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CANADIAN PRACTICE IN INTERNATIONAL LAW/PRATIQUE CANADIENNE EN MATIÈRE DE DROIT INTERNATIONAL

At Global Affairs Canada in 2023

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1. Airspace sovereignty

A. Unforeseen rocket re-entry and Canadian sovereignty: considerations

Convention on International Civil Aviation — Convention on International Liability for Damage Caused by Space Objects — *Annex 15 to the* Convention on International Civil Aviation — *Aeronautical Information Services, 16th edition*

Sovereignty — Airspace — Rocket debris — Liability — Notice to airmen — Advanced warning

Summary
Over the winter of 2023–2024, the Public International Legal Bureau prepared for Global Affairs Canada officials the following analysis considering the hypothetical re-entry of a rocket body into Canadian territory. The Bureau advised that an unexpected re-entry of a rocket body into Canadian territory is not an actionable breach of a treaty or convention in the absence of demonstrable damage. The launching State should warn Canada, and other potentially affected States, the moment it knows or ought to know that an object is off course and re-entering in an uncontrolled manner. However, the lack of a warning or notice is not a breach of an international obligation contained in a treaty or convention.

Analysis
Article 1 of the *Convention on International Civil Aviation*, done at Chicago on 7 December 1944 (the "*Chicago Convention*") confirms that every State has complete and exclusive sovereignty over the airspace above its territory. In practice that means that other States cannot enter Canadian airspace without permission from the Government of Canada; doing so would be a violation of Canadian sovereignty and a breach of Article 1 of the *Chicago Convention.* However, unintentional trespasses by rocket debris into airspace are rarely, if ever, the subject of a complaint. This includes

The extracts from official correspondence contained in this survey have been made available by courtesy of Global Affairs Canada. Some of the correspondence from which extracts are given was provided for the general guidance of the enquirer in relation to specific facts that are often not described in full in the extracts within this compilation. The statements of law and practice should not necessarily be regarded as definitive.

inadvertent and uncontrolled re-entries of rocket bodies and spacecraft into foreign territory. There are recent examples of Space X debris re-entering and landing in foreign territory without the victim State making a complaint or accusing the perpetrator of breaching international law. The absence of a complaint is usually due to the lack of significant damage caused by the breach of sovereignty. A trespass without any measurable damage is rarely pursued as a breach of the *Chicago Convention* or customary international law. There has only been one case in which the victim State made a claim against the launching State for damage from the re-entry of a space object: Canada claimed financial compensation from the USSR as a result of the 1978 crash of Cosmos 954, a nuclear-powered satellite, in the Northwest Territories. In that case, the large area of radioactive debris was the subject of a significant remediation effort for which Canada claimed compensation. In the proposed scenario, the extent of the damage caused by the re-entry of the rocket body is unknown. Canada would likely look to determine whether radioactive or other toxic materials were incorporated into the rocket or its payload. If measurable damage would occur, Canada could, as it did in 1978, make a claim under the *Convention on International Liability for Damage Caused by Space Objects*, done at London, Moscow and Washington, D.C. on 29 March 1972 (the "*Liability Convention*").

Annex 15 to the *Chicago Convention* establishes the standards relevant to the provision of notices to States and air operators of potential dangers to international civil aviation. Standard 6.3.2.3(m) of Annex 15 states that a Notice to Airmen (NOTAM) shall be circulated whenever a hazard which affects air navigation is present. Rocket launches and rocket debris are specifically identified in the Standard as hazards for which a NOTAM must be circulated. The Standard does not establish when a NOTAM should be issued (i.e. how many days or hours before the hazard is present) but the established practice is to provide 7–10 days notice in advance of the anticipated hazard materializing.

The standards in the Annexes to the *Chicago Convention* are not legally enforceable international obligations in and of themselves. Therefore, failure to strictly adhere to the standards is not a breach of the *Chicago Convention* or an international obligation. Furthermore, an unanticipated hazard caused by an unpredictable re-entry will make it very difficult to issue a NOTAM with 7–10 days' notice. Nevertheless, the launching State should issue a NOTAM or contact the potentially affected States as soon as it becomes evident that the hazard to international civil aviation will materialize. Launching States are absolutely liable for any damage caused on earth by any space object or related component launched from their territory and as such are expected to collect information and monitor launch activities from their territories, including by private launch operators. When a launching State knows or ought to know that there is indeed a hazard and whether they would be in a position to issue a NOTAM or inform Canadian civil air navigation service providers so that they could issue a NOTAM would depend on the circumstances of each launch and the domestic reporting requirements for that kind of information that may be applied by the launching State.

Failing to warn Canadian authorities of a potential danger to international civil aviation and to persons or property on the ground may not be an actionable breach of an international obligation. However, it represents reckless and irresponsible behaviour on the part of the launching State. At some point, a launching State will be aware that its rocket is going to re-enter in an uncontrolled manner in the vicinity of Canadian territory. At that point, it should warn Canadian authorities. Some launching States will no doubt, as the USSR did in 1978, claim that they did not foresee any danger to

Canadian territory, so they saw no need to alert Canadian authorities. That was an unacceptable response in 1978 and it is even more unacceptable in 2023. It represents a pattern of behaviour demonstrating reckless disregard for the interests and sovereignty of other States. While Canada may not be able to bring a claim for damages, it is still possible to highlight the reckless behaviour and advocate for more responsible behaviour from launching States. However, Canada would first need to locate the debris, and assess the damage, if any, in order to properly calibrate any possible public messaging towards the responsible launching State.

In the final analysis, launching States should warn Canada, and other potentially affected States, the moment they know or ought to know that their object is off course and re-entering in an uncontrolled manner. However, the unexpected re-entry of a rocket body into Canadian territory is not an actionable breach of a treaty or convention, based on the information currently available. This conclusion can be re-assessed as the specific facts of an individual case becomes available.

2. Diplomatic relations

A. Exploring the lawful limits to a foreign state's diplomatic footprint under the Vienna Convention on Diplomatic Relations

(1) Introduction

The *Vienna Convention on Diplomatic Relations*[1] was negotiated during the late 1950s and early 1960s, and entered into force in 1964. The Convention codified many obligations for the exchange and treatment of envoys between States, which had been firmly established in customary international law over hundreds of years, and also added new law in a number of discrete areas. The preamble to the *VCDR* underlines that the Convention aims to promote fundamental principles of international law, including the sovereign equality of States, the maintenance of international peace and security, and the promotion of friendly relations among nations. The obligations in the *VCDR* are therefore crucial to the conduct of foreign relations and to a rules-based international order. They provide a set of rules that govern the diplomatic relations between all States. By their very nature, they are facilitative, intended to assist States in resolving an array of matters through dialogue and reliance on the Convention's provisions regulating diplomatic relations.

It is in this context that this article assesses one area of particular importance in diplomatic relations, namely the rules that permit a State to lawfully limit or reduce the number of foreign diplomats at a diplomatic mission located in their territory. As a case study to explore the scope of the relevant *VCDR* provisions, this article delves into the recent decision by the Government of India to unilaterally remove the privileges and immunities of 41 accredited Canadian diplomats (more precisely "diplomatic agents" in the language of the *VCDR*) at the Canadian High Commission in New Delhi and their accompanying family members by October 20, 2023.

[1] *Vienna Convention on Diplomatic Relations*, 18 April 1961, 500 UNTS 95, Can TS 1966 No 29 (entered into force 24 April 1964, accession by Canada 25 June 1966) [*VCDR*].

According to the Indian government's public statement of October 20, 2023, Canadian diplomats in India were accused of "continued interference in [India's] internal affairs," and its actions were justified because they brought "parity" of diplomatic presence between India and Canada.[2] In reality, it is Canada's position that the relevant articles of the *VCDR* demonstrate that India's actions were contrary to the *VCDR*, for the reasons outlined below.

Research in support of this article makes clear that the receiving State does not have an absolute discretion to set the size of a diplomatic mission in its territory. The article also shows that there does not exist in international diplomatic law any agreed concept of "parity" of representation, despite claims by India to the contrary. In addition, it shows that the only way in which a receiving State[3] can legitimately revoke the privileges and immunities of accredited diplomats in its territory is by declaring them "*persona non grata.*" By showing the reality of what is and is not lawful under the *VCDR*, this article seeks to dispel a number of misconceptions found in the public statements by the Government of India, by which it tried to legitimize its illegal actions. This assessment is undertaken with a view to making clear that India's actions in this instance are not accepted State practice.

(2) The Scope of Article 11.1 of the VCDR: The Size of a Diplomatic Mission

Article 11.1 of the *VCDR*, which addresses the circumstances in which the receiving State may limit the size of a foreign diplomatic mission in its territory, reads as follows:

> *Article 11*
>
> *1. In the absence of specific agreement as to the size of the mission, the receiving State may require that the size of a mission be kept within limits considered by it to be reasonable and normal, having regard to circumstances and conditions in the receiving State and to the needs of the particular mission.*

In the seminal text, *Diplomatic Law: Commentary on the Vienna Convention on Diplomatic Relations*, Eileen Denza notes that, among the States negotiating Article 11, there was general agreement that "a balance must be struck between the interests of the sending and the receiving State."[4] Denza states that, in the absence of agreement, the *VCDR* provides that the receiving State can determine the size of a particular foreign diplomatic mission. She immediately adds, however, that this discretion of the receiving State to determine the size of a foreign diplomatic mission has "prescribed constraints".[5] Thus, while the receiving State can rely on Article 11.1 to limit the size of a foreign diplomatic mission, it can only do so within the scope provided therein.

