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

At Global Affairs Canada in 2017

Aux Affaires mondiales Canada en 2017

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ENVIRONMENTAL LAW

Climate Change — Paris Agreement — Article 15 — Implementation and Compliance — Committee Mechanism — Modalities and Procedures

On 30 March 2017, in advance of inter-sessional climate change negotiations in Bonn, Germany, in May 2017 to further the development of the *Paris Agreement* work program, the Government of Canada submitted its preliminary views on the modalities and procedures for the effective operation of the mechanism to facilitate implementation and promote compliance set out in Article 15 of the *Paris Agreement*, as follows:

Pursuant to an invitation by the Ad Hoc Working Group on the Paris Agreement (APA) at COP22/CMA1 in November 2016,[1] Canada is pleased to submit its views on the following three elements as outlined by the APA in its draft conclusions:

a) Specify the modalities and procedures required for the effective operation of the committee referred to in Article 15, paragraph 2, of the *Paris Agreement*;

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[1] UN Doc FCCC/APA/2016/L.4, para 18.

Vol. 55 [2017], doi:10.1017/cyl.2018.8

b) Elaborate elements that could be addressed through such modalities and procedures; and
c) Share their views on how to take the work further under this agenda item in order to ensure that the APA can fulfil its mandate in accordance with decision 1/CP.21, paragraph 103.

Article 15.1 of the *Paris Agreement* establishes a mechanism to facilitate implementation of and promote compliance with the provisions of the *Paris Agreement*. Article 15.2 defines the mechanism as a committee that is *expert based and facilitative in nature* and which is to *operate in a manner that is transparent, non-adversarial and non-punitive*. Article 15.2 also directs the committee to pay particular attention to the respective national capabilities and circumstances of Parties, and Article 15.3 requires the committee to report annually to the CMA [Conference of the Parties Serving as the Meeting of the Parties to the Paris Agreement].

Decision 1/CP.21 par[agraph] 102 further establishes the composition of the committee as 12 members with competence in relevant scientific, technical, socio-economic or legal fields to be chosen on the basis of the five UN regional groups with one member each from the Small Island Developing States (SIDS) and Least Developed Countries (LDCs) while taking into account the goal of gender balance.

a) Modalities and procedures required for the effective operation of the committee referred to in Article 15, paragraph 2, of the *Paris Agreement*

Nature and Structure

As set out above, many aspects of the committee have already been determined in Article 15 and Decision 1/CP.21. That being the case, it is clear that Article 15.1 establishes a single committee that is applicable to all Parties to facilitate implementation and promote compliance with the provisions of the *Paris Agreement*. While the modalities and procedures of the committee apply equally to all Parties, the contextual considerations and any potential outcomes of the committee would pay attention to the respective national capabilities and circumstances of Parties.

In order to reflect the requirements that the committee be facilitative in nature and operate in a manner that is non-adversarial and non-punitive, facilitating implementation and promoting compliance should not be considered as mutually exclusive functions; rather it is the singular role of the committee to work with Parties that need assistance in implementing and complying with the appropriate obligations in the Agreement. While potential outcomes may be viewed by Parties as being either more implementation or compliance based along a conceptual continuum, the overall purpose of the committee is to work with Parties as necessary to enhance implementation of and compliance with the appropriate obligations in the Agreement.

Further issues for discussion in this area include modalities and procedures relating to ensuring transparency of the committee's work and proceedings, election of committee members, information gathering, conduct of proceedings and decision-making, as well as facilitating the inclusive participation of the Party concerned throughout the process.

Triggers

There are several potentially workable options for how to initiate the work of the committee. One such trigger is self-referral where a Party requests the committee to assess an issue of implementation and compliance and work with the Party to remedy the situation. Another potential trigger could be the committee itself initiating a review. This could be done on a periodic, rolling basis for every Party, and/or by a decision of the committee in an individual circumstance. Another option would be referral by the Secretariat. A primary concern with any trigger other than self-referral is to ensure the continuing credibility of the committee; maintaining its effectiveness while protecting it from undue influence and politicization. As such, the procedures related to triggers need to ensure appropriate safeguards to ensure such decisions are made impartially and are based on relevant and material questions of implementation and compliance.

Outcomes

As set out above, the outcomes are inherently linked to the purpose of the committee, namely to facilitate implementation of and promote compliance with the appropriate provisions of the Agreement. Keeping this in mind, and if helpful to conceptualize, the outcomes could be seen on a continuum as being more facilitative or more compliance-based. An example of a more facilitative outcome on the continuum could be providing advice and working with a Party to access capacity-building support, while an example of a more compliance-based outcome could be recommending a statement of concern to the CMA.

The committee's decision to apply a particular outcome along the conceptual implementation-compliance continuum could be based on contextual factors in a given case such as the respective capabilities and circumstances of the Party, how long the issue has persisted, the willingness of the Party to work with the committee and implement its advice, and the continuing efforts by the Party to remedy the situation.

b) Elements that could be addressed through such modalities and procedures

In light of the robust transparency framework in Article 13 of the Agreement, as well as the periodic global stocktake in Article 14, the Article 15 mechanism can best serve the Agreement by facilitating implementation and promoting compliance with

https://doi.org/10.1017/cyl.2018.8 Published online by Cambridge University Press

clear individual Party legally binding obligations. These obligations may include: the Article 4 obligations to prepare, communicate and maintain an NDC [nationally determined contribution] every 5 years and provide information necessary for clarity, transparency and understanding in accordance with decision 1/CP.21 and further CMA decisions, the Article 11.4 obligation to report on capacity-building actions if taken, and the Article 13 obligations to report specified information and participate in the technical expert review process and the facilitative multilateral consideration of progress.

In order to maximize its effectiveness, additional value and complementarity while avoiding confusion and duplication, the Article 15 mechanism must be appropriately situated within the broader context and mechanics of the *Paris Agreement*. The Agreement is exceptional as Article 13 creates a robust transparency framework for the reporting, review and facilitative multilateral consideration of progress of climate action and support. The processes under the transparency framework will in themselves yield detailed information on individual Parties' efforts to implement their obligations under the Agreement. They will also include their own procedures to facilitate improvement of a Party's reporting over time. This should be taken into account when designing the functioning of the committee as well as its areas and issues of focus.

Additionally, the global stocktake in Article 14 of the Agreement creates a collective and periodic process to review progress toward achieving the long-term goals of the Agreement. This process will comprehensively consider collective action on mitigation, adaptation and the means of implementation and support. This periodic review of collective action should also be kept in mind when considering the scope of the Article 15 mechanism.

Any discussions on potential further interaction between the Article 15 mechanism and the Article 13 transparency framework and Article 14 global stocktake must be appropriately paced with the evolving understanding and development of these distinct processes. Further discussions must seek to ensure that, if any potential interactions are identified, they are to the benefit of the objectives of the Agreement and do not unintentionally confuse, conflate and generally diminish the effectiveness of these processes.

c) Views on how to take the work further under this agenda item in order to ensure that the APA can fulfil its mandate in accordance with decision 1/CP.21, paragraph 103

In order to ensure that all necessary work is completed and forwarded to the resumed first session of the CMA in 2018, Parties will need to continue constructive discussions on this item at the intersessional meetings in Bonn in May 2017. Further submissions after these meetings may also be helpful for Parties to continue to refine their ideas on this item, and, depending on progress made during these discussions and potential further submissions, a workshop before COP23 may also prove worthwhile subject to budgetary and resource considerations.

Marine Biological Diversity — Biodiversity beyond Areas of National Jurisdiction (BBNJ) — Marine Genetic Resources — Area-based Management — Environmental Impact Assessments

In response to an invitation to submit its views to the chair of the preparatory committee established to make substantive recommendations on the elements for an international legally binding instrument on marine biological diversity beyond areas of national jurisdiction,[2] Canada provided the following views, made available to the public in early 2017:

Bordered by three oceans, Canada is a maritime nation whose economy, environment and social fabric are inextricably linked to the oceans and their resources. Canada strongly supports efforts to conserve marine ecosystems and biodiversity and improve the health and sustainable use of our oceans. As such, Canada strongly supports efforts by the Preparatory Committee to develop a governance framework that will protect and conserve marine biodiversity and ensure the sustainable use of marine resources.

Canada suggests that certain key underlying principles and approaches should guide our efforts in this process. These include:

- All elements of any agreement developed through this process should be understood within the context of, and be compatible with, the *United Nations Convention on Law of the Sea* (*UNCLOS*). This would include respecting the balance of rights and obligations, such as those of coastal States, negotiated therein and the relevant existing definitions or clauses.
- Any agreement should find effective means of meeting its goals, including through making the best use of existing organizations, institutions, and bodies with the relevant expertise by respecting their mandates and allowing them to manage their respective activities. Effective achievement of the overall objectives should include avoiding duplication of efforts, being cost effective, and not creating overly burdensome processes. A new agreement could assist with coordinating efforts, provide guidance, and facilitate cooperation and communication between the relevant organizations and bodies;
- Highlighting the precautionary, ecosystem and risk-based approaches and the use of the best available science;
- Promoting the importance of marine scientific research by: [p]reserving *UNCLOS*' intent to promote scientific exploration and research; and [e]nsuring scientific research is not stifled in any proposed regime.

Canada submits that the objectives of this agreement can largely be achieved within existing governance regimes, particularly in light of the breadth of existing regional

[2] *Development of an international legally binding instrument under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction*, GA Res 69/292, UN Doc A/RES/69/292 (2015).

https://doi.org/10.1017/cyl.2018.8 Published online by Cambridge University Press

and sectoral organizations that have been created to address many of the activities that may have impacts on biodiversity in ABNJ [areas beyond national jurisdiction]. Encouraging and facilitating regional and sectoral authorities to carry out their mandated activities effectively will serve to avoid duplication of efforts across institutions.

Marine Genetic Resources (MGRs)

Canada is supportive of efforts to manage marine genetic resources in ABNJ as a means to conserve biological diversity and encourage the sustainable use of its components.

Canada suggests that this process should consider developing a *sui generis* regime that is practical, workable, and will address the views and concerns expressed by all sides.

Canada believes that any benefit sharing regime that may arise from the use of MGRs in ABNJ should not negatively impact States' rights to conduct Marine Scientific Research consistent with the regime under *UNCLOS*. Care should be taken to avoid creating disincentives to undertaking research and development activities in the high seas which could lead to scientific research and innovations that benefit all of humankind.

Canada also believes that any benefit-sharing regime should emphasize capacity-building opportunities, such as access to scientific research vessels destined for the high seas, educational opportunities and training programs, to increase accessibility to MGR in ABNJ.

Canada suggests that a distinction should be made between the use of fish for their genetic properties, and the use of fish as a commodity. The former could be addressed in the same manner as other MGR under any new BBNJ agreement, while the latter is already effectively managed under existing regimes, such as Regional Fisheries Management Organizations (RFMOs), and should not be considered an MGR for the purposes of this new agreement.

Area-based Management Tools (ABMTs), including Marine Protected Areas (MPAs)

Canada suggests that the principles of the ecosystem-based and precautionary approaches, and the use of best available science, should underpin a new agreement as a whole, but are particularly relevant to the ABMT and environmental impact assessment (EIA) elements.

In support of the concept of "use of best available science", Canada notes that the work done by the *Convention on Biological Diversity* (*CBD*) to describe Ecologically and Biologically Significant Areas (EBSAs) may be helpful in identifying priority biodiversity areas.

Canada believes that a wide range of ABMTs can be used to conserve marine biodiversity, and the appropriate ABMT for a given circumstance should reflect the ecological components of interest in the area. MPAs are tools that allow

for varying levels of protection to account for the specific environmental, social and economic needs of the geographical area. These needs should be reflected in clear conservation objectives, which will help define the parameters of the MPA, based on the best-available science. As such, MPAs should not be restricted to "no take" zones. Canada believes that a similar approach should be taken with other ABMTs. That is, human activities that may take place within an ABMT should be compatible with the conservation of ecological components of interest.

There are a number of expert bodies already active, such as RFMOs, the International Maritime Organization (IMO) and the International Seabed Authority (ISA), whose mandates and expertise to manage their respective activities should be recognized, respected and supported. These organizations have the knowledge and expertise on the specifics of ecosystems within their area of competence, potential impacts of their regulated activities on these ecosystems, and options to mitigate these impacts (including through organization specific area-based management tools such as the establishment of measures to protect and mitigate impacts on Vulnerable Marine Ecosystems (VMEs) and Particularly Sensitive Sea Areas (PSSAs)). These existing organizations, processes and measures, authorities and expertise should be respected and not undermined, duplicated or replaced by any new agreement.

Canada suggests that the new agreement should enable cooperation and coordination between regional and sectoral bodies that are responsible for implementation of ABMTs. It should facilitate consultation, and effective coordination and communication between relevant stakeholders — including interested States, regional, sectoral, intergovernmental and global bodies — for the purposes of transparency and reporting.

If, based on the use of best available science, it is determined that an ABMT is not delivering biodiversity conservation benefits, Canada supports an adaptive management approach (e.g. changes to the tool used or the restrictive activities in the area).

Environmental Impact Assessments (EIAs)

Canada believes that EIA provisions should operationalize the precautionary approach, the ecosystem-based approach and be based on the best available science. Canada suggests that internationally agreed upon standards, such as those found in the Espoo Convention, should provide the starting point for discussions on this topic, particularly in considering relevant definitions and information provided in the EIA reports.

