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INTERNATIONAL HUMAN RIGHTS LAW

Arrest and Detention — Foreign Nationals — Absence of Due Process — Use as Leverage in Interstate Relations — Declaration Against Arbitrary Detention in State-to-State Relations

On 26 October 2021, Canada hosted the thirty-first annual Meeting of Legal Advisers on the margins of the seventy-sixth session of the United Nations General Assembly as part of the annual International Law Week hosted by the General Assembly's Sixth Committee. The meeting focused on the launch of the *Declaration Against Arbitrary Detention in State-to-State Relations* by Canada's then Minister of Foreign Affairs, Marc Garneau, on 15 February 2021 and was accompanied by a panel discussion. With over two hundred persons in attendance, Alan Kessel, Legal Adviser at Global Affairs Canada, introduced the panel discussion and *Declaration* as follows:

We will turn now to the main event of our meeting today, which is a discussion of an emerging issue in international law, [being] the arbitrary detention of foreign

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nationals as leverage in state-to-state relations. Before we go further, I would like to underline that in putting this topic on the table we are not seeking to target any particular country. In our bilateral discussions it has become clear that this is an issue that is increasing in scope and that has affected many of our ministries, as you will hear shortly. It can affect any sending State, large or small, and is thus of concern to the international community.

By arbitrary detention we refer to the arrest and detention of people where there is no real evidence that a crime has been committed or where due process is not followed. Such detentions are prohibited by international law, and are the subject of study of a Working Group on Arbitrary Detention within the Office of the [United Nations] High Commissioner on Human Rights. In its 2018 report, this Working Group recognized the nexus between arbitrary detention and consular law and concluded that foreign detainees are particularly vulnerable.

Cases of arbitrary detention can pose delicate legal and bilateral issues for consular staff and for Legal Advisers. This is especially the case where the arbitrary arrest or detention is understood to be a tool to compel action or to exercise leverage over a foreign government. Such difficult cases can rise to the level of a bilateral irritant, with the potential to undermine trust and friendly relations between nations. State behaviour in these contexts may also extend beyond the strict legal definition of arbitrary detention, for example in matters of sentencing or consular access, which may also be used in seeking leverage. Finally, the matter can also be complicated by another problematic area of consular law, that of dual nationality.

To address such situations, a group of 65 UN Member States, including my own, plus the European Union, have joined the *Declaration Against Arbitrary Detention in State-to-State Relations*. Underpinning the *Declaration* is a commitment to uphold core principles of human rights, consular relations, international cooperation, the rule of law, and judicial independence — all universal values grounded in international law. …

Declaration Against Arbitrary Detention in State-to-State Relations

The arbitrary arrest or detention of foreign nationals to compel action or to exercise leverage over a foreign government is contrary to international law, undermines international relations, and has a negative impact on foreign nationals traveling, working and living abroad. Foreign nationals abroad are susceptible to arbitrary arrest and detention or sentencing by governments seeking to compel action from other States. The purpose of this *Declaration* is to enhance international cooperation and end the practice of arbitrary arrest, detention or sentencing to exercise leverage over foreign governments.

Recognising a pressing need for an international response to the prevalence of these practices, and guided by international law and the principles of the *Charter of the United Nations*:

1. We reaffirm that arbitrary arrests and detentions are contrary to international human rights law and instruments, including the *Universal Declaration of Human*

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Rights, the *International Covenant on Civil and Political Rights* and other international and regional human rights instruments;
2. We express grave concern about the use of arbitrary arrest or detention by States to exercise leverage over foreign governments, contrary to international law;
3. We are deeply concerned that arbitrary arrest, detention, or sentencing to exercise leverage over foreign governments undermines the development of friendly relations and cooperation between States, international travel, trade and commerce, and the obligation to settle international disputes by peaceful means;
4. We are alarmed by the abuse of State authority, including judicial authority, to arbitrarily arrest, detain or sentence individuals to exercise leverage over foreign governments. We call on States to respect their obligations related to a fair and public hearing by a competent, independent and impartial tribunal;
5. We urge all States to refrain from arbitrary arrest, detention, or sentencing to exercise leverage over foreign governments in the context of State-to-State relations;
6. We reaffirm the fundamental importance of the rule of law, independence of the judiciary, respect for human rights, and respect for the obligation to provide consular access in accordance with international law, including the *Vienna Convention on Consular Relations* and other applicable international instruments;
7. We call upon States to take concrete steps to prevent and put an end to harsh conditions in detention, denial of access to counsel, and torture or other cruel, inhuman or degrading treatment or punishment of individuals arbitrarily arrested, detained or sentenced to exercise leverage over foreign governments. We reaffirm the urgent need to provide these individuals with an effective remedy consistent with international human rights law, and call for their immediate release;
8. We stand in solidarity with States whose nationals* have been arbitrarily arrested, detained or sentenced by other States seeking to exercise leverage over them and acknowledge the need to work collaboratively to address this issue of mutual concern at the international level.

* Including dual nationals in accordance with endorsing countries' laws on nationality.

European Convention on Human Rights — *Interstate Proceedings — State Responsibility — Post-incident Conduct — Failure to Cooperate — Prohibition on Inhuman and Degrading Treatment — Rights of the Next of Kin — Right to Truth*

On 29 January 2021, the Legal Bureau made the following written submission to the European Court of Human Rights in *Ukraine and the Netherlands v Russia*, Nos 8019/16, 43800/14 and 28525/20, pursuant to leave granted

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by the President of the Grand Chamber on 21 December 2020 (the text of treaty provisions quoted in the footnotes of the original submission have been deleted from this extract):

I. Introduction …

1. Canada continues to mourn the terrible loss of lives aboard Malaysia Airlines flight MH17, which was downed on 17 July 2014. The tragedy appears to be the result of serious violations of international human rights. The families and friends of the 283 passengers and 15 crew members who lost their lives that day are owed the truth about what happened to their loved ones, and justice must be served.
2. In its inter-State application against Russia, the Kingdom of the Netherlands submits that Russia's conduct in the aftermath of the downing of Flight MH17, including its refusal to adequately and effectively cooperate in the investigation, its refusal to provide complete and non-contradictory information, and its shielding of potential perpetrators from criminal investigations, amounts to a violation of the Article 3 rights of the next of kin of the victims on board MH17.
3. Section VI(4) of the Netherlands' application highlights some of the instances in which this Court has found a violation of the Article 3 rights of an initial victim's next of kin. Similarly, the Inter-American Court of Human Rights (IACtHR) has repeatedly found that a State's conduct following an initial serious human rights violation such as enforced disappearances, extrajudicial executions, or torture can itself be so egregious as to constitute inhuman or degrading treatment of the victim's loved ones, in violation of international law. Canada wishes to draw the Court's attention to the reasoning employed in these decisions.
4. Canada hopes that its observations will be of use to the Court when weighing the question of whether the Respondent State's conduct in the aftermath of the downing of Flight MH17 amounts to a violation of the Article 3 rights of the primary victims' next of kin.

