article 2.2 and by interpreting overly narrowly the phrase "taking account of the risks non-fulfilment would create" in that provision.

[21] See, for example, Appellate Body Report, *Korea–Dairy* at para 80.

[22] Panel Report, *US – Carbon Steel (India)* at paras 7.83, 7.87.

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The legal test generally

In setting out the legal test at the outset of its analysis, the Compliance Panel did not indicate how it would address the factors it identified as relevant nor describe any relationship these factors may have between each other. Although the six factors identified by the Compliance Panel[23] are relevant, the Compliance Panel should have clarified how it intended to address them. The first three factors it identified pertain to the relational analysis while the last three factors pertain to the comparative analysis. The Compliance Panel should have indicated that it would assess the first three factors separately and then *in relation to each other*. As a result of that omission, the Compliance Panel failed to describe how these factors are to be weighed and balanced against each other ...

The "risks non-fulfilment would create"

The Compliance Panel also erred by excluding or dismissing relevant factors for assessing the "risks non-fulfilment would create". As a result, the Compliance Panel could not give the correct weight to those risks in the legal test ...

While the relative importance of the values or interests underlying the legitimate objective may not be a "separate factor" under Article 2.2,[24] such an evaluation should normally be included in the assessment of the "risks non-fulfilment would create."

In principle, there is a direct correlation between the relative importance of the values or interests being protected and the gravity of the consequences of not fulfilling the measure's objective ... [A] measure giving effect to a policy objective aimed at the provision of origin information to consumers, where that information plays no obvious role other than to enable those consumers that are interested in the information to make

[23] The six factors identified by the Compliance Panel are:

a. the amended COOL measure's degree of contribution to a legitimate objective;
b. the trade-restrictiveness of the amended COOL measure;
c. the nature of the risks at issue and the gravity of consequences that would arise from non-fulfilment of the objective pursued by the United States through the amended COOL measure;
d. whether the alternatives proposed by the complainants are less trade restrictive than the amended COOL measure;
e. whether the proposed alternatives would make an equivalent contribution to the relevant legitimate objective, taking account of the risks non-fulfilment would create; and
f. whether the proposed alternatives are reasonably available.

See Panel Reports, *US – COOL (Article 21.5 – Canada and Mexico)* at para 7.303.

[24] *Ibid* at para 7.311.

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purchasing decisions motivated by nationalistic preferences or specious health beliefs, cannot be said to reflect a value of particularly high importance. That value is objectively not highly important in and of itself and in comparison with other values, such as protecting human life or the environment. The consequence of not fulfilling the objective of providing consumer information is that consumers would not be provided with the information.[25] That consequence is not particularly grave, both from an objective standpoint and in comparison with other consequences ...

[A]ssessing the relative importance of the values or interests underlying the legitimate objective could shed light on the gravity of the consequences that would arise from non-fulfilment of the measure's objective. Therefore, the Compliance Panel erred by excluding the relative importance of the values or interests underlying the legitimate objective from its assessment of the risks non-fulfilment would create.

The correlation described above is clear in this case because the United States has not claimed, either in the original proceedings or in these proceedings, that the information is linked to human health[26] (or, for instance, environmental protection) … Also, origin information is a credence attribute that does not affect the final product.[27] Therefore, the fact that no harm would be caused to consumers … from not receiving origin information is a relevant element to consider in assessing the gravity of the consequences of not fulfilling the amended COOL measure's objective. The Compliance Panel excluded that fact on the basis that assessing the risks non-fulfilment would create under Article 2.2 does not require defining any precise relationship with the relative importance of the interests or values protected under Article XX of GATT.[28] The Compliance Panel thus reviewed the risks "strictly from the viewpoint of the [amended COOL measure's] objective, i.e. providing consumer information on origin."[29] The correlation described above highlights

[25] *Ibid* at para 7.417.

[26] Original Panel Reports, *US – COOL* at paras 7.581 and 7.637. That said, the USDA stated that information on production steps in each country "may embody latent (hidden or unobservable) attributes, which may be important to individual consumers and result in additional but hard to measure benefit increases" (2013 Final Rule, Exhibit CDA-1 at 31377). If these "attributes" were a veiled reference to food safety concerns, requiring the provision of information on such attributes would be at odds with the United States' explanations in the original dispute that the COOL measure is not related to food safety.

[27] Canada's first written submission to the Compliance Panel at para 145.

[28] Panel Reports, *US – COOL (Article 21.5 – Canada and Mexico)* at para 6.59.