Canada believes that transboundary impacts do not require separate assessment processes but are rather included as part of a properly conducted EIA generally. Canada submits that EIAs could:

- Describe potentially affected environments, including potentially sensitive or vulnerable areas;
- Identify potential environmental impacts, including direct, indirect, short-term and long-term, positive and negative effects;

https://doi.org/10.1017/cyl.2018.8 Published online by Cambridge University Press

- Identify measures available to mitigate any potential significant adverse impacts; and,
- Include follow up actions to verify the accuracy of the environmental assessment and the effectiveness of mitigation measures.

Canada further submits that existing processes and guidance developed to assess the impacts of human activities on biodiversity features applicable in ABNJ, including those under regional and sectoral regimes, should be respected, and duplication of processes and outcomes in this regard should be avoided. Existing activities managed under regional and sectoral organizations should be allowed to continue where these organizations are mandated to consider the environmental impacts in the regulation of their respective activities (e.g. RFMOs and IMO). Any new agreement could play a useful role in assisting to coordinate these efforts, and facilitating cooperation and information sharing between these bodies.

Canada submits that compatibility with coastal state measures should be built into EIAs conducted in relation to ABNJ adjacent to areas under the coastal state's national jurisdiction. This agreement should respect coastal States' jurisdiction regarding EIAs for activities that are within their national jurisdictions.

Canada supports inclusive public consultation as part of the EIA process, as well as making the results of EIAs publicly available, e.g. through the establishment of a global information sharing mechanism.

Canada believes that States should retain final decision-making authority with regard to the authorization of activities requiring EIAs, taking place in ABNJ and which fall under their jurisdiction. States should be responsible for ensuring that EIAs are undertaken when required. Cooperation among States should be encouraged to mitigate the possible issue of 'flags of convenience' for those wishing to undertake activities with a high risk of significant adverse environmental impacts.

Capacity-Building and Transfer of Marine Technology

Canada supports the inclusion of elements dealing with capacity-building and transfer of marine technology in the proposed implementing agreement. Canada looks forward to further discussions on the various ways in which contributions could be most effectively implemented.

To this end, Canada believes that a new agreement should draw from existing guidelines and frameworks that are already agreed upon, such as the Intergovernmental Oceanographic Commission's "Criteria and Guidelines on the Transfer of Marine Technology". One or more clearinghouse mechanisms, which could provide prioritized lists of required capacity-building efforts and marine technology and which may have a "match-making" function to facilitate the transfer of technology and capacity building assistance, could be an effective means of achieving this.

Seabed Mining in Areas beyond National Jurisdiction — Regulation of Exploitation — International Seabed Authority — United Nations Convention on the Law of the Sea (UNCLOS) — Article 82 — Equitable Sharing Criteria

At the twenty-third annual session of the International Seabed Authority in August 2017, Canada delivered the following statement to the Assembly on behalf of Canada, Australia, and New Zealand (CANZ):

We recognize the valuable work of the [International Seabed] Authority in regulating the Area, and the progress made in the last 12 months toward the development of a mining code.

As the focus of the Authority moves from exploration to exploitation, we urge it to proceed with caution, based on science, to manage the mineral resources of the Area while ensuring that the marine environment is protected from any harmful effects of mining-related activities.

We urge the Authority, through the LTC [Legal and Technical Commission], to continue its work on the exploitation regulations as a matter of priority. We would like to thank the LTC for the development of a roadmap for completion of the mining code, with key milestones. Importantly, the roadmap must allow time for member states to engage substantively on successive drafts, not only through formal submissions but also through detailed and substantive discussions in Council meetings. These discussions will be particularly important to allow for an exchange of views with a wide range of stakeholders and for engagement by states that may not have capacity to produce formal written submissions. We therefore urge the Authority to circulate the next iteration of the regulations well in advance of next year's council session and encourage open and transparent consultation going forward.

We emphasize that exploration and environmental regulations must be developed and adopted concurrently, and that we see the two sets of regulations as two parts of a whole. As such, we welcome the release a consolidated set of regulations covering both exploitation and environmental matters. We will assess this latest version of the draft regulations in detail and provide formal feedback as requested. We encourage other stakeholders to do the same. It will be important to ensure that the draft regulations provide sufficient protections for the marine environment, and accurately reflect *UNCLOS*.

The marine environment is one that we still do not fully understand. We must make decisions based on the best available science, and remain flexible to respond to advances in our scientific understanding. We must also adopt a precautionary approach. As the regulations develop we will seek to ensure that the Authority has the power to verify compliance with environmental obligations, to ensure there are consequences for breaches of those obligations, and to act swiftly, and even pre-emptively if necessary, to protect our shared marine environment.

https://doi.org/10.1017/cyl.2018.8 Published online by Cambridge University Press

While work continues with the regulations, it will also be important to move forward in other areas.

We would like to reiterate the importance of the review of the Environmental Management Plan (EMP) for the Clarion Clipperton Zone (CCZ). This work is essential to the good management of the marine environment in the Area, which is a core function of the Authority. We note the decision of the Commission to defer until early 2018 a workshop on the status of the implementation of the CCZ EMP, and areas of particular environmental interest. We welcome the Commission's intention to convene a workshop later this year on the criteria for the selection of impact reference zones and preservation reference zones and stress the need for environmental management plans to be developed for other regions.

In addition to the LTC's required work on the exploitation regulations, the Finance Committee will need to begin work on matters that are in their purview such as the determination of administrative and fixed fees and performance guarantees. The development of equitable sharing criteria for economic benefits from exploitation activities in the Area as well as payments arising from Article 82 will also need to begin soon.

We encourage the Authority to continue to include Article 82 [of *UNCLOS*] in its work plan. There is increasing exploration activity in the continental shelf beyond 200 NM of several Members, and though exploitation remains years in the future, more clarity regarding how this provision of the Convention will be implemented may be necessary in order for operators to properly assess the commercial viability of discoveries in these areas.

[A]t a time when the Authority is facing a mounting workload, we need to ensure the working methods of the Council assist the Authority's overall efficiency and effectiveness. CANZ continues to consider how to improve the ISA's institutions and working methods. We note our support for the measures already underway to streamline the functions of the Secretariat, particularly with respect to environmental policy, and look forward to discussing the suggestions made by the art[icle] 154 Review Committee later this week. In this regard, we look forward to the Secretary-General's submission of a draft strategic plan to the Assembly in 2018. The plan will be important to ensure the organs of the Authority work in a focused, efficient and prioritised manner going forward.

Finally, CANZ welcomes the Council's continued efforts to be clearer about what it expects from other organs of the Authority — in particular from the Secretariat and the LTC. We think it is useful for the Council to set out its expectations (including timeframes) in a decision, as has occurred over the past few years. We would like to express our great appreciation for the Secretary-General's report this year on the Council's decision in 2016 regarding the LTC's priorities and program of work. We consider that this practice increases transparency and assists in building the Authority's institutional memory and we would welcome further such reports in future.

HUMAN RIGHTS LAW

Migration — Children's Rights — Rights of Migrant Workers and Their Families — Committee on the Rights of the Child — Draft Joint General Comment

On 11 August 2017, the Government of Canada provided the following comments to the Committee on the Rights of the Child and the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families on a draft Joint General Comment on the human rights of children in the context of international migration:

1. Canada appreciates the Committees' work on this draft General Comment, and welcomes in particular the draft's strong emphasis on the key principle of the best interest of the child, and the recognition of the various types of discrimination and hardship that can be experienced by different groups of migrant children, including girls, racial minorities and LGBTI children.
2. Canada recognizes the independence and impartiality of the Committees and their ability to issue General Comments. Canada reiterates, however, that General Comments are capable only of providing guidance to States Parties in their interpretation of their obligations. The Comments do not create binding legal obligations in and of themselves, nor do they reflect an interpretation of the Conventions that is necessarily agreed upon by States Parties.
3. Given that Canada is not party to the *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families* (*CMW*), our comments pertain to the interpretation of the *Convention on the Rights of the Child* (*CRC*) and do not indicate acceptance of the *CMW* or the Committees' interpretation of that Convention.
4. As a general practice, we would recommend the Committees make clear when they are referring to State obligations and when they are referring to best practices. To avoid confusion, we would recommend use of the word "should" for best practices and "must" when referring to State obligations. In addition, to ensure legal accuracy, we would strongly suggest that the Committees use Convention language throughout the document when referring to specific rights under those treaties to avoid expanding or changing the scope of those rights.

Comments concerning the principles of "best interests of the child" and role of child protection

Paragraphs 15, 16, 28, 75 and 76

5. In paragraph 15, Canada disagrees that child protection authorities should have a "leading/deciding role on policies, practices and decisions that impact the rights of children in the context of migration". Canada's view is that child protection authorities should be consulted. The current wording removes the

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responsibility from States' migration authorities, which may not be feasible for all States.

6. Canada has concerns with the Committee's suggestion, at paragraphs 16, 28, 75 and 76 in particular, that States Parties have a duty to ensure that the principle of the best interests of the child take precedence over migration management objectives or other "non-rights-based" considerations in immigration-related decisions. Article 3 of the *Convention on the Rights of the Child* provides that the best interest of the child shall be *a primary consideration* in all actions concerning children. It does not suggest that the best interests of the child must be the paramount consideration. Therefore, while recognizing that the best interests of the child must be treated as a significant factor in any decisions concerning children, Canada respectfully disagrees with the Committees that States Parties have an obligation to ensure that the principle of the best interest of the child always take precedence over migration-related objectives or other considerations.
7. Canada recommends the Committees to revisit the language in the abovementioned paragraphs accordingly. For example, paragraph 16 could read: "States shall ensure that children in the context of migration are treated first and foremost as children, and develop policies aimed at fulfilling the rights of all the categories of children in the context of migration, ensuring that the principles of the child's best interest [ADD: be a primary consideration in] [DELETE: ~~takes precedence over~~] migration management objectives or other administrative considerations."

Comments concerning the principle of "non-refoulement"

Paragraphs 42 and 43

8. At paragraphs 42 and 43 of the draft General Comment, Canada suggests that the Committee more clearly distinguish between the principle of non-refoulement, which obliges States to refrain from removing persons to serious risks of irreparable harm as contemplated by Articles 6 and 37(a) of the *CRC* (or Articles 6 and 7 of the *International Covenant on Civil and Political Rights*), and the principle of the best interest of the child, which may, in certain circumstances, oblige a State to refrain from removing a child to a country where there are substantial grounds for believing that the child would face other types of harm in their country of return.
9. While, in certain circumstances, respect for the best interest of the child may require refraining from removing a child to their country of origin because of specific socio-economic conditions in countries of origin, Canada does not accept the Committee's proposition at paragraph 43 that the principle of non-refoulement "should be construed as including socio-economic conditions". We would recommend replacing the reference to non-refoulement with a reference to the "best interests of the child".

https://doi.org/10.1017/cyl.2018.8 Published online by Cambridge University Press

10. Canada proposes the following language for the Committee's consideration:

    Paragraph 42: "… States shall not return a child to a country where there are substantial grounds for believing that there is a real risk of irreparable harm to the child, such as, but by no means limited to, those contemplated under articles 6 and 37 of the Convention, either in the country to which removal is to be effected or in any country to which the child may subsequently be removed. Such non-refoulement obligations apply irrespective of whether serious violations of those rights guaranteed under the Convention originate from non-State actors or whether such violations are directly intended or are the indirect consequence of action or inaction. The assessment of the risk of such serious violations should be conducted in an age and gender-sensitive manner. [DELETE: ~~and should, for example, take into account the particularly serious consequences for children of the insufficient provision of food or health services~~] [ADD: Giving due consideration to the best interest of the child, States may, in certain circumstances, have to refrain from removing a child because of a risk of harm as contemplated in other provisions of the CRC.]"
    Paragraph 43: "… in the case of migrant children, [DELETE: ~~the principle of non-refoulement, should be construed as including~~] [ADD: consideration of the best interests of the child should include] socio-economic conditions in countries of origin; and family reunification entitlements in countries of origin and destination and migrant children and their families should be protected in cases where expulsions would constitute arbitrary interference with the right to family and private life."

Comments concerning the application of the normative framework of *CMW* and *CRC Conventions*

Paragraphs 13 and 57

11. In paragraph 13, Canada has concerns with language that implies that children outside a State's territory could come within its jurisdiction by attempting entry. An "attempt to enter the country" is not the same as entry into the country. Entry would normally create jurisdiction while a failed attempt would not. We respectfully recommend deletion of the following sentence: "Moreover, State obligations under the Conventions apply within the borders of a State, including with respect to those children who come under the State's jurisdiction while attempting to enter the country's territory."
12. In paragraph 57, Canada does not accept the Committees' view that a State's obligations apply in areas under its "effective control". A State party's obligations under the *CRC* extend to those within its jurisdiction. In addition, there is no "right to due process". We recommend the sentence be reworded to say: "The [DELETE: ~~right to~~] due process [ADD: rights] of all migrants regardless of their status shall be protected and respected in all areas where the State exercises jurisdiction [DELETE: ~~or effective control~~]."