II. Inter-American Court of Human Rights cases on inhuman or degrading treatment of victims' next of kin

5. Both the *European Convention on Human Rights* (*ECHR*) and the *American Convention on Human Rights* (*ACHR*) contain a prohibition on inhuman or degrading treatment.[1] Canada wishes to bring to this Court's attention the fact that the IACtHR has found a violation of the prohibition of inhuman and degrading

[1] … It should be noted that when it comes to the rights of the family members of victims, the IACtHR will often find both violations of the right to personal integrity under Article 5 (1) [*ACHR*] and of the prohibition of cruel, inhuman, or degrading treatment or punishment under Article 5(2) [*ACHR*], using language from both provisions interchangeably. See, for example, IACtHR, *Case of Bámaca Velásquez v Guatemala*, Judgment of November 25, 2000, Series C No 70, paras 165-166; IACtHR, *Case of the Mapiripán Massacre v Colombia*, Judgment of September 15, 2005, Series C No 134, para 146; IACtHR, *Case of Radilla-Pacheco v Mexico*, Judgment of November 23, 2009, Series C No 209, para 172; and *Case of*

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treatment for a primary victim's next of kin in a variety of circumstances, including where the primary victim's right to life or bodily integrity was violated.[2] In addition, the number of next of kin found to have had their *ACHR* Article 5 rights violated as a result of the serious violation of the human rights of a family member can be large. In the *Plan de Sanchez* and *Mapiripán Massacre* cases, for example, those persons beyond the initial victims who were found to be injured parties numbered in the hundreds.[3]

6. One such case is *Villagran-Morales et al v Guatemala*.[4] The case centered around the kidnapping, torture, and death of four minors living in the streets of Guatemala City by the Guatemalan National Police. In addition to finding that the deceased street children's fundamental human rights had been violated, the IACtHR found that their families' right not to be subjected to cruel and inhuman treatment had been violated, both because of the manner in which the youths were murdered and because of the State's conduct after their deaths.[5] In reaching this conclusion, the Court pointed to the State's failure to properly establish the identity of the victims, the failure to provide the families with information on the development of the investigations, the failure of the public authorities to fully investigate the corresponding crimes and punish those responsible, and the treatment given to the remains.[6] This Court will recall that the Applicant State in the present case has alleged analogous conduct by the Respondent State in relation to the aftermath of the downing of MH17.

Gudiel Álvarez et al ("Diario Militar") v Guatemala, Judgment of November 20, 2012, Series C No 253, paras 290–291.

[2] The Inter-American Commission on Human Rights noted as much in an application it filed with the Inter-American Court of Human Rights in the case of *Heliodoro Portugal* in which it stated, "As regards the victim's next-of-kin, the Inter-American Court has ruled that *the persons closest to the victim can be considered, in turn, as victims in cases that violate such basic rights as the right to life and to human[e] treatment*. See *Application filed with the Inter-American Court of Human Rights in the case of Helidoro Portugal (Case 12.408) against the Republic of Panama*, at para 155 (emphasis added), available at https://bit.ly/2XvZa2i. The IACtHR has occasionally relied on the *ECHR* Article 3 jurisprudence of the European Court of Human Rights and the views of the UN Human Rights Committee on communications involving violations of Article 7 of the *International Covenant on Civil and Political Rights*. See, for example, IACtHR, *Case of Bámaca Velásquez v Guatemala*, Judgment of November 25, 2000, Series C No 70, paras 162–164 and *Mariam Sankara et al v Burkina Faso*, Communication No 1159/2003, UN Doc CCPR/C/86/D/1159/2003 (2006), available at http://hrlibrary.umn.edu/undocs/1159-2003.html.

[3] *Case of the Mapiripán Massacre v Colombia*. Merits, Reparations and Costs, Judgment of September 15, 2005, Series C No 134; *Case of the Plan de Sánchez Massacre v Guatemala*, Reparations, Judgment of November 19, 2004, Series C No 116.

[4] *Case of the "Street Children" (Villagrán Morales et al) v Guatemala*, Merits, Judgment of November 19, 1999, Series C No 63.

[5] *Ibid* [at] para 177.

[6] *Ibid* [at] paras 173 and 174.

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7. Similarly, in the *Bámaca-Velásquez v Guatemala* case, a rebel commander was detained, tortured, and presumed murdered by state authorities, and the IACtHR found that the State's conduct constituted a violation of his next of kins' [*sic*] right not to be subjected to cruel, inhuman or degrading treatment.[7] In support of this finding, the Court pointed to the "suffering and anguish" that the violation of the primary victim's rights caused his loved ones, along with the sense of insecurity, frustration and impotence they faced as a result of the state's failure to investigate.[8] The Court looked particularly closely at the suffering of the murdered commander's partner, Jennifer Harbury. It referred to the "continued obstruction" by the Respondent State of her efforts to learn the truth about what happened to her partner, and "the official refusal to provide relevant information," in finding that Ms. Harbury's right not to be subjected to cruel, inhuman or degrading treatment had "clearly" been violated.[9]
8. In addition to the *Bámaca-Velásquez* case, there are a number of judgments of the IACtHR that have found that a State denying the truth to the next of kin about the circumstances of their loved one's death is a human rights violation in itself. For example, in the *La Cantuta v Perú* decision, the Court recalled that "continued deprivation of the truth regarding the fate of a disappeared person constitutes cruel, inhuman and degrading treatment against close next of kin."[10] And in the *Case of the Mapiripán Massacre v Colombia*, involving a massacre by paramilitary forces who executed and displaced a large number of victims, the Court noted that there had not been "a complete and effective investigation" of the massacre, and that such lack of an effective remedy was "a source of additional suffering and anguish" for the next of kin whose rights, including the Article 5(2) prohibition against cruel, inhuman or degrading treatment, had been violated.[11]

III. The "right to truth" concept

9. The lack of information about, or proper investigation into, the circumstances surrounding a loved one's death is a common element in the cases discussed above. This Court may recall that the Government of Canada provided written submissions on the subject of the "right to truth" on October 2, 2020 in *Ayley and Others v Russia* (Application no. 25714/16) and *Angline and Others v Russia* (Application no. 56328/18). As Canada noted in that submission, Canada's view

[7] *Case of Bámaca Velásquez v Guatemala,* Merits, Judgment of November 25, 2000, Series C No 70 at paras 165–166.

[8] *Ibid* at para 160.

[9] *Ibid* at para 165.

[10] *Case of La Cantuta v Peru*, Interpretation of the Judgment on Merits, Reparations and Costs, Judgment of November 30, 2007, Series C No 173 at para 125. See also *Case of Goiburú et al* [*v Paraguay*, Merits, Reparations and Costs, Judgment of September 22, 2006, Series C No 153], para. 101; *Case of 19 Tradesmen*, Judgment of July 5, 2004, Series C No 109, para 267; and *Case of Trujillo-Oroza*, Reparations (Art. 63(1) *American Convention on Human Rights*), Judgment of February 27, 2002, Series C No 92, para 114.

[11] *Case of the Mapiripán Massacre v Colombia*, Judgment of September 15, 2005, Series C No 134 at paras 145, 219, 221, 223.

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is that the right to truth is best understood as the "right of families to know the fate of victims of serious human rights violations such as enforced disappearance, torture, or extrajudicial killings." Canada would invite this Court to consider whether a serious and ongoing violation of the right to truth about the death of an initial victim would also support a finding of a breach of the Article 3 rights of the victims' next of kin.