The negotiating history of the *VCDR* fully supports the interpretation that Article 11.1 does not allow the receiving State to unilaterally limit the size of diplomatic missions in its territory. Leading up to and during the negotiations that resulted in the *VCDR*, there was agreement that it would be helpful to formulate some rule on mission size (no such

[2]<https://www.mea.gov.in/press-releases.htm?dtl/37201/Parity+in+Canadian+diplomatic+presence+in+India>.

[3]The term "receiving State" is the term of art used in the VCDR to describe the host State, that is the State which receives foreign Embassies or High Commissions in its territory.

[4]Eileen Denza, *Diplomatic Law: Commentary on the Vienna Convention on Diplomatic Relations*, 4th ed (Oxford: Oxford University Press, 2016) at 79.

[5]*Ibid.*, at 80.

rule existed at that time in customary international law). The primary point of debate was the level of discretion that the receiving State should have in the setting of limits on mission size. The final result was the present text of Article 11.1: the "subjective" test which it sets out makes clear that it is the receiving State's assessment that is the starting point, but also fetters the State's complete discretion by requiring that any limits which it places on mission size must be demonstrably "reasonable and normal."[6]

While the receiving State is allowed a certain leeway in interpreting what is reasonable and normal, for the reasons discussed above, it does not change the fact that any decision must still be reasonable and normal based on the facts.

Looking to the *Vienna Convention on the Law of Treaties* (*VCLT*), the provisions confirm the requirement to interpret a treaty in "good faith", and "in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its [the treaties] object and purposes."[7] Thus, the VCLT supports an ordinary meaning analysis. Relying on the ordinary meaning given to those terms, "reasonable" means: moderate or fair; not extreme or excessive".[8] Moreover, "normal" is defined as "conforming to a type, standard, or regular pattern; characterized by that which is considered usual, typical or routine."[9]

Additionally, the *VCLT* supports an approach to the interpretation of Article 11.1 in light of the objects and purposes of the *VCDR* itself, which — as set out in the preamble — include principles such as the promotion of international peace and security and of friendly relations among States. Both these approaches reinforce an understanding of Article 11.1 that does not allow for unilateral action by the receiving State that completely disregards the needs of the sending State.

Finally, based on both the ordinary meaning of the language of Article 11.1, as well as an analysis of the provision in the context of the objective purpose of the *VCDR*, it becomes clear that while the receiving State enjoys some discretion in the way it may apply the reasonable and normal standard, it can only limit mission size in a manner that is usual, typical, moderate, fair and not excessive.

The obligation for the receiving State to determine the size of the mission in a manner that is reasonable and normal is further qualified by two additional requirements. First, the receiving State must have regard "to the circumstances and conditions in the receiving State". Second, the receiving State must have regard "to the needs of the particular mission."

The requirement to have regard to the needs of a particular mission can be understood as a requirement to have regard to the needs of the sending State[10] in the receiving State. This is because the mission represents the sending State in the receiving State. Thus, the

[6] *Ibid.*, at 79–80.

[7] *Vienna Convention on the Law of Treaties*, 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980; accession by Canada 14 October 1970) [*VCLT*]. See Article 31 on "General rule of interpretation," and in particular Article 31.1, from which the cited language is taken.

[8] <https://www.merriam-webster.com/dictionary/reasonable>

[9] <https://www.merriam-webster.com/dictionary/normal>

[10] The term "sending State" is the term of art used in the VCDR to describe the country which has a diplomatic representation in a foreign State. i.e. an Embassy or High Commission is the representation in a foreign country of a sending State. Contrast this with the "receiving State," which, as described above, is the host State in which a diplomatic mission is located.

receiving State is obligated to give due consideration to the needs of the sending State in the receiving State. A decision by the receiving State to limit the size of the mission of the sending State in a manner that completely disregards the latter's needs would be contrary to Article 11.

Article 11.1 is therefore clear that the receiving State does not have *carte blanche* to take any decision that it wishes regarding limits to the size of a foreign mission already staffed with accredited diplomatic agents. Article 11.1 does not provide the receiving State with absolute discretion to set the size of a foreign diplomatic mission. On the contrary, Article 11.1 is a carefully crafted result of negotiations reflecting the agreement mentioned by Denza to strike a balance between the interests of the sending State and those of the receiving State.

The case of India offers a unique deep dive on the extent to which a receiving State is allowed, under international law, to limit the size of a diplomatic mission. Based on the foregoing analysis, Article 11.1 does not, for example, provide a valid justification for India's October 2023 decision to unilaterally and abruptly revoke the accreditation, and thus the privileges and immunities, of 41 Canadian diplomats ("diplomatic agents" in the language of the VCDR) who were serving at the Canadian High Commission of Canada in Delhi. The decision, which reduced the number of Canadian diplomatic agents in India by two-thirds, evidently failed to give any consideration to the circumstances and conditions in the receiving State as well as the needs of the Canadian mission in particular — including the need for a high staff component sufficient to meet the high demand for its services in India.

(3) Is "Parity" a Valid Basis for Limiting the Size of a Diplomatic Mission under Article 11.1?

On September 18, 2023, Canadian Prime Minister Trudeau announced before Parliament that Canadian intelligence agencies were "actively pursuing credible allegations of a potential link between agents of the Government of India and the killing of a Canadian citizen, Hardeep Singh Nijjar."[11] India responded by informing Canada that the privileges and immunities of 41 Canadian diplomats at the Canadian High Commission in New Delhi and their accompanying family members would be removed by October 20, 2023.

According to its public statement of October 20, 2023[12], the Government of India said that its unilateral revocation of Canadian diplomats' accreditation was grounded in what it called "parity" and "equivalence" between the number of Indian diplomats serving in Canada and the component of Canadian diplomats serving in India. India further expressly stated that it rejected any attempt to portray India's actions as a "violation of international norms."[13]

The language of "parity" and "equivalence" is not found in the *VCDR*. While the *VCDR* is completely silent on this point, one could say, for the sake of argument, that "parity" of

[11]Prime Minister Trudeau's statement before Parliament cited in the following article: <https://www.cbc.ca/news/politics/trudeau-indian-government-nijjar-1.6970498#:~:text=%22Canadian%20security%20agencies%20have%20been,to%20the%20House%20of%20Commons>.

[12]<https://www.mea.gov.in/press-releases.htm?dtl/37201/Parity+in+Canadian+diplomatic+presence+in+India>.

[13]*Ibid.*

diplomatic representation in the sending State and receiving State could be one factor, among others, for the receiving State to consider in assessing what is a reasonable and normal size of the foreign diplomatic mission under Article 11.1. As noted above, however, in applying Article 11.1 the receiving State is obligated to have regard to the needs of the sending State's mission in the receiving State. Clearly the diplomatic representational needs of one State in the other State's territory may differ significantly, which can translate in a significant difference in the diplomatic representation footprint between them. The relative population size of each State, and the volume of client demands for consular, immigration, trade and other services will often, for example, vary greatly between a sending State and a receiving State.

The fact that parity is not a primary consideration in mission size is confirmed by reference to the large discrepancies of representation between States all over the world. There are many examples of diplomatic representation of one country that is from two times to even ten times larger than that of its bilateral counterpart. Such result is not an aberration, but rather reflects standard state practice in the conduct of bilateral diplomatic relationships between various countries. Consequently, "parity" or "equivalence" alone is not by itself a valid justification to limit the size of a foreign diplomatic mission under Article 11.1 of the *VCDR*.

Moreover, the attempt to use "parity" as a concept from which to assess mission size is problematic because the basis for applying "parity" can never be clean cut. For example, it is not clear whether an assessment of parity would include accredited consular staff of a sending State at consular posts, which are located outside the capital city of the receiving State. It is also unclear whether non-diplomatic staff (so called "locally engaged staff") who work at a mission of the sending State would be included in the assessment of parity.

Ultimately, "parity" or "equivalence" is a misleading term, a term perhaps appealing at face value, but for which further examination reveals that it is not included in the *VCDR* as a factor for decision-making in regard to mission size, and that it is not a term which allows for easy comparison between the diplomatic state representation of sending States.

(4) *Persona Non Grata* Provision in the *VCDR*

As set out in the foregoing analysis, Article 11.1 carefully circumscribes the circumstances in which a receiving State is lawfully permitted to limit the size of a foreign mission. Additional provisions in the *VCDR* specify how a diplomat's functions in a foreign diplomatic mission, and by extension the privileges and immunities to which they are entitled, can come to an end. A joint reading of articles 43 and 9 of the *VCDR* is important in that respect:

> *Article 43*
>
> *The function of a diplomatic agent comes to an end, inter alia:*
>
> *(a) On notification by the sending State to the receiving State that the function of the diplomatic agent has come to an end;*
>
> *(b) On notification by the receiving State to the sending State that, in accordance with paragraph 2 of article 9, it refuses to recognize the diplomatic agent as a member of the mission.*

Article 9

1. The receiving State may at any time and without having to explain its decision, notify the sending State that the head of the mission or any member of the diplomatic staff of the mission is persona non grata or that any other member of the staff of the mission is not acceptable. In any such case, the sending State shall, as appropriate, either recall the person concerned or terminate his functions with the mission. A person may be declared non grata or not acceptable before arriving in the territory of the receiving State.