Comments on the obligation of States to protect and reduce migration-related risks to children

Paragraph 31

13. Canada would suggest emphasizing in this paragraph the vulnerabilities of refugees and migrant workers, and the special approaches and protections these persons may need, such as safe spaces. Canada would also suggest including here the recommendation that states need to put in place measures to identify child victims of exploitation and abuse, including victims of sexual exploitation and abuse, labour trafficking, and child marriage. These child victims can only be protected and supported if they are identified. As described in the document, migrant children are particularly vulnerable to exploitation or abuse; but, very few will themselves report the exploitation or abuse.

Comments to strengthen drafting

14. In paragraph 8, Canada agrees that the world is increasingly witnessing migration out of necessity, driven by root causes often directly related to severe and mass violations of human rights, including children's rights. However, Canada suggests acknowledging in this paragraph the fact that most migration takes place voluntarily and without incident.
15. In paragraph 20, we would strongly recommend using language from Article 2(1) of the *CRC* when listing prohibited grounds of discrimination. "Economic status" is captured by "property" in Article 2(1) of the *CRC*. In addition, "documentation status" is not a recognized ground for discrimination. There may be legitimate reasons why states would differentiate between different categories of documentation holders. Eg: A driver's licence is a legal requirement to be able to drive.
16. Similarly, in paragraph 21, we would recommend using the language from Article 2(1) of the *CRC* when listing prohibited grounds of discrimination. "Health status" and "economic and social situation" are not recognized grounds for discrimination.
17. In paragraph 28 (subparagraph 7), the Committees stress that States should conduct Best Interests Assessments to evaluate the impact of deportation on children's rights and development, including their mental health. Canada would suggest including "physical health", given that both areas of health may be impacted during migration.
18. Paragraph 37 overstates the right to be heard. We would ask that this sentence be identified as an opinion or include the phrase "in accordance with Article 12 of the *CRC*".
19. Paragraph 49 incorrectly paraphrases Article 37(b) of the CRC which states that ""no child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with

https://doi.org/10.1017/cyl.2018.8 Published online by Cambridge University Press

the law and shall be used only as a measure of last resort and for the shortest appropriate period of time." We would recommend the Committees use the exact language from the *CRC* to avoid expanding or changing the scope of this right.

20. In paragraph 56, Canada has concerns with the sentence stating that "… child migration related detention constitutes in itself a violation of children's right to liberty …" While Canada does not seek to detain children, on rare occasions the detention of children for immigration purposes is at times necessary as a measure of last resort having taken into account in the best interest of the child and the totality of the circumstances. As such, the language provided by the Committees is too categorical and does not allow for carefully nuanced and tailored national procedures and practices with respect to the detention of children for immigration purposes.
21. In addition, in paragraph 56, the Committees claim that " … States have the legal obligation to comply with international standards on detention conditions …" Canada respectfully asks for the source of this legal obligation as it disagrees with this assertion. We would recommend rephrasing as follows: "Highlighting General Comment No.10 (CRC/C/GC/10, 2007) of the CRC Committee, it is reiterated that States [DELETE: ~~have the legal obligation to~~] [ADD: should] comply with international standards on detention conditions, including the Rules for the Protection of Juveniles Deprived of their Liberty (the Havana Rules) which apply to all forms of detention including administrative or non-criminal detention."
22. In paragraph 59, the guarantees of due process that are listed by the Committee are different from those listed in Articles 12 and 40 of the *CRC*. If the Committee is discussing best practices, these should be clearly identified to avoid confusion. We would also strongly urge the Committee to not refer to best practices as "rights" to reduce confusion about what is a treaty right and what is best practice.
23. In paragraph 60, Canada disagrees with the assertion that legal assistance forms part of regular consular assistance, and would suggest removing this idea from the paragraph.

Conclusion

24. In conclusion, Canada reiterates its appreciation of the opportunity to review the Draft Joint General Comment on the Human Rights of Children in the Context of International Migration, and more generally its support of the work of the Committees. Canada avails itself of the opportunity to renew to the Committees the assurances of its highest consideration.

Non-refoulement — Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment — Committee against Torture — Draft Revised General Comment

On 26 April 2017, the Government of Canada provided the following reply to the Committee against Torture concerning a draft revised General

https://doi.org/10.1017/cyl.2018.8 Published online by Cambridge University Press

Comment on the implementation of the principle of non-refoulement in the context of individual communications:

1. The Government of Canada appreciates the work of the Committee against Torture in monitoring States Parties' implementation of the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* ("the Convention"). Canada wishes to thank the Committee for the opportunity to comment on Draft Revised General Comment No. 1 on the implementation of article 3 of the Convention in the context of article 22 ("the Draft Revised General Comment").[3] Canada welcomes constructive dialogue and engagement between the United Nations treaty bodies and States Parties on issues such as the content of General Comments.
2. Canada recognises the independence and impartiality of the Committee, and its ability to issue General Comments. Canada reiterates, however, that General Comments are capable only of providing guidance to States Parties in their interpretation of their obligations. The Comments do not create binding legal obligations in and of themselves, nor do they reflect an interpretation of the Convention that is necessarily agreed upon by States Parties.
3. As a general comment, Canada recommends that the Committee use a consistent term to distinguish the State that performs the removal, deportation or extradition from the State that receives the individual. For greater clarity, Canada proposes "the removing State" and the "receiving State".
4. Similarly, Canada also encourages the Committee to avoid paraphrasing and directly use the language of the Convention particularly Article 3, where possible.

(1) Comments concerning the Article 22 procedure:

Paragraphs 36 and 37: Remedies

5. In paragraphs 36 and 37, Canada does not agree with the Committee's narrow approach to what kinds of remedies must be exhausted as a condition of admissibility, in the context of Article 3. According to Article 22(5)(b) of the Convention, exhaustion of domestic remedies requires an individual to exhaust all "available domestic remedies" that are not "unreasonably prolonged" or "unlikely to bring effective relief".
6. Canada's interpretation is that a domestic process will be an available and effective domestic remedy to prevent Article 3 violations if it: (1) is reasonably accessible; (2) can potentially lead to suspension of the individual's removal pending completion of the process;[4] (3) involves consideration of

[3] [*Draft Prepared by the Committee*, UN Doc CAT/C/60/R.2 (2 February 2017)].

[4] See below at paragraphs 26–27, for additional discussion of the "suspensive effect" of domestic remedies.

https://doi.org/10.1017/cyl.2018.8 Published online by Cambridge University Press

the implications of removal for the individual concerned, and in light of that consideration has the potential to allow the individual to remain in the removing State; (4) is a procedure provided by law; and (5) is reviewable by independent administrative and/or judicial authorities.

7. In Canada's view, paragraphs 36 and 37 should reflect the principles set out above. Additionally, Canada has specific concerns with two aspects of paragraph 37. First, the call for recourses to be accessible "without any obstacles of any nature" is overly broad and unrealistic in practice. A remedial avenue need only be "reasonably accessible". Second, the indication that decisions "should be reviewed" by an independent authority is also overbroad. An effective remedial scheme should provide for the possibility of review, but paragraph 37 could be misunderstood as implying that review should occur for each decision as a regular practice. It is more appropriate to call for decisions to be "reviewable" by independent authorities.

Paragraph 39: Requests for interim measures

8. Canada's next area of comment relates to paragraph 39. Canada has a long-standing commitment to engage in good faith with the individual communications procedure established by Article 22. Canada appreciates that interim measures requests may be an important means by which fundamental human rights may be protected from immediate and irreversible harm, pending the Committee's consideration of a case. Nevertheless, interim measures requests are not legally binding in international or domestic law.
9. Canada supports the important work of the Committee and always gives its requests due consideration. However, Canada firmly disagrees with the position taken in paragraph 39. There is no requirement under Article 22 for States Parties to comply with the Committee's requests. Where a State Party does not agree with the Committee's decision to make an interim measures request but nevertheless continues to engage with the communications procedure (for example through the filing of written submissions to explain its position), this is not a failure of the State to fulfill obligations under the Convention, including any obligation to cooperate with the Committee.

Paragraph 43: Assessment of an individual's claim

10. Canada's next area of comment is paragraph 43, which describes best practices to facilitate a fair domestic assessment of an individual's claim that his or her removal would be a violation of Article 3. In Canada's view, this text should be more flexible in identifying potential best practices. With respect to medical examinations, it is unrealistic and inappropriate to describe them as a process that must be provided in each case. Depending on the circumstances, there are often other ways to assess an individual's credibility, and allegations of past torture can be one of many relevant factors in assessing risk on a prospective basis.

11. Canada therefore suggests that paragraph 43 be replaced with the following: "Where appropriate and depending on an individual's circumstances, guarantees and safeguards can include:

    (a) Linguistic, legal, medical, social and, when necessary, financial assistance;
    (b) Reasonable access to review of a decision of deportation within a timeframe which is reasonable for an individual in a precarious and stressful situation and with the potential for the review application to have a suspensive effect on the enforcement of the deportation order; and
    (c) Where appropriate, a medical examination at the initiative of a complainant, which can help to assess the credibility of the individual's allegations, and assist authorities in completing their assessment of the risk of torture."

Paragraphs 50 and 51: Article 3 and the internal flight alternative

12. Canada's next area of comment relates to the notion of internal flight alternative and its relevance to the implementation of Article 3. In paragraph 50 of the Draft Revised General Comment, the Committee signals that it "will take into account the human rights situation of that State as a whole and not a particular area of it", partially because the "State party is responsible for any territory under its jurisdiction".
13. Canada does not agree with this approach to Article 3, and recommends deletion of paragraph 50. The assessment of risk is a factual one, and it must take into account all of the person's individual circumstances to determine whether the person would be at risk of torture upon return. In certain circumstances, especially where the receiving State is geographically large and/or the risk faced by the individual is based in a specific identifiable area, variations in rights protection between different areas of the receiving State can be a relevant concern. Although the receiving State has responsibilities for any territory under its jurisdiction (if it is a State Party to the Convention), the relevant question for Article 3 is a factual assessment for the individual and not a legal assessment of responsibility for the receiving State.
14. With respect to paragraph 51, Canada has serious concerns about the call for "reliable information before the deportation that the State of return has taken effective measures to guarantee the full and sustainable protection of rights of the person concerned." A literal interpretation of this statement would raise serious concerns for the privacy of the author of the communication.
15. Moreover, paragraph 51 describes an absolutist approach to the "admissibility" of such arguments, which is inconsistent with the contextual and fact-dependent nature of the Article 3 obligation. It is also confusing from a procedural perspective: the concept of admissibility applies to authors'

communications, and not to particular arguments made by authors or States Parties.

16. Canada would suggest a more nuanced approach to outlining the kind of information that is useful to the Committee where an internal flight alternative is at issue. Canada recommends redrafting paragraph 51 as follows: "In order to support the position that an individual has an 'internal flight alternative' in the receiving State, the removing State should provide to the Committee reliable (recent and objective) information to support its conclusion that the individual can access a specific area of the country where he or she would *not* be in danger of being subjected to torture. This can include information relevant to the specific circumstances of the individual's case, along with up to date reports on actual country conditions. Ultimately, the question is whether the removal would foreseeably expose the individual to a danger of being subjected to torture, in all the facts of the case, including information on variations in rights protection within the receiving State."

(2) Comments concerning the legal content of Article 3:

Paragraph 8, 9 and 10: On the absolute nature of Article 3 and its scope

17. Canada has concerns regarding paragraph 8 of the Draft Revised General Comment, which addresses the absolute nature of Article 3 of the Convention. Rather than referring to the "principle of non-refoulement", paragraph 8 should be more precise and based in the obligations of the Convention itself, and thus make clear that it is the Article 3 prohibition that is absolute.
18. Canada would therefore suggest the following rephrasing of paragraph 8: "The Article 3 prohibition, embodying the principle of 'non-refoulement' of persons in danger of being tortured, is similarly absolute."
19. Canada's next comment is on paragraphs 9 and 10 of the Draft Revised General Comment, which discuss the scope of a State Party's obligations under Article 3. Canada notes that while Article 2(1) of the Convention establishes an obligation for each State Party to take effective measures to prevent torture "in any territory under its jurisdiction", the other provisions of the Convention are specific obligations that do not necessarily have the same scope as the general Article 2(1) obligation. For example, Articles 5(2), 6(1), 7(1), 12, 13, and 16 all contain their own language with respect to scope.
20. Turning to Article 3, the application of this provision is factual in nature: it applies whenever a State Party seeks to "expel, return (*refouler*) or extradite a person to another State." Canada agrees this provision may be applicable outside the territory of the State in narrow and specific circumstances.
21. Canada would therefore suggest that paragraphs 9 and 10 should be replaced by the following text: "Each State party must apply the principle of non-refoulement, as set out in Article 3, whenever it seeks to 'expel, return (*refouler*) or extradite a person to another State'."

https://doi.org/10.1017/cyl.2018.8 Published online by Cambridge University Press

Paragraphs 14 and 18: Best practices for preventing refoulement

22. Paragraphs 14 and 18 of the Draft Revised General Comment overlap in their content, and both essentially describe best practices for preventing refoulement to a danger of being subjected to torture. The measures set out in paragraph 14 are not necessarily obligations that flow from Article 3 of the Convention. Thus, Canada recommends moving the guidelines in paragraph 14 to the list in paragraph 18.
23. Canada does not agree with the statement in paragraph 18(e) of the Draft Revised General Comment that, as a best practice to prevent Article 3 violations, the individual should have a "right of appeal … with the suspensive effect of [the deportation order's] enforcement". Canada has two suggestions to add nuance, and reflect the range of ways in which States Parties can effectively ensure respect for Article 3.
24. First, in Canada's view, the reference to an appeal must take into account different domestic legal systems around the world including those countries, like Canada, that have administrative law systems. Canada understands a "right of appeal" in this context to be intended to mean an independent review of the decision at first instance. This includes judicial review as practised in Canada. As this Committee has recognized in several individual communications involving Canada, judicial reviews "are not mere formalities" because the reviewing court "may, in appropriate cases, look at the substance of a case", for example to review the substantive reasonableness of the decision.[5]
25. A court performing judicial review will properly show some degree of deference to the expert administrative tribunal's decision. But if it finds an error of law or an unreasonable finding of fact in the decision under review, it has the authority to set the administrative decision aside and send it back for re-determination by a different decision-maker, in accordance with such directions as the court considers to be appropriate. Therefore, judicial review of administrative decisions is an effective remedy that can scrutinize the substance of a decision.
26. Second, the draft text is unclear in its reference to "suspensive effect". It is not necessary for a review application to have "automatic" suspensive effect (i.e., immediately upon an application being made), as long as accessible mechanisms exist to consider whether suspension of removal is warranted in the individual's case, pending review of the decision. This precision should be reflected in the text. (Canada notes that the Committee follows a similar approach under the Article 22 procedure, to the extent that it considers the information available before deciding whether to make a request for interim measures.)