10. The "right to truth" is partly grounded in the obligation of customary international law to provide an effective remedy for human rights violations, as reflected in Article 8 of the *Universal Declaration of Human Rights*: "Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law." The right to an effective remedy is also found explicitly in Article 2(3) of the *International Covenant on Civil and Political Rights* (*ICCPR*). …
11. As outlined below, the "right to truth" has been treated in the inter-American context as indivisible from human rights obligations related to effective remedies for human rights violations, access to courts and judicial protection, fair trials, recognition as a person before the courts, and access to information.
12. The IACtHR and the Inter-American Commission on Human Rights (IACHR) have further recognized the "right to truth" as directly connected to the right to judicial guarantees and the right to judicial protection.[12] These rights are described in Articles XVIII and XXIV of the *American Declaration on the Rights and Duties of Man* and Articles 8 and 25 of the *ACHR*.… The IACHR considers the right to truth as "a basic and indispensable consequence for every State Party" arising out of the *American Convention*.[13]
13. In some cases, the IACtHR and the IACHR have considered that the right to truth is related to the right to seek and receive information, as reflected in Article 13 of the *American Convention*.[14] The "right to truth" is also closely connected to the Article 19(2) *ICCPR* freedom to seek, receive and impart information, within the limitations of Article 19(3) *ICCPR*.…

[12] The IACtHR first recognized this connection in *Bámaca-Velásquez v Guatemala*, Judgment of November 25, 2000 (Merits), para 201. See also Inter-American Commission on Human Rights, *The Right to Truth in the Americas*, [OAS Doc] OEA/Ser.L/V/II.152, August 13, 2014, Chapter II(B).

[13] For example, IACHR, Report No 25/98, Cases 11.505, 11.532, 11.541, 11.546, 11.549, 11.569, 11.572, 11.573, 11.583, 11.595, 11.657 and 11.705, *Alfonso René Chanfeau Orayce et al*, Chile, April 7, 1998, paras 85 to 89, available at http://hrlibrary.umn.edu/cases/1997/chile25-98.html.

[14] See, for example, the *Case of Contreras et al v El Salvador*, Merits, Reparations and Costs, Judgment of August 31, 2011, Series C No 232 at para 271: "[T]he right to know the truth is related to the Ordinary Action filed by the next of kin, which is linked to access to justice and to the right to seek and receive information enshrined in Article 13 of the *American Convention*." See also the *Case of Gelman v Uruguay*, Merits and Reparations, Judgment of February 24, 2011, Series C No 221 at para 243: "All persons, including the next of kin of the victims of gross human rights violations, have, pursuant to Articles 1(1), 8(1), and 25, as well as in certain circumstances Article 13 of the Convention, the right to know the truth."

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14. Based on general principles of international human rights law, including as illustrated in the jurisprudence of the IACtHR, Canada emphasizes that all States have an obligation at international law to respect the right of family members to know the fate of victims of serious human rights violations such as enforced disappearance, torture, or extrajudicial killing.

IV. Conclusion

15. The Inter-American Court of Human Rights has found a violation of the prohibition of inhuman and degrading treatment for a primary victim's next of kin in a variety of circumstances, including where the primary victim's right to life or bodily integrity was violated. The lack of information about, or proper investigation into, the circumstances surrounding a loved one's death is a common element in these cases, which can also involve a violation of the right to truth. Canada would invite the Court to consider these cases and observations when determining whether the respondent State has violated the Article 3 rights of the next of kin of the victims of the downing of Flight MH17.

INTERNATIONAL TRADE LAW

World Trade Organization (WTO) — Agreement on Rules of Origin *(*ARO*)* — *Country of Origin*

In its first written submission in *United States – Origin Procedure* (DS597), dated 16 July 2021, as well as its oral statement delivered on 1 September 2021, Canada outlined its view that the *Agreement on Rules of Origin* (*ARO*) does not apply to a WTO member's determination of the particular country that must be marked as the country of origin or what a member must take into consideration when determining what constitutes a "country" for country of origin marking purposes (full submission available upon request to jlt@international.gc.ca):

Under the *ARO*, "rules of origin" are defined as "laws, regulations and administrative determinations of general application applied by any Member to determine the country of origin of goods" and include rules of origin used in origin marking requirements under Article IX of [the *General Agreement on Tariffs and Trade 1994* (*GATT 1994*)].[1] Article 2(c) of the *ARO* disciplines the conditions and requirements imposed by a Member as a prerequisite for a conferral of origin. In particular, the second sentence "requires Members to ensure that the conditions their rules of origin impose as a prerequisite for the conferral of origin not include a condition which is unrelated to manufacturing or processing." Article 2(d) requires that the

[1] *Agreement on Rules of Origin*, Article 1.2.

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strictness of the requirements that must be satisfied for that good to be accorded the origin of a particular Member is the same, regardless of the provenance of the good in question. In Canada's view, these obligations are concerned with the conditions or requirements for a good to be considered originating from a particular country, for example, the last country in which manufacturing or processing of the good took place would determine the origin status of the good. …

[T]he provisions of the *ARO* at issue in this dispute do not discipline a Member's determination of the particular country that must be marked as the country of origin or what a Member must take into consideration when determining what constitutes a "country" for country of origin marking purposes. Rather, the provisions at issue govern the substantive origin requirements that must be met for a good to obtain a certain origin status. This includes requirements such as manufacturing or processing that must be met before a particular origin will be conferred. The provisions do not discipline or dictate what the actual country of origin must be. …

[T]he definition of "country" in the Explanatory Notes to the *WTO Agreement* provides that the term "country" is understood to include … a separate customs territory Member of the WTO. However, in Canada's view, neither this definition, nor the provisions in the *ARO*, require a Member to choose one particular WTO Member over another when determining what constitutes a "country" for the purposes of country of origin determinations. The definition in the Explanatory Notes to the *WTO Agreement* does not set out a conclusive definition of what constitutes a "country", or how a Member must arrive at that determination, but rather uses the term "includes" to signify that the term is to be understood to encompass separate customs territories. …

[T]he definition does not preclude a Member from considering the relationship between a separate customs territory and the country with which it is associated in determining what constitutes a "country for the purposes of identifying the country of origin. Rather, in Canada's view, this is a determination that is firmly within the right of WTO Members to make. Such a determination is not a "rule of origin per se, and therefore not governed by the *ARO*. The *ARO* governs rules that determine whether a product originates in a particular country, not the identification of that particular country.

Moreover, there is nothing in the *ARO* or the *WTO Agreements* more generally that requires that the country of origin for marking purposes must be the same as an identified separate customs territory.

WTO — General Agreement on Tariffs and Trade (GATT) — *Article XX* — *General Exceptions*

In its third-party submission in *Certain Measures Concerning Palm Oil and Oil Palm Crop-based Biofuels* (DS597), dated 19 March 2021, Canada outlined its view that the tests that have been developed for each paragraph under

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Article XX of the *GATT* are distinct, are based on the different language used in each paragraph, and require that different elements be proven (citations are as they appear in Canada's original submission, which is available upon request to jlt@international.gc.ca):

It is well established by previous Appellate Body decisions that a measure that is otherwise found to be inconsistent with the *GATT 1994* can be justified under *GATT* Article XX if: (1) the measure is found to be provisionally justified under one of the policy categories enumerated in the paragraphs of Article XX; and (2) the measure satisfies the requirements of the chapeau.[1]

It is also well established that the first step in this analysis involves an examination of the degree of connection or relationship between the disputed measure and the state interest or policy to be promoted or realized.[2]

The inquiry into the degree of connection or relationship between the disputed measure and the state interest or policy to be promoted or realized is dictated by the language used in each paragraph under Article XX.[3]

While acknowledging that the language in paragraphs (a), (b) and (g) of Article XX differs with regard to the required nexus, or connection, other parties contend that the legal tests under these subparagraphs of Article XX of *GATT 1994* are in practice very similar. Based on this conclusion, other parties appear to propose an aggregate Article XX test in the first stage of the two-step analysis that focuses on whether a disputed measure is "rational and reasonable in both its design and application."

