Articles

Indigenous Rights and Trade Obligations: How Does *CUSMA*'s Indigenous General Exception Apply to Canada?

Droits autochtones et obligations commerciales internationales: comment l'exception générale autochtone de l'*ACÉUM* s'applique-t-elle au Canada?

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Abstract

Canadian commitments under trade and investment treaties have been an ongoing concern for Indigenous peoples. The *Canada-United States-Mexico Agreement* (*CUSMA*) is the first Canadian treaty to include a general exception for measures that a party state "deems necessary to fulfill its legal obligations to [I]ndigenous peoples." This exception is likely to afford Canada broad, but not unlimited, discretion to determine what its legal obligations to Indigenous peoples require. There is a residual risk that Canada's reliance on the exception could be challenged through the *CUSMA* dispute settlement process. A *CUSMA* panel would not have the expertise necessary to decide inevitably complex questions related to what Canada's legal obligations to Indigenous

Résumé

Les engagements du Canada en vertu de traités de commerce et d'investissement sont une préoccupation constante des peuples autochtones. L'*Accord Canada–États-Unis–Mexique* (*ACÉUM*) est le premier traité canadien à inclure une exception générale pour les mesures qu'un État partie "juge nécessaire[s] pour remplir ses obligations légales à l'égard des peuples autochtones." Cette exception donne vraisemblablement au Canada un pouvoir discrétionnaire large, mais non illimité, pour déterminer ce qu'exigent ses obligations juridiques envers les peuples autochtones. Il existe donc un risque résiduel que le recours éventuel du Canada à l'exception soit contesté dans le cadre du processus de règlement des différends de

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peoples require. While state-to-state cases under the *North American Free Trade Agreement* have been rare, a *CUSMA* panel adjudication regarding the Indigenous general exception risks damaging consequences for Canada's relationship with Indigenous peoples.

l'*ACÉUM*. Or, un groupe spécial institué en vertu de l'*ACÉUM* n'aurait pas l'expertise nécessaire pour trancher des questions inévitablement complexes liées aux obligations juridiques du Canada envers les peuples autochtones. Bien que les litiges d'État à État en vertu de l'*Accord de libre-échange nord-américain* aient été rares, une détermination d'un groupe spécial de l'*ACÉUM* concernant l'exception générale autochtone risque de nuire aux relations du Canada avec les peuples autochtones.

Keywords: Indigenous general exception; Indigenous peoples' rights; international dispute settlement; international investment; international trade; treaty interpretation; *United Nations Declaration on the Rights of Indigenous Peoples*; *Canada-United States-Mexico Agreement*.

Mots-clés: Accord Canada–États-Unis–Mexique; commerce international; *Déclaration des Nations Unies sur les droits des peuples autochtones*; droits des peuples autochtones; exception générale autochtone; interprétation des traités; investissement international; règlement des différends internationaux.

Introduction

The *Canada-United States-Mexico Agreement* (*CUSMA*) came into force on 1 July 2020.[1] *CUSMA* contains a novel exception for measures that a party state "deems necessary to fulfill its legal obligations to [I]ndigenous peoples."[2] A footnote explains that, for Canada, these legal obligations include those rights recognized and affirmed by section 35 of the *Constitution Act, 1982*[3] and those rights contained in self-government agreements between Canadian governments and Indigenous peoples. While previous Canadian trade treaties, including the *North American Free Trade Agreement* (*NAFTA*),[4] have included limited protections for Canadian measures

[1] *Protocol Replacing the North American Free Trade Agreement with the Agreement between Canada, the United States of America, and the United Mexican States*, 30 November 2018, Can TS 2020 No 5 (entered into force 1 July 2020); *Protocol of Amendment to the Agreement between Canada, the United States of America, and the United Mexican States*, 10 December 2019, Can TS 2020 No 6 (entered into force 1 July 2020) [*CUSMA* collectively].

[2] *CUSMA*, *supra* note 1, art 32.5. We will refer to "Indigenous" rather than "indigenous" peoples and their rights. We will use the term "Indigenous peoples" when writing in our own hand, but we will occasionally use "Aboriginal peoples" to reflect that expression in constitutional documents, trade agreements, and other sources.

[3] *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

[4] *North American Free Trade Agreement*, 17 December 1992, Can TS 1994 No 2 (entered into force 1 January 1994) [*NAFTA*].

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relating to Indigenous peoples, *CUSMA* is the first to create a general carve-out from all treaty obligations.

This is a crucial time in the relationship between Canada and Indigenous peoples. From the earliest European settlement in this territory, colonial governments have pursued antagonistic and racist policies towards Indigenous peoples.[5] Indigenous peoples have struggled to have their inherent and treaty rights recognized and affirmed by Canadian governments. Indigenous groups, commissions of inquiry, and allies have called on Canadian governments to prioritize Canada's constitutional and moral obligations to Indigenous peoples. Within this context, ensuring that Canadian international treaty obligations respect the rights of Indigenous peoples and Canada's corresponding obligations is imperative. Canadian commitments under earlier trade and investment treaties, however, have been an ongoing concern for Indigenous peoples, especially those agreements' commitments to protect foreign investors.[6] For example, foreign investors might claim that new Canadian project approval requirements that uphold duties to consult Indigenous peoples are inconsistent with treaty obligations to provide "fair and equitable treatment" if enhanced consultation requirements create serious delays or ultimately prohibit the project.[7] Undoubtedly, these sorts of concerns encouraged Canada to propose an exception for actions that fulfill its obligations to Indigenous peoples, which is referred to in this article as the Indigenous general exception (IGE).[8]

[5] Perhaps the leading example are the Calls to Action of the Truth and Reconciliation Commission of Canada (TRC) in 2015. The TRC's summary of its final report began with these words: "For over a century, the central goals of Canada's Aboriginal policy were to eliminate Aboriginal governments; ignore Aboriginal rights; terminate the Treaties; and, through a process of assimilation, cause Aboriginal peoples to cease to exist as distinct legal, social, cultural, religious, and racial entities in Canada." TRC, *Honouring the Truth, Reconciling for the Future: Summary Report of the Final Report of the Truth and Reconciliation Commission of Canada* (2015) at 1, online: <www.trc.ca/assets/pdf/Honouring_the_Truth_Reconciling_for_the_Future_July_23_2015.pdf>.

[6] Several examples are cited in Risa Schwartz, "Toward a Trade and Indigenous Peoples' Chapter in a Modernized NAFTA," CIGI Papers No 144 (September 2017) [Schwartz, "Toward"]. A burgeoning literature on Indigenous peoples and international trade exists. See e.g. Sergio Puig, "International Indigenous Economic Law" (2019) 52 UC Davis L Rev 1243; Patricia Goff, "Bringing Indigenous Goals and Concerns into the Progressive Trade Agenda" (2021) 65 Papers in Political Economy, online: <journals.openedition.org/interventionseconomiques/12777>.

[7] Schwartz cites several real-world examples. Schwartz, "Toward," *supra* note 6. She also refers to *Report of the Special Rapporteur of the Human Rights Council on the Rights of Indigenous Peoples on the Impact of International Investment and Free Trade on the Human Rights of Indigenous Peoples*, UNGAOR, 70th Sess, UN Doc A/70/301 (2015), online: <www.un.org/en/ga/search/view_doc.asp?symbol=A/70/301>.

[8] Risa Schwartz, "Guest Post: Protecting Indigenous Rights in the United States-Mexico–Canada Agreement," *International Economic Law and Policy Blog* (8 October 2018), online:

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This article provides a preliminary analysis of the prospects for Canada to rely on the IGE and some possible implications of doing so. A new exception complementing existing protections for state actions in relation to Indigenous peoples enhances Canadian flexibility to appropriately respect and protect Indigenous rights, compared to other recent treaties, like the *Canada-Europe Comprehensive Economic and Trade Agreement* (*CETA*) and the *Comprehensive and Progressive Agreement for Trans-Pacific Partnership* (*CPTPP*).[9] Many leading commentators on international trade and Indigenous peoples have characterized the IGE as providing the broadest protection for Indigenous peoples' rights found in any trade treaty.[10] A key question, however, is whether the IGE permits Canada to decide what its obligations to Indigenous peoples require or whether Canada's reliance on the IGE could be challenged by the United States or Mexico and, ultimately, ruled on by a dispute settlement panel under *CUSMA*. We conclude that interpretation of the IGE is likely to afford Canada broad, but not unlimited, discretion to determine what its "legal obligations to [I]ndigenous peoples" require.[11] This interpretation creates a residual risk that Canada's reliance on the IGE could be challenged through *CUSMA*'s dispute settlement process.

The prospect of a *CUSMA* panel deciding whether Canada can rely on the IGE raises several concerns. As explained in more detail below, these concerns include the composition of the panel, the expertise of the panel members, and the limited participatory rights of affected Indigenous

<worldtradelaw.typepad.com/ielpblog/2018/10/guest-post-protecting-indigenous-rights-in-the-united-states-mexico-canada-agreement.html> ["Schwartz, "Protecting"]. Canada had originally proposed a much broader set of provisions related to Indigenous peoples, including an Indigenous chapter. See Schwartz, "Toward," *supra* note 6 at 15.

[9] *Comprehensive and Progressive Agreement for Trans-Pacific Partnership*, 8 March 2018 (entered into force 30 December 2018 for Canada, Australia, Japan, Mexico, New Zealand, Singapore; entered into force 14 January 2019 for Vietnam), online: <www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/tpp-ptp/text-texte/toc-tdm.aspx?lang=en> [*CPTPP*]; *Comprehensive Economic Partnership Agreement Between Canada, of the One Part, and the European Union and Its Member States, of the Other Part*, 30 October 2016 (provisionally applied 21 September 2017), online: <www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/ceta-aecg/text-texte/toc-tdm.aspx?lang=eng> [*CETA*]. As discussed below, these agreements, unlike *CUSMA*, allow foreign investors to make claims for financial compensation directly against Canada for breach of investment chapter obligations, substantially increasing the risk of claims.

[10] See e.g. Risa Schwartz, "Developing a Trade and Indigenous Peoples Chapter for International Trade Agreements" in John Borrows & Risa Schwartz, eds, *Indigenous Peoples and International Trade: Building Equitable and Inclusive International Trade Agreements* (Cambridge: Cambridge University Press, 2020) 248 at 272 [Schwartz, "Developing"].

[11] *CUSMA*, *supra* note 1, art 32.5.

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parties. And, critically, to the extent that the United States or Mexico can challenge whether a Canadian measure is protected by the IGE, Canadian flexibility to determine how best to fulfill its obligations could be circumscribed. Canada requires significant flexibility because its obligations to Indigenous peoples are extensive, complex, and, in many cases, evolving and contested. Where uncertainty surrounds Canada's legal obligations to Indigenous peoples, recourse to the IGE is also uncertain. The risk of challenge from the United States or Mexico could inhibit Canada's willingness to fulfill those obligations.[12]

The threat of panel adjudication under *CUSMA* should not be overstated. For a variety of reasons, such cases are likely to be rare. Significantly, the IGE marks the first time that the United States and Mexico have agreed in a trade treaty to allow broad protection for another party's measures relating to Indigenous peoples. As noted, the IGE creates a defence against US and Mexican claims that Canada has breached its treaty obligations that has no analogue in any other Canadian treaty. Nevertheless, any panel adjudication regarding the availability of the IGE could have damaging, if unintended, consequences on Canada's already fraught relationship with Indigenous peoples, to the extent that a panel will have a role in deciding what Canada's obligations to Indigenous peoples require. This possibility only arises because of the IGE. The focus of this article is on how the IGE applies in relation to Canada, but many of the conclusions will be relevant for understanding how the new exception might apply to measures in the United States and Mexico.

The Text of the IGE

The IGE is set out in Article 32.5 of *CUSMA*, in Chapter 32, Section A: Exceptions, under the heading "Indigenous Peoples Rights":

> Provided that such measures are not used as a means of arbitrary or unjustified discrimination against persons of the other Parties or as a disguised restriction on trade in goods, services, and investment, this Agreement does not preclude a Party from adopting or maintaining a measure it deems necessary to fulfill its legal obligations to [I]ndigenous peoples.

A footnote to the article adds the following clarification: "For greater certainty, for Canada the legal obligations include those recognized and affirmed by section 35 of the *Constitution Act 1982* or those set out in self-

[12] In the context of investment obligations, many have argued that the uncertainty of obligations contributes to this kind of "regulatory chill." See e.g. Kyla Tienhaara, "Regulatory Chill and the Threat of Arbitration: A View from Political Science" in Chester Brown & Kate Miles, eds, *Evolution in Investment Treaty Law and Arbitration* (Cambridge: Cambridge University Press, 2011) 606.

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government agreements between a central or regional level of government and [I]ndigenous peoples." The IGE imposes two distinct requirements. To rely on the IGE in relation to the adoption or maintenance of a particular measure, the state must "deem[] [the measure] necessary to fulfill its legal obligations to [I]ndigenous peoples." Even if this requirement is met, however, the measure must not be "used as a means of arbitrary or unjustified discrimination against persons of the other Parties or as a disguised restriction on trade in goods, services, and investment." This second requirement (referred to in this article as the IGE chapeau) imposes an additional limitation on Canada's reliance on the IGE. Before considering the interpretation of these requirements, however, we will locate the IGE in the context of other provisions related to Indigenous peoples in Canada's other major trade treaties.

Canada's Approach to Matters Related to Indigenous Peoples in Previous Trade Treaties Compared to *CUSMA*

Previous Canadian treaties contain no exception like the IGE. Rather, Canada has relied on a broad reservation from certain obligations related to trade in services and investment protection (referred to as a Services and Investment Reservation) to allow it to fulfill commitments to Indigenous peoples.[13] In *NAFTA*, for example, the Services and Investment Reservation allows Canada to "adopt or maintain any measure denying investors of another Party and their investments, or service providers of another Party, any rights or preferences provided to [A]boriginal peoples."[14] This provision identifies the *Constitution Act, 1982* as an existing measure protected by this reservation. As noted, the *Constitution Act, 1982* includes the protection of "Aboriginal" and treaty rights under section 35, although section 35 is not mentioned in the reservation.[15] An identical Services and Investment Reservation is included in the *CPTPP*[16] and *CETA*.[17]

Canada has taken a similarly worded Services and Investment Reservation in *CUSMA*, but it refers specifically to section 35 of the *Constitution Act, 1982* and to self-government agreements:

> Canada reserves the right to adopt or maintain measures conferring rights or preferences to [A]boriginal peoples. For greater certainty, Canada reserves the right to adopt and maintain measures related to the rights recognized and

[13] See note 22 below and accompanying text for a list of these provisions.

[14] *NAFTA*, *supra* note 4, Annex II: Reservations for Future Measures, Schedule of Canada.

[15] *Constitution Act, 1982*, *supra* note 3.

[16] *CPTPP*, *supra* note 9, Annex II, Schedule of Canada, Reservation II-C-I.

[17] *CETA*, *supra* note 9, Annex II, Schedule of Canada, Reservation II-C-I.