[5] *Aung v Canada*, CAT Communication No 273/2005 (2006) at para 6.3; *L.Z.B. v Canada*, CAT Communication No 304/2006 (2007) at para 6.6.

https://doi.org/10.1017/cyl.2018.8 Published online by Cambridge University Press

27. Therefore, Canada recommends that paragraph 18(e) should be rephrased as follows: "The right of review by the person concerned against a deportation order to an independent administrative or judicial body, within a reasonable period of time after the individual is notified of the order, and with the potential for suspensive effect of the order's enforcement pending review."

Paragraph 20: Diplomatic assurances

28. Canada has joined in a joint submission with the United States, United Kingdom, and Denmark on the subject of diplomatic assurances.[6] Canada does not agree with the suggestion that "diplomatic assurances from a State Party to the Convention to which a person is to be deported" are inherently contrary to the principle of non-refoulement.
29. Canada therefore recommends rephrasing paragraph 20 as follows: "The Committee considers that diplomatic assurances from a State party to the Convention to which a person is to be deported or extradited should not replace the individualized risk assessment necessary to determine if there are substantial grounds for believing that he/she would be in danger of being subjected to torture in that State. Diplomatic assurances cannot be used in such a way as to avoid States parties' obligations to respect Article 3."

Paragraphs 21 and 22: Redress and compensation

30. Canada recommends clarification of paragraphs 21 and 22, concerning redress and compensation. Paragraph 21 addresses the rehabilitation needs of victims of torture, including where the individuals are subject to removal. This paragraph is not clear, especially because it does not distinguish between what is an obligation under Article 3 and what is more relevant to rehabilitation obligations under Article 14. In Canada's view, the measures discussed in paragraph 21 may arise in the context of fulfilling a State Party's obligations under Article 14 of the Convention. The measures are not obligations arising from Article 3 itself. Canada recommends clarifying this in the text.
31. Similarly, paragraph 22 describes redress and compensation measures that may function as remedies for individuals who have suffered a violation of Article 3. To better reflect the context-specific nature of remedial obligations, Canada would rephrase paragraph 22 as follows: "Where an individual has suffered a violation of Article 3 as a result of a deportation or other removal, the removing State may consider one or more of the following as potential effective remedies to extend to the individual:

[6] Joint Observations of Canada, Denmark, the United Kingdom, and the United States of America of 31 March 2017 in relation to paragraph 19 and 20 of the draft General Comment.

https://doi.org/10.1017/cyl.2018.8 Published online by Cambridge University Press

a) Financial and/or legal assistance, in order to enable the individual to access judicial procedures empowered to put an end to individual's risk of torture or any ongoing torture;
b) Requests to independent international experts or organizations or national experts and institutions to carry out monitoring and follow-up visits to the individual concerned and facilitate their access to judicial remedies; and
c) When necessary, legal, administrative, and/or diplomatic procedures for the return of the individual to its territory, as long as any such measures are in accordance with the human rights of the individual (including his or her right to liberty and security of the person) and the rights of the receiving State and any other implicated States."

Sub-paragraphs 30(h), (k) and (l): Specific human rights situations

32. Canada's next area of comment concerns paragraph 30 (h), which relates to the application of the *Geneva Conventions*. Canada recommends that this paragraph should insert the caveat: "Whether the person concerned would be deported to a State party to the Geneva Conventions and their Protocols where, *in the context of a non-international armed conflict, ...*" Further, Canada recommends for the footnotes for this section that the actual text of the Convention be used for clarity and, for Protocol II Article 4, paragraph 2 is sufficient for citation as paragraph 1 does not speak to the underlying issue of torture.
33. Paragraphs 30 (i) and (j) also relate to the application of the *Geneva Conventions*. Canada recommends that both paragraphs insert the caveat: "Whether the person concerned would be deported to a State where, *in the context of an international armed conflict, ...*"
34. Paragraphs 30 (k) and (l) raise the potential infliction of the death penalty in the receiving State. Canada notes that such issues can sometimes be relevant to assessing risk for the purpose of Article 3 of the Convention, but they are most directly addressed by Article 6 of the *International Covenant on Civil and Political Rights* and the non-refoulement obligations associated with that provision. Canada recommends that the language relating to the death penalty in paragraph 30(k) be deleted, but that paragraph 30(l) be retained. The language in paragraph 30(l) would be adequate to fully and elegantly address these issues to the extent they are relevant to Article 3 of the Convention.

Paragraphs 31 and 32: Non-State actors

35. Paragraph 31 discusses potential risks from non-State actors in the receiving State. Canada notes that Article 3 applies where the individual is in danger of being subjected to "torture", as defined by Article 1. Paragraph 31 goes beyond the scope of Article 3, to the extent it refers to risks "at the hands of

non-State actors over which the [receiving State] has no or only partial de facto control or is unable to counter their impunity". In other words, paragraph 31 refers to human rights abuses by non-State actors that lack the kind of connection to the State that is required for abuses to amount to "torture" under Article 1.[7] The draft appears to recognize this by framing this paragraph as a recommendation ("should") rather than an obligation.

36. Canada recommends that the Committee should clarify in the text that paragraph 31 goes beyond the scope of States Parties' binding obligations under Article 3.
37. As for paragraph 32, Canada recommends clarifying what is intended by the phrase "military operation programs". This is not a term familiar to Canada, and therefore we are unable to comment.

(3) Comments to strengthen the drafting:

Paragraph 5: Competence to consider individual complaints

38. Canada's next comment is with respect to paragraph 5, which addresses the competence of the Committee to consider communications from or on behalf of individuals. Pursuant to Article 22, these individuals must be subject to the jurisdiction of the State Party concerned. However, the way that Article 22 is quoted in the Committee's draft mistakenly implies that the communication procedure is open to individuals subject to *the Committee's* jurisdiction.
39. Canada therefore recommends rephrasing as follows: "Pursuant to Article 22 of the Convention, the Committee 'receives and considers communications from or on behalf of individuals' subject to a State party's jurisdiction 'who claim to be victims of a violation by a State party of the provisions of the Convention.' As Article 22 makes clear, such communications may only concern a State Party that has declared that it recognizes the Committee's competence in this regard."

Paragraph 17: The definition of torture

40. With respect to the second sentence of paragraph 17 of the Draft Revised General Comment, Canada expresses concern about the reference to "infliction of violent acts". This reference is too narrow an articulation of the forms that torture can take, as per the definition at Article 1 of the Convention. Torture may be inflicted through a single act or through a series of actions that may not necessarily qualify as "violent".

[7] See e.g. Manfred Nowak & Elizabeth McArthur, *The United Nations Convention against Torture: A Commentary* (Oxford: Oxford University Press, 2008) at 200 (as illustrated by views of the Committee against Torture [that] "threats of torture by non-State actors without the consent or acquiescence of the government fall outside the scope of Article 3").

https://doi.org/10.1017/cyl.2018.8 Published online by Cambridge University Press

41. To more closely track Article 1 of the Convention, Canada recommends rewording the second sentence of paragraph 17 as follows: "It depends on the negative physical or mental repercussions that are or may be experienced by the individual in question, taking into account all relevant circumstances of each case, including the duration of the treatment, the physical and/or mental effects, the sex, age and state of health and vulnerability of the victim."

Paragraph 24: Article 3 of the Convention and extradition treaties

42. In paragraph 24, Canada recommends a more explicit recognition of the important objectives pursued by extradition treaties. The Convention itself includes provisions that rely for their effectiveness on timely extradition and mutual legal assistance between States Parties.
43. Canada recommends adding the following text for paragraph 24: "The Committee also acknowledges that as crime continues to become increasingly transnational in nature, extradition has become an increasingly critical tool to ensure that serious crime can be effectively prosecuted. In order to be effective extradition proceedings must be efficient; significant delays in the extradition process can seriously undermine the criminal proceedings that underlie a request for extradition. The crucial role of extradition in combating impunity and facilitating law enforcement is recognized by the *CAT* itself."

Paragraph 29: Article 3 in the context of Article 16(2)

44. Canada's final area of comment relates to the indication of a danger of torture described in paragraph 29. Canada agrees that past incidents where cruel, inhuman or degrading treatment or punishment was inflicted on the individual or their family in the receiving State are a relevant consideration when assessing the individual's danger of being subjected to torture, in the receiving State post-removal. This would apply where the receiving State is the individual's State of origin. However, past infliction of cruel, inhuman or degrading treatment or punishment in the State of origin is not necessarily a relevant consideration if the receiving State is not the State of origin. Similarly, the treatment or punishment inflicted on a family member in the past would not necessarily establish substantial grounds that the individual facing removal will be subjected to a danger of torture.
45. Canada would therefore rephrase paragraph 29 as follows: "In this regard, the Committee observes that the infliction of cruel, inhuman or degrading treatments or punishments, whether amounting or not amounting to torture, to which a person or his/her family were exposed or would be exposed in the receiving State, constitutes an indication that the person may be in danger of being subjected to torture if he/she is expelled, returned or extradited to the receiving State. States parties should consider this factor when determining whether the person would be in danger of being subjected to torture in the receiving State, post-removal."

Conclusion:

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

Right to Life — International Covenant on Civil and Political Rights — Human Rights Committee — Draft General Comment

On 23 October 2017, the Government of Canada provided the following response to a request from the Human Rights Committee for views on a draft General Comment on Article 6 of the *International Covenant on Civil and Political Rights* (*ICCPR*) concerning the right to life, which is to be known as General Comment no. 36:

1. The Government of Canada appreciates the work of the Human Rights Committee in monitoring States Parties' implementation of the *International Covenant on Civil and Political Rights* ("the Covenant"). Canada wishes to thank the Committee for the opportunity to comment on Draft General Comment No. 36 on the right to life ("the Draft General Comment").[8] Canada welcomes constructive dialogue and engagement between the United Nations treaty bodies and States Parties on issues such as the content of General Comments.
2. Canada recognises the independence and impartiality of the Committee, and its ability to issue General Comments. Canada reiterates, however, that General Comments are capable only of providing guidance to States Parties in their interpretation of their obligations. The Comments do not create binding legal obligations in and of themselves, nor do they reflect an interpretation of the Covenant that is necessarily agreed upon by States Parties.
3. The specific comments below are not exhaustive, but rather highlight areas of concern. Silence in respect of other areas does not constitute acquiescence in the Committee's interpretation of States' obligations. Canada has seven main areas of comment in relation to the Draft General Comment.
4. As a general comment, Canada recommends that the Committee clearly distinguish between obligations under Article 6 and what the Committee considers to be best practices for implementation of Article 6. Canada recommends reserving the verb "must" when describing obligations and using the verb "should" when describing best practices.
5. Article 6 does not provide the authority for the Committee to expand the scope of measures required by the Covenant to prevent violations of the

[8] [*Draft General Comment No. 36: Article 6 Right to Life*, draft prepared by Yuval Shany & Nigel Rodley, Rapporteurs, UN Doc CCPR/C/GC/R.36/Rev.2 (2 September 2015); revised by the Committee on First Reading, July 2017].

https://doi.org/10.1017/cyl.2018.8 Published online by Cambridge University Press

right to life. It is appropriate for the Committee to recommend effective measures and "best practices". The Committee should refrain from intimating that these measures are legally required to be adopted by States Parties pursuant to Article 6. A General Comment should not endeavour to alter the plain and ordinary meaning of treaty provisions, or to expand the obligations they contain beyond the scope of States' consent.

6. Canada has observed that Draft General Comment raises issues that fall more squarely within other bodies' mandates, particularly the mandates of the Committee against Torture and the Committee on Economic, Social and Cultural Rights. Canada urges this Committee to focus on its core mandate.