While Canada agrees that a measure, such as a measure designed to respond to the climate crisis, may pursue a variety of the objectives described in the paragraphs of *GATT* Article XX, we respectfully disagree with an approach that would result in the conflation of the legal tests under these paragraphs.

Previous Appellate Body reports are clear as to why there is no single "rational and reasonable" test, but rather individualized tests under each paragraph. As the Appellate Body noted in *US – Gasoline*, for example, the different words in each paragraph were chosen for a reason, and that it "does not seem

[1] Appellate Body Reports, *US – Shrimp*, para. 159; *US – Gasoline*, p. 23; and *Brazil – Retreaded Tyres*, paras. 215, 224.

[2] Appellate Body Report, *US – Gasoline*, p. 18.

[3] See p. 17, *US – Gasoline*, where the Appellate Body clearly sets out that as a matter of interpretation, "the words of a treaty, like the *General Agreement*, are to be given their ordinary meaning, in their context and in the light of the treaty's object and purpose." The Appellate Body concluded that the panel "failed to take *adequate account of the words actually used by Article XX in its several paragraphs*. In enumerating the various categories of governmental acts, laws or regulations which WTO Members may carry out or promulgate in pursuit of differing legitimate state policies or interests outside the realm of trade liberalization, Article XX uses different terms in respect of different categories" (emphasis added).

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reasonable" to assume that "in respect of each and every category, the same kind or degree of connection or relationship [is required] between the measure under appraisal and the state interest or policy sought to be promoted or realized."[4]

Indeed, the Appellate Body has specifically cautioned against transposing the concept of "necessary" from (b) into the analysis under (g) for precisely this reason.[5]

The other parties point out that in interpreting the relevant "nexus," the tests for (b) and (g) both turn on the concept of a genuine relationship between means and ends. While the tests are conceptually similar, they are not identical.

Under paragraph (g), "relating to" requires a close relationship of ends and means. While "necessity" under (b) also requires a genuine relationship between ends and means, this relationship is just *one part* of the overall "necessity" test. This makes the "necessity" test under (b) distinct from (g) despite the common element of a close and genuine relationship between means and ends. Since these tests require a Member to demonstrate different things, it follows that they should not be collapsed into a single "rational and reasonable" test that would eliminate this distinction.[6]

If a panel were to decide to collapse the different tests under Article XX, doing so would not only mark a significant departure from prior panel and Appellate Body findings, but would effectively undermine the specific language Members chose to include in the text of Article XX. If a Member wishes to avail itself of multiple paragraphs under Article XX to defend its measures, *then it is currently able to do so.* That Member must demonstrate that the required elements under each paragraph have individually been met. The cross-cutting nature of a measure does not change this.

Simply put, the tests that have been developed for each paragraph under Article XX are distinct, are based on the different language used in each paragraph, and require that different elements be proven. Canada submits that there is no cogent reason for a panel to depart from these previous decisions.

[4] Appellate Body Report, *US – Gasoline*, p. 18.

[5] Ibid., p. 16.

[6] See FN 147 in *Korea – Various Measures on Beef*, where the Appellate Body made this comment: "We recall that we have twice interpreted Article XX(g), which requires a measure "*relating* to the conservation of exhaustible natural resources" (emphasis added). ***This requirement is more flexible textually than the "necessity" requirement found in Article XX(d).*** We note that, under the more flexible "relating to" standard of Article XX(g), we accepted in *US – Gasoline* a measure because it presented a "*substantial* relationship", (emphasis added) i.e., a close and genuine relationship of ends and means, with the conservation of clean air. In *US – Shrimp* we accepted a measure because it was "reasonably related" to the protection and conservation of sea turtles (bolded emphasis added; original footnotes omitted).

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INTER-STATE ARBITRATION

State-to-State Proceedings — Role for Legally Binding Instrument — Compromis

In 2021, the Legal Bureau was asked to advise as to whether state-to-state arbitration on non-commercial issues habitually proceeds on the basis of a legally binding instrument. The Legal Bureau advised as follows:

Summary Response

State-to-State arbitration on non-commercial issues habitually proceeds on the basis of a legally binding instrument. The common term for an instrument relating to the arbitration of a particular dispute is "*compromis*". Secondary literature describes [a] *compromis* as a specialized treaty, and International Court of Justice (ICJ) decisions are consistent with this idea, although there does not appear to be a case that specifically addresses whether a non-binding instrument (a memorandum of understanding or "MOU") or other non-treaty-instrument could constitute a *compromis*. In the context of this research, out of the arbitration cases and *compromis* examined, examples of treaties serving as *compromis* were found, while no example of a non-binding instrument serving as a *compromis* was found. It is likely a treaty must set out at least some of the modalities of the arbitration, even if it could potentially be supplemented by a non-treaty instrument setting out additional technical details (such as remuneration, for instance).

Discussion

1. Compromissory Clauses and *Compromis*

An instrument regarding the arbitration of a particular dispute is often referred to as a "special agreement" or a "*compromis*", which is treated in legal texts and ICJ decisions as a specialized international agreement or treaty.

Anthony Aust[1] states:

> Since arbitration is a consensual process, the parties must first agree that the dispute will be taken to arbitration. This can be done by the following methods:
>
> (1) A treaty under which the parties agree to submit future disputes (not just about treaties) to arbitration. …
> (2) A clause in a treaty (known as a "compromissory clause") under which the parties agree to submit all or part of their future disputes regarding the interpretation or application of the treaty to arbitration. In the past such clauses were usually drawn in general terms, and left most of the important details to be worked out only when one of the parties had invoked the

[1] *Modern Treaty Law and Practice*, 3rd ed (Cambridge: Cambridge University Press, 2013) at 311–12.

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clause. Many such clauses are to be found in treaties still in force. It is better, however, to put into the clause as much detail as possible. …

(3) A *compromis*. If there is no existing agreement, or if it does not contain enough detail, it will be necessary for the parties to conclude a treaty called a *compromis* (sometimes termed in English "special agreement", even though the more elegant term, in English, is *compromis*, never "compromise"). The *compromis* sets out all the details of the establishment and procedure of the arbitral tribunal.

Hugh Thirlway[2] likewise indicates that a *compromis* for the purposes of referring a dispute to an arbitral or judicial body is an international agreement (a treaty). He states:

1. In present-day usage, the term *compromis*, originally a French word, refers to an agreement for the immediate reference of a specific dispute to settlement by a judicial or arbitral body […]

5. Compromissory clauses however themselves fall into two classes. Particularly when the dispute settlement body chosen is the ICJ, it is possible to make them self-executing, as it were, by providing that any dispute that arises within the category contemplated may be brought before the ICJ unilaterally by either party (possibly with provision for prior exhaustion of negotiations). Other clauses amount to no more than a *pactum de contrahendo*: … they select the dispute settlement body, but require the parties to reach agreement on the modalities of its seising, by the conclusion of a *compromis* (in the narrower sense) or otherwise. …

6. A *compromis* is itself a treaty and the normal rules of treaty law apply to its conclusion, its validity and interpretation, and its execution. … Where it provides for reference of the dispute to a standing body, and in particular the ICJ, it may be in a somewhat simplified form, sometimes to such an extent that one party may question whether the instrument was intended to function as a *compromis* at all. For instance in the case *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v Bahrain)*, the minutes of a tripartite meeting were held to constitute an imperfect commitment to judicial settlement of a dispute between two of the three States that had signed them, and binding on them. It has even been argued that a joint press communiqué issued by two heads of State, referring to settlement of a dispute by the ICJ, represented a commitment to judicial settlement and thus a form of *compromis* (*Aegean Sea Continental Shelf [Greece v Turkey]*, [1978] ICJ Rep 3; *Frontier Dispute Case [Burkina Faso/Republic of Mali]*). It is conceivable, though highly unlikely, that a purely oral agreement might be held to constitute a *compromis* for

[2] "*Compromis*" in *Max Planck Encyclopedias of International Law* (2006)….