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> affirmed by section 35 of the *Constitution Act, 1982* or those set out in self-government agreements between a central or regional level of government and [I]ndigenous peoples.[18]

The first sentence follows the language of previous Services and Investment Reservations in protecting preferential Canadian policies directed at Indigenous peoples. The second sentence is intended to clarify that the scope of *CUSMA*'s reservation includes Canadian actions that relate to existing Indigenous rights under section 35 of the *Constitution Act, 1982* as well as self-government agreements, which do not benefit from constitutional protection in some cases. The intent of the second sentence is not to modify the scope of the Services and Investment Reservation as compared to those in previous treaties.[19]

As discussed in more detail below, the IGE complements, rather than replaces, Canada's reliance on such reservations. While general exceptions like the IGE can benefit all treaty parties, Services and Investment Reservations are inherently limited. Such reservations only apply to the country that lists them; thus, Canada's Services and Investment Reservation applies only to Canada. In the Canada-US context, then, the Services and Investment Reservation will be ineffective in carving out US actions in relation to Indigenous groups whose traditional territory or inherent rights straddle the Canada-US border.[20] The United States has taken no comparable reservation-protecting measures related to Indigenous peoples.[21]

CUSMA's Services and Investment Reservation, like its predecessors, only applies to some Canadian treaty obligations:

[18] *CUSMA*, *supra* note 1, Schedule of Canada, Reservation II-C-I.

[19] As to whether self-government agreements are constitutionally protected under section 35, Sébastien Grammond describes some self-government arrangements as ancillary to modern land claim treaties. In those examples, the self-government arrangements are not part of the treaty and not protected by section 35. Grammond distinguishes those from treaties that do contain self-government provisions. In cases where the self-government provisions rest inside the treaty, all aspects of the agreement are protected by section 35. Sébastien Grammond, "Treaties as Constitutional Agreements" in Peter Oliver, Patrick Macklem & Nathalie Des Rosiers, eds, *The Oxford Handbook of the Canadian Constitution* (New York: Oxford University Press, 2017) 305 at 314–15.

[20] Measures affecting Indigenous peoples with rights that transcend the border might be protected in Canada. See *R v Desautel*, 2021 SCC 17 [*Desautel*], where the majority found that Indigenous residents or citizens of the United States can come within "Aboriginal peoples of Canada" for the purposes of exercising Aboriginal rights in Canada. The trial decision (2007 BCSC 2389) was cited and discussed in Schwartz, "Toward," *supra* note 6 at 5, 17–18.

[21] The United States has taken a reservation permitting it "to adopt or maintain any measure according rights or preferences to socially or economically disadvantaged minorities" that might be relied on in some cases. Mexico has taken an almost identical reservation. *CUSMA*, *supra* note 1, Annex II, Schedule of the United States, Schedule of Mexico.

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- Articles 14.4 and 15.3 on National Treatment: obligations to treat foreign investors (and their investments) and foreign services suppliers of the other treaty parties no less favourably than Canadian investors (and their investments) and services suppliers;
- Articles 14.5 and 15.4 on Most-Favoured-Nation Treatment: obligations to treat foreign investors (and their investments) and foreign services suppliers of the other treaty parties no less favourably than other foreign investors (and their investments) and foreign services suppliers;
- Article 14.10 on the Prohibition on Performance Requirements: an obligation not to impose requirements on foreign investors to do certain things (like meet minimum levels of local content in goods they produce) in connection with the "establishment, acquisition, expansion, management, conduct, operation, or sale or other disposition" of a foreign investment, or to condition the receipt of a benefit to an investor on some of these performance requirements;
- Article 14.11 on the Prohibition on Nationality Requirements for Senior Management and Boards of Directors: an obligation not to impose requirements for senior management, or a majority of the Board of Directors of an investment business of a foreign investor of another treaty party, to have any particular nationality;
- Article 15.6 on the Prohibition on Local Presence Requirements: an obligation not to require that a foreign services supplier of another treaty party have a local office or be a resident in Canada as a condition of allowing the services supplier to supply a service.[22]

The main effect of *CUSMA*'s Services and Investment Reservation and similar reservations in other Canadian treaties is to avoid treaty conflicts related to Canadian measures that favour Indigenous peoples over foreign investors and services suppliers, whether in recognition of a right or otherwise.

None of Canada's Services and Investment Reservations, however, insulates Canada's actions from challenge under other provisions of Canadian trade agreements. Significantly, these reservations do not apply to the provisions in the investment chapters of Canadian trade agreements that prohibit expropriating foreign investors' investments without compensation, or that require

[22] *Ibid*, Annex II, Schedule of Canada, Reservation II-C-1. All existing regional government measures in force on the date *CUSMA* came into force as well as amendments to them are similarly carved out of these obligations. *Ibid*, arts 14.12(a)(ii), 15.7.1(a)(ii), and Annex I, Reservation of Canada I-C-26. For Canada, regional governments are provincial and territorial governments (art 1.4). *CUSMA* also incorporates the general exceptions from art XIV of the World Trade Organization's (WTO) *General Agreement on Trade in Services*, 15 April 1994, 1869 UNTS 183 (entered into force 1 January 1995) in relation to the services chapter and some other chapters in the agreement. *CUSMA*, *supra* note 1, art 32.1(2).

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Canada to provide foreign investors with fair and equitable treatment.[23] Those treaty provisions have enabled the most successful claims by investors in investor-state arbitration under the investment provisions in trade and investment agreements, including Chapter 11 of *NAFTA* and stand-alone bilateral investment treaties.[24] As discussed below, *CUSMA* eliminates investor-state arbitration between US investors and Canada. But the substantive investor protection obligations still apply.[25]

In one respect, however, the Services and Investment Reservations traditionally taken by Canada provide broader protection for Canadian measures than the IGE. The IGE is limited to measures fulfilling legal obligations to Indigenous peoples, while measures "conferring rights or preferences" that are permitted by the reservations do not necessarily flow from any legal obligation owed to Indigenous peoples.[26] A right or preference, such as a subsidy or incentive, would be insulated under the reservations even if not mandated by a legal obligation. As discussed below, in addition to the requirement for a legal obligation, the IGE chapeau imposes other requirements that must be satisfied before the exception is available. Those requirements do not apply to these reservations. Because its availability is not conditioned on satisfaction of these requirements, the Services and Investment Reservation taken by Canada in *CUSMA* represents an important complement to the IGE.

Two recent and important Canadian trade and investment treaties — *CETA* and the *CPTPP* — contain provisions relating to Indigenous peoples that are not found in other agreements and that are designed to give Canada additional flexibility regarding measures related to Indigenous peoples in specific circumstances. *CUSMA* provides equivalent flexibility. The chapters of *CETA* and the *CPTPP* establishing rules regarding government procurement of goods and services contain a reservation excluding all measures "adopted or maintained with respect to Aboriginal peoples" and "set asides for [A]boriginal businesses" from these rules. These carve-outs also clarify that "existing [A]boriginal or treaty rights" under section 35 of the *Constitution Act, 1982* are "not affected" by the chapter's obligations.[27] *CUSMA*

[23] See e.g. *NAFTA*, *supra* note 4, arts 1110, 1105.

[24] United Nations Conference on Trade and Development (UNCTAD), *Fair and Equitable Treatment*, UNCTAD Series on Issues in International Investment Agreements II (New York: United Nations, 2011) at 1.

[25] *CUSMA*, *supra* note 1, Annex 14-D, art 14.D.1, Definitions.

[26] One linguistic difference is that the Indigenous general exception (IGE) refers to the rights of "[I]ndigenous" peoples, whereas the reservations, including in *CUSMA*, refer to "[A]boriginal" peoples. This is likely a response to changes in contemporary usage rather than any difference in the intended beneficiaries of the provisions.

[27] *CETA*, *supra* note 9, Annex 19-7, art 2(a), discussed in Schwartz, "Toward," *supra* note 6 at 13; *CPTPP*, *supra* note 9, Schedule of Canada, s G.3(b).

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takes a different approach. Its procurement chapter does not apply to Canada.[28] Instead, Canada's procurement obligations to the United States and some other World Trade Organization (WTO) member countries are governed by the WTO's *General Agreement on Government Procurement*.[29] Canada's commitments under this agreement contain an exclusion identical to the reservations in *CETA* and the *CPTPP*.

CETA's domestic regulation chapter "does not apply to licensing requirements, licensing procedures, qualification requirements, or qualification procedures … relating to … [A]boriginal affairs."[30] This exclusion means that the chapter's obligations regarding, for example, objective criteria for licencing decisions do not apply. This leaves government decision-makers more flexibility and discretion in licencing that may implicate Indigenous peoples. *CETA*'s domestic regulation chapter has no equivalent in Canadian agreements negotiated prior to *CUSMA*.[31] The Good Regulatory Practices chapter in *CUSMA* applies to regulations, but, for Canada, regulations do not include "a measure concerning … federal, provincial, territorial relations and agreements and relations with Aboriginal Peoples."[32]

Like the Services and Investment Reservation, these additional exclusions related to procurement and domestic regulation complement the IGE.

[28] *CUSMA*, *supra* note 1, art 13.2(3). See generally Marion Panezi, "The Complex Landscape of Indigenous Procurement" in Borrows & Schwartz, *supra* note 10, 217 at 229–31.

[29] *Agreement on Government Procurement*, 15 April 1994, 1869 UNTS 508 (entered into force 1 January 1995), General Notes, s 3; *Marrakesh Agreement Establishing the World Trade Organization*, 15 April 1994, 1867 UNTS 154 (entered into force 1 January 1995); *General Agreement on Tariffs and Trade 1994*, 15 April 1994, 1867 UNTS 187 (entered into force 1 January 1995) [*GATT*]. Mexico is not a party to the *Agreement on Government Procurement*. The investment obligations regarding national treatment (art 14.4), most-favoured nation treatment (art 14.4), and Senior Management and Boards of Directors (art 14.11) in *CUSMA*, *supra* note 1, do not apply to subsidies, grants, or government procurement at all (art 14.12). None of the obligations in the services chapter apply to subsidies, grants, or government procurement (art 15(2).2(b), (d)). These exceptions largely overlap the reservations described above.

[30] *CETA*, *supra* note 9, art 12.2.2.

[31] Licensing requirements for services suppliers are addressed in *CUSMA*, *supra* note 1, art 15.8, and earlier trade agreements (e.g., *NAFTA*, *supra* note 4, art 1210). These obligations are not subject to Canadian reservations.

[32] *CUSMA*, *supra* note 1, Annex 28-A, Additional Provisions Concerning the Scope of "Regulations" and "Regulatory Authorities." Schwartz notes some other provisions in Canadian trade agreements related to Indigenous peoples, such as an exclusion from the rules applicable to state-owned enterprises (*CPTPP*, *supra* note 9, Annex IV, Schedule of Canada; *CUSMA*, *ibid*, Annex IV, Schedule of Canada); and the protection of Aboriginal harvesting (*CPTPP*, *ibid*, art 20.1; *CETA*, *supra* note 9, art 24.1; *CUSMA*, *ibid*, art 24.1 (definition of environmental law)) and Indigenous traditional knowledge (*CPTPP*, *ibid*, arts 20.13, 29.8) and linking the well-being of Indigenous peoples and the conservation of the natural environment (*CUSMA*, *ibid*, arts 24.2, 24.4, 24.15). Schwartz, "Developing," *supra* note 10 at 259–61, 266–70.

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Indeed, where they apply, these exclusions offer much more straightforward and predictable protection for a broad range of actions taken by Canadian governments in relation to Indigenous peoples. The limitations on Canadian reliance on the IGE are described in the following part.

Interpreting the Standard for Invoking the IGE

introduction

The scope of the IGE for Canada is defined by Canada's "legal obligations" to Indigenous peoples. The meaning of this expression is addressed below. An important preliminary question, however, is whether Canada can unilaterally invoke the exception by asserting that its actions are necessary to fulfill these obligations. If it could, Canada would have significant flexibility to determine when and how to best accommodate its obligations. But if the application of the IGE depends on external, "objective" criteria, relying on the IGE is more problematic for Canada. At least in principle, Canada's reliance on the IGE could be challenged by the United States or Mexico and, ultimately, become the subject of adjudication under *CUSMA*'s dispute settlement procedures. This prospect, in turn, could affect the willingness of Canada to rely on the IGE. Whether Canada can unilaterally invoke the IGE turns on how it is interpreted.

general approach to interpreting the ige

As a treaty provision, the IGE must be interpreted as mandated by the *Vienna Convention on the Law of Treaties* (*VCLT*) — in particular, Articles 31 and 32.[33] The prime directive in Article 31(1) is that a treaty be interpreted "in good faith in accordance with the ordinary meaning given to the terms of the treaty in their context and in light of its object and purpose." For the purposes of this directive, the context includes the preamble and any annexes, as well as certain other agreements and actions involving the state parties. Additionally, interpreters must consider "any relevant rules of international law applicable in the relations between the parties" under Article 31(3)(c).[34] Under Article 32, an interpreter may also consider supplementary means of interpretation, such as the preparatory work related to the treaty.

[33] *Vienna Convention on the Law of Treaties*, 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980) [*VCLT*]. Canada and Mexico are parties. The United States signed the treaty on 24 April 1970 but has not ratified it. Nevertheless, the United States accepts the *VCLT* as codifying customary international law. See US State Department, online: <2009-2017.state.gov/s/l/treaty/faqs/70139.htm>. See Kenneth J Vandevelde, "Treaty Interpretation from a Negotiator's Perspective" (1988) 21 Vand J Transntl L 281 at 290.

[34] *VCLT*, *supra* note 33, art 31(3)(c).

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The treaty context for the IGE warrants a few initial comments. The multiple Canadian reservations and exclusions regarding Indigenous peoples might be thought to reflect an intention that the treaty, including the IGE, should be interpreted to provide broad protection to measures related to Indigenous peoples, at least as far as Canada is concerned. But the IGE must be interpreted in the same manner for all parties, so it would not be appropriate to accord a distinctive, broader interpretation to the IGE solely for Canada.[35] Indeed, the many specific reservations for Canadian measures to benefit Indigenous peoples might suggest that a broad interpretation of the IGE is inappropriate. Where the parties intended to protect measures benefiting Indigenous peoples, they did so expressly and did not intend to rely on a broad interpretation of the IGE.[36] In sum, the presence of the Canadian reservations and exclusions does not seem to yield a clear interpretive direction, forcing the interpreter to closely consider the words and other relevant considerations, including *CUSMA*'s preamble.

CUSMA's preamble contains a specific reference to Indigenous peoples: the parties "RECOGNIZE the importance of increased engagement by [I]ndigenous peoples in trade and investment." The other eighteen statements in the preamble address a wide range of considerations but are dominated by statements related to increased trade and investment and economic cooperation. Cumulatively, the preamble may direct parties to interpret the treaty in a manner that promotes trade and investment, including the engagement of Indigenous peoples in trade and investment. The preamble's role in informing the interpretation of the IGE would be limited to measures with this goal. Few Canadian measures related to Indigenous peoples, however, are likely to embody this goal. Canada will try to shelter measures under the IGE that are inconsistent with the trade and investment liberalization provisions in *CUSMA*. Thus, the preamble of *CUSMA* would not seem to provide much interpretive guidance, apart from discouraging a broad interpretation of the IGE to protect measures that impair trade or investment generally, except where those measures contribute to greater Indigenous engagement in trade and investment.

A more helpful source in the *VCLT* is the requirement to "take into account any relevant rules of international law applicable in the relations between the parties" in Article 31(3)(c). "Taking into account" does not mean that other rules of international law are part of the applicable law or that other international rules can displace the meaning of the treaty

[35] *European Communities – Customs Classification of Certain Computer Equipment (Complaint by the United States)* (1998), WTO Doc WT/DS62/AB/R at 67–68 (Appellate Body Report).