(1) Comments concerning the extraterritorial application of the Covenant:

Paragraphs 26 and 66

7. As a State Party, Canada has undertaken to respect and to ensure the Covenant rights of all individuals within its territory and subject to its jurisdiction. Article 2(1) of the Covenant states clearly that a State Party has the obligation to respect and ensure the Covenant rights of all individuals within its territory and subject to its jurisdiction. Article 2(1) reflects the principle that the jurisdictional competence of a State is primarily territorial. Exceptions to that general rule are generally defined and limited by the sovereign territorial rights of the other relevant States. The Committee's interpretation of Article 6 attempts to expand the scope of the Covenant beyond the territory under the jurisdiction of the State. Such an interpretation would impinge on well-established principles of sovereignty. Canada requests that the General Comment reflect the exact language of Article 2(1) of the Covenant.

(2) Canada's position on the Death Penalty under the Covenant:

Paragraphs 5, 6, 16–17, 34 and 55

8. The right to life is fundamental. Canada opposes the death penalty. Canada has abolished the death penalty and encourages the abolition of the death penalty internationally. Where the death penalty is still in use, Canada advocates full respect for international human rights, and other safeguards and standards, including respect for due process and fair trial rights. Canada also seeks clemency for every Canadian facing the death penalty abroad.

Comments on Specific Paragraphs

9. In paragraph 5 of the Draft General Comment, Canada agrees with the Committee that the prohibition on "arbitrary" deprivations of life in Article 6 places

constraints on the imposition of the death penalty, such as its imposition at the outcome of unfair legal processes.

10. In paragraph 6, Canada would focus the definition of "deprivation of life" on intention, rather than a "deliberate … act or omission". Thus, Canada would rephrase the sentence as follows: "Deprivation of life involves the termination of life through a harm or injury to the person that is caused by another's act or omission, where that termination of life was either intentional or was a reasonably foreseeable and preventable outcome."
11. The imposition of the death penalty often amounts to torture or cruel, inhuman or degrading treatment or punishment. Canada takes the view that the relationship between the death penalty and the Article 7 prohibition of torture, cruel, inhuman or degrading treatment or punishment (CITDP) is evolving, especially in light of the heightened obligations to prevent and ensure accountability for torture and other CIDTP that apply to States Parties to the *Convention against Torture* [*and Other Cruel, Inhuman or Degrading Treatment or Punishment*.] Canada broadly agrees with the approach taken by the Committee in paragraph 55.

(3) Obligations in relation to non-State actors:

Paragraphs 7, 11, 13, 25, 26, 27-31, 32, 57, 68

12. 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 life by non-State actors, as distinct from the discussion of Article 6 as it applies to governmental action.
13. As noted above in paragraph 4, Canada requests that the General Comment clearly distinguish between obligations under Article 6 and what the Committee considers to be best practices for implementation of Article 6. This recommendation is particularly relevant to the parts of the General Comment discussing obligations to prevent and address harm by non-State actors.
14. Where the General Comment identifies positive obligations on the State to prevent or address harm by non-State actors, Canada requests that the Committee clearly explain the source of the obligation, with reference in particular to the language of the Covenant (e.g. Article 2) and the *Vienna Convention on the Law of Treaties*.
15. The Draft General Comment mixes the analysis of State and non-State action, for example when it refers to an obligation extending "to all threats that can result in loss of life". Canada does not view the Draft General Comment as providing clear or consistent guidance to States Parties on the scope of their obligations with respect to State and non-State action.

(4) The relationship between Article 6 and other obligations:

Paragraphs: 3, 8, 30, 35, 63, and 65

16. Canada has serious concerns about the Draft General Comment's approach to the relationship between Article 6 and other Covenant obligations, as well as the relationship between Article 6 and other areas of international law. Canada regrets that the Committee has described Article 6 as encompassing many protections already protected under the rubric of other civil, political, economic, social and cultural rights. Its approach in the Draft General Comment is too expansive and does not provide helpful guidance to States on the implementation of their Article 6 obligations. Issues that are outside the scope of Article 6, such as enforced disappearances, torture and CIDTP, should be reserved for another Draft General Comment. Similarly, Canada urges the Committee to restrict its comments to the substantive and procedural obligations under the Covenant, rather than what is required under other branches of international law, such as refugee law.

Comments on Specific Paragraphs

Paragraph 65: The right to life and environmental protections

17. As a strong supporter of effective measures to support, protect and promote both human rights and environment protections, Canada fully recognizes the importance of protecting the environment and the positive impact this may have on the enjoyment of human rights. Nevertheless, Canada also notes that the importance of these issues should not lead us to confuse the relationship between the human rights and environmental protection. In this context, Canada has some concerns with how paragraph 65 addresses the right to life and environmental degradation. In particular, while Canada fully recognizes that Article 6 dealing with the inherent right to life is a key provision of human rights law, Canada also notes that it seeks to ensure that no one is arbitrarily deprived of his or her life without legal protection or recourse. As such, the overall premise of paragraph 65, which links environmental degradation, climate change and the undefined concept of non-sustainable development to the right to life, is not supported by the text of Article 6.
18. In addition, this paragraph attempts to overlay States Parties' right to life obligations onto international environmental obligations without legal justification. Canada appreciates that States carefully negotiate multilateral environmental agreements ("MEAs") and agree upon specific international environmental obligations to address specific environmental issues with a view to promoting and realizing overarching objectives of protecting human health and the environment. Nevertheless, the right to life is not defined by environmental considerations and threats such as those suggested by

paragraph 65. Rather, international environmental obligations involve a careful balancing of interests, trade-offs and reasonable measures. The notion that Article 6 should "reinforce" international environmental obligations imposes a level of obligation on States that international environmental law does not contemplate, and that States have not accepted under MEAs.

19. Canada takes issue with the final sentence of paragraph 65 because it suggests that the only matters relevant to enjoyment of the right to life are environmental measures taken by States, which is not the case. There are other matters relevant to the enjoyment of the right to life. Finally, Canada notes that the reference to precaution at the end of paragraph 65 should be in terms of the "precautionary approach" consistent with the text of the Rio Declaration.

Paragraphs 3, 30, 63, and 65: Article 6 and economic, social and cultural rights

20. Canada disagrees with the Committee's assertion that the right to life includes a right to a life with dignity to the extent that this could be read to encompass certain socio-economic entitlements. Economic and social rights are protected by the *International Covenant on Economic, Social and Cultural Rights* (*ICESCR*). Canada emphasizes that any discussion of the relationship between Article 6 and *ICESCR* rights must recognise that the *ICESCR* imposes a different standard of implementation of States Parties' obligations, which is progressive realization, as described in article 2(1) of *ICESCR*.

(5) Comments concerning the relationship of the Covenant to international humanitarian law:

Paragraphs 11, 12, 67, 70 and 71

21. In relation to paragraph 11, Canada supports the "Montreux Document on Pertinent International Legal Obligations and Good Practices for States Related to Operations of Private Military and Security Companies During Armed Conflict"; however, this is not a legally binding document. States may not always be directly responsible for the actions of private individuals or entities. The Montreux document sets out circumstances to consider when determining responsibility.
22. Canada would insist on removing paragraphs 12, 67, 70 and 71. Canada would emphasize that international humanitarian law (IHL) is *lex specialis* during armed conflict, and IHL compliance is therefore the main consideration when assessing compliance with applicable human rights law in such situations. IHL is the appropriate body of law for consideration of the study, development, acquisition or adoption of a new weapon or weapon system. *Jus ad bellum* is governed by the United Nations Charter and customary international law, and compliance should therefore be assessed with reference to those bodies of law.

https://doi.org/10.1017/cyl.2018.8 Published online by Cambridge University Press

(6) Interim Measures Requests:

23. Canada's next comment is on the nature of interim measures requests. The Draft General Comment suggests that the Committee's interim measures requests are binding on States Parties. Canada does not agree with this proposition. It is not accurate to characterize these interim measures requests as legally binding at international law. There is nothing in the plain text of the Covenant or the Optional Protocol to suggest that the Committee's requests are intended to be binding, and no record of State practice to indicate that this is an interpretation of the Optional Protocol accepted by States Parties.
24. Canada recognises the usefulness of the issuance of interim measures requests in order to avoid irreparable harm pending the Committee's consideration of a communication, and therefore takes indications of interim measures seriously and gives them careful consideration. However, Canada reiterates that interim measures requests, like the Committee's views, are not legally binding. The legal nature of interim measures in international law is dependent on the legal nature of the ultimate decision. As an illustration of this, interim measures of the International Court of Justice and of the European Court of Human Rights are binding because of the binding nature of the final decisions these courts are empowered to make.
25. Canada complies in good faith with its obligations under the Covenant and the Optional Protocol. Canada gives the views, recommendations, and requests of the Committee serious consideration. Canada recognises that pursuant to the principle *pacta sunt servanda* — codified in Article 26 of the *Vienna Covenant on the Law of Treaties* — States Parties are required to give effect to the obligations under the Covenant and the Optional Protocol in good faith, which in turn leads to an obligation to cooperate with the Committee by giving careful considerations to its views. However, Canada is concerned that paragraph 50 of the Draft General Comment goes beyond what is required of States Parties when it states that "Failure to implement such interim measures is incompatible with the obligation to respect in good faith the procedures established under the specific treaties governing the work of the relevant international bodies."
26. Canada maintains its position that the issuance of interim measures requests should be subject to strict criteria. Interim measures requests should only be issued for communications in cases of real urgency and where there is a demonstrated risk that the individual will suffer irreparable harm. An interim measures request is not appropriate for communications that fail to demonstrate the basis for an alleged rights violation.

(7) The standard of risk:

Paragraphs 15, 34 and 59

27. In relation to paragraph 15, Canada insists on the use of a consistent standard of risk needed to establish a prima facie case in the individual

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communications process. Canada would also support clearly indicating that this is a discussion of the individual complaints process. Canada would therefore rephrase paragraph 15 as follows: "Individuals claiming to be victims of a violation of the Covenant, for the purposes of article 1 of the Optional Protocol must show, however, that their rights were violated by acts or omissions attributable to the State Party that is the subject of the individual's communication, or that their rights are under a foreseeable, real and personal risk of being so violated."

28. Similarly, Canada would use the standard of "foreseeable, real and personal risk" in paragraph 34. Canada agrees that general conditions in the receiving State are generally not sufficient to establish a personal and foreseeable risk, but would not foreclose the possibility that there may be cases in which general evidence of pervasive and systemic human rights abuses in the receiving State can form the basis for considering that the person sought faces a substantial risk of torture or mistreatment. Canada would add a reference to assurances and rephrase the first part of paragraph 34 as follows: "The duty to respect and ensure the right to life requires States parties to refrain from deporting, extraditing or otherwise transferring individuals to countries where there is a foreseeable real and personal risk that they would be deprived of their life in violation of article 6 of the Covenant. Such a risk must be personal in nature and cannot derive merely from the general conditions in the receiving State. For example, as explained in paragraph 38 below, it would be contrary to article 6 to extradite an individual from a country that abolished the death penalty to a country in which there is a real, foreseeable and personal risk that the death penalty will be imposed (for example, if no reliable assurances have been provided that the death penalty will not be sought or imposed)."
29. More specifically in relation to assurances, Canada agrees with the statement in paragraph 38 that States Parties that abolished the death penalty cannot deport or extradite persons to a country in which they are facing criminal charges that carry the death penalty, unless credible and effective assurances against the imposition of the death penalty have been obtained. Canada would also redraft the final sentence in paragraph 34 as follows: "When relying upon assurances from the receiving State of treatment upon removal, the removing State should engage in a fair assessment of whether such assurances are credible and effective, and consider whether there are adequate mechanisms for ensuring compliance by the receiving State with the issued assurances."

(8) Other comments:

30. In paragraph 6, Canada would focus the definition of "deprivation of life" on intention, rather than a "deliberate … act or omission". Thus, Canada would rephrase the sentence as follows: "Deprivation of life involves the termination

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of life through a harm or injury to the person that is caused by another's act or omission, where that termination of life was either intentional or was a reasonably foreseeable and preventable outcome."

31. In addition, Canada notes that the Covenant does not contain any obligation in either Article 2 or Article 6 to provide "the same remedies" for violations by States and abuses by non-State actors. Canada would thus rephrase paragraph 11 as follows, for consistency with the language of Article 2 of the Covenant: "… They should also ensure that victims of arbitrary deprivation of life by private actors empowered or authorized by the State are granted an effective remedy."
32. Regarding paragraph 49, Canada objects to the overgeneralization of military tribunals as not being "sufficiently independent and impartial". The Covenant requires States to ensure that military tribunals comply with the Covenant, including the fair trial guarantees in Article 14.
33. Canada recommends clarification of paragraphs 32 and 33 regarding investigations. Investigations into violations of Article 6 must be prompt and impartial. Any person whose Covenant rights are violated must have an effective remedy in accordance with Article 2. Moreover, Canada disagrees with the shifting of the burden of proof onto the State when a loss of life occurs in custody. While Canada accepts that the State has the obligation to investigate such losses of life, the burden of proof under Article 6 remains on the person or representative alleging a rights violation. Canada would therefore rephrase paragraph 33 as follows: "Loss of life occurring in custody, especially when accompanied by reliable reports of an unnatural death, create serious concerns that there has been an arbitrary deprivation of life by State authorities, which requires a prompt and impartial investigation on whether there has been an arbitrary deprivation of life or other human rights violations."
34. Finally, Canada would remove the term "peremptory" in paragraph 69, as this term should be reserved for peremptory norms of customary international law (*jus cogens*).