2. If the sending State refuses or fails within a reasonable period to carry out its obligations under paragraph 1 of this article, the receiving State may refuse to recognize the person concerned as a member of the mission.

Once a diplomatic agent has already been accredited by the sending State, Articles 43 and 9 provide the lawful ways by which the functions of the diplomatic agent can be brought to an end. In accordance with Article 43, the first way by which the functions of a diplomatic agent can come to an end is by notification of this fact by the sending State to the receiving State, upon which the receiving State will end the accreditation of the diplomatic agent on the relevant date found in the notification. The second way is for the receiving State to end the diplomatic functions of a diplomat whom they have accredited. The only way provided for the receiving State to end the diplomatic function of a diplomat at their discretion is through notification by the receiving State of a decision to declare the diplomat *persona non grata* under Article 9 of the *VCDR*. (Article 9.2 even permits the receiving State to declare a person *not grata* before their arrival in the territory of the receiving State.)

Notification that a diplomatic agent is *persona non grata* triggers an obligation on the sending State to recall that individual or terminate their functions in the diplomatic mission "within a reasonable period" (defined in Canada's *Foreign Missions and International Organizations Act*[14] as "a period, not exceeding ten days, commencing on the day on which notice is given").[15] Article 9.2 of the *VCDR* provides that if the sending State refuses or fails within the reasonable period to carry out its obligations to recall or terminate the diplomat's functions, the receiving State may then refuse to recognize the person concerned as a member of the mission.

When a diplomatic agent is declared *persona non grata*, they will no longer benefit from the diplomatic privileges and immunities which they had enjoyed under the *VCDR* throughout their period of service at the mission.[16]

Several provisions of the *VCDR* set out the range of privileges and immunities that must be accorded to diplomatic agents for the period of their service at their diplomatic mission in the receiving State. These privileges and immunities provide diplomatic agents with specific exemptions from the application of the sending State's jurisdiction. For example, in the absence of an express waiver by the sending State,[17] an accredited

[14]SC 1991, c 41.

[15]*Ibid.*, at s 2(2).

[16]By virtue of Article 39.2 *VCDR*, a former diplomatic agent will only retain immunity in the foreign country in respect of official functions as a member of the mission. They will no longer have immunity for acts carried out in their personal capacity.

[17]*VCDR*, *supra* note 1, Article 32.

diplomat cannot be prosecuted by the courts of the receiving State, nor can they be sued in the receiving State in respect of certain civil matters. They cannot be compelled to be a witness; their residence, vehicle, and other property in the receiving State are protected from the enforcement jurisdiction that a State normally has over all individuals present in their territory.[18]

The requirement that the receiving State grant diplomatic privileges and immunities to diplomatic agents is, in part, recognition of the equality of States in their conduct of foreign relations. The foreign diplomatic agent embodies the foreign State and is tasked with conducting its official functions in the receiving State. The receiving State cannot therefore legally impose its jurisdiction on a foreign State through the application of its own domestic laws. As the preamble to the *VCDR* states, privileges and immunities "contribute to the development of friendly relations among nations, irrespective of their differing constitutional and social systems". The preamble also confirms that "the purpose of such privileges and immunities is not to benefit individuals but to ensure the efficient performance of the functions of diplomatic missions as representing States."

The receiving State, however, retains the ability to declare an accredited diplomatic agent *persona non grata* and require the person to depart the territory of the State in a timely manner and without having to explain its decision. The existence of this tool is the counterpart for the extensive privileges and immunities that diplomatic representatives enjoy in the foreign State. Moreover, Article 9.2 of the *VCDR* provides that if the sending State refuses or fails within a "reasonable period" to recall the persons concerned or terminate their functions with the mission, the receiving State may "refuse to recognize the person concerned as a member of the mission." This provides the receiving State with the authority to revoke a foreign diplomatic agent's accreditation and the full range of diplomatic privileges and immunities. Article 9 provides the only lawful method in the *VCDR* for a receiving State to unilaterally revoke the privileges and immunities of a diplomat whom they have accredited.

Returning to the unilateral and abrupt revocation by India of the privileges and immunities of 41 Canadian diplomats, it has already been shown that India's statement regarding the need for "parity" in diplomatic presence alone does not meet the justification test set out in Article 11.1 of the *VCDR* to limit the size of a foreign mission. As demonstrated above, the only legitimate manner in which the receiving State (India in this case) can unilaterally revoke the privileges and immunities of diplomatic agents — once they have been granted — is by using the *persona non grata* process set out in Article 9 of the *VCDR*. Thus, the revocation of the privileges and immunities of the duly accredited foreign diplomats by India, without using the *persona non grata* process, was inconsistent with the *VCDR*.

(5) Examples of Other Mass Expulsions of Diplomats

A review of previous incidents of mass expulsions since the coming into force of the *VCDR* supports the understanding that the mechanism for the determination of the size of a diplomatic mission set out in Article 11.1 has not been cited in past cases to justify such expulsions.

[18] *Ibid.*, Articles 30 and 31.

In a recent article, Kevin Riehle provides data on all expulsions of Soviet and Russian diplomats since World War II. Two specific examples which he references are the mass expulsion in 1982 of 17 Soviet diplomats from Costa Rica, and the mass expulsion of 47 Soviet diplomats from France in 1983.[19] In neither of those examples, discussed in the Riehle article or other sources, is there any indication that Article 11.1 was used by the receiving States to effect the expulsions. In fact, quite the opposite. Riehle makes clear his understanding that "[t]he only recourse for a host government that wants to protest the actions of a foreign diplomat is to declare the person *persona non grata* and expel them from the country for 'activities incompatible with diplomatic status.'" Riehle goes on to specify that it is the *persona non grata* mechanism that "gives countries the right to expel diplomats who violate host country laws or who interfere in the host country's internal affairs."[20]

Another helpful example is from 1971, when the United Kingdom expelled 105 Soviet diplomats for "inadmissible activities." The removal of the individuals was undertaken through the use of the *persona non grata* mechanism. Importantly, the decision to reduce (place a limit on) the allowable number of Soviet diplomats which the UK would accredit by a number equal to the total number of diplomats expelled from the UK, was taken as a separate decision to that of the expulsions.

The understanding that can be drawn from the above example is that placing a ceiling on the number of diplomats allowed in the receiving State was justified under Article 11.1, given the circumstances in the UK: the UK had clear evidence — portions of which were made public, that espionage activity — clearly not a permissible diplomatic activity — was being undertaken by certain members of the Soviet Embassy. Thus, the UK could make the strong argument that the needs of the mission could be met by the "true" diplomats in place who were carrying out diplomatic functions (i.e. the total contingent minus those who were expelled for espionage). In carrying out a significant expulsion of individuals, the UK did not assert that a simple ceiling on the number of foreign diplomats would be sufficient to justify the removal of the individuals. Rather, there was a separate *persona non grata* decision made through which the individuals were removed from the country.[21]

The foregoing examples reinforce the conclusions regarding the illegality under the *VCDR* of the recent Indian actions to deny 41 accredited Canadian diplomats of their privileges and immunities, without formally declaring the individual as a *persona non grata*. Indian attempts to justify its actions by citing "parity" and equality of numbers — concepts that do not exist in the *VCDR* — do not withstand scrutiny. As the examples above confirm, India's purported reliance on Article 11.1 to remove the privileges and immunities of Canadian diplomats in India was contrary to the *VCDR*.

[19]Kevin P. Riehle, "Soviet and Russian Diplomatic Expulsions: How Many and Why?", (2023) 37:4 *International Journal of Intelligence and CounterIntelligence* 1238, at 1247. See CIA, "Costa Rica Intelligence Overview, for specific numbers of expelled diplomats," available at: <https://www.cia.gov/readingroom/docs/CIA-RDP84B00049R000400680012-6.pdf>. See INA, « 5 avril 1983: la France expulse 47 diplomates russes soupçonnés d'espionnage », available at: <https://www.ina.fr/ina-eclaire-actu/5-avril-1983-la-france-expulse-47-diplomates-russes-soupconnes-d-espionnage>.

[20]Riehle, *supra* note 19, at 1239.

[21]See <https://www.theguardian.com/world/2010/sep/27/britain-expels-90-soviet-spies>. See also Denza, *supra* note 4, at 81.

(6) Article 47.1 of the VCDR: The Prohibition of Discrimination as between States

Article 47.1 speaks to the prohibition of discrimination against states. It reads as follows:

> *Article 47*
>
> *1. In the application of the provisions of the present Convention, the receiving State shall not discriminate as between States.*
> *2. However, discrimination shall not be regarded as taking place:*
>
> (a) *Where the receiving State applies any of the provisions of the present Convention restrictively because of a restrictive application of that provision to its mission in the sending State;*
> (b) *Where by custom or agreement States extend to each other more favourable treatment than is required by the provisions of the present Convention.*

Article 47.1 lays down a general obligation not to discriminate as between States in the application of the provisions of the *VCDR*, whereas Article 47.2 sets out the exceptional circumstances in which discrimination is deemed not to have taken place. The Government of India's decision to effectively reduce by two-thirds Canada's diplomatic footprint in the country was discriminatory. As of the time of writing, no other States have been targeted by India for a such a significant reduction in diplomatic mission size. India's actions were therefore inconsistent with Article 47.

(7) Conclusion

As an almost universally ratified instrument derived largely from customary international law, the *VCDR* continues to play a prominent role in reinforcing the rules-based international order in an increasingly complex world. Its provisions on the lawful limitations or reductions in the diplomatic footprint in a receiving State are intended to provide a stable foundation for the conduct of foreign relations.