[36] This kind of *a contrario* reasoning is commonly used in treaty interpretation. See e.g. *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)*, Merits, [1986] ICJ Rep 14 at para 222.

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language being interpreted.[37] This provision is intended to ensure a degree of coherence between the interpretation of treaty language and other relevant international legal rules. This coherence has several aspects. A treaty should not be interpreted to permit a breach of another international legal obligation unless the words clearly require it. More significantly, other international rules may help clarify the meaning of a treaty provision and so encourage consistency across international obligations.[38]

Consistent with Article 31(3)(c) of the *VCLT*, we consider the impact of relevant international legal rules applicable between Canada, the United States, and Mexico, focusing on the *WTO Agreements*. As will be seen, the IGE seems significantly inspired by language in Articles XX and XXI of the WTO's *General Agreement on Tariffs and Trade* (*GATT*) that create general exceptions for measures related to public policy areas like health and national security, respectively.[39] The interpretation of these provisions by WTO panels and the Appellate Body suggests how the IGE should be interpreted and, therefore, the circumstances in which Canada may invoke the IGE.

INTERPRETING "DEEMS NECESSARY TO FULFILL ITS LEGAL OBLIGATIONS TO INDIGENOUS PEOPLES"

Leaving aside momentarily the additional requirements of the IGE chapeau, the IGE exempts any action that Canada "deems necessary to fulfill its legal obligations to [I]ndigenous peoples" from treaty commitments. "[D]eems necessary to fulfill" could be interpreted numerous ways. For example, the expression might mean that Canada has an unreviewable discretion to determine whether the exception is available to shield its actions. Alternatively, it might mean that Canada's reliance on the exception can be reviewed only to determine whether Canada invoked the IGE in good faith. Or, it might mean that Canada can only rely on the IGE where, objectively, Canada has a legal obligation to Indigenous peoples and the action taken is necessary to fulfill that obligation.

Offering a crude interpretation of the individual words, the *Oxford English Dictionary* defines the verb "deem" as "[t]o form the opinion, to be of the opinion; to judge, conclude, think, consider, hold."[40] This definition and others do not illuminate except to suggest that the word "deems" in the IGE affords some discretion to determine what is "necessary to fulfill its legal

[37] Tarcisio Gazzini, *Interpretation of International Investment Treaties* (Oxford: Hart, 2016) at 210–13.

[38] *Ibid.*

[39] *GATT*, *supra* note 29.

[40] *Oxford English Dictionary*, sub verbo "deem," online: <oed.com>.

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obligations to Indigenous peoples."[41] As discussed below, "deem" has been interpreted in other international treaty contexts to confer decision-making discretion. The question then becomes what it means to determine that a measure is "necessary" to fulfill a legal obligation. "Necessary" typically means "indispensable, vital, essential, requisite,"[42] which would suggest that a Canadian measure must be the only way for Canada to fulfill a particular obligation to benefit from the IGE. The interpretation of "necessary" in the trade and investment treaty context, however, has been somewhat more flexible.

The word "necessary" appears in both Article XX and Article XXI of the *GATT*.[43] As discussed below, the security exception in Article XXI provides the closest analogue to the operative part of the IGE. But we can usefully consider the meaning of "necessary" in Article XX, which has been the subject of much more analysis in WTO disputes. Following a chapeau like the IGE chapeau, Article XX provides, in part, that

> nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:
> (a) necessary to protect public morals;
> (b) necessary to protect human, animal or plant life or health.

WTO panels and the Appellate Body have held that "necessary" in this article is not always equivalent to indispensable. Degrees of necessity are arrayed on a continuum between "indispensable," on the one end, and "contributing to," on the other. In determining where "necessary" falls in a particular case, WTO cases have required parties to consider:

- the relative importance of the interests or policies furthered by the challenged measure;
- the contribution of the measure to the protection of those interests or the successful achievement of those policies; and
- the degree to which the measure restricts international trade.[44]

[41] E.g., *Merriam-Webster Dictionary*, sub verbo "deem," online: <www.merriam-webster.com/dictionary/deem>.

[42] *Oxford English Dictionary, supra* note 40, sub verbo "necessary".

[43] *GATT, supra* note 29.

[44] *Colombia – Measures Relating to the Importation of Textiles, Apparel and Footwear* (2016), WTO Doc WT/DS461/29 at paras 5.71–5.74 (Appellate Body Report), citing *China – Publications and Audio-Visual Products* (2009), WTO Doc WT/DS363/AB/R at paras 239–45 (Appellate Body Report); *US – Measures Affecting the Cross-Border Supply of Gambling and Betting Services* (2005), WTO Doc WT/DS285/AB/R (Appellate Body Report) [*US – Gambling*]; *Korea – Various Measures Affecting Imports of Fresh, Chilled and Frozen Beef* (2001), WTO Doc

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According to the WTO's Appellate Body, these three factors must be "weighed and balanced."[45] To do so, the Appellate Body has said that a measure becomes easier to justify as "necessary" where the interests or policies furthered by the challenged measure are more important[46] and the contribution of the measure to the protection of those interests or the successful achievement of those policies is greater.[47] But the more restrictive of international trade the measure is, the more difficult it will be to justify it as being "necessary."[48] As part of this determination, the interpreter of Article XX of the *GATT* should consider the existence of "an alternative measure that would achieve the same end and that is less restrictive of trade."[49] In practice, once the responding state seeking to protect a measure under Article XX has made a *prima facie* case that the measure is "necessary," the complainant must identify a WTO-consistent alternative measure that is less restrictive and that the responding party could have taken.[50]

Such a contextual approach is consistent with the interpretation of the expression "deems necessary" in other treaties. The expression "deems necessary" is found in many important international instruments. In the *Charter of the United Nations* (*UN Charter*), Article 40 empowers the United Nations Security Council, before making recommendations or deciding upon measures to address "any threat to the peace, breach of the peace or act of aggression," to "call upon the parties concerned to comply with such provisional measures as it deems necessary or desirable."[51] Article 51 confirms the Security Council's power to take any action that it "deems necessary in order to maintain or restore international peace and security," despite any measure taken by member countries in the exercise of their right to self-defence. Most

WT/DS161/WT/DS169/AB/R at para 164 (Appellate Body Report) [*Korea – Beef*]. See generally Gabrielle Marceau & Joel Trachtman, "Responding to National Concerns" in Daniel Bethlehem et al, eds, *Oxford Handbook on International Trade Law* (Oxford: Oxford University Press, 2009) 210 at 216. This same approach has been followed in interpreting "necessary" in art XI of the Argentina – US bilateral investment treaty in *Continental Casualty Co v Argentina*, ICSID Case No ARB(AF)/04/1, Award (5 September 2008) at para 194. Other investment cases have taken a range of views. See José Alvarez & Kathryn Khamsi, "The Argentine Crisis and Foreign Investors" (2009) YB Intl Investment L 379.

[45] *Korea – Beef, supra* note 44 at para 164.

[46] *Ibid* at para 162.

[47] *Ibid* at para 163.

[48] *Ibid.*

[49] *EC – Measures Affecting Asbestos and Products Containing Asbestos* (2001), WTO Doc WT/DS135/AB/R at para 172 (Appellate Body Report).

[50] *US – Gambling, supra* note 44 at paras 308–11.

[51] *Charter of the United Nations*, 26 June 1945, Can TS 1945 No 7 (entered into force 24 October 1945) [*UN Charter*].

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states accept that these provisions afford the Security Council a broad discretion to decide what is necessary. The exercise of the Security Council's discretion to decide what is necessary must be guided by the purposes of the *UN Charter*, subject to a requirement that "the impact [of the measures chosen] is not manifestly out of proportion to the aims pursued."[52] Thus, consistent with the approach taken by the WTO's Appellate Body, the Security Council does not have to decide that its measures are indispensable; it must decide that the impact of its measures is proportionate to their aims.

The meaning of "deems necessary" in the IGE may also be subject to a contextual interpretation. Whether a measure is necessary to fulfill Canada's legal obligations to Indigenous peoples might not mean that the measure is the only measure available. Rather, the expression might refer to the importance of the obligation and the measure's effectiveness in fulfilling it outweighing the measure's impact on trade and investment. But the more important question is Canada's latitude in deciding what it "deems necessary" to fulfill its legal obligations to Indigenous peoples. The answer to this question will determine whether and on what basis Canada's reliance on the IGE could be challenged by the United States or Mexico and, ultimately, reviewed by a *CUSMA* dispute settlement panel. A similar interpretive challenge confronted a WTO panel established in 2017 to hear Ukraine's complaint that Russia breached its WTO obligations by restricting the transit of Ukrainian goods through Russia to Kazakhstan.[53] The approach adopted in that decision could be applied to interpret the IGE.

THE APPROACH TO INTERPRETING *GATT* ARTICLE XXI IN *RUSSIA – TRANSIT*

In *Russia – Transit*, Russia claimed that the panel lacked jurisdiction to hear Ukraine's complaint because Russia could rely on the security exception in Article XXI(b)(iii) of the *GATT*. In relevant part, Article XXI provides as follows:

> Nothing in this Agreement shall be construed …

[52] Bruno Simma et al, eds, *The Charter of the United Nations: A Commentary*, 3rd ed, vol 2 (Geneva: United Nations, 2012) at 1260, para 47. Art 5 of the *North Atlantic Treaty* uses similar language, providing that, in case of armed attack against a member of the organization, each other member shall take "such action as it deems necessary." *North Atlantic Treaty*, 4 April 1949, 34 UNTS 243 (entered into force 24 August 1949).

[53] *Russia – Measures Concerning Traffic in Transit*, Report of the Panel (2019), WTO Doc WT/DS512/R (Panel Report) [*Russia – Transit*]. The panel report in *Saudi Arabia – Measures Concerning the Protection of Intellectual Property Rights* (2020), WTO Doc WT/DS567/R at paras 7.230, 7.231, 7.241ff (Panel Report) [*Saudi Arabia – Intellectual Property*] followed the *Russia – Transit* approach. Saudi Arabia has appealed the report, even though the Appellate Body is not available at the moment. The complainant, Qatar, has sought arbitration as an alternative.

> (b) to prevent any contracting party from taking *any action which it considers necessary* for the protection of its essential security interests …
> (iii) taken in time of war or other emergency in international relations.[54]

Russia argued that the words "any action which it considers necessary" rendered its actions "immune from scrutiny by a WTO dispute settlement panel" once it invoked the exception.[55] The United States supported Russia's position. The panel found, however, that it could review Russia's reliance on the exception and proceeded to explain the nature of that review. First, the panel decided that the words "it considers necessary" did not qualify the situations spelled out in subparagraph (ii) — that is, whether the action was "taken in time of war or other emergency in international relations." The panel had to determine on an objective basis whether an "emergency in international relations" existed and, if so, whether Russia's actions were taken during that emergency. Ultimately, the panel was satisfied that relations between Ukraine and Russia did constitute an emergency in international relations and that Russia's measures were taken "in time" with respect to that emergency.[56]

Second, the panel assessed whether paragraph (b) of Article XXI should be interpreted as permitting Russia to determine its "essential security interests" and when an action was "necessary" to protect them. The panel decided that the provision afforded Russia that discretion. In exercising its discretion, Russia had only to act in good faith, meaning, at minimum, not intending to circumvent its obligations.[57] In the panel's view, this good faith requirement also meant that Russia had to "articulate essential security interests said to arise from the emergency in international relations sufficiently enough to demonstrate their veracity" and that the "the measures at issue meet a minimum requirement of plausibility in relation to the proffered essential security interests."[58] In the end, the panel concluded that Russia had satisfied these requirements and could rely on the exception.[59]

[54] Emphasis added.

[55] *Russia – Transit*, *supra* note 53 at para 7.57.

[56] *Ibid* at para 7.125.

[57] *Ibid* at para 7.129–133. The panel did not address the meaning of "necessary," simply saying "it is for Russia to determine the 'necessity' of the measures for the protection of its essential security interests" (at para 7.146).

[58] *Ibid* at paras 7.134, 7.138. The panel found that Russia's articulation of its security interests was sufficient because it was "minimally satisfactory" (para 7.137). In considering this issue, the panel suggested that the degree of articulation needed would depend on the seriousness of the emergency in international relations (at para 7.135). The panel in *Saudi Arabia – Intellectual Property*, *supra* note 53, characterized this standard as "not a particularly onerous one" and "appropriately subject to limited review" (at para 7.281).

[59] *Russia – Transit*, *supra* note 53 at paras 7.5.6.1, 7.5.7.

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Of course, the approach adopted in that case is not directly applicable to the interpretation of the IGE. Significantly, the language of Article XXI of the *GATT* differs from that of the IGE. As well, the panel's conclusions in the *Russia – Transit* case relied on the *travaux préparatoires* related to the negotiation of the *GATT* in 1947. Obviously, those documents have no bearing on *CUSMA*'s interpretation.[60] Nevertheless, given their similarity, the words "deems necessary" in the IGE might be interpreted in the same way as "considers necessary" in Article XXI of the *GATT*.[61] As such, the approach adopted by the panel in the *Russia – Transit* case presents one possible vantage point from which to approach the IGE.

APPLYING THE APPROACH TO INTERPRETING *GATT* ARTICLE XXI IN *RUSSIA – TRANSIT* TO THE IGE

If the *Russia – Transit* panel's approach applied to the IGE, Canada could decide whether its actions were necessary to fulfill its legal obligations to Indigenous peoples, subject only to a requirement to act in good faith. That would mean that Canada: (1) could not invoke the IGE for a purpose other than fulfilling a legal obligation to Indigenous peoples and (2) would have to make out some plausible connection between the action taken and the obligation. To demonstrate a plausible connection, Canada would have to describe the obligation and explain how the measure fulfilled it. A *CUSMA* dispute settlement panel could review whether Canada satisfied the good faith and related plausible connection requirements if the United States or Mexico challenged its reliance on the IGE.

Not clear, however, is whether the *Russia – Transit* approach would mean that Canada could unilaterally determine the existence and characterization of the legal obligation compelling its action. The *Russia – Transit* panel's conclusion that Russia could decide what its "essential security interests" required was influenced by the nature of the concept of "essential security interests," which the panel characterized as follows:

> 7.131. The specific interests that are considered directly relevant to the protection of a state from such external or internal threats will depend on the particular situation and perceptions of the state in question, and can be expected to vary with changing circumstances. For these reasons, it is left, in general, to every Member to define what it considers to be its essential security interests.

[60] *Ibid* at paras 7.83–7.100.

[61] See discussion of the meaning of "deems necessary" above. As noted, *VCLT*, *supra* note 33, art 31(3)(c) requires a treaty interpreter to consider other rules of international law applicable between the parties, like *GATT*, *supra* note 29, art XXI.

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By contrast, the IGE refers to "legal obligations," which are more susceptible to objective assessment than "essential security interests." Whether Canada has a legal obligation in the first place and what it requires might have to be determined on an objective basis. If so, Canada's assessment in this regard could be reviewed in dispute settlement under *CUSMA*. A good faith assertion of what the obligation requires would not be enough.

In short, reliance on the IGE is not wholly within Canada's discretion. At a minimum, that reliance is likely subject to an obligation to act in good faith, including a requirement that the measure not be a façade for some other purpose. To demonstrate good faith, Canada may have to plausibly connect its action to the fulfillment of a legal obligation. Canada might also have to establish the existence and nature of a "legal obligation to [I]ndigenous peoples" on an objective basis. The additional language of the IGE chapeau further qualifies the availability of the exception.