Conclusion:

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

INVESTOR–STATE DISPUTE SETTLEMENT

NAFTA Chapter 11 Tribunal — Articles 1116 and 1117 — Standing — Reflective Loss

In its Counter-Memorial dated 9 June 2017, and its Rejoinder Memorial dated 6 November 2017, in the *NAFTA* Chapter 11 arbitration in *Bilcon et al. v Canada* (UNCITRAL, PCA Case no. 2009-04), Canada submitted

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an argument regarding standing to recover damages under Article 1116. At issue was whether an investor may seek to recover damages personally for losses incurred by an enterprise investment that the investor owns or controls, following a respondent State's violation of *NAFTA* Chapter 11. Canada maintained that the standing provisions in Chapter 11 establish a strict separation between claims by an investor on its own behalf (Article 1116) and claims on behalf of an enterprise (Article 1117) and further argued that a proper analysis of Article 1116 under the *Vienna Convention on the Law of Treaties* (*Vienna Convention*) demonstrates that investors have no standing under Article 1116 to recover damages for loss incurred by an enterprise. An excerpt from Canada's argument follows:

Under Article 1116, Investors May Only Recover Losses They Incur, Not Losses Their Investments Incur

Under Article 31 of the *Vienna Convention*, *NAFTA* is to be interpreted "in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." *NAFTA* Article 1116 grants standing for a claim by an investor of a party on its own behalf, when "*the investor has incurred* loss or damage" from a breach of Chapter Eleven Section A (emphasis added). The ordinary meaning of this text is that an investor has standing under Article 1116 only for loss or damage that the investor incurred. Article 1116 does not contain language that allows investors to recover damages for losses incurred by an enterprise that the investor owns or controls. No qualifying clauses (e.g., "including" or "such as") suggest that the enumeration of eligible claims in Article 1116 is merely illustrative. The *expressio unius est exclusio alterius* interpretive rule precludes supplementing the list in Article 1116 with other *NAFTA* obligations.

The ordinary meaning of Article 1116 reflects a fundamental principle of corporate law recognized by advanced legal systems of domestic corporate law and customary international law: the corporation has separate legal personality from its shareholders.[9] In common law and civil law courts, shareholders are generally precluded from personally recovering damages for wrongs done to the corporation they invest in. They may file derivative claims, where any damages are awarded to the corporation. But advanced legal systems prohibit shareholders bringing claims for "reflective loss" — a claim of loss inseparable from the loss of the corporation for wrongs done to it. To uphold the corporation's separate legal personality, Canadian law prohibits reflective loss claims.[10]

[9] RA-118, D Gaukrodger, *Investment treaties as corporate law: Shareholder claims and issues of consistency. A preliminary framework for policy analysis, OECD Working Papers on International Investment*, No 2013/3, OECD Investment Division (Gaukrodger 2013), 53.

[10] R-584, *Meditrust HealthCare Inc v Shoppers Drug Mart*, 61 OR (3d) 786 (Ont Ct App 2002), para 12–14.

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Customary international law also bars claims for reflective loss. In *Barcelona Traction,* the International Court of Justice ("ICJ") acknowledged the corporation's separate legal personality as established by municipal law,[11] and held: "Not a mere interest affected, but solely a right infringed involves responsibility, so that an act directed against and infringing only the company's rights does not involve responsibility towards the shareholders, even if their interests are affected."[12]

In the *Diallo* case, the ICJ cited *Barcelona Traction* approvingly and reaffirmed that international law does not permit claims of reflective injury to shareholders.[13] 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."[14] Nothing in the language of Article 1116 indicates a clear intention by the *NAFTA* Parties to dispense with the important principle of international law that prohibits claims for reflective loss.

The Context of Article 1116 Does Not Support Interpreting It to Allow Investors to Bring Claims for Reflective Loss

Article 1116 must be interpreted in the context of Article 1117. The two provisions identify who has standing to bring a claim for which damages under Chapter 11.[15] Article 1117 derogates from customary international law by creating a right for investors to bring claims on behalf of an enterprise on the basis that "*the enterprise has incurred* loss or damage" (emphasis added).[16] Pursuant to Article

[11] RA-110, *Case Concerning the Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)* (ICJ Reports 1970) Second Phase, Judgment, 5 February 1970 ("*Barcelona Traction 1970*"), para 38.

[12] RA-110, *Barcelona Traction 1970*, para 46.

[13] CA-282, *Case Concerning Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)* Judgment on Preliminary Objections, 24 May 2007, paras 61–64 (distinguishing between admissible claims based on direct rights as shareholder and inadmissible claims based on reflective loss); RA-114, *Case Concerning Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of the Congo)* (ICJ Reports 2010) Judgment, 30 November 2010 ("*Diallo 2010*"), para 105 (reaffirming the distinction).

[14] RA-75, *Loewen Group Inc. v. United States* (ICSID Case No ARB(AF)/98/3) Award, 26 June 2003 ("*Loewen — Award*), para 160 (citing CA-105, *Case Concerning Elettronica Sicula SpA (ELSI) (United States of America v. Italy*) (ICJ Reports 1989), p. 42). See also RA-75, *Loewen — Award*, 26 June 2003, para 162: ("It would be strange indeed if *sub silentio* the international rule were to be swept away.")

[15] RA-125, M Kinnear, A Bjorklund and J Hannaford, *Investment Disputes under NAFTA: An Annotated Guide to NAFTA Chapter 11* (Kluwer, 2006), 1116-4–;1116–5.

[16] RA-119, D Gaukrodger, *Investment Treaties and Shareholder Claims for Reflective Loss: Insights from Advanced Systems of Corporate Law*, OECD Working Papers on International Investment, No. 2014/2, OECD Publishing (Gaukrodger, 2014), 23.

1135(2), any damages awarded under Article 1117 are paid to the enterprise, not to the investor.[17]

Articles 1116 and 1117 establish a strict separation for investors to seek standing, based on which entity incurred loss or damage—the investor or the enterprise, respectively. Ignoring this distinction would render Article 1117 redundant: a controlling shareholder could seek to personally recover damages under Article 1116 for losses incurred by the enterprise, rather than submit a claim under Article 1117 in which any damages would be awarded to the enterprise. Thus, permitting investors to use Article 1116 to recover damages for losses incurred by their enterprise would eliminate the distinction between Articles 1116 and 1117. A corollary of the "general rule of interpretation" in the *Vienna Convention* is that interpretation must give meaning and effect to all the terms of the treaty. An interpreter is not free to adopt a reading that reduces treaty clauses to inutility.[18]

Articles 1121(1) and 1121(2) also reflect the strict separation between *NAFTA*'s standing provisions. Where Article 1121(1) sets conditions precedent for claims under Article 1116, Article 1121(2) sets conditions precedent for claims under Article 1117. The parallel structure of Articles 1121(1) and 1121(2) confirms the distinct nature of claims that investors may bring under Articles 1116 and 1117.

Article 1121(1)(b) includes a requirement that the investor waive most rights to make a claim in domestic courts where a claim under Article 1116 is "for loss or damage to an interest in an enterprise …" Loss or damage to an investor's *interest in an enterprise* is distinct from loss or damage *incurred by the enterprise* itself. Article 1139(e) defines "investment" as "an *interest in an enterprise* that entitles the owner to share in income or profits of the enterprise"; and Article 1139(f) defines "investment" as "an *interest in an enterprise* that entitles the owner to share in the assets of that enterprise on dissolution" (emphasis added). In short, an interest in an enterprise is the entitlement or right to certain benefits regarding the enterprise.

For example, if the only effect of a *NAFTA* violation is to reduce the size or frequency of the dividends that an enterprise can pay its investors, a claim may be brought under Article 1117, but not Article 1116. The investor retains all of its entitlements regarding the enterprise. The fact that the enterprise is making less money and unable to pay dividends of the same size or frequency is a loss of the enterprise that is only felt reflectively by the investor. In contrast, if a measure caused the investor to lose its legal entitlement to receive dividends, this would be damage or loss to the investor's interest in the enterprise, rather than damage to the enterprise itself. Other potentially relevant claims that could be brought under Article 1116 rather than Article 1117 would include damage or loss to an investor's entitlement to: vote on major issues for the enterprise; own a portion of the enterprise; transfer ownership of the investor's

[17] RA-47, *NAFTA* Article 1135(2) states in part: "where a claim is made under Article 1117(1): … an award of monetary damages and any applicable interest shall provide that the sum be paid to the enterprise."

[18] CA-125, World Trade Organization, *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, 29 April 1996, 23.

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interest; have first refusal to purchase shares; inspect corporate records; or sue for wrongful acts.

Furthermore, although Article 1121(2) requires that both the investor and the enterprise waive their right to certain domestic proceedings to make a claim under Article 1117, Article 1121(1) does not require a waiver from the enterprise for minority shareholders to make a claim under Article 1116. It would be anomalous to conclude that while a non-controlling shareholder has no standing under Article 1117 without the enterprise's consent to claim that damages should be paid to the enterprise for losses incurred by the enterprise, that same investor has standing under Article 1116 to claim that damages should be paid directly to him or herself for losses incurred by the enterprise.

The Object & Purpose of NAFTA Does Not Support Interpreting Article 1116 to Allow Investors to Bring Claims for Reflective Loss

The object and purpose of *NAFTA*, as established in the Preamble and Article 102, includes achieving: (1) a more predictable commercial framework; (2) greater investor protection; and (3) increasing opportunities for investment. Granting standing for reflective loss undermines all three goals.

First, the established commercial framework in which corporations in advanced common and civil law jurisdictions conduct business deems that shareholders cannot circumvent the corporate form to recover damages for losses incurred by the enterprise. Allowing claims of reflective loss would overturn that settled principle, and subject investors to contradictory rules on the same issue depending on the applicable law. Furthermore, the *GAMI* tribunal warned that permitting minority shareholders to seek damages for the enterprise's loss could result in overlapping claims for the same loss, which would certainly be uncoordinated.[19] That tribunal cautioned that awarding damages for reflective loss would produce insurmountable difficulties with respect to quantification of any loss to a particular investor.[20] The risks of double recovery and inconsistent decisions also arise as the number of cases brought to address the same harm increases.[21] All of this would undermine commercial predictability.

Second, permitting claims of reflective loss would undermine investor protection. Creditors that make loans to qualified investments may be investors under Article 1139(d). In corporate law, company creditors have a priority claim over shareholders for corporate assets.[22] The distinction between Articles 1116 and 1117 protects

[19] RA-27, *GAMI Investments Inc v United Mexican States* (UNCITRAL) Final Award, 15 November 2004 (*GAMI — Final Award*), para 119.

[20] RA-27, *GAMI — Final Award*, paras 116–21.

[21] RA-118, Gaukrodger, 2013, 9: ("national courts have frequently underlined that the no reflective loss principle serves the societal interest in "judicial economy" by reducing the number of cases needed to address the harm.")

[22] RA-120 D. Gaukrodger, Chapter 8, *The impact of investment treaties on companies, shareholders and creditors* (OECD Business and Finance Outlook, 2016) p 235.

creditor rights by ensuring that damages suffered by a corporation from a *NAFTA* breach are paid to the corporation, not to its shareholders.[23] Allowing shareholders to personally recover damages for the losses incurred by the enterprise means creditors would effectively lose their priority position above the claimant shareholder over the enterprise's assets. It would be inappropriate for a shareholder to take advantage of the separate legal status of a corporation to shield itself from potential liability, but then disregard that legal status for the purpose of making claims for reflective loss. Indeed, the *Mondev* tribunal recognized that awarding damages to the enterprise for its losses could be important to creditors with security interests in the damages paid.[24] Moreover, shareholders that do not bring a claim would recover nothing even if a claimant won damages under Article 1116 for the enterprise's losses. These outcomes would undermine investor protection.

Third, permitting reflective loss claims could harm investment opportunities in the *NAFTA* territory. The perception that reflective loss entails stripping assets from the company to the detriment of creditors and other shareholders could affect the availability, pricing, and conditions of debt and equity financing for investment. Moreover, company management may be unable to settle claims with governments who determine that settling with the enterprise would not prevent shareholders from raising claims for the same measures. Thus, permitting reflective loss claims under Article 1116 undermines the object and purpose of *NAFTA*.

Furthermore, according to *VCLT* [*Vienna Convention*] Article 31(3), the Parties' subsequent agreement and practice "shall be taken into account." Subsequent agreement can take various forms, provided the purpose is clear; and consistent practice by all Parties is a strong indication of what they understand a provision to mean.[25] Since the U.S. *Statement of Administrative Action* of 1993 implementing *NAFTA*,[26] the *NAFTA* Parties have never departed from their consistent interpretation that Article 1116 does not offer standing for reflective loss. The Parties' repeated statements that Article 1116 and Article 1117 are strictly separate constitute subsequent agreement and practice under *Vienna Convention* Articles 31(3)(a) and 31(3)(b), which tribunals should take into account.

[23] See, e.g., RA-117, *GAMI Investments Inc v United Mexican States* (UNCITRAL) Submission of the United States, 30 June 2003 (*GAMI — Submission of the United States*), para 17; RA-28, *GAMI Investments Inc v United Mexican States* (UNCITRAL) Mexico's Statement of Defence, 24 November 2003 (*GAMI — Statement of Defence*), paras 166–67 (agreeing with and quoting US submission); R-585, *Alford v Frontier Enterprises, Inc*, 599 F 2d 483 (1st Cir 1979), 2: ("[the shareholder] is attempting to use the corporate form both as shield and sword at his will […T]he corporate form … effectively shielded [him] from liability", but the shareholder contended that he "can disregard the corporate entity and recover damages for himself. Of course, this is impermissible.")