As this article has shown, a receiving State's unilateral decision to revoke the privileges and immunities of a significant number of a given country's accredited diplomats, without recourse to the *persona non grata* mechanism, is contrary to diplomatic law. In the case study of India, the purported justification for the revocation of the privileges and immunities of two-thirds of Canada's diplomats, based on a notion of "parity" in diplomatic presence between Canada and India is not supported by a legal analysis of the *VCDR*, or State practice.

Some of the effects of India's actions were immediate — the departure of 41 Canadian diplomats. However, another less visible consequence — the erosion of the spirit and intent of the provisions of a foundational international Convention — cannot be underestimated. The actions of India have the potential to put into question the fundamental protections that international law affords to the diplomatic agents of any State, those who are tasked by their sending States to serve in foreign States without fear of personal legal consequence. Respect for international law is vital to supporting and maintaining a rules-based international order. At a time of increasing uncertainty, it behooves each member of the international community to uphold international law, including diplomatic law, as part of their commitment to strengthening the global system of international relations. Ultimately, an empowered rules-based international order is a vehicle to ensure peace, stability and security for all.

3. Inter-state dispute settlement

A. International Court of Justice

Convention on the Prevention and Punishment of the Crime of Genocide — *Jurisdiction — Existence of a dispute — International Court of Justice*

Background

On 26 February 2022, Ukraine instituted proceedings against the Russian Federation ("Russia") at the International Court of Justice (the "Court")[22] under the *Convention on the Prevention and Punishment of the Crime of Genocide* (the "*Genocide Convention*").[23] In its Application Instituting Proceedings, Ukraine argued that Russia had falsely claimed that acts of genocide had occurred in the Luhansk and Donetsk regions of Ukraine. Ukraine further argued that, based on this false and unsubstantiated allegation, Russia subsequently embarked on a military invasion of Ukraine to prevent and punish these purported acts of genocide, despite there being no factual basis supporting the existence of genocide.[24] On 1 October 2022, Russia filed preliminary objections to the jurisdiction of the Court and the admissibility of the case.[25]

As Contracting Parties to the *Genocide Convention*, Canada and the Netherlands filed a Joint Declaration of Intervention with the Court on 7 December 2022 pursuant to Article 63 of the *Statute of the International Court of Justice*, pertaining to issues of interpretation of the provisions of the *Genocide Convention* relevant to both the Court's determination of jurisdiction, and to the eventual merits.[26] The Court confirmed the admissibility of Canada and the Netherlands' joint intervention at the preliminary objections stage. The Court also determined that, of the 31 other declarations of intervention filed, 30 were admissible at the preliminary objections stage, insofar as they concerned the interpretation of the provisions of the *Genocide Convention* that were relevant for the determination of the Court's jurisdiction.[27]

[22] *Allegations of Genocide under the Convention of the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation)*, Application (Ukraine), [26 February 2022], [Ukraine Application] <https://www.icj-cij.org/public/files/case-related/182/182-20220227-APP-01-00-BI.pdf>.

[23] *Convention on the Prevention and Punishment of the Crime of Genocide*, 9 December 1948, 78 UNTS 277 (entered into force on 12 January 1951; ratification by Canada on 3 September 1952) [*Genocide Convention*].

[24] Ukraine Application, *supra* note 1, at 4, 8-12.

[25] *Allegations of Genocide under the Convention of the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation)*, Preliminary Objections (Russia), [1 October 2022] <https://www.icj-cij.org/sites/default/files/case-related/182/182-20221003-wri-01-00-en.pdf>.

[26] *Allegations of Genocide under the Convention of the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation)*, Joint Declaration of Intervention Pursuant to Article 63 of the Statute of the Court (Canada and the Netherlands), [7 December 2022] <https://www.icj-cij.org/sites/default/files/case-related/182/182-20221207-WRI-02-00-EN.pdf>.

[27] *Allegations of Genocide under the Convention of the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation)*, Admissibility of the Declarations of Intervention, Order of 5 June 2023, [5 June 2023] <https://www.icj-cij.org/sites/default/files/case-related/182/182-20230605-ORD-01-00-EN.pdf>.

Canada and the Netherlands' Intervention

On 5 July 2023, Canada and the Netherlands filed their joint Written Observations regarding the interpretation of the compromissory clause found in Article IX of the *Genocide Convention*.[28] This provision states that "[d]isputes between the Contracting Parties relating to the interpretation, application or fulfilment of the present Convention, including those relating to the responsibility of a State for genocide or for any of the other acts enumerated in article III, shall be submitted to the International Court of Justice at the request of any of the parties to the dispute."[29]

The joint observations of Canada and the Netherlands include three main arguments: (1) the term "dispute" must be interpreted consistently with the wide meaning given to that term in the case law of the Court; (2) disputes can be referred to the Court at the request of any of the parties; and (3) the inclusion of the word "fulfilment" in Article IX supports a broad interpretation of this provision.

(i) Wide meaning of "dispute" Canada and the Netherlands did not address the existence of a dispute between the parties as such but focussed on the proper interpretation of "dispute," as included in Article IX.[30] They argued, in particular, that the term "dispute" is sufficiently broad to encompass a disagreement over the lawfulness of the conduct of an applicant State and is not limited to the conduct of the respondent State.[31]

(ii) Referral of disputes by any party Article IX of the *Genocide Convention* expressly states that disputes shall be referred to the Court "at the request of any of the parties to the dispute."[32] Canada and the Netherlands argued that the ordinary meaning of these words supports the conclusion that any Contracting Party facing what it considers to be unfounded allegations of a breach of the *Genocide Convention* can, on its own accord, bring the matter before the Court. The Court's jurisdiction is not limited to situations where the applicant State claims that the respondent State is responsible for genocide.

(iii) "Fulfilment" in Article IX supports a broad interpretation The inclusion of the term "fulfilment" in Article IX supports a broad interpretation of this provision. Canada and the Netherlands notably argued that this article confers jurisdiction where a dispute arises concerning the scope and content of the provisions of the *Genocide Convention*, along with any actions taken in response. As such, any actions taken in relation to the duty to prevent and punish genocide embodied in Article I of the *Genocide Convention* would fall within the jurisdiction of the Court.

Conclusion and Next Steps

On 2 February 2024, the Court delivered its decision on the preliminary objections relating to the jurisdiction of the Court and the admissibility of the case. The Court rejected most of Russia's preliminary objections and determined that it had jurisdiction

[28] *Allegations of Genocide under the Convention of the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation)*, Written Observations Pursuant to Article 63 of the Statute of the Court (Canada and the Netherlands), [5 July 2023], [Canada and the Netherlands' Written Observations] <https://www.icj-cij.org/sites/default/files/case-related/182/182-20230705-wri-09-00-en.pdf>.

[29] *Genocide Convention*, *supra* note 2, Article IX.

[30] Canada and the Netherlands' Written Observations, *supra* note 5, at 4.

[31] *Ibid.*

[32] *Genocide Convention*, *supra* note 2, Article IX.

to adjudicate on whether there is credible evidence supporting a finding that Ukraine has committed genocide, contrary to the *Genocide Convention*. However, the Court upheld one of Russia's preliminary objections and found that it did not have jurisdiction to adjudicate whether Russia's use of force in and against Ukraine as well as Russia's recognition of the independence of the so-called "Donetsk People's Republic" and the "Luhansk People's Republic," violate the *Genocide Convention*.[33]

The case will now move to the merits stage. The Court has fixed 2 August 2024 as the time-limit for the filing of the Counter-Memorial by Russia.[34] Recent developments can be found on the International Court of Justice's website.

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment — *International Court of Justice — Provisional measures — Urgency and irreparable prejudice*

Background

On 8 June 2023, Canada and the Netherlands (the "Applicants") filed a Joint Application instituting proceedings at the International Court of Justice (the "Court") against the Syrian Arab Republic ("Syria") concerning alleged violations of the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (the "*Convention against Torture*").[35] The Applicants made a concurrent request for the indication of provisional measures.[36] Oral hearings to consider the provisional measures request were held in The Hague on 10 October 2023, following a 3-month postponement requested by Syria. Ultimately, Syria chose not to attend the oral proceedings, but did provide its position to the Court by letter.[37]

Circumstances Requiring the Indication of Provisional Measures

Pursuant to Article 41 of the *Statute of the International Court of Justice* (the "Statute") and Articles 73, 74 and 75 of the Rules of Court (1978), Canada and the Netherlands filed a request for the indication of provisional measures. In order for the Court to

[33] *Allegations of Genocide Under the Convention on the Prevention and Punishment of the Crime of Genocide*, Preliminary Measures, Judgement of 2 February 2024 <https://www.icj-cij.org/sites/default/files/case-related/182/182-20240202-jud-01-00-en.pdf>.

[34] *Allegations of Genocide Under the Convention on the Prevention and Punishment of the Crime of Genocide*, Fixing of Time-limits, Order of 2 February 2024, at 2 <https://www.icj-cij.org/sites/default/files/case-related/182/182-20240202-ord-01-00-en.pdf>.

[35] *Joint Application Instituting Proceedings Concerning a Dispute under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Canada and the Netherlands v. Syria)*, Joint Application, [8 June 2023] <https://www.icj-cij.org/sites/default/files/case-related/188/188-20230608-APP-01-00-EN.pdf>; *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment of Punishment*, 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987; ratified by Canada on 24 June 1987) [*Convention against Torture*].