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purposes of jurisdiction, though it would be unlikely to contain any other material provisions.

The last sentence quoted in paragraph 5 above supports the position that a non-self-executing compromissory clause requires the conclusion of an international agreement on the modalities of arbitration, because Thirlway characterizes such compromissory clauses as a "*pactum de contrahendo*"/"*pactum de negotiando*," which "is a binding legal instrument under international law by which contracting parties assume legal obligations to conclude or negotiate future agreements" (emphasis added).[3]

Paragraph 6 above cites examples of unusual instruments that could potentially constitute *compromis*, but it is clear that these would still need to constitute international agreements. In the *Qatar v Bahrain* case cited above, the minutes in question were held to be one of several "international agreements creating rights and obligations for the Parties."[4] Likewise, in the *Greece v Turkey* case cited above, while the Court did not ultimately find that the joint communiqué constituted a commitment to accept the submission of the dispute to the Court,[5] it observed that it "knows of no rule of international law which might preclude a joint communiqué from constituting an international agreement to submit a dispute to arbitration or judicial settlement."[6] In the *Burkina Faso/Republic of Mali* case cited above, Burkina Faso argued that the communiqué "has to be treated as a genuine international agreement binding upon the States parties."[7] The Court in that case did not appear to address this contention directly.[8]

Normally, therefore, a *compromis* takes the form of a treaty.

2. Examples of *Compromis*

Just as the literature and cases cited above support the conclusion that a *compromis* must be an international agreement (a binding instrument), one can refer to a number of examples of arbitration *compromis* taking the form of treaties. By contrast, while the research for this memorandum was undertaken, out of the arbitration

[3] Hisashi Owada, "Pactum de contrahendo, pactum de negotiando" in *Max Planck Encyclopedias of International Law* (2008). …

[4] *Case Concerning Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v Bahrain)*, Jurisdiction and Admissibility Judgment of 1 July 1994, [1994] ICJ Rep 112 at para 41.

[5] *Aegean Sea Continental Shelf Case (Greece v Turkey)*, Judgment of 19 December 1978, [1978] ICJ Rep 3 at para 107.

[6] *Ibid* at para 96.

[7] *Case Concerning the Frontier Dispute (Burkina Faso/Republic of Mali)*, Judgment of 22 December 1986, [1986] ICJ Rep 554 at para 38.

[8] The communiqué's relevance was as one of several pieces of evidence of supposed acquiescence by Mali to the alleged binding nature of a mediation commission's decision, and the Court focused on other elements of Burkina Faso's argument when concluding that no such acquiescence occurred.

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cases and *compromis* encountered, no example of an MOU serving as a *compromis* was found.

Examples of *compromis* that are treaties include an arbitration agreement between the Government of the State of Eritrea and the Government of the Republic of Yemen, signed at Paris on 3 October 1996,[9] the *Agreement between the Kingdom of Belgium and the Kingdom of the Netherlands on the Arbitration relating to the Reactivation and Modernization of the Iron Rhine*, done at The Hague on 22 and 23 July 2003 (the "*Iron Rhine Compromis*"),[10] the *Compromis of Arbitration between the Government of the United States of America and the Government of the French Republic*, done at Washington on 11 July 1978,[11] and the *Agreement establishing a Court of Arbitration for the Purpose of carrying out the Delimitation of Maritime Areas between Canada and France*, done at Toronto and Paris on 30 March 1989.[12]

These four *compromis* are treaties, as demonstrated by their drafting and final provisions. They were not based on compromissory clauses of underlying treaties, but there is no reason to assume that a *compromis* based on a compromissory clause

[9] The official title is not clear. The *compromis* could not be located in the UN Treaty Collection but may be found at https://jusmundi.com/fr/document/pdf/other/en-sovereignty-and-maritime-delimitation-in-the-red-sea-eritrea-yemen-the-arbitration-agreement-thursday-3rd-october-1996. The dispute did not relate to treaty law, as Eritrea was not a Party to the *United Nations Convention on the Law of the Sea*, done at Montego Bay on 10 December 1982. See *Eritrea/Yemen – Sovereignty and Maritime Delimitation in the Red Sea* (1999) (Permanent Court of Arbitration) (PCA).

[10] This *compromis* is published in 2332 UNTS 481. It enabled the *Iron Rhine Arbitration (Belgium/Netherlands)* (2005) (PCA). In one of the underlying treaties in the dispute, the *Treaty between Belgium and the Netherlands relative to the Separation of Their Respective Territories*, done at London on 19 April 1839 (https://wetten.overheid.nl/BWBV0006129/1839-06-08#Verdrag_1_Verdragtekst), one does not find any dispute settlement provisions. The text of the other underlying treaty, the *Convention between Belgium and the Netherlands relative to the Payment of the Belgian Debt, the Abolition of the Surtax on Netherlands Spirits, and the Passing of a Railway Line from Antwerp to Germany across Limburg*, done at Brussels on 13 January 1873, could not be accessed and consulted for the purposes of this memorandum.

[11] Published in 30 UST 1960 (as TIAS 9274). The Parties appear to have entered into this *compromis* rather than simply following the dispute settlement provision of the underlying treaty, the *Air Services Agreement between the United States of America and France*, done at Paris on 27 March 1946, as amended. For example, the Parties named the three arbitrators in the *compromis*, but Article X of the air services agreement set out a procedure for each Party to name an arbitrator and the third one to be agreed by the two other arbitrators. The arbitration case is *Case Concerning the Air Service Agreement of 27 March 1946 between the United States of America and France* (1978) (Arbitrators: Willem Riphagen, Thomas Ehrlich, Paul Reuter).

[12] Can TS 1989 No 34. It appears that the Parties entered into this *compromis* rather than simply following the compromissory clause contained in the underlying treaty. Article 10 of the *Agreement between Canada and France on Their Mutual Fishing Relations*, done at Ottawa on 27 March 1972 (Can TS 1979 No 37), set out a process for establishing a Commission that would sit as an arbitral tribunal. The arbitration case was *Delimitation of Maritime Areas between Canada and France* (1992) (Arbitrators: Eduardo Jiménez de Aréchaga, Oscar Schachter, Gaetano Arangio-Ruiz, Prosper Weil, Allan E Gotlieb).

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would not take the form of a treaty, given the treatment of *compromis* in the legal texts and cases cited above.