INTERPRETING THE IGE CHAPEAU

The IGE is limited by the words in its chapeau: "Provided that such measures are not used as a means of arbitrary or unjustified discrimination against persons of the other Parties or as a disguised restriction on trade in goods, services, and investment." Trade treaty general exceptions frequently use similar language, which can be traced back to Article XX of the *GATT*.[62] Versions of the *GATT* Article XX chapeau's wording appear in the general exception provisions of Canada's model Foreign Investment Promotion and Protection Agreement and many bilateral investment treaties and trade treaties worldwide.[63] The *CPTPP*'s exception for New Zealand measures that grant more favourable treatment to Māori contains identical language.[64] Undoubtedly, the chapeau of Article XX of the *GATT* was the inspiration for the IGE's language.

[62] *GATT*, *supra* note 29, art XX provides in part: "Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of [a number of policy-based categories of measures, like the protection of human health]." Art XX is incorporated by reference in *CUSMA*, *supra* note 1, art 32.1, as it was in *NAFTA*, *supra* note 4, art 2101.1. The use of almost identical language in two places in the same treaty suggests that the language should be interpreted consistently.

[63] See Canadian Model Foreign Investment Promotion and Protection Agreement, art 10, online: <italaw.com/documents/Canadian2004-FIPA-model-en.pdf>.

[64] *CPTPP*, *supra* note 9, art 29.6. This language had been used in previous treaties signed by New Zealand. The historical practice of New Zealand is discussed in Waitangi Tribunal, *Report on the Trans-Pacific Partnership Agreement* (2016).

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What is the effect of the IGE chapeau? It must be understood to limit recourse to the exception in some way. While we cannot fully address WTO decisions on the chapeau in Article XX of the *GATT*, some elements of the WTO approach help explain how the IGE chapeau might be interpreted.[65] The WTO's Appellate Body has consistently decided that the *GATT* chapeau was intended to prevent "abuse or misuse" of the Article XX exceptions. Those exceptions permit state actions to achieve enumerated public policy objectives, such as the protection of health, safety, and the environment, where they would otherwise be contrary to the *GATT*.[66] According to the Appellate Body, this characterization requires the interpreter to first determine whether the exception is available based on one of the enumerated public policy categories before considering the chapeau's application.[67] In the context of the IGE, this approach would require the interpreter to decide that the action taken was a "measure deemed necessary [by Canada] to fulfill its legal obligations to [I]ndigenous peoples" before considering whether the IGE chapeau's requirements are met.[68]

With respect to its effect, the Appellate Body has said that the *GATT* chapeau expresses the general principle of good faith.[69] Following this approach, the IGE chapeau confirms, in a seemingly duplicative way, the interpretation suggested above, requiring Canada to act in good faith in relying on the IGE. With respect to the substantive requirement of the IGE, however, the focus is on whether Canada acted in good faith in asserting that its actions were taken to fulfill a legal obligation to Indigenous peoples. The IGE chapeau requires an enquiry into whether Canada acted in good faith in applying the measure.[70] The IGE chapeau identifies two specific criteria that must both be met in that regard. The first is that a measure cannot be "used

[65] For a useful discussion, see Niall Moran, "The First Twenty Cases under GATT Article XX: Tuna or Shrimp Dear?" in Giovanna Adinolfi et al, eds, *International Economic Law: Contemporary Issues* (Heidelberg: Springer, 2017) 3. For a critique of the Appellate Body's approach, see Lorand Bartels, "The Chapeau of the General Exceptions in the WTO GATT and GATS Agreements: A Reconstruction" (2015) 109 AJIL 95.

[66] *US – Importation of Certain Shrimp and Shrimp Products* (1998), WTO Doc WT/DS58/AB/R at paras 119–20 (Appellate Body Report) [*US – Shrimp*]. The Appellate Body later characterized the chapeau as meaning that the exceptions in art XX were "limited and conditional" (at para 157).

[67] *Ibid* at paras 119–20.

[68] This is the approach taken in this article to the interpretation of the IGE.

[69] *US – Shrimp, supra* note 66 at paras 158–59.

[70] That the IGE chapeau must have an independent meaning is confirmed by the well-established principle of treaty interpretation that treaty language must be interpreted in a manner that renders it effective. See *Fisheries Jurisdiction Case (Spain v Canada)*, [1998] ICJ Rep 432 at para 52; Gillian White, "Treaty Interpretation: The Vienna Convention 'Code' as Applied by the World Trade Organisation Judiciary" (1999) 20 Australian YB Intl L 319 at 332-34.

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as a means of arbitrary or unjustified discrimination against persons of the other Parties." To assess this criterion, one must first identify some discriminatory effect, meaning different and less favourable treatment of individual nationals or enterprises of another state party compared to similarly situated nationals or enterprises of the allegedly offending party or another state.[71] If the party seeking to rely on the exception has discriminated against persons of the United States or Mexico, the enquiry shifts to whether the discrimination is arbitrary or unjustified.

In interpreting the *GATT* chapeau, the WTO's Appellate Body has held that a measure might breach the substantive non-discrimination obligations in the *GATT* but not be arbitrary or unjustified.[72] Assessing whether a measure is arbitrary or unjustified would seem to require considering whether any rationale justifies the measure's discriminatory effect.[73] Where no such rationale exists, the measure is arbitrary or unjustified.[74] If a state invokes a rationale, the question becomes whether the rationale is sufficiently compelling to justify the discrimination.[75] What kind of discrimination might violate the IGE chapeau's requirements? Impermissible action might include discrimination connected to actions alleged to breach the two most important obligations in *CUSMA*'s investment chapter: the prohibition of expropriation without compensation and fair and equitable treatment.[76]

[71] "[P]erson of a Party" is defined in *CUSMA*, *supra* note 1, art 1.4 to include both a national and an enterprise of a state party. "[E]nterprise of a Party" is an enterprise constituted or organized under the laws of a state party, defined to include a corporation, partnership, or trust. For a comprehensive discussion of non-discrimination in trade and investment law, see Andrew Mitchell, David Heaton & Caroline Henckels, *Non-Discrimination and the Role of Regulatory Purpose in International Trade and Investment Law* (Cheltenham, UK: Edward Elgar, 2016).

[72] WTO cases have been clear that what constitutes "arbitrary or unjustified discrimination" is distinct from a breach of the non-discrimination obligations in *GATT* art I (most favoured nation treatment) and art III (national treatment). This logically follows from the interpretive principle that, otherwise, the same language would have been used in the chapeau and the non-discrimination obligations. *EC – Measures Prohibiting the Importation and Marketing of Seal Products* (2014), WTO Doc WT/DS400/AB/R at paras 5.298, 5.318 (Appellate Body Report) [*EC – Seal Products*].

[73] *Brazil – Measures Affecting Imports of Retreaded Tyres* (2007), WTO Doc WT/DS332/AB/R at para 226 (Appellate Body Report) [*Brazil – Tyres*].

[74] *US – Measures Concerning the Importation, Marketing and Sale of Tuna, Recourse to Article 21.5 of the DSU by Mexico* (2015), WTO Doc WT/DS381/RW at para 7.316 (Appellate Body Report).

[75] *EC – Seal Products*, *supra* note 72 at para 5.321. The Appellate Body has sometimes said that this requires asking whether the rationale for the discrimination has a rational connection to the objective of the measure (e.g. *Brazil –Tyres*, *supra* note 73 at para 226). Bartels, *supra* note 65 at 116–17, argues there is no basis for limiting the possible justifications in this way.

[76] To be legal under *CUSMA*, *supra* note 1, art 14.8(b), an expropriation must be carried out "in a non-discriminatory manner." Discrimination has been held to be relevant to a

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For example, if a foreign investor alleged that an expropriation of its property was discriminatory because a similarly situated domestic investor's property was not expropriated, reliance on the IGE chapeau would depend on the absence of arbitrary and unjustifiable discrimination. Canada would have to demonstrate a public policy rationale and justify the discrimination. Canada's position could be challenged by the other state parties, possibly in a formal dispute under the treaty where a panel would determine whether Canada's measure was sufficiently justified. The IGE chapeau cannot plausibly be interpreted to allow Canada to unilaterally decide whether it violates the "arbitrary or unjustified discrimination" prohibition.

The second criterion in the IGE chapeau prohibits parties from using a measure "as a disguised restriction on trade in goods, services, and investment."[77] Few cases have considered the similar criterion in the chapeau of Article XX of the *GATT*. Lorand Bartels argues that the criterion should be interpreted as applying to measures "for which an ostensibly legitimate purpose is merely a 'disguise' for an improper purpose."[78] Rather than measures adopted for no legitimate purpose, which would either be arbitrary or in bad faith, Bartels argues that disguised restrictions are measures adopted for a mixture of legitimate and illegitimate purposes.[79] He notes that adopting his approach would require a WTO panel to decide the relative significance of the legitimate and illegitimate purposes to determine whether the measure was a disguised restriction on trade.

In applying Bartels' approach to the IGE, a measure would violate the second criterion of the IGE chapeau if it had an illegitimate purpose that restricted trade in goods, services, and investment in addition to the legitimate purpose of fulfilling a Canadian legal obligation to Indigenous peoples. As discussed, before the IGE chapeau became relevant, the interpreter would have already found that Canada had a legal obligation and acted in

determination of whether the fair and equitable treatment obligation has been breached. See e.g. *Waste Management Inc v Mexico*, ICSID Case No ARB(AF)00/3, Award (30 April 2004) at paras 98–99, applied in *Bilcon of Delaware et al v Government of Canada*, PCA Case No 2009-04, Award on Jurisdiction and Liability (17 March 2015) at para 442; but see *Methanex v United States*, UNCITRAL Final Award on Jurisdiction and Merits (3 August 2005), Part IV, Chapter C at paras 9–26.

[77] As written, this second criterion would seem to mean that the IGE chapeau would not prevent the application of the IGE unless the disguised restriction applied to trade in goods, services, and investment. Few measures will be a disguised restriction in relation to all three of these areas of economic activity, suggesting a very limited role for this second criterion in practice. We are grateful to Caroline Henckels for pointing out this surprising drafting.

[78] Bartels, *supra* note 65 at 123.

[79] *Ibid*. Indeed, this should be the only situation in which it can arise because it must be provisionally justified based on the legitimate policy goals set out in art XX.

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good faith in deciding that the measure was necessary to fulfill the obligation. The interpreter would have found that Canada had shown some plausible connection between the measure and the fulfillment of the obligation. Presumably, this would be considered a legitimate purpose. The measure would only be a "disguised restriction" if the measure had an illegitimate second purpose and it was more significant for the state than the legitimate purpose. In such a case, the legitimate purpose would be a disguise. But, in such a situation, an interpreter might plausibly have found that Canada did not act in good faith in the first place.

INTERPRETING THE IGE CHAPEAU: AN EXAMPLE

To illustrate the approach described above and the challenges it raises, consider the following example. Suppose that a Canadian province enacted a measure to fulfill a legal obligation recognizing an Indigenous group's title to territory. The measure excludes anyone but that group from managing commercial activity in the territory. Assume that the provincial measure was also intended to benefit a Canadian business with which the group had partnered to develop eco-tourism on the land. Assume further that this benefit disadvantaged an American investor.[80] Imagine, for example, that the American investor had invested substantial time and money in developing a proposal for an eco-tourism business of its own and was seeking provincial environmental approvals, all of which would be made moot by the provincial measure. Finally, assume the Canadian courts had recognized Indigenous title over the territory, meaning the provincial government had a legal obligation, and the province acted in good faith in deciding that its measure was necessary to fulfill it.

While a discriminatory effect flows from the measure, one might say that the discrimination cannot be described as arbitrary or unjustified because the province had a legitimate and important purpose: recognizing Indigenous title. This conclusion, however, conflates the first requirement of the IGE chapeau with the IGE's basic requirement that Canada act in good faith in undertaking the measure to fulfill a legal obligation to Indigenous people rather than for some other purpose. If this conclusion is correct, satisfying the "deems necessary to fulfill a legal obligation to [I]ndigenous peoples" requirement would automatically satisfy the first requirement of the IGE chapeau. Accordingly, some further enquiry would be needed in regard to whether the discrimination in applying the measure (rather than the measure itself) was arbitrary or unjustified. That enquiry could include asking whether the discrimination was an unavoidable consequence of the measure

[80] One can imagine that proving such an intention would be challenging. On the issue of developing titled territory, see e.g. "Mining, Oil & Gas," online: <www.tsilhqotin.ca/mining-oil-gas/>.

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or could have been reasonably avoided or whether the province had taken steps to avoid or mitigate the discriminatory effect, such as by offering compensation to the foreign investor. The facts of this imagined scenario do not address these considerations. However, a conclusion that the measure does not constitute arbitrary or unjustified discrimination is supported by the fact that the measure does not require the discriminatory effect. Rather, the Indigenous group's sovereign decision to partner with the Canadian business to the exclusion of the US investor created that effect.

Regarding the second requirement of the IGE chapeau in this scenario, two purposes drive the measure — one that is legitimate (the recognition of Aboriginal title) and the other that is arguably illegitimate (extinguishing the US investor's rights in favour of the Canadian business' interest).[81] Under Bartels' approach, if the United States challenged the measure and the matter went to a panel, the panel would have to decide whether the illegitimate purpose was sufficiently important in motivating the measure that it would be considered a disguised restriction on trade in goods, services, and investment. If so, the measure would be prohibited. Divining and weighing such intentions behind a government action will be a daunting and uncertain task.[82] But, more importantly, recall that this requirement of the IGE chapeau should only arise after a panel has determined that Canada has acted in good faith to fulfill a legitimate purpose: a legal obligation to Indigenous peoples. Accordingly, the circumstances in which a measure will have a sufficiently important illegitimate purpose to render it a disguised restriction on trade in goods, services, and investment are likely to be rare.

INTERPRETING "THIS AGREEMENT DOES NOT PRECLUDE"

The simplest interpretive issue with respect to the IGE is the meaning of the phrase "this Agreement does not preclude" Canada from adopting or maintaining a measure that meets the requirements of the IGE, as discussed earlier. Similar wording in other exception provisions has been interpreted to provide a defence to a state action that would otherwise be a breach of the treaty if the exception's substantive requirements have been met. In some cases, the wording is treated as a permission to engage in the conduct permitted by the exception, placing the conduct outside the scope of the treaty's

[81] If the measure recognizing Indigenous title were challenged only as providing a right or preference in favour of the Indigenous group contrary to *CUSMA*'s national treatment obligation, no breach of *CUSMA* would arise because such a preference over a US investor is permitted under the Services and Investment Reservation. See note 22 above and accompanying text.

[82] Many investor-state tribunals have rejected a requirement that a state have an intention to discriminate to be found to have breached national treatment obligations because of the difficulty of determining a state's intention. E.g. *Marvin Feldman v Mexico*, ICSID Case No ARB(AF)/99/1, Award (16 December 2002) at paras 183–84.

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prohibitions.[83] Important implications flow from whether the provision is a defence or a permission. For example, an exception only becomes relevant after a breach of the treaty has been found. A permission's application should be considered as a preliminary question of the tribunal's jurisdiction to hear a claim that a substantive treaty obligation has been breached.[84] A discussion of the nature of the IGE in this regard is beyond the scope of this article. In either case, however, the IGE would protect a Canadian government measure that meets the requirements from challenge under the treaty.