[36] *Request for the Indication of Provisional Measures Further to the Joint Application Instituting Proceedings Concerning a Dispute under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Canada and the Netherlands v. Syria)*, Request for Provisional Measures, [8 June 2023] <https://www.icj-cij.org/sites/default/files/case-related/188/188-20230608-REQ-01-00-EN.pdf>.

[37] International Court of Justice, "Conclusion of the Public Hearing Held on Tuesday 10 October 2023", *Unofficial Press Release* (10 October 2023) <https://www.icj-cij.org/sites/default/files/case-related/188/188-20231010-pre-01-00-en.pdf>.

indicate provisional measures, the Applicants must satisfy three conditions: (1) that the Court has *prima facie* jurisdiction over the dispute; (2) that the rights claimed are "plausible" and linked to the measures requested; and (3) that there is a real and imminent risk of irreparable prejudice to the rights claimed.

(i) Prima Facie Jurisdiction When considering the issue of jurisdiction for the purposes of the indication of provisional measures, the Court need only be satisfied that it has *prima facie* jurisdiction over the dispute.[38] The Applicants contended that they satisfied the criteria under Article 30(1) of the *Convention against Torture* to establish the jurisdiction of the Court pursuant to Article 36(1) of the Statute. They demonstrated that there is an existing dispute between the parties concerning the interpretation and application of the *Convention against Torture* which could not be settled through negotiation despite their genuine attempts to do so for more than two years. Furthermore, no agreement had been reached on the organisation of arbitration within six months, and the dispute had not been otherwise resolved in the meantime. Therefore, the Applicants argued that the Court had *prima facie* jurisdiction to hear the request for provisional measures.

(ii) The Rights Whose Protection Is Sought and Their Plausible Cause At the provisional measures stage of any proceedings, the Court must only decide whether the rights claimed, and for which protection is sought, are "plausible" and whether they are linked to the provisional measures requested.[39] The Applicants asserted that their rights, which were to secure compliance by Syria with its obligations under the *Convention against Torture*, were plausible by dint of their status as States Parties to that convention. They submitted that the protection of their rights to seek Syria's compliance would also protect persons in Syria that were at imminent risk of torture and ill-treatment. The Applicants further contended that the measures requested were directly linked to the rights which formed the subject matter of the dispute.

(iii) Risk of Irreparable Prejudice and Urgency In consideration of a request for provisional measures, the Court must assess whether irreparable prejudice could be caused to the rights which are at issue in the case. Provisional measures will only be indicated if there is urgency in the sense that there exists a "real and imminent risk that irreparable prejudice will be caused to the rights claimed before the Court gives its final decision."[40] The Applicants contended that Syria's well-documented, systematic and reoccurring violations of its obligations under the *Convention against Torture* were causing irreparable prejudice to their right to seek Syria's compliance with its obligations, and constituted irreparable harm with respect to each victim. They further

[38] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)*, Provisional Measures, Order of 23 January 2020, [2020] ICJ Rep 3, at 12, para 26.

[39] *Allegations of Genocide Under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine* v. *Russian Federation)*, Provisional Measures, Order of 16 March 2022, [2022] ICJ Rep 211, at 224, para 51 [*Ukraine v. Russian Federation*]; *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Armenia v. Azerbaijan)*, Provisional Measures, Order of 22 February 2023, [2023] ICJ Rep 14, at 21, para 28 [*Armenia v. Azerbaijan*].

[40] *Armenia v. Azerbaijan*, *supra* note 5, at para 46; *Alleged Violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights (Islamic Republic of Iran* v. *United States of America)*, Provisional Measures, Order of 3 October 2018, [2018] ICJ Rep 623, at 645–646, para 78 [*Islamic Republic of Iran v. United States of America*].

explained that the urgency to indicate provisional measures had persisted throughout the dispute.

Provisional Measures Requested by the Applicants

The Applicants requested seven provisional measures, followed by an eighth introduced during the oral hearing. The provisional measures requested were aimed at ensuring compliance with Syria's obligations to prevent torture and other ill-treatment, as well as to protect the evidentiary record and the integrity of the proceedings before the Court. Additionally, certain provisional measures were sought to specifically address the substantially enhanced risk of being subjected to torture and other CIDTP for detainees who are arbitrarily detained, held incommunicado, or living in abhorrent detention conditions.

Order of the Court and Next Steps

On 16 November 2023, the Court delivered its Order on the request for provisional measures, which has binding effect.[41] The Court determined that it had *prima facie* jurisdiction to decide on the question of provisional measures pursuant to Article 36(1) of the Statute and Article 30(1) of the Convention against Torture.[42] Furthermore, the Court reaffirmed its decision in *Belgium* v. *Senegal*[43] by concluding that the Applicants had *prima facie* standing in this case given the *erga omnes partes* character of the obligations in the convention.[44]

The Court held that the rights claimed were plausible and that there existed a link between the rights claimed and some of the requested provisional measures.[45] Furthermore, the Court stated that torture and other CIDTP create a real and imminent risk of irreparable prejudice to the asserted rights.[46]

The Court ordered two provisional measures:

1. By thirteen votes to two, the Court ordered that Syria shall take all measures within its power to prevent acts of torture and CIDTP and ensure that its officials, as well as any organizations or persons which may be subject to its control, direction or influence, do not commit any acts of torture or CIDPT;
2. By thirteen votes to two, the Court held that Syria shall take effective measures to prevent the destruction and ensure the preservation of any evidence related to allegations of acts within the scope of the Convention against Torture.[47]

[41] *Application of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Canada and the Netherlands v. Syrian Arab Republic)*, Provisional Measures, Order of 16 November 2023, [*Canada and Netherlands v. Syria*] <https://www.icj-cij.org/sites/default/files/case-related/188/188-20231116-ord-01-00-en.pdf>.

[42] *Ibid.*, at paras 20-47.

[43] *Questions relating to the Obligation to Prosecute or Extradite (Belgium* v. *Senegal)*, Judgment, [2012] ICJ Rep 422 at 449, para 68.

[44] *Canada and Netherlands v. Syria*, *supra* note 10, at paras 48–51.

[45] *Ibid.*, at paras 52–63.

[46] *Ibid.*, at paras 63–75.

[47] *Ibid.*, at para 83.

In its Order of 1 February 2024, the Court fixed 3 February 2025 as the time limit for the filing of the Memorial by the Applicants. The time limit for the filing of the Counter-Memorial by Syria was set for 3 February 2026.[48]

4. Law of the sea

A. International Tribunal for the Law of the Sea

Obligations of States Parties to the United Nations Convention on the Law of the Sea *(*UNCLOS*) — Part XII of* UNCLOS *— Climate change*

On 16 June 2023, as a Party to the *United Nations Convention on the Law of the Sea* (the "Convention"),[49] Canada submitted a written statement to the International Tribunal for the Law of the Sea (the "Tribunal") in the context of the *Request for an Advisory Opinion Submitted by the Commission of Small Island States on Climate Change and International Law* (COSIS). The full text of Canada's statement is available in English at <https://www.itlos.org/fileadmin/itlos/documents/cases/31/written_statements/1/C31-WS-1-25-Canada-rev_01.pdf> and in French at<https://www.itlos.org/fileadmin/itlos/documents/cases/31/written_statements/1/C31-WS-1-25-Canada_traduction_TIDM_01.pdf>:[50]

Background

On 16 December 2022, the Tribunal produced an order accepting the request from COSIS for an advisory opinion on the following:

What are the specific obligations of State Parties to the [Convention], including under Part XII:

a. to prevent, reduce and control pollution of the marine environment in relation to the deleterious effects that result or are likely to result from climate change, including through ocean warming and sea level rise, and ocean acidification, which are caused by anthropogenic greenhouse gas emissions into the atmosphere?
b. to protect and preserve the marine environment in relation to climate change impacts, including ocean warming and sea level rise, and ocean acidification?[51]

[48] *Application of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Canada and the Netherlands v. Syrian Arab Republic)*, Fixing of Time-limits, Order of 1 February 2024, at 2 <https://www.icj-cij.org/sites/default/files/case-related/188/188-20240202-ord-01-00-en.pdf>.

[49] *United Nations Convention on the Law of the Sea*, 10 December 1982, 1883 UNTS 397 (entered into force 16 November 1994; ratification by Canada on 7 November 2003) [*Convention*].

[50] International Tribunal for the Law of the Sea, *Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law* [COSIS Advisory Opinion], online: <https://www.itlos.org/en/main/cases/list-of-cases/request-for-an-advisory-opinion-submitted-by-the-commission-of-small-island-states-on-climate-change-and-international-law-request-for-advisory-opinion-submitted-to-the-tribunal/>.

[51] International Tribunal for the Law of the Sea, Order 2022/4, online: <https://www.itlos.org/fileadmin/itlos/documents/cases/31/C31_Order_2022-4_16.12.2022_01.pdf>.