3. Other instruments

a) Agreement vs Joint Decision

In relation to some treaties, one could envision something other than an agreement or an MOU, such as a (binding) joint decision made under the treaty, as the main instrument setting out the modalities of arbitration. For example, rather than a *compromis*, a joint decision setting out rules of procedure[13] was made by the Parties to the *Ireland v United Kingdom (OSPAR Arbitration)* (2003) (PCA) case, a dispute relating to the *Convention for the Protection of the Marine Environment of the North-East Atlantic*, done at Paris on 22 September 1992 (the "*OSPAR Convention*"). The *OSPAR Convention* has a fulsome compromissory clause in its Article 32, and Article 32(2) specifies that "Unless the parties to the dispute decide otherwise, the procedure of the arbitration referred to in paragraph 1 of this Article shall be in accordance with paragraphs 3 to 10 of this Article" (emphasis added).

b) Decisions of the ICJ on Compromissory Clauses

The ICJ has interpreted a number of treaty compromissory clauses. However, none of these cases involved a written instrument regarding arbitration that could have arguably constituted an agreement or even a joint decision or a non-binding instrument, and the issue in these cases did not pertain to the nature of the *compromis* as a treaty, MOU or joint decision. Rather, the issue was whether the ICJ had jurisdiction, which required a failure by the Parties to secure an arbitration agreement, since these compromissory clauses stipulate that a Party can only refer the case to the ICJ if the Parties "are unable to agree on the organization of the arbitration."

The Court in these cases did not indicate what form or substance an "agreement" would have needed to permit organization of an arbitral tribunal. While the Court did not simply look for the absence of a treaty to prove that the Parties were "unable to agree" within six months, in our view, this does not suggest that something other than a treaty could potentially have been sufficient to enable the convening of an arbitral tribunal and, in turn, prevent the ICJ from taking jurisdiction. The Court could not simply point to the absence of a treaty, because it had to find an *inability* "to agree", not just a lack of an agreement; thus, it had to examine whether one Party had attempted to propose arbitration and whether the other Party had ignored or rebuffed that attempt or the negotiations regarding the arbitration modalities had otherwise failed.

For example, in *Questions relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)*,[14] a case under the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, done at New York on 10 December 1984 (the "*CAT*"), the Court held that:

[13] *Rules of Procedure for the Arbitral Tribunal Constituted under the OSPAR Convention pursuant to the Request of Ireland Dated 15th June 2001* (https://pcacases.com/web/sendAttach/608).

[14] Judgment of 20 July 2012, [2012] ICJ Rep 422 at para 61.

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> 61. Following its request for arbitration, Belgium did not make any detailed proposal for determining the issues to be submitted to arbitration and the organization of the arbitration proceedings. In the Court's view, however, this does not mean that the condition that "the Parties are unable to agree on the organization of the arbitration" has not been fulfilled. A State may defer proposals concerning these aspects to the time when a positive response is given in principle to its request to settle the dispute by arbitration. As the Court said with regard to a similar treaty provision:
>
> "the lack of agreement between the parties as to the organization of an arbitration cannot be presumed. The existence of such disagreement can follow only from a proposal for arbitration by the applicant, to which the respondent has made no answer or which it has expressed its intention not to accept." (*Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda)*, Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2006, p. 41, para. 92)

The present case is one in which the inability of the Parties to agree on the organization of the arbitration results from the absence of any response on the part of the State to which the request for arbitration was addressed.

The *Lockerbie* cases against the United States (US)[15] and the United Kingdom (UK)[16] dealt with another compromissory clause that is virtually identical to Article 30(1) of the *CAT*, Article 14(1) of the *Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation*, done at Montreal on 23 September 1971. The Court found that the US and the UK did not respond to the arbitration proposal contained in Libya's letter and clearly expressed their "intention not to accept arbitration — in whatever form — when presenting and strongly supporting resolution 731 (1992) adopted by the Security Council three days later, on 21 January 1992," thus absolving "Libya from any obligation under Article 14, paragraph 1, of the Convention to observe a six-month period starting from the request for arbitration, before seising the Court."[17]

The ICJ in another case, *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russian Federation)*,[18] applied the similar Article 24(1) of the *International Convention for the Suppression of the Financing of*

[15] *Case Concerning Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v United States of America)*, Preliminary Objections Judgment of 27 February 1998, [1998] ICJ Rep 115 ("*US Lockerbie Case*").

[16] *Case Concerning Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v United Kingdom)*, Preliminary Objections Judgment of 27 February 1998, [1998] ICJ Rep 9 ("*UK Lockerbie Case*").

[17] *US Lockerbie Case* [*supra* note 15] at para 20; *UK Lockerbie Case* [*supra* note 16] at para 21.

[18] Preliminary Objections Judgment of 8 November 2019, [2019] ICJ Rep 558.

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Terrorism, done at New York on 9 December 1999, and found that negotiations concerning the organization of the arbitration were held for six months but "the Parties were unable to agree on the organization of the arbitration during the requisite period," which enabled Ukraine to refer the dispute to the ICJ.[19]

By contrast, the Court in the *Democratic Republic of the Congo v Rwanda* case referenced above held that it did not have jurisdiction to hear the dispute, as, among other reasons, it found that "the DRC also failed to prove any attempts on its part to initiate arbitration proceedings with Rwanda."[20] This case addressed Article 29(1) of the *Convention on the Elimination of All Forms of Discrimination against Women*, done at New York on 18 December 1979, which is also virtually identical to the compromissory clauses referenced above.

Conclusion

On the whole, it would be consistent with treaty law and practice to require a *compromis* that takes the form of an international agreement to cover arbitration between States. As discussed above, academics refer to *compromis* as treaties; the Court in a number of ICJ decisions has assumed that only an international agreement could be a *compromis*; and only treaties were found as examples of *compromis* for the purposes of researching this memorandum. It is desirable to ensure that the *compromis* takes the form of a treaty in order to dispel any doubts as to the binding nature of a decision given by the arbitral tribunal organized under that *compromis*. While one could imagine an argument that an MOU could serve as a *compromis* and have legal effect as evidence of acquiescence[21] or subsequent practice,[22] the

[19] *Ibid* at para 76.

[20] *Case Concerning Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v Rwanda)*, Jurisdiction of the Court and Admissibility of the Application Judgment of 3 February 2006, [2006] ICJ Rep 6 at para 92.

[21] For an argument that a State acquiesced to the binding nature of the arbitral tribunal's decision, the MOU would probably need to be accompanied by additional evidence of acquiescence. See *Burkina Faso/Republic of Mali*, *supra*, for an example of a (failed) argument that a State acquiesced to the binding nature of a decision. See also Karin Oellers-Frahm, "Judicial and Arbitral Decisions, Validity and Nullity" in *Max Planck Encyclopedia of International Law* (2019) … at para 13: "Traditionally, the invalidity of the instrument conferring jurisdiction on the court or tribunal has been counted among the grounds for nullity. This seems no longer acceptable because if it is advanced by a party and accepted by the tribunal in due time, that is, before the beginning of the proceedings, there will be no award, and *if it is advanced after the award has been rendered, this will be regarded as belated and cannot affect the binding character of the compromis*. …" (emphasis added)

[22] The tribunal in *United States-United Kingdom Arbitration Concerning Heathrow Airport User Charges (United States-United Kingdom)* (1992) (Arbitrators: Isi Foighel, Fred F Fielding, Jeremy Lever) held at para 6.7 that a particular MOU (which was not an MOU on dispute settlement) "constitutes consensual subsequent practice of the Parties and, certainly as such, is available to the Tribunal as an aid to the interpretation of Bermuda 2 and, in particular, to clarify the meaning to be attributed to expressions used in the Treaty and to resolve any ambiguities."