SUMMARY AND PRELIMINARY CONCLUSIONS REGARDING THE INTERPRETATION OF THE IGE

Whether Canada can rely on the IGE with respect to a particular measure depends on how the exception is interpreted. Based on the foregoing analysis, the IGE will not allow Canada to unilaterally determine what actions are necessary to fulfill its legal obligations to Indigenous peoples. The United States and Mexico could challenge Canada's reliance on the IGE, and, ultimately, whether reliance on the IGE is permitted in a particular case could be determined by a state-to-state dispute settlement panel under the treaty. Given the prospects for such a review, Canada would have to determine whether the requirements suggested above are met in assessing whether a measure would be protected by the IGE.

Exactly how the IGE should be interpreted, however, is not entirely clear. By protecting any "measure [Canada] deems necessary to fulfill its legal obligations to [I]ndigenous peoples," the IGE does accord Canada significant discretion to decide what its legal obligations are and what actions are necessary to fulfill them. But the *Russia – Transit* case, which dealt with a similar broad grant of discretion in Article XXI of the *GATT*, suggests that such discretion is not unlimited. The approach adopted in *Russia – Transit* would require Canada to act in good faith to rely on the IGE, meaning that Canada's measure could not be adopted or maintained for a purpose other than the

[83] For example, recently, the International Court of Justice found that art XXI(1)(d) of the 1955 *Treaty of Amity, Economic Relations, and Consular Rights* between Iran and the United States, which states that the treaty "shall not preclude measures necessary to protect essential security interests," provides a defence. *Certain Iranian Assets (Islamic Republic of Iran v United States of America)*, Preliminary Objections, [2019] ICJ Rep 7 at para 47.

[84] Henckels argues that general exceptions and especially security exceptions (which as noted are similar to the IGE) should be interpreted as permissions rather than defences. Caroline Henckels, "Permission to Act: The Legal Character of General and Security Exceptions in International Trade and Investment Law" (2020) 69 ICLQ 557. The same argument may apply to the characterization of the IGE. Henckels acknowledges that the treatment of exceptions by trade and investment tribunals "demonstrates inconsistent and incoherent approaches both within and between the two subfields" but suggests that the *Russia – Transit* panel's approach can be understood as treating the *GATT* security exception as a permission, even though the panel was not clear in that regard (at 570–71).

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fulfillment of a legal obligation to Indigenous peoples. Showing good faith would require Canada to describe some plausible connection between its measure and the fulfillment of a legal obligation, meaning that Canada would have to describe the obligation and explain how its measure fulfilled it. The existence and nature of the "legal obligation to [I]ndigenous peoples," however, might have to be established on an objective basis. In other words, Canada ultimately might have to convince a dispute settlement panel of the existence and nature of the legal obligation, rather than simply show the panel that it was acting in good faith in identifying the obligation and characterizing its effects.

The existence of a good faith requirement is confirmed by the IGE chapeau, but this provision imposes additional requirements. It limits the availability of the IGE in specific ways by requiring that, to be protected by the exception, a Canadian measure cannot constitute "arbitrary or unjustified discrimination" or be a "disguised restriction" on trade in goods, services, and investment. The first condition would seem to require Canada to provide a rationale that justifies any discriminatory effect of its measure. Applying Bartels' approach, as described above, the second condition would become relevant if Canada had demonstrated some illegitimate purpose for its action that restricted trade in goods, services, and investment in addition to the legitimate purpose of fulfilling a legal obligation to Indigenous peoples. Canada would then have to show that the illegitimate purpose was not sufficiently significant compared to the legitimate purpose of fulfilling a legal obligation. If not, the measure could be considered a disguised restriction on trade in goods, services, and investment.

While this suggested approach might seem disconcertingly abstract and complex, it is consistent with the language of the IGE. Even if the analysis above is not fully adopted, the main conclusion that Canada cannot unilaterally decide what the IGE requires is hard to resist. The United States and Mexico could challenge Canada's reliance on the IGE, possibly leading to a decision by a dispute settlement panel established under the agreement. Canada would have to consider that possibility in taking any action that relied on the exception. Such an assessment might limit the circumstances in which Canada would act in reliance on the IGE, encouraging a "chilling effect."

The nature of these concerns is set out in more detail in the following parts. Various factors, however, mitigate the risks associated with a challenge to Canada's reliance on the IGE in practice. Before turning to these concerns and mitigating factors, however, we discuss the obligations that Canada owes to Indigenous peoples because these define the IGE's substantive scope.

Scope of the Exception

Introduction

Regardless of the standard for invoking the IGE, its scope is defined by Canada's "legal obligations to Indigenous peoples." *CUSMA* provides that

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Canadian obligations include, but are not limited to, those rights that are recognized and affirmed by section 35 of the *Constitution Act, 1982* and those rights contained in self-government agreements between Canadian governments and Indigenous peoples.[85] As explained below, determining the existence, nature, and content of these specific obligations is a complex and evolving process. Indigenous peoples in Canada have been engaged in a continuous struggle to assert rights and have them recognized and affirmed in Canadian courts and respected by Canadian governments. At present, courts — particularly, the Supreme Court of Canada — play a significant role in defining constitutionally protected rights and creating rules around rights recognition in that context.

The IGE expressly states that it is not limited to constitutionally protected rights. Other obligations almost certainly include Canada's obligations under other international rules, including international treaties to which Canada is a party as well as customary international law.[86] Canada's international legal obligations in relation to Indigenous peoples extend across a wide range of subject areas from human rights to cultural property and traditional knowledge. If "legal obligations" in the IGE embrace general Canadian international obligations, such as basic human rights obligations, which obviously extend to Indigenous peoples, the range of legal obligations enabling recourse to the IGE could be extremely broad.[87] Domestic Canadian statutory obligations to Indigenous peoples, such as those under the *Indian Act*,[88] could also be included as well as obligations based in Indigenous law.[89]

[85] *CUSMA*, *supra* note 1, art 32.5.

[86] Customary international law rules are formed by "long-term, consistent and widespread state practice combined with *opinio juris* indicating that that practice is motivated by a sense of obligation." Krista Nadakavukaren, "Actors, Institutions, and Policy in Host Countries" in J Anthony VanDuzer & Patrick Leblond, eds, *Promoting and Managing International Investment: Toward an Interdisciplinary Approach* (London: Routledge, 2020) 51 at 54, n 11.

[87] For example, Canada is a party to the *International Covenant on Civil and Political Rights*, 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) and the *International Covenant on Economic, Social, and Cultural Rights*, 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976). Both state in art 1 that "[a]ll peoples have the right of self-determination." The *UN Charter*, *supra* note 51, refers in art 1(2) to "respect for the principle of equal rights and self-determination of peoples" as one of its primary purposes. Canada is required by international law to comply with these obligations.

[88] *Indian Act*, RSC 1985, c I-5. As pointed out by numerous commentators and observers, the *Indian Act* has also been a primary vehicle for curtailing Indigenous rights. In addition to the TRC, *supra* note 5, see generally Mary-Ellen Kelm & Keith D Smith, *Talking Back to the Indian Act: Critical Readings in Settler Colonial Histories* (Toronto: University of Toronto Press, 2018).

[89] Recent controversy in Wet'suwet'en territory — never "surrendered" by treaty — demonstrates how unsettled questions between Crown and Indigenous nations governments' approval of projects absent dialogue informed by Indigenous law can upend projects.

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In the following subparts, we sketch out some of Canada's constitutional obligations that are expressly covered by the IGE. This discussion helps explore the content of the exception and illuminate some of the challenges and concerns with its application.

CONTEXT AND HISTORY

Canada owes obligations to a diversity of Indigenous nations and peoples. Any descriptions and identifications of these nations and peoples, other than those generated by Indigenous peoples themselves, are inevitably imprecise and reflect colonial thinking.[90] We offer the information below simply to afford a sense of the breadth of Indigenous groups to whom the government is obligated. According to recent government figures, approximately 1.67 million people in Canada identify as "Aboriginal," a broad term that can refer to "First Nations," Inuit, or Métis people and peoples.[91] "First Nations" refers to "Aboriginal" people who are neither Inuit nor Métis, and, within this first category alone, the government estimates more than

Nation-wide protests and blockades sprang up after hereditary Wet'suwet'en leadership opposed a natural gas pipeline through their territory. The project had received approval, but the hereditary leaders said this was not the case based on Wet'suwet'en law. See e.g. Douglas Sanderson, "Give the Wet'suwet'en Space to Conduct their Lawmaking, Away from the Barricades," *Policy Options* (24 February 2020) online: <policyoptions.irpp.org/magazines/february-2020/give-the-wetsuweten-space-to-conduct-their-law-making-away-from-barricades/>. After weeks of stand-offs, the federal government and Wet'suwet'en leadership negotiated a preliminary agreement recognizing Wet'suwet'en title, although details remain unknown. "Wet'suwet'en Chiefs, Ministers Reach Tentative Arrangement over Land Title but Debate over Pipeline Continues," *CBC News* (1 March 2020), online: <www.cbc.ca/news/canada/british-columbia/wetsuweten-agreement-reached-1.5481681>.

[90] The seminal Royal Commission on Aboriginal Peoples (RCAP), for instance, spoke to federal legislative classifications that ignore "cultural and national differences" between Indigenous groups. Royal Commission on Aboriginal Peoples (RCAP), *Report of the Royal Commission on Aboriginal Peoples: Looking Forward, Looking Back*, vol 1 (Ottawa: Supply and Services Canada, 1996), online: <data2.archives.ca/e/e448/e011188230-01.pdf>. That source also explains that, "[f]or statistical and other purposes, the federal government usually divides the Aboriginal population into four categories: North American Indians registered under the *Indian Act*, North American Indians not registered under the *Indian Act* (the non-status population), Métis people and Inuit. Basic population characteristics of each group are described below using the 1991 Aboriginal Peoples Survey as the source" (at 23). References to government inclusion and exclusion under the *Indian Act* highlight the colonialism involved in such categories.

[91] Crown-Indigenous Relations and Northern Affairs Canada (CIRNAC), "First Nations," online: <www.rcaanc-cirnac.gc.ca/eng/1100100013791/1535470872302>. Some of the government's information aligns with that produced in RCAP, *supra* note 90 at 20. But current population numbers exceed those recorded in the RCAP's report.

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630 groups speaking fifty different languages.[92] As noted earlier, the term "Aboriginal" is used in the *Constitution Act, 1982*, and the federal government often uses this term for that reason; "Indigenous," however, is the more commonly used term domestically and internationally.[93]

The specific obligations owed to diverse Indigenous collectives are complicated and evolving, but largely stem from colonialism and assumed Crown sovereignty. The 1763 *Royal Proclamation* placed the Crown[94] between settlers and Indigenous peoples and required Indigenous peoples to "cede" land directly to the Crown rather than to settlers. The *Royal Proclamation* also asserted that the transfer of land would be predicated on mutually negotiated treaties and that relations between settlers and Indigenous peoples would be premised on respect for the latter's internal sovereignty.[95] Many Indigenous nations did not perceive the treaty process as involving the "surrender" of land; rather, they continue to view treaties as agreements intended to guide mutually beneficial and respectful relationships.[96] The Crown's one-sided view of treaties as land cession agreements with minimal Indigenous rights has often marred treaty relationships and implementation.[97] In some areas of Canada, the Crown ushered in settlement and

[92] CIRNAC, *supra* note 91; RCAP, *supra* note 90.

[93] See e.g. United Nations, Department of Economic and Social Affairs, "Indigenous Peoples at the United Nations" online: <www.un.org/development/desa/indigenouspeoples/about-us.html>. The summarized Martinez Cobo report helps define commonalities between Indigenous nations affected by colonialism, without rigidly defining who Indigenous peoples are.

[94] In *Clyde River (Hamlet) v Petroleum Geo-Services Inc*, 2017 SCC 40 at para 28, the Supreme Court of Canada defined the Crown as "[t]he personification in Her Majesty of the Canadian state in exercising the prerogatives and privileges reserved to it. The Crown also, however, denotes the sovereign in the exercise of her formal legislative role (in assenting, refusing assent to, or reserving legislative or parliamentary bills), and as the head of executive authority. … For this reason, the term 'Crown' is commonly used to symbolize and denote executive power."

[95] See e.g. John Borrows, "Wampum at Niagara: The Royal Proclamation, Canadian Legal History, and Self-Government" in Michael Asch, ed, *Aboriginal and Treaty Rights in Canada: Essays on Law, Equity, and Respect for Difference* (Vancouver: UBC Press, 1997) 155 at 155. For a different perspective on imperial views on internal sovereignty at the time, see e.g. Justice Harry S LaForme with Claire Truesdale, "Section 25 of the Charter; Section 35 of the Constitution Act, 1982: Aboriginal and Treaty Rights — 30 Years of Recognition and Affirmation" in Errol Mendes & Stéphane Beaulac, eds, *Canadian Charter of Rights and Freedoms*, 5th ed (Markham, ON: LexisNexis, 2013) 1337 at 1343–45.

[96] See e.g. Michael Coyle, "As Long as the Sun Shines: Recognizing That Treaties Were Intended to Last" in John Borrows & Michael Coyle, eds, *The Right Relationship: Reimagining the Implementation of Historical Treaties* (Toronto: University of Toronto Press, 2017) 39 at 46–47.

[97] See Harold Cardinal & Walter Hildebrandt, *Treaty Elders of Saskatchewan: Our Dream Is That Our Peoples Will One Day Be Clearly Recognized as Nations* (Calgary: University of Calgary Press, 2000).

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development without first negotiating treaties at all.[98] In other areas, sparse treaties were made under circumstances of privation. Julie Jai, for example, speaks to post-Confederation treaties that "allegedly surrendered land [and that] were signed during this … period when Indigenous populations had been decimated by European diseases, wars, loss of wildlife which they relied upon, and settler pressures for the best agricultural land."[99] Colonial governments became increasingly disrespectful and expedient in their quest for land, treating Indigenous peoples as far less than equal partners in the treaty relationship.[100] Settlement led not only to loss of territory but also to disease, death, and the imposition of external control within Indigenous nations.[101] Insidious racism informed and compounded the effects of colonial policy.[102]

In this context of increasing antagonism and racism towards Indigenous peoples, the legal force of treaties was often ignored, and the Crown disregarded their terms. As well, Indigenous rights could be and were nullified by legislative enactment under Canada's system of parliamentary supremacy. The *Constitution Act, 1867*, which united British colonies into the Dominion of Canada, simultaneously excluded Indigenous peoples from shared political power and made them and their lands a subject of federal legislative authority.[103] That power has been primarily articulated in the *Indian Act*, a section of which maintains the obligation of surrendering Indigenous land to the Crown.[104] The Act purports to define status and identity in ways that do not necessarily coincide with the self-definition of all Indigenous peoples. The Act also authorized the indescribably destructive residential school system, the societal effects of which persist even after the closure of the state- and church-run institutions.[105]

[98] Much of British Columbia was settled without treaties, although some treaties were made on what is now called Vancouver Island.

[99] Julie Jai, "Bargains Made in Bad Times: How Principles from Modern Treaties Can Reinvigorate the Interpretation of Historical Treaties" in Borrows & Coyle, *supra* note 96, 105 at 111.

[100] *Ibid.*

[101] See Laforme & Truesdale, *supra* note 95 at 1341–42.