[29] *Ibid.*

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the relevance of considering the risks non-fulfilment would create in a broader perspective. The Compliance Panel's failure to do so constitutes an error ...

The Compliance Panel erred in concluding that it could not assess the gravity of the consequences of non-fulfilment

The Compliance Panel wrongly concluded that, "based on the evidence" provided, it was "unable" to ascertain the gravity of the consequence that would arise from the non-fulfilment of the amended COOL measure's objective.[30] According to the Compliance Panel, that consequence is that "consumers would not receive meaningful information on the origin of covered products"[31] … The Compliance Panel's inability to assess the gravity of the consequence of non-fulfilment is the direct consequence of the incorrect legal test it applied to assess the "risks non-fulfilment would create." Had the Compliance Panel applied the correct legal test and, as a result, considered all of the evidence and arguments, it would have concluded that the consequence it had identified would not be particularly grave.

At the outset, the consequence of non-fulfilment identified by the Compliance Panel is not, in and of itself, particularly grave. This is even more apparent when that consequence is compared to other types of consequences, such as the death of a human being that may arise from the non-fulfilment of a legitimate objective ...

The existence of a direct correlation between the relative importance of the values or interests being protected and the gravity of the consequences of not fulfilling the measure's objective supports the conclusion that the consequence identified by the Compliance Panel is not particularly grave.

The design, structure and architecture of the amended COOL measure show that, for the United States itself, the fact that consumers may not receive "meaningful information on the origin of covered products" does not constitute a grave consequence. The "covered products" represent only a small fraction of all the beef and pork sold in the United States and, of those "covered products," a significant proportion is inaccurately labelled (i.e. ground meat)[32] … Therefore … *from the United States' own perspective,* consumers may buy beef and pork in the absence

[30] *Ibid* at paras 7.423–7.424.

[31] *Ibid* at para 7.417.

[32] *Ibid* at para 7.258. See also Original Panel Reports, *US – COOL* at para 7.606.

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of meaningful origin information without suffering any particularly significant, let alone grave, consequences.

Although the Compliance Panel identified "consumer demand for origin information" as a "relevant indicator" for assessing the gravity of the consequence of not fulfilling the amended COOL measure's objective, it wrongly excluded the single most relevant element from its assessment based on an erroneous legal ground.[33] The Compliance Panel specified that it "[did] not review the risks non-fulfilment would create from a possible market failure perspective."[34] This explains the otherwise inexplicable omission by the Compliance Panel to address the USDA's admission that there was no "compelling market failure argument regarding the provision of country of origin information."[35] The absence of a "market failure" means that the market would voluntarily provide information on origin if a sufficient number of consumers value such information highly enough[36] …

In conclusion, Canada's arguments and evidence demonstrate that the consequence that would arise from the non-fulfilment of the amended COOL measure's objective would not be particularly grave, which is in line with the Appellate Body's finding in the original proceedings.[37] In light of these facts, the Compliance Panel erred in concluding that it could not assess the gravity of the consequences of non-fulfilment.

INTERNATIONAL TREATY LAW

International Treaty Law — Differences between Legally Binding and Non-Legally Binding Instruments

In 2014, the Legal Adviser wrote:

The Treaty Law Division is part of the Department's Legal Affairs Bureau. The Division is responsible for providing legal and linguistic advice to the

[33] Panel Reports, *US – COOL (Article 21.5 – Canada and Mexico)* at para 7.418.

[34] *Ibid* at para 6.59.

[35] 2013 Final Rule, Exhibit CDA-1 at 31377. The USDA explained that:

> Comments received on the 2009 final rule and previous requests for comments elicited no evidence of significant barriers to the provision of this information other than private costs to firms and low expected returns. Thus, from the point of view of society, such evidence suggests that market mechanisms could ensure that the *optimal level* of country of origin information would be provided to the *degree valued by consumers* (2013 Final Rule, Exhibit CDA-1 at 31377) (emphasis added).

[36] Canada's first written submission to the Compliance Panel at para 142.

[37] Appellate Body Reports, *US – COOL* at paras 478–79.

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federal government on international treaty law and for arrangements not intended to give rise to binding obligations. The Division's lawyers and juri-linguists are responsible for procedures related to the making of treaties and ensure that the form and substance of international agreements into which Canada may enter conform to international law and Canadian practice.