[24] RA-46, *Mondev International Ltd v United States of America* (ICSID Case No ARB(AF)/99/2) Award, 11 October 2002 (*Mondev — Award*), paras 84, 86.

[25] RA-109, A Aust, *Modern Treaty Law and Practice* (Cambridge University Press, 2004), 191, 195.

[26] RA-140, The North American Free Trade Agreement Implementation Act, *United States Statement of Administrative Action*, Chapter Eleven, November 1993, 146.

In sum, interpreting Article 1116 in light of its ordinary meaning, context, the object and purpose of *NAFTA*, and the Parties' subsequent agreement and practice demonstrates that a proper *Vienna Convention* analysis supports one conclusion: Article 1116 does not grant standing to claim reflective loss. The detailed scheme that Articles 1116 and 1117 establish must be respected. NAFTA does not permit investors to circumvent the corporate form and personally recover for losses incurred by an enterprise. Indeed, the *Mondev* tribunal was concerned with preserving the "detailed scheme" between Article 1116 and 1117 claims, explaining that "[h]aving regard to the distinctions drawn between claims brought under Articles 1116 and 1117, a *NAFTA* tribunal should be careful not to allow any recovery, in a claim that should have been brought under Article 1117, to be paid directly to the investor."[27]

For all the reasons above, it is improper to dismiss the distinction between *NAFTA*'s carefully designated standing categories and to permit claims of reflective loss under Article 1116. The rights that an investor can protect under Article 1116 are his or her own, not the rights of the enterprise.

INTERNATIONAL TRADE LAW

World Trade Organization (WTO) — China's Accession Protocol — Price Comparison Methodologies — Principle of Effectiveness in Treaty Interpretation

In a third-party submission dated 21 November 2017 to the Appellate Body of the World Trade Organization (WTO) in *European Union — Measures Related to Price Comparison Methodologies*, Canada argued (full submission available on request to jlt@international.gc.ca):

Following the expiry of subparagraph 15(a)(ii),[28] China's Accession Protocol continues to permit Members to use a methodology that is not based on a strict

[27] RA-46, *Mondev — Award*, para 86 (emphasis added).

[28] Paragraph 15(a), including the chapeau, states: "Article VI of the GATT 1994, the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 ("Anti-Dumping Agreement") and the SCM Agreement shall apply in proceedings involving imports of Chinese origin into a WTO Member consistent with the following:

(a) In determining price comparability under Article VI of the GATT 1994 and the Anti-Dumping Agreement, the importing WTO Member shall use either Chinese prices or costs for the industry under investigation or a methodology that is not based on a strict comparison with domestic prices or costs in China based on the following rules:
   (i) If the producers under investigation can clearly show that market economy conditions prevail in the industry producing the like product with regard to the manufacture, production and sale of that product, the importing WTO Member shall use Chinese prices or costs for the industry under investigation in determining price comparability;
   (ii) The importing WTO Member may use a methodology that is not based on a strict comparison with domestic prices or costs in China if the producers under investigation cannot clearly show that market economy conditions prevail in the industry producing the like product with regard to manufacture, production and sale of that product."

comparison with domestic prices or costs in China, albeit without the right to presume that non-market economy conditions prevail in the Chinese industry under investigation.

If all of paragraph 15(a) ceased to apply despite the expiry of only subparagraph 15(a)(ii), this would render the clauses of paragraph 15(a) and subparagraph 15(a)(i) inutile. This would be contrary to Article 31 of the *Vienna Convention* [*on the Law of Treaties*] and the principle of effectiveness. The expiry of subparagraph 15(a)(ii) must have some meaning, though not to the extent that the remaining clauses of paragraph 15(a) and subparagraph 15(a)(i) are rendered inutile.

The meaning that remains is that the chapeau of paragraph (a) permits the use of either Chinese or non-Chinese prices or costs in determining price comparability "based on" the remaining rule in subparagraph 15(a)(i), consistent with the *Anti-Dumping Agreement* and the *GATT 1994*. Accordingly, if the producers under investigation clearly show that market economy conditions prevail, then the importing Member must use Chinese prices or costs. However, there is no remaining presumption under subparagraph 15(a)(ii) putting the onus on the producers under investigation to prove this. Therefore, in accordance with the duty of an investigating authority under the *Anti-Dumping Agreement* to seek out information, evaluate it in an objective manner, and base its conclusions on positive evidence, the investigating authority must do the same in making a determination as to whether or not market economy conditions prevail in the industry under investigation.[29] If the evidence shows that market economy conditions do not prevail in the industry under investigation, then the investigating authority may use a methodology not based on a strict comparison with domestic prices or costs in China in accordance with the chapeau of paragraph 15(a).

China may still demonstrate that market economy conditions prevail, either nationwide (per the first sentence of paragraph 15(d)), or in a particular industry (per the third sentence), thereby rendering inapplicable all of paragraph 15(a) for the country as a whole or for a particular industry, as the case may be. Until China demonstrates that market economy conditions prevail, an investigating authority may continue to apply a methodology that is not based on a strict comparison with domestic prices or costs in China.

The context provided by the rest of Article 15 of *China's Accession Protocol* provides support for the above textual and contextual arguments. Paragraph 15(b) of the Protocol and paragraph 151 of the Working Party Report confirm that the "special difficulties" that may exist in China are related to cost and price comparability in both anti-dumping investigations and countervailing duty investigations, and may persist until China transitions to a full market economy. The specific reference in paragraph 15(c) to the methodologies used in paragraph 15(a) that Members are required to notify clearly signifies that non-market economy methodology used by importing Members relates to all of paragraph 15(a) and not merely subparagraph 15(a)(ii).

[29] Appellate Body Report, US — *Anti-Dumping and Countervailing Duties (China)*, para. 344.

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The Protocol and the Working Party Report show that the general intention of the Members upon China's Accession was to allow for differential treatment of China because of its non-market-based economy, with the expectation that it would transition to a market economy, at which point differential treatment would no longer be necessary. The object and purpose of *China's Accession Protocol* therefore supports Canada's interpretation of the ordinary meaning of the terms of the Protocol read in their context, which allows for the possibility of non-market economy treatment as long as special difficulties continue to exist in determining cost and price comparability prior to China's transition to a full market economy.

World Trade Organization (WTO) — WTO Agreement on Subsidies and Countervailing Measures (SCM Agreement) — Compliance Obligation Following a Finding That a Subsidy Has Caused Adverse Effects

In a third-party submission dated 31 January 2017 to the Appellate Body of the World Trade Organization (WTO) in *European Communities – Measures Affecting Trade in Large Civil Aircraft* (Recourse to Article 21.5 of the Dispute Settlement Understanding by the United States), Canada argued (full submission available on request to jlt@international.gc.ca):

Article 7.8 of the *SCM Agreement* sets out how a Member is to comply with its obligations when it is found to have provided a subsidy that caused adverse effects to the interests of another Member. The provision states: "Where a panel report or an Appellate Body report is adopted in which it is determined that any subsidy has resulted in adverse effects to the interests of another Member within the meaning of Article 5, the Member granting or maintaining such subsidy shall take appropriate steps to remove the adverse effects or shall withdraw the subsidy."

Accordingly, for Members "granting or maintaining" a subsidy that has been determined to be inconsistent with Article 5 of the *SCM Agreement*, Article 7.8 provides two paths to compliance: take appropriate steps to remove the adverse effects of the subsidy *or w*ithdraw the subsidy.

However, when interpreting Article 7.8, the Panel found that, due to the "effects-based nature of the disciplines of Article 5", the remedial options are, in fact, as follows: take appropriate steps *unrelated to the subsidy* to remove its adverse effects (e.g. "more effects-based or market-focused solutions") *or* withdraw the subsidy *and* remove its adverse effects.

Pursuant to this interpretation, the Panel determined that Members are required to "remove the adverse effects" resulting from subsidies "*irrespective of whether those subsidies continue to exist* in the implementation period". Based on this obligation, the Panel concluded that the end of the lives, or expiration, of the LA/MSF [Launch Aid/Member State Financing] and capital contribution subsidies for certain aircraft cannot alone support a finding that the European Union has withdrawn those subsidies in accordance with Article 7.8. …

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The interpretation of Article 7.8 adopted by the Panel and supported by the United States is fundamentally misguided. … Under a principled interpretation of Article 7.8, a Member only has a compliance obligation with respect to subsidies in existence during the reasonable period of time (RPT) for implementation. Indeed, Article 7.8 refers to a situation where a Member is "granting or maintaining" a subsidy. If a subsidy has expired (e.g. through the passage of time) before or during the RPT, it is no longer being granted or maintained at the end of the RPT and a Member, as a result, has no compliance obligation with respect to that subsidy. Moreover, when a subsidy exists during the RPT, a subsidizing Member has two distinct options to comply with Article 7.8. It can either: (1) maintain the subsidy but ensure the removal of its adverse effects, or (2) withdraw the subsidy. In Canada's view, independent meaning must be given to each of these compliance options.

Canada's interpretation is supported by the customary rules of interpretation of public international law, as codified in Article 31 of the *Vienna Convention*, which require that a treaty be interpreted "in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose". …

With respect to the ordinary meaning of the terms of Article 7.8, the phrase "granting or maintaining" indicates that the existence of a subsidy during the implementation period is a precondition for the compliance obligation under Article 7.8. As expired or withdrawn subsidies no longer exist, those subsidies entail no compliance obligation under Article 7.8. Moreover, the phrase "shall take appropriate steps to remove the adverse effects or shall withdraw the subsidy" indicates that the compliance options are disjunctive in nature. Therefore, compliance under Article 7.8 can be achieved by withdrawing the WTO-inconsistent subsidy.

The following elements of the context of Article 7.8 support this understanding. First, the text of Article 7.9 of the *SCM Agreement* confirms the compliance options under Article 7.8 are disjunctive. Second, the difference in wording between Article 5 and Article 7.8 underscores an asymmetry between the circumstances in which a finding of an actionable subsidy may be made and the resulting compliance obligation. This difference must be afforded meaning. Where causing adverse effects is a constituent element for an actionable subsidy, removing those adverse effects is not the only way to comply with Article 7.8. Members can also comply by withdrawing the subsidy. Third, the compliance obligation for prohibited subsidies and the restrictions on the application of countervailing duties confirm that withdrawal of the subsidy constitutes compliance under Article 7.8. The Appellate Body has indicated that a Member can comply with Article 4.7 of the *SCM Agreement* by removing a prohibited subsidy. Moreover, if removing the subsidy negates the right to apply countervailing duties, it must also negate the right to apply countermeasures — the remedy for actionable subsidies. Fourth, the general rule of compliance under the DSU is the removal of the WTO-inconsistent measure. Where no subsidy exists, as a result of expiry or withdrawal, no compliance obligation remains.

With respect to the object and purpose of the *SCM Agreement*, it is subsidies that the *SCM Agreement* disciplines, not the adverse effects that linger after the subsidies no longer exist. Limiting the application of the compliance obligation under

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Article 7.8 to existing subsidies is consistent with this object and purpose. It is also consistent with the general objective of the WTO agreements to foster security and predictability in the international trading system. …

In addition, the Panel improperly took into account the effects of expired subsidies when it determined that subsidies were causing serious prejudice and that the European Union had therefore failed to remove the adverse effects of the subsidies.

A counterfactual analysis involves a comparison between the current market situation and a counterfactual situation without subsidies. The Panel's analysis relied on a counterfactual situation where the challenged LA/MSF would not have been granted.

This is the wrong counterfactual situation. The correct counterfactual situation is rather one where only the subsidies present at the end of the RPT do not exist. Indeed, there must be consistency between the two options available to a responding Member under Article 7.8. A Member must either withdraw the subsidies or remove their adverse effects by the end of the RPT. If a given subsidy has been withdrawn or has expired, a Member cannot be asked to also remove its adverse effects.

It is only through a comparison of the correct counterfactual situation with the current market situation that the Panel could have properly assessed whether the subsidies that remained at the end of the RPT caused serious prejudice and, relatedly, whether the European Union had removed the adverse effects of these subsidies. The Panel failed to do so.

SPACE LAW

Liability — Concept of the Launching State — State Responsibility — Private Entities

On 18 January 2017, the Legal Adviser wrote the following [footnotes added]:

The *Liability Convention*[30] was not intended to give States the option of assuming liability; it was designed to be based on an objective test in order to ensure that there is always a State held liable so that the victim has a recourse against someone (at least in the case of damage on the surface of the Earth or to aircraft in flight). It could be that there was an unspoken consensus in the room when the texts that would become UNGAR 59/115 (Concept of the Launching State)[31] and UNGAR 62/101 (Registration Practices)[32] were developed but that is not reflected in the text of either resolution; neither one comes close to providing guidance on launches by private entities and whether that makes the State of nationality or State of residence of the operator a launching State.

[30] *Convention on International Liability for Damage Caused by Space Objects*, 29 March 1972, 961 UNTS 187 (entered into force 1 September 1972).

[31] *Application of the concept of the "launching State"*, GA Res 59/115, UN Doc A/RES/59/115 (2005).