[102] *Ibid* at 1351–52. See also Peter H Russell, *Canada's Odyssey: A Country Based on Incomplete Conquests* (Toronto: University of Toronto Press, 2017) at 149–50.

[103] *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, s 91(24), reprinted in RSC 1985, Appendix II, No 5.

[104] *Indian Act, supra* note 88, c I-5, ss 18(1), 37–38.

[105] Beginning in the late nineteenth century, Canada forced Indigenous children to leave their parents and communities and attend residential schools as part of a program of assimilation. The operation of residential schools and their devastating effects on generations of Indigenous peoples is described in TRC, *supra* note 5.

The foregoing is a non-exhaustive history and list of colonial harms. This description points to why and how the Crown is now compelled to act remedially and to prioritize commitments to Indigenous peoples. And it helps to explain the risk of subjecting those remedial and evolving commitments to adjudication by a trade panel. Some of Canada's commitments to Indigenous peoples were constitutionalized in 1982 as rights. While constitutional recognition was significant, the intent of Indigenous representatives was always to negotiate the scope of Aboriginal rights protection with Canadian governments.[106] Negotiations foundered, and, ultimately, the Canadian courts have defined many Aboriginal and treaty rights. The courts have inevitably engaged in this task piecemeal, dealing with cases as they arrive before them, while often urging government and Indigenous parties to negotiate and determine rights in political fora.[107] Cases incrementally change the scope of rights as do negotiations around modern land claim agreements.

INDIGENOUS RIGHTS AS DEFINED BY THE CANADIAN COURTS

Thus far, courts have interpreted Aboriginal rights under section 35(1) of the *Constitution Act, 1982* as protecting a fairly narrow range of activities said to be "integral to [an Indigenous group's] distinctive culture."[108] The Supreme Court of Canada's *Van der Peet* test for Aboriginal rights recognition is notoriously difficult for Indigenous parties, given the Court's evidentiary and other requirements.[109] *Van der Peet* requires rights claimants to demonstrate that a claimed right "be an element of a practice, custom or tradition integral to the distinctive culture of the aboriginal group claiming the right."[110] The claimed practice must be of central significance to that group; former Chief Justice Antonio Lamer explained that, without that practice, the group would be significantly altered.[111] The practice in issue must have continuity with pre-European contact practice, placing a heavy evidentiary burden on the claimant. Many have vociferously criticized the test and its

[106] Section 37 of the *Constitution Act, 1982*, *supra* note 3, which provided for a constitutional conference to address identification and definition of the rights of Indigenous peoples to be included in the Constitution of Canada, was automatically repealed one year following the coming into force of the *Constitution Act, 1982*, *ibid*, s 54.

[107] See e.g. *Delgamuukw v British Columbia*, [1997] 3 SCR 1010 at 1123–24, 153 DLR (4th) 193 [*Delgamuukw*]; *First Nation of Nacho Nyak Dun v Yukon*, 2017 SCC 58 at para 33 [*Nacho Nyak*].

[108] *R v Van der Peet*, [1996] 2 SCR 507 at 548ff, 137 DLR (4th) 289 [*Van der Peet*].

[109] *Ibid*. See generally *R v Pamajewon*, [1996] 2 SCR 821, 138 DLR (4th) 204, for an example of the test's application and how the Court recharacterizes parties' claims. On this, see also *Lax Kw'alaams Indian Band v Canada (Attorney General)*, 2011 SCC 56 [*Lax Kw'alaams*].

[110] *Van der Peet, supra* note 108 at 549.

[111] *Ibid* at 554.

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burdens.[112] In those cases where rights claimants have succeeded, judges have generally recognized narrow, site-specific fishing, hunting, trapping, and other cultivation rights as Aboriginal rights;[113] commercial rights relating to any of these activities have been even more narrowly construed.[114]

Treaty rights vary depending on the content of the underlying agreement. The Supreme Court of Canada has enumerated a list of distinctive treaty interpretation principles guiding the review of historic treaties. Speaking to a post-Confederation treaty in *R. v Badger*, Justice Peter Cory pointed to the solemn and sacred nature of treaty promises. The Crown must act honourably and refrain from "sharp dealings." Ambiguous language is resolved in favour of the Indigenous party and limitations on Indigenous signatories' rights are narrowly interpreted.[115] Numerous other cases speak to this "large and liberal" interpretive approach.[116] Cases involving historic treaties have interpreted these instruments as guaranteeing fishing, hunting, trapping, and other resource cultivation rights, albeit narrow ones.[117]

Modern treaties[118] and land claim agreements contain a broader and more specific range of rights and obligations. These treaties and agreements purport to involve the surrender of larger title claims in exchange for defined territory and specific rights. Newer agreements often include some form of power sharing between Indigenous and territorial or provincial

[112] For critical commentary, see e.g. Russel L Barsh & James Youngblood Henderson, "The Supreme Court's *Van der Peet* Trilogy: Naive Imperialism and Ropes of Sand" (1997) 42 McGill LJ 993; John Borrows, "The Trickster: Integral to a Distinctive Culture" (1997) 8 Const Forum Const 27.

[113] See e.g. *R v Gladstone*, [1996] 2 SCR 723, 200 NR 189 [*Gladstone*]; *R v Powley*, 2003 SCC 43 (recognizing Métis Aboriginal hunting rights); *R v Sappier*; *R v Gray*, 2006 SCC 54 (right to cultivate wood for domestic purposes).

[114] See *Gladstone*, *supra* note 113; *Lax Kw'alaams*, *supra* note 109.

[115] *R v Badger*, [1996] 1 SCR 771 at 793–93, 133 DLR (4th) 324 [*Badger*]. See also RCAP, *Report of the Royal Commission on Aboriginal Peoples: Restructuring the Relationship*, vol 2 (Ottawa: Supply and Services Canada, 1996) at 41, online: <data2.archives.ca/e/e448/e011188230-02.pdf>.

[116] See e.g. *R v Simon*, [1985] 2 SCR 387 at 402, 62 NR 366. These special rules of treaty interpretation have been criticized on numerous grounds, including the failure of the courts to faithfully apply them. See e.g. Aimée Craft, "Treaty Interpretation: A Tale of Two Stories" in Aimée Craft, *Breathing Life into the Stone Fort Treaty* (Vancouver: UBC Press/Purich, 2013).

[117] See e.g. *R v Morris*, 2006 SCC 59; *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)*, 2005 SCC 69; *R v Marshall*, [1999] 3 SCR 456 at 470, 177 DLR (4th) 513.

[118] The *Agreement between the Grand Council of the Crees (of Quebec), the Northern Quebec Inuit Association, the Government of Quebec, la Société d'énergie de la Baie James, la Société de développement de la Baie James, la Commission hydro-électrique de Québec and the Government of Canada*, 11 November 1975, online: <www3.publicationsduquebec.gouv.qc.ca/produits/conventions/lois/loi2/pages/page4.en.html>, also known as the *James Bay Northern Quebec Agreement*, was the first "modern" treaty. See e.g. *Beckman v Little Salmon/Carmacks First Nation*, 2010 SCC 53 at para 12 [*Little Salmon*].

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governments, at least in specified subject areas.[119] Pursuant to the 1997 Little Salmon/Carmacks First Nation Final Agreement,[120] for example, Indigenous signatories

> surrendered all undefined Aboriginal rights, title, and interests in [their] traditional territory in return for which [they] received:
>
> - title to 2,589 square kilometres of "settlement land" [Chapters 9 and 15];
> - financial compensation of $34,179,210 [Chapter 19];
> - potential for royalty sharing [Chapter 23];
> - economic development measures [Chapter 22];
> - rights of access to Crown land (except that disposed of by agreement for sale, surface licence, or lease) [Chapter 6];
> - special management areas [Chapter 10];
> - protection of access to settlement land [s. 6.2.7];
> - rights to harvest fish and wildlife [Chapter 16];
> - rights to harvest forest resources [Chapter 17];
> - rights to representation and involvement in land use planning [Chapter 11] and resource management [Chapters 14, 16–18].[121]

The Supreme Court of Canada has adopted a different interpretive posture around these newer, lengthier, and more detailed agreements, preferring to defer to the language of the document but still holding the Crown to expectations of honourable conduct, discussed in more detail below.[122]

Title is a specific genre of "Aboriginal" right, recognized only once by the Supreme Court.[123] In *Tsilhqot'in Nation v British Columbia*, the Court explained that title protects a broad scope of rights within it, including possession, land use management, and the right to profit from the land.[124] If title is proven — typically after an onerous legal proceeding — the Crown might have to reassess or cancel earlier decisions if those decisions would infringe on title rights and cannot be justified.[125] Brad Morse describes the unceded territory in Canada where resource companies operating on Crown leases or licenses could be affected by title claims as including

[119] See *Little Salmon, supra* note 118; *Nacho Nyak, supra* note 107.

[120] *Umbrella Final Agreement between the Government of Canada, the Council for Yukon Indians and the Government of the Yukon*, 1993, online: <www.rcaanc-cirnac.gc.ca/eng/1297278586814/1542811130481>.

[121] *Little Salmon, supra* note 118 at para 36.

[122] See e.g. *Nacho Nyak, supra* note 107 at paras 36–38.

[123] *Calder v Attorney-General of British Columbia*, [1973] SCR 313, 34 DLR (3d) 145, affirmed title as a common law doctrine, but the Court did not make a title declaration in that case.

[124] *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44 at para 73 [*Tsilhqot'in*].

[125] *Ibid* at para 92.

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> the vast majority of British Columbia, … areas in the southern Yukon and southern Northwest Territories, the Ottawa Valley, southern Quebec (from the Labrador and New Brunswick borders to Ontario south of the James Bay and Northern Quebec Agreement and Northeastern Agreement boundaries), southern Labrador, and arguably all three Maritime provinces as well as the island of Newfoundland.[126]

Regardless of the type of constitutional right involved, however, Aboriginal law doctrine allows governments to justify infringements. The Supreme Court has stated that governments may justifiably infringe any rights, including title, for such purposes as resource conservation, agriculture, hydro power generation, and settlement.[127] Justifiable infringement will turn, in part, on whether the government upholds Indigenous peoples' priority access to resources "after valid conservation measures have been implemented."[128]

The foregoing discussion has sketched out just some of the kinds of constitutional rights and some corresponding obligations that are recognized in Canadian case law: inherent Aboriginal rights, treaty rights, and title. But this is an incomplete statement of obligations. For instance, the Crown owes Indigenous parties a fiduciary duty when it "assumes discretionary control over specific [Indigenous] interests."[129] That duty would apply when an Indigenous group transfers land to the Crown.[130] Fiduciary and other duties find their root in the Crown's broader obligation to act "honourably" in all of its dealings with Indigenous peoples as a consequence of its unilateral assertion of sovereignty.[131] The overarching principle of the

[126] Bradford W Morse, "*Tsilhqot'in Nation v. British Columbia*: Is It a Game Changer in Canadian Aboriginal Title Law and Crown-Indigenous Relations?" (2017) 2 Lakehead LJ 64 at 80–81. That said, Morse goes on to enumerate subsequent cases from various levels of courts where decisions were "business as usual," but those decisions were not necessarily informed by the *UNDRIP*, as subsequently discussed (at 81–82). *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UNGAOR, 61st Sess, Supp No 49, UN Doc A/61/49 (2008) [*UNDRIP*].

[127] See e.g. *Tsilhqot'in*, *supra* note 124 at para 83, citing *Delgamuukw*, *supra* note 107 at para 165.

[128] See *R v Sparrow*, [1990] 1 SCR 1075,70 DLR (4th) 385; *Gladstone*, *supra* note 113, allowed the Crown to "balance" a range of other interests when an Indigenous commercial right is at stake.

[129] *Manitoba Metis Federation Inc v Canada (Attorney General)*, 2013 SCC 14 at para 59 [*Manitoba Metis*], citing *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73 at para 18 [*Haida Nation*]. The seminal case on this is *Guerin v the Queen*, [1984] 2 SCR 335, 13 DLR (4th) 321 [*Guerin*].

[130] *Guerin*, *supra* note 129 at 382.

[131] See e.g. *Haida Nation*, *supra* note 129 at para 32, where the Court linked the ever-present honour to "the Crown's assertion of sovereignty over an Aboriginal people and *de facto* control of land and resources that were formerly in the control of that people." See also *Manitoba Metis*, *supra* note 129 at para 66; *Mikisew Cree First Nation v Canada (Governor General in Council)*, 2018 SCC 40 at para 21 [*Mikisew* 2018]. See also Brian Slattery, "Aboriginal Rights and the Honour of the Crown" (2005) 29 SCLR (2d) 433 at 443–44.

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"Honour of the Crown" takes different shapes in different contexts, animating the particular interpretation and discharge of Aboriginal and treaty rights, as discussed, and the duty of consultation.[132]

The duty of consultation warrants further elaboration. The duty requires the Crown to consult with affected Indigenous groups when it contemplates actions that could adversely affect asserted or proven rights and interests, including treaty rights and title.[133] The Crown's specific responsibilities vary according to the nature and strength of the Indigenous right asserted.[134] The Supreme Court of Canada has located the duty on a spectrum; contemplated conduct with fewer, or less intense, impacts on rights could require mere notice to the affected group.[135] In *Tsilhqot'in*, the Court clarified that consultation in the context of established title — the "biggest" right under section 35 — could require the consent of the affected Indigenous group before action is taken on the territory.[136] In *Rio Tinto Alcan v Carrier Sekani Tribal Council*,[137] the Supreme Court clarified that actual or contemplated Crown action sufficient to trigger consultation includes "strategic, higher level decisions" (or, at paragraph 47, "structural changes to the resource's management") such as

> the transfer of tree licences which would have permitted the cutting of old-growth forest (*Haida Nation*); the approval of a multi-year forest management plan for a large geographic area (*Klahoose First Nation v. Sunshine Coast Forest District (District Manager)* …); the establishment of a review process for a major gas pipeline (*Dene Tha' First Nation v. Canada (Minister of Environment)* …); and the conduct of a comprehensive inquiry to determine a province's infrastructure and capacity needs for electricity transmission (*An Inquiry into British Columbia's Electricity Transmission Infrastructure & Capacity Needs for the Next 30 Years, Re* …). We leave for another day the question of whether government conduct includes legislative action: see *R. v. Lefthand*….[138]

[132] *Manitoba Metis*, *supra* note 129 at paras 68–69, consolidating previous jurisprudence.

[133] *Ibid* at para 73; *Haida Nation*, *supra* note 129 at paras 19, 32. The Crown's honour is implicated in making and implementing treaties with Indigenous nations, prohibiting any "sharp dealing" by the Crown. *Badger*, *supra* note 115 at 794, also established that the honour of the Crown informs the appropriate interpretation of legislation that affects Indigenous interests.

[134] *Haida Nation*, *supra* note 129 at paras 37, 39, 43–45.

[135] *Ibid* at para 43.

[136] *Tsilhqot'in*, *supra* note 124 at para 76. At para 73 of the decision, the Court listed some of the incidents of title, including the "right to decide how the land will be used"; "the right to the economic benefits of the land"; and "the right to pro-actively use and manage the land." See further para 77 for comments about justified infringement.

[137] *Rio Tinto Alcan Inc v Carrier Sekani Tribal Council*, 2010 SCC 43 at paras 40–50 [*Rio Tinto*].