Following the Tribunal's order on 15 February 2023, States Parties to the Convention were granted until 16 June 2023, to provide their written statements on the questions submitted to the Tribunal.[52]

Summary of Canada's Position

In the conclusion of its statement, Canada respectfully submitted that the Tribunal should reach findings that are aligned with the following:

1. Anthropogenic emissions of greenhouse gases (GHGs) are captured by the definition of marine pollution under Article 1(1)(4) of the Convention;
2. All States Parties have a general obligation under Part XII to protect and preserve the marine environment in relation to the impacts of climate change, including ocean warming, acidification, and sea level rise;
3. All States Parties have a general obligation under Part XII to put rules and measures in place to prevent, reduce and control pollution of the marine environment in relation to the deleterious effects that result or are likely to result from climate change, including through ocean warming and sea level rise, and ocean acidification, which are caused by anthropogenic GHGs emissions into the atmosphere;
4. All States Parties also have obligations to prevent, reduce and control pollution of the marine environment from specific forms of pollution related to climate change, with the most important ones being pollution from land-based sources, and pollution from and through the atmosphere;
5. The obligations of States Parties under Part XII are ones of due diligence, which require both the adoption and enforcement of rules and measures, and such rules and measures must take into account "*internationally agreed rules, standards and recommended practices and procedures*,"[53] especially those from the International Climate Change regime[54];
6. All States Parties have a duty to cooperate in addressing pollution of the marine environment from climate change, which can include mitigation and adaptation efforts, capacity-building and the transfer of technology initiatives, and the further development of international norms;
7. The obligations under Part XII are informed by the obligations under specialized international regimes dealing with climate change, and especially those under the International Climate Change regime, but the obligations under Part XII should not create additional obligations that go beyond or conflict with the relevant external obligations; and
8. An important indicator of the extent to which States Parties are meeting their general obligation to protect and preserve the marine environment, as well as their specific obligations under Part XII in relation to climate change pollution and the impacts of

[52]International Tribunal for the Law of the Sea, Order 2023/1, online: <https://www.itlos.org/fileadmin/itlos/documents/cases/31/C31_Order_2023-1_15.02.2023_Readable.pdf>.

[53]*Convention*, *supra* note 1, Arts 207 and 212.

[54]For the purposes of its submission, Canada used the term International Climate Change regime to include the three multilateral climate change treaties. The *United Nations Framework Convention on Climate Change*, 9 May 1992, 1771 UNTS 107 (entered into force 1 March 1994; ratification by Canada on 4 December 1992) [*UNFCCC*]; the *Kyoto Protocol to the United Nations Framework Convention on Climate Change*, 11 December 1997, 2303 UNTS 162 (entered into force 16 February 2005; ratification by Canada on 17 December 2002) [*Kyoto Protocol*]; and the *Paris Agreement to the United Nations Framework Convention on Climate Change*, 12 December 2015, 3156 UNTS 88 (entered into force 4 November 2016; ratification by Canada on 5 October 2016) [*Paris Agreement*]; and the outputs of their governing bodies.

climate change, is the extent to which they effectively and ambitiously implement relevant international agreements related to climate change.[55]

Canada is of the view that the above positions will ensure the preservation of the Convention's overall integrity and overarching objectives, while also ensuring that obligations under other agreements, such as the *United Nations Framework Convention on Climate Change* (*UNFCCC*) and the *Paris Agreement*, are not undermined by imposing a separate set of conflicting or differing climate change related obligations.

As a final observation in its statement, Canada highlighted the role it played during the negotiations of the Convention in ensuring the inclusion of Article 192. In 1972, during a Sea-Bed Committee session, Canada introduced a working paper on the preservation of the marine environment for the purpose, in part, of providing "a general outline of a comprehensive approach to the preservation of the marine environment and the prevention and control of marine pollution."[56] The paper noted an absence of any treaty provision "explicitly laying down the general obligation of States to preserve the marine environment and to prevent its pollution from all sources" and stressed:

[t]he importance of such a general formulation in a general or master treaty on the preservation of the marine environment cannot be overemphasized; it would be the binding element or organic link between the general treaty and particular treaties or national measures dealing with individual aspects of marine pollution, and would help to establish a general commitment to the elaboration of and adherence to such particular treaties. In addition it would provide a new environmentally-oriented basis for the work of such specialized agencies as IMCO [IMO] in this field.[57]

While those words were written over 50 years ago, during a time when climate change was not under international consideration, Canada believes that the sentiment of those words remains relevant today and serves as an important reminder of the Convention's role in furthering commitments to protect and preserve our oceans, by supporting and promoting the work in other more specialized international regimes dealing with climate change.

As such, addressing the impacts of climate change on our oceans should involve the harmonious and complementary engagement of many different areas of international law, including the law of the sea and the International Climate Change regime.

5. Regional trade agreements

A. The Canada-United States-Mexico Agreement (CUSMA)

i. Canada's Dairy Tariff-Rate Quota's (TRQ's) Allocation under the "Processor Clause" *CUSMA* Article 3.A.2.11(b)

Canada — Dairy Tariff-Rate Quota Allocation Measures 2023 (CDAUSA-2023-31-01) — Final report of the panel

[55]For example, compliance with Article 4(1), Article 4(2) and Article 4(3) of the *Paris Agreement* could be one indicator of State compliance with obligations under Articles 207 and 212 of the Convention.

[56]Myron H Nordquist, Satya Nandan and Shabtai Rosenne (eds), *United Nations Convention on the Law of the Sea Online* (Leiden: Nijhoff, 2013) at para 194.10 (10) [*Virginia Commentary*].

[57]*Ibid.*

In its final report dated 10 November 2023, the *CUSMA* Panel sided with Canada on all claims brought by the United States, including under the "processor clause" of *CUSMA* Article 3.A.2.11(b) (extracts below, footnotes have been removed to facilitate reading. Submission available at <https://ustr.gov/sites/default/files/Final%20Report%20of%20the%20Panel%20as%20issued.pdf>):

VI. The United States' Claims regarding Canada's Use of a Market Share Allocation System with Different Criteria for Different Types of Applicants

114. The United States also challenges the market share basis used by Canada in its dairy TRQs allocation regime, as well as Canada's application of different criteria to different types of eligible applicants for the allocation.

115. These basic facts are not in dispute: It is not contested that Canada's measures with respect to the allocation of its dairy TRQs are based on a market share approach and use different criteria to determine the market share of each type of eligible applicant. The Panel described these features above.

116. The United States makes several different claims concerning the market share basis of Canada's dairy TRQ regime under various provisions of the Agreement. The Panel will take up each of those claims separately in the same order as that adopted by the United States. …

A. Claims concerning Article 3.A.2.11(b)

117. In its relevant part, Article 3.A.2.11(b) reads as follows:

A Party administering an allocated TRQ shall ensure that: …

(b) unless otherwise agreed by the Parties, it does not … limit access to an allocation to processors.

118. This part of Article 3.A.2.11(b) is referred to by the Parties as the "processor clause". …

The Panel's analysis

129. The Parties agree that Article 3.A.2.11(b) means that Canada cannot limit access to an allocation to processors. As presented by the United States, the debate is about whether the design and operation of the measures has the effect of limiting access to an allocation to processors.

130. In the opinion of the Panel, the answer to this question lies in the interpretation of the phrase "limit access to an allocation to processors" in Article 3.A.2.11(b) and its constituting terms.

131. The Parties do not debate the meaning of the term "limit". The United States indicates that the term means "to confine within limits, to set bounds to; … to bound, restrict". Canada does not provide a definition for the term, but it accepts that the processor clause is intended to prevent a party from restricting the ability to apply for and obtain quota allocation. Therefore, there is a convergence of views between Parties that "limit" means "restrict".

132. As for the term "access", the United States refers to the definition of the noun and suggests that it means "the right or opportunity to benefit from or use a system or service. For its part, Canada refers to the verb "access", which is "to obtain, acquire: to get hold of something". Common to these definitions is the idea that the term means the right or opportunity to obtain or acquire something. When put in the context of the phrase in which the term is used, the Panel agrees with Canada that it is about the right or opportunity to obtain or acquire an allocation.

133. Concerning the term "allocation", the United States submitted that one meaning of the term is "that which is allocated to a particular person, purpose, etc.; a portion, a share, a quota". Both Parties agree that, in context, the relevant meaning of the term is in reference to what is being allocated and not to the allocation process itself. The United States argues that, in context, the term "allocation" means a "portion" of the quota. Canada argues that this definition is reductive, focusing only on the object of the allocation, i.e., a "portion" or volume of the quota, thereby ignoring the broader meaning suggested by the phrase "that which is allocated to a particular person" in the definition. Instead, Canada argues that the term "allocation" should be understood to mean a "share of a TRQ that may be 'allocated to a particular applicant'".

134. The Panel does not believe that it has to resolve this debate about whether the term "allocation" concerns an indefinite volume of TRQ or a share of the quota that may be allocated to a particular applicant. As will be demonstrated below, the difference in meaning does not affect the Panel's conclusion on the consistency of Canada's measures with Article 3.A.2.11(b).

135. With these definitions in mind, the Panel will analyze Canada's measures and determine whether anything on their face or in their design or operation limits access to an allocation to processors.

136. The Panel first examines whether, on their face, the measures limit access to an allocation to processors. In that respect, it is clear to the Panel that the language of the measures accommodates applicants other than processors. Each Notice to Importers states that "[y]ou are eligible for an allocation if you are a: processor … [or a] distributor". Some TRQs indicate also that "further processors" are able to apply. On their face, the measures specify that distributors, and further processors in some cases, have an opportunity to obtain or acquire an allocation of the TRQ.

137. Nothing else in the language of the Notices to Importers imposes any limit on access by those two groups of applicants that are not processors (i.e., distributors and further processors). Likewise, the policy document entitled "General Information on the Administration of TRQs" refers back to the Notices to Importers when discussing who may be eligible to receive an allocation.