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outcome of such an argument would be uncertain. Indeed, it would be legally impossible for a non-binding instrument to produce binding results.

INVESTOR-STATE DISPUTE SETTLEMENT

North American Free Trade Agreement (NAFTA) — *Article 1116(1)* — *Burden of Proof*

In its Rejoinder Memorial on Jurisdiction in *Tennant Energy LLC v Government of Canada*, dated 26 May 2021, Canada made the following arguments on the issue of the burden of proof in public international law (original headings removed to facilitate reading; full submission available online: <pcacases.com/web/sendAttach/29023>):

34. … Simply producing evidence does not automatically satisfy the Claimant's burden to establish jurisdiction under Article 1116(1).[1] The Claimant must also meet the applicable standard of proof.[2] As Professor Bin Cheng stated:

> [A] party having the burden of proof must not only bring evidence in support of his allegations, but must also convince the Tribunal of their truth, lest they be disregarded for want, or insufficiency of proof.[3]

35. Tribunals have offered four points of guidance on the standard of proof that are relevant in this case. First, cogent evidence is required.[4] Tribunals have denied claims for failure to provide such evidence.[5] For example, the *Mesa* tribunal rejected many of the claimant's allegations due to its failure to marshal cogent evidence that

[1] *Ampal-American Israel Corporation and Others v Arab Republic of Egypt* (ICSID Case No ARB/12/11) Decision on Jurisdiction, 1 February 2016 ("*Ampal – Decision on Jurisdiction*"), ¶ 219. *See also* Frederic Sourgens, Kabir Duggal, Ian A Laird, "Evidence in International Investment Arbitration", (2018) [Excerpt] ("Sourgens *et al.*"), ¶ 4.04. Julien Fouret, Gloria Alvarez, Remy Gerbay, "The ICSID Convention, Regulations and Rules — A Practical Commentary" (Edward Elgar Publishing, 2019) [Excerpt], fn. 444. The standard of proof is distinct from the burden of proof, which denotes the obligation on a party to prove (or disprove) a fact in issue to the requisite standard of proof. *See* Canada's Counter-Memorial on Jurisdiction, ¶ 75.

[2] The most common standard of proof in investment arbitration is the "balance of probabilities" or a "preponderance of evidence". *See* Sourgens *et al.*, ¶¶ 5.09–5.16.

[3] Bin Cheng, "General Principles of Law as Applied by International Courts and Tribunals", (1953) [Excerpt], p. 329.

[4] For example, in assessing a claim for legitimate expectations, the *Metalpar* tribunal looked for concrete evidence to substantiate the claim. The tribunal ultimately rejected the claim because there was no bid, license, permit or contract of any kind arising at the material time between the State and the claimant. *See Metalpar S.A. and Buen Aire S.A. v Argentine Republic* (ICSID Case No ARB/03/5) Award, 6 June 2008 ("*Metalpar – Award*"), ¶ 186.

[5] *Metalpar – Award*, ¶ 186; *Mesa – Award*, ¶ 329; fn. 76.

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it was seeking to make an investment through the Ontario FIT Program before the alleged breach occurred.[6]

36. Second, in the case of alleged ownership of an investment, such evidence should take the form of reliable, contemporaneous documentary evidence.[7] Materials drafted in contemplation of arbitration do not offer reliable evidence of ownership.[8] For example, the *Gallo* tribunal declined jurisdiction as the claimant did not file reliable, contemporaneous documentary evidence proving his ownership of shares when the alleged breach occurred.[9] In *Ampal*, the claimants argued that they beneficially owned the investment through an alleged trust. The tribunal found that the claimants did not meet their burden, as they filed no contemporaneous evidence and relied on documents prepared years after the breach and said to apply retroactively.[10] …

37. Third, contemporaneous documentary evidence that is inconsistent with a claimant's asserted ownership of an investment may disprove that assertion. For example, in *Europe Cement*, the claimant argued it beneficially owned shares when the alleged breach occurred, but it filed contemporaneous financial statements and corporate documents that gave no indication of the claimant's purported ownership. To the tribunal, "[t]he Claimant's attempt to explain this as an 'oversight' strains credulity. It all points to the inference that no share transfer took place."[11] … In declining jurisdiction, the tribunal also expressed incredulity because the

[6] On Mesa's assertions that it was seeking to make its investments before the alleged breach occurred, the tribunal stated that: "[n]o cogent evidence has been submitted by the Claimant for the North Bruce and Summerhill projects". *See Mesa – Award*, ¶ 329. […]

[7] *Gallo – Award*, ¶¶ 216, 292-296; *Ampal – Decision on Jurisdiction*, ¶¶ 223–226. Depending on the circumstances, evidence of ownership could be established through one or several documents such as a trust deed, trust reporting materials, tax filings, corporate records, financial statements, shareholder ledgers or resolutions, contracts, share certificates, cheques, dividend statements, or bank records. See e.g. *Europe Cement Investment & Trade SA v Republic of Turkey* (ICSID Case No ARB(AF)/07/2) Award, 13 August 2009 ("*Europe Cement – Award*"), ¶¶ 156–157; *Invesmart B.V. v Czech Republic* (UNCITRAL), Award, 26 June 2009, ¶ 251.

[8] *Gallo – Award*, ¶¶ 174, 216–219, 286–290. *See also Europe Cement – Award*, ¶ 153: "the share transfer agreements were in fact executed in 2005 and back-dated to 20 May 2003 in order to meet the jurisdictional requirements of Europe Cement's claim."

[9] *Gallo – Award*, ¶¶ 289, 290, 297, 312, 325–326. The tribunal found: "there is a total absence of written circumstantial evidence. The record lacks any document of any type proving that Mr. Gallo became the shareholder of the Enterprise before the enactment of the AMLA". *See* ¶ 218. Not only did the claimant fail to provide contemporaneous documents in *Gallo*, but the tribunal found that the documents provided were also backdated and signed after the alleged breach in an attempt to establish jurisdiction after the fact. *See Gallo – Award*, ¶¶ 218–219, 297.

[10] *Ampal – Decision on Jurisdiction*, ¶¶ 223–226.

[11] *Europe Cement – Award*, ¶ 158 (emphasis added). The tribunal held: "[t]hat the directors of Europe Cement simply overlooked this when signing the financial statements seems highly implausible." *See* ¶ 157.

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claimant's alleged share purchase was a substantial transaction, yet no contemporaneous evidence proved it occurred.[12]

38. Fourth, relying on a witness with a personal interest in the arbitration is not sufficient, on its own, to prove ownership of an investment.[13] Reliable, contemporaneous documentary evidence is needed to corroborate such a witness's factual assertions. Moreover, while a tribunal has discretion over the weight of evidence,[14] hearsay in a self-serving witness statement that lacks independent corroboration warrants no weight.[15] … The Claimant can only meet the standard of proof with reliable, contemporaneous documentary evidence of its alleged ownership or control of the investment at the relevant time.