[138] *Ibid* at para 44 [citations omitted]. In *Mikisew* 2018, *supra* note 131, a plurality of judges also rejected the idea that a duty is owed when developing and enacting legislation. In different

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The Court explained that a contractual shift in management, for example, might transfer decision-making power to a third party, diminishing the Crown's capacity to ensure resource development in a way that respects section 35 rights.[139] *Carrier Sekani* also underlined the need for a "causal" relationship between the Crown's conduct and the adverse effect on the Indigenous right in question — the connection cannot be "speculative."[140]

Many Indigenous nations and groups have expressed intense frustration with consultation doctrine. The doctrine is viewed as being common law oriented, one-sided, and tilted towards the project's inevitable approval.[141] The Crown, many say, treats consultation as a *pro forma* obligation that inevitably leads to project approval. And, while touted as a dialogue, consultation often disregards Indigenous laws and decision-making processes.[142]

THE IMPACT OF THE *UNITED NATIONS DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES* (*UNDRIP*)

Perceived failings in section 35 doctrine, including consultation, and the Crown's approach to its relational duties, have led many to call for the full domestic implementation of the *UNDRIP*.[143] The *UNDRIP* underlines

sets of reasons, these judges underlined that the duty falls on executive actors and not legislative ones, even in a system with a less than stark distinction between the two branches. The *UNDRIP*, *supra* note 126, does mandate consultation in that context, but the Court did not refer to the declaration.

[139] *Rio Tinto*, *supra* note 137 at para 47.

[140] *Ibid* at paras 45–46.

[141] See e.g. Grace Nosek, "Re-imagining Indigenous Peoples' Role in Natural Resource Development Decision Making: Implementing Free, Prior and Informed Consent in Canada through Indigenous Legal Traditions" (2017) 50 UBC L Rev 95 at 96.

[142] See e.g. Sarah Morales, "Braiding the Incommensurable: Indigenous Legal Traditions and the Duty to Consult" in John Borrows et al, eds, *Braiding Legal Orders: Implementing the United Nations Declaration on the Rights of Indigenous Peoples* (Waterloo, ON: Centre for International Governance Innovation, 2019) 65 at 68–69 [Borrows et al, *Braiding*]. See also Nosek, *supra* note 141 at 101–03, 105–09, nn 48–61. Dwight Newman amasses a list of critics of the duty in its present form but criticizes them, in turn, by saying that they are "overly skeptical from a descriptive point of view, [and] may also be focused on a limited range of values … thereby negatively judging all efforts at the real world reconciliation of interests and values that must actually occur." Dwight Newman, "The Section 35 Duty to Consult" in Oliver, Macklem & Des Rosiers, *supra* note 19 at 353, n 21.

[143] *UNDRIP*, *supra* note 126. The TRC's final report called for full *UNDRIP* implementation as one measure necessary to improve Canada's relationship with Indigenous peoples. See TRC, *supra* note 5, Call to Action 43. Academic support of the *UNDRIP* is legion. For one example, see Morales, *supra* note 142.

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Indigenous peoples' right to self-determination, tying that right to territorial sovereignty and explicitly linking these concepts to participatory decision-making.[144]

Numerous *UNDRIP* articles speak to consultative processes, using language that suggests a process that is more inclusive of Indigenous law and autonomy, including, for example,

> Article 19 — States shall consult and cooperate in good faith with the [I]ndigenous peoples concerned through their own representative institutions in order to obtain their *free, prior and informed consent* before adopting and implementing legislative or administrative measures that may affect them … Article 32(2) — States shall consult and cooperate in good faith with the [I]ndigenous peoples concerned through their own representative institutions in order to obtain *their free and informed consent* prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.[145]

Debate surrounds the meaning of many *UNDRIP* provisions, but the *UNDRIP* certainly offers stronger substantive and participatory rights for Indigenous peoples than what Canadian governments and courts currently recognize. The *UNDRIP*'s stronger guarantees would likely affect projects implicating land and resource use.[146] In the narrow frame of the current discussion, we offer some thoughts on the *UNDRIP*'s legal effects in Canada since they would affect "obligations" for the purposes of the IGE.

Parliament has recently reintroduced legislation regarding the *UNDRIP* at the federal level. Clause 4 of the bill describes the legislation's purpose as "affirm[ing] the Declaration as a universal human rights instrument with application in Canadian law; and provid[ing] a framework for the Government of Canada's implementation of the Declaration."[147] British Columbia

[144] See e.g. *UNDRIP*, *supra* note 126, preamble, arts 3–4.

[145] Emphasis added.

[146] Kerry Wilkins, "Strategizing UNDRIP Implementation: Some Fundamentals" in Borrows et al, *Braiding*, *supra* note 142, 177 at 179.

[147] Bill C-15, *An Act respecting the United Nations Declaration on the Rights of Indigenous Peoples*, 2nd Sess, 42nd Parl, 2020 (first reading 3 December 2020). Minister Lametti, speaking in the House of Commons on 3 December 2020, said that the bill was intended to "implement" the *UNDRIP*. House of Commons Debates, 42-2, No 42 (3 December 2020) at 1500. The bill's preamble refers to implementing the *UNDRIP* numerous times. But the text of the bill itself refers to ensuring that federal laws are "consistent with" the *UNDRIP* (clause 5) and crafting an action plan to "achieve the objectives of the Declaration" (clause 6). These clauses make it difficult to confidently state whether the legislation would create binding legal obligations for the purposes of the IGE. Bill C-15 was enacted after this article was written and was about to be published: see *United Nations Declaration on the Rights of*

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has made somewhat firmer progress, recently enacting the *Declaration on the Rights of Indigenous Peoples Act* (*DRIPA*).[148] The *DRIPA* raises some important questions in terms of how it could interact with the IGE. The precise legal effect of the new provincial law is an open question.[149] The new legislation does not clearly state that it "implements" the *UNDRIP*: the title does not refer to implementation, although a listed purpose is to "contribute" to the *UNDRIP*'s implementation.[150] Consistent with international bodies' requirements,[151] the *DRIPA* requires an action plan to implement the *UNDRIP* and requires a

Indigenous Peoples Act, SC 2021, c 14. The foregoing description of Bill C-15 is consistent with the final, enacted provisions of the *Act*. The discussion below of British Columbia's similar legislation is largely representative of considerations that may arise under the new federal legislation.

[148] SBC 2019, c 44 [*DRIPA*]. The Trudeau government supported a New Democratic Party private member's bill intended to "harmonize" Canada's laws with the *UNDRIP* in a previous Parliament. That bill died in the Senate when an election was called in 2019. Bill C-262, *An Act to Ensure the Laws of Canada Are in Harmony with the United Nations Declaration on the Rights of Indigenous Peoples*, 42nd Parl, 1st Sess, 2016 (Hon Romeo Saganash) (committee report presented without amendment in the Senate).

[149] The Attorney General of British Columbia recently asserted that "the Act does not give the UN Declaration the force of law in BC or create new substantive rights." The statement was made in the Attorney General's Reply Factum before the Supreme Court of Canada in the appeal of *Desautel*, *supra* note 20 at para 6, File no 38734, Reply Factum of the Appellant. The Attorney General cited Hansard in support of this point. British Columbia, Official Report of Debates of the Legislative Assembly (Hansard), 41st Parl, 4th Sess, No 297 (25 November 2019) at 10753 (Hon S Fraser). Minister Fraser said: "I stated earlier that Bill 41 doesn't give the UN Declaration itself the force of law and doesn't create any new laws and new rights. That's inclusive of private land. It's to be applied within the constitutional framework of Canada, including section 35 of the constitution. … The degree of the constitutional protection already afforded to Indigenous land rights in Canada is unique, I think, among UN member states, largely because of section 35. How this and other articles will be applied in B.C. — whether it's in relation to alignment of laws, in section 3, which is yet to come, or Bill 41 or development of the action plan set out in section 4 — will be done in consultation and cooperation with Indigenous peoples in British Columbia. This work will also involve — and this is, I think, referring to private land — engagement with the public, local governments and other stakeholders. Again, I look forward to those discussions coming." We thank our colleague, John Mark Keyes, for discussion on this point.

[150] *DRIPA*, *supra* note 148. In "The Impression of Harmony," Gib van Ert assessed an earlier federal implementing bill with similar language, noting that it did not use orthodox implementing language. Gib van Ert, "The Impression of Harmony: Bill C-262 and the Implementation of UNDRIP in Canadian Law" (27 November 2018), online: <canlii.ca/t/2cvr>.

[151] Sheryl Lightfoot, "Using Legislation to Implement the UN Declaration on the Rights of Indigenous Peoples" in Centre for International Governance Innovation & Wiyasiwewin Mikiwahp Native Law Centre, *UNDRIP Implementation: More Reflections on Braiding International, Domestic and Indigenous Laws* (Special Report) (Waterloo, ON: Centre for International Governance Innovation, 2018) 17 at 19, 22–23, online: <www.cigionline.org/sites/default/files/documents/UNDRIP%20Fall%202018%20lowres.pdf>.

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government to report on its progress. But that language again underscores that the *UNDRIP* is not immediately and fully incorporated into provincial law.[152] The *DRIPA* "affirm[s] the application of [the *UNDRIP*] to the laws of British Columbia" and requires that the government align provincial laws with *UNDRIP*, in consultation with Indigenous peoples.[153] This last requirement seems consistent with Article 38 of the *UNDRIP*, which requires "States in consultation and cooperation with [I]ndigenous peoples, [to] take the appropriate measures, including legislative measures, to achieve the ends of this Declaration."

We raise the question of the *DRIPA*'s effect only to determine whether the Act creates binding obligations on the BC government to comply with the declaration. If it does, Kerry Wilkins might describe the result as statutory rights, rather than constitutional ones.[154] Statutory rights, though more ephemeral than constitutional rights, nonetheless denote "legal" obligations. *CUSMA*'s text explains that Canada's legal obligations "include," but are not limited to, respecting rights under section 35. But what precisely does the *DRIPA* oblige? If the Act does not create binding and enforceable obligations against the government but, rather, speaks to progressive realization, would measures taken pursuant to the statute be protected under the IGE?

Imagine amendments to British Columbia's project approval legislation that required approval only with "free, prior and informed consent" of affected groups, as required by Article 32(2) of the *UNDRIP*. Assume, at a minimum, that such consent requires Indigenous participation beyond current Canadian legal consultative requirements. That enhanced collaboration might involve longer time frames for Indigenous groups to reflect on proposals pursuant to their own laws and procedures. If the United States or

[152] Van Ert, *supra* note 150 at para 13. Lightfoot, *supra* note 151, explains the importance of domestic legislative surveys as important first steps to *UNDRIP* implementation. Lightfoot writes: "The handbook for parliamentarians on implementing the UN Declaration, published by the InterParliamentary Union and several UN agencies, cites the law-making role of parliaments as of particular importance in the implementation of the UN Declaration" (at 19–20).

[153] *DRIPA*, *supra* note 148, ss 2–3.

[154] Wilkins, *supra* note 146 at 184. To be clear, Wilkins does not speak specifically to the *DRIPA*. Wilkins points to alternative ways of implementing the *UNDRIP*: formal constitutional amendment or through a treaty styled as a land claim agreement pursuant to section 35(3) of the *Constitution Act, 1982*. The last suggestion is premised on section 35's protection of treaty rights that existed as of 1982; newer land claim agreements are constitutionally protected under section 35(3). And, finally, responding to a point Wilkins raises, section 14(1) of the provincial *Interpretation Act*, RSBC 1996, c 238, states that the "government" is bound by acts unless specifically exempted. But section 14(2) of that Act also states that enactments that "bind or affect the government in the use or development of land" do not bind or affect the government, possibly leading to questions that are beyond the scope of this article.

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Mexico were to claim that the imposition of these new time frames breaches Canada's *CUSMA* obligation to give fair and equitable treatment to their investors, could Canada then rely on the IGE to protect the provincial law? Would measures like those taken under the BC legislation to contribute to the progressive realization of the *UNDRIP* be shielded by the IGE? The answer is unclear.[155]

CANADA'S EVOLVING LEGAL OBLIGATIONS TO INDIGENOUS PEOPLES

This discussion of the *UNDRIP* illustrates only one way in which Canadian legal obligations to Indigenous peoples have evolved. This evolution raises other distinct issues in the context of the IGE. Accepted principles of treaty interpretation require that the language of most commitments and obligations in trade agreements be interpreted as of the moment the treaty is concluded.[156] Under this view, Canadian legal obligations would be fixed at the moment *CUSMA* came into force on 1 July 2020. That position is untenable in the context of Canada's evolving and changing relationship with Indigenous peoples. The International Court of Justice and the WTO's Appellate Body have recognized that some international obligations are evolutionary and that the parties must have intended that they should be interpreted in light of the circumstances in existence at the time an issue regarding their application arises.[157] An evolutionary approach has been applied, for example, in determining the meaning of the exception from the general obligations of the *GATT* for measures designed to protect "exhaustible natural resources" set out in Article XX of the *GATT*.[158]

Such an approach should not be necessary to accommodate the slow and often grudging affirmation of Aboriginal rights by Canadian courts and governments. Because such affirmed rights are not "new" rights, the issue of evolutionary interpretation arguably does not arise. But what about treaties between Canada and Indigenous peoples that are negotiated after 1 July 2020 and that change Canada's current obligations? This form of evolution should

[155] If the *UNDRIP* is not incorporated into Canadian law by implementing statute, it might form part of Canada's legal obligations through the operation of customary international law or through the honour of the Crown doctrine. See van Ert, *supra* note 150 at paras 5, 16. In any case, the declaration could still influence courts' interpretation of legislation and constitutional rights claims. See Wilkins, *supra* note 146 at 178.

[156] This is the principle of contemporaneity. Humphrey Waldock, "Third Report on the Law of Treaties" (1964) 16:2 YB Intl L Commission 5 at 55-56; Michael Lennard, "Navigating by the Stars: Interpreting the WTO Agreements" (2002) 5 J Intl Econ L 17 at 39.

[157] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, [1971] ICJ Rep 16 at para 53; *US – Shrimp, supra* note 66. This approach to interpretation is discussed in Lennard, *supra* note 156 at 75–76.

[158] *US – Shrimp, supra* note 66.

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be accommodated for the purposes of the IGE. If Canada negotiates a new treaty with an Indigenous group, the resulting obligations are arguably not new but, rather, derivative of underlying pre-existing Aboriginal and treaty rights and the inherent sovereignty of the Indigenous group. Predicting IGE analysis becomes murkier when one contemplates obligations to Indigenous peoples that are clearly novel. With *CUSMA* in force, whether Canada would expand its legal obligations to Indigenous peoples by undertaking any new international obligations is unclear. It is difficult to say whether Canada, the United States, and Mexico intended that Canada's obligations for the purposes of the IGE would change if Canada ratified a new convention subjecting Canada to new levels of international commitment.

The discussion of British Columbia's new *DRIPA* raises a similar, difficult issue. Did Canada, the United States, and Mexico intend "legal obligations" for the purposes of the IGE to include ordinary domestic law obligations, as opposed to constitutionally protected obligations, undertaken by a Canadian government? The *DRIPA* came into effect before *CUSMA* did. But would clearer and more enforceable Canadian legislative obligations be "legal obligations to Indigenous peoples"? The parties did not likely intend that Canada could protect, in effect, its actions under the IGE through the simple expedient of enacting legislation. Would it matter that the legislation was intended to give effect to an obligation to Indigenous peoples under the *UNDRIP*? Certainly, the words "legal obligations" are broad enough to support this analysis. The fact that constitutional obligations are separately identified as a subset of legal obligations suggests that a broader meaning must have been intended. But how broad is unclear.