A treaty is a legally binding international agreement concluded between states, in written form, and governed by international law (see Article 2.1(a) of the VCLT). A treaty may also be referred to as a "convention," "agreement," "protocol," or some other similar word. Treaties can be bilateral (between two countries), multilateral (between three or more countries and generally developed under the auspices of international organizations), or plurilateral (generally entered into between one State and a group of States). Treaties can only be entered into by an entity having international legal personality (e.g., States, international organizations). In Canada, the jurisdiction to enter into such agreements, to legally bind Canada, rests with the Federal government.

One of the tasks of the Treaty Law Division is to explain the legal difference between a treaty and a Memorandum of Understanding (MOU). A non-legally binding instrument, or MOU, is an arrangement or understanding between governments regarding certain matters that do not create formal international legal obligations between states and therefore are not governed by international law. The provisions of an MOU should be expressions of intent rather than obligations. Canada uses non-legally binding instruments in international relations to express political and moral commitments. As MOUs are not legally binding, they can be concluded between States; between respective government departments and agencies of States, and between a State's sub-entities (e.g. a state, province or territory) and a foreign State. As some States in certain instances consider MOUs to be binding, it is important that all of the participants involved in the negotiation of a non-legally binding instrument are of the understanding that the instrument will be non-legally binding in nature.

OCEANS LAW

Oceans Law — Conservation and Sustainable Use of Marine Biological Diversity

At the April 2014 Meeting of the Ad Hoc Open-ended Informal Working Group to study issues relating to the conservation and sustainable use of marine biological diversity beyond areas of national jurisdiction, the Canadian delegation delivered the following opening statement:

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Conservation and sustainable use of marine biodiversity in areas beyond national jurisdiction is important. Canada has been, and continues to be, a strong supporter of conservation efforts in regional and global fora. For example, at the International Maritime Organization ("IMO"), Canada supports the establishment of a robust Polar Code which would set technical requirements for safety and environmental protection for ships operating in the Arctic and is an active, constructive participant in ongoing negotiations. In the International Commission for the Conservation of Atlantic Tuna ("ICCAT"), Canada has put forward proposals for recommendations that would mandate the application of a precautionary and ecosystem approach to fisheries management within the Convention area. And in the Northwest Atlantic Fisheries Organization ("NAFO"), Canada has played a leadership role in the adoption of a suite of measures to promote sustainable use of marine biodiversity in areas beyond national jurisdiction, including comprehensive stock management plans based on the precautionary approach, targeted measures to minimize bycatch and the establishment of an evergreen ecosystem roadmap for the Organization. In fact, NAFO has implemented the most complete program to manage impacts on vulnerable marine ecosystems in areas beyond national jurisdiction in the Northwest Atlantic. In addition, based largely on Canadian proposals, NAFO has closed 13 areas to protect important concentrations of various species of cold water corals, sponges and sea pens. Protection zones have been established for five seamount areas, along with provisions for fishing vessels that encounter vulnerable marine ecosystems and avoidance rules. All of these measures have been established using sound scientific advice, based on a multilateral research initiative, led in part by Canadian scientists.

Canada is of the opinion that States have a responsibility to devote stronger efforts to the effective implementation of existing international instruments and mandates and to increasing the number of adherents to those instruments. An extensive suite of rights and obligations already exists, and, in our view, their effective implementation could have a significant and immediate effect on the conservation and sustainable use of marine biodiversity beyond national jurisdiction. In this regard, Canada would urge States to continue their conservation and sustainable use efforts in existing fora.

We would not want to see existing instruments, such as the UN Fish Stocks Agreement, and conservation processes undertaken within their purview adversely affected by a new instrument, nor that achievements obtained in other fora be diluted by a new instrument. We must be careful not to allow progress already achieved to be undermined by expectations of different future outcomes, as it is not clear that such outcomes would be better than what we have already put in place.

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In addition, we must realize that activities in the realm of marine genetic resources are nascent and capable of quick evolution. We must take care not to create complex international processes or bodies that risk being quickly rendered obsolete or irrelevant and therefore ineffective.

Negotiators of UNCLOS were successful in striking a careful balance between competing uses of the oceans, and this same approach must guide us in our consideration of this issue. This balance of rights and duties must be preserved. The conservation and sustainable use of biodiversity in areas beyond national jurisdiction requires an integrated approach to management, one that takes into account humanity's reliance on natural resources, while maintaining the biological richness and ecological processes necessary to sustain marine ecosystems. For any conservation and sustainable use efforts to be effective all stakeholders must be engaged on the issue. All stakeholder views must be taken into account and the issues examined from a variety of viewpoints, including environmental, economic, scientific and legal perspectives. Existing expertise from those currently engaged in regulating maritime activities are important to recognize and take into account.

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