NAFTA — *Dual Nationals — Determination of Predominant Nationality*

In its non-disputing Party submission in *Alicia Grace et al v United Mexican States*, dated 24 August 2021, Canada argued that, when the underlying investment agreement is silent on the issue, the standing of a dual-national claimant who possesses the nationality of the Respondent State may be determined through the concept of predominant nationality under principles of customary international law (full submission available online: <icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C7653/DS16812_En.pdf>):

7. The situation where an investor of a Party possesses, at the same time, the nationality of a *NAFTA* Party (home state) and of the respondent/host State ("dual nationals") is not expressly addressed in the *NAFTA*. In the absence of guidance in the *NAFTA*, there can be no presumption that *NAFTA* establishes a *lex specialis* for claims by dual nationals or that such claims are necessarily permitted. It is well recognized that "[a]n important principle of international law should not be held to have been tacitly dispensed with by international agreement, in the absence of words making clear an intention to do so."[1] The only intention made clear under Articles 1116 and 1117 is that an investor may not bring a claim against its own Party.

[12] *Europe Cement – Award*, ¶¶ 140–143, 156, 163–167, 170.

[13] See e.g., Canada's Counter-Memorial on Jurisdiction, ¶ 76; citing *Gallo – Award*, ¶ 289, citing: *Hussein Nuaman Soufraki v United Arab Emirates* (ICSID Case No ARB/02/7) Award, 7 July 2004, ¶ 78.

[14] Procedural Order No 1, ¶ 8.1; 1976 UNCITRAL Arbitration Rules, Article 26.6; IBA Rules, Article 9.1.

[15] *EDF (Services) Limited v Romania* (ICSID Case No ARB/05/13) Award, 8 October 2009, ¶ 224; *Helnan International Hotels A/S v Arab Republic of Egypt* (ICSID Case No ARB/05/19) Award, 3 July 2008, ¶ 157; Canada's Counter-Memorial on Jurisdiction, ¶ 79. See e.g., Canada's Counter-Memorial on Jurisdiction, ¶¶ 78–79.

[1] *Case Concerning Elettronica Sicula SpA (ELSI) (United States of America v Italy)*, I.C.J. Reports 1989, Judgement, 20 July 1989, p. 42, ¶ 50 ("Yet the Chamber finds itself unable to accept

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8. *NAFTA* Article 1131 requires that the Tribunal decide issues in dispute "in accordance with the *NAFTA* and "applicable rules of international law," which include principles of customary international law.[2] In the absence of specific language addressing claims by dual nationals, *NAFTA* tribunals as well as other investment tribunals have therefore considered whether certain claims by dual nationals are allowed by reference to the concept of predominant nationality under customary international law.[3] Under the rule, a dual national's standing is determined on the basis of their *dominant and effective nationality*,[4] i.e. a claimant is prohibited from making a claim against their state of dominant and effective nationality.

9. Therefore, Canada agrees with the United States and Mexico, that

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that an important principle of customary international law should be held to have been tacitly dispensed with, in the absence of any words making clear an intention to do so"); *Loewen – Final Award*, ¶¶ 160, 162 ("It would be strange indeed if *sub silentio* the international rule were to be swept away").

[2] This provision may be used for "gap-filling" where the treaty might not specifically address an issue or where the treaty is otherwise silent, including on the issue of dual nationality. See *Methanex Corporation v United States of America* (UNCITRAL) Final Award, 3 August 2005, Part IV, Chapter B, ¶ 29; *Corn Products International, Inc v United Mexican States* (ICSID Case No ARB (AF)/04/1) Decision on Responsibility, 15 January 2008, ¶ 76; *Archer Daniels Midland Company et al v United Mexican States* (ICSID Case No ARB(AF)/04/5) Award, 21 November 2007 ("*Archer Daniels – Award*"), ¶ 195.

[3] Legal commentators have noted that a "general rule" has emerged in investor-state dispute settlement, whereby tribunals apply the dominant and effective nationality rule when the treaty is silent on the issue standing of dual national claimants. See Campbell McLachlan, Laurence Shore and Matthew Weiniger, "International Investment Arbitration: Substantive Principles (2nd ed)" (Kluwer Law International, May 2017) ("*McLachlan, Shore & Weiniger*") §§ 5.92, 5.89–5.96. See also Noah D. Rubins et al, "Investor-State Arbitration" (OUP: 2008), p. 304. See also Zachary Douglas, "The International Law of Investment Claims" (Cambridge University Press, January 2010), p. 321. Recent cases that have strayed from this general rule, cited by the Claimant as "governing international law" have both been overturned in appeal and are nevertheless interpreting specific language to a text that is not relevant to the NAFTA. Claimant's Reply Memorial, ⁋ 599. *Serafin Garcia Armas et al v Republic of Venezuela* (UNCITRAL) Decision on Jurisdiction, 15 December 2014; *Serafin Garcia Armas et al v Republic of Venezuela*, Cour d'appel de Paris, Decision, 3 June 2020.

[4] *Nottebohm Case* (*second phase*), I.C.J. Reports 1955, Judgement of 6 April 1955 ("*Nottebohm Case*"), pp 23–24. *Mergé Case – Decision No. 55*, UN Italian-United States Conciliation Commission, Decision, 10 June 1955, ¶¶ 243–246. *Iran-United States Claims Tribunal*, Case No A/18-FT, 5 Iran-U.S. CL. Tribunal Rep. 251 (1984-1), ¶ 510. Canada's position is that the dominant and effective nationality rule is only with respect to determining an individual's *citizenship* and does not apply in respect of any other immigration status. See *Marvin Roy Feldman Karpa v United Mexican State* (ICSID Case No ARB(AF)/99/1) Interim Decision on Preliminary Jurisdictional Issues, 6 December 2000, ¶¶ 30, 31–32] *Manuel Garcia Armas et al v Republic of Venezuela* (UNCITRAL) Award, 13 December 2019, ¶ 741; *Enrique Heemsen and Jorge Heemsen v Venezuela* (PCA Case No 2017) Decision on Jurisdiction, 29 October 2019, ¶¶ 439–440.

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> the rule set forth in *United States ex rel. Mergé v. Italian Republic*, and adopted by *Iran v. United States, Case No. A/18*, provides a rule of decision that governs [*NAFTA*] Chapter Eleven tribunals by virtue of Article 1131(1). … This rule in effect states that the principle of "non-responsibility" must yield to the principle of "dominant and effective" citizenship which the claim is brought by or on behalf of a dual citizen whose "dominant and effective" citizenship is not that of the defending State. In other words, a State is not responsible for a claim asserted against it by one of its own citizens, *unless the claimant is a dual citizen whose dominant and effective citizenship is that of the other State*." (Emphasis added).[5]

10. Thus, when a potential *NAFTA* claimant with the nationality of one contracting state also has the nationality of the host /respondent State, the tribunal must determine the State to which the claimant is most closely attached by "his tradition, his establishment, his interests, his activities, his family ties, his intentions for the near future."[6] The claimant does not have standing to bring a *NAFTA* claim if their dominant and effective nationality is that of the respondent State.

[5] *Marvin Roy Feldman Karpa v United Mexican States* (ICSID Case No ARB(AF)/99/1), United States 1128 Submission, 6 October 2000, ¶ 8; Cited with approval by Mexico in Sastre et al, Memorial on Jurisdiction, ¶ 76.

[6] See *Nottebohm Case*, p. 24. The International Court of Justice ultimately determined that there was an absence of bond of attachment between Liechtenstein and Nottebohm. See *Nottebohm Case*, p. 25. As noted by the International Court of Justice in the *Nottehohm* decision, the purpose of the inquiry is to determine whether the home state is sufficiently close, so that the nationality conferred upon him, compared to any other nationality, was *real and effective*, at p. 24.

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