SUMMARY AND PRELIMINARY CONCLUSIONS REGARDING CANADIAN LEGAL OBLIGATIONS TO INDIGENOUS PEOPLES

Canadian governments must respect and uphold constitutionally protected Aboriginal and treaty rights and numerous other obligations stemming from the Crown's duty of honourable conduct.

Some of the interpretive issues around the evolving content of obligations can be addressed under the conventional rules of treaty interpretation, although the IGE presents these issues in a distinctive context. More importantly, the nature and content of Canada's legal obligations to Indigenous peoples raise extremely complex issues of domestic and Indigenous law and practice that are not addressed in any way by the rules of treaty interpretation. Those issues are far outside the ordinary competence of international law specialists. Addressing them effectively and sensitively requires a deep understanding of a fraught historical context and the Crown's unique responsibilities. A non-expert tribunal struck pursuant to *CUSMA* would be completely ill-suited to address and determine the content of Canada's

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"legal obligations to Indigenous peoples." The concerns in this regard are set out in more detail in the next part.

Specific Risks Related to *CUSMA*'s State-to-State Dispute Settlement Panel's Adjudication of Canada's Reliance on the IGE

The prospect of *CUSMA* panels adjudicating Canada's ability to rely on the IGE raises concerns regarding the likely competence of panel members and the nature of the adjudication process. In practice, *CUSMA* panel members are unlikely to have much understanding of Canadian Indigenous peoples' rights and Canada's corresponding legal obligations. Under *CUSMA*, panels are composed of five members. If the dispute were between Canada and the United States, for example, the two countries would first try to agree on a panel chair. If the parties could not agree to a chair after fifteen days, the disputing party chosen by lot could choose the chair, who cannot be a national of that party.[159] The practice under the similar procedure in Chapter 20 of *NAFTA* was to agree on a chair who was not a national of either disputing party to avoid concerns about nationality bias.[160] After the selection of a chair, Canada would choose two Americans from a roster to be established under the treaty, and the United States would choose two Canadians from the roster.[161] Therefore, at least two, and likely three, of the five panellists would be non-Canadians, and the two Canadians on the panel would be chosen by the United States. Roster members must meet certain qualifications in *CUSMA*, but knowledge of Indigenous rights is not one of them.[162] The quality of a decision by such a panel regarding whether a Canadian measure was "necessary to fulfill its legal obligations to [I]ndigenous peoples" is dubious. As described above, the nature of Canada's legal obligations to Indigenous peoples is unique and complicated, including in the manner in which they are

[159] *CUSMA*, *supra* note 1, art 31.9(1)(b).

[160] *Tariffs Applied by Canada to Certain US-Origin Agricultural Products*, NAFTA Case No Can-US-95-2008-01, Final Report of the Panel (2 December 1996) [*Tariffs on US Agricultural Products*]; *US Safeguard Action Taken on Broomcorn Brooms from Mexico*, NAFTA Case No USA-97-2008-01, Final Report of the Panel (1 November 1998) [*Brooms from Mexico*]; *In the Matter of Cross-Border Trucking Services*, NAFTA Case No USA-Mex-98-2008-01, Final Report of the Panel (6 February 2001) [*Cross-Border Trucking*]. All decisions can be found on the Canada-Mexico-United States Secretariat website, online: <can-mex-usa-sec.org>.

[161] *CUSMA*, *supra* note 1, art 31.9(1)(c). Roster members must possess "expertise or experience in international law, international trade, other matters covered by this Agreement, or the resolution of disputes arising under international trade agreements," be selected on the basis of "objectivity, reliability, and sound judgment," be independent of all three *CUSMA* countries and comply with a code of conduct established by the Free Trade Commission.

[162] *Ibid*, art 31.8(2).

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established, interpreted, and changed. Ad hoc *CUSMA* panels are poorly positioned to opine on these obligations.

As discussed above, the precise task of a panel charged with assessing whether Canada can rely on the IGE is not known because the exception is novel and untested. Our analysis suggests that a panel would have to determine whether Canada acted in good faith in determining that its actions were necessary to fulfill a legal obligation to Indigenous peoples. To do so, the panel would be required to decide whether Canada had shown some plausible connection between its measure and the fulfillment of a legal obligation. More importantly, the panel might have to decide whether Canada had a "legal obligation to [I]ndigenous peoples" in the first place and what that obligation required on an objective basis. In other words, Canada might ultimately have to convince a dispute settlement panel of the existence and nature of the legal obligation rather than simply showing the panel that it was acting in good faith in identifying the obligation and characterizing its effects. Trade panels are ill-equipped to perform this element of the task. The panel would also have to decide whether the measure met the requirements of the IGE chapeau: Canadian measures must not constitute arbitrary and unjustified discrimination or a disguised restriction on trade in goods, services, and investment. These requirements are very similar to Article XX of the *GATT* and, so, within the realm of conventional trade law analysis that *CUSMA* panels would have the necessary expertise to perform.

A second concern compounds the first. Affected Indigenous groups will have very limited participation rights in *CUSMA* panel proceedings. *CUSMA* provides for public hearings unless the state parties agree otherwise. Parties other than the states have restricted and uncertain opportunities to participate. A panel must consider any request from a non-governmental entity located in the territory of a disputing party to provide written views regarding the dispute that may assist the panel in evaluating the submissions and arguments of the disputing parties.[163] This is an untested innovation in *CUSMA*. Nothing guarantees that affected Indigenous groups would be permitted to participate. In contrast, Canadian law requires consultation if Crown measures could affect Indigenous peoples, as described above. Canadian court rules permit participation by affected Indigenous groups either as parties or as intervenors.

[163] *Ibid*, art 31.11. The New Zealand government is developing a protocol setting out rules that ensure effective participation by Māori in investor-state dispute settlement cases implicating the country's trade and investment treaty exception for measures according more favourable treatment to Māori (see note 64 above). See New Zealand Ministry of Foreign Affairs and Trade, online: <www.mfat.govt.nz/assets/Trade-General/Investor-State-Dispute-Settlement-ISDS/Draft-ISDS-Protocol-for-consultation.pdf>. A similar protocol for *CUSMA* cases against Canada implicating the IGE might allay some concerns about participation by affected Indigenous peoples.

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Finally, Canada's experience shows that the process for determining Indigenous rights and Canada's corresponding obligations must permit and accommodate iterative reconsideration of those rights and obligations. Unlike domestic courts, a *CUSMA* tribunal hearing a single complaint does not have that capacity. Overall, a panel appointed under *CUSMA* would be ill-suited to determine whether Canada can rely on the IGE.

Factors Mitigating the Risk of *CUSMA* Panel Adjudication in Practice

Despite these concerns, the risks associated with Canada's reliance on the IGE are significantly mitigated in practice. Canada's Services and Investment Reservation in the new agreement for measures that confer rights or preferences on Indigenous peoples is not subject to the same limitations as the IGE. In relation to the treaty obligations to which the reservation applies, Canada is free to "adopt or maintain measures conferring rights or preferences to [A]boriginal peoples" without restriction. Unlike the IGE, the Services and Investment Reservation is not limited to actions required to fulfill legal obligations or subject to any chapeau-like limitation. Reliance on the IGE would only be needed for measures not protected by this reservation or any other carve-out in *CUSMA*.[164]

Obligations not to expropriate foreign investors without compensation and to provide fair and equitable treatment are the basis of most investor-state claims. These obligations are not excluded by the Services and Investment Reservation, but the risk of claims based on these obligations seems small. The risk of expropriation claims is lessened to the extent that Canadian governments follow their historical practice of compensating investors for expropriations.[165] The risk of a claim under the notoriously unpredictable fair and equitable treatment obligation is more worrisome.[166] But the risk of claims actually being made under either provision is substantially attenuated under

[164] The same may be said for *CUSMA*'s reservation relating to the obligations in the Good Regulatory Practices chapter (Chapter 28). See note 32 above and accompanying text.

[165] This was one of the factors relied on by the Federal Court in rejecting the claim by the Hupacasath First Nation, along with the "strong presumption" in Canadian law that, if land is expropriated by the state, compensation will be paid to the landowner. The Hupacasath First Nation had argued that Canada's commitments to protect Chinese investors under the *Canada-China Foreign Investment Promotion and Protection Agreement*, 9 September 2012, Can TS 2014 No 26 (entered into force 1 October 2014), could conflict with their Aboriginal rights and interests in certain lands in British Columbia. These kinds of conflicts in the abstract were dismissed by the Federal Court as "speculative." *Hupacasath First Nation v Canada (Minister of Foreign Affairs)*, 2013 FC 900 at para 134, aff'd 2015 FCA 4.

[166] One leading commentator described the standard as "maddeningly vague, frustratingly general, and treacherously elastic." Jeswald Salacuse, *The Law of Investment Treaties*, 2nd ed (Oxford: Oxford University Press, 2015) at 221.

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CUSMA as compared to *NAFTA*. Under *CUSMA*, the investor-state arbitration procedure cannot be used against Canada, precluding US or Mexican investor claims based on the expropriation or fair and equitable treatment obligations.[167]

The substantive investor protection obligations and other obligations not covered by reservations could be invoked in state-to-state dispute settlement, but state-to-state cases are likely to be rare in practice for several reasons. First, an aggrieved American or Mexican investor would have to convince its government to initiate the case. The investor's claim may not be of sufficient interest to its state to warrant pursuit unless the investor — alone or together with other individuals affected by the Canadian measure — represents a significant and influential business interest or the claim raises important general issues related to the application of the IGE or other provisions of *CUSMA*. Second, even if a state considered making a complaint, that complaint would be unlikely to proceed to a panel adjudication in the formal state-to-state dispute settlement process. *NAFTA*'s similar state-to-state panel process has proven ineffective, and it has not been used since the third case was initiated in 1998.[168] Despite some improvements, more frequent use of state-to-state dispute settlement under *CUSMA* seems unlikely.[169] No one has yet challenged the use of the similar exception in New Zealand's treaties for Māori or the carve-outs under Canada's agreement on internal trade for measures related to Indigenous peoples.[170] As well, given the nature of Canada's relationship with Indigenous peoples, Canada may be highly motivated to find a solution to any American or Mexican concern before a panel adjudication. Indeed, because of the political sensitivities related to Indigenous issues, the US and Mexican governments may also be reluctant to push their concerns to a panel.[171]

[167] *CUSMA*, *supra* note 1, Annex 14-D, art 14.D.1 Definitions. Mexican investors can still make claims against Canada under the *CPTPP*, *supra* note 9, which does not have an exception comparable to the IGE.

[168] *Cross-Border Trucking*, *supra* note 160. The other cases were *Tariffs on US Agricultural Products*, *supra* note 160; *Brooms from Mexico*, *supra* note 160. A fourth case was commenced in 1998, *Cross-Border Bus Services*, NAFTA Case No USA-98-2008-02, though no panel decision was ever made public. Rafael Leal-Arcas, "Comparative Analysis of NAFTA's Chapter 20 and the WTO's Dispute Settlement Understanding" (2011) Queen Mary University of London, School of Law Research Paper No 94/2011.

[169] J Anthony VanDuzer, "State-to-state Dispute Settlement under the *USMCA*: Better Than *NAFTA*?" in *Festschrift in Honour of Professor Stephen T Zamora* (Houston: Arte Publico, forthcoming).

[170] Schwartz, "Developing," *supra* note 10 at 238.

[171] Risa Schwartz argues that situations in which Canada would face a challenge to an action in purported reliance on the IGE are likely to be rare because of Canada's history of failing to live up to its obligations to Indigenous peoples. *Ibid* at 238–39.

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Even if, at some future date, a dispute settlement panel were to decide that the IGE was not available to protect a Canadian government measure, a *CUSMA* panel's determination that the IGE does not protect a Canadian measure is not binding or authoritative under Canadian law. As well, unlike the WTO, *CUSMA* has no developed enforcement procedure.[172] Instead, *CUSMA* provides only that the parties "endeavour to agree on a resolution to the dispute."[173] On the other hand, in the absence of mutual agreement on a resolution of the dispute within thirty days, the complaining party may suspend trade concessions that are equivalent in effect to any Canadian non-compliance until the parties can agree on a resolution of the dispute.[174] In short, the risk of a panel decision on the availability of the IGE to Canada is small. That said, in the event of a panel decision that the IGE was not available, Canada could face pressure in the form of tariffs or other trade actions adopted by the complaining party to remove a measure or amend it to rectify any non-compliance with *CUSMA*.[175]

Conclusion

Canada's international treaty obligations, including those under *CUSMA*, must not restrict Canada's ability to honour its obligations to Indigenous peoples. The IGE is therefore a progressive development. Compared to *CETA* and the *CPTPP*, *CUSMA*'s IGE, coupled with the elimination of investor-state arbitration between Canada and the United States, significantly reduces the risk of treaty-based challenges to Canadian measures in relation to Indigenous peoples. However, because the IGE is novel, its requirements are somewhat uncertain. Nevertheless, the analysis above suggests that those requirements are likely to be interpreted in a manner that will undermine its utility. While Canada has discretion to decide what measures are necessary to fulfill its legal obligations to Indigenous peoples, that discretion must be exercised in good faith, which means that, to rely on the IGE, Canada will have to identify an obligation and provide a plausible rationale for how the measure is necessary to fulfill it. Of greater concern, the existence and nature of the obligation might have to be demonstrated on some objective basis. The IGE chapeau imposes additional limitations. Canadian measures under the IGE must not constitute arbitrary and

[172] *Ibid.*

[173] *CUSMA*, *supra* note 1, art 31.18.

[174] *Ibid*, art 31.19(1).

[175] In one of the two *NAFTA* cases where non-compliance was found, retaliation was not used. In *Cross-Border Trucking*, *supra* note 160, Mexico finally decided to retaliate in 2009, eight years after the panel decision. Mexico imposed more than $2.4 billion in trade sanctions on US imports in 2009. *Diario Oficial* (Mexico), 18 March 2009, cited in Leal-Arcas, *supra* note 168 at 16.

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unjustified discrimination or a disguised restriction on trade in goods, services, and investment. Canada requires flexibility in assessing its obligations to Indigenous peoples in order to meaningfully discharge them and repair its relationships. The IGE's requirements constrain that flexibility.

A critical implication of this analysis is that Canada's reliance on the IGE may be challenged by the United States or Mexico, with the possibility that a dispute settlement panel under *CUSMA* may ultimately determine whether the exception is available. While the real-world likelihood of such a case seems small, the prospect is a concern to the extent that the panel would have to determine the content and effect of Canadian legal obligations and the degree to which a Canadian measure was responsive to them. *CUSMA* panels are simply not equipped to assess such matters. The nature and content of Canada's obligations to Indigenous peoples are distinctive in their essential nature and how they are proven and interpreted. Canadian courts and governments recognize, affirm, and often deny these rights in lurching and uncertain steps. One-time adjudication by a *CUSMA* panel cannot come close to approximating even existing, imperfect decision-making processes in Canada. Panellists, while expert in matters related to international trade, will have no expertise to decide on issues related to the content of Canada's obligations to Indigenous peoples. Moreover, affected Indigenous groups are not guaranteed participation in the adjudication process. As a result, panel decisions on the IGE contain risk. Perhaps most importantly, a *CUSMA* panel's decision denying the exception could undermine the delicate relationship between Canada and Indigenous peoples.

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