138. The Panel therefore concludes that the plain language of the measures does not limit access to an allocation of the TRQ to processors. On the contrary, the measures allow access to an allocation to distributors and in some cases to further processors also.

139. The United States' contention goes beyond the text of the measures, however. It concerns their "design and operation". As mentioned above, the United States argues that "[d]ue to the design and operation of Canada's dairy TRQ allocation measures, processors have the ability to create and determine for themselves the size of pools of TRQ volume to which only processors have access".

140. This argument rests on two aspects of Canada's allocation regime: (i) the exclusion of additional market participants — apart from distributors and further processors — from the list of eligible applicants, and (ii) the use of a market share-based allocation mechanism using different criteria for the allocation to different types of eligible applicants. The Panel has dealt with the issue of the exclusion of certain market participants from the list of eligible applicants.

141. The second aspect of Canada's TRQ regime that is part of the design and operation of the mechanism that, according to the United States, limits access to an allocation to processors is the use by Canada of different criteria for the determination of the market shares of the different types of applicants.

142. The United States does not challenge the use of a market share-based allocation mechanism per se. The United States recognizes that the Agreement does not prescribe precisely the type of allocation mechanism that can be used by Canada. The United States also recognizes that Canada has a degree of discretion to formulate and apply its allocation mechanism, but the United States points out that the Agreement sets out a host of rules with which Canada must comply when formulating and applying whatever allocation mechanism Canada chooses.

143. The Panel is left with the following question: whether Canada by designing an allocation mechanism that uses different criteria to determine the activity level of the different types of eligible applicants, and ultimately their market shares, operates in such a way as to "limit access to an allocation to processors".

144. Important to the Panel is that nothing in the language of Article 3.A.2.11 (b) prohibits the use of different criteria for the allocation of TRQ quantities to different types of eligible applicants.

145. The measures deploy a calculation method that uses two critical points of information to derive the market share of the applicant. The method uses the market activity level of the individual applicant as the numerator for the calculation and it uses the total market activity reported by all applicants as the denominator. For the market activity level, applicants are asked to provide the volume of product produced, used or sold, depending on the type or category of applicant concerned.

146. The United States suggests that it is in the selection of different criteria for the different types of applicants that the measures are inconsistent with the Agreement. To the United States, by using volume produced for processors, volume used for further processors, and volume sold for distributors, Canada designed a mechanism that operates in such a manner as to allow processors to skew the results of the allocation. The United States argues that this approach allows processors get a large portion of the allocation that is exclusive to them and could lead to distributors getting a significantly smaller share of that allocation.

147. It is the understanding of the Panel that the measures invite applicants to report their market activities but the volume of product that an applicant reports — or put differently, the amount the applicant has manufactured, processed, or sold — is a representation of the business activity of the applicant during the reference period. The applicant's business activity is largely the product of commercial decisions made by the applicant and subject to market conditions, as with any rational economic agent.

148. The evidence filed by the United States about the Canadian market in which the measures operate and about various commercial practices or strategies that have been or that could be adopted by certain players of the industry does not support the proposition that the measures "delegate" processors authority to manage their production and sales to maximize the size of their allocation and minimize that of the distributors. The Panel finds nothing persuasive in that material to support the proposition that the measures "deputize" processors or "delegate" to processors the ability to bypass distributors to dictate the outcome of the allocation exercise.

149. As for the estimations produced by the United States, they do show that the method for calculating the market shares can result in high volumes of products being allocated to processors, but they also demonstrate that distributors have access and have received an allocation of the TRQs. In themselves, these estimations do not establish that the measures limit access to an allocation to processors. They may simply, as suggested above, reflect how the Canadian dairy market operates in view of the relative role played by the various actors of the industry.

150. Moreover, none of the data supplied by the Parties on this question reflects outcomes "guaranteed" by the measures. In that sense, they have nothing in common with the guaranteed "pool" of allocation that was examined by the panel in Canada — Dairy TRQs 1. Considering that the market activity level reported by each applicant is related to business decisions the applicant makes, it follows that the allocation results could vary significantly year to year depending on market dynamics and market conditions. Depending on business opportunities, processors could theoretically get a smaller proportion of the TRQ allocation, while further processors and distributors could get a larger share of the allocation. Canada's method of allocation allows for this.

151. Finally, the Panel agrees with Canada that TRQ volumes that Canada has allocated to processors alone, are not, in themselves, evidence that the measures limit access to that allocated volume in contravention of Article 3.A.2.11(b). Such an allocation result is nothing but the consequence of the application of a market share-based allocation mechanism. As stated earlier, such an allocation mechanism is not prohibited under the Agreement and the Panel does not read such an obligation in the Agreement.

152. The above demonstrates that Canada's allocation measures by selecting and applying different criteria for the allocation of its TRQs to different types of applicants do not "limit access to an allocation to processors", either on their face or in their design and operation. The language makes clear that distributors, and further processors in certain circumstances, have the opportunity to obtain or acquire an allocation for each of the 14 TRQs that are the object of Canada's commitments. Further, the design and operation of the measures and in particular the use of different criteria for purposes of determining allocations do not guarantee any specific volumes of quota allocation to processors nor limit the size of the allocation to which distributors can have access.

153. In conclusion, on the basis of the above, the Panel finds that Canada's measures, by using a market share allocation system and different criteria for different types of applicants, are not inconsistent with Article 3.A.2.11(b) of the Agreement.

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ii. "The Alberta Court Decisions Do Not Constitute a Breach under *NAFTA* Article 1110"

T.D. Einarsson and Others v Government of Canada — Canada's counter-memorial on jurisdiction, merits, and damages

In its counter-memorial on jurisdiction, merits, and damages dated 17 January 2023, Canada made the following arguments on Article 1110 of *NAFTA* (extracts below, footnotes have been removed to facilitate reading. Submission available at <https://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C10678/DS19021_En.pdf):

> 224. The Claimants' case is that the "Alberta Decisions are the measures at issue in this Arbitration." To meet their case, the Claimants must therefore prove that the Alberta Court Decisions — not the Regulatory Regime — constitute a breach of *NAFTA*. They fail to do so. The Claimants' attempt to frame their case around the Alberta Court Decisions in order to circumvent the time limitation is entirely based on a mischaracterization of the Alberta Court Decisions. Contrary to the Claimants' assertions, the Alberta Court Decisions did not: (i) "issue" a compulsory licence; (ii) "confiscate" GSI or its copyright; (iii) "enforce" any requirement on GSI to transfer seismic material to the Boards; or (iv) "prohibit" GSI from enforcing its intellectual property rights. Properly understood, the Alberta Court Decisions are incapable of establishing a breach of *NAFTA* Articles 1110 and 1106.
>
> 225. The Alberta Courts interpreted and applied Canadian law and found that in disclosing GSI's seismic materials pursuant to the Regulatory Regime and allowing copying, the Boards did not breach GSI's copyrights, and neither did the oil and gas companies when accessing this material. The Tribunal has no basis to second-guess this interpretation of GSI's rights by Canada's judiciary. Canada further demonstrates below that the Claimants failed to establish any of the main elements necessary to prove a violation of Articles 1110 and 1106.
>
> **A. The Alberta Court Decisions Do Not Constitute a Breach of Article 1110 (Expropriation)**
>
> **1. Summary of Canada's Position on Article 1110**
>
> 226. The Claimants allege that the Alberta Court Decisions violated Article 1110 by imposing a compulsory licence and prohibiting GSI from enforcing its intellectual property rights in domestic courts, which the Claimants allege effectively confiscated GSI's copyright and rendered GSI valueless as an enterprise. This claim is fundamentally flawed and incapable of establishing a violation of Article 1110 for multiple reasons.
>
> 227. First, the Alberta Court Decisions cannot constitute an expropriation in violation of Article 1110 absent a denial of justice. International tribunals pay high deference to domestic court decisions interpreting rights and obligations under domestic law, absent denial of justice. The Claimants have not alleged a denial of justice. Nor could they, as they received full due process and appellate review of their claims. The Claimants may dislike the outcome of the domestic court process but they cannot invoke Article 1110 to appeal domestic judicial findings or re-litigate issues decided by domestic courts.

228. Second, under Canadian law GSI never held the right it alleges the Alberta Courts confiscated — exclusivity over the Disclosed Seismic Materials after the confidentiality period expired. The Alberta Courts reviewed the evidentiary record, interpreted the statutory scheme and found that GSI's right to exclusivity in the Disclosed Seismic Materials ended once the confidentiality period expired. After that point, pursuant to the Regulatory Regime and the conditions that applied to GSI's seismic surveys, the Boards could disclose seismic materials to the public for copying. The Tribunal should defer to this determination by the Canadian judiciary of GSI's rights under Canadian law. Given that GSI did not have the alleged right to prevent disclosure and copying of the Disclosed Seismic Materials after the confidentiality period, there can be no expropriation of such right.