[32] *Recommendations on enhancing the practice of States and international intergovernmental organizations in registering space objects*, GA Res 62/101, UN Doc A/RES/62/101 (2007).

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Article VI combines several different concepts and obligations which should be carefully separated and analyzed. The first is State Responsibility; States are responsible for "national activities" whether carried out by government agencies or non-governmental entities. National activities are not defined. Some States and academics believe this term is synonymous with "activities of nationals". However, several prominent space-faring nations do not hold this view. I do not believe this is the correct interpretation to be given to the term "national activities" based on both the historical context and the ordinary meaning of the words used in the treaty. The context was that in the 1960s the US had decided to nominate COMSAT as its participant in INTELSAT (when it was an international organisation, before it was privatised). Some States did not like a private company carrying out State functions. It was viewed by some as an attempt to avoid responsibility for State actions. As a result, the 1963 Declaration of Legal Principles[33] and subsequently the *Outer Space Treaty*[34] made it clear that States could not avoid international responsibility for national activities by assigning those activities to private entities. I also find that the ordinary meaning of the words in Article VI [of the *Outer Space Treaty*] would be strained if one were to read "activities of nationals" in the place of "national activities": "States Parties to the Treaty shall bear international responsibility for [activities of their nationals] in outer space … whether such activities are carried on by governmental agencies or non-governmental entities …"

If the objective had been to make States responsible for the activities of their nationals in outer space, the sentence could have ended where I placed the ellipsis. The remainder of the sentence only confuses the matter if the intent was to attribute private actions to the State.

The obligation to authorize and supervise is in the next sentence and it constitutes a separate obligation upon State Parties. More importantly, it does not make any reference to nationality or national activities but instead places the obligation on the "appropriate State Party to the Treaty". This seems to be an implicit recognition that the State of nationality might not always be the State that is obligated to authorize and supervise the activity. It also de-links the obligation to authorize and supervise from the imposition of liability in the next Article; the *Outer Space Treaty* contemplates a situation in which the launching State (the State that is liable for damage) is not the appropriate State to authorize and supervise the private entity. In other words, the launching State, the State of nationality of the private entity operating the space object and the appropriate State to supervise the activity or the entity may not be the same in all cases. If we interpret Article VI to mean that Canada is internationally responsible for the acts of private entities as though those acts were those of the State, even where there is no Government of Canada involvement in

[33] *Declaration of Legal Principles Governing the Activities of States in the Exploration and Use of Outer Space*, GA Res 1962/XVIII, UN Doc A/RES/18/1962 (1963).

[34] *Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies*, 27 January 1967, 610 UNTS 205 (entered into force 10 October 1967).

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the space activity or the space object, the distinction contemplated in the *Outer Space Treaty* evaporates. In essence, Article VI and VII are merged; the State responsible for the national activity is also the launching State in every case (although there may be multiple launching States). That does not seem to be a reasonable interpretation of the Treaty in my opinion.

STATE IMMUNITY

Immunity of State Officials — Foreign Criminal Jurisdiction — International Crimes

On the proposals made by the International Law Commission (ILC) concerning the immunity of state officials from foreign criminal jurisdiction,[35] the Legal Adviser wrote:

Issue

Limitations and exceptions to the applicability of immunity *ratione materiae* (i.e., 'functional immunity' or immunity for acts performed in an official capacity) of state officials in relation to international crimes.

Position

Canada recognizes that state immunity (including immunity of state officials) represents a key plank to the diplomatic principles of comity and the mutual respect between states. That being said, Canada is a strong supporter of international justice and accountability. As such, Canada will want to be very careful that the ILC accurately describes the state of international law and, in terms of any progressive development, ensure that the ILC strikes the appropriate balance between ensuring that state officials are not given broad immunity for very serious crimes while limiting the scope for vexatious or politically motivated prosecutions. While arguably draft article 7 may not reflect the views of all states, Canada does not oppose the language or spirit of draft article 7.

Background

I. ILC Draft Article 7 on "Crimes in respect of which immunity does not apply":

The mandate of the International Law Commission (ILC) is to promote the progressive development and codification of international law. In 2007, the ILC appointed a Special Rapporteur to consider the topic of "Immunity of State Officials from Foreign Criminal Jurisdiction". The first Special Rapporteur

[35] See *Report of the International Law Commission, Sixty-ninth session (1 May-2 June and 3 July-4 August 2017)*, UN Doc A/72/10 (2017), ch VII at para 68–141.

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submitted three reports. The second and present Special Rapporteur — Ms. Concepción Escobar Hernández — was appointed in 2012, and has since submitted five reports.

The ILC has thus far provisionally adopted six draft articles and commentaries. It is important to note that, in 2014, the ILC provisionally adopted two articles with respect to the definition of a 'state official' and persons enjoying immunity *ratione materiae*.

At the 69th session in July, the ILC provisionally adopted draft article 7 by a recorded vote (21 in favour, 8 opposed, and 1 abstention). Since the adoption of substantive draft articles is generally done by consensus, some concerns were raised about the choice to hold a vote on this matter.

Draft article 7 is substantive in nature, listing particular crimes under international law where immunity *ratione materiae* from foreign criminal jurisdiction shall not apply. These crimes are: (a) genocide; (b) crimes against humanity; (c) war crimes; (d) *apartheid*; (e) torture; and (f) enforced disappearance.

The majority of the ILC members decided to include draft article 7 for two main reasons. First, there had been an apparent trend in national courts and legislatures towards limiting the applicability of immunity from jurisdiction *ratione materiae* in respect of certain crimes under international law.[36] Second, in order to preserve the integrity of the international legal order, such ILC members wished to strike a balance — ensuring that immunity fulfils its purpose (to protect the sovereign equality and legitimate interests of states) while not being turned into a procedural mechanism to block attempts at holding certain individuals (state officials) criminally accountable of "the most serious crimes under international law."[37]

Some members disagreed with the above analysis, noting that, in the absence of consistent state practice and *opinio juris*, customary international law continued to be in a state of flux on this topic, particularly with regards to the crimes of torture, *apartheid*, and enforced disappearance.

The sixth report, which will deal with procedural aspects of immunity, is expected to be submitted in 2018.

II. Canadian Domestic Law:

a) Criminal Context

Canada's criminal laws are consistent with draft article 7.

(1) *Crimes Against Humanity and War Crimes Act* (*CAHWCA,* 2000). Canada became the first country to incorporate the obligations of the *Rome Statute of the International Criminal Court* (*Rome Statute*) into its domestic laws, with the enactment of

[36] *Ibid* at 180.

[37] *Ibid* at 181.

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the CAHWCA in June 2000. The CAHWCA criminalizes the most serious crimes of concern to the international community, as defined under Articles 5 to 8 of the *Rome Statute*. Jurisdiction to prosecute acts of genocide, crimes against humanity, and war crimes may be exercised by Canadian courts for offences committed abroad in accordance with international consensus that, at customary international law, such universal jurisdiction exists.

The *CAHWCA* incorporates several grounds of jurisdiction:

- *active nationality jurisdiction*, which ensures Canada holds jurisdiction over crimes committed by Canadian citizens (s. 8(a)(i));
- *passive nationality jurisdiction*, which gives Canada jurisdiction over crimes committed against Canadian nationals or their allies in an armed conflict; (ss. 8(a)(iii) & 8(a)(iv)); and
- *universal jurisdiction*, which allows Canada to prosecute any individual present in Canada for serious offences regardless of nationality or place of commission of the crime. (ss. 6(1) & 9(1)).

According to s. 6(3) of the *CAHWCA*, which deals with offences committed outside of Canada:

- crime against humanity means murder, extermination, enslavement, deportation, imprisonment, torture, sexual violence, persecution or any other inhumane act or omission that is committed against any civilian population or any identifiable group and that, at the time and in the place of its commission, constitutes a crime against humanity *according to customary international law or conventional international law* or by virtue of its being criminal according to the general principles of law recognized by the community of nations, whether or not it constitutes a contravention of the law in force at the time and in the place of its commission.
- genocide means an act or omission committed with intent to destroy, in whole or in part, an identifiable group of persons, as such, that at the time and in the place of its commission, constitutes genocide according to customary international law or conventional international law or by virtue of its being criminal according to the general principles of law recognized by the community of nations, whether or not it constitutes a contravention of the law in force at the time and in the place of its commission.
- war crime means an act or omission committed during an armed conflict that, at the time and in the place of its commission, constitutes a war crime according to customary international law or conventional international law applicable to armed conflicts, whether or not it constitutes a contravention of the law in force at the time and in the place of its commission.

Furthermore, s. 6(4) provides clarity on the interpretation of customary international law for this Act:

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6(4) For greater certainty, crimes described in articles 6 and 7 and paragraph 2 of article 8 of the Rome Statute are, as of July 17, 1998, crimes according to customary international law, and may be crimes according to customary international law before that date. This does not limit or prejudice in any way the application of existing or developing rules of international law.

As such, torture, *apartheid*, and enforced disappearance are caught by the *CAHWCA* if committed as a war crime or crime against humanity (*apartheid* and enforced disappearance are considered "crimes against humanity" under Article 8 of the *Rome Statute*), whether committed within or outside of Canada.

Finally, the *CAHWCA* does not carve out an exception for state officials, as it applies to "every person".

(2) *Geneva Convention Act* (*GCA*, 1985). A person may also be charged under the *GCA*, whether the person is in or outside of Canada for grave breaches under the *Geneva Conventions*.
(3) *Criminal Code*. Torture committed by, or on behalf of a government official, is criminalized in s. 269.1:

> Every official, or every person acting at the instigation of or with the consent or acquiescence of an official, who inflicts torture on any other person is guilty of an indictable offence and liable to imprisonment for a term not exceeding fourteen years.

For the purposes of this section, "official" under the Code means:

> (a) a peace officer,
> (b) a public officer,
> (c) a member of the Canadian Forces, or
> (d) any person who may exercise powers, pursuant to a law in force in a foreign state, that would, in Canada, be exercised by a person referred to in paragraph (a), (b), or (c), whether the person exercises powers in Canada or outside Canada.

If the Canadian government were to carry out acts of torture, such conduct would: breach binding international law rules and principles, be illegal under the Code, and likely be unconstitutional.

b) Civil Context

In Canada, state immunity from civil suits is codified in the *State Immunity Act* (*SIA*). The cornerstone of the Act is found in section 3(1), which provides that a foreign state is immune from the jurisdiction of any court in Canada, "except

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as provided by the Act."[38] These exceptions include: 1) proceedings concerning commercial activities of a state,[39] 2) proceedings regarding any death or personal or bodily injury, or any damage to or loss of property that takes place in Canada,[40] and 3) states that support terrorism, as set out in a specified list under the Act.[41] It is important to note that the *SIA* does not apply to criminal proceedings.[42]

Under Section 2 of the *SIA*, the definition of a "foreign state" includes:

(a) any sovereign or other head of the foreign state or of any political subdivision of the foreign state while acting as such in a public capacity,
(b) any *government* of the foreign state or of any political subdivision of the foreign state, including any of its departments, and any agency of the foreign state, and
(c) any political subdivision of the foreign state.

In the Supreme Court of Canada torture case [of] *Kazemi Estate v Republic of Iran* (2014), Justice LeBel, writing for the majority, clarified the meaning of "foreign state", and confirmed that "public officials, being necessary instruments of the state, are included in the term 'government' as used in the *SIA*."[43] That being said, LeBel J. stated that public officials will only benefit from state immunity when acting in their official capacity.[44] In the end, the Court ruled that torture could be considered an official act for the purposes of the immunity of state officials,[45] thus demonstrating that states and state officials can be immune from civil suit in Canada for violations of international *jus cogens* norms, such as torture.

Jurisprudence on this topic outside of Canada has been more mixed. In *Pinochet No. 3* (2000), the UK House of Lords determined that for the purposes of criminal proceedings against an individual, torture could not be considered an "official act" giving rise to *ratione materiae* immunity.[46] However, the Ontario Court of Appeal in *Bouzari v Iran* (2004) noted that the reasoning of the House of Lords in *Pinochet* was specific to criminal proceedings, and that a number of the Law Lords expressed the belief that immunity would still apply in civil cases.[47]

[38] *State Immunity Act*, RSC 1985, c S-18, s 3; *Bouzari v Islamic Republic of Iran* [2004] 71 OR (3d) 675 (CA) at para 42 [*Bouzari*].

[39] SIA (*ibid*), s 5.

[40] *Ibid*, s 6(a)–(b).

[41] *Ibid*, s 6.1.

[42] *Ibid*, s 18.

[43] *Kazemi Estate v Islamic Republic of Iran*, 2014 SCC 62, [2014] 3 SCR 176 at para 93 [*Kazemi*].

[44] *Ibid.*

[45] *Ibid* at para 109.

[46] *R v Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (No 3)*, [2000] 1 AC 147.

[47] *Bouzari*, *supra* note 38 at para. 91.

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Conclusion

While some members of the international community may argue that draft article 7 does not reflect existing law (*lex lata*) or a desirable progressive development of the law (*lex ferenda*), Canada recognizes that exceptions to immunity *rationae materiae* of state officials for certain crimes under international law exist in the criminal context. On a national level, Canada's existing legal and legislative framework manages to strike a balance between providing for appropriate levels of immunity of state officials while allowing the possibility of exercising universal criminal jurisdiction for certain international crimes. As such, the ILC's draft article 7 is in line with Canadian practice.

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