229. Indeed, the Claimants' Article 1110 claim rests on an erroneous factual premise. The Alberta Court Decisions did not issue a compulsory licence. The Alberta Court Decisions described "in the alternative" the Regulatory Regime as creating a compulsory licencing system. The Alberta Courts did not "confiscate" GSI's copyright. The ABQB used the term "confiscate" in obiter to describe the Regulatory Regime (echoing the term that a Senator had used to describe the Regulatory Regime in a political debate held decades previously). The Alberta Court Decisions did not "prohibit" GSI from enforcing its copyright. The ABCA explained that since GSI no longer held exclusivity in the Disclosed Seismic Materials after the confidentiality period expired, GSI had "no legal basis" under Canadian law to bring claims against the Boards. In short, the Alberta Court Decisions did not "take" GSI or any of its rights. The Decisions described GSI's rights under the Regulatory Regime — as they have always existed from the moment GSI obtained authorizations to conduct seismic surveys in Canada's offshore. Even if the Regulatory Regime could be characterized as imposing a "compulsory licence" (which is doubtful) or as being "confiscatory" (which was not a legal determination made by the Courts), the Regulatory Regime is plainly outside the scope of this Tribunal's jurisdiction *rationae temporis.*

230. The claim must fail on these bases alone.

231. In any event, none of the elements necessary to establish an indirect expropriation under *NAFTA* Article 1110 are otherwise present. The Alberta Court Decisions did not lead to a substantial deprivation of the Claimants' investments in Canada. The Claimants have not specified the seismic material in which they claim GSI held copyright, provided evidence to establish copyright in that material or specified the alleged lost value of the Disclosed Seismic Material. Most of the commercial value of GSI's copyrights over Disclosed Seismic Materials, if established, would exist during the confidentiality period, as the value of the materials diminished over time. The Alberta Court Decisions did not interfere with the confidentiality period set out in the Regulatory Regime or GSI's ability to licence its seismic data during that time (10 or 15 years for those surveys that GSI conducted between 1997 and 2008).

232. The value of the Disclosed Seismic Materials would in any case only represent a portion of the value of GSI's seismic data library. GSI still retained the field data and reprocessed data, which it did not submit to the Boards and that it licenced to third parties.

233. Moreover, the Claimants' allegation that the loss of value of GSI's business is attributable to the Alberta Court Decisions runs directly contrary to the Claimants' own allegations in domestic proceedings, where GSI previously claimed that the business was expropriated by the Regulatory Regime. In reality, GSI's business failure long predates the Alberta Court Decisions. Due to its poor financial management, risky business decisions and inability to adapt to tough economic conditions and technological

change, by 2012 and possibly before GSI was no longer a going-concern, even though much of the Submitted Seismic Materials related to GSI's seismic surveys remained confidential. GSI's scorched-earth litigation strategy destroyed its reputation in the oil and gas industry. Suing virtually all its customers undermined the commercially realizable value of its seismic data.

234. Furthermore, the Alberta did not interfere with any distinct, reasonable investment-backed expectation of the Claimants. The Claimants never held an objectively reasonable expectation of exclusivity over the Disclosed Seismic Materials after the confidentiality period expired. They knew or should have known of the requirements for the submission and disclosure of seismic materials under the Regulatory Regime when they invested in Canada. GSI knew in 1993 when it bought Halliburton's seismic data library that most of the seismic materials submitted to regulators were already public. The Claimants knew when GSI sought authorization under the Regulatory Regime for its own seismic surveys between 1997 and 2008 that GSI would be subject to the rules permitting the Boards to disclose the seismic materials after the confidentiality period expired. Nor was the character of the Alberta Court Decisions expropriatory. The Alberta Courts independently and impartially interpreted the statutory scheme and described GSI's rights under Canadian law. This is the proper function of a judiciary. For all these reasons, the Article 1110 claim must fail.

235. Finally, the Tribunal has no jurisdiction to decide an alleged breach of *NAFTA* Chapter Seventeen (Intellectual Property) or the Berne Convention. The Claimants cannot invoke Article 1110(7) to turn investment protection obligations under NAFTA into a mechanism for arbitrating alleged violations of intellectual property rights or consistency with international intellectual property obligations. Moreover, it is simply unnecessary to consider the consistency of the challenged measures under Chapter Seventeen, because the Alberta Court Decisions clearly did not expropriate the Claimants' investment.

iii. "Legacy Investment" under *CUSMA* Annex 14-C

Westmoreland Coal Company v Canada *(ICSID Case no. UNCT/23/2) — Canada's memorial on jurisdiction*

In its memorial on jurisdiction dated 28 June 2023, Canada explained that jurisdiction cannot be established as the claimant did not own or control an investment on the date that *CUSMA* entered into force (extracts below, footnotes have been removed to facilitate reading. The submission is available online at <https://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C11218/DS18879_En.pdf>):

B. The Claimant Has Failed to Establish That It Holds a Legacy Investment under Paragraph 6(a) of *CUSMA* Annex 14-C

1. *CUSMA* Annex 14-C Requires a Claimant to Own or Control the Relevant Investment When *CUSMA* Entered into Force

81. On July 1, 2020, *CUSMA* superseded *NAFTA* as the free trade agreement in force between Canada, the United States, and Mexico. *CUSMA* Chapter 14 (Investment) does not contain a trilateral investor-State dispute settlement ("ISDS") mechanism. Instead, after July 1, 2020, with respect to Canada, "an investor may only submit a claim to

arbitration under [Chapter 14] as provided under Annex 14-C (Legacy Investment Claims and Pending Claims)" and in accordance with *NAFTA*'s ISDS mechanism. WCC filed its NOA in this arbitration after July 1, 2020. Thus, WCC must prove it meets the jurisdictional requirements in both *CUSMA* Annex 14-C and *NAFTA* Chapter Eleven.

82. *CUSMA* Annex 14-C sets out the circumstances of Canada's limited consent to arbitrate claims for a transition period of three years following *CUSMA*'s entry into force. In particular, paragraph 1 establishes that Canada's consent to arbitrate is limited to "legacy investments":

> 1. Each Party consents, with respect to a legacy investment, to the submission of a claim to arbitration in accordance with Section B of Chapter 11 (Investment) of *NAFTA* 1994 and this Annex alleging breach of an obligation under:
>
> (a) Section A of Chapter 11 (Investment) of *NAFTA* 1994; … (emphasis added.)

83. Paragraph 6(a) defines the term "legacy investment" as follows:

> 6. For the purposes of this Annex: (a) "legacy investment" means an investment of an investor of another Party in the territory of the Party established or acquired between January 1, 1994, and the date of termination of *NAFTA* 1994, and in existence on the date of entry into force of this Agreement; (emphasis added).

84. Paragraph 6(b) of *CUSMA* Annex 14-C provides further guidance on the meaning of "legacy investment". It specifies that, for the purposes of the Annex, the terms "investment" and "investor" have the meanings accorded in *NAFTA* Chapter Eleven. *NAFTA* Article 1139 (Definitions) defines the term "investment of an investor of a Party" as "an investment owned or controlled directly or indirectly by an investor of such Party".

85. Thus, a "legacy investment" is an investment owned or controlled by an investor of another Party in the territory of the Party that was: (1) established or acquired while *NAFTA* was in force; and (2) "in existence on the date" of *CUSMA*'s entry into force, July 1, 2020. As a consequence, a tribunal would have no jurisdiction under *CUSMA* over a claim brought by a claimant that disposed of the investment that is the subject of the claim before July 1, 2020.

86. This interpretation is confirmed by the relevant context. Paragraph 1 of *CUSMA* Annex 14- C offers the *CUSMA* Parties' consent to the submission of a claim regarding a legacy investment in accordance with Section B of *NAFTA* Chapter Eleven. *NAFTA* Articles 1116(1) and 1117(1) set out the circumstances under which an "investor of a Party" may bring a claim under Section B. Both Articles 1116(1) and 1117(1) require that a claim pertain to the alleged breach of an obligation under Section A of *NAFTA* Chapter Eleven.

87. Section A opens with Article 1101(1), the "gateway" to *NAFTA* Chapter Eleven, which sets out the scope and coverage of the Chapter. Article 1101(1) circumscribes the application of the obligations of Section A and of the dispute settlement mechanism in Section B. In relevant part, Article 1101(1) reads:

> 1. This Chapter applies to measures adopted or maintained by a Party relating to:

(a) investors of another Party;
(b) investments of investors of another Party in the territory of the Party; […] (emphasis added).

88. The obligations contained in Section A thus apply to measures that "relat[e] to" investors of another Party and investments held by investors of another Party Read together with Articles 1116(1) and 1117(1), a measure alleged to breach an obligation under Section A must "relat[e] to" the "investor of a Party" bringing the claim, or to the investments held by that "investor of a Party". *NAFTA* tribunals have consistently applied Article 1101(1) to require a "legally significant connection" between the challenged measure and the claimant or its investment. Thus, where a claimant cannot establish that the challenged measure had an "immediate and direct effect" on itself or its investment, the claim must fail for lack of jurisdiction under Article 1101(1).

89. The same reasoning applies to paragraph 6(a) of *CUSMA* Annex 14-C. Its language on "an investment of an investor of another Party … in existence on the date of entry into force of this Agreement" requires the claimant to have held the investment at issue on July 1, 2020.

90. This interpretation is consistent with a core object and purpose of *CUSMA*: to supersede *NAFTA*. In that context, the *CUSMA* Parties offered limited consent to use *CUSMA* Annex 14-C to submit ISDS claims in accordance with Section B of *NAFTA* Chapter Eleven. The *CUSMA* Parties did not intend for Annex 14-C to allow investors that had sold their investment before *NAFTA* was terminated to submit new claims in accordance with *NAFTA* Chapter Eleven following *CUSMA*'s entry into force. Thus, jurisdiction cannot be established if the claimant did not hold the investment on that